Economic Policy Institute

Briefing Paper

1660 L Street, NW • Suite 1200 • Washington, D.C. 20036 • 202/775-8810 • http://epinet.org

ELIMINATING THE RIGHT TO OVERTIME PAY

Department of Labor proposal means lower pay, longer hours for millions of workers

by Ross Eisenbrey and Jared Bernstein

Executive summary

On March 31, 2003, the Department of Labor (DOL) proposed regulatory changes, which if adopted, could make more than eight million white-collar employees ineligible for overtime pay. Under the current Fair Labor Standards Act (FLSA) regulations adopted in 1938, most workers—an estimated 79% as of 1999—are guaranteed the right to overtime pay, or time and a half, for every hour worked beyond the normal 40-hour workweek. For white-collar workers, three tests determine whether they are exempt, and thus ineligible for overtime pay, or nonexempt, and thereby eligible for overtime pay. The rule changes proposed by the Bush Administration in March 2003 would make drastic changes to these tests, vastly increasing the number of exempt employees and making it likely that millions of them will work longer hours at reduced pay.

Under current law, *each* of the following three tests must be met to classify an employee as exempt and therefore ineligible for overtime. First, the "salary-level" test stipulates that employees earning less than a certain level each week cannot be exempt. Second, the "salary basis" test states that employees must be paid a set salary—not an hourly wage—in order to be exempt. Finally, the third screening test is the "duties test," which states that a worker cannot be denied overtime pay unless his or her duties are primarily "administrative," "professional," or "executive" in nature.

The DOL's proposed regulations would raise the salary level under which all employees are protected to $425 per week (i.e., any employee making under $425 would be eligible for overtime

benefits). Under current law that level is set at $155 ($170 for professionals), a pay rate that has remained unchanged since 1975. This proposed increase is sorely needed and would raise the number of workers entitled to overtime pay by roughly 1.3 million. However, earnings of $425 per week equal an annual salary of just $22,100, and because the level is not indexed for inflation, it will protect fewer and fewer workers over time.

Unfortunately, the proposal removes as many employees from overtime coverage from the upper end of the pay scale as it adds at the bottom. The DOL proposes a new exemption that will deny overtime pay to white-collar employees who earn $65,000 or more a year, even if they do not meet the definition of executive, administrative, or professional employees. This proposal will exempt an estimated 1.3 million employees who currently are entitled to overtime pay.

The many other rules changes the DOL proposes would remove millions of workers from overtime coverage and cancel out the benefit to employees of the higher salary-level test. For example, changes to the three duties tests would dramatically increase the number of workers who would be classified as "professional," "administrative," or "executive." Current law stipulates that employees who do not have sufficient status and authority to exercise discretion or independent judgment in their work may not be so classified and should, therefore, be entitled to overtime pay. Under the proposed regulations, this requirement would be eliminated, and hundreds of thousands of editors, reporters, health technicians, and others who are currently entitled to overtime pay will lose it.

Equally significant, education levels required to be considered a professional or administrative employee are diluted, allowing employers to deny overtime pay to paralegals, emergency medical technicians, licensed practical nurses, draftsmen, surveyors, and many others who currently have the law's protection.

Changes in the primary duty test and the redefinition of "executive" will allow employers to deny overtime pay to workers who do a very low level of supervising and a great deal of manual or routine work, including employees who do set-up work in factories and industrial plants. Employees who can only recommend—but not carry out—the hiring or firing of the two employees they "supervise" will be exempted as "executives."

We estimate that—just in the 78 occupational groups we studied (out of 257 "white-collar" occupations)—2.5 million salaried employees and 5.5 million hourly workers will lose their right to overtime pay if the proposed rules are adopted. The total effect of the proposed rule on all occupations is undoubtedly much greater. Employers will not have to convert hourly workers to salaried, but the financial incentive—the option to require that employees work overtime without having to pay for it—combined with competitive pressure will ensure that most will do so. The DOL recognizes that this conversion from hourly to salaried will occur, but it woefully underestimates how significant the change in the workforce will likely be, identifying only 644,000 workers to be affected by the change in regulations and limiting its estimate to only those employees who are currently paid overtime, have exempt administrative and professional duties, and have at least an associate's degree.

Over the years, employers have called the FLSA overtime regulations "outdated" and in need of revision. Once again these claims have been leveled, but this time by the Department of Labor, an odd about-face from the conclusion it reached on the matter just two years ago. In fact, the legitimacy of the

proposed changes is questionable: Congress, which has amended the FLSA many times over the years (most recently in 2000), has not authorized any change in the white-collar exemption rules and has not directed the DOL to take overtime protection from millions of workers.

Millions of families count on overtime pay to make ends meet, a reality that has only increased as both wage growth and the economy have stalled. The protections that workers are afforded under the FLSA should not be weakened.

Introduction

The Fair Labor Standards Act of 1938 (FLSA) established the expectation that American workers would have a normal workweek of 40 hours. For most workers, it guarantees the right to overtime pay—"time and a half"—for each hour beyond 40 worked in a week. In 1999, the U.S. Department of Labor estimated that almost 80% of the nation's 120 million wage and salary workers were entitled to overtime protection under the FLSA.[1]

Section 13(a)(1) of the FLSA states that the obligation of employers to pay an overtime pay premium (or even the minimum wage) for each hour beyond 40 worked per week does not apply to "any employee employed in a bona fide executive, administrative, or professional capacity." The regulations to implement that exemption have been in place since 1940, with few significant changes, except to the dollar amount of the salary-level test.

Qualifying for exempt status generally requires meeting three tests: (1) the amount of salary paid must meet minimum specified amounts (the "salary-level test"); (2) the employee must be paid a predetermined and fixed salary, not an hourly wage that is subject to reductions because of variations in the quality or quantity of work performed (the "salary basis test"); and (3) the employee's job duties must primarily involve managerial, administrative, or professional skills as defined by FLSA regulations (the "duties tests").

On March 31, 2003, the Department of Labor's Wage and Hour Administrator issued a Notice of Proposed Rulemaking to change the regulations governing the right to overtime pay for "white-collar" employees. The purpose of this report is to examine the potential effect of these proposed changes on the right of employees to receive overtime pay. Specifically, we estimate the number of employees who currently have the right to overtime pay who will lose that right if the proposed rule takes effect.

Summary of proposed changes

The proposed rule would make dramatic changes in the regulations, and would, with one key exception, expand the exemptions and take away from employees the right to overtime pay. Among the most important changes in the proposed rule are the following:

Salary-level test

- Salaried employees engaged in nonmanual work, who make $65,000 or more, will be almost automatically exempt and lose their eligibility for overtime pay.

- The two current salary tests are combined into one test; the salary level below which employees are automatically entitled to overtime pay is raised to $425 a week, or $22,100 a year.

Duties test

- The exemption for professional employees has been dramatically expanded to include occupations that not only do not require an advanced degree or postgraduate study, but also those that do not require even an associate's degree or any prolonged course of academic training or intellectual instruction. Knowledge that cannot be attained at the high school level is all that is necessary under the new definition of "learned professional." Work experience or training in the armed forces may substitute for academic training, but no minimum amount of such experience or training is established. Moreover, the proposed rule abandons the longstanding requirement that professional work involve the exercise of discretion and independent judgment—the hallmark of the traditional professions (e.g., medicine, law, theology, architecture).

- The "executive" exemption is expanded to deny overtime eligibility to low-level supervisors with no real discretionary authority, who do the same work as the employees they supervise, and who spend less than half of their time engaged in managerial or supervisory functions. Frontline supervisors like fire sergeants and floor supervisors in retail stores who devote most of their time to the same duties as the employees they supervise will become exempt "executives" and lose their overtime eligibility. Employees who do not even have the power to hire or fire the two or more employees they supervise will be exempt.

- The "administrative" exemption is vastly expanded by removing the requirement that administrators exercise independent judgment and discretion in their work, by removing limits on the amount of time they may spend on nonadministrative work, and by eliminating the requirement that the employee's primary duty must be "staff" work rather than "production" work. The new test—that the employee hold a "position of responsibility"—is broad and vague enough to cover a multitude of jobs that are entitled to overtime pay under current law. An employee will meet this new test if his or her job requires a "high level of skill or training" (how much skill or training is not spelled out) even if the work is not of substantial importance to the employer.

- Finally, the primary duty test, which determines eligibility for overtime pay according to job responsibility, is diluted. Employees can be exempted if only one of their several duties qualifies for exemption. The amount of time an employee spends on a task matters less than whether the employer considers the task "the most important"—except when it leads to exemption from overtime pay. Employees who spend *more* than 50% of work time performing exempt tasks will be considered to have a primary duty of performing exempt work, but if *less* than 50% of their time is spent on exempt tasks, their primary duty can still be classified as exempt work. Employees who spend most of their time stocking shelves and cleaning, for example, can be exempted if they also spend part of their time handling customer complaints or ordering merchandise.

Effect of the proposed changes

The proposed rule makes numerous other changes that will affect coverage, and it is difficult to estimate precisely the effects of all these changes. It is possible, however, to make rough, conservative estimates of the number of employees who currently have the right to overtime pay but will be classified as exempt under the proposed rule.

Examining only 78 occupations among more than 250 identified by the Department of Labor as "white collar," the changes in the duties tests will cause an estimated 2.5 million salaried workers to lose their right to overtime pay. Moreover, an estimated 5.5 million hourly workers could meet the new exemption tests and lose their right to any pay for the overtime hours they work (see **Table 1**). Although 1.3 million low-wage workers will gain overtime protection if the salary-level test is raised to $425 a week, this will be offset by the 1.3 million employees earning $65,000 a year or more who will lose overtime protection if the new "highly compensated" employee test is adopted.

An examination of each of the major changes in the proposed rule will explain the basis of these estimates.

Minimum salary threshold

The Department of Labor estimates that raising the weekly salary level below which all workers are automatically exempt from $155 to $425 (an annual salary of $22,100) will restore overtime protection to about 1.3 million employees. While this increase is a positive development for the low-wage workers it affects, it falls about $5,000 short of the level that would be achieved if $155 had been adjusted for inflation since 1975. It is worth noting that the U.S. Department of Health and Human Services poverty guidelines in 2003 set a threshold of $18,400 a year for a family of four, and $23,000 in Alaska. Because the DOL has not indexed the salary level for inflation, however, the number of employees protected from exemption will undoubtedly diminish over time.[2] Moreover, the proposed regulation itself coaches employers how to avoid paying additional salary to workers newly eligible for overtime pay (68 FR 15576-7).

The Labor Department recognizes that employers will manipulate both the level of pay and the way employees are paid in order to reduce costs. In order to avoid paying more in overtime to employees who would be exempt under a higher salary-level test, employers will raise their salary, a fact the DOL recognizes in its proposal:

> However, for the PRIA it was assumed that, for any nonexempt employee who satisfies the pertinent duties test, the employer will choose to pay the smaller of either the additional weekly salary required to qualify the employee for exemption or the usual weekly overtime payment for the employee (68 FR 15576, March 31, 2003).

Employers will have to convert hourly workers to salaried, but the financial incentive—the option to work employees overtime without having to pay for it—combined with the financial and competitive

pressure many employers feel, ensures that most will do so. The DOL recognizes that this conversion from hourly to salaried will occur, but woefully underestimates its magnitude. The DOL identifies only 644,000 workers who will be converted from hourly to salaried status, limiting its estimate to only those employees who are currently paid overtime, have exempt administrative and professional duties, and have at least an associate's degree.

Highly compensated employees

With regard to the new exemption for "highly compensated employees"—salaried employees who earn $65,000 a year or more—the Department's Preliminary Regulatory Impact Analysis estimates that this exemption would deny overtime protection to 6.5 million to 7.0 million workers.[3] The DOL seems to assume, without any substantiation, that all of these workers are already exempt under current law.

However, it is not at all clear that these "highly compensated employees" are already exempt under current law. Clearly, there are many employees who will meet at least one prong of the many duties tests without meeting all of them. The DOL itself offers the example in new 541.601(c) of supervisors who meet only one of the three tests of an executive: they direct the work of two other employees, but do not manage a department or subdivision of a department and do not have the authority to hire or fire, or even recommend the hiring or firing of employees. Under the new highly compensated employee test, these low-level supervisors will nevertheless be exempt, and more than a million such workers will lose the overtime protection they now have.

In FLSA-covered industries and occupations, there were 8.3 million white-collar employees who earned at least $65,000 in 2000. Approximately 7.4 million were paid a salary, and about 843,000 were paid hourly. Like the Department of Labor, we assume that hourly workers who would be exempt under the new rules if they were paid a salary will be converted to a salary basis by their employers and will therefore be exempt. As the Department of Labor explained in the preamble to the rule:

> Most employers affected by the proposed rule would be expected to choose the most cost-effective compensation adjustment method that maintains the stability of their work force, pay structure, and output levels (68 FR 15576, March 31, 2003).

We also assume that every employee paid $65,000 or more will be able to meet at least one prong of the many duties tests. There is no minimum educational attainment or job experience to qualify for this exemption. Any employee, for example, who works in an "area such as tax, finance, accounting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, government relations and similar activities" (new 541.201(b)) and earns $65,000 or more will be exempt.

More than eight million employees (8.3) currently earning more than $65,000 a year will be denied overtime protection under the new rule—1.3 million workers more than the Department of Labor's estimate of 7.0 million.

Professional employees

The proposal's key changes to the "professional" exemption from overtime protection are:

- the elimination of the requirement for a prolonged course of scientific or specialized intellectual education and the substitution of work experience;
- the expansion of the kinds of occupations that are considered professions; and
- the elimination of any requirement that professionals exercise discretion or independent judgment in their work.

Elimination of educational requirements

An examination of how the proposed rule affects dental hygienists will illustrate the broad impact of eliminating the current educational requirements. Under current law, dental hygienists are considered professionals for purposes of the exemption *only* if they have completed "a prolonged course of specialized instruction and study," which means at a minimum, "four academic years of pre-professional and professional study in an accredited university or college recognized by…the American Dental Association."[4] Using that test and other requirements of the law, the Department of Labor estimated in 1999 that about 30% of dental hygienists met the duties test and would be exempted from overtime protection as "professionals."

Under the proposed rule, by contrast, the great majority of dental hygienists will be exempt professionals, because the test sets no lower limit on the amount of academic training required. Employers will deem their employees "professionals" based on their work experience, as no minimum level even of on-the-job training will be required. The proposed rule also eliminates the requirement in current law that the individual's work must involve the exercise of discretion and independent judgment. Thus, a dental hygienist who is closely supervised by a more highly qualified employee is not exempt under current law, but would be exempt from overtime under the proposed rule. We conclude that these proposed changes will lead to the exemption of approximately 95% of dental hygienists under the new rule.

Multiplying .95 times the total number of dental hygienists who are paid a salary of more than $425 a week yields an estimate that about 21,000 salaried dental hygienists will be exempt under the proposed rule, as opposed to 6,000 under current law. The difference—about 14,000—is the effect of the proposed rule on salaried dental hygienists, the number we estimate will lose overtime protection. It is also the case that thousands of dental hygienists are paid on an hourly basis and would not qualify for the exemption under the proposed rule for that reason. But once it becomes possible to exempt hygienists who have not obtained a four-year degree from an accredited college or university, dental hygienists who are currently paid hourly will be converted to a salary basis and will be exempted. Approximately 56,000 dental hygienists are paid hourly at a rate in excess of $425 a week, and would meet the requirements of the new duties tests; these workers could be all converted to salary and then exempted if the proposed rule is adopted.

The proposed rule's revision of the professional exemption will lead to similar results for a host of skilled occupations in the health professions, such as clinical laboratory technologists and technicians, radiologic technicians, and licensed practical nurses, among others. Workers employed in these and related occupations have formal academic training ranging from a master's or bachelor's degree to a two-year associate's degree or one-year certification. Under the proposed rule, as long as the employee's knowledge is "substantially the same" as the minimum level required of a degreed employee, the employee can be exempted as a professional without pursuing "a prolonged course of specialized intellectual instruction and study," as required under the current law by 29 CFR 541.301(e)(2). Whereas the Department of Labor estimated that 30% of health technologists and technicians are exempt under current law, we estimate that 70% will be denied the right to overtime pay under the proposed rule.

Elimination of independent judgment and discretion requirements

It will no longer matter that a technician has only limited opportunities for the exercise of discretion and independent judgment. The proposed rule drops the requirement in section 29 CFR 541.306 that the employee's work be "predominantly intellectual and varied in character as opposed to routine" and the requirement in section 29 CFR 541.3(c) that the work not be "of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time." Thus, the fact that a lab technician is required to do 20 samples of the same test per hour would disqualify her as a professional under the current rule, but not under the proposed rule.

Expansion of the "creative professions"

Some occupations that previously were not considered "learned professions" or "creative professions" have been arbitrarily identified as such by the proposed rule, and hundreds of thousands of employees will lose their statutory right to overtime pay as a result.

For example, whereas newspaper and magazine columnists generally are exempt because of the creative freedom they enjoy, print reporters have generally not been exempt from overtime as professionals. But the proposed rule (541.302(d)) reverses years of court decisions and simply declares that news reporters *are* exempt creative professionals: "Writers for newspapers, news magazines, television news programs…generally perform work involving originality and talent. Exempt work includes conducting interviews, reporting, or analyzing public events." Whereas the Labor Department found that only 30% of editors and reporters were exempt in 1999, we estimate—conservatively—that under the proposed rule, 70% of reporters and editors will be denied overtime protection.

Expansion of the "learned professions" and substitution of work experience for academic education

The expansion of the "learned professions" is even bolder, as the proposal's treatment of chefs and cooks illustrates. Because culinary academies and a number of colleges and universities offer degrees in the culinary arts, the proposed rule specifically states that chefs[5] and sous chefs qualify as "learned professionals." And because cooks, chefs, and sous chefs who do not obtain a culinary arts degree can achieve

through work experience or on-the-job training substantially the same knowledge level as a degreed individual, the rule throws open the possibility that *any* cook with enough work experience can be exempted from overtime pay protection as a learned professional.

The Department of Labor's own preliminary regulatory analysis equates six years of work experience with a college degree and suggests that any worker with six or more years work experience in an occupation that includes professionals could be deemed a professional and denied the right to overtime protection.[6]

There are about 2.1 million cooks employed in the United States, and 21%—more than 440,000 workers—have at least six years of experience. Under the proposed rule, all of those experienced cooks and chefs who make more than $425 a week—about 240,000 in all—would be exempt.

But, in fact, the proposed rule does not set *any* minimum number of years of job experience to qualify for the professional exemption, and it might be that far more of the 2.1 million chefs, cooks, and sous chefs will be exempt. The preamble states, "We have not proposed any specific formula in the regulations for determining the equivalencies of intellectual instruction and qualifying work experience."[7] It may be that employers will decide that a single year or two of job experience is enough to provide "professional-level" knowledge, and it is hard to see how the Department of Labor will test the culinary skills of restaurant cooks to determine whether they are "learned professionals."

The proposed rule eliminates any requirement that "professionals" have even the equivalent of four years of academic training or education. The treatment of physician assistants is instructive. Proposed section 541.301(e)(4) explicitly establishes that with only one year (2,000 hours) of patient care experience and one year of professional course work in a hospital, a physician assistant meets the requirement for being a learned professional.

In the same way, licensed practical nurses (LPNs), who are certified by state regulatory agencies after completing a one- or two-year course of academic training, will also be deemed "learned professionals." More so than chefs, for example, their academic training is in a "field of science or learning" and is "a standard prerequisite for entrance into the profession." According to the Department of Labor's *Occupational Outlook Handbook*, "Classroom study covers basic nursing concepts and patient-care related subjects, including anatomy, physiology, medical-surgical nursing, pediatrics, obstetrics, psychiatric nursing, administration of drugs, nutrition, and first aid."

We estimate that 233,000 LPNs could lose their statutory right to overtime pay under the terms of the proposed rule. Most LPNs are currently paid hourly, but if by paying them a salary an employer could exempt them, we assume that most employers will do so.

The full extent and effect of the proposed changes in the professional exemption are currently unknown because the Department of Labor has signaled its intention to extend the definition of learned professional to include a broad range of "knowledge workers" not currently included in the professional category. Proposed section 541.301(f) states that, "The areas in which professional exemptions may be available are expanding."

Administrative employees

Changes in the exemption for "administrative" employees will also have significant effects on the rights of employees to overtime compensation. As noted earlier, the key changes in the proposed rule concern:

- the elimination of the requirement that exempt employees' primary duties require the consistent use of discretion and independent judgment, or that employees devote the greatest part of their work time to the exempt administrative duties;
- the substitution of an employee's high skill or level of training for a requirement that the employee's work be managerial and of substantial importance to the employer's business operations.

Independent judgment

Under current law, the administrative exemption is generally limited to employees engaged in the management of the business. Only employees with the status and authority to affect management policies or the freedom to exercise discretion and independent judgment in carrying out those policies lose their right to overtime pay.

For example, although bookkeepers are white-collar employees involved in general business operations, they are currently entitled to overtime pay because their work does not require the exercise of independent judgment. Similarly, most technical writers and public relations specialists are nonexempt. Although they "rely on techniques and skills acquired by special training or experience" and "may have some leeway in the performance of their work," they are nonexempt because the decisions they make and the policies they effectuate are not the result of independent judgment. Rather, as the rule explains, they are engaged "in exercising skill rather than discretion and independent judgment " (541.207(c)(2)). We estimate that 70% of public relations specialists and technical writers will become exempt from overtime pay, that approximately 16,000 salaried employees in those occupations will lose their right to overtime pay, and that another 41,000 hourly public relations specialists and technical writers will meet the new duties tests and be at risk of conversion to exempt status. (We have insufficient data to make an estimate for bookkeepers.)

The proposed rule explicitly eliminates the requirement of independent judgment and discretion and thereby exempts from overtime pay millions of currently nonexempt jobs and workers.

High level of skill or training

The proposed rule will no longer require that the employee's work be of substantial importance to the employer or the employer's customers. New section 541.202 explicitly states that a worker will be exempt if *either* the work has substantial importance *or* it requires a high level of skill or training.

The nonexempt technical writers, bookkeepers, and public relations specialists referred to above (along with millions of other workers) will likely be exempt under the proposed rule because they have skills acquired by special training or experience. New section 541.204 sets a vague and potentially low standard for the level of skill or training required to meet the exemption: "The specialized knowledge or

abilities need not be acquired through any particular course of academic training or study….[the] high level of training required may involve…advanced on-the-job training."

Just as the proposed rule sets no minimum standard for the course of instruction or experience needed to establish that an employee is an exempt professional, it sets no minimum to establish an employee as a highly skilled or trained exempt administrative employee. Professional employees have traditionally attained a higher level of knowledge and skill than administrative employees. In estimating the effects of the proposed rule on the number of employees who will be newly exempt as "highly skilled" administrative employees, we consulted the Department of Labor's O*NET[7] and its National Compensation Survey (NCS). We assume that NCS knowledge level 4 or greater equates to the proposed rule's definition of "highly skilled."[9] This is the level of "specialized knowledge" of a dental hygienist with two years of academic training, who has passed the certification exam and has at least three years of experience.[10] In its own calculation of the number of hourly workers whom employers will convert to salaried, the Department of Labor treated a two-year associate's degree as a proxy for the skill and training required to establish the professional and administrative exemptions (68 FR 15580, March 31, 2003).

Thus, for example, whereas the Department of Labor estimated that 70% of personnel and labor relations specialists are exempt under current law, nearly 100% have a knowledge level of at least 4, and 93% have a knowledge level of 5 or higher.[11] We estimate, therefore, that 95% of personnel and labor relations specialists—432,000 in all—will be exempt, 158,000 more than under current law.

Sales engineers, 30% of whom the Department of Labor estimated to be exempt under current law, use engineering skills to help customers determine which products best suit their needs. Most have a bachelor's degree in an engineering specialty and tend to specialize throughout their careers because their value depends on knowledge of the latest technology. We estimate that nearly all sales engineers would be exempt under the proposed rule because of their high level of skill or training. This means that 17,000 additional sales engineers will lose overtime protection under the proposed rule.

Executive employees

The key changes in the executive exemption requirements are:

- eliminating a requirement that the employee exercise independent judgment or discretion;
- minimizing the amount of time spent in supervision while maximizing the time spent doing the same work as the employees supervised;
- including manufacturing "set-up" work as an exempt supervisory duty.

These changes will have the greatest effect on supervisory employees, since executives— those who direct a business or a significant part of it—have always been clearly exempt from overtime pay eligibility. The current rule exempts only true supervisors, employees whose predominant tasks are the hiring and firing of employees, the adjustment of pay rates, and the assignment of work and training.

The proposal would broaden the definition of "supervisor" to include those who spend most of their time performing manual tasks and routine sales work, as long as they also spend some time directing the work of others. This change will exempt large numbers of employees, especially in the retail industry. The Department of Labor suggests that a ratio of one supervisor for every two employees will be acceptable, even though supervision will account for a small fraction of the time of such "supervisor/executives." By eliminating the requirement that supervisors exercise independent judgment, the revision also allows the exemption of much lower status employees who have no power or authority to make important decisions affecting the economics of the workplace.

In 1999, the Department of Labor estimated that only 30% of employees classified as managers in food serving and lodging establishments were exempt as executives. Under the proposed rule, 90-100% of such managers will be exempt under the duties tests, and we estimate that an additional 195,000 will lose the right to overtime pay, including 54,000 workers who are currently paid a salary. Similarly, the Department of Labor estimated that only 30% of supervisors in food preparation and service occupations were exempt under the current rule; we estimate that 95% will be exempt if the revision becomes law, denying overtime pay to an additional 22,000 salaried supervisory employees and putting 48,000 hourly supervisors at risk of conversion and loss of overtime protection.

Set-up work

"Set-up" work refers to the adjustment of a machine for a particular job. The treatment of "set-up" work as exempt executive work in manufacturing operations is especially troubling. New section 541.703 declares: "Work that is directly and closely related to the performance of exempt work is also considered exempt work." If set-up work is "a highly skilled operation which the ordinary production worker or machine tender typically does not perform," it may be treated as exempt work because it is "directly and closely related to the executive's responsibility for the work performance of subordinates and for the adequacy of the final product."

This revision could lead to the exemption of a new class of workers in industry. The Department of Labor estimated in 1999 that only 5% of factory supervisors were exempt executives, but the proposed rule could lead to the exemption of at least half of all supervisors. We estimate, conservatively, that 50%—or 76,000—additional salaried supervisors of production workers will lose overtime protection. Another 424,000 hourly supervisors will be put at risk.

Conclusion

Some have falsely claimed that Congress enacted the FLSA 65 years ago and then forgot about it while the world changed. In 1985, almost 50 years after the FLSA was enacted, Congress reviewed the law and extended it to state and local governments, having made a decision that the white-collar pay exemptions were still appropriate. If Congress had determined that the executive, administrative, and professional exemptions or the Labor Department's implementing regulations were out of date or incompatible with the modern workplace, it could have and, presumably, would have changed the exemptions at that

time. Congress chose to leave the exemptions in place, unchanged. Twice since 1985, Congress added or amended other FLSA exemptions without changing section 13(a)(1) or directing any change in the regulations that implement these exemptions.

There is no reason to believe, therefore, that Congress has authorized the Department of Labor to dramatically reduce coverage under the FLSA, taking overtime protection away from millions of workers. Yet, as this analysis has shown, that is exactly what the Department of Labor has proposed.

Looking at only one-third of the occupations most directly affected by the "white-collar" exemptions, we estimate that 2.5 million salaried workers will lose their right to overtime pay as a result of the proposed rule's changes in the executive, administrative, and professional exemptions and that 5.5 million hourly workers will be put at risk of the same fate. Approximately 1.3 million employees will lose overtime protection if the new "highly compensated" employee test is implemented. About 1.3 million employees will gain protection because their salary falls below the $425 a week salary-level test.

It is troubling that such dramatic losses in overtime protection are being proposed as a means of bringing clarity to the regulations and reducing litigation.[12] As we have shown above, the proposed rule is rife with ambiguity and new terms, such as "position of responsibility," that will spawn new litigation.[13]

Our estimates are conservative. Depending on how broadly the Department of Labor applies these modified exemptions, the number of employees exempted could rise much higher. For example, if the Department of Labor actually intends that there be no minimum amount of work experience that could qualify an employee as a professional, then one million cooks—rather than the 240,000 included in our estimate—could lose their right to overtime pay. Similar effects on dozens of other occupational categories could lead to the exemption of millions of additional employees.

The millions of employees who will see their pay reduced will, in all likelihood, see their hours of work increase at the same time. Once employers are not required to pay for overtime work, they will schedule more of it. Despite the assurance of Wage and Hour Administrator Tammy D. McCutchen that the proposed rule "will not adversely affect the well-being of families," the increased hours and decreased pay that are likely to result from the proposed FLSA changes will have a negative effect on millions of working families.

The authors would like to thank Danielle Gao for her extraordinary programming assistance and Matthew Walters and Brendan Hill for their excellent research assistance. We also wish to thank Karen Dulaney Smith for her generous and invaluable assistance in understanding the many complexities of the proposed rule, for her insights into the current enforcement of the overtime regulations, and for her truly inspirational spirit of public service.

TABLE 1
Weighted numbers for workers who earn $425 and above per week by occupation
(in thousands of workers)

	Workers receiving a salary			Workers exempt under the the proposed rules who earn an hourly wage	Total difference between the current and the proposed rules
	Current rules	Proposed rules	Difference between current and proposed rules		
TOTAL	**6,218**	**8,725**	**2,507**	**5,518**	**8,025**
MANAGERIAL AND PROFESSIONAL SPECIALTY OCCUPATIONS TOTAL	**3,096**	**3,556**	**460**	**1,362**	**1,822**
Executive, managerial, and administrative occupations total	1,967	2,223	256	821	1,077
Managers, food serving and lodging establishments	458	512	54	141	195
Managers, properties and real estate	185	206	21	59	80
Funeral directors	19	27	8	7	15
Other financial officers	442	494	53	127	180
Management analysts	166	186	20	33	53
Personnel, training, and labor relations specialists	274	314	40	118	158
Purchasing agents and buyers, farm products	2	4	1	1	3
Buyers, wholesale and retail trade except farm products	58	70	12	35	47
Purchasing agents and buyers	90	106	17	66	83
Business and promotion agents	11	11	1	1	2
Construction inspectors	12	15	3	38	41
Inspectors and compliance officers, exc. construction	109	113	4	58	62
Management related occupations	142	165	23	137	160
Professional specialty occupations total	1,129	1,333	204	541	745
Surveyors and mapping scientists	4	4	0	4	4
Dietitians	15	21	6	21	26
Occupational therapists	17	18	1	20	21
Physical therapists	46	49	3	58	61
Speech therapists	62	62	0	16	16
Therapists	29	32	3	30	33
Teachers, pre-kindergarten and kindergarten	179	194	15	58	73
Counselors, educational and vocational	169	175	6	28	33
Economists	66	77	11	15	26
Social scientists	9	11	2	4	7
Urban planners	13	14	1	3	4
Social workers	262	390	128	195	323
Authors	27	29	3	3	6
Technical writers	27	30	3	15	18
Editors and reporters	122	132	10	46	56
Public relations specialists	81	94	13	25	39
TECHNICAL, SALES, AND ADMINISTRATIVE SUPPORT OCCUPATIONS TOTAL	**2,904**	**4,675**	**1,771**	**2,924**	**4,695**
Technicians and related support occupations total	376	770	394	1,585	1,979
Clinical laboratory technologists and technicians	16	38	22	162	183
Dental hygienists	6	21	14	56	71
Health record technologists and technicians	0	0	0	8	8
Radiological technicians	6	15	8	104	113
Licensed practical nurses	7	15	9	225	234
Health technologists and technicians, n.e.c.	18	43	25	270	295
Electrical and electronic technicians	4	33	29	210	239
Industrial engineering technicians	0	0	0	2	2
Mechanical engineering technicians	0	2	2	8	9
Engineering technicians	2	17	15	78	93
Drafting occupations	3	23	20	97	116
Surveying and mapping technicians	1	7	6	38	44

(cont.)

TABLE 1 *(cont.)*
Weighted numbers for workers who earn $425 and above per week by occupation
(in thousands of workers)

	Workers receiving a salary			Workers exempt under the the proposed rules who earn an hourly wage	Total difference between the current and the proposed rules
	Current rules	Proposed rules	Difference between current and proposed rules		
Biological technicians	1	7	6	24	31
Chemical technicians	0	2	2	36	38
Science technicians, n.e.c.	0	4	4	30	33
Airplane pilots and navigators	44	69	26	42	68
Air traffic controllers	3	9	6	12	18
Computer programmers	231	305	73	102	175
Legal assistants	33	160	127	83	210
Sales occupations total	2,249	3,476	1,226	789	2,015
Supervisors and proprietors, sales occupations	1,285	1,770	485	538	1,023
Insurance sales occupations	183	230	47	53	100
Real estate sales occupations	146	242	96	21	117
Securities and financial service sales occupations	250	313	63	42	105
Advertising and related sales occupations	62	81	19	15	34
Sales engineers	9	25	16	1	17
Sales representatives, mining, manufacturing, and wholesale	315	815	500	118	619
Administrative support occupations, including clerical total	279	429	151	550	701
Dispatchers	32	34	2	99	102
Insurance adjusters, examiners, and investigators	131	181	51	130	180
Investigators and adjusters, except insurance	116	214	98	321	419
SERVICE OCCUPATIONS TOTAL	**51**	**150**	**99**	**362**	**461**
Protective services occupations total	25	76	50	57	108
Supervisors, firefighting & fire prevention occupations	4	13	9	17	26
Supervisors, police and detectives	21	63	41	41	82
Service occupations, except protective and household total	26	74	49	304	353
Supervisors, food preparation and service occupations	8	30	22	48	69
Cooks	15	19	3	195	198
Supervisors, cleaning and building service workers	1	13	13	49	62
Supervisors, personal service occupations	1	12	11	13	24
FARMING, FORESTRY, AND FISHING OCCUPATIONS TOTAL	**44**	**49**	**5**	**30**	**35**
Managers, farms, except horticultural	27	27	0	2	2
Managers, horticultural specialty farms	1	2	1	3	4
Supervisors, farm workers	9	9	0	4	4
Supervisors, related agricultural occupations	7	10	3	17	20
Supervisors, forestry and logging workers	1	1	1	3	3
PRECISION PRODUCTION, CRAFT, AND REPAIR OCCUPATIONS TOTAL	**123**	**295**	**171**	**840**	**1,012**
Supervisors, mechanics and repairers	29	47	18	83	102
Supervisors; brickmasons, stonemasons, and tile setters	0	1	1	5	5
Supervisors, carpenters and related workers	0	2	2	16	17
Supervisors, electricians and power transmission installers	0	4	3	23	26
Supervisors; painters, paperhangers, and plasterers	0	2	2	8	10
Supervisors; plumbers, pipefitters, and steamfitters	0	1	1	15	16
Supervisors, n.e.c.	7	71	64	252	316
Supervisors, extractive occupations	5	10	5	15	20
Supervisors, production occupations	82	159	76	424	500

Note: All figures in thousands.

Source: Authors' analysis of Current Population Survey data.

Methodology

We have used the same methodology as the U.S. Department of Labor in its January 2001 report, "The New Economy and Its Impact on the Executive, Administrative and Professional Exemptions to the Fair Labor Standards Act (FLSA)."[14] This methodology was also used by the U.S. General Accounting Office (GAO) in its 1999 report, "Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place."[15]

Using the data processing programs employed by the GAO and Department of Labor, we estimated the total number of white-collar, salaried employees who are exempt under current law by applying to persons covered by the FLSA percentages derived by the Department of Labor Wage and Hour Division of employees likely to be exempt in each of 257 occupations. For example, if the DOL had estimated that 30% of workers in a given occupation were exempt, and the Current Population Survey indicates that there are 120,000 salaried employees earning more than $155 per week in that occupation, but only 100,000 are employed by employers covered by the FLSA, we would find that 30,000 of those employees are currently exempt.

To estimate the number who will become exempt because of changes in the duties tests under the proposed rule, we consulted with experts in employment law and in the application of the FLSA exemptions. For each occupation, based on factors such as the education level required, as determined by the Bureau of Labor Statistics' National Compensation Survey (NCS) or suggested by the O*NET and the BLS Occupational Outlook series, and the nature of any supervisory duties required, as determined by the NCS, suggested by the O*NET, Occupational Outlook, or our experts' knowledge of the occupations, we applied the proposed rule and derived new estimates of the percentage exempted. We then applied those percentages to the number of covered employees in each occupation earning at least $425 per week (the new salary level) and calculated the total number who will lose overtime protection.

Ours was a limited sample and underestimates the effect of the proposed rule. We made estimates for only about one-third of the 257 white-collar occupations examined by the Department of Labor. These occupations accounted for about 15 million workers who earn at least $425 a week, out of a total sample of about 63 million. By and large, the occupations we examined were those that were most clearly affected by the proposed rule. We did not examine dozens of teaching occupations, for example, where little change is expected because almost all employees are already exempt under current law.

Endnotes

1. U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division. 2001. *The "New Economy" and Its Impact on Executive, Administrative, and Professional Exemptions to the Fair Labor Standards Act (FLSA).* Washington, D.C.: Department of Labor, p. 4.

2. The Department of Labor last raised the amount of the salary-level tests in 1975. In 1975, according to the U.S. General Accounting Office (GAO), approximately 30% of the workforce was automatically exempt. By 1998, due to the effects of inflation, only 1% of the full-time workforce was automatically exempt. As cited in United States General Accounting Office. 1999. F*air Labor Standards Act: White-Collar Exemptions in the Modern Work Place*. GAO/HEHS-99-164. Washington, D.C.: Department of Labor, p. 28.

3. CONSAD Research Corporation and the U.S. Department of Labor, Employment Standards Administration. 2003. "Economic analysis of the proposed and alternative rules for the Fair Labor Standards Act (FLSA) regulations at 29 CFR 541." Technical paper, February 10. Table 4.1.

4. U.S. Department of Labor, Wage and Hour Division. 1975. Opinion Letter, December 29.

5. The *American Heritage Dictionary* defines "chef" as "a cook, especially the chief cook of a large kitchen."

6. CONSAD Research Corporation and the U.S. Department of Labor, Employment Standards Administration. 2003. "Economic analysis of the proposed and alternative rules for the Fair Labor Standards Act (FLSA) regulations at 29 CFR 541." Technical paper, February 10. p. 39.

7. U.S. Department of Labor, Wage and Hour Division. 2003. "Defining and delimiting the exemptions for executive, administrative, professional, outside sales, and computer employees." Department of Labor, Federal Register Report, Vol. 68, No. 61. Washington, D.C.: Department of Labor, March 31, p. 15568.

8. The O*Net is a compilation and ranking of the duties, skills, required training, and work context for hundreds of different occupations prepared by contractors under the supervision of the Department of Labor.

9. Knowledge level 4 is defined in part as, "Knowledge of an extensive body of rules, procedures, operations, products or services requiring extended training and experience to perform a wide variety of interrelated or nonstandard procedural assignments and resolve a wide range of problems: OR Practical knowledge of standard procedures in a technical field, requiring extended training or experience…." (U.S. Department of Labor, Bureau of Labor Statistics. 2001. *National Compensation Survey: Occupational Wages in the United States*. Washington, D.C.: U.S. Government Printing Office. Appendix C, page 168.)

10. U.S. Department of Labor, Bureau of Labor Statistics. 2001. *National Compensation Survey: Occupational Wages in the United States*. Washington, D.C.: U.S. Government Printing Office. Appendix D, p. 174.

11. Knowledge level 5 is defined in part as, "Knowledge (such as would be acquired through a pertinent baccalaureate educational program or its equivalent in experience, training, or independent study) of basic principles, concepts, and methodology of a professional or administrative occupation, and skill in applying this knowledge in carrying out elementary assignments, operations, or procedures." (U.S. Department of Labor, Bureau of Labor Statistics. 2001. *National Compensation Survey: Occupational Wages in the United States*. Washington, D.C.: U.S. Government Printing Office. Appendix C, page 168.)

12. U.S. Department of Labor, Wage and Hour Division. 2003. "Defining and delimiting the exemptions for executive, administrative, professional, outside sales, and computer employees." Department of Labor, Federal Register Report, Vol. 68, No. 61. Washington, D.C.: Department of Labor, March 31, p. 15563.

13. Ironically, *The Chicago Tribune* (June 15, 2003) reports on page 1 of its business section that "The Labor Department's McCutchen predicts a deluge of lawsuits as employees and employers press for clarifications once the new rules go into effect."

14. U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division. 2001. *The "New Economy" and Its Impact on Executive, Administrative, and Professional Exemptions to the Fair Labor Standards Act (FLSA).* Washington, D.C.: Department of Labor.

15. United States General Accounting Office. 1999. *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place*. GAO/HEHS-99-164. Washington, D.C.: Department of Labor.