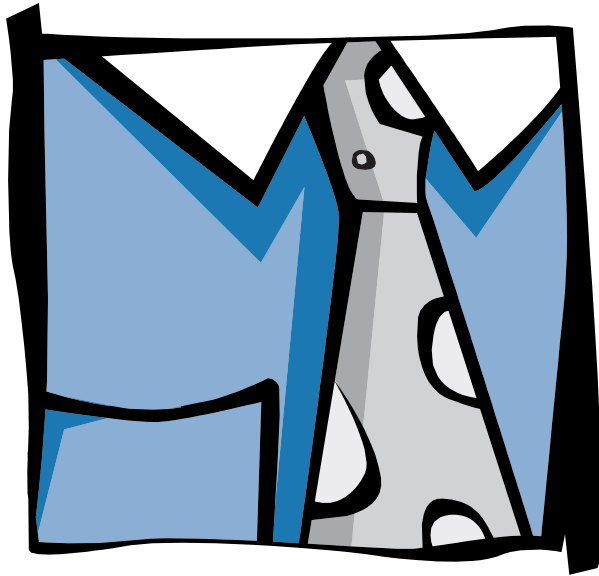


The Facts About

**PROPOSED CHANGES TO THE**

**FLSA**

**WHITE COLLAR  
REGULATIONS**



**Why the 50-Year Old Rules Must Be Revised**  
**Why the Reform Process Is Working**

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**HR Policy Association** is a public policy advocacy organization representing senior human resource executives of more than 200 of the largest corporations doing business in the United States. The HR Policy Association's purpose is to ensure that U.S. employment policy supports the competitive goals of its member companies and their employees. The HR Policy Association member companies employ more than 19 million employees worldwide.

## **Preface**

On March 31, 2003, Secretary of Labor Elaine Chao proposed a series of changes to the white collar regulations of the Fair Labor Standards Act. The regulations set forth a series of rules written in the 1940s and not changed since 1954 governing which employees are exempt from the Act's overtime requirements.

Unfortunately, the Secretary's proposal has been subjected to a sophisticated disinformation campaign conducted by the AFL-CIO and the Economic Policy Institute. The workplace has made tremendous technological strides during the last half century, yet the white collar rules still think that Dwight Eisenhower is President, computers are powered by vacuum tubes, and ideas are communicated using typewriters. The Secretary's proposal updates Vietnam War era salary levels and recognizes new industries and new classifications of employees that have emerged since then.

Under the current regulations, someone making less than \$10,000 working behind a counter at a restaurant can be called a manager and denied overtime. The Secretary's proposal is the first one since 1954 which fulfills the Department of Labor's obligation to keep the Fair Labor Standards Act's regulations in pace with the times.

This pamphlet attempts to explain the confusing world of wage hour regulations and describes how Secretary Chao's proposal will achieve much needed reforms.

## The Fair Labor Standards Act and Its Overtime Requirements

In 1938, President Roosevelt signed one of our first employment laws—the Fair Labor Standards Act.

The Fair Labor Standards Act requires that employees be paid time-and-a-half for hours worked in excess of forty in a workweek.

Certain workers are exempt from this requirement, because they fall within the so-called white collar exemptions. There are three categories of employees covered by the white collar exemptions:

- executive
- administrative
- professional



### FAIR LABOR STANDARDS ACT

JULY 6 (calendar day, July 8), 1937.--Ordered to be printed

by the Committee on Education and Labor  
the following

### REPORT

(To accompany S. 2475)

The Committee on Education and Labor, after holding hearings and after the report of the subcommittee introduced in substantially identical form, has carefully considered all the testimony and suggestions presented, and hereby reports to the Senate, with the recommendation of a substitute, with the recon-

### I

On July 4, 1937, the President sent the following message to the United States:

"I have urged for us to take further action to extend the benefits of such further action initiated by the legislative branch of the Government administered by the Executive, and sustained by the people, within the framework and purpose of our Constitution and the approval of our electorate.

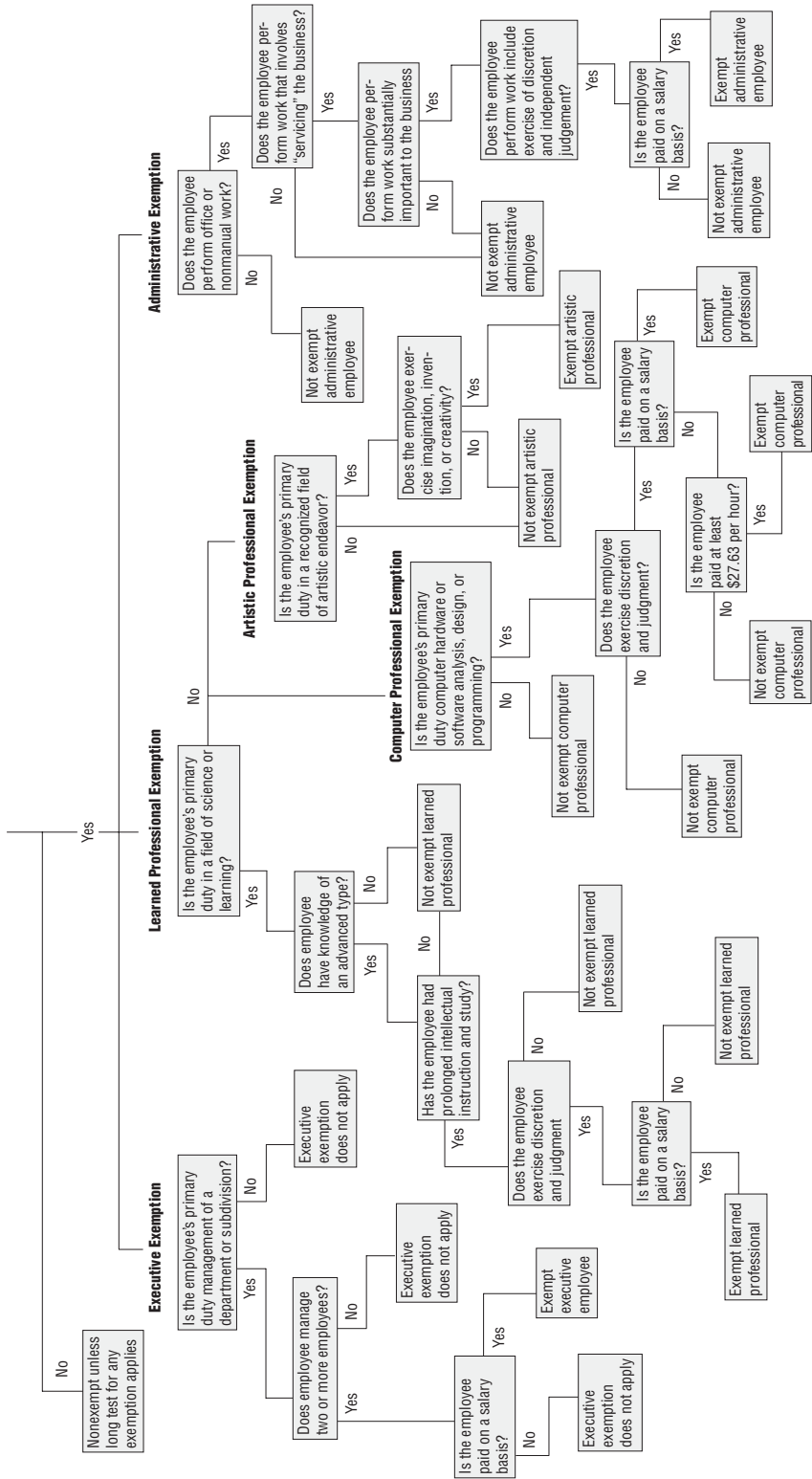
"The overwhelming majority of our population earns its daily bread in industry. One-third of our population, the vast majority of which is in agriculture or industry, is ill-nourished,

"The overwhelming majority of this Nation has little patience with the high prices which vociferates today that prosperity has returned, that the cost of living is high, and that Government should take action. The matter, of course, is that the exponents of the theory of the Government for deep-seated national ills want in most cases to see the problem from the point of view of their own interests. Well-intentioned as they may be, they do not see the problem from the point of view of the people. They are not unanimous because they have not the power to do so, and, finally, they have no power to do so within their own ranks.

# Exemption Decision Chart

## “Short” Test Under Existing Exemptions

Does the Employee Receive a Weekly Salary of at Least \$250?



## Figuring Out Who Is Exempt From Overtime

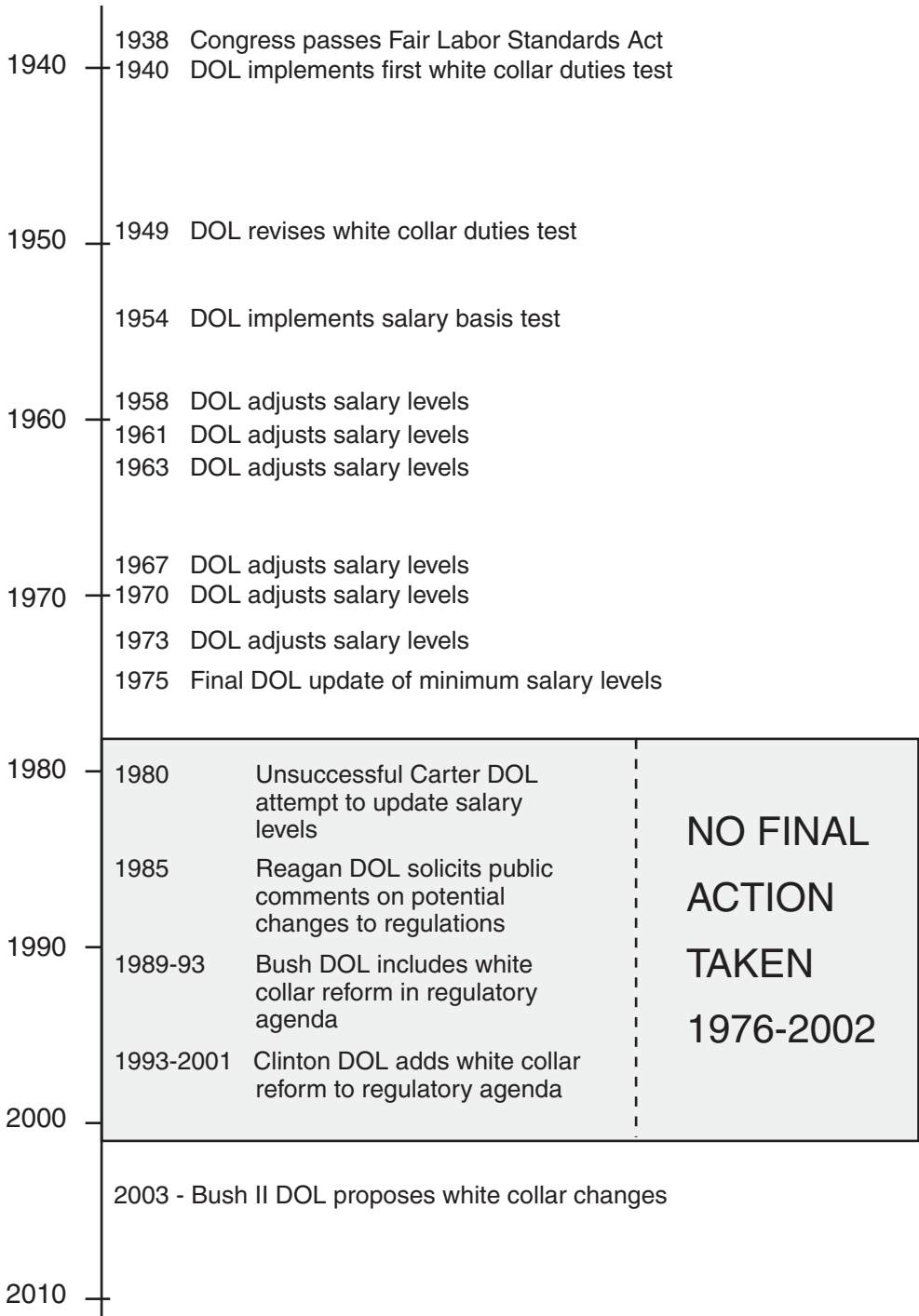
To figure out whether an employee is exempt from overtime under the current regulations, the following analysis must be conducted.

1. Is the employee paid at least **\$155 per week (long test)** or **\$250 per week (short test)**? If yes, then:
2. Is the employee paid a fixed, predetermined salary that is not reduced by fluctuations in the employee's quality and quantity of work? (This is the "**salary basis**" test.) If yes, then:
3. Does the employee have the duties of:
  - a) an **executive** employee—that is, an employee who manages at least two other people and a department or subdivision?  
*or*
  - b) an **administrative** employee—that is, an employee who performs or manages a business function, but not necessarily other people, such as safety directors or marketing specialists? *or*
  - c) a **professional** employee—that is, someone in an occupation customarily requiring a prolonged course of intellectual instruction (for example, an undergraduate or graduate degree) such as a doctor, lawyer, chemist, or engineer?

If the employee fits within one or more of the executive, administrative or professional exemptions, then the employee is exempt from overtime.

Often, there are no clear answers to these questions. If the employer believes the employee meets these criteria, it may pay the employee a set salary instead of paying an hourly wage with overtime. The employer, however, can always be second-guessed by the Department of Labor or the courts. Clarity of the rules is only as certain as the next court decision.

### Timeline 1938 - Present



## **Keeping the Regulations Up to Date**

### **Labor Secretary Required to Keep Pace With Changes in the Workplace**

The Fair Labor Standards Act requires the exemptions be “defined and delimited from time to time by regulations” of the Department of Labor.

The Department defined the exemptions through regulation in 1949 and 1954 but has not updated them since then.

The current proposed changes are the first serious attempt by a Department of Labor since 1954 to update the exemptions. If this attempt fails, the 1954 rules will be locked in place for another generation.



**1954 Chevrolet**

## Words and Phrases Used in Current White Collar Rules

Strawboss

Key punch operator

Foreman-fixer (hosiery)

Under bookkeeper

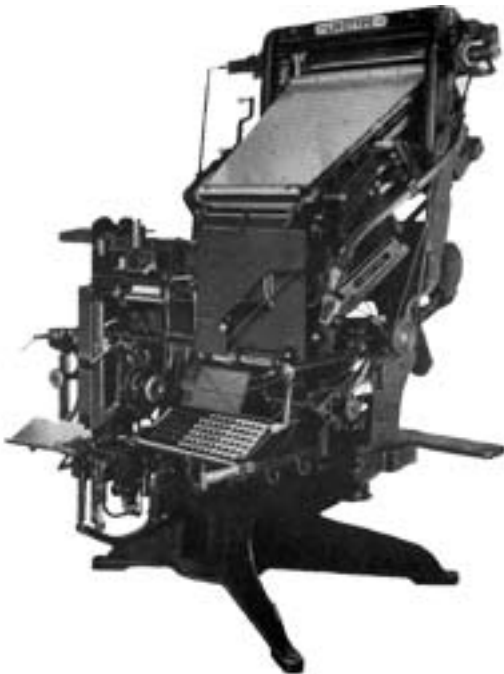
Legman

Gang leader

Contact man

Ratesetter

Linotype operator



The Linotype machine was introduced in 1886. For generations, it was used by newspapers and general printers to set a solid “line of type” in order to create a metal slug used in printing.

## Can You Understand This?

### Sample Language in the Current White Collar Rules

“Watching machines” as an example of work closely and directly related to duties of an exempt executive.

f) Watching machines is another duty which may be exempt when performed by a supervisor under proper circumstances. Obviously the mere watching of machines in operation cannot be considered exempt work where, as in certain industries in which the machinery is largely automatic, it is an ordinary production function. Thus, an employee who watches machines for the purpose of seeing that they operate properly or for the purpose of making repairs or adjustments is performing nonexempt work. On the other hand, a supervisor who watches the operation of the machinery in his department in the sense that he “keeps an eye out for trouble” is performing work which is directly and closely related to his managerial responsibilities. Making an occasional adjustment in the machinery under such circumstances is also exempt work.

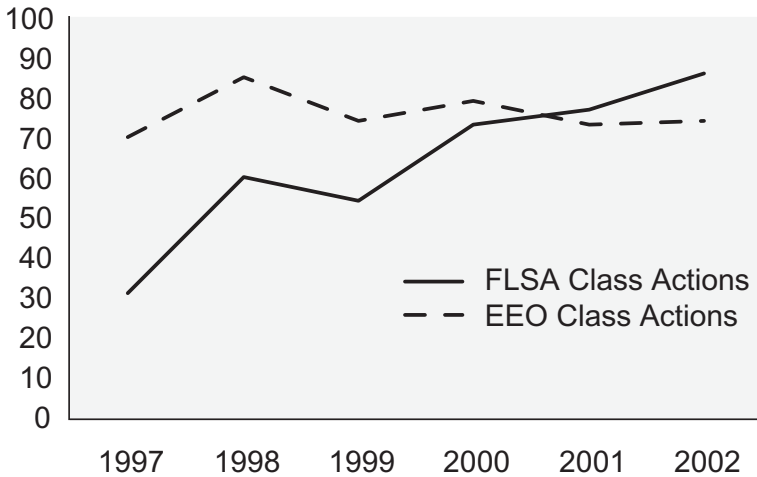
29 C.F.R. § 541.108(f)

Discretion

2) It is not possible to state a general rule which will distinguish in each of the many thousands of possible factual situations between the making of real decisions in significant matters and the making of choices involving matters of little or no consequence. It should be clear, however, that the term “discretion and independent judgment,” within the meaning of the regulations in subpart A of this part, does not apply to the kinds of decisions normally made by clerical and similar types of employees. The term does apply to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise. The regulations in subpart A of this part, however, do not require the exercise of discretion and independent judgment at so high a level.

29 C.F.R. § 541.207(d)(2)

## FLSA Class Actions Outpace EEO Class Actions



Source: Administrative Office of the U.S. Courts, Judicial Business of the U.S. Courts, 1997-2002

### What Plaintiffs' Lawyers Say About the Current Rules

In a recent Virginia Bar Association session, a plaintiffs' attorney instructing his peers how to build an employment law practice included the following under the heading "Statutory Violations: the FLSA is the Best:"

FLSA claims are very desirable because the plaintiff does not have to prove bad intent by the employer. Indeed, the employer has the burden of proof on a number of significant issues. The employer must demonstrate that the employee is exempt, and the exemptions are construed narrowly against the employer.... There are liberal collective action opt-in rules.

Source: Christopher Colt North, Reading the Tea Leaves: Practical Considerations for Plaintiff's Counsel in Investigation and Evaluation of Employment Claims

## DOL's Failure to Act Triggered Litigation Explosion

As employers struggled to apply the existing rules, lawyers discovered a gold mine. In 2001, the number of wage and hour class actions exceeded employment discrimination class actions for the first time. In addition, individual FLSA lawsuits doubled in 2002. Here are some examples of litigation under the white collar regulations.

### ***Carpenter v. R.M. Shoemaker Co.***

The court ruled that a project superintendent who supervised three large construction projects for a construction management company and earned \$90,000 per year was not an exempt administrative employee. Since the company provided “the effective management of construction projects for others,” the employee “produced” construction project management and was thus a nonexempt “production worker.” Based on the court’s opinion, the company owed the superintendent \$65 per hour for every hour of overtime worked.

### ***Hashop v. Rockwell Space Operations***

The court ruled that “network communications specialists” who possessed advanced physics, mathematics, and engineering degrees and trained mission control personnel were not exempt professionals because they used technical manuals and made decisions in groups, and thus failed to exercise discretion.

### ***Oral v. Aydin Corp.***

The parties settled a class action lawsuit for \$4.1 million giving backpay to several former vice presidents, a former in-house lawyer, and a former director of human resources, merely because the company had a policy on the books that violated the salary basis test. The lawyers received \$1.3 million of the settlement.

## **Secretary Chao's Effort to Define and Delimit the White Collar Exemptions**

On March 31, 2003, Secretary of Labor Elaine Chao published a proposed revision of white collar regulations in the *Federal Register*. The proposal suggests the following revisions:

### **Minimum Salary**

For an employee to be considered exempt under any of the three exemptions, he or she must receive a salary of at least \$425 per week (\$22,100 per year compared to current floor of \$8,060). An estimated 1.3 million new workers will be entitled to overtime as a result of this change.

### **Highly Compensated Workers**

Workers with an annual salary of at least \$65,000 are exempt if they perform office or non-manual work AND they meet at least one of the duties tests of an exempt executive, administrative or professional employee. In contrast with the minimum salary, an employee is not automatically exempt if he or she earns \$65,000.

### **Salary Basis**

Retains existing requirement that employee be paid a fixed, predetermined salary for each week in which the employee performs work but limits employer's liability to employees who were more directly affected.

### **Executive Duties Test**

The requirements to be an exempt executive are stiffened. The employee must (1) have a primary duty of managing the entire enterprise or a department or subdivision thereof, (2) direct the work of two or more other workers, AND (3) have hiring/firing authority or substantial influence over these actions.

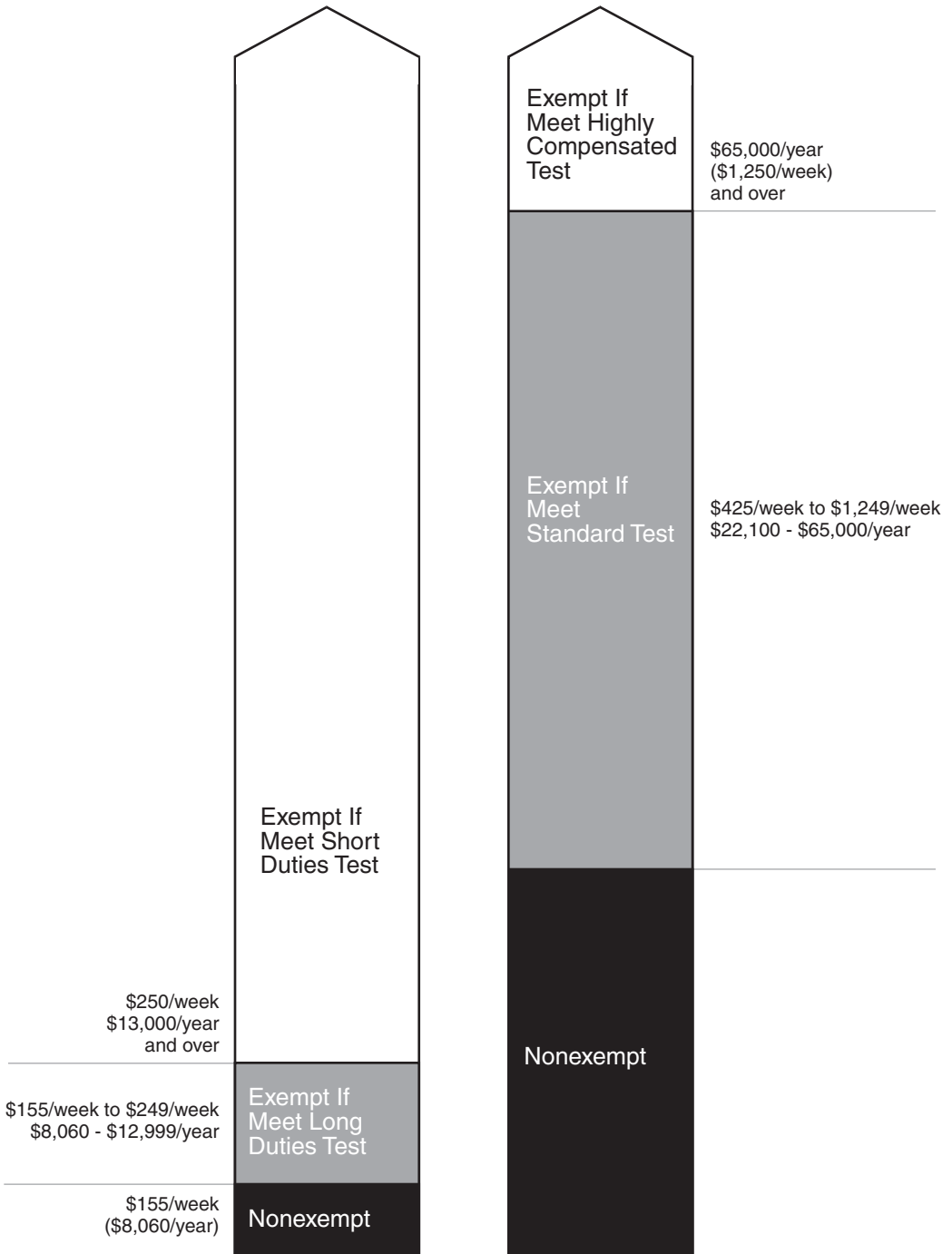
### **Administrative Duties Test**

The existing rule is retained except that instead of requiring “discretion and independent judgment,” the employee must hold a “position of responsibility with the employer.” A position of responsibility is defined as either “performing work of substantial importance to the employer” (a phrase used in current regulations) or performing work requiring a high level of skill or training.

### **Professional Duties Test**

The existing rule is retained, but the proposal clarifies when education and experience qualify an employee as a professional. The discretion test is eliminated.

## Overview of Existing and Proposed Salary Tests



**Current Regulations**

**Proposed Regulations**

## **How Many Workers Will Be Affected by the Proposed Changes**

The vast majority of American workers will be unaffected by the proposed changes. Those affected will be workers in low-paying jobs who are currently exempt and those who work in jobs where the current rules are unclear.

### **1.3 Million Workers Now Exempt Automatically Get Overtime**

1.3 million workers will gain overtime protection by the new requirement that any workers earning less than \$425 per week (\$22,100 per year) are automatically required to be paid overtime.

### **Overtime Protection Strengthened for 10.7 Million Workers**

10.7 million hourly workers who currently perform both exempt and non-exempt duties and are paid overtime will have their protection strengthened by making it clearer under the law that they are entitled to overtime.

### **644,000 Workers Subject to Reclassification**

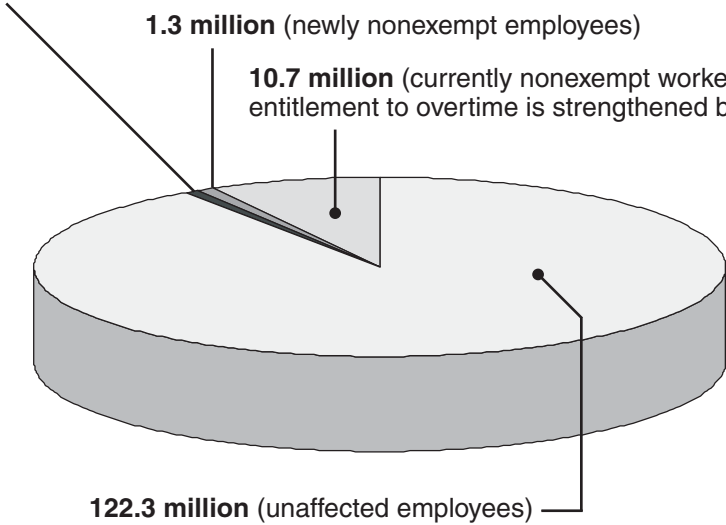
644,000 highly educated workers working overtime and earning an average of \$50,000 per year may be subject to reclassification by their employer.

## Effect of Proposed Changes on Employment

**644,000** (potential number of workers converted to salaried to become exempt)

**1.3 million** (newly nonexempt employees)

**10.7 million** (currently nonexempt workers' whose entitlement to overtime is strengthened by clarification)

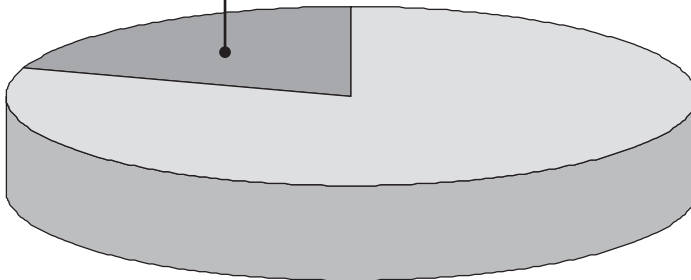


**Total Employment: 137.5 Million Employees**

Source: Employment Policy Foundation Tabulation of Current Population Survey Data

## Proportion of All Hourly Employees Who Work Overtime

**≈ 20%** (hourly workers who work overtime)



Source: Employment Policy Foundation Tabulation of Current Population Survey Data

## Why the Economic Policy Institute Estimate of 8 Million Affected Workers Is Too High

### Estimate Based on Several Flawed Assumptions

The union-funded Economic Policy Institute has estimated that 2.5 million salaried workers and 5.5 million hourly workers will lose overtime protection under the proposed regulations. In arriving at this estimate, EPI makes several erroneous assumptions:

- EPI assumes that most or all of the workers in particular categories (*e.g.*, cooks) will be converted to exempt, even though the rule changes will only apply to a small portion of those workers, if any
- EPI assumes that all workers making more than \$65,000 per year will be exempt, even though the rules require that they perform office or non-manual work and satisfy at least one of the tests for an exemption
- EPI ignores the proposed changes in the rules that will make it more difficult for employees to qualify as exempt executives
- EPI includes workers in its calculations who do not work overtime, including part-time workers
- EPI assumes widespread changes in the professional exemption, when the proposal is, in fact, a mere clarification of existing rules

## Occupations Not Affected by the Change

Opponents of white collar reform have made sweeping claims that the changes will cause broad categories of occupations to lose overtime protections. These claims are wrong. While every job is unique and the test must be applied individually to each job, the following categories of workers will not be affected by the rules:

**Registered Nurses:** Registered nurses are already specifically exempted from overtime under the current rules. That exemption is merely continued. Nearly 74 percent of all RNs receive overtime currently as a result of their employer's policies or a collective bargaining agreement, not as a result of the law.

**Licensed Practical Nurses:** Licensed practical nurses receive significantly less training than registered nurses and perform routine care of patients. They would have neither the duties nor experience to qualify them as exempt professionals.

**Police Officers:** Police officers will continue to be paid overtime as they are under current law. In a recent letter to the Fraternal Order of Police, the Department of Labor made clear that it will be more difficult for police officers to meet the executive exemption, and that police officers would not meet the revised administrative or professional exemptions. Even officers paid more than the \$65,000 threshold would remain nonexempt unless they perform office or nonmanual work.

**Firefighters:** The same analysis that applies to police officers would apply to firefighters.

**Paramedics:** Paramedics generally receive less than one year of classroom, medical and on the job instruction combined. Historically, courts have viewed them as not meeting the professional exemption. They would not qualify for the proposed professional exemption because, regardless of their level of income, their level of knowledge would not be substantially equivalent to a degreed professional.

**Chefs:** Only chefs with a four-year culinary arts degree, such as executive or sous chefs, or those who have equivalent knowledge and can perform similar duties will be exempt. Experience as a short-order cook does not qualify an individual for the exemption.

**Journalists:** The proposal makes clear that it is not intended “to make any material changes from the existing regulations” with respect to journalists. Thus, employees of small news organizations who spend their time “gathering facts from routine community events such as municipal, school board and city council meetings...and then reporting those facts in a standard format” are not exempt. On the other hand, employees of larger news organizations already tend to be exempt, but many are paid overtime pursuant to collective bargaining agreements.

**Secretaries:** Clerical assistants will continue to be nonexempt, as under the current regulations. Likewise, just as under the current regulations, an executive assistant to a senior executive who, “without specific instructions or prescribed procedures, has been delegated authority to arrange meetings, handle callers and answer correspondence” may be exempt.

**Unionized Workers:** The overtime pay of unionized workers will continue to be governed by their collective bargaining agreements. Even under the current rules, many exempt employees are paid overtime premiums pursuant to such agreements.

**Highly Compensated Blue Collar Workers:** Even though the proposed changes establish newer rules for employees earning over \$65,000, they will only be exempt they perform office or non-manual work and have at least one of the duties of an executive, administrative or professional employee.

## **Elimination of Discretion Test**

### **Proposal Removes Primary Cause of Confusion in Figuring Out Exemptions**

One of the murkiest areas of the current regulations is the requirement that administrative and professional employees exercise discretion in order to be exempt.

The discretion test is very difficult for employers, Department of Labor investigators, and the courts to apply in practice, and has caused a great deal of confusion. Among other difficulties, there are many professional occupations in which following protocols is essential and useful, such as medicine, engineering, and accounting. However, following such protocols eviscerates discretion as articulated in the regulations.

As was stated in a 1999 GAO report, “According to DOL investigators, determinations about independent judgment and discretion can be the most difficult part of a compliance review. To assess this requirement, an investigator must review both the general duties of the position and the specific duties of the employee. Further, the determination may hinge upon how an individual employee views his or her own duties.”

By replacing the discretion test under the administrative exemption with a new definition, the exemption’s broad ambiguities would be removed, and a clearer, more well-defined exemption which maintains key protections, would result.

By eliminating discretion as a requirement under the professional exemption, the Department has recognized that the key to exempt professional work is the possession of professional knowledge and the performance of work that requires the utilization of that knowledge.

## **The Professional Exemption**

### **Substitution of “Equivalent Knowledge” for an Academic Degree**

Opponents of reform have argued that the proposed regulations will let virtually any individual with experience be an exempt professional. For example, they contend that any kind of cook with six years of experience, such as a short-order cook at the local diner, will be considered to have the experience of an executive Chef, such as Emeril Lagasse or Wolfgang Puck.

The reality is that this is one area where the proposed changes merely clarify what the existing rules already provide.

Both the existing and the proposed regulations recognize that the professional exemption is generally restricted “to professions where specialized academic training is a standard prerequisite for entrance into the profession.” Both recognize that individuals without the requisite academic degrees can be exempt professionals.

For example, the existing regulations provide that there are some professionals who “have gained their knowledge by home study and experience...Such persons are not barred from the exemption.” Unlike the existing regulations, however, the proposal provides a clearer idea of when nondegreed individuals will be considered exempt professionals, namely, when they have “substantially the same knowledge level as degreed employees” and are performing professional level duties.

Returning to the chef example, the proposal provides that an individual with a college degree in culinary arts who performs the duty of an executive chef or sous chef will be exempt. Merely being a long-time cook however, would not trigger the exemption. The same analysis would apply to dental hygienists, nurses, medical technologists, engineers, and similar occupations.

## **Conclusion**

In 1954 when the Labor Department last updated the Fair Labor Standards Act regulations, Elvis Presley was still a senior in Humes High School in Memphis. The regulations haven't been changed since then, even though the world of work is an entirely different place. Elvis is no longer with us, and most of us have learned to let him go. The time has come to let the Pre-Elvis era white collar regulations of the Fair Labor Standards Act go as well.