

It's About Time: Modernizing the Massachusetts Overtime Law Would Help 435,000 Salaried Workers

By Jeremy Thompson, Senior Policy Analyst

Introduction

Everyone deserves fair pay for the hours they work, and the freedom to have a personal life away from the job. The more we work, the less time we have for ourselves, our families, and our communities. That's why we have federal and state overtime laws, which require that most workers be paid time-and-a-half for every hour they work over 40 in a given week. It's a straightforward bargain: when workers give up scarce personal time for their job, that time becomes more valuable. Employers then have to balance their demand for more hours from their employees with the increased costs of such a demand.

Unfortunately, this bargain has broken down when it comes to millions of modestly paid salaried workers across the country, including hundreds of thousands in Massachusetts. Almost all workers paid by the hour are automatically covered by overtime protection. For workers paid a salary, however, weak, outdated, and confusing overtime laws make it easy for employers to require them to work 50, 60, or more hours in a week without paying them anything more than if they had worked 40 hours. When this happens, salaried workers end up sacrificing their personal time – for free. (See the box titled “Hourly v. Salaried: A Big-Box Retail Example.”)

Many people – including salaried workers themselves – are surprised to learn that salaried workers are eligible for overtime at all; we tend to think overtime protection is exclusively for hourly workers. In fact, salaried workers have been legally entitled to overtime ever since the passage of the Fair Labor Standards Act as part of the New Deal.

Overtime protections are codified in a mix of federal and state laws and regulations. These standards specify a salary threshold below which salaried workers are automatically eligible for overtime; the higher the threshold, the more salaried workers are protected. The current salary threshold, set by the federal government in 2004, is just \$455 per week. But in Massachusetts, the minimum wage is \$12 per hour, or \$480 per week over the course of 40-hour workweek. **It is effectively impossible for any worker covered by Massachusetts wage and overtime laws to be eligible for overtime under the current salary threshold**, since it's illegal in Massachusetts to pay any such worker below \$480 for a 40-hour workweek, let alone \$455.

Currently, both the state and federal governments are considering updates to this salary threshold:

- Bills now before the state legislature **would grant new or stronger overtime protections to 435,000 salaried workers in Massachusetts**. That's one out of four salaried workers in the state.¹

- Meanwhile, President Trump's Department of Labor (DoL) has proposed its own, much weaker set of overtime protections. This proposal would help just six percent of salaried workers in Massachusetts – **330,000 fewer salaried workers than the Massachusetts bills.**² Besides protecting far fewer workers than the Massachusetts bills, the Trump administration's proposal is also a significant rollback of improvements the Obama administration put in place before leaving office. (See the box titled "The Backstory: Rolling Back the Obama Administration's Overtime Improvements.")

The Trump DoL proposal on the salary threshold for overtime eligibility is open for public comment through May 21, 2019. Readers who wish to submit comments to the U.S. Department of Labor can click [here](#).

Why do so many salaried workers lack clear overtime protections?

The bargain laid out above, under which an employee's hours on the job grow more valuable as they cut into what would be personal time, has been a fundamental right of workers for over 80 years. The federal Fair Labor Standards Act (FLSA) was passed as part of the New Deal in 1938, and the Massachusetts overtime law dates to 1960.

Hourly v. Salaried: A Big-Box Retail Example

Consider big-box retail. Almost all cashiers are paid hourly and earn just above minimum wage – about \$25,000 a year in Massachusetts, if they work full-time. As hourly workers they're automatically eligible for overtime, but almost none actually work more than 40 hours in a week.

Now think of the assistant managers who supervise the cashiers. About half are salaried, and they typically make a little under \$40,000 per year in Massachusetts. While many assistant managers in big-box retail may be legally eligible for overtime, it is difficult for them to enforce this right because of the confusing nature of the law.

In Massachusetts, 37 percent of assistant managers in big-box retail work more than 40 hours a week. Over one quarter work more than 50 hours per week. That's time they could be spending helping their kids with homework, volunteering in their communities, or taking classes. Instead they're forced to give that time to their employers – in most cases, for free.

Ever since FLSA became the law of the land, salaried workers have had the right to earn overtime under certain conditions. Overtime eligibility for salaried workers depends on two things: how much they make and what job duties they perform. These are known as the "**salary level test**" and the "**duties test.**" Salaried workers who earn below a certain **salary threshold** are automatically eligible for overtime. Currently that threshold is just **\$455 per week** (\$23,660 per year).

For workers with salaries above the threshold, the "duties test" comes into play. If a worker's salary is above the threshold and they are *not* a "bona fide executive, administrative, or professional" employee, then this worker – despite earning more than the salary threshold – should be eligible for overtime pay. **With few exceptions, only salaried workers who both (1) earn above the salary threshold and (2) are "bona fide executive, administrative, or professional" employees are ineligible for overtime.**

Unfortunately, the salary threshold – and with it, overtime protections for millions of workers – has eroded over time. In 1975, over 60 percent of full-time salaried workers nationally were automatically

eligible for overtime protections because they made below the threshold. By 2016, the threshold had been allowed to erode so dramatically that this share had fallen to just 7 percent.³

The current salary threshold is ineffective everywhere – and meaningless in Massachusetts

The point of using a **salary level test** is to ensure clarity in compliance and enforcement. Because it's a number, it's transparent and easy to comply with. As DoL puts it, "The salary level test provides certainty for employers and employees, as well as efficiency for government enforcement agencies."⁴

The logic behind the amount at which the **salary threshold** is set, as expressed by DoL, is that employees who make above it are generally the ones who help set the rules of the workplace – including pay and hours. They often have enough responsibilities and bargaining power on the job that they do not need special overtime protection.⁵ Conversely, workers making below the threshold – even "executive, administrative, or professional" employees – have little bargaining power with their employers. Absent strong overtime protections, they could be forced to work long hours for low pay.

In order for that logic to hold up, however, the salary threshold must be set at a level that actually reflects a common-sense distinction between workers with bargaining power and workers without bargaining power. The last time the salary threshold was set at a level that effectively made this distinction was in 1975, during the Ford administration. If updated for inflation, the 1975 salary level would be about \$58,000 – more than \$1,100 per week – in 2020.⁶ Currently the salary threshold, as set by the U.S. Department of Labor in 2004, is \$455 per week. That's \$23,660 per year – below the poverty level for a family of four. In 2017, fewer than 10 percent of full-time, year-round workers in Massachusetts earned so little, making the current threshold an unlikely line of demarcation between workers with bargaining power in the workplace and those without.

Besides being too low to serve its purpose as an index of worker bargaining power, the federal salary threshold of \$455 per week is, at least in Massachusetts, meaningless for the following reason: it's below the state minimum wage. State law sets minimum wages and overtime pay for most workers. The Massachusetts minimum wage in 2019 is \$12 per hour – or \$480 over the course of a 40-hour week. It is effectively impossible for any worker in Massachusetts covered by the state's wage and overtime laws to be eligible for overtime under the salary level test, since it's illegal in Massachusetts to pay any such worker below \$480 for a 40-hour workweek, let alone \$455.

The duties test is complicated and confusing

Since the current threshold doesn't help virtually any salaried worker in Massachusetts, the next question is about what a salaried worker does on the job – the **duties test**. It's possible that someone could earn above the threshold and still perform duties not counted as "executive, administrative, or professional," which means they would be eligible for overtime. But for pretty much the entire 81-year history of the FLSA, the duties test has been the subject of dispute and contradictory interpretations among employers, employees, lawyers, and courts at both the state and federal levels. In practice, the duties test has much less impact than the salary level test on who has overtime protection.

Whereas the salary level test is straightforward and transparent, the duties test involves complicated, case-by-case analyses of specific job responsibilities. It's confusing, which makes it easy for employers to misclassify workers as executive, administrative, or professional employees who aren't eligible for overtime protection. Workers who believe they've been misclassified can file complaints with the attorney general, or take their employers to court, but these are time-consuming and expensive measures.

The bottom line is that because the duties test is a source of confusion and open to abuse by employers, the salary level test is the best way to ensure that salaried workers have strong overtime protections.

The Best Test: What Workers Earn v. What Workers Do

Salaried workers are eligible for overtime based on how much they make — **the salary level test** — and what their job responsibilities are — **the duties test**.

The salary level test is **transparent and easy to understand and comply with**. The duties test is **complicated and confusing**, which makes it easy for employers to misclassify low-wage workers as ineligible for overtime and force them to work long hours for no extra pay.

Because the duties test is a source of confusion and open to abuse by employers, **the salary level test is the best way to ensure that salaried workers have strong overtime protections**.

Raising the salary threshold would make the salary level test effective again

Consider Celia, an assistant manager at a big-box store. Celia earns a salary of \$39,000 a year and works 50 hours a week, which is not unusual in her industry.⁷ That comes out to \$750 per week. Because Celia's weekly salary is above the threshold of \$455, the question is: does she perform the kind of job duties that make her a "bona fide executive, administrative, or professional" — and thus exempt from overtime?

Her employer might say yes, and require Celia to work her usual 50 hours — with no overtime. Celia might disagree and take her employer to court. She could argue that many of her job duties are the same as the people she supervises: serving customers, stocking shelves, cleaning. Her employer might concede that Celia spends some of the time doing those tasks but note that she also helps set the schedules of the people she supervises. Such disputes can take months or years to resolve.

It's also possible that there is no dispute about her duties. Celia might agree that she is in fact a "bona fide executive, administrative, or professional" employee.

Nevertheless, whether the courts side with Celia or with her employer in a dispute, or even if there is no dispute, this much is certain: she works long days, giving up significant amounts of personal time, for just \$15 per hour (her weekly salary of \$750 divided by her usual workweek of 50 hours) and no overtime.

This wasn't always the case. Under the original Massachusetts overtime law, passed in 1960, most salaried workers making up to \$80 per week were entitled to overtime pay. Why \$80 per week? That was **two times the minimum wage** — then \$1 per hour — for a 40-hour workweek.⁸ Importantly, it was also the same as the federal rule.⁹

Now imagine that Celia was living under the protection of an overtime law that set the salary threshold at twice the minimum wage. In 2019 the Massachusetts minimum wage is \$12. Over a 40-hour workweek, that translates to a weekly salary of \$480. Twice that is \$960.

Because Celia makes below \$960, she would be eligible for overtime under the transparent salary level test. There would be no need to apply the confusing duties test. For a 40-hour week, her regular rate of pay would be \$18.75 per hour. For each hour worked over 40 in a week she would earn \$28.13 per hour – 1.5 times her regular rate. Working 10 hours of overtime each week for an entire year would mean \$14,600 in overtime pay -- a 38 percent increase over her \$39,000 base salary.

Or perhaps Celia's employer would decide that the extra cost is not worth requiring her to work overtime. She would then get to work a regular 40-hour workweek for the same pay as before, and have 10 hours to do as she pleases. Perhaps the employer would hire an additional worker. (This is not far-fetched. If the store employs three assistant managers at \$39,000 apiece, and they each work a 50-hour week, the costs of overtime would come to nearly \$44,000 – more than the base salary of a fourth assistant manager.)

Either way, Celia would gain more in earnings or in precious personal time. And she wouldn't have to navigate a drawn-out, uncertain legal process to enforce her rights, because everyone knows that \$960 is higher than \$750.

The Massachusetts proposal and the Trump administration proposal

The federal Fair Labor Standards Act is a "floor." In other words, states are free to create their own more generous wage and hour standards, and many do. Both the Massachusetts legislature and the federal Department of Labor are considering updates to overtime protections, including higher salary thresholds.

- The Massachusetts proposal sets the salary threshold at twice the minimum wage – a level that reflects the state's especially high cost of living. The Massachusetts proposal also indexes the threshold to inflation so it will keep up with that high cost of living over time.
- The Trump DoL proposal, on the other hand, sets its salary threshold based on what the lowest-paid salaried workers in the lowest-cost region of the U.S. – the South – earn. The Trump DoL proposal does not index the threshold to inflation.

What's the difference between "new" and "strengthened" overtime protections?

When we refer to "**new**" overtime protections, we're talking about salaried workers who are likely *properly* classified as "bona fide executive, administrative, or professional" employees. They are ineligible for overtime only because they make more than \$455 per week. Raising the salary threshold to twice the minimum wage would make them automatically eligible for overtime based on the salary level test, despite their job duties.

"**Strengthened**" overtime protections, on the other hand, would benefit salaried workers who are currently at risk of being misclassified by their employers as "bona fide executive, administrative, or professional" employees. Raising the salary threshold would lead to "strengthened" overtime protection in this case because it would do away with the need to undertake the confusing and easily abused duties test – along with the time-consuming and expensive process of enforcing it.

The Massachusetts proposal

Under bills now before the Massachusetts, the salary threshold would increase to \$64,000 (about \$1,231 per week) by 2024. That is simply a restoration of the standard the state first applied when it created its overtime law in 1960: twice the value of the minimum wage, adjusted for inflation.¹⁰

In order to give employers time to prepare, the state salary threshold would increase in four phases: \$35,000 in 2021, \$45,000 in 2022, \$55,000 in 2023, and \$64,000 in 2024. After that, it would increase with inflation or increases in the minimum wage, whichever results in a higher threshold.

In 2024, the Massachusetts bills would:

- *grant new overtime protection* to an estimated **168,000 workers currently ineligible for overtime because of how much they make**; and
- *strengthen overtime protection* for another **267,000 workers currently at risk of being misclassified by their employers as ineligible for overtime**.

In all, **435,000 salaried workers in Massachusetts would gain new or strengthened overtime protections** by 2024. That's one out of four salaried workers in the state.

The Backstory: Rolling Back the Obama Administration's Overtime Improvements

Besides protecting far fewer workers than the Massachusetts bills, the Trump administration's proposal is also a significant rollback of improvements his predecessor put in place before leaving office. In 2016, under President Obama, the U.S. Department of Labor raised the salary threshold to \$47,476 (\$913 per week). This change would have extended new or stronger overtime protection to hundreds of thousands of salaried workers in Massachusetts.

In November of that year, however, a federal judge in Texas blocked the Obama administration's improvements from taking effect, in response to a lawsuit brought by Republican-led states and business groups. Instead of defending the gains made by workers under the Obama DoL rule, the Trump administration waited over two years before issuing its proposed rule in March of this year.

The Trump administration proposal

In the meantime, President Trump's Department of Labor (DoL) has proposed its own, much weaker set of overtime protections. Under the Trump DoL proposal, only salaried workers making under \$35,308 (\$679 per week) would gain overtime protections.

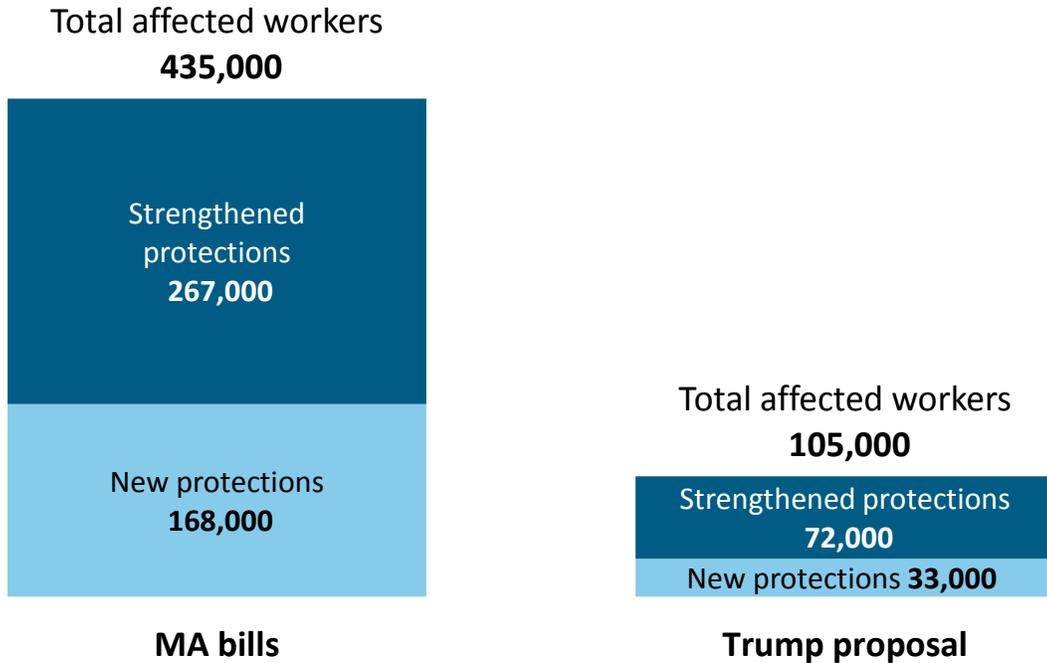
In 2024, the Trump DoL proposal would:

- *grant new overtime protection* to **just 33,000 salaried workers in Massachusetts currently ineligible for overtime because of how much they make**; and
- *strengthen overtime protection* for **just 72,000 salaried workers in Massachusetts currently at risk of being misclassified by their employers as ineligible for overtime**.

In 2024, the Trump DoL proposal will cover **330,000 fewer workers than the Massachusetts bills**. And because the Trump DoL's proposed salary threshold would not increase with inflation, the number of workers it covers will only shrink over time.

The Trump Administration Proposal Would Protect 330,000 Fewer Workers Than the Massachusetts Proposal

Salaried workers in Massachusetts granted new and strengthened overtime protections in 2024 under Trump DoL and MA proposals



Source: Economic Policy Institute analysis of pooled Current Population Survey Outgoing Rotation Group microdata, 2016–2018. Totals may be off due to rounding.

The current Massachusetts overtime law contains exemptions that were removed from federal law over 40 years ago

Laws protecting workers' rights need to be updated regularly to reflect changes in the labor markets they govern. The Massachusetts overtime law contains several outdated exemptions that were removed from federal law long ago. Most of these exemptions were written into the state law in 1960 to match the federal Fair Labor Standards Act then in place. But even as Congress and several presidents modernized the federal overtime law over the years, the language of the Massachusetts overtime law never caught up.

For example:

- In 1966 Congress amended the Fair Labor Standards Act to extend overtime protections to workers in **hospitals and institutions of higher education** – two of the most important industries in Massachusetts.
- In 1977 Congress extended full overtime coverage to workers in **hotels and restaurants**.

The Massachusetts overtime law to this day retains these and other outdated exemptions. Because these exemptions no longer exist in FLSA, most Massachusetts workers who qualify for overtime currently do so under federal law. The Massachusetts bills would modernize the state overtime law and bring it into conformity with federal standards by removing these outdated exemptions. Absent this measure, salaried workers in hotels, restaurants, hospitals, colleges, and universities – along with some other industries and occupations – would not benefit from an increase in the state’s salary threshold.

Adjunct and Non-Tenure-Track Faculty

In addition, the bills would clarify that non-tenure-track faculty – including adjunct faculty – at colleges and universities are entitled to overtime pay. Adjunct faculty work on short-term contracts – usually a single semester – and are paid by the course. Even working full-time, they are paid a fraction of what other faculty make. Some colleges in Massachusetts pay adjunct faculty \$2,400 per course or less.

Other non-tenure-track faculty also work on short-term contracts – generally one to three years – and are paid an annual salary for full-time work. Full-time non-tenure-track faculty are paid less – often far less – than tenured and tenure-track faculty, even though students expect (and pay for) the same high-quality teaching from all, regardless of rank or title.

Both adjunct and full-time non-tenure-track faculty constitute a growing share of the academic workforce. Their workweek isn’t limited to the classroom: course preparation, grading, and meeting with students all take up significant time.

Under federal law, faculty are not entitled to overtime pay. But in Massachusetts higher education plays a [uniquely important role in the strength of the state’s economy](#). The Massachusetts bills would ensure that adjunct and full-time non-tenure-track faculty who work long hours in and out of the classroom are paid for their hard work.

¹ Economic Policy Institute (EPI) analysis of pooled Current Population Survey Outgoing Rotation Group (CPS ORG) microdata, 2016–2018, following the methodology used in the U.S. Department of Labor’s 2019 proposed rule, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [proposed rule],” 84 Federal Register 10900–10969. The Massachusetts bills are S.1092 [<https://malegislature.gov/Bills/191/S1092>] and H.1609 [<https://malegislature.gov/Bills/191/H1609>], “An Act Updating Overtime Protections to Protect the Commonwealth’s Middle Class Workers.”

² EPI analysis of CPS ORG microdata

³ Heidi Shierholz, EPI, April 8, 2019, “More than eight million workers will be left behind by the Trump overtime proposal,” p. 2 [<https://www.epi.org/files/pdf/165984.pdf>].

⁴ March 22, 2019, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [proposed rule]” (hereafter DoL Proposed Rule), 84 Federal Register 10901 [<https://www.govinfo.gov/content/pkg/FR-2019-03-22/pdf/2019-04514.pdf>].

⁵ DoL Proposed Rule, 10907, fn. 66.

⁶ Shierholz, p. 2.

⁷ In 2017 the median salary for First-Line Supervisors of Retail Sales Workers (Standard Occupation Classification code 41-1011) in the General Merchandise Stores industry (North American Industrial Classification System code 452) was \$37,250 in Massachusetts (Massachusetts Executive Office of Labor and Workforce Development, Staffing Pattern Data by Area and Industry). At 2.5 percent annual wage growth that salary would increase to about \$39,000 in 2019. 26 percent of full-time front-line big-box retail supervisors in Massachusetts report working 50 or more hours per week (MassBudget analysis of U.S. Census Bureau, 2013-2017 American Community Survey Public Use Microdata Sample).

⁸ U.S. Department of Labor, “History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938 – 2009” [<https://www.dol.gov/whd/minwage/chart.htm>].

⁹ Part 541 – Defining and Delimiting the Terms “Any Employee Employed in a Bona Fide Executive, Administrative, Professional or Local Retailing Capacity, or in the Capacity of Outside Salesman”: Miscellaneous Amendments, 23 Federal Register 8962 [<https://www.govinfo.gov/content/pkg/FR-1958-11-18/pdf/FR-1958-11-18.pdf>].

¹⁰ The Massachusetts minimum wage will increase to \$15 in 2023. Over a full year of 40-hour workweeks, that comes to \$31,200, and twice that is \$62,400. Adding one-year of inflation growth of 2.5 percent brings the threshold to \$63,960 in 2024.