

NELP

Immigrant & Nonstandard Worker Project Policy Update

Advocating for the Working Poor and the Unemployed

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Low-Wage But Exempt from Overtime: New Rules Could Mean More Hours and Less Pay

DOL Issues New Regulations on So-Called “White-Collar” Overtime Exemptions

The U.S. Department of Labor (DOL) has issued new rules describing who is not entitled to overtime pay under the administrative, executive and professional exemptions, and the news is not good for low-income workers and their families. These so-called “white-collar” exemptions were meant to permit employers to require workers who were not paid by the hour, and who held leadership and management jobs, to work more than 40 hours a week without being paid overtime premium pay of time-and-a-half their regular hourly rate. The logic behind the exemptions when they were enacted was that these executive, administrative and professional jobs entailed the exercise of independent judgment and discretion, and these employees were paid an annual salary to do their job, regardless of how many hours a week the job entailed. NELP and other signatories submitted comments to the DOL on the proposed rules last year. See <http://www.nelp.org/docUploads/FLSAcomments063003%2Epdf>. In addition, the Economic Policy Institute has presented testimony against the new rules, at www.epinet.org/content.cfm/webfeatures_viewpoints_final_overtime_regulations.

While the DOL increased the minimum annual salary a worker has to make to be considered for the exemptions (from \$ 8,060/ year to \$23,660/ year), the exemption still includes many low-wage workers whose employers are now free to require them to work more than 40 hours a week with no overtime pay.

This Policy Update is for workers and their advocates who want to know more about the new overtime rules and what can be done about them.

New Rules Hurt Low-Income Workers and Allow Employers to Designate Their Low-Level Employees as Exempt

Salary Basis Test is Easier for Employers to Show

Under the old rules, only employees who were not be subject to suspensions or deductions from pay for less than one day (unless for serious safety violations) were considered “salaried” and exempt from overtime pay. A worker who was suspended for trivial violations of workplace rules would have been eligible for overtime pay under the old rules. Now, an employer can suspend a worker for any violation of a workplace rule, and still call that person a exempt and refuse to pay overtime. An employer

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could also dock pay for a workers' mistake at the cash register, and still claim that person is exempt from overtime.

The new rules also permit employers who “inadvertently” deduct or suspend a salaried employee to fix the improper deduction by reimbursing any employees improperly deducted, without any further liability for the practice. This “no harm, no foul” window of correction effectively permits any employer to treat so-called salaried workers like hourly workers until and unless a worker complains.

Working Supervisors Lose Overtime

The old regulations generally did not permit employees who spent most of their time performing non-exempt work (such as flipping burgers, cleaning aisles, stocking shelves) to be classified as “exempt” from overtime. The new rules do not set any limits on the amount of time an employer-designated exempt worker can spend on these non-exempt duties. Thus, an assistant manager at Burger King who spends 90% of his time flipping burgers, cleaning up and helping customers at the counter can be deemed exempt from overtime pay if the employer can show he otherwise meets the test for the exemption.

Many Low-Wage Jobs Won't Pay Overtime Anymore

These new exemptions mean that many working in the following jobs will no longer be entitled to overtime pay, for example:

- Fast food managers;
- Retail managers in grocery, department stores, and other goods;
- Pre-school and nursery teachers;
- Cooks, chefs and sous-chefs;
- Claims adjusters;
- Outside salespersons;
- Dental assistants;
- Physicians' assistants;
- “Team leaders” so-designated by their employers, even if they don't have direct supervisory responsibility over others on the “team;”
- mortgage processors, and
- funeral home workers.

Some States Stay True to the Overtime Rules' Intent

Illinois Recently Enacted a State Law Overriding the New Federal Regulations

In response to the proposed federal rules, Illinois enacted a state law that maintains Illinois state requirements that employers pay white-collar workers (as defined under the previous federal rules) overtime after 40 hours in a week. The Illinois law can be found at <http://www.legis.state.il.us/legislation/publicacts/fulltext.asp?Name=093-0672>

Other states already have provisions with broader overtime coverage; check your state law.

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What Can Workers and Their Advocates Do?

Support the Harkin Amendment and Other Congressional Votes of No-Confidence

Within a month of the issuance of the new rules, the U.S. Senate passed the Harkin proposed amendment that would block portions of the new overtime rules, by a vote of 52-47. Harkin's amendment provides that any worker currently entitled to overtime pay after working 40 hours cannot be deprived of that overtime by operation of the new rules. Worker advocates can continue to speak out against these rules and urge their senators and representatives to support the Harkin amendment.

Don't Take Employers' Words for It: Fight for Overtime Pay in Specific Instances

The Fair Labor Standards Act (FLSA) is intended to be construed broadly, and is meant to cover most workers within its overtime protections. This means that employers' self-serving characterizations that workers are "exempt" under these new rules are not controlling. The rules state that a worker's job title alone is not enough to make her exempt, and employers must prove that a worker is properly exempt under the rules. The FLSA requires a look into the "economic reality" of a worker's job, looking to what in fact he does at work, and not what he is supposed to be doing on paper or in a job description.