

United States Senate

WASHINGTON, DC 20510

October 31, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Acting Secretary Su:

We write to urge you to withdraw the U.S. Department of Labor’s (DOL) Notice of Proposed Rulemaking (NPRM) on the salary exemption threshold for bona fide executive, administrative, and professional employees under the Fair Labor Standards Act (FLSA). The proposal will further harm the U.S. economy at a time when American families and businesses are being hard hit by the failures of “Bidenomics.”

DOL proposes a 55 percent overtime threshold increase as 70 percent of Americans believe the economy is getting worse, not better, and 44 percent are planning to cut back on holiday spending.¹ Soaring inflation made food 12.7 percent more expensive in 2022. An average household spent \$691 per month in groceries in 2021 and \$779 in 2022—an increase of \$88 per month.² Food price growth is expected to again surpass historical averages in 2023.³ The gasoline index increased 10.6 percent in August alone.⁴ Meanwhile, workforce shortages continue, with 9.6 million job openings and 6.4 million unemployed workers, according to the most recent data from the Department of Labor.⁵ The labor force participation rate remains at historic lows.

DOL proposes to turn 3.6 million salaried workers into hourly workers.⁶ This will result in shuttered storefronts, fewer services from non-profits, increased labor costs for colleges, and lost jobs. Employers will respond by substituting more cost-efficient alternatives to work done beyond

¹ Press Release, Suffolk Univ. Boston, Americans Hold Grim View of Economy (Sept. 14, 2023), [https://www.suffolk.edu/news-features/news/2023/09/14/14/51/sbs-usat-econ-poll-2023#:~:text=Americans%20overwhelmingly%20said%20they%20are,delaying%20home%20improvements%20\(57%25\)](https://www.suffolk.edu/news-features/news/2023/09/14/14/51/sbs-usat-econ-poll-2023#:~:text=Americans%20overwhelmingly%20said%20they%20are,delaying%20home%20improvements%20(57%25)).

² Press Release, U.S. Bureau of Lab. Stats., Consumer Expenditures--2022 (Sept. 8, 2023), <https://www.bls.gov/news.release/cesan.nr0.htm>.

³ Econ. Rsch. Serv., *Summary Findings, Food Price Outlook, 2023 and 2024*, U.S. DEP’T OF AGRIC., <https://www.ers.usda.gov/data-products/food-price-outlook/summary-findings/#:~:text=Food%20prices%20are%20expected%20to,of%205.4%20to%206.2%20percent> (last updated Oct. 25, 2023).

⁴ Press Release, U.S. Bureau of Lab. Stats., Consumer Price Index – September 2023 (Oct. 12, 2023), <https://www.bls.gov/news.release/cpi.nr0.htm>.

⁵ *Job Openings and Labor Turnover Survey*, U.S. BUREAU OF LAB. STATS., <https://www.bls.gov/jlt/> (last visited Oct. 31, 2023).

⁶ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. 62152 (proposed Sept. 8, 2023) (to be codified at 29 C.F.R. pt. 541).

40 hours per week. This means fewer hours for workers, lower base pay, and ultimately investments in technology to replace worker hours. Jared Bernstein, Chair of the Biden White House’s Council of Economic Advisors, admitted: “The costs of increased [overtime] coverage would ultimately be borne by workers as employers set base wages taking expected overtime pay into account.”⁷

Small companies, which are the backbone of our economy, non-profits, and colleges will bear the brunt of the overtime proposal. It will increase operating costs and cut into small businesses’ opportunities to hire more workers. The rule will increase compliance costs, further diverting resources from growth. Employers will have to track the hours of eligible employees and pay overtime wages, regardless of role or job duties. Formerly salaried workers will need to be tracked by the hour, denying them the flexibility they have grown accustomed to. Fourteen higher education associations, representing 4,300 two- and four-year public and non-profit colleges and universities in all 50 states, argued a proposed overtime rule will severely undermine employees’ ownership over their own schedules.⁸

The Trump administration raised the overtime threshold only three years ago. This new 55 percent increase from the recently established threshold will raise the cost of doing business dramatically. It will gut Main Street while hurting workers in the long run.

In addition, indexing the updates to wage levels is inflationary, particularly as wages are outpacing inflation.⁹ With inflation at 40-year highs, and as millions have dropped out of the workforce, this is the exact wrong time for the administration to implement such a drastic increase.¹⁰ Automatic updates to the threshold blind the administration to critical considerations about the state of the economy and the workforce, including the unemployment rate, inflation, job vacancies, or whether employers are in a position to adjust to the increases without shedding jobs.

A federal court blocked the Obama administration’s attempt to raise the overtime threshold to \$47,476 in 2017. The court found the threshold was high enough to render the job duties test irrelevant, contrary to the plain language of the FLSA. The court held the Department of Labor had “exceeded its authority and gone too far” by improperly making “salary rather than an employee’s duties determinative of whether a ‘bona fide executive, administrative, or professional capacity’ employee should be exempt from overtime pay.”¹¹ The Biden administration’s new

⁷ Jared Bernstein & Ross Eisenbrey, *New inflation-adjusted salary test would bring needed clarity to FLSA overtime rules*, ECON. POL’Y INST. (Mar. 13, 2014), <https://www.epi.org/publication/inflation-adjusted-salary-test-bring-needed/>.

⁸ Letter from Bailey Graves, CUPA-HR Gov’t Rels. Team, to Jessica Looman, Acting Adm’r, Wage & Hour Div., U.S. Dep’t of Lab. (Feb. 8, 2022), <https://www.cupahr.org/wp-content/uploads/advocacy/CUPA-HR-Overtime-Letter-to-DOL.pdf>.

⁹ Amara Omeokwe & Megan Tagami, *Pay Raises Are Finally Beating Inflation After Two Years of Falling Behind*, WALL ST. J. (July 17, 2023, 12:00 AM), <https://www.wsj.com/articles/pay-raises-are-finally-beating-inflation-after-two-years-of-falling-behind-3e89bc2d>.

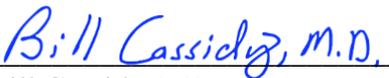
¹⁰ Stephanie Ferguson, *Understanding America’s Labor Shortage*, U.S. CHAMBER OF COM. (Oct. 16, 2023), <https://www.uschamber.com/workforce/understanding-americas-labor-shortage>.

¹¹ *Nevada v. U.S. Dep’t of Lab.*, 275 F. Supp. 3d 795, 807 (E.D. Tex. 2017).

proposal to increase the threshold by 55 percent is effectively as high as the Obama administration's proposed threshold would be after adjusting for inflation. This casts serious doubts as to whether it can hold up in court, and creates uncertainty for businesses, colleges, and non-profit organizations.

For the reasons outlined, we urge the Department to withdraw the proposed rule and leave in place the threshold which went into effect in 2020. With Americans struggling to make ends meet, now is not the time to implement yet another inflationary Bidenomics policy that will ultimately result in fewer jobs and lower wages.

Sincerely,


Bill Cassidy, M.D.
Ranking Member
U.S. Senate Committee on Health,
Education, Labor, and Pensions


Mike Braun
U.S. Senator


Roger Marshall, M.D.
U.S. Senator


Tommy Tuberville
U.S. Senator


Markwayne Mullin
U.S. Senator


Ted Budd
U.S. Senator


Bill Hagerty
U.S. Senator


Kevin Cramer
U.S. Senator


James Lankford
U.S. Senator


John Thune
U.S. Senator