JAY INSLEE
Governor

STATE OF WASHINGTON
Office of the Governor

May 21, 2019

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Dear Secretary Acosta:

On behalf of the state of Washington, I write to express my opposition to the U.S. Department of Labor's proposed overtime rules ("Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees").

While I wholeheartedly support increasing the salary threshold level for the Executive, Administrative, Professional (EAP) exemption, thereby extending overtime protections to millions of American workers, the Trump Administration's proposal is grossly insufficient to protect workers' overtime rights and risks undermining the purpose of the Fair Labor Standards Act (FLSA). On behalf of the more than 3.5 million total workers in Washington State, I cannot support the erosion of workers' fundamental right to overtime. I urge you to withdraw these rules and adopt a salary threshold that is sufficiently protective of workers who face potential misclassification and exploitation in the workforce. Additionally, I have serious concerns with the proposal's failure to provide for automatic updates to adjust the salary threshold to maintain its effectiveness, and urge you to ensure any final rule includes such a process to prevent future erosion of overtime protections.

By almost any measure, Americans are working harder and longer than ever before. Even though worker productivity is much higher than in the 1970s, workers in similar positions today are likely earning less than they were 50 years ago, when adjusted for inflation. Millions of workers put in more than 40 hours every week but do not see a penny of overtime in their paychecks.

Federal overtime protections must ensure that workers are fairly compensated when they work more than 40 hours in a given week — time they could otherwise be spending with their families and in their communities. This basic concept is at the heart of Congress's intent when it enacted the FLSA. The law was explicitly designed to protect workers from "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and

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general well-being of workers."[1] Overtime protections under the FLSA apply to most workers, but certain "white-collar workers" are exempt.

The exemption from wage and hour protections was intended only for workers employed in a bona fide EAP capacity, recognizing that white-collar workers are set apart from non-exempt workers because they earn salaries well above minimum wage, receive fringe benefits, and have greater job security and opportunities for advancement.[2] The importance of this distinction cannot be overstated. These workers are exempt because they are deemed to have the bargaining power to protect themselves from insufficient compensation for hours worked. The salary threshold, which has not been updated in nearly 15 years, fails to adequately identify legitimately exempt EAP workers. As a result, millions of American workers are subject to potential misclassification as EAP and unfairly denied the overtime protections they deserve.

Under the proposed rules, only those workers earning less than $35,308 annually are guaranteed overtime protections. This low level only serves to perpetuate stagnant wages in America and fails to prevent worker misclassification. For states like Washington with higher incomes and a robust economy, this is especially concerning. A simple and effective solution is to adopt a salary threshold high enough to protect workers who are most likely to face this type of misclassification.

As you know, the determination of EAP status has historically been based on three test criteria: (1) the "salary basis test," meaning the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in their work; (2) the "salary level test," meaning the amount of salary paid must meet a minimum specified amount; and (3) the "duties test," meaning the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations. Although salary level has long been regarded as the best measure for distinguishing bona fide EAP employees from workers who should be covered by FLSA protections, essentially "drawing a line" between exempt and non-exempt employees, the Department has historically recognized the salary level works in tandem with the duties tests.

These rules have not been successfully updated since 2004, when the Department moved to a single test for all salary ranges, modified the duties test, adopted a flawed methodology, and set the salary threshold too low. Like the rules being considered today, the 2004 update also failed to provide for regular adjustments to the salary threshold to maintain its effectiveness — exacerbating the erosion of overtime protections over time and leaving millions without the pay they deserve. In 2016, the Department recognized the inadequacy of those rules and took meaningful action to mitigate the consequences, issuing rules that would have guaranteed overtime pay for all workers earning less than $47,476 and providing for automatic updates to the salary threshold. Importantly, the 2016 update would have simplified the process for determining a worker's EAP status by ensuring anyone working under the salary threshold is

[1] 29 U.S.C. § 202(a).
[2] 81 Fed. Reg. 32,391, 32,392 (May 23, 2016).

eligible for overtime, regardless of the duties they perform. Unfortunately, these rules were blocked from taking effect.

The Trump Administration's proposal falls far short of the 2016 rules and the overtime protections our workers need. By establishing a salary threshold well below the 2016 rules without modifications to the duties test, it fails to guard against abuse of the very workers that FLSA was enacted to protect. Additionally, it does not adequately protect against misclassification for millions of salaried white-collar workers who should be entitled to overtime, regardless of salary, because they do not meet the duties test. This misclassification, whether intentional wage theft or not, denies these workers the compensation they are owed for hours worked above the 40-hour workweek, harming their families and our economy.

Modernizing our federal overtime rules is essential. However, this proposal is woefully inadequate and misses the mark for our nation's workers. It leaves behind more than 3 million employees who would have been entitled to overtime pay under the Obama Administration's rules, depriving them and their families of the labor protections and fair compensation they deserve. It also fails to ensure that the rules are updated automatically to prevent erosion and maintain protections for future generations. As a nation, we can and must do better.

I urge you to withdraw this flawed proposal and adopt overtime rules that truly reflect and honor the dignity of American workers.

Very truly yours,

Jay Inslee
Governor

CC: Melissa Smith, Director of Regulations, Wage and Hour Division
The Hon. Patty Murray, Ranking Member, Senate HELP Committee
The Hon. Pramila Jayapal, U.S. Representative, House Education and Labor Committee
The Hon. Kim Schrier, U.S. Representative, House Education and Labor Committee