Fact Sheet 2003–8

BUSH ADMINISTRATION PROPOSES DISAPPEARING ACT FOR OVERTIME PAY

Background

Under the Fair Labor Standards Act of 1938 (FLSA), a covered employer must pay at least one-and-a-half times the regular hourly rate for an employee's hours beyond 40 in a week. The requirement of premium pay discourages employers from imposing endless hours of work, envisions a 40-hour week as a norm, provides a floor for collective bargaining over pay and overtime, and compensates workers for their loss of family and leisure time.

Exemptions from the FLSA overtime protections include workers performing in an "executive, administrative, or professional capacity" and as outside salesmen, teachers and academic administrators in elementary and secondary schools, and computer employees.

The FLSA delegates to the Secretary of Labor the authority to define the exemptions. On March 31, 2003, the Department of Labor (DOL) issued a proposed revision of its regulations defining the exemptions and requested written comments by June 30, 2003. (*Federal Register*, Vol. 68, No. 61 [Monday, March 31, 2003], http://www.dol.gov/esa/whd/.)

Under the current regulations, an exemption generally applies when:

1) a worker receives a salary rather than hourly wages (the "salary basis" test),
2) his or her salary is above a specified minimum (the "salary level" test), and
3) his or her duties meet the criteria for executive, administrative or professional work that the regulations set (the "duties" tests).

DOL last set the "salary level" test in 1975. No executive or administrative employee earning less than $155 a week could be exempt, nor could any professional employee earning less than $170 a week. Above those levels, a long test of duties applied, unless an employee earned $250 a week or more; then a short test determined whether the employee is exempt. With a federal minimum wage today of $5.15 an hour, or $206 for a 40-hour week, whether employees are exempt as executive, administrative, or professional is usually judged by the short test of duties.

The proposed regulations would modify the salary level and duties tests in three ways:

- The proposed regulations would increase the salary level below which workers are automatically non-exempt – and thus by law required to receive overtime pay for overtime work – to $425 a week, or $22,100 a year.
- The proposed regulations would replace the long and short duties criteria with a single set of duties tests that would apply to workers earning between $22,100 a year and $65,000 a year. The proposed duties tests make a worker's classification as an executive, administrative, or professional employee – and exempt from the requirements of being paid overtime pay for overtime work – far more likely.
- And for the first time, the proposed regulations would classify any worker receiving a salary of $1,250 a week – $65,000 a year – or more who meets a single part of the applicable duties tests as exempt and thus no longer required by law to receive overtime pay for overtime work.

The Proposed Regulations Threaten Overtime Pay in Professional and Technical Fields, Where the Jobs Are and Will Be

A DPE analysis of data from the U.S. Bureau of Labor Statistics (BLS) shows that professional and technical employment will grow faster and add more jobs than any other major occupational group. By 2010, it will include more than 20 percent of the work force. (DPE Fact Sheet 2003-2, "Vital Work Force Statistics.") The proposed regulations would hit professional and technical workers especially hard.

Start with the salary level test. Above $65,000 a year, a worker who met only one of the duty tests would be automatically exempt. Unpublished BLS data show the median earnings in 2002 for aerospace, chemical, mining, nuclear and petroleum engineers are above that level. In other words, *more than half* of these workers would be at risk of no overtime pay protections.

Between $22,100 and $65,000 a year, the duties tests would apply. The proposed regulations could dramatically expand the exemptions for both learned and creative professionals.

Under the current regulations, a learned professional is an employee "[w]hose primary duty consists of the performance of ... [w]ork requiring knowledge of an advanced type in a field of science or learning *customarily acquired by a prolonged course of specialized intellectual instruction and study*, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes" [emphasis added].

For the first time, DOL raises in the proposed regulations the possibility that a worker with a high school diploma may become a learned professional "through a combination of work experience, training in the armed forces, attending a technical school, attending a community college or other intellectual instruction." This possibility could easily double the number of workers in or entering the work force each year who would be classified as "learned professionals."

In 2001, according to the National Center for Education Statistics, roughly 1.8 million people received bachelor's, master's, doctoral or first professional degrees. Under the proposed regulations, even holding aside classification on the basis of work experience, another roughly 1.4 million people *each year* might be classed as "learned professionals": more than a hundred thousand veterans leaving the military, some 870,000 people receiving sub-baccalaureate degrees, and another 390,000 graduates from non-degree granting institutions eligible for financial aid from the U.S Department of Education.

Among the examples of "learned professions" in the proposed regulations are registered or certified medical technologists, registered nurses, dental hygienists, physician assistants, accountants, chefs and sous chefs. The proposed regulations explicitly recognize that the "learned profession" exemption *will expand*: "The areas in which professional exemptions may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When a specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession."

The proposed regulations also would expand the universe of media workers not required by law to receive overtime pay. They would render exempt journalists; writers "for newspapers, news magazines, television news programs, the Internet and other media"; and radio and television announcers. The proposed regulations state: "Exempt work includes conducting interviews, reporting or analyzing public events, and acting as a narrator, announcer or commentator."

In short, under the proposed regulations far more workers would find themselves honored as professionals – with longer hours and a pay cut.

The Proposed Regulations Would Eliminate Overtime Pay Protections for Vast Numbers of Workers Who Would Be Reclassified as Executive or Administrative

The proposed job duties tests for classifying workers as executive or administrative, like those for professionals, would vastly increase the number of exempt workers.

Under the proposed regulations, an executive would be anyone earning at least $22,100 who: 1) has a "primary duty" of managing an enterprise or one of its parts, 2) directs the work of at least two other employees, and 3) whose suggestions to change the status of other employees are "given particular weight."

The proposed definition of "primary duty" works only to assist employers in defining workers as exempt executives. Thus, if a worker spends *more* than 50 percent of his or her time on exempt work, that work is the "primary duty." But the concept "does *not* require that employees spend over fifty percent of their time performing exempt work" [emphasis added]. The example makes clear the intent of the proposed regulations:

> "Thus, for example, an assistant manager in a retail establishment who performs exempt work such as supervising and directing the work of other employees, ordering merchandise, handling customer complaints and authorizing payment of bills may have management as the primary duty, even if the assistant manager spends more than fifty percent of the time performing non-exempt work such as running the cash register."

Nor do the proposed regulations require that a worker exercise discretion or independent judgment to be classified as an executive: "... that an employer has well-defined operating policies or procedures should not by itself defeat an employee's exempt status."

In other words, assistant managers for fast-food restaurants, or grocery store produce or meat department lead persons, could find themselves "executives" and thus required to work longer hours for no additional pay.

The pattern of lowering the bar for declaring workers exempt – and thus depriving them of the overtime pay protections – continues with the proposed regulations for "administrative" work.

A worker would be classified as "administrative" if she or he earns $22,100 a year and meets two criteria: 1) A "primary duty" for the worker is to perform "office or non-manual work related to the management or general business operations of the employer or the employer's customers," and 2) the worker holds a "position of responsibility."

We have seen already how a "primary duty" is both broad and flexible – for an employer's purposes. So, too, a "position of responsibility": the proposed regulations state explicitly that the phrase "refers to the importance *to the employer*" [emphasis added].

DOL shows how all-inclusive the "administrative" exemption could be. Included is "work in areas 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, public relations, government relations and similar activities."

Examples include a buyer of equipment in an industrial plant, an assistant buyer for a retail or service establishment, an insurance claims adjuster, and a leader of team to complete a major project, "even if the employee does not have direct supervisory responsibility over the other employees on the team." Also included are "[o]ther employees that perform work of substantial importance, *even if their decisions or recommendations are reviewed for possible modification or rejection at a higher level*" [emphasis added], including "an executive or administrative assistant to a proprietor or chief executive of a business if such employee, without specific instructions or prescribed authority, has been delegated authority to arrange meetings, handle callers and answer correspondence."

Omitted from the proposed regulations is the current requirement that an administrative employee regularly exercise discretion and independent judgment.

The Proposed Regulations Are a Shell Game That Would Deprive Millions of Lower-Wage Workers of Income from Overtime Work

DOL has touted the increase in the minimum salary level for exempt employees to $425 a week. Its news release called it "the largest increase" since FLSA came into law and declared it "will automatically guarantee overtime to 1.3 million additional low-wage workers."

These declarations were fraudulent advertising. First, almost all workers earning as little as $425 a week are already non-exempt and receive overtime pay for overtime work. Second, as the AFL-CIO points out, adjusting for inflation since the last change would require an increase in the minimum to over $500 a week, or $27,000 a year. Third, once millions of workers were reclassified as professionals, executives, or administrators, *employers would shift all overtime work to the people who could be forced to do it for nothing.*

At the expense of the lowest wage earners on up, DOL is intent on giving employers a bonanza.

Conclusion

The Department for Professional Employees, AFL-CIO and its affiliated unions believe the proposed regulations will harm the four million professional, technical and administrative support workers they represent as well as millions of other working Americans.

More than two million manufacturing jobs have disappeared since March 2001. A dismal economy and Bush Administration tax cuts have created deficits at the federal and state levels, which compel states to lay off workers and dismantle programs from which working families benefit. The Federal Reserve Bank worries publicly about deflation. Forcing millions of workers to work longer hours for less pay, while depriving others of the overtime pay on which their families depend, would be wrong: wrong for military veterans, firefighters, and police; wrong for lower-wage workers; wrong for unemployed workers who might do the work that, under the proposed regulations, employers would demand from their current employees; wrong for millions of hard-working Americans already forced to spend too little time with their families; and wrong for the U.S. economy.

The Department for Professional Employees, AFL-CIO (DPE) comprises 25 AFL-CIO unions representing four million people working in professional, technical and other highly skilled white collar occupations. DPE-affiliated unions represent: journalists and writers, broadcast technicians and communications specialists; librarians, teachers, college professors, and school administrators; engineers, scientists and IT workers; nurses, doctors and other health care professionals; cinematographers, performing and visual artists; professional athletes, social workers, and many others. DPE was chartered in 1977 in recognition of the fast-growing professional and technical occupations.

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