

# The Case for Reforming Federal Overtime Rules:

## Stories from America's Middle Class

BY JUDY CONTI

### Introduction

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America's middle-class workers are spending more hours at work than ever before, and yet are still falling behind. The erosion of overtime pay is a key factor in the deterioration of middle-class wages and living standards.<sup>1</sup> Reform of the nation's overtime rules is much needed and long overdue. The U.S. Department of Labor (DOL) has the authority to update regulations governing to whom overtime must be paid, and President Obama recently issued a Presidential Memorandum directing DOL to do just that. The stories of middle-class Americans that follow reveal how sorely needed an update is.

When the Fair Labor Standards Act (FLSA) was enacted in 1938, one of its most important provisions was premium pay for workers who put in more than 40 hours per week. Anything over that 40-hour threshold meant that workers were entitled to time-and-a-half their regular hourly wage.<sup>2</sup>

The overtime premium was instituted for two primary reasons. First, one of the stated purposes of the FLSA was

to protect employees from difficult working conditions that are "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."<sup>3</sup> Workers need leisure time for themselves, time to spend with their family, time for parenting, going to school, or enjoying other activities that help rejuvenate them from the stresses of work. Thus, overtime provides a financial incentive not to overwork employees, but when an employer nonetheless insists on long hours per week, workers then receive a wage premium that compensates them for working so hard.

Second, if there is so much work to be done that more than 40 hours per week from staff is regularly necessary to accomplish it, the overtime premium creates an incentive for employers to hire more people, rather than overworking their existing employees. This job-creation incentive is especially important during periods of high unemployment.

### The White-Collar Exemption to Overtime Pay

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Not all workers qualify for overtime pay. The law contains a number of exemptions that are more fully defined in regulations issued by the U.S. Department of Labor. Among the most commonly used exemptions are those referred to as the "white collar" exemptions for "executive," "administrative," and "professional" workers. The purpose of these exemptions is to permit employers to pay a salary to higher-level employees who

have managerial or professional duties and can exercise independent judgment in their jobs, including the ability to decide how to get their work done in whatever hours or time is required.

Employers must meet two requirements in order to exempt an employee under these provisions. First, a worker must be paid a salary of at least \$455 per week,<sup>4</sup> which totals to \$23,660 per year—assuming one is paid

for all 52 weeks in a year—an amount that is below the poverty line for a family of four. Any worker making less than \$455 per week is per se entitled to overtime, no matter what their job duties are.

Second, the employer must show that the worker's job duties comport with the rule to ensure that the worker exercises sufficient independent judgment and

managerial responsibilities. Simply being called an “executive” or “manager” in one's job title or employment contract is not enough to qualify someone as an exempt white-collar worker. The employee's primary duties are what determine whether an employer can claim a white-collar exemption to paying overtime or minimum wage.<sup>5</sup>

## Vague Definitions Lead to Abuse of the Exemption

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While most employers comply with the FLSA's overtime requirements, there are still many who do not, for a variety of reasons. Some employers get away with violating overtime laws because workers resist coming forward to complain of overwork and low pay for fear of losing their jobs or other employer retaliation.<sup>6</sup>

As demonstrated in the worker stories below, many who are classified as exempt white-collar workers are in fact doing manual labor and working long hours that affect their health and well-being. But because they are classified as exempt, they do not receive overtime premium pay, even though their wages are already relatively low, especially considering the long hours they are working.

The problem with the current DOL definitions of “executive,” “professional,” and “administrative” employees is that they are too vague. Even though mere titles alone do not confer exempt status, the fact is that the rest of the current regulations afford too much leeway for employers to misclassify employees who are not truly managers in any meaningful sense of the word or who do not exercise independent discretion. For example, the current regulations do not place a limit on how much of an exempt employee's day can be spent doing non-exempt tasks, such as working as a line cook, stocking shelves, unloading freight off a truck, or simply answering phones and doing rote paperwork. Some employees spend as much as 95 percent of their time at work doing

clearly non-exempt work, but they are still properly classified as an exempt executive and not entitled to overtime pay under the current rules.

The current regulations also make it too easy for employers to give an employee a title of manager or supervisor so that the employer can claim a white-collar exemption, in spite of clear judicial precedent making it clear that titles do not displace reality when it comes to classification. In many recent cases, employers have “promoted” employees to a titled position without giving them any real managerial power, while still requiring them to perform the same tasks as an employee they “supervise.” After these meaningless promotions, the newly exempt employees not only lose their overtime pay but often find that their hours have increased dramatically.

Another tactic is for employers to give workers a little bit of authority so that they can classify them as exempt from the FLSA. In a recent Sixth Circuit case, the court overturned dismissal of a case in which employees allege that Eaton Aeroquip misclassified supervisors at a plant in Michigan as exempt executives. The supervisors filled out evaluations and made hiring recommendations, but they presented evidence that the company did not consider their opinion when making hiring and firing decisions. The court found that this was insufficient and meaningless “authority” to justify exemption from the FLSA's overtime requirement.<sup>7</sup>

## Stories from the Middle Class

Below are case stories of workers who allege they should not have been exempted from the FLSA's overtime protections, even though their employers treated them as exempt under the white-collar overtime rules. Workers such as these have little to no room to exercise discretion or judgment, and they perform routine or manual tasks, yet their employers misclassify them as FLSA-exempt and they end up working long hours for little pay. These stories are representative of what happens across the country and at all types of employers. These workers lose leisure and family time and are badly underpaid, and our economy suffers from the loss of jobs that would otherwise be created if the work were spread out among more people, or if the workers were properly classified and had more money to spend in our economy.

### Walter Bass, New York



Walter Bass worked as a Pest Control Technician for a company based in Brooklyn, New York, earning approximately \$35,000 per year. His job consisted of going to commercial building sites, including office buildings and the Barclays Center, where he would conduct inspections, spray for pests, or put down traps.

Walter's workday was planned out by headquarters; the company gave him a set schedule for the day that included which clients to visit and in what order. He had to check in and check out with his supervisor at each job site he visited and could not leave a job site without the permission of his supervisor.

His shifts were supposed to be eight hours a day, but usually they were longer; Walter worked as long as 13 hours some days. He also often worked from home: the company gave him a BlackBerry and expected him to answer calls and reply to emails within one hour, even if the call came outside of his shift. On average, Walter reports that he spent up to two hours per night answering e-mails, with the majority of these e-mails arriving between 7 to 9 p.m., while he was trying to eat dinner and spend time with his family. Instead of 40 hour weeks, Walter often worked as many as 50 hours per week, with no added compensation for overtime.

The unpredictable and uncompensated overtime hours had a detrimental impact on Walter's home life. He and his wife lost their daycare provider when he could

not pick up their baby on time. And even though he had holidays off, he had to make up the appointments that would have been scheduled for that day by working extra hours without overtime pay during the rest of the week. Walter's \$35,000 annual salary is scandalously low for him to be considered an exempt white-collar worker. If the salary threshold had been appropriately adjusted since 1975, Walter would be covered without any need to examine his job duties.

### Wanda Womack, Alabama



Wanda Womack worked as a Store Manager for Dollar General for 11 years, where she was classified as an exempt executive employee. When she left the company in 2004, she

was making around \$37,000 per year and working 50 to 70 hours per week. She supervised six to eight employees, and in that capacity was required to handle scheduling and payroll, post monthly transactions, and go to the bank every day. Her work rarely stopped, and she was constantly answering phone calls related to work, even when she was at home after her shift or while on vacation.

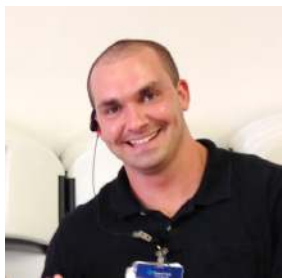
Although her job responsibilities sound like exempt work, in fact, most of Wanda's time was spent performing non-managerial tasks. Dollar General permitted each store manager to spend an allocated amount of funds on hiring. With the amount allotted for her store, Wanda could not hire enough employees to run the store and stay within budget. She thus spent the majority of her day working the cash register, performing inventory, and unloading freight, none of which were managerial tasks. In particular, delivery trucks would arrive two to three times per week containing 500 to 1,000 boxes each. Although she only weighed 110 pounds, Wanda routinely unloaded boxes that sometimes weighed 50 pounds or more.

As a result of all this heavy lifting, Wanda suffered from chronic pain in her shoulders, back, and neck. She has had three rotator cuff surgeries and suffers from a herniated disc. After her last surgery, her physical therapist told her that she could only lift a maximum of 25 pounds, 20 pounds less than the requirement at Dollar General. Wanda was forced to leave her job.

Wanda's story shows us two problems with the current overtime regulations. Because she performed some

managerial tasks, even though the bulk of her work was clearly non-exempt, Dollar General did not have to pay her overtime for the 10 to 30 extra hours she worked each week. Second, if the salary threshold for overtime were set at a more appropriate level and indexed to inflation, Wanda, like Walter and all the workers profiled in this paper, could have been eligible for overtime for all the hours she worked regardless of how she spent her time.

### **Scott Wilson, California**



Scott Wilson was employed as an Asset Protection Manager at Wal-Mart from December 2011 to February 2014. His yearly salary was approximately \$40,000 his first year, and a 15-percent cost-of-living adjustment increased it to

approximately \$46,000 his second year. His job description was to ensure the proper operation and repairs of alarm equipment, detain and process shoplifters, observe and review store surveillance cameras, train store associates on how to properly use equipment, and attend weekly informational conferences to learn about proper loss-prevention techniques, all in accordance with Wal-Mart's company policies. Like Wanda and Walter, he earned more than the current salary threshold, yet less than what the threshold would be if it had kept pace with inflation since 1975.

When Scott took over a new job at his store, Wal-Mart consistently assigned him menial jobs that should have been outside the normal duties of a manager. He was required to conduct manual repairs in the meat and bakery departments, unload trucks, push shopping carts, transfer merchandise for cashiers, and put together promotional displays, in addition to the job tasks stated above.

Ultimately, he spent almost all of his workday engaged in non-managerial, non-exempt work tasks for Wal-Mart. As a result, he would often have to stay late to complete his work. Scott usually worked six, and sometimes seven days each week, and his shifts were usually 10 hours, totaling 60 to 70 hours per week. The long hours and low pay had a negative effect on Scott's home life and his well-being, causing him to leave Wal-Mart.

### **Anonymous, California**

LandSafe, a subsidiary of Bank of America, conducts home appraisals. It classifies its residential appraisers as exempt employees under the administrative and professional exemptions. The appraisers are guaranteed approximately \$33,600 per year as a base salary, but can earn more depending on how many properties, usually single family homes, they appraise.

For each property assigned, LandSafe gives appraisers a set deadline by which they must complete their work and submit a report. If they fail to meet the deadline, they are penalized. Appraisals are very standard: The appraiser visits the property to inspect it, record information such as its condition and the quality of the building materials, and gather photographs and information about the property and the comparable properties. After taking pictures in the field and gathering information from databases from their home offices, appraisers complete a standardized appraisal form composed partly of various pull-down menus. Appraisers typically complete two to three appraisals per day. Refusing to appraise a property could result in a reduction in pay.

Appraisers often work extremely long hours to meet LandSafe's deadlines for appraisal reports. They are expected to be available for inspections whenever the homeowner is available, including weekends, evenings, and holidays. Working as an appraiser can be a surprisingly physical job that sometimes involves taking pictures of parts of the house that are not easily accessible.

One appraiser we spoke to typically worked at least 60 hours per week, and sometimes significantly more, to complete her assignments. She also worked late into the night to meet deadlines. In the rare instances when she took vacation, the appraiser usually took a laptop along and was expected to answer emails and finish work while on vacation.

Grueling hours, weekend and late-night work, and a lack of support from LandSafe had a negative impact on the appraisers' personal lives. "My life was my work, that was all I could do," one said. She missed out on graduations, birthdays, and seeing friends. When the appraiser did go out, the ticking clock and impending deadlines were always on her mind.

Clearly, there was more work than the current cadre of appraisers should have been expected to handle. But because LandSafe classified them as exempt professionals, it could get away with the long hours and constant demands made on its appraisers, rather than hiring more workers to handle the load.

### **Matthew Dewan, Texas**

Matthew Dewan worked as a Drilling Fluid Specialist for M-I Swaco, an oil drilling company, earning a salary of between \$50,000 and \$58,000 per year. M-I Swaco classifies its drilling fluid specialists as exempt employees under the administrative exemption. Drilling fluid specialists work in the field, mixing “drilling mud,” the liquid used in extracting oil from a well, and checking rigs to make sure there are no problems with the mud. Mr. Dewan’s job involved keeping inventory on all products that he used; determining if he needed to make more mud; checking the system for problems; and taking samples of mud twice a day to check that it was okay. He had to follow a pre-set plan to mix the drilling mud and could not deviate from the mud plan without approval from a drilling engineer. He would test the mud at the site rather than working from an office. He and his colleagues often referred to themselves as “mud babysitters.”

Not only was the work of a routine and entirely pre-determined nature, from which Mr. Dewan and his

colleagues could not deviate, but they had absolutely no managerial responsibilities, and although their work was of tremendous value to the company, they did not exercise any discretion or independent judgment over any matters of significance for their employer.

In addition to losing overtime pay, Mr. Dewan had to work so many hours that it imposed extreme hardship on his family life as well. During the first year and a half at his job, Mr. Dewan worked one week on, and one week off, doing 24-hour service on the wells, which required living in a trailer on site. After several months, he began working on a drive-by basis, which meant he would have to visit rigs individually, usually driving 380 to 400 miles per day. Once transferred to drive-by, he worked 24 to 25 days in a row and then would have six days off. On the days he was working, he would be on-call all day. He was away from his house 10 to 12 hours each day on average, and sometimes longer.

## **Recommendations for Updating Overtime Rules**

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Clearer regulations with more bright-line rules will benefit both workers and employers, both of whom deserve certainty and ease of evaluating positions. Our recommendations include the following changes:

**1. Significantly raise the salary threshold.** The current overtime salary threshold of \$455 per week was set in 2004 and is not annually adjusted for inflation. Looking back a little further, we see that the salary threshold has not been adequately adjusted since 1975, when it was set at \$250 per week. If the 1975 salary threshold had been annually adjusted with the Consumer Price Index, it would stand at \$984 per week today, or \$51,168 per year.<sup>8</sup> But also consider this: In 1975, 65 percent of all workers were paid less than the \$250 per week salary threshold, making them eligible for overtime pay. Contrast that with today’s workforce, in which only 11 percent of all workers fall beneath the overtime salary threshold. If we look to cover 65 percent of all of today’s workers, the salary threshold would be \$1,327 per week, or \$69,004 per year.<sup>9</sup> These figures demonstrate that not only does DOL have a duty to adequately adjust the salary threshold, but that it also has a wide margin of discretion in how it sets a new threshold.

**2. Clarify that an exempt worker cannot spend more than half of his time in non-exempt work.**

The current regulations provide no such definition, giving employers the incentive to give workers scant qualifying duties and still exclude them from overtime coverage. Using the concept of “concurrent duties,” the current regulations permit exempt employees to spend the vast majority of their time doing non-exempt work while they simultaneously supervise or manage other employees. The DOL should establish a bright-line test that no more than half of an exempt employee’s time may be spent performing non-exempt work.

**3. Specify that workers must exercise real independent judgment in how to do one’s job.** If an employee cannot truly exercise independent judgment in performing the job, that worker should not be FLSA-exempt. So for instance, if a worker must follow a strict and inalterable set of steps for each task, or if tasks are dictated to the worker, or if the employee cannot truly independently decide how to perform the job duties, that worker should be eligible for overtime.

## Conclusion

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As these representative stories make clear, in their current form, the regulations governing the FLSA's white-collar exemptions do not meet the needs of America's workers. The vague nature of the regulations, the low salary threshold, and the lack of a limit on how much time an exempt employee can spend performing non-exempt duties allow employers to claim overtime exemptions for workers that have no real managerial or supervisory duties.

By misclassifying workers, employers get away with not paying overtime or the guaranteed minimum wage.

As a result, workers sometimes find their hours increasing dramatically once they are "promoted" to an exempt position, while their duties remain the same. The long hours and lack of overtime pay have had a negative effect on the well-being of many workers and our nation's economy. The U.S. Department of Labor should modernize its white-collar overtime regulations to ensure that workers are paid for the long hours they are working and that employers hire more workers when additional hours are required.

## Endnotes

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1. Hanauer, Nick. "Whatever Happened to Overtime?" Politico Magazine, November 17, 2014.
2. See generally, 29 C.F.R. 541, et seq.
3. 29 U.S.C. § 202(a).1.
4. 29 C.F.R. 541.600.
5. Id. at 541.2.
6. Bernhardt, Annette, et al. Broken Laws, Unprotected Workers, 2009, pp. 28-29.
7. Bacon, et al., v. Eaton Corp, et al., at <http://www.ca6.uscourts.gov/opinions.pdf/14a0351n-06.pdf>.
8. Bernstein, Jared, and Eisenbrey, Ross. New Inflation-Adjusted Salary Test Would Bring Needed Clarity to FLSA Overtime Rules, Economic Policy Institute Report, March 13, 2014.
9. Shierholz, Heidi. It's Time to Update Overtime Pay Rules, Economic Policy Institute Issue Brief #381, July 9, 2014.

### About NELP

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