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New Federal Overtime Rules Create Opportunities in the States

The U.S. Department of Labor's (DOL) new overtime rules for administrative, executive and professional employees are generally less favorable for workers, and in particular, for lower-income workers in certain job categories. NELP's May 2004 Policy Update, "Low-Wage But Exempt from Overtime: New Rules Could Mean More Hours and Less Pay," at ([http://www.nelp.org/docUploads/policy update overtime june 1 2004.pdf](http://www.nelp.org/docUploads/policy%20update%20overtime%20june%201%202004.pdf)) describes the potential impact of these new overtime rules on lower-income workers. Losing overtime pay (often 25% of a family's income, or about \$8,400 a year) hurts working families who are struggling to make ends meet with longer hours at work, increasing health care costs, and household expenses.¹ This policy update describes the analogous overtime rules in the 50 states, and suggests opportunities for state worker advocates to protect overtime rights for lower-income workers and their families at the state level.

So-Called "White-Collar" Overtime Exemptions Became Effective August 2004 – A Review

DOL's new rules describing entitlement to overtime pay under the administrative, executive and professional exemptions became effective August 23, 2004. The U.S. DOL has a fact sheet on the new regulations at www.dol.gov/fairpay. These regulations broaden the so-called "white-collar" exemptions from overtime to include workers in job categories that traditionally would not be considered "white-collar," with the attendant independence and discretion afforded to workers in those positions. While the new rules guarantee overtime pay to workers earning up to \$455 a week (up from \$155 a week under the old regulations), the new exemptions mean that many working for as little as \$23,660 per year could be denied overtime. Workers in the following jobs may not be entitled to overtime pay, for example:

- Fast food managers, even if they perform the same work as the same workers, because of new executive exemption rules;
- Retail managers in grocery, department stores, and other goods;
- Pre-school and nursery teachers, under the professional employee exemption's loosening of the requirement that exempt professionals exercise independent judgment and discretion in their jobs;
- Chefs and sous-chefs;
- Financial service sector employees, because of a new industry-wide exemption for financial service employees, including workers who collect customer financial information and market financial products;
- Outside salespersons, defined more broadly under the new regulations;
- "Team leaders" so-designated by their employers, even if they don't have direct supervisory responsibility over others on the "team;" because of the new regulatory concept created in the administrative exemption.

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States With Their Own Overtime Rules Need Not Follow the Federal Leadⁱⁱ

- **Only six states plus the District of Columbia explicitly track the federal overtime rules. These states are D.C., Massachusetts, New York, North Carolina, Ohio, Rhode Island, and Wisconsin.** Workers in these states are left with newly-restricted overtime rights. See, NELP chart, “Overtime Laws by State,” on p. 4 of this update. To recover overtime rights, advocates in three states (MA, NY, WI) need to make regulatory changes, while the other three states (RI, OH, and NC) require statutory change.
- **Eighteen states have no state overtime law at all. These states are Alabama, Arizona, Delaware, Florida, Georgia, Idaho, Iowa, Louisiana, Mississippi, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.** Workers in those states are covered by the federal law with newly-restricted overtime rights, and workers not covered by the federal law with no overtime rights at all.ⁱⁱⁱ
- In the remaining 26 states, many states have identical language to the federal Fair Labor Standards Act’s statutory administrative, executive and professional exemption, but may not interpret the language the same as DOL. **These states are Alaska, Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Pennsylvania, Vermont, Washington, West Virginia.**

Some of these states have more favorable overtime rules, including exemption carve-outs for specific jobs, like registered nurses and pharmacists in CA, and retail and service employees in several states, including Alaska, MI, and PA. Several states have the lower weekly salary thresholds that predate the new federal rules; these lower thresholds will be trumped by the more worker-protective federal regulations in workplaces where the federal law applies. It is in these 26 states where there is an opportunity for workers and their advocates to clarify (either by regulations, or by statutory change) that the state provisions will not follow the more restrictive aspects of new federal overtime rules. Just as federal overtime rights were modified through regulations, state overtime regulations can be protected through regulations that better reflect the original intent of the exemptions under overtime laws. Employers in these states are required to follow whichever provisions (state or federal) are more generous to workers, under federal law, 29 U.S.C. § 218(a).

A few of these states have white-collar overtime laws that are clearly better for workers, including Illinois, which recently passed a state law clarifying that it was not going to follow the new restrictive rules. The Illinois law can be found at <http://www.legis.state.il.us/legislation/publicacts/fulltext.asp?Name=093-0672>. The Maine legislature is considering similar proposed legislation.

Model State Overtime Provisions

States with their own overtime laws can enact agency-level regulations or state-level laws that clarify that workers in that state will not be subject to the new federal overtime regulations, as Illinois did in April, 2004, with the caveat that the new federal weekly salary threshold of \$455/ week will be maintained. Conservatively, the new state laws or regulations could simply clarify that the old federal regulations in effect prior to the August change are in effect in that state, adding the new minimum weekly salary threshold in the August 2004 regulations.

More aggressive states could re-write their law or regulations to ensure that low-level workers, who are not “white-collar” under anyone’s definition, are covered by overtime provisions. This could include carving out certain job categories from overtime exemptions, such as low-wage retail, fast food and restaurant workers, and pre-school and nursery school teachers. Contact NELP for other suggestions.

State advocates could consider modeling existing carve-outs in some state overtime laws for retail, nursing and service sector workers (such as in CA, MI and PA) to ensure better coverage for those workers and to bring their state laws into line with the original purposes of the white-collar exemption in the FLSA.

Any state-level legislative enactment should include a clear “purpose of the bill” provision, stating that the new federal overtime rules made effective on August 23, 2004 took away overtime rights for many workers previously covered by the Fair Labor Standards Act, and that the state’s bill is intended to restore those overtime rights, while preserving the higher federal minimum weekly salary threshold.

Sample model legislation developed by the AFL-CIO can be found attached to the end of this document.

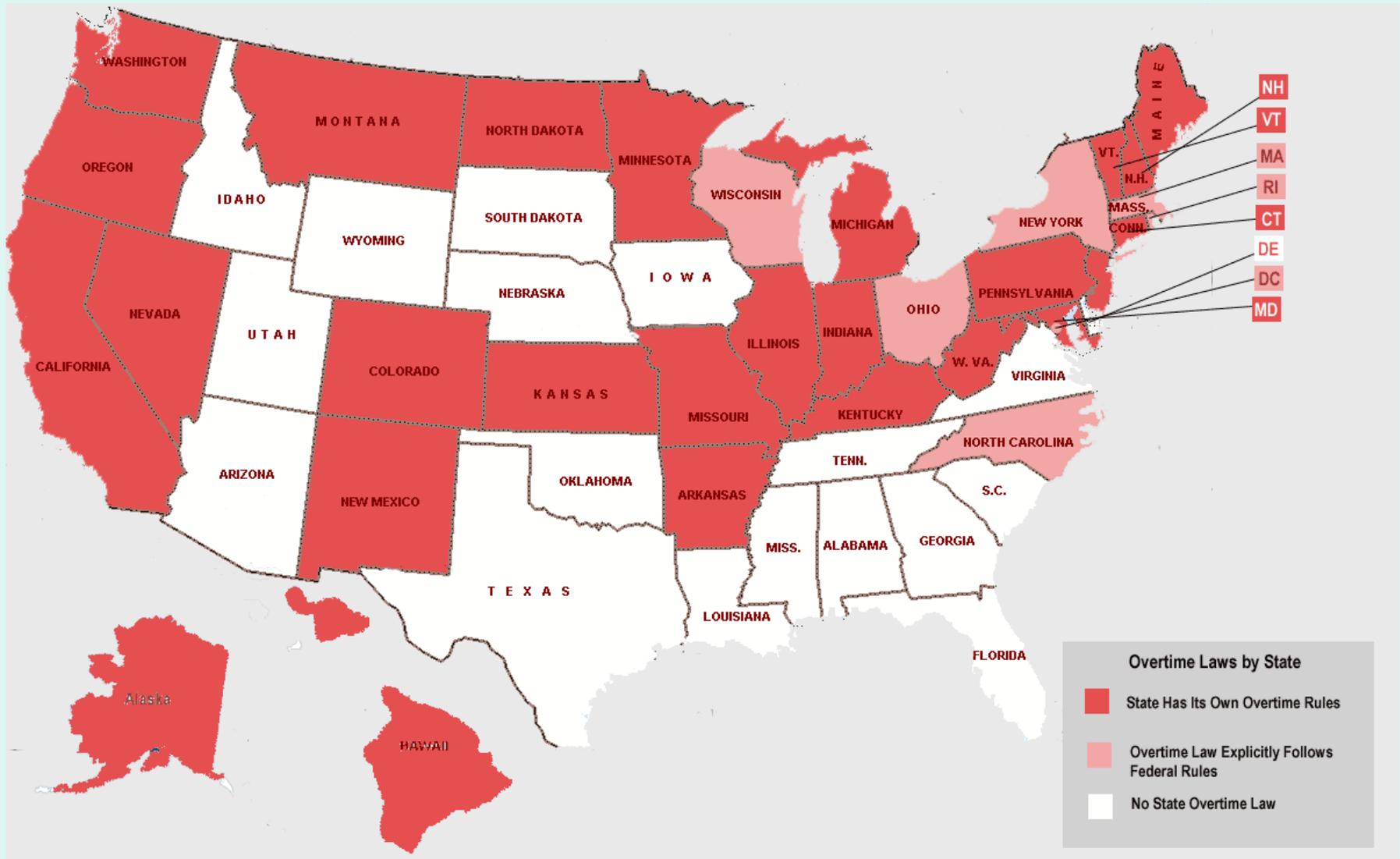
References:

ⁱ “Overworked, Underpaid, and Under Attack: The Bush Administration Plan to Deny Overtime Pay to Six Million Americans,” a report by the Democratic Staff of the House Appropriations Committee and the Education and Workforce Committee, July 22, 2004, at www.house.gov/appropriations_democrats, at p. 2.

ⁱⁱ See NELP chart of state overtime provisions, and NELP Map with 50 state depiction of overtime laws, attached to this document.

ⁱⁱⁱ Of those 18 states without a state overtime law, five have *no state minimum wage law* either. Those states are Alabama, Louisiana, Mississippi, South Carolina, and Tennessee. Florida just passed its first state minimum wage law in the 2004 elections.

State Overtime Laws, 2004



State Overtime Laws in the Midst of Federal Changes to Exemptions from Overtime Pay, 2004

State	State OT for White-Collar Workers ¹	Better or Worse Than FLSA
Alaska	Bona fide executives, administrators and professionals are exempt from OT. (AL Stat. 23.10.055 (9), (10). Minimum weekly salary for retail and service employees is \$572/ week, effective 9/14/04.	Better for retail and service employees
Arkansas	Bona fide executives, administrators and professionals are exempt from OT. (AK Stat. 11-4-210- 11-4-212); Regulations define exempt administrative, executives and professionals in a more favorable way for workers, despite lower minimum weekly salary thresholds of \$155-\$160.	Slightly better for workers
California	Administrative, executive, professional exemption if earn monthly salary equivalent of \$2,160, or approx. \$540/ week. Cal. Code Regs tit. 8, 11010 – 11130 and 11150. California exempts “professionals” as defined under FLSA regulations, but registered nurses and pharmacists are covered unless proven exempt under administrative or executive exemptions. Cal.Lab.Code 1186. Requires “customary and regular” exercise of discretion for exemption to hold.	Better for workers
Colorado	Colorado Wage Order 22 covers retail and service, commercial support service, food and beverage and health and medical employees. Exemptions include “administrative, executive/supervisor, professional” employees, as defined in the wage order. Definitions are narrower than the FLSA, providing better OT coverage for employees. www.coworkforce.com/lab/WageOrder22.pdf	Slightly better for workers
Connecticut	CT overtime provisions remain slightly more favorable for white collar workers. CT salary threshold is \$475/ week, and there is no exemption for computer professionals, highly paid employees. See “Comparison of FLSA and CTDOL ‘White-Collar’ Exemption Regulations,” prepared by CT DOL, at www.ctdol.state.ct.us/wgwkstnd/flsa-ctdol-compare.pdf	Slightly better for workers
Hawaii	Bona fide executives, administrators and professionals are exempt from OT. HRS 387-1 (5).	Can’t tell because law and regulations don’t define
Illinois	Previous exemption from OT defined bona fide executives, administrators or professionals as defined by the FLSA. In 2004, IL state legislature amended its overtime law to maintain the old FLSA definitions and interpretations of the white collar exemptions, with the higher minimum weekly salary threshold. 820 Ill.Comp. Stat. Ann. 105/4a(2), as amended by S. 1645, L. 2003, effective 4/2/04.	Better for workers.

¹ Covered employers must comply with both state and federal overtime rules. If an employer is covered by FLSA and state law, federal law requires that it follow the rule that is most favorable to the worker. 29 U.S.C. § 218(a). FLSA stands for Fair Labor Standards Act

State	State OT for White-Collar Workers ¹	Better or Worse Than FLSA
Indiana	Exemption under state overtime provision for administrative, executive or professional employees is worded more narrowly, so is better for employees, except for lower weekly salary threshold. Ind. Code Ann. 22-2-2-3, -4.	Better for workers, except for weekly salary threshold
Kansas	Exemption under state overtime provision for administrative, executive or professional employees is worded more narrowly, so is better for employees generally. Kan. Stat. Ann. 44-1202(e); Regs. 49-30-1 (i)-(k).	Slightly better for workers
Kentucky	Exemption under state overtime provision for administrative, executive or professional employees is worded more narrowly, so is better for employees generally, though salary threshold is much lower. KRS 337.010(2)(a)(2); 803 KAR 1:070	Better for workers, except for weekly salary threshold
Maine	Bona fide executives, administrators and professionals with annual salary of at least \$18,750 are exempt from OT. Me. Rev. Stat. tit. 26, 663(3). Note proposed change	Slightly worse due to weekly salary limits
Maryland	Exemptions for executive, administrative and professional employees are more favorable to workers under MD OT law. MD. Code Ann. Lab.& Empl., 3-403.	Slightly better for workers
Michigan	Bona fide executives, administrators and professionals are exempt from OT. Retail or service employees are not exempt under white collar exemption if less than 40% of their duties per week are devoted to exempt work. Mich. Stat. Ann. 408.394a; Mich. Adm. Code 408.721-408.735.	Better for retail and service workers
Minnesota	MN OT required after 48-hours/ week. MN white-collar exemptions are slightly more favorable to workers. Minn. Stat. 177.28; Regs. 5200.0180.	Slightly better for workers
Missouri	Bona fide executives, administrators and professionals are exempt from OT. Mo. Rev. Stat. 290.500(3)(a); 8 CSR 30.4.010.	Can't tell because law and regulations don't define
Montana	Bona fide executives, administrators and professionals are exempt from OT. Mont. Code Ann 39-3-406(1); Regs. 24.16.206.	Slightly better for workers
Nevada	Bona fide executives, administrators and professionals are exempt from OT. Nev. Rev. Stat. Ann. 608.018(2)(e)	Can't tell because law and regulations don't define
New Hampshire	No specific exemption for executives, administrators and professionals in state OT law. N.H. Rev. Stat. An.. 279:21.	Better
New Jersey	NJAC 12:56-7.1-7.3 lists white-collar exemptions, which are generally more favorable to workers, though salary thresholds are lower now (\$400/ week).	Better for workers

State	State OT for White-Collar Workers¹	Better or Worse Than FLSA
New Mexico	Bona fide executives, administrators and professionals are exempt from OT. N.M. Stat. Ann. 50-4-21 (c).	Can't tell because law and regulations don't define
North Dakota	Bona fide executives, administrators and professionals are exempt from OT. N.D. Admin. Code 46-02-07-02(4).	Can't tell because law and regulations don't define
Oregon	Bona fide executives, administrators and professionals are exempt from OT, if perform predominantly intellectual, managerial or creative tasks, exercise discretion and independent judgment, and are paid on a salary basis. Weekly salary thresholds lower than the FLSA. O.R.S. 653.020 (3); ORS 279.340 – 342; Regs. 839-020-0320.	Better for workers, except for weekly salary thresholds
Pennsylvania	Exemptions for bona fide executive, administrative, professional workers. 43 Pa. Stat. 333.105(a). Retail and service workers can only be exempt if less than 40% of their time is spent on non-exempt work.	Better for workers in retail and service.
Vermont	Exemptions for bona fide executive, administrative, professional workers. VSA 383 (5). Vermont DOL states it will follow FLSA rules in effect at time VT. Passed its white collar exemption, or old FLSA rules, for time being. www.state.vt.us/labind/Wagehour/whitecollar.htm	Slightly better for workers
Washington	See, "New Federal Overtime Rules – 2004: How they Apply to Washington State," prepared by WA Dept. of L&I at www.lni.wa.gov/workplacerrights/files/overtime/FedOTFactSheet.pdf . WA state OT rules follow old federal rules for white-collar exemptions, so are generally more favorable to workers, except for the salary thresholds. Wa. Rev. Code 49.46.010(5).	Slightly better for workers.
West Virginia	Exemptions for bona fide executive, administrative, professional workers. W.Va. Code 21-5C-1(f); Regs. 42-8-8.7.	Slightly better for workers

Model Overtime Protection Act

Background:

The Bush Administration's final overtime regulations were announced on April 23, 2004 and will go into effect on August 23, 2004. Although some of the proposed regulations' most outrageous provisions were cut from the final rules, there will be many white-collar workers who will have their right to overtime pay eliminated.

The Bush Administration's final regulation restricts overtime eligibility for workers earning as little as \$23,660. The Bush Administration claims that no workers earning between \$23,660 and \$100,000 will lose their overtime rights under the final regulation, but this claim does not account for numerous changes to the eligibility rules that strip overtime rights from workers earning as little as \$23,660 per year. These include: "team leaders", working supervisors and assistant managers, outside salespeople, chefs, computer employees, registered nurses, insurance claims adjusters, funeral directors and embalmers, and workers in the financial services industry.

State legislatures should take action to protect overtime for workers in their states. Do states have this power? Absolutely. States have long held the right to establish minimum wage and overtime protections that are greater and more protective than the federal level as illustrated by current state laws: 1.) Many states have higher minimum wage rates than the federal rate of \$5.15 per hour, and 2.) Some states have daily overtime laws that require businesses to pay overtime to workers who work more than 8 hours a day.

Purpose of Bill:

The model legislative provisions are designed to insulate employees from the effect of the federal regulations that take effect on August 23, 2004, which make it easier for employers to classify their employees as exempt from the right to earn overtime. At the same time, the provisions preserve the salary threshold established by the new regulations, below which employees, regardless of their job duties, must earn overtime.

Model 1: For states that do not have their own regulations on overtime exemptions -- either the state code is silent or provides that the state will follow the FLSA

- a. The regulations promulgated by the United States Department of Labor ("the Department") at 29 C.F.R. Part 541, which became effective on August 23, 2004, and which revised the regulations governing the exemption from overtime for executive, administrative, professional, outside sales, and certain computer employees in effect prior to that date, shall apply to employees employed in this State as follows:
 - b. any employee who would have had the right to earn overtime under the Department's regulations in effect on August 22, 2004 shall not lose the right to overtime as a result of application of the regulations in effect as of August 23, 2004.

- c. any employee who would have had the right to earn overtime under the Department's regulations in effect on August 22, 2004, but who would lose the right to earn overtime under the regulations in effect as of August 23, 2004, shall continue to have his or her eligibility for overtime determined under the regulations in effect on August 22, 2004.
 - d. an employee referred to in subsection (a) includes an employee who became employed on or after August 23, 2004, but who would have had the right to overtime had that employee been employed in a position having the same duties on August 22, 2004.
2. The minimum salary an employer must pay an employee before that employee can lose the right to overtime shall be the salary set forth at 29 C.F.R. Section 541.600, as that provision was revised effective August 23, 2004, or as it may be revised from time to time by the Secretary of Labor.

Model 2:

1. Any provision of the regulations promulgated by the United States Department of Labor at 29 C.F.R. Part 541, which became effective on August 23, 2004, and which revised the regulations governing the exemption from overtime for executive, administrative, professional, outside sales, and certain computer employees in effect prior to that date, that exempts from the right to earn overtime any employee in this State who would not otherwise be exempt if the regulations in effect on August 22, 2004 remained in effect, shall have no force or effect and that portion of such regulations (as in effect on August 22, 2004) that would prevent such employee from being exempt shall remain in effect.
2. Notwithstanding the preceding section, the increased salary requirements provided for in the regulations that became effective on August 23, 2004 at section 29 C.F.R. Section 541.600, shall remain in effect.

Model 3: For states that have their own exemption criteria

1. When an employee has the right to earn overtime pay under regulations promulgated by the [name the state agency] of this State, those regulations shall apply to the employee, notwithstanding the loss of such right under the regulations promulgated by the United States Department of Labor at 29 C.F.R. Part 541 under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, which became effective on August 23, 2004.
2. The minimum salary an employer must pay an employee before that employee can lose the right to overtime shall be the higher of the salary set forth under regulations promulgated by the [name the state agency] of this State or regulations promulgated by the Secretary of Labor at 29 C.F.R. Part 541.

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