Economic Policy Institute

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October 29, 2003

Honorable Randy "Duke" Cunningham
2350 RHOB
United States House of Representatives
Washington, DC 20515

Dear Rep. Cunningham:

Thank you for your letter about the Department of Labor's proposed rule relating to overtime pay for 'white collar' employees. I am happy to respond to your questions and hope that you can get a response from the Department of Labor regarding their miscalculation of the proposal's effect on low-income employees. Congress should make its decisions about the proposed rule based on facts.

1. **Why does EPI now challenge DOL's estimate that 1.3 million employees would benefit from the proposed rule?** Like you and most Members of Congress, EPI initially accepted uncritically DOL's estimate that 1.3 million salaried employees earning more than $8,060 a year but less than $22,100 would be guaranteed overtime pay by raising the exemption threshold to $425 a week. Former Wage Hour division investigators and advocates for low-wage workers pointed out to us the implausibility that so many workers are legitimately exempt under current law, and congressional staff argued that DOL had never done the research required to support its claims. At their urging, we took a closer look at the matter. The critics were right.

   In fact, DOL committed significant errors in constructing its estimate. In the first place, there are not nearly so many low-wage, salaried, **white collar** employees working overtime without being paid for it. As you know, raising the threshold for exemption only changes the rights of *white collar* employees, those who are subject to the exemptions for workers employed as bona fide executives, professionals and administrators. Blue collar workers and laborers are not exempt under current law and cannot, therefore, benefit from the threshold change. But according to the Bureau of Labor Statistics data DOL used to construct its estimate, there are only 737,000 salaried white collar employees who work overtime and make less than $22,100. DOL – inadvertently, perhaps – included approximately 600,000 employees who are laborers, machine operators, and other manual, non-office workers who do not fall within the current exemption.

Including blue collar workers is only half the problem. The Department has also overestimated the effect of the proposed rule on the remaining 'white collar' employees. The fact that an employee is paid a salary is not dispositive of his or her exempt status. Low-level managers, clericals, bookkeepers, and others who do not exercise substantial decision-making power and whose jobs do not require the exercise of independent judgment and discretion, are not exempt under current law. As the Department itself argues on page 106 of its Preliminary Regulatory Impact Analysis (PRIA), the likelihood that an employee is an exempt manager or professional increases as pay increases. Conversely, the likelihood of exemption declines with declining salary. (The Department provides a graphic representation of this relationship between low pay and the likelihood of exemption on page 107 of the PRIA, but the model is applied only to salaries higher than $509 per week, $26, 468 a year.) Clearly, therefore, substantially less than 100% of the low-wage salaried workers earning less than $22,100 are actually exempt. The Department has not applied its "Linear Model of Exemption" to determine how much smaller the population who would benefit from the threshold increase actually is. As the advocates for low-wage workers have argued, however, the odds are near zero that any employee making less than $15,000 a year is a bona fide executive or administrator, and the odds are probably not much greater for employees earning between $15,000 and $22,100. Assuming generously that half of these employees are exempt under current law, the total number who would benefit from the threshold increase in the Department's proposal is less than 370,000.

2. **Why does EPI continue to claim that first responders will lose overtime protection when the Fraternal Order of Police has no doubts that police officers will be protected?** I am in no position to comment on any assurances F.O.P. President Chuck Canterbury might have received from DOL about a final rule. I do know that other police organizations and unions, including the National Association of Police Organizations, the International Union of Police Associations, and the International Brotherhood of Police Officers, oppose the proposed rule.

   DOL offers no coherent explanation why its proposed rule would not jeopardize the overtime rights of police officers, firefighters, nurses and other first responders. DOL's broadening of the executive, administrative, and professional exemptions would affect these employees in much the same way as millions of other employees, and the proposed rule contains no special protections for first responders that would protect them from these changes. Experts in overtime law, including lawyers who represent police officers and firefighters, emergency medical technicians, and nurses, agree that the rule changes or eliminates several key provisions of the current regulations that have prevented employers from denying overtime pay to these employees. By changing those provisions, the proposed rule would change the outcome of the cases.

   For example, the professional exemption has been changed in a way that clearly affects nurses. By permitting employers to substitute work experience for all or part of the educational requirements, the proposal will allow employers to deny overtime

pay to nurses who have less than a four-year college degree in nursing. Thus, nurses with a two-year associates degree, who currently must be paid for their overtime, could be denied overtime pay as exempt "learned professionals" under the proposed rule if they are paid a salary of $22,100 or more. It would be interesting to know how many nurses are among the 644,000 hourly employees with two-year degrees that the Department has identified in its Preliminary Regulatory Impact Analysis as being at risk of losing overtime pay they are currently receiving. (The Department did not disclose the occupations of the targeted group.) But whether they were included in the PRIA or not, it is clear that nurses are at risk.

Several cases have rejected employers' attempts to deny overtime pay to police and firefighters who train recruits at police and fire academies. Police and fire departments have tried to use both the administrative exemption and the professional exemption to deny overtime protection to firefighters and police officers, but have failed because the courts found that the employees conducting the training did not exercise sufficient independent judgment and discretion in their work. As you know, the proposed rule eliminates the requirement for the exercise of independent judgment and discretion for professional employees and administrative employees alike. Other important cases involving police officers have turned on the provision of current law that distinguishes between exempt "staff" employees and nonexempt "line" or "production" employees. The DOL proposal eliminates the provision of the current regulations that established this distinction. DOL says it has retained the concept in the proposal, but it admits that it is "deemphasized," that is to say, weakened.

The new, extraordinarily loose exemption for employees who earn at least $65,000 a year is another method by which employers will deny overtime pay to nurses, police and firefighters. Unlike current law exemptions, it does not require that employees be paid on a salary basis – employees must merely have "total compensation" (not defined) that equals $65,000 for the year. It does not require any examination of the employee's primary duty, so a police officer or firefighter who performs **any** office or non-manual work is subject to the exemption, even if he or she is not a bona fide administrator, executive or professional under current law. The Department deliberately adopted a test that does not require fully meeting the duties requirements under current law. The necessary result is that some employees who do not meet those requirements and are, therefore, nonexempt under current law will be exempt under the proposal and will lose their right to overtime pay.

3. **How can one trust EPI's conclusions, given factual errors such as the claim that cooks without a college degree in culinary arts would lose overtime protection?** The factual error you cite is your own, not EPI's. The proposed rule does *not* require a college degree for *any* of the exempt professions. That is the whole point of the changes being made in the proposed rule. The best explanation of the changes comes from the Department's own Preliminary Regulatory Impact Analysis, page 39:

> "First, the current rule requires that employees who are classified as learned professionals must have "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study" to qualify for exemption on the basis of the duties test. **The proposed rule allows work experience to be substituted for all or part of the educational requirement for exemption of learned professionals**." (Emphasis added)

As we pointed out in our original report, the Department chose to use six years of job experience as the equivalent of a college degree for purposes of estimating the effect of the proposed rule's changes in the professional exemption. In other words, an employee who had never gone to college could be treated as a professional (and lose the right to overtime pay) if he or she had six years of work experience. This statement is found at 68 FR 15577:

> "The Department also assumed that six years or more of work experience would be considered equivalent to a bachelor's degree for the learned professional exemption."

To my knowledge, no court has come close to holding that employees with little or no college education may be exempted as learned professionals under current law.

4. **What is the basis for your erroneous assertion that the proposal's revision of the professional exemption will lead to similar results for a host of skilled occupations in the health professions?** The proposed rule's changes in the professional exemption, which permit the substitution of work experience for all or part of the educational requirements, apply to every learned profession. Nothing in the proposal limits the changes to particular professions or establishes special protections for the health professions. Acting Solicitor of Labor Howard Radzely, in a letter to Sen. Jack Reed, stated that a number of health professionals, including therapists, pharmacists, and psychologists, are among those who would be affected by the substitution of work experience for educational requirements.

5. **How can you assert that bookkeepers will be exempt when you state that there is insufficient data to make an estimate for bookkeepers?** The two statements are not inconsistent. One can know there will be an effect without knowing the ultimate size of the effect. The proposed rule will exempt bookkeepers whose duties require a "high level of skill or training." EPI did not have sufficient information in June about the different levels of knowledge and training required for the 1.5 million full-time bookkeeping jobs nationwide to estimate how many the proposed rule would exempt. We therefore provided no estimate of the number of bookkeepers who could lose their overtime rights. Based on additional information we received from the Department of Labor subsequently, it appears that about 15% of bookkeeping jobs require enough knowledge and training to qualify as exempt administrative positions under the proposed rule.

6. **EPI apparently cherry-picked certain job categories. Given the limited sample, what assumptions did your experts apply to come up with the 8 million estimate?** This question reflects a misunderstanding of EPI's methodology. EPI did not project the total figure of 8 million by extrapolating from a limited sample. On the contrary, EPI only estimated the number of affected employees in a limited number of job categories (78 out of 257 identified by DOL as 'white collar') The total number of affected employees in all 257 job categories will obviously be much higher. EPI based its estimates of the percentage increases on the best judgment of a group of experts in FLSA law and human resources, DOL data on job tenure, and skill requirements as set forth by the National Compensation Survey.

I applaud your desire that the fate of this proposal be decided upon facts. I sincerely hope, therefore, that you will re-examine the Department's erroneous claims and that you will make the results of that re-examination known to the conferees and the public.

Sincerely,

Ross Eisenbrey
Vice President and Policy Director
Economic Policy Institute

Cc:
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Honorable Judd Gregg (R-NH)
Honorable Larry E. Craig (R-ID)
Honorable Kay Bailey Hutchinson (R-TX)
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Honorable Jesse Jackson, Jr. (D-2nd IL)
Honorable Lucille Roybal-Allard (D-33rd CA)
Honorable Victoria Lipnic, Asst. Secretary, DOL