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On the Department of Labor's Proposed Overtime Regulations

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Senator Dorgan, thank you for inviting me to testify today. It's an honor for me and for the Economic Policy Institute to present our views to you and to your colleagues.

I applaud your attempts to enact the Harkin amendment and to block the Department of Labor's overtime proposal. The proposed regulation would be the biggest roll-back of worker rights in half a century and will have profound effects on the pay and work hours of millions of Americans.

When the Department of Labor issued its Notice of Proposed Rulemaking at the end of March, we tried to understand how it could conclude that only 644,000 employees would lose their right to overtime pay. The proposal makes sweeping, radical changes in the law, but the regulatory analysis does not reflect them. We asked the Department and its contractor for explanations, but could not get answers to our questions.

So we analyzed the changes ourselves, with the help of a team of experts, and prepared an estimate for the effect of the proposed rule on a subset of the working population, employees in 78 of the total 257 occupational categories identified by the Department of Labor as having substantial numbers of white collar (office or non-manual) employees.

Our conclusions are very different from those of the Department. We estimate that in those 78 occupations, over 8 million workers will lose the right to overtime pay. We also discovered that the Department's claim that 1.3 million low-income workers would benefit from the rule is false. The Department knows its claim is false, yet Department officials and their allies in Congress continue to cite it as if it were true.

Why do our numbers differ so greatly from what the Department of Labor has reported? Briefly, we think the Department's analysis has three major flaws:

1. **The Department does not estimate how many employees will lose overtime *protection,* but rather only estimates how many employees who are currently receiving overtime *pay* will lose it.** While approximately 80 or 90 million workers have overtime protection, only 11 or 12 million at any one time are actually working overtime and being paid for it. Because the overtime premium works as it was designed to, and discourages employers from assigning overtime to non-exempt workers, removing overtime protection will result in many employees working overtime who don't work overtime now. Congress and the public should be concerned about the loss of overtime *protection*, not just the loss of overtime pay. The Department's estimate that 644,000 employees will lose overtime pay implies that more than 5 million employees will lose overtime protection.

2. **It fails to analyze the effect of most of the key changes in the regulations.** DOL does not calculate how many employees will lose overtime protection because of the following changes:

   - *The proposal eliminates the requirement that professionals and administrators consistently exercise independent judgment and discretion.* DOL opinion letters and many court cases identify this as a key test in determining whether workers are the kind of professional or top administrator who should be exempt or have less authority and – however highly skilled or well-trained they might be – should have the right to overtime pay. See, for example, *Hashop v. Rockwell Space Operations Co*., 867 F. Supp. 1287 (S.D. Tex. 1994), involving space shuttle ground control instructors, and cases involving trucking company dispatchers and entry-level architects and engineers listed on page 24 of GAO's September 1999 report, *Fair Labor Standards Act: White Collar Exemptions in the Modern Workplace.* Based on this requirement, DOL opinion letters have denied employers' requests to exempt employees in a wide range of occupations, from executive secretaries and mortgage loan officers to engineering firm designers and human resource generalists.

   - *The proposal eliminates the provision in current law that distinguishes between "staff" jobs that are exempt and "line" or "production" jobs that have overtime protection.* Numerous DOL opinion letters and cases involving employees ranging from police and firefighters to paralegals and parole officers have denied employer attempts to exempt employees because they were non-exempt line or production workers. See, for example, *Dalheim v. KDFW-TV*, 918 F.2d 1220 (5th Cir. 1990), where the court found that producers and other employees in the departments responsible for the production of newscasts were non-exempt.

   - *The proposal undermines the educational requirements that are a key part of the professional exemption.* Whereas current law has, in rare instances, permitted employers to deny overtime protection to a highly skilled and experienced employee who does not have the advanced degree generally required to qualify as a learned professional, the proposal allows employers to substitute work experience "for all or part of the educational requirement." Rather than

exempting what the Department has termed the "occasional chemist," in reality the proposal allows every employee working in a professional field (and the number of such fields is constantly expanding) to be deemed a professional and denied overtime pay if they have enough work experience. DOL assumes in its regulatory analysis that six years of job tenure is the equivalent of a college degree and estimates that 44 out of 100 non-degreed employees working in the learned professions will be exempt. DOL neglects to calculate how many such employees there are or which professions are affected and to what extent.

- *The primary duty test, which applies to each of the three exemptions, is rewritten to make it easier for employers to exempt their workers.* Under the proposal, exempt executives, for example, must have only "a" primary duty that is executive. Current law requires that executive tasks must be "the" primary duty of the exempt employee. Moreover, the 50% "rule of thumb" is eliminated, allowing employers to label a small part of an employee's job the "primary duty."

- *The new "highly compensated" test will allow employers to deny overtime pay to employees whose primary duty is not administrative, professional, or executive.* Rather, employees who perform any "office or non-manual work" and are guaranteed "total compensation" (not necessarily a salary) of at least $65,000 a year, will be exempt if the employee performs *any* exempt duty or responsibility. Thus, any "highly compensated" employee who does "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" will be automatically exempt.

3. **The Department did not apply the changes in the rule on an occupation-by-occupation basis using the methodology established by the Department and GAO in 1999.** No attempt was made to estimate the effect of the rule changes on social workers, paralegals, respiratory therapists, reporters and news announcers, bank loan officers, or any of the other scores of occupations DOL examined in detail in the past.

In the months since the comment period closed, the Department has said a number of things about the effects of the proposed rule that downplay the extent to which the proposal will weaken or eliminate overtime protections but which are at odds with its text and with the regulatory analysis.

Most notably, the Department has argued that the proposed rule makes no changes in the professional exemption that will affect nurses and other health technicians, no changes that will affect police officers, no changes that will affect cooks, and none that will affect secretaries. Each of these claims is wrong.

To be exempt, nurses, like all professionals, have had to meet strict educational requirements under current law. Under the proposed rule, as both the text of the rule and

the regulatory analysis make plain, work experience may be substituted "for all or part of the educational requirements" for any learned profession, including nursing. Once an employer determines that an R.N. with only a two-year degree has substantially the same knowledge as an R.N. with a four-year degree, it will be free under the proposed rule to exempt him or her and refuse to pay overtime.

It will also be much easier to establish that "a" primary duty of a nurse is administrative or executive. An otherwise non-exempt nurse who spends 90 percent of her time performing patient care could still be found to have a primary duty that is administrative or executive, especially since the administrative duty tests have been substantially weakened.

Police sergeants and other low-level police supervisors are likely to be exempted as executives under the proposed rule. The "staff vs. line" dichotomy that helped establish the overtime rights of police officers has been eliminated. Overtime exemptions under section 13(a)(1) of the FLSA are not based on job titles or broad occupational class; rather, they depend on the tasks and functions each individual employee performs. Each officer's duties will be reexamined if the proposed rule becomes law, and if but one primary duty is determined to be supervisory or administrative, the officer will lose overtime protection. Thus, the fact that a sergeant performs non-manual work like walking the beat during 90 percent of his work hours will not matter if he has a primary duty of supervising two other officers or performing non-exempt administrative work.

Under the proposal, highly compensated police officers will not even have to have a primary duty of performing exempt work. If they perform any "office or non-manual work" and perform any one exempt duty of an executive, administrator, or professional — no matter how little of their time is spent doing it — they will lose the right to overtime pay.

Police departments have sometimes tried to exempt officers who teach in police academies, but have been prevented because the instructors did not exercise sufficient independent judgment and discretion in how they taught their courses. Because the proposed rule eliminates the requirement for independent judgment and discretion, those officers will lose their right to overtime pay under the proposed rule.

The Department claims that under the proposal, "only chefs with a college degree in culinary arts qualify as professionals." But the rule clearly states — and the regulatory analysis supports — that work experience or training that comes from non-college sources can be substituted for all or part of the educational requirements.

Likewise, the proposal encourages employers to treat all of the various medical technicians, from respiratory therapists and physical therapists to physician assistants and radiology technicians as exempt professionals even if they do not have four-year college degrees in their professional field. The proposed rule explicitly allows physician assistants with 2,000 hours of patient care experience and one year of professional course work to be exempted as professionals.

Finally, the Department has claimed that even highly compensated "teamsters," autoworkers, plumbers, carpenters, and various other construction workers "will maintain their entitlement to overtime" because their work is not office or non-manual work. Some members of these trades and occupations do, however, perform office or non-manual work during at least part of their workday or workweek. A tool-and-die maker who designs and draws up plans for a new tool, for example, performs non-manual work. The proposal does not set any minimum percentage of time that must be spent doing non-manual work to be subject to exemption and loss of overtime pay under the highly compensated test.

Most of the public's attention — and Congress' as well, has focused on how the rule will eliminate overtime protection for nurses, firefighters, and police officers. Most of its impact, however, will hit office workers in the insurance industry, the financial industry, the pharmaceutical industry, and other industries that don't catch the public imagination. To give you an idea of the scope of these sweeping changes, I have attached a partial listing of the soon-to-be exempt occupations identified by employers in comments submitted to the Department after the proposal was issued. We excerpted this list from just a few of the thousands of comments submitted; the ultimate impact will be much broader.

Because the Department's regulatory impact analysis is flawed in so many ways, its numbers have no credibility. EPI's study demonstrates that the paychecks and work hours of millions of workers are at stake in this rulemaking. If the Department wanted to preserve the current law's overtime protections, it would have to withdraw this rule and rewrite it. The Department should eliminate loopholes and clarify the rules in ways that preserve or expand overtime protection, rather than weaken it. There is no reason for workers to sacrifice their right to one of this country's bedrock entitlements.

The Harkin amendment, which permits changes in the rule to guarantee additional overtime protection for low-income workers, while prohibiting changes that would eliminate protection provided by current law, is clearly the best answer for America's working men and women.