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September 4, 2015

Submitted via www.regulations.gov

Ms. Mary Ziegler
Director, Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Comments in Support of DOL’s Notice of Proposed Rulemaking
Defining and Delimiting the Exemptions for Executive,
Administrative, Professional, Outside Sales and Computer

Dear Ms. Ziegler:

The Service Employees International Union (SEIU) submits these comments to voice our strong support for the Department of Labor’s proposed regulatory revisions, which are an important step towards reversing decades of declining wages suffered by America’s middle class. We appreciate this opportunity to comment on the proposed regulations.

SEIU represents more than 2 million workers throughout the United States employed in the fields of healthcare, property, and public services, including more than 200,000 workers in job classifications subject to the Fair Labor Standards Act (FLSA)’s executive, administrative, and professional (EAP) exemptions, such as nurses and other healthcare professionals, project managers, librarians, scientists, engineers, information technology consultants, and social service workers.

SEIU thanks the Department for proposing a rule that increases FLSA protections for white-collar workers and simplifies employers’ and employees’ efforts to determine who is eligible for overtime. We fully support this proposal and hope that the Department promptly issues it as a final rule.

Sincerely,

Arun Ivatury
Policy Director

cc: Katie Roberson-Young
Assistant General Counsel
I. The proposed rule embodies the letter and the spirit of the FLSA.

The Department’s Notice of Proposed Rulemaking reflects well-considered policy determinations that are fully authorized and supported by the terms and spirit of the Fair Labor Standards Act (FLSA). The FLSA expressly grants rulemaking authority to the Department to define the scope of the exemptions in Section 213.\(^2\) As the Supreme Court affirmed in \textit{Batters顿 v. Francis}, when a federal statute instructs an agency to define the details of broad statutory definitions, those regulations have the force of law.\(^3\)

Congress passed the FLSA in order to protect workers from substandard wages and oppressive working hours, “labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”\(^4\) The FLSA was designed to ensure that workers receive “a fair day’s pay for a fair day’s work” and are protected from “the evil of ‘overwork’ as well as ‘underpay.’”\(^5\) However, exemption under current regulations of white-collar workers who earn more than $455/week has generated both overwork and underpay for workers whom Congress intended the FLSA to protect.

Congress found that working conditions detrimental to minimum labor standards constituted an “unfair method of competition” among employers.\(^6\) In 1937, then-Commissioner of Labor Statistics Isador Lubin reported to members of Congress that “employers with high standards were forced by cut-throat competition to exploit labor in order to survive.”\(^7\) The proposed rule accordingly benefits not only potentially misclassified low-wage, white-collar workers, but also white-collar workers employed by employers with high standards—high standards that are threatened by competition with employers who have taken advantage of the current regulation’s outdated salary threshold.

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\(^1\) Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees Under the Fair Labor Standards Act, 80 Fed. Reg. 38515 (proposed July 6, 2015) (to be codified at 29 C.F.R. pt. 541) [hereinafter “NPRM” or “proposed rule”].


\(^3\) See 432 U.S. 416, 425 n.9 (1977).


\(^5\) 81 Cong. Rec. 4983 (1937) (message of President Roosevelt).


By establishing overtime pay requirements, Congress sought to encourage employers to spread work more broadly among those workers willing and able to perform it.\(^8\) Supporters of the legislation argued that the FLSA would end “unnecessarily long hours which wear out part of the working population while they keep the rest from having work to do.”\(^9\) When, as under the current regulations, an unprecedented number of low-wage, white-collar workers can be required to work more than forty hours a week without additional pay, while overtime-eligible employees often struggle to get enough hours,\(^10\) this core purpose of the FLSA is frustrated.

Furthermore, Congress presumed that Section 13(a)(1)’s exemptions for bona fide executive, administrative, and professional (EAP) employees would apply only to workers who earned salaries well above the minimum wage and enjoyed other privileges that compensated for long work hours, such as above-average fringe benefits, greater job security, and better opportunities for advancement in comparison to overtime-eligible employees.\(^11\) Such presumed benefits of white-collar work have become less accessible to workers in today’s economy. As a result, and in stark contrast to Congress’s intentions, many low-wage, white-collar workers currently lack the privileges of white-collar work but are denied the protections of the FLSA. The Department’s proposed rule is an important corrective step toward ensuring that those workers Congress intended the FLSA to protect are shielded from overwork and underpay.

II. \textbf{SEIU strongly supports the proposed rule.}

\textbf{a. The proposed salary threshold is reasonable.}

The NPRM’s proposed salary threshold for EAP exemptions is a reasonable measure to restore the effectiveness of the salary level test as a proxy for distinguishing between white-collar workers that should be classified as eligible for overtime pay and those whom Congress intended to exempt.

The current salary threshold is inadequate, and the new level proposed by the Department is an important step toward bringing overtime eligibility in line with today’s economic realities. The current threshold of $455/week allows employers to deny FLSA protections to workers

\(^8\) See Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 577-78 (1942) (“By [requiring 150% of pay for overtime hours], although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the Act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work.”)

\(^9\) U.S. Dep’t of Labor, Record of the Discussion before the U.S. Congress on FLSA of 1938, at 20-21 (1938).


\texttt{Compare} Bureau of Labor Statistics, U.S. Dep’t of Labor, Employment, Hours, and Earnings from the Current Employment Statistics survey (national): Average Weekly Hours of All Employees, available at \texttt{http://data.bls.gov/pdq/surveyoutputServlet/} (reporting that private sector employees—full and part-time—work an average of 34.5 hours per week for a given employer); with Lydia Saad, \textit{The “40-Hour” Workweek Is Actually Longer – by Seven Hours}, Gallup, Aug. 29, 2014 (reporting that salaried full-time employees work an average of 49 hours per week, while hourly full-time employees work an average of 44 hours per week).

earning below the poverty level for a family of four.\textsuperscript{12} Workers who are forced to perform overtime work without any additional compensation often make little more than minimum wage\textsuperscript{13} and are more likely to qualify for public assistance than those workers enjoying the full protection of the FLSA.

The proposed rule’s automatic overtime eligibility for white-collar workers who make less than $50,440/year (or $970/week) in 2016 is entirely reasonable. It will significantly increase the number of white-collar workers who are automatically covered by overtime-pay protections: from 8 percent to 44 percent.\textsuperscript{14} Although the proposed threshold is lower than other reasonable options calculated by different methods—such as applying the Department’s 1975 benchmark, under which more than 60 percent of white-collar workers fell below the threshold and were automatically covered\textsuperscript{15}—it is a marked improvement over the current level. The proposed threshold brings the regulations into closer compliance with the purpose and goals of the FLSA, which was intended to cover most workers in our economy.

\textbf{b. The salary threshold should be indexed.}

The Department’s proposal to index the salary threshold to an objective measure provides a predictable and efficient way to ensure that workers whom Congress intended to cover continue to receive the FLSA’s protections. Previous regulatory adjustments to the salary threshold have been infrequent and irregular, permitting employers to sweep low-wage workers into exemptions not meant to cover them.\textsuperscript{16} Automatic incremental adjustments would maintain a bright-line threshold so that low-wage workers do not lose protection over time. Indexing the threshold to a readily identifiable level would also remove the need to engage in periodic, time-consuming rule-making and would save government and public resources. SEIU recommends indexing based on the method of calculation the Department uses to set the threshold in the NPRM, thus maintaining the threshold at the fortieth percentile of earnings for full-time salaried white-collar workers.

\begin{footnotesize}
\begin{enumerate}
\item See Annual Update of the HHS Poverty Guidelines, 80 F.R. 3236 (Jan. 22, 2015) (setting the 2015 poverty threshold for a family of four living in the continental U.S. at $24,250 a year).
\item For example, a white-collar worker who is paid $25,000 annually and works an average of 60 hours per week would have an effective hourly rate of pay that is just above $8.00.
\item For example, in 1979, 12 million salaried workers earned less than the salary threshold and were therefore automatically eligible for overtime; today, with a 50% bigger workforce, only 3.5 million workers earn less than the threshold. \textit{Testimony of Ross Eisenbrey to U.S. House of Representatives Subcommittee on Workforce Protections}, Econ. Policy Inst., 2 (July 23, 2015), available at http://s4.epi.org/files/2015/ross-eisenbrey-testimony-07-23-15-final.pdf/.
\end{enumerate}
\end{footnotesize}
c. The duties test should be revised in future rulemaking.

The NPRM updates the salary threshold to a moderate level, leaving workers who earn above the fortieth percentile but perform few exempt duties without automatic overtime eligibility. Employers and workers would both benefit from clear guidance on how to interpret the scope of the exemption for workers who earn more than the salary level.

The Department should revise the duties test in future rulemaking to ensure that employers do not exempt workers “who were not intended by Congress to come within [EAP exemption] categories.” NPRM at 38524. The duties test permits employers to classify workers earning above the salary threshold as exempt from the FLSA’s overtime protections based on the nature of the work they perform. Under the current federal rules, there is no designated percentage of time that an exempt worker must spend performing exempt duties; accordingly, workers may be classified by employers as exempt even though they spend the vast majority of their time performing the same work as overtime-eligible workers.

SEIU supports aligning the federal standard with the duties test used in California. The California rule requires that a worker spend at least 50 percent of her time on exempt duties in order to be classified as ineligible for overtime pay. This approach has been successfully field-tested and would provide a bright-line test to ensure that workers who should be entitled to the FLSA’s protection are not improperly exempted.

III. The proposed rule will impact SEIU’s members.

a. SEIU represents many white-collar workers throughout the United States who will benefit from the proposed rule.

Nationally, SEIU represents more than 200,000 workers in classifications that may be subject to the EAP exemptions, with salaries ranging from below the proposed threshold to well above. SEIU’s white-collar members include a number of healthcare professionals such as nurses, physician assistants, respiratory therapists, radiation therapists, and laboratory technicians. SEIU also represents many white-collar employees engaged in public service, such as librarians, scientists, engineers, project managers, economists, budget analysts, information technology consultants, and social service workers.

The majority of SEIU’s white-collar members work in industries that the Bureau of Labor Statistics has identified as hospitals, healthcare services, social assistance, and professional and technical services, which together employ 6.2 million workers who are potentially affected by EAP exemptions. NPRM at 38602. It is unfortunately all too common
for healthcare and public service workers to have their professional commitment to helping people used as a justification for requiring them to perform unpaid or underpaid work. All of SEIU’s members therefore appreciate and support the Department’s update to the salary threshold, which will ensure that more workers in low-wage, white-collar service positions are guaranteed protections under the FLSA.

b. Social service workers have been improperly excluded from the FLSA’s protections and will benefit from the proposed rule.

The following example from SEIU Arizona illustrates how the current salary threshold has failed social workers, case managers, and other social service workers. The Department has rated social workers and “miscellaneous community and social service specialists” as being “probably not exempt” from the FLSA’s protections. The NPRM estimates that only 10-50 percent of workers in these occupations pass the duties test, meaning that 50-90 percent of these workers ought to be eligible for overtime. NPRM at 38591, 38595. However, only 2.5 percent of social workers earn less than the current salary threshold, and so only a small percentage of the social workers who should be protected by the FLSA are automatically eligible for overtime.

19 In contrast, the proposed salary threshold will increase the number of social workers who are automatically eligible for overtime to almost 56 percent.

Victim advocates (“advocates”) in Pima County, Arizona, provide aid and support services to crime victims while the victim’s cases are processed by the criminal justice system. These white-collar workers fall under the occupation category of “miscellaneous community and social service specialists.”21 Like many other social service workers, they are currently classified as exempt from overtime protections, with a salary range between $37,000 and $68,000 per year.22 The position requires a Bachelor’s degree with a major in social or behavioral science, criminal justice, public administration, or a closely related field, as well as one year of related work experience. Advocates communicate with crime victims and witnesses, provide crisis intervention services, advise victims of statutory rights, update victims about their cases, provide referrals to community support resources, and act as liaisons between victims and county attorneys. Advocates also spend a significant amount of time documenting case management, inputting data into required forms, and completing various menial tasks such as stocking supplies and maintaining work vehicles that are used to respond to crisis calls.

19 An economist at EPI estimated that social workers and counselors would be two of the top ten occupations most affected by an increase in the salary threshold to $984/week in 2014 (which is only slightly higher than the proposed threshold of $970/week in 2016). Heidi Shierholz, Workers in Lower-Paid White-Collar Occupations Need Overtime Protections, EPI Issue Brief #383 (Sept. 2, 2014), available at http://www.epi.org/publication/workers-paid-white-collar-occupations-overtime/.

20 Id.


22 Most advocates earn salaries at the lower end of the range. For example, one advocate with more than eighteen years’ seniority has a salary of approximately $47,700. Advocates’ salaries are on par with the median wage of social workers, which is $47,312/year. Shierholz, supra note 17.
Advocates often work nights and weekends in addition to their regular work week. Volunteers from the community fill in for advocates as primary responders after-hours and on weekends, but advocates are assigned to be on call during these times as well, in case multiple crisis calls are received at once or a scheduled volunteer cancels at the last minute. Some crisis calls, such as those from domestic violence or rape victims, can require the volunteer or advocate to spend up to twelve hours responding to the call (including accompanying the victim to the hospital and providing immediate follow-up support). Advocates are nevertheless scheduled to work on all week days, regardless of the time spent responding to a crisis call the preceding night. They are paid a lump stipend that amounts to approximately $10/hour for the nights and weekends they are on call.

Advocates are also required to perform other duties outside of normal work hours, including attending community events, assisting at trainings of volunteers, and updating written and computer records. Advocates often work additional hours in order to complete required data entry forms and to track criminal case legal updates. Such information is necessary for victim services grants, and advocates are required to enter the necessary data before quarterly reporting deadlines. They receive no additional compensation for this time.

Based on their duties and education, advocates are arguably eligible for overtime under current regulations, but have nevertheless been classified as exempt. Advocates at the lower end of the salary range ($37,252/year) will benefit immediately from the proposed regulations, while the status of advocates at the higher end of the salary range ($68,827/year) will remain unclear until the Department revises the duties test.

c. Employers who pay white-collar workers for overtime work under collective bargaining agreements compete against employers that apply the outdated EAP exemptions.

The collective bargaining process provides union members the means to circumscribe or receive compensation for working excessively long hours, regardless of overtime eligibility. Under SEIU’s contracts with employers, many white-collar employees (particularly registered nurses and other healthcare employees) are paid hourly and are therefore eligible for overtime pay or are otherwise contractually entitled to be compensated for overtime work. Many of these workers perform primarily bona fide EAP duties and earn salaries above the proposed salary threshold. Others, such as physician assistants, lab technicians, and the social service workers discussed previously are more likely to earn less than the proposed salary threshold and to perform work that does not satisfy the duties test. Regardless of salary, SEIU members favor negotiating contractual rights to overtime pay so that their employers have a financial disincentive from requiring excessively long hours of work.

23 See Wage and Hour Div., U.S. Dep’t of Labor, Opinion Letter FLSA 2005-50, Nov. 4, 2005 (finding that case managers did not meet the EAP exemptions’ professional duty test because the required bachelor’s degree in social science did not constitute specialized academic training).
24 For example, SEIU Local 503 has negotiated contracts that entitle salaried, overtime-ineligible employees to be paid straight pay for time worked beyond forty hours in a week.
However, while SEIU members’ employers may be contractually obligated to pay their white-collar employees for overtime work, their competitors are, of course, not required to follow the same practices. SEIU members’ achievements at the bargaining table are therefore jeopardized by the outdated standards in the current regulations, which allow other employers to exempt workers Congress intended to cover from the FLSA’s protections. SEIU therefore has an additional interest in updated regulations that ensure FLSA protections are implemented for all workers, so that its members’ employers do not have to compete unfairly with other employers who have lower labor standards.25

Industry standards regarding overwork are of particular concern in the healthcare field. It is well established that minimizing excessive hours for healthcare workers improves patient care.26 Accordingly, setting a reasonable salary threshold for overtime eligibility benefits not only salaried workers, but also hourly workers in the same classifications, employers with high standards, and the public.

d. SEIU members’ families and communities will benefit from the proposed rule.

SEIU further supports the proposed rule based on its impact on white-collar workers generally and their communities. As female and minority workers make up a disproportionate percentage of low-wage managerial and professional employees, these historically underpaid and overworked workers in particular will benefit from the proposed rule.27

Like the workers in the social service occupations described above, other white-collar service workers will also benefit greatly from the proposed rule, especially workers employed in the restaurant and retail industries.28 Workers in white-collar retail and restaurant service classifications earn some of the lowest wages among white-collar workers.29 Yet, due to the outdated salary threshold, most of these workers are misclassified as ineligible for overtime and

25 Protecting employers with high standards from “unfair methods of competition” was a central purpose of the FLSA. 29 U.S.C. § 202(a). See also Hearings to Provide for the Establishment of Fair Labor Standards in Employments in and Affecting Interstate Commerce and for Other Purposes Before the J. Comm. on Educ. and Labor, 75th Cong. 309-10 (1937) (statement of Isador Lubin, Comm’r of Labor Statistics) (noting that “employers with high standards were forced by cut-throat competition to exploit labor in order to survive”).
28 The ten occupations most impacted by the proposed rule include first-line supervisors of food preparation and serving workers, food service managers, and first-line supervisors of retail sales workers. Shierholz, supra note 17.
29 Id.
may legally be required to work excessively long hours without additional pay.\textsuperscript{30} The proposed salary threshold would greatly decrease such misclassifications by automatically entitling the majority of white-collar retail and restaurant workers to the protections of the FLSA.\textsuperscript{31}

The proposed rule’s benefits will also extend to SEIU members’ communities, as low-wage, white-collar workers will gain enforceable rights to quality time with their families and to overtime wages to spend in their local economies. Labor Secretary Tom Perez has estimated that the proposed rule could increase white-collar wages by as much as $1.2 billion.\textsuperscript{32} As SEIU President Mary Kay Henry has noted, “By making more people eligible for overtime pay, both workers and our economy will benefit. When workers have more money to spend in their local communities, everybody wins.”

IV. Earning above-average pay and benefits confers white-collar “status”; EAP exemptions do not.

Congress created the EAP exemptions based on the presumption that exempt workers would earn salaries significantly higher than minimum wage and enjoy other benefits that compensate for long work hours.\textsuperscript{33} As noted in the NPRM, employer representatives have argued against increasing the salary threshold because “employees are attached to the perceived higher status of being in exempt salaried positions and value the time, flexibility and steady income that comes with these positions.” NPRM at 38521.

However, an employer’s designation of a worker as “exempt” on its own does not automatically connote favorable status or guarantee that the worker has “time, flexibility, and a steady income” in comparison to overtime-eligible employees. Being classified as ineligible for overtime is little comfort to a worker who routinely works more than forty hours a week and can barely afford child care for the time she is missing with her family. Nor does the classification cancel out the shame felt by a worker who must rely on food stamps or other public assistance despite working full time in a purportedly EAP capacity. Workers recognize such exploitation for what it is, regardless of the label applied.

The Department’s 1940 analysis of similar employer arguments is equally applicable today: “[w]ithout underestimating the general desirability of weekly or monthly salaries which enable employees to adjust their expenditures on the basis of an assured income (so long as they remain employed), there is little advantage in salaried employment if it serves merely as a cloak

\textsuperscript{30} Id.

\textsuperscript{31} Id. (calculating that, with a weekly salary threshold of $980, the following percentages of workers would be automatically eligible for overtime: 79.5% of first-line supervisors of food preparation and serving workers; 60.7% of food service managers; 56% of first-line supervisors of retail workers).


\textsuperscript{33} Wage and Hour Div., U.S. Dep’t of Labor, \textit{Executive, Administrative, Professional…Outside Salesman Redefined}, Report and Rec. of Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition, 19 (Oct. 10, 1940) (“Stein Report”) (assuming that exempt workers “enjoy compensatory privileges and [noting that] this assumption will clearly fail if they are not paid a salary substantially higher than the wages guaranteed as minimum”).
for long hours of work. Further, such salaried employment may well conceal excessively low hourly rates of pay.”

It is the pay and benefits that accompany certain white-collar jobs, rather than the resulting exemption, which confer status on workers – and it is absurd to conclude that workers who do not enjoy above-average pay or benefits would consider merely being labeled exempt a meaningful marker of status. SEIU’s members can attest that being labeled exempt or nonexempt from FLSA protections does not define one’s status in the workplace. For example, most registered nurses perform bona fide professional duties (and their earnings, in SEIU’s experience, generally exceed the NPRM’s proposed salary level), but nevertheless prefer to be paid hourly and classified as overtime eligible.

Moreover, whether or not some low-wage, white-collar workers prefer a designation of exempt that matches neither their compensation nor their duties, Congress intended that the FLSA provide them with protections from underpayment and overwork that cannot be waived.

V. The Department should undertake future rulemaking to revise the regulations covering other exemptions for white-collar worker.

As the Department notes in the NPRM, certain white-collar workers earn less than the proposed salary level and yet will still be considered ineligible for overtime under sections of the regulations that the NPRM does not revise. NPRM at 38529. SEIU urges the Department to undertake further rulemaking to examine not just the EAP duties test, but the full scope of white-collar exemptions. Such rulemaking is necessary to ensure that the regulations are fulfilling their statutory purpose and that they do not exclude from coverage workers who do not enjoy the types of white-collar benefits that Congress presumed exempt employees would receive. SEIU is particularly concerned with the overbroad exemption of college and university faculty and of child care workers, for the reasons discussed below.

a. University and College Faculty

The academic workforce has significantly changed over the last sixty years. Colleges and universities increasingly rely upon contingent academic labor who work outside the tenure system and are hired on a class-by-class basis, often with low pay and no benefits. In 1969, tenured and tenure-track positions made up approximately 78.3 percent of faculty, and non-tenure track positions represented only 21.7 percent. Today, 67 percent of all employees with faculty status at institutions of higher education in the U.S. work outside the protections of

34 Id. at 7.
35 See U.S. Dep’t of Labor, Fact Sheet #17N: Nurses and the Part 541 Exemptions Under the Fair Labor Standards Act (July 2008) (listing the requirements for the “learned professional” employee exemption as applied to nurses).
tenure. The college professor—once the quintessential middle-class profession—has become one of the many precarious part-time positions typical of our modern economy.

A recent national survey by SEIU on faculty workplace conditions found that 40 percent of survey respondents worked an average of 40 hours or more per week and 26 percent worked more than 50 hours per week for their academic employers.

According to the data provided by respondents, approximately:

- 16 percent were paid below the federal minimum wage of $7.25 per hour;
- 24 percent were paid below $10/hour;
- 43 percent were paid below $15/hour; and
- 68 percent were paid less than $15,000 in total compensation during a single semester.39

Nor do professors necessarily enjoy compensatory benefits, such as above-average fringe benefits or job security. It is common for colleges and universities to cancel or reassign classes due to low enrollment. A course can be canceled even after classes have commenced, and contingent faculty are often not compensated for initial classes taught in a cancelled course or for their considerable work preparing to teach the course.

As one faculty member wrote, “As an adjunct there is no job security. I am scheduled to teach a class at [a university] in the fall. That class can be canceled up to the morning it is supposed to start—and that is it. No pay. If I am offered another class and there is a conflict, I have to pick one or the other—but if the one I picked is canceled then I lose my compensation because the other one will no longer be available. They treat us like we are Kleenex.”

Another reported, “Last year I was asked to teach a class at half pay because it was under-enrolled. It was a new class for me and required extra work to develop class materials. [The class] was only one student short of full enrollment. This is not half of the work, if anything it is nine-tenths of the work.”

Faculty are also routinely pressured by employers to perform or “volunteer” for duties without additional compensation, such as giving tours and reviewing applications to the school. Non-tenured professors fear that if they refuse to take on such duties, then they will not be rehired the following semester.

SEIU has learned of many instances when faculty have received little or no compensation for teaching. This appears to be a widespread practice in higher education across numerous geographic markets. Representative stories include a professor in the San Francisco Bay area,

39 SEIU survey respondents were asked to provide the number of classes they teach; the estimated number of hours they work each week, including preparation; and the total combined compensation paid for the semester. This data was used to determine professors’ hourly wages, similarly to the Department’s fee basis method.
who taught a new, semester-long independent graduate study course and was paid only $250; a professor in Boston, who taught an independent study course at two different universities, but was not paid for either course; and a professor in New York City, who directed a student’s Master of Arts thesis and received no compensation.

The experiences of academic faculty demonstrate that, as our economy increasingly relies on contingent work, the benefits that Congress presumed white-collar employees enjoyed have become far less accessible to employees.

b. Child Care Workers

Child care workers are often denied overtime pay, including workers employed at daycare centers and preschools who are sometimes called daycare teachers. 40 They earn an average of $417/week, below even the current salary threshold for overtime ineligibility. 41 Child care workers at daycare centers and preschools may be classified as exempt from FLSA protections under either the learned professional exemption or, more commonly, the teacher exemption.

The learned professional category of EAP exemptions could apply to child care positions that require advanced degrees in early childhood education and pay more than the salary threshold for EAP exemptions. The current salary threshold is greater than child care workers’ average wage, and the proposed threshold is more than twice the average wage. Thus nearly all child care workers would be eligible for overtime under the proposed rule for this exemption.

Child care workers can also be classified as ineligible for overtime based on the teacher exemption, which has no minimum salary level requirement. 42 Many preschools and daycare centers do not qualify as “educational establishments,” which is required for the teacher exemption to apply, and their workers are therefore eligible for overtime. 43 However, a child care worker performing the same job duties as her overtime-eligible colleagues could be classified as exempt if she works at an “educational establishment.” 44 For example, a child care worker employed at an elementary school could be classified as exempt, while her counterpart at

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42 29 C.F.R. §541.303.

43 29 C.F.R. §541.204(b).

44 She would, of course, also have to meet the other requirements of the teacher exemption, including performing the primary duty of teaching. 29 C.F.R. § 541.303.
a private daycare center lacking a state-funded preschool program should be eligible for overtime under the current regulations.45

This lack of clarity and uniformity results in employers misclassifying or otherwise denying overtime to child care workers who ought to be protected by the FLSA.46 The Department has recognized that misclassification is a “typical problem” in the field of childcare.47 It should solve this problem by extending the salary threshold for the EAP exemptions to apply to child care workers.

SEIU has heard from countless child care workers from daycare centers and preschools who have difficulties making ends meet despite working long hours.48 Child care workers forego food, housing, and other necessities because they simply cannot afford them. A child care worker from Hillsborough County, Florida explained, “I rent a room in a house because I cannot afford to live alone. In the past, I’ve had to sleep in [homeless] shelters or in my car [while working full time].” Another worker told SEIU, “The last time I was able to buy groceries was a month ago,” because she cannot afford a car, transportation to the store, or the cost of groceries.

Many child care workers do not receive compensation that is sufficient to purchase basic necessities, let alone enjoy the types of benefits that Congress presumed would be provided to exempt white-collar workers.49 Child care workers make agonizing choices regarding how to spend their meager wages. According to the Florida worker, “When I have $5 to spare, I have to decide whether to buy food or get to work.” Another worker from Atlanta, Georgia, asked, “Do I buy food or my asthma pump?” A worker from Raleigh, North Carolina noted the impact of these conditions on turnover and morale among child care workers: “In order for child care teachers to be able to provide the best care possible, we need to know where our next meal is coming from. We need to be able to afford a place to live.”

Child care workers’ low wages and long hours also create obstacles to providing care for their own children. 50 For instance, one child care worker in Sacramento, California completed

45 See Wage and Hour Div., U.S. Dep’t of Labor, Opinion Letter FLSA 2008-13NA, Sept. 29, 2008 (finding that child care workers at day care center were eligible for overtime because the center was not an “educational establishment,” and noting that the Department of Public Welfare licensed the center rather than the State Department of Education).
46 See U.S. Dep’t of Labor, Fact Sheet #46: Daycare Centers and Preschools Under the Fair Labor Standards Act (July 2009) (identifying “typical problems” in this industry including the misclassification of workers as ineligible for overtime and the failure to pay overtime).
47 Id.
49 Congress intended Section 13(a)(1)’s white-collar exemptions to apply to workers who earned salaries well above the minimum wage and enjoyed other privileges that compensated for long work hours. See notes 10, 31, supra.
50 While costs of early child care for parents doubled from 1997-2011, over this same time period child care workers’ real wages did change. Indeed, child care workers were consistently in the 2nd or 3rd percentile in the Bureau of Labor Statistics rankings of occupations by mean annual salary—sharing comparable rankings with food preparation workers and laundry workers. Whitebook, supra note 47, at 17.
her early childhood education degree but was forced to quit working once she had a baby because she could not afford to pay for child care on her meager salary. Another worker said, “Maybe it’s a blessing I don’t have children. It’s okay if I go hungry, but not for a child to go hungry.” And yet another explained, “Child care teachers and parents—many of whom are low-wage workers in fast food, retail or other [low wage] jobs—are caught in the middle of a broken system that squeezes everyone who just wants the best for our kids.”

SEIU agrees with the Department’s long-held position that a salary threshold is “the best single test” to determine overtime eligibility of EAP employees and to ensure that white-collar workers who ought to be protected under the FLSA are not improperly exempted. NPRM at 38524, 38526, 38546. After finalizing the NPRM’s much-needed update for EAP exemptions, the Department should next prioritize expanding application of the salary test to other white-collar employees—including child care workers, who fall below even the current salary threshold and are often required to work for minimum wage or less.

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If you have any questions about our comments, please contact Katie Roberson-Young at 954-804-2710 or Katherine.roberson-young@seiu.org.