Briefing Paper

LONGER HOURS, LESS PAY

Labor Department's new rules could strip overtime protection from millions of workers

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On April 23, 2004 the Department of Labor (DOL) published regulatory changes that, if they are allowed to take effect, could strip away the right to overtime pay for over six million workers. The original version of these rules, proposed by the Bush Administration in March 2003, would have stripped overtime protection from eight million workers. In the face of widespread public opposition, the administration promised that its final version of the rules would correct this problem, a promise it has failed to keep.

Under the current Fair Labor Standards Act (FLSA) regulations, most workers are guaranteed the right to overtime pay, commonly known as "time-and-a-half," for every hour worked beyond the normal 40-hour workweek. Three basic tests determine whether workers are exempt (i.e., ineligible for overtime pay) or non-exempt (i.e., eligible for overtime pay). The regulatory changes issued by the Bush Administration in April 2004 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 new regulations would raise the salary level under which all employees are protected to $455 per week (i.e., any employee making under $455 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. A salary of $455 per week equals an annual salary of just $23,660, about $5,000 a year above the poverty level for a family of four. And because the exemption level is not indexed for inflation, it will protect fewer and fewer workers over time. **Initially, about 400,000 employees who work overtime will now be paid for it.**

The many other rules changes—principally those amending the three key duties tests—would dramatically increase the number of workers who would be classified as "professional," "administrative," or "executive" and thus remove millions of additional workers from overtime coverage.

Changes in the primary duty test and the redefinition of "executive" will allow employers to deny overtime pay to workers who do very little supervision and a great deal of manual or routine work, including employees in factories and industrial plants. Employees who can only recommend—but not carry out—the "change of status" of the two employees that they "supervise" will be exempted as "executives" even if they manage nothing more substantial than a team or grouping of employees. **In all, 1.4 million low-level, salaried supervisors will lose their overtime rights, along with 548,000 hourly supervisors, who could be switched to being paid on a salary basis and thus denied overtime protection.**

More than 900,000 employees without a graduate degree or even a college degree will be designated "professional employees" and lose the right to overtime pay, even if their pay and status fall far below that of degreed employees. As many as 2.3 million team leaders with no supervisory authority will be exempted as "administrative employees" even if they are line or production employees.

Approximately 130,000 chefs and sous chefs who are not executive chefs will be exempted as "learned professionals" and "creative professionals." Pre-kindergarten and nursery school teachers, no matter how low their pay, will be exempt under the new rule, even if their work does not require the exercise of discretion and judgment. We estimate that 30,000 nursery school teachers will lose the right to overtime pay.

Mortgage loan officers will be affected by the new financial services industry exemption and by the gutting of the protections for employees who are line workers, rather than policy or business operations staff. **Ultimately, 160,000 mortgage loan officers will lose the right to overtime pay that they currently have today.**

In addition, nearly 90,000 computer employees, funeral directors, and licensed embalmers will become exempt professionals and lose their right to overtime pay.

Furthermore, the DOL creates a new exemption that will deny overtime protection to otherwise non-exempt employees who earn $100,000 or more a year, as long as they regularly perform a single task that could be considered characteristic of an executive, administrative, or professional employee. **This new provision will exempt an estimated 400,000 employees who currently are entitled to overtime pay.**

Altogether, we estimate that nearly six million employees will lose their right to overtime pay on the basis of just 10 of the many changes the final rule makes in these critical regulations. The total effect of the new regulation is undoubtedly greater, but we have been unable to determine the impact of many of the changes with any precision. The broad new exemption of employees in the financial services industry, for example, combined with the elimination of the provision in current law that protects the overtime

rights of "line" or production workers, might affect hundreds of thousands of additional employees, but we have not been able to make a reliable estimate of these numbers. The final rule also greatly expands the exemption of "outside sales employees," creates a new exemption for athletic trainers, and weakens the overtime rights of tens of thousands of editors, reporters, and journalists "performing on the air in radio, television, or other electronic media."

Millions of families count on overtime pay to make ends meet, a need that has only increased in importance as wage growth continues to stall. If anything, the protections that workers are afforded under the FLSA should be further strengthened, not weakened.

Background

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—often referred to as "time-and-a-half"—for each hour worked beyond 40 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.

Section 13(a)(1) of the FLSA states that the obligation of employers to pay an overtime pay premium 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 increase coverage and raise the dollar amount of the salary-level test. Being designated exempt from overtime protection 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 test").

On April 23, 2004, the U.S. Department of Labor published a final rule that amends the regulations for the overtime pay exemptions. The purpose of this report is to examine the potential effect of these 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 new regulation takes effect.

The final rule makes dozens of significant changes in the right of employees to be paid overtime when they work more than 40 hours in a workweek. Almost every one of these changes will weaken the right of employees to earn overtime pay. By analyzing the effect of just 10 of the final rule's dozens of changes from current law, it becomes apparent that millions of workers will lose their right to overtime pay under the Department of Labor's new rule.

Summary of major changes

The changes fall into three categories: changes in the salary and salary-basis[1] tests; changes in the duties tests; and the creation of a new exemption for highly compensated employees.

Salary Test

The final rule makes a significant change in the salary test. The salary threshold below which employees are guaranteed overtime compensation, regardless of their duties, has been raised from $155 a week[2] ($8,060 a year) to $455 a week ($23,660 a year). From the standpoint of employees, this is the only positive change of any significance in the final rule.

Unfortunately, the Department of Labor (DOL) oversells this change. DOL claims that 1.3 million salaried workers earning less than $455 a week will gain overtime pay, but its analysis is flawed and demonstrably wrong. DOL wrongly assumes that thousands of non-managerial, non-professional employees in low-level positions, including typists, cashiers, bookkeepers, bank tellers, data entry keyers, secretaries, and teacher's aides are properly exempt under current law and would benefit from the increased income threshold. DOL estimates that almost 70,000 teachers will gain overtime pay—even though the salary threshold does not apply to them at all, and they can be exempt even if they make less than the minimum wage. DOL also assumes that more than 80,000 low-paid sales workers are currently exempt and would gain overtime pay under the final rule, an estimate that is almost certainly wrong. The methodology DOL used to determine that such employees are exempt is so unreliable that it casts grave doubt on its identification of exempt employees in other job classifications, including a very large number of sales supervisors, computer systems analysts, and low-paid managers. DOL then compounds its error by wrongly assuming that all of these employees already work overtime, even though its own data identify them only as working 35 hours or more a week (these workers would have to work more than 40 hours a week to receive overtime pay).

We estimate that the salary threshold change could guarantee overtime pay to an additional 384,000 salaried white-collar workers who work more than 40 hours a week. This estimate is derived by calculating the total number of white-collar employees working more than 40 hours per week and earning between $155 and $455 a week, using DOL's 2002 CPS Outgoing Rotation Group data. We then applied DOL's 1999 estimates of the percent likely to be exempt in each occupation and derived the sum for all the occupations.

Duties Tests[3]

Team leaders are newly exempt under the final rule.

Section 541.203(c) exempts "an employee who leads a team of other employees assigned to complete major projects for the employer" even if the employee does not have direct supervisory authority over the other employees on the team. This is a broad new exemption that Professor Thomas Kochan of MIT's Sloan School of Management has shown could apply to as many as 2.3 million currently non-exempt team leaders throughout U.S. industry.[4]

Another approach yields a somewhat smaller, but still substantial, figure. According to MIT Professor Paul Osterman, 13% of non-supervisory employees in a 1994 Census Bureau survey of establishments with 20 or more employees were in self-managed teams. There are 94 million employees in establishments with 20 or more employees. We can assume, conservatively, that 75% of those 94 million (i.e., 70.5 million employees) are non-supervisory. Thirteen percent of these 70.5 million non-supervi-

sory employees equals 9.16 million workers. Assuming an average team size of 10, then 916,000 employees in 1994 were non-managerial team leaders who would be subject to exemption by the new provision. Teams, however, are even more prevalent today than they were in 1994, so 916,000 is probably an underestimate.

The regulation provides that team leaders assigned to complete "major projects" will generally be exempt. The problem is that the new regulation does not define "major projects." In practice, this limitation could be meaningless. The regulation lists "designing and implementing productivity improvements" as an example of a "major project." Employers easily will be able to argue that teams involved in improving customer service, productivity, employee safety and health, employee morale, and a wide range of other subjects are assigned "major" projects.

It is important to note that this provision will affect blue-collar and white-collar employees alike. Just as the supervisors of blue-collar workers can lose the right to overtime pay because their work is the "executive" work of supervision, so will blue-collar team leaders lose their overtime rights when they perform the "administrative" task of leading a team on a major project.

Kochan's estimate and the estimate based on Osterman's work measure the effect of the new team leader provision assuming current work practices. Nothing prevents the 60% of employers who do not now use teams on a routine basis from changing their practice in order to take advantage of the new loophole, and there are enormous competitive pressures to encourage them. Thus, the ultimate loss of overtime rights could be greater than 2.3 million.

DOL argues that the team leader exemption is more protective than a provision of current law that deals with "major assignments." But this claim is clearly erroneous. The "major assignment" language in current section 541.205(c) merely provides an illustration of the meaning of one prong in the duties test for the administrative exemption: "directly related to management policies or general business operations." Satisfying that one requirement does not satisfy all of the duties requirements under current law for the administrative exemption, whereas the final rule provides that a team leader on a major assignment "generally meets the duties requirements for the administrative exemption"—not just the requirement that the employee's work be "directly related to the management or general business operations."

A team-leader provision was included in the proposed rule, as well, but in a different form, as an illustration of the term "work of substantial importance." It is a new loophole in search of a rationale, not a continuation of current law. No case has ever held that being a team leader is grounds for exemption from the right to overtime pay.

Nursery school and pre-kindergarten teachers will be made exempt.

According to the testimony Karen Dulaney Smith—a former Wage and Hour Division investigator—gave before the House Committee on Education and the Workforce, under current law, the Department of Labor treats most nursery school teachers as non-exempt because their jobs do not require them to exercise sufficient discretion and judgment to be considered professional employees. Nor has teaching—the imparting of knowledge—been considered their primary duty; most of their time at work is

devoted to custodial care of the children. In agreement with Ms. Smith, the leading treatise on the Fair Labor Standards Act states that, "Preschool 'teachers,' on the other hand, were found generally not to be exempt."[5] DOL nevertheless suggests that 50-90% of preschool and kindergarten teachers are already exempt under current law,[6] perhaps because most kindergarten teachers (but not nursery school teachers) are public school employees who hold teaching certificates and engage in academic instruction. In 2002, according to DOL, there were 361,000 preschool and kindergarten teachers subject to the FLSA. If we adopt the low end of DOL's estimate and assume that 50% are exempt, including all 168,000 kindergarten teachers, then 181,000 nursery and pre-K teachers are non-exempt and entitled to overtime under current law. Because no minimum salary-level requirement applies,[7] every nursery school teacher in an educational institution is subject to exemption under the final rule, which eliminates the requirement for discretion and judgment[8] and weakens the primary duty test. Thus, the final rule will eliminate overtime rights for at least 30,000 nursery school teachers, because at least one in six works in an "educational institution," strictly defined.

Working supervisors and employees with some executive duties will be more easily exempted under the final rule.

Several changes in the final rule combine to make it much easier for employers to reclassify supervisors as "executives" and thus exempt them from overtime protection.

- The current regulation has a clear, bright line test that helps determine exempt status: a 20% limit on non-exempt work by working foremen.[9] The final rule eliminates this so-called "tolerance test" and replaces it with a new "primary duty" test that sets no identifiable upper limit on the amount of non-exempt, menial, and routine work an individual can do and yet be exempt as an executive.[10]

- The new primary duty test no longer adopts the "good rule of thumb" in which the primary duty is the one that requires the major part (over 50%), of the employee's time. The final rule (in new section 541.106) codifies the worst of the federal case law, which holds that a low-paid Burger King assistant manager, for example, with no authority to hire or fire subordinates, who spends 90% of her time running the cash register and serving customers, and who does not have discretionary powers, can still be classified as an exempt executive and be denied any pay for her overtime hours.

- To make matters worse, the final rule dilutes the requirement that exempt executives must manage the enterprise or a recognized department or subdivision, "rather than a mere collection of employees assigned from time to time to a specific job." The Department states that it intends to allow a "grouping" or "team" to be considered "a customarily recognized department or subdivision," and DOL specifies in section 541.103(d) that the exemption is not lost "merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units, if other factors are present that indicate that the employee is in charge of a recognized unit with a continuing function."

- The rule no longer requires that an executive "be in charge of" a recognized subdivision. The final rule permits employees to "be in charge of" the same employees as another supervisor/executive. As long as there are at least two supervisees for each supervisor, the supervisors can all simultaneously be in charge of the same unit, and thus be denied overtime pay as exempt executives.

The new section on concurrent duties in section 541.106 makes it clear that employees can simultaneously do production work and exempt supervisory work. Because the final rule eliminates the 20% and 40% tolerance tests for non-exempt work by supervisors (and, indeed, any identifiable time limitation on non-exempt work), factory foremen who spend virtually their entire day doing manual work on the line next to the employees they supervise will lose their right to overtime pay, because it will be easier to find that their primary, or most important, duty is executive, i.e., supervisory. The fact that the supervisor manages nothing more than a grouping of employees will not defeat the exemption.

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 on the basis of their duties. This low rate of exemption under current law is partly due to the fact that many of these managers spend the majority of their time doing non-exempt work. Under the final rule, however, employees can spend nearly all of their time doing non-exempt work and still be exempt from the right to overtime pay if they simultaneously supervise two other employees. There are 1.18 million salaried managers of food serving and lodging establishments who earn more than $455 a week. If only 70% are exempt under the final rule, which we offer as a conservative estimate, an additional 472,000 salaried food service and lodging managers will lose overtime rights. Under the final rule, we estimate that at least 70%[11] of employees in most supervisory occupations will meet the weakened duties requirements. Among sales supervisors alone, we estimate that more than 744,000 salaried employees earning more than $455 a week will lose their right to overtime pay. An additional 162,000 salaried supervisors in production operations and 58,000 salaried supervisors of mechanics and repairers will become exempt and lose the right to overtime pay. All told, we estimate that more than 1.4 million low-level, salaried management and supervisory employees who are non-exempt under current law will become exempt as a result of the changes in the final rule and will lose their right to overtime pay.

Furthermore, 548,000 hourly supervisors and managers in these various occupations who earn more than $455 a week also will be affected by the changed duties tests. By paying them on a salary basis rather than hourly, their employers will be able to reclassify them and exempt them from the right to overtime.

The number of exempt professional employees will increase because of the work experience provision in the final rule.

The final rule, like the proposed rule, makes it possible for non-degreed employees to be treated as learned professionals and exempted from the right to overtime pay. Under the current regulation, to be exempt as a learned professional, an employee generally must have completed a prolonged course of intellectual instruction, culminating in a professional degree.[12] New language in the final rule allows

employers to substitute knowledge gained from work experience for knowledge gained through a prolonged course of intellectual instruction. New section 541.301(d) makes "the exemption available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction." Thus, for example, employees who attended engineering school for one year and then learned more about engineering through four or five years of on-the-job training, training in the armed forces, and other work experience, could be exempted from the right to overtime pay even though they never attained a degree in engineering and do not have the status or receive pay comparable to a degreed engineer.

Essentially this same provision appeared in the proposed rule (section 541.301(d)), accompanied by a preliminary regulatory impact analysis that estimated it would allow employers to reclassify 354,000 non-exempt, non-degreed hourly workers as "professional employees" and deny them the overtime pay they receive today.[13] This major loss of overtime protection was a sharp departure from current law, which DOL itself describes as permitting only rare exceptions: "Although some flexibility to focus on the worker's knowledge exists in the current regulation, it is very limited and rarely used" (68 Fed. Reg. at 15567).

Moreover, the DOL contractor that prepared the analysis estimated that for every employee who would lose overtime pay, four or five more would lose overtime rights, meaning that a total of more than 1.5 million non-degreed professional employees would lose their right to overtime pay under the new revisions to the FLSA. In a separate report, the Congressional Research Service estimated that "1.0 million full-time learned professionals with six or more years of work experience had at least a high school degree but had not earned a bachelor's or advanced degree."[14] Using the rule of thumb employed by the Department of Labor in its own contracting processes,[15] all of those employees are likely to have "substantially the same knowledge" as a degreed employee fresh out of school, and all of them would be subject to exemption under the final rule.

The Department affirms that it has not changed the intent of the proposed rule[16] and, in fact, both versions allow the substitution of work experience for a prolonged course of intellectual instruction and the attainment of a degree. The Department's preliminary regulatory impact analysis affirmed that work experience may be substituted "for all or part of the educational requirement," and it estimated that 44% of non-degreed professionals would lose their overtime pay. Nevertheless, and without any explanation, the Department now estimates that the final rule has no measurable effect on the overtime rights of non-degreed professional employees. Clearly, this assertion is wrong. The final rule will have an even greater effect because it applies to a much larger employee population than the version in the proposed rule—professional employees earning between $23,660 and $100,000, as opposed to employees earning between $22,100 and $65,000.

To be conservative, we adopt a mid-range estimate that 900,000 non-degreed learned professional employees will lose the right to overtime pay under the final rule.

Chefs and sous chefs will be exempt under two new provisions of the final rule.
The final rule creates two new exemptions for chefs who are not exempt as executive chefs: a creative professional exemption and a learned professional exemption. Together, they have the potential to eliminate overtime protection for a large number of employees who currently are non-exempt and entitled to overtime.

Under current law, only the chef in charge of the kitchen, who manages the operation, supervises the kitchen staff, and plans the menu is generally exempt as an executive. By contrast, the new "creative professional" exemption will apply to any chef "who has a primary duty of work requiring invention, imagination, originality or talent, such as that involved in regularly creating or designing unique dishes and menu items." "Regularly" means periodically or more than occasionally. It is probably the case that most chefs will meet this test. On the other hand, in the preamble to the regulation, DOL states its intention "that the creative professional exemption extend only to truly 'original' chefs, such as those who work at five-star or gourmet establishments." Whether this will exempt 5,000 chefs or 50,000 depends on how broadly the courts interpret DOL's "gourmet" limitation.

The effect of the new "learned professional" exemption for chefs and sous chefs is much clearer. Under current law, no chef, sous chef, or cook is exempt as a learned professional. The final rule makes chefs and sous chefs exempt if they "have attained a four-year specialized academic degree in a culinary arts program." The rule also allows an alternative means of exemption: if the employee has not attained a four-year degree but has "substantially the same knowledge level and performs substantially the same work as the degreed employees." Thus, any cook,[17] chef, or sous chef who has approximately the same skills as a graduate of a culinary arts school can be exempted even without obtaining a professional degree—even a two-year associate's degree is not required.

There are more than two million chefs, sous chefs, and cooks employed in the United States. The majority, according to the DOL's Occupational Outlook Handbook, work as "fast food," "short order," or "cafeteria and institutional" cooks and chefs. But more than 650,000 are currently non-exempt restaurant chefs who are not head chefs or executive chefs. If we assume, conservatively, that only one in five has the skills and knowledge of a graduate of a four-year culinary arts school, about 130,000 of these chefs, sous chefs, and cooks would be exempt and lose the right to overtime pay.[18]

Funeral directors and embalmers can be more easily exempted under the final rule.
The final rule provides that funeral directors and embalmers licensed by and working in a state that requires four years of pre-professional and professional study are generally exempt as "learned professionals." In two of the 11 federal judicial circuits, the courts permit the exemption of funeral directors and embalmers, but for the rest of the country, the final rule is a change from current law, under which DOL has held consistently that funeral directors and embalmers are non-exempt. Only 912 funeral directors earn less than $455 a week, so virtually all would be subject to exemption on the basis of their salary. But the effect of the rule is limited because, at most, 16 states currently require four years of pre-professional and professional study.[19] We estimate that only 2,000 licensed funeral directors or embalmers will lose their right to overtime pay, until more states establish licensing standards that conform to the requirements in the final rule.

More financial services industry employees will be exempt under the final rule.
Section 541.203(b) creates a broad new exemption for:

> ...employees in the financial services industry…if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments, or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

This raises many questions. Can an employee whose primary duty is simply collecting information about a customer's debts be exempt? What is the difference between "marketing" or "promoting" the employer's financial products, "advising the customer regarding the advantages and disadvantages of different financial products," and selling financial products? How will an employee know whether her primary duty is selling or marketing and promoting?

Proof of the confusion this new exemption will cause can be found in Table A-3 in the rule's economic analysis. Despite the rule's statement that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption," the DOL estimates that 295,175 out of 389,000 employees (76%) in "securities and financial services sales occupations" are exempt. This is the same proportion that will be exempt in insurance sales occupations and real estate sales occupations. These figures do not include supervisors in these occupations, who fall into a separate occupational classification.

It is clear, however, that the new provision will lead to the exemption of hundreds of thousands of currently non-exempt employees. The treatment of mortgage counselors and loan officers is a good example of how this provision will operate to take away overtime rights. According to the Department of Labor's Occupational Outlook Handbook, there are about 225,000 mortgage loan officers who earn more than $455 a week. Under current law, most receive overtime pay because they are line employees whose jobs do not require the consistent exercise of independent judgment and discretion. Under the final rule, however, the duties of mortgage loan officers fit the new financial services exemption perfectly. As the National Association of Mortgage Brokers testified in a House Small Business Committee hearing, "Most mortgage loan officers conduct such work and should therefore be classified under the administrative exemption from overtime pay." The Occupational Outlook Handbook describes these duties in detail:

> Once this initial contact has been made, loan officers guide clients through the process of applying for a loan. This process begins with a formal meeting or telephone call with a prospective client, during which the loan officer obtains

> basic information about the purpose of the loan and explains the different types of loans and credit terms that are available to the applicant. Loan officers answer questions about the process and sometimes assist clients in filling out the application.
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> After a client completes the application, the loan officer begins the process of analyzing and verifying the information on the application to determine the client's creditworthiness. Often, loan officers can quickly access the client's credit history by computer and obtain a credit "score." This score represents the creditworthiness of a person or business as assigned by a software program that makes the evaluation. In cases in which a credit history is not available or in which unusual financial circumstances are present, the loan officer may request additional financial information from the client or, in the case of commercial loans, copies of the company's financial statements. With this information, loan officers who specialize in evaluating a client's creditworthiness—often called loan underwriters—may conduct a financial analysis or other risk assessment.

Because new section 541.203(b) presumes that a financial services employee with such duties "meets the duties requirements for the administrative exemption," no separate inquiry is required to establish whether the employee consistently exercises independent judgment and discretion. We estimate that 160,000 mortgage loan officers will lose their right to overtime pay.

We are unable to estimate how many other employees, currently classified as non-exempt financial products sales employees, will be found exempt in the future because their primary duty (though a small part of each day's work time) will be determined to be marketing and promoting financial products, collecting and analyzing customer information, or advising customers which product to buy, rather than selling. The number is, however, likely to be substantial.

Computer programmers without highly specialized knowledge will be exempt as professionals. DOL estimates that 415,318 computer programmers earn a salary greater than $455 a week. Under current law, DOL estimates that 70% of these employees are already exempt. But 125,000 are non-exempt and entitled to overtime pay if they work more than 40 hours in a week. The final rule makes two important changes that will eliminate overtime rights for most of these employees.

To be exempt as a computer professional under current law, a computer programmer must do work that requires the consistent exercise of discretion and judgment, and the primary duty must be "the performance of work requiring theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, and software engineering." These requirements have been eliminated in the final rule, which makes the exemption applicable to less-skilled employees. Unlike the current exemption, the final rule's exemption will apply to "trainees or employees in entry-level positions learning to become proficient in such areas or to employees in these computer-related occupations

who have not attained a level of skill and expertise which allows them to work independently and generally without close supervision."[20]

Employees earning between $455 a week and $27.63 an hour (the level of pay at which the lesser standard for exemption of 29 USC 13(a)(17) applies) will be directly affected by these changes to the computer professional exemption. There are 288,696 programmers paid in that range, 30% of whom are currently non-exempt on the basis of their duties. We estimate that the final rule will eliminate the right to overtime for 87,000 computer programmers.

Highly Compensated Employees

The final rule also creates a new exemption for highly compensated employees, defined as those earning at least $100,000 a year. The Department estimates that 107,000 white-collar employees who are currently entitled to overtime pay could lose it because of this exemption. We estimate the number to be about 400,000, or roughly four times as many as DOL estimates. The Department makes several mistakes that contribute to its underestimate.

There are, according to DOL, 214,000 hourly white-collar workers who earn more than $100,000 a year, including 22,000 registered nurses and 10,000 pharmacists. DOL contends that only 47,000 are likely to lose overtime pay. DOL underestimates the effect of the new test on highly compensated employees, in part by contending that the nurses' and pharmacists' employers would already have converted their pay to a salary and exempted them if they could. DOL also erroneously calculates that an employee who would not be exempt under current law is only slightly more likely to be exempt under the new test.

To make these highly compensated employees exempt, the rule does not require employers to guarantee them $1,923 a week, the weekly equivalent of $100,000 a year. All 214,000 hourly white-collar workers could be exempted from the right to overtime pay, while still having most of their salary paid on an hourly basis. Employers choose to pay nurses, pharmacists, and others on an hourly basis in order to have certainty that staffing needs are met (salaried employees cannot have their pay docked for each hour of work they miss). Under the rule, employers will have the best of both compensation schemes. By guaranteeing a partial salary to highly paid hourly employees, employers will be able to compel attendance at work by threatening to dock the remaining pay on an hourly basis. This new arrangement will give employers full control of staffing schedules while permitting the denial of overtime premium pay as if the employees were salaried. Market forces, however, particularly with respect to nurses, will prevent employers from reclassifying all of these employees. We estimate that half of the highly compensated nurses and pharmacists will eventually lose their overtime protection.

There is little relation between the likelihood of exemption under current law and the likelihood of exemption under the new highly compensated test, and the Department's arbitrary reduction in the number of employees who will become exempt is indefensible. Any sales employees, for example, who earn $100,000 a year and whose primary duty is clearly non-exempt under current law will nevertheless be denied overtime pay under the new test if they regularly perform an administrative duty or responsibility that involves safety and health, quality control, procurement, purchasing or similar activities, or

perform an executive responsibility such as determining the type of materials, supplies, machinery, equipment, or tools to be used or merchandise to be bought. These same employees would also be denied overtime compensation if they make suggestions about discipline, promotion, or assignment of other employees. We estimate that employers will exploit this new loophole to exempt three-quarters (approximately 150,000) of these highly compensated hourly white-collar employees.

DOL contends that 300,000 salaried white-collar employees who earn at least $100,000 annually are currently non-exempt, but then DOL estimates that only 60,000 could become exempt under the final rule.[21] This estimation is plainly wrong. Every one of these 300,000 can easily be reclassified as exempt; 100% of the employees working in a managerial, administrative, supervisory, or professional occupation should meet the highly compensated duties test even if they fail the short duties test under current law. The final rule does not require that the employee's *primary* duty (which can involve a small part of their work day) be exempt, though it must involve office or non-manual work; highly compensated employees need only have a *single exempt task* that is performed "customarily and regularly," which can mean once a week or perhaps even as rarely as twice a year.[22] Even sales employees, whom the Department gives only a 15% likelihood of exemption under the highly compensated test, can easily be exempted. If any highly compensated salaried employee otherwise failed the duties test, an employer could simply add a duty to the job description that would reclassify that employee. The easiest exempt duty to assign is that of "suggesting" discipline, promotions, or assignment of other employees. As long as the employer sometimes actually follows the employee's suggestion, thereby giving the suggestion what the rule calls "particular weight," the highly compensated exemption will be established, even if the employee is a salesperson or secretary. This new test will decrease protections for more than 400,000 high-income employees.

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Endnotes

1. With a few exceptions, employees who are not paid a salary cannot be exempt. The final rule makes significant changes in the rules governing whether an employee's compensation is actually a salary, i.e., a guaranteed amount of compensation regardless of the hours worked or the quality of the work performed. The effect of these changes is to exempt more employees by making it easier to find that employees are paid on a salary basis, but we are unable to estimate with any precision how many employees will lose their right to overtime pay as a result.
2. The current salary threshold is $170 a week for professional employees.
3. The final rule eliminates the so-called "long duties" tests that formerly established the fundamental criteria for determining whether the nature of a job was primarily executive, professional, or administrative. A second set of easier-to-satisfy criteria were applied under current law as an exception to the fundamental criteria in cases where employees had high enough salaries that they would meet all of the criteria of the "long duties" test. These streamlined criteria—called the "Special Proviso for High Salaried Employees," or the "short duties" test—have also been eliminated. DOL has replaced them with an even less protective set of criteria, called the "standard duties test." The new standard duties test applies to a broad range of employees earning between $23,660 and $100,000 a year. As set in 1975, the "long duties" tests applied to employees earning up to the equivalent of about $45,400 in today's dollars. Thus, to determine the full impact of the new rule would require measuring the effect of eliminating the "long duties" test on employees earning less than $45,400 today. We have left that task to others.
4. Kochan's estimate is based on a nationally representative sample of establishments with 50 or more employees, which found that approximately 40% of workplaces use work teams on a routine basis. BLS estimated in 1999 that approximately 80% of the nation's 120 million workers currently are eligible for overtime. Given incremental labor force growth since 1999, Kochan uses 100 million non-exempt workers as the round number to begin this calculation.

   BLS data indicate approximately 58% or 58 million workers are employed in workplaces with 50 or more employees. If 40% of these larger establishments routinely use work teams, then approximately 23.2 million (58 x 0.4) non-exempt employees currently work in teams in these establishments. Work teams tend to range in size from 5 to 15 workers. Taking the midpoint of this range (10 employees per team), implies approximately 2.3 million team leaders in the labor force would now be at risk of being reclassified as exempt employees and therefore lose overtime coverage as a result of this new rule.
5. American Bar Association (Monica Gallagher, Editor-in-Chief), The Fair Labor Standards Act: 2002 Cumulative Supplement, page 154.
6. Regulatory Impact Analysis, Table A-2, 69 Fed. Reg. at 22249.
7. New 541.600(e).
8. Under current law, section 541.3 defines an "employee employed in a bona fide professional capacity" to be one whose work requires the consistent exercise of discretion and judgment in its performance." Under the "short duties" test, section 541.3(e) requires that the professional employee's primary duty "includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor." This requirement applies to all professional employees, including learned professionals, artistic professionals, and teachers. Under the final rule, the requirement to perform "work requiring the consistent exercise of discretion and judgment" appears only in the exemption of "learned professionals" in new section 541.301(b), where it helps define "work requiring advanced knowledge," a concept that does not appear in the exemption of teachers in section 541.303.
9. In retail industries, the limit on non-exempt work is 40%.
10. Former Wage and Hour Division officials report that the strict 20% tolerance test has not been applied except as a guideline for many years, but the requirement that no substantial part of an exempt executive's work should be production work or routine, non-exempt work continues to be enforced.
11. The chief factor limiting the executive exemption for supervisors and managers will be the requirement that the employee supervise at least two full-time employees. But nearly all employees classified as supervisors do supervise two or more other full-time employees: a conservative, low-end estimate would be 80%, according to Paul Osterman, Deputy Dean of the MIT Sloan School of Management.
12. The current regulation at 541.301(d) makes the exemption available to the "occasional lawyer who has not gone to law school, or the occasional chemist who does not have a degree in chemistry." But it makes clear that these few must be in every sense the equal of their fellow professionals: their "status is equal"; their "attainments are the same"; and their "word is the same." None of this appears in the final rule. The case of *Leslie v. Ingalls Shipbuilding, Inc.,* 899 F. Supp. 1578 (S. D. Miss. 1995) illustrates the rare use of this exception. An engineer with 30 years of engineering work experience, who had completed three years of engineering school and who did the same work as degreed engineers, was found to be an exempt professional.

13. Solicitor of Labor Howard Radzely, letter to Sen. Edward M. Kennedy, August 23, 2003, page 7.
14. Gerald Mayer. *The"White-Collar" Exemptions to Overtime Pay Under Current and Proposed Regulations: An Economic Analysis* (CRS Report for Congress, April 8, 2004), p.15.
15. Preliminary Regulatory Impact Analysis, p. 39.
16. 69 Fed. Reg. at 22149.
17. According to the DOL Occupational Outlook Handbook, the terms "chef" and "cook" are interchangeable, a position confirmed by the American Heritage Dictionary, which defines chef as: "A cook, esp. the chief cook of a large kitchen staff."
18. Based on the methodology employed by the Department of Labor in its preliminary regulatory impact analysis, which equated six years of work experience with a bachelor's degree, about 200,000 non-degreed cooks and chefs would be exempt.
19. The preamble to the final rule cites the comments of the National Funeral Directors Association on the proposed rule for this figure.
20. 29 CFR 541.303(c). The Department argues that the current regulations are more protective of overtime rights than the statute requires and the changes the final rule makes merely conform the regulations to the statutory language of the computer professional exemption. Nevertheless, the current regulations have the force of law, and the final rule weakens the overtime rights of computer programmers.
21. DOL applies very precise percentages of the likelihood that employees in particular occupations will be exempt, based on four levels created for the duties tests under current law. This exercise is without any meaning or relevance to the highly compensated test. With a modicum of effort, employers can assure that every salaried employee earning $100,000 a year or more will be exempt.
22. Section 541.701 defines "customarily and regularly" to mean "a frequency that must be greater than occasional but which, of course, may be less than constant." A task performed once a workweek is performed "customarily and regularly" but a one-time task is not. A task performed regularly, twice a year, might meet the definition.