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# Economic Policy Institute

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## THE DEPARTMENT OF LABOR'S FALSE CLAIMS ABOUT THE OVERTIME RULE

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**T**he U.S. Department of Labor has circulated a document that attacks the Economic Policy Institute's Briefing Paper, *Eliminating the Right to Overtime Pay*, an analysis of the Bush Administration's proposal to rewrite the white-collar overtime pay exemption regulations under the Fair Labor Standards Act. EPI's analysis concludes that more than eight million workers are likely to lose their right to overtime pay if the proposed rule takes effect.

This memorandum responds to the Department of Labor's most significant criticisms of the EPI analysis. But to put matters in perspective, it makes sense to start with an important—and completely false—claim the DOL makes about the rule.

### AUTOMATIC COVERAGE

On page two of its document, in bold type, the DOL states that “**for the first time in the history of the FLSA, the lowest 20% of all salary workers will be guaranteed overtime.**” First of all, the lowest 20% are not guaranteed *overtime*, but rather they are guaranteed premium pay if they work overtime. But in any case, the DOL is way off the mark in this assertion. When the salary levels were last amended, in 1975, the lowest **35%** of all salary workers earned less than the \$155 per week salary level and were guaranteed overtime pay if they worked more than 40 hours in a week. There is simply no basis for the DOL's claim that the proposal grants overtime to a greater percentage of employees than ever before. And protecting only one-fifth of the salaried workforce is nothing to be proud of.

### THE PROFESSIONAL EXEMPTION

The DOL claims it “makes no substantive changes to the current rules regarding educational requirements for exempt professionals.” This is blatantly false. The proposed rule adds to the professional exemption the following language, which will, for the first time, allow employees with little or no academic training to qualify as “learned professionals”:

The term “advanced knowledge” means knowledge that is customarily acquired through a prolonged course of specialized intellectual instruction, but which may also be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience. (Proposed section 541.301)

The DOL’s Preliminary Regulatory Impact Analysis, prepared by a contractor, CONSAD, gives an honest description of this radical change in the regulations: **“The proposed rule allows work experience to be substituted for all or part of the educational requirement for exemption of learned professionals.”**

This proposal posed a challenge for the regulatory analysis, which as a matter of law must include an estimate of the economic effects of every substantial change in the regulations. To determine the impact on employers, the DOL first had to estimate how many more employees will lose overtime pay because of the weakening of the educational standards. How much work experience would an employee who had never attended college need to be deemed a professional under the proposal? The proposal itself does not set *any* minimum amount of work experience that might substitute for a college education or a “prolonged course of specialized instruction and study.” So the DOL’s regulatory analysis arbitrarily selected six years of job tenure as enough to make an employee a professional—even without so much as a day of higher education:

**“Based on these guidelines, a rough estimate that six years or more of work experience might be considered equivalent to a bachelor’s degree has been used in the analysis.”**

Accordingly, the DOL itself estimated that 44% of the “learned professional employees without college degrees” will be exempt under the proposed rule. Not just the “occasional chemist,” but 44 out of every 100 employees working in the fields of chemistry, biology, nursing, engineering, accounting, and other traditional professional fields will lose their right to overtime pay.

In fact, the effect of this major reduction in educational standards will be even greater, because the proposed rule does not require even six years of job tenure as the minimum amount of work experience for exemption. There is *no* minimum standard. For example, nothing in the proposed rule prevents an employer from designating an employee with no higher education and only two years of work experience as a “learned professional” who is therefore ineligible for overtime protection.

### *Nurses*

The DOL is wrong to claim that the proposal will not cause nurses or skilled health technicians and technologists to lose their overtime protection. Because “the proposed rule allows work experience to be substituted for all or part of the educational requirement for exemption of learned professionals,” the proposal’s list of examples of learned professionals and the academic training those professions traditionally require is only a starting point. By the DOL’s own admission, nurses without four-year degrees are no longer guaranteed overtime protection. Nurses are exempt if they have a four-year nursing degree but are also exempt if they have a two-year degree and some work experience. The DOL has turned educational *requirements* into educational *guidelines* that are no longer binding. The effect will be dramatic.

The DOL’s own regulatory analysis shows that 644,000 hourly employees will be converted to salary and exempted as professionals or administrators—many of them possessing

only an associate's degree. Under current law, there is no professional exemption for employees who have earned no more than an associate's degree.

### ***Chefs and Cooks***

The dilution of the educational standards will also apply to chefs and cooks. The DOL now claims that only chefs and cooks "with a college degree in culinary arts" will be exempt professionals. But because "the proposed rule allows work experience to be substituted for all or part of the educational requirement," chefs and cooks who have never attended college at all, let alone received a degree, will be made exempt on the basis of their work experience. Even using the DOL's own rough estimate that six years of job tenure is the equivalent of a college degree, 440,000 cooks and chefs will lose their right to overtime pay.

### ***Dental Hygienists***

Contrary to the DOL's claims, dental hygienists will be directly and dramatically affected by the proposed rule. Although, as DOL admits, under current law "dental hygienists are only exempt if they have successfully completed four years of pre-professional and professional study," under the proposed rule, work experience can be "substituted for all or part of the educational requirement." There is simply no legitimate debate about whether dental hygienists with only two years of academic training will be exempted as professionals if the proposed rule becomes law.

The DOL did not make occupation-by-occupation estimates of the effect of its proposed rule. Instead it lumped the learned professions together and made an aggregated estimate of how many workers would lose overtime protection. By the DOL's own estimates, the number of workers who would lose overtime protection is not zero, but rather 44 workers out of 100.

## **THE ADMINISTRATION EXEMPTION**

The DOL, which claims its proposed rule is intended to bring clarity and simplicity to the white-collar exemption, says it intends to "reduce but not eliminate the emphasis on the so-called production-vs.-staff dichotomy in distinguishing between exempt and non-exempt workers."

How much has the DOL reduced this emphasis? Under current law, 29 CFR 541.201 (a) (2) distinguishes between staff and "line employees," declaring that staff employees can be exempt, while line employees cannot. The DOL did more than just deemphasize this component of the overtime regulations: in the proposed rule, the distinction between staff and line employees is nearly eliminated. There is no provision in the proposed regulatory text that addresses "staff employees," one of the three narrowly drawn categories of employees that qualify for exemption as administrators under current law.

Instead, the DOL has radically rewritten the administrative exemption to cover employees who *are* line employees. Lower level employees who are *not* "administrators," are *not* "in charge of a so-called functional department" (29 CFR 541.201 (a) (2) (ii)), will be exempt under the DOL's proposed rule simply because they "work in the area of tax, finance, accounting, auditing, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, and similar activities" (Proposed 541.201(b)) and "employ a high level of skill or training" (Proposed 541.202).

Contrary to the DOL's assertion, the proposal does not set minimum standards for what "a high level of skill or training" means. The proposal states that the training "*may* involve advanced academic instruction or advanced on-the-job training" (Proposed 541.204(a)). However,

advanced training is not a requirement. If the proposed rule provided that training “shall” or “must” involve academic instruction or advanced on-the-job training to qualify for exemption, then a minimum standard would be set, but this is not the case.

The proposed rule provides little clarity other than to establish that secretarial, clerical, and “other routine work” does not require a high level of skill or training. Even that clarity is undermined by another provision, Proposed 541.203(b)(4), which says an executive assistant (a title frequently given to the secretaries of top managers) can be exempt and lose the right to overtime pay if he or she “without specific instructions or prescribed procedures, has been delegated authority to arrange meetings, handle callers, and answer correspondence.” This kind of authority is not unusual, and hundreds of thousands of secretaries and executive assistants who perform such tasks could lose their right to overtime pay if the proposed rule takes effect. The Economic Policy Institute’s original estimate did not address this possibility.

### **HIGHLY COMPENSATED TEST**

The DOL has tried to minimize the negative impact of its new exemption by claiming that 94.2% of office and nonmanual workers earning \$65,000 a year or more are already exempt salaried workers not entitled to overtime under current law. Elsewhere, the DOL admits it has no basis for such a claim. In the proposed rule, on page 68 Fed Reg 15577, the DOL admits that “data limitations prevent the Department from identifying exactly which workers are exempt and nonexempt based on the current and proposed duties tests.” Rather than making occupation-by-occupation estimates of the impact of the changes in the duties tests, the DOL simply dismissed the need to identify who is covered by the duties tests, making it *impossible* to determine from its regulatory analysis how many social workers, for example, or bank loan officers, or labor relations specialists are exempt under current law—let alone how many more will be exempt under the proposed rule.

The DOL’s only “analysis” was to make an assumption “that, for employees in occupations with a combination of exempt and nonexempt duties, those with lower salaries would more likely be nonexempt.” In other words, there is no basis for the DOL’s absurdly precise estimate—other than the DOL’s own unsupported assumptions that 94.2% of highly compensated white-collar employees are already exempt.

In 2000, 8.3 million white-collar employees earned \$65,000 or more. The DOL has no explanation for its estimate that only 6.5 million to 7.0 million of those employees will be exempt under the proposed rule’s highly compensated test. These workers will have to meet only one prong of any of the various duties test in order to lose their right to overtime. *Every* highly compensated employee who works “in the area of tax, finance, accounting, auditing, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, and similar activities” (Proposed 541.201(b)) will be automatically exempt. Any highly compensated white-collar or nonmanual employee in other areas who does work of substantial importance, or is highly skilled or highly trained, or who, though not a supervisor, customarily directs the work of two other employees, will be exempt. The DOL would have difficulty identifying any white-collar employee earning \$65,000 a year or more who will not meet at least one of these tests.

### **UNION AND MANUAL WORKERS**

The DOL claims that “teamsters,” police officers, and various other workers in highly unionized occupations will not lose their entitlement to overtime pay.

First, it should be pointed out that there are precious few “teamsters” still driving teams of horses, mules, or oxen. But there are more than a million members of the International Brotherhood of Teamsters, who work as nurses, graphic artists, health technicians, and in scores of other jobs that will definitely be affected by the proposed rule. And thousands of them will lose their right to overtime pay if the proposed rule becomes law.

As the DOL knows, job titles do not determine the exemptions. A police officer who walks a beat (manual work) may not lose overtime protection, but a police sergeant who spends significant time supervising two or three other officers *will* lose overtime protection under the proposed rule because supervision is nonmanual work. The fact that the sergeant walks the beat 90% of the time does not matter under the DOL’s proposed rule so long as the employee has as “a primary duty exempt supervisory work.” Construction work is also manual work, but supervisors on construction sites can already be exempt under current law, and even more will lose overtime protection under the more lenient definitions outlined in the proposed rule.

### **THE EXECUTIVE EXEMPTION**

The DOL claims that it will be more difficult to qualify as an exempt executive under the proposed rule. This claim is belied by the fact that the regulatory analysis does not estimate that a single additional employee will gain overtime protection as a result of changes in the executive duties tests. The DOL is required by law to account for all substantial economic impacts on employers in its regulatory analysis. The DOL can’t have it both ways. The regulatory analysis does not account for increased coverage of “executive” employees because there is no such increase.

The proposal makes major changes that expand the executive exemption, but the DOL fails to discuss them. Most notably, the proposal permits exemption if an employee’s executive duty is “a” primary duty, rather than “the” primary duty. By emphasizing that executive tasks that might take up only a small part of an employee’s time can be “a primary duty” sufficient for exemption, the DOL widens the exemption to low-level employees who cannot in any ordinary sense of the word be considered “executives,” including workers who spend most of their day stocking shelves, sweeping floors, running a cash register, and performing other nonmanagement tasks.

The DOL’s claim that it has not changed the provision dealing with set-up work is also false. By extending the set-up work exemption to nonsupervisory employees, the proposed rule jeopardizes overtime rights for skilled trades workers who are not supervisors and are not exempt under current law.

The Department of Labor has not been honest about the damage its proposed rule will do to millions of American workers. A more accurate appraisal of the proposed rule was made by Sarah Pierce, manager of employment policy for the Society for Human Resource Management, as reported by the *Philadelphia Inquirer*: “This is going to affect every workplace, every employee, and every professional.”