

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered within the hourglass. The text is overlaid on the hourglass.

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*The White Collar Exemptions to Overtime Pay Under  
Current and Proposed Regulations: An Economic Analysis*

Gerald Mayer, Domestic Social Policy Division

Updated April 8, 2004

**Abstract.** This report is in four parts. The first section describes the policy objectives of requiring employers to pay time-and-a-half for overtime. Next, the report provides an economic framework for analyzing overtime pay and the white-collar exemptions. The report then summarizes both the current and proposed regulations that administer the white-collar exemptions. Finally, using selected demographic, social, and labor market characteristics, the report compares exempt and nonexempt employees under current regulations with employees who may become exempt or nonexempt under certain changes proposed in the revised regulations.

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## **The “White-Collar” Exemptions to Overtime Pay Under Current and Proposed Regulations: An Economic Analysis**

**April 8, 2004**

Gerald Mayer  
Economic Analyst  
Domestic Social Policy Division

<http://wikileaks.org/wiki/CRS-RL32349>

# The “White-Collar” Exemptions to Overtime Pay Under Current and Proposed Regulations: An Economic Analysis

## Summary

The Fair Labor Standards Act of 1938 (FLSA) requires employers to pay time-and-a-half to nonexempt employees who work overtime. The main policy objectives of requiring employers to pay time-and-a-half for overtime are to reduce involuntary unemployment and lessen overwork.

Employers are not required to pay overtime to bona fide executive, administrative, and professional employees. The Department of Labor (DOL) has proposed new regulations to administer the white-collar exemptions. As of April 8, 2004, the regulations are under review by the Office of Management and Budget (OMB).

Under current regulations, to be classified as a white-collar worker an employee must meet each of three tests: a salary basis test, a salary level test, and a job duties test. The proposed regulations would make changes to each of these tests. Among the changes, the proposed regulations would raise the minimum weekly salary level tests from either \$155, \$170, or \$250 to \$425. An exemption would be allowed for “learned professionals” who acquire advanced knowledge through a combination of work experience and education.

Estimating the potential effects of the proposed regulations is complicated by several factors. It is difficult to estimate the number of exempt and nonexempt workers using available survey data, many of the proposed changes are open to different interpretations, and the immediate impact of the changes may differ from the long-term impact.

According to estimates for 2002 by the Congressional Research Service (CRS), approximately 1.0 to 1.1 million employed full-time wage and salary executive, administrative, and professional employees earned more than the current salary test levels but less than \$425 a week. If these employees are currently exempt they would be nonexempt under the proposed regulations. An estimated 1.0 million employed full-time learned professionals with six or more years of work experience had at least a high school education but less than a bachelor’s degree. If these employees are currently nonexempt they may be exempt under the proposed regulations. Finally, if the proposed changes create incentives that do not exist under current regulations, employers may convert some nonexempt hourly white-collar workers to exempt salaried workers. In 2002, an estimated 8.4 million employed full-time white-collar workers were paid by the hour.

A CRS analysis of CPS data for 2001 and 2002 suggests that cyclical changes in the levels of employment among lower wage workers who may have been nonexempt (instead of exempt) and learned professionals who may have been exempt (instead of nonexempt) under the proposed regulations were consistent with the policy objective of reducing involuntary unemployment during an economic downturn. The report may be updated as issues warrant.

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# The “White-Collar” Exemptions to Overtime Pay Under Current and Proposed Regulations: An Economic Analysis

## Introduction

The Fair Labor Standards Act of 1938 (FLSA, P.L. 75-718) requires employers to pay time-and-a-half to employees who work over 40 hours a week at a given job. The FLSA includes various exemptions to this requirement. The largest group of workers exempt from overtime pay are bona fide executive, administrative, and professional employees. The Department of Labor (DOL) has proposed new regulations that administer the white-collar exemptions to the FLSA.<sup>1,2</sup> As of April 2, 2004, the regulations are being reviewed by the Office of Management and Budget (OMB). An issue before Congress is whether, and how, to respond to changes in current regulations.<sup>3</sup>

The main policy objectives of requiring employers to pay time-and-a-half for overtime are to reduce involuntary unemployment and lessen overwork. The proposed regulations, if issued as final regulations, may redefine some exempt employees as nonexempt and some nonexempt employees as exempt.<sup>4</sup> The purpose of this report is to examine whether certain changes in the proposed regulations are consistent with these objectives.

The report is in four parts. The first section describes the policy objectives of requiring employers to pay time-and-a-half for overtime. Next, the report provides an economic framework for analyzing overtime pay and the white-collar exemptions. The report then summarizes both the current and proposed regulations that administer the white-collar exemptions. Finally, using selected demographic, social, and labor market characteristics, the report compares exempt and nonexempt employees under

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<sup>1</sup> U.S. Department of Labor, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, *Federal Register*, vol. 68, no. 61, Mar. 31, 2003, pp. 15560-15597. (Hereafter cited as U.S. Department of Labor, *Defining and Delimiting Exemptions for Executive, Administrative, and Professional Employees*.)

<sup>2</sup> Unless stated otherwise, in this report the term “white-collar workers” is used to refer to executive, administrative, and professional employees.

<sup>3</sup> For a description of the evolution of the white-collar exemptions, see CRS Report RL32088, *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13 (a)(1)*, by William G. Whittaker.

<sup>4</sup> “Nonexempt” employees are workers who are eligible for time-and-a-half for overtime. “Exempt” employees are not eligible for time-and-a-half.

current regulations with employees who may become exempt or nonexempt under certain changes proposed in the revised regulations.

## Legislation in the 108th Congress

In the first session of the 108<sup>th</sup> Congress, legislation was introduced to change or postpone final implementation of DOL's proposed overtime regulations. H.R. 2665, introduced by Representative Peter King, and S. 1485, introduced by Senator Edward Kennedy, would amend the FLSA to prevent DOL from implementing new regulations that would exempt from overtime any employee who is not exempt under current regulations. An amendment introduced by Representative David Obey to the FY2004 appropriations bill for DOL (H.R. 2660) would have prevented DOL from using FY2004 funds to implement regulations that would exempt from overtime any employee who is not exempt under current regulations. The Obey amendment was defeated by a vote of 213 to 210. In the Senate, a similar amendment, sponsored by Senator Tom Harkin, was approved by a vote of 54 to 45. The House later approved, by a vote of 221 to 203, a motion instructing House members to the conference committee on H.R. 2660 to accept the Senate amendment. The Consolidated Appropriations Act of 2004 (H.R. 2673, P.L. 108-199), an omnibus appropriations bill that included FY2004 funding for DOL, did not contain the Senate overtime amendment. S. 1611, introduced by Senator Arlen Specter, would establish a commission to study and make recommendations to modernize the overtime provisions of the FLSA.<sup>5</sup>

In the second session of the 108th Congress an amendment offered by Senator Tom Harkin to S. 1637 (a bill to amend the Internal Revenue Code to comply with World Trade Organization rulings on tax benefits for U.S. exports) would amend the FLSA to prevent DOL from implementing new regulations that would exempt from overtime any employee who is not exempt under current regulations. Two votes on a cloture motion to limit debate on S. 1637 have not received the necessary 60 votes, and no vote has been taken on the Harken amendment to S. 1637.<sup>6</sup> Congress may also use the Congressional Review Act to prevent final regulations from taking effect.<sup>7</sup>

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<sup>5</sup> A hearing on the proposed regulations was held in the Senate on July 31, 2003. U.S. Congress, Senate Committee on Appropriations, Subcommittee on Labor, Health and Human Services, and Education, *Proposed Rule on Overtime Pay*, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., July 31 2003, S. Hrg. 108-233 (Washington: GPO, 2004). A second hearing was held by the same subcommittee on Jan. 20, 2004. U.S. Congress, Senate Committee on Appropriations, Subcommittee on Labor, Health and Human Services, and Education, *Department of Labor's Proposed Rule on Overtime Pay*, 108<sup>th</sup> Cong., 2<sup>nd</sup> sess., Jan. 20, 2004, S. Hrg. 108-394 (Washington: GPO, 2004).

<sup>6</sup> Jumpstart Our Business Strength (JOBS) Act, *Congressional Record*, vol. 150, Mar. 22, 2004, p. S2852. Bureau of National Affairs, "Senate Welfare Reauthorization Bill Stalls Over Democrats' Minimum Wage Proposal," *Daily Labor Report*, no. 63, Apr. 2, 2004, p. A-3. Bureau of National Affairs, "Senate Democrats Again Block Tax Bill, Insist on Overtime, Unemployment Votes," *Daily Labor Report*, no. 67, Apr. 8, 2004, p. A-14.

<sup>7</sup> For a description of procedures under the Congressional Review Act, see CRS Report (continued...)

## Policy Objectives of Overtime Pay

Section 7(a) of the FLSA requires employers to pay time-and-a-half to nonexempt employees who work overtime. Employers must pay nonexempt employees one-and-a-half-times their regular rate of pay for hours worked in excess of 40 hours a week at a given job. The regular rate of pay includes all payments for employment, except for paid vacation and holidays, contributions to a health insurance or retirement plan, income from stock option plans, and discretionary bonuses.<sup>8</sup> The time-and-a-half requirement in federal law does not apply to hours worked in excess of a given number per day. The FLSA does not prevent employers from paying more than time-and-a-half for overtime or from paying exempt employees a premium wage for overtime.<sup>9</sup>

Section 13(a)(1) of the FLSA exempts bona fide executive, administrative, and professional workers, as well as outside sales workers, from overtime coverage. It also gives the Secretary of Labor the authority to administer the exemptions.<sup>10</sup>

Requiring employers to pay time-and-a-half for overtime is intended to achieve two main policy objectives. First, time-and-a-half is intended to reduce involuntary unemployment. The FLSA was signed into law in June 1938. During the 1930s, the United States was in the midst of a prolonged economic depression. In 1929, the civilian unemployment rate was 3.2%. It increased to 24.9% in 1933 and did not fall below 10% until 1941.<sup>11</sup> It was argued that a penalty for overtime hours would shorten the workweek and increase employment. The second policy objective of requiring time-and-a-half for overtime is to reduce overwork. During debate over the FLSA it was argued that some employees worked overly long hours, which was harmful to individual health and public safety.<sup>12</sup> President Franklin D. Roosevelt said that the FLSA was needed “to conserve our primary resources of manpower.”<sup>13</sup>

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<sup>7</sup> (...continued)

RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth.

<sup>8</sup> Commerce Clearing House (CCH), *Labor Law Reporter: Wages Hours*, Chicago, CCH, 2002, pp. 39221-39222. For a discussion of the exemption of stock option plans from the regular rate of pay, see CRS Report RL30542, *Stock Options and Overtime Pay Calculation Under the Fair Labor Standards Act*, by William G. Whittaker, pp. 1-8.

<sup>9</sup> If a state has higher overtime standards or a higher basic minimum wage, the higher standards normally apply.

<sup>10</sup> Title 29, *Code of Federal Regulations*, Chapter 5, Part 541. (Hereafter cited as 29 *CFR* 541.)

<sup>11</sup> Ronald G. Ehrenberg and Robert S. Smith, *Modern Labor Economics: Theory and Public Policy*, 7th ed., Reading, Mass., Addison-Wesley, 2000, p. 30. (Hereafter cited as Ehrenberg and Smith, *Modern Labor Economics*.)

<sup>12</sup> Jonathan Grossman, “Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage,” *Monthly Labor Review*, vol. 101, June 1978, p. 25.

<sup>13</sup> Willis J. Nordlund, “A Brief History of the Fair Labor Standards Act,” *Labor Law* (continued...)

Opponents argued that the act amounted to government planning and would increase, not reduce, unemployment.

## Economic Framework for Analysis

Economics provides a framework for analyzing the policy objectives of overtime pay and the white-collar exemptions. According to standard economic theory, governments may intervene in labor markets for a number of reasons. These reasons include policies to reduce involuntary unemployment and to improve competition.<sup>14</sup> In addition, governments sometimes require certain kinds of behavior that policymakers believe may improve individual or public welfare. These requirements are called “merit goods.”<sup>15</sup>

### Involuntary Unemployment

To many economists, involuntary unemployment is one of the most visible signs that a market economy is not functioning properly.<sup>16</sup> Involuntary unemployment occurs when there are qualified individuals who cannot find work at prevailing wages.<sup>17</sup> Involuntary unemployment that is due to inadequate demand — for consumption goods, investment goods, or both — is generally associated with an economic slowdown or recession.

As a means of reducing involuntary unemployment during an economic downturn, time-and-a-half for overtime is intended as an incentive for employers to reduce overtime hours before laying off workers.<sup>18</sup> When unemployment rises, it

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<sup>13</sup> (...continued)

*Journal*, vol. 39, Nov. 1988, p. 719. (Hereafter cited as Nordlund, *A Brief History of the Fair Labor Standards Act*.)

<sup>14</sup> Governments may also intervene in private markets to produce “public” goods (e.g., national defense), improve the distribution of earnings or income, or correct instances where the market price of a good does not fully reflect its social costs or benefits (called, respectively, negative and positive “externalities”).

<sup>15</sup> An example of a “merit good” is the requirement that drivers wear seatbelts.

<sup>16</sup> Joseph E. Stiglitz, *Economics of the Public Sector*, 3rd ed., New York, W.W. Norton & Co., 2000, p. 85. (Hereafter cited as Stiglitz, *Economics of the Public Sector*.)

<sup>17</sup> Paul A. Samuelson and William D. Nordhaus, *Macroeconomics*, 16th ed., New York, McGraw-Hill, 1992, pp. 260-261.

<sup>18</sup> A penalty for overtime hours may increase the number of persons employed but may reduce the total number of hours worked. A penalty for overtime hours raises the average cost per hour worked. (For persons who work overtime, a penalty raises the average hourly wage. If the penalty reduces overtime, fixed costs — for example, for employer-paid health insurance — are spread over fewer hours.) The higher average cost per hour may cause employers to substitute capital goods for hours worked (reducing the total number of hours worked) and to substitute additional workers for overtime hours (increasing the number of persons employed). Ehrenberg and Smith, *Modern Labor Economics*, p. 152. Daniel S. (continued...)



generally increases more for less skilled than for more skilled workers.<sup>19,20</sup> One reason for this difference is that labor costs consist of both *variable* and *fixed* costs. Labor is sometimes called a quasi-fixed factor of production. Fixed labor costs vary with the number of workers employed, while variable costs vary with the number of hours employees work. Variable costs consist mainly of wages. Fixed costs include fringe benefits (e.g., health insurance) as well as hiring and training costs.<sup>21</sup>

Hiring and training costs generally increase with skill level. Thus, the costs of hiring and training executive and professional employees are generally greater than the costs of hiring and training workers with less responsibility.<sup>22</sup> Because of the greater investment employers often make in skilled workers, in an economic downturn employers are more likely to lay off less skilled workers.<sup>23</sup> But, since overtime costs more than straight-time, requiring time-and-a-half for overtime for less skilled workers may lessen the amount of involuntary unemployment during an economic downturn.<sup>24,25</sup>

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<sup>18</sup> (...continued)

Hamermesh, *Labor Demand*, Princeton, NJ, Princeton University Press, 1993, pp. 174-177. (Hereafter cited as Hamermesh, *Labor Demand*.)

<sup>19</sup> Bruce E. Kaufman, *The Economics of Labor Markets*, 4th ed., Fort Worth, Dryden Press, 1994, pp. 192-193. Robert Topel, "What Have We Learned from Empirical Studies of Unemployment and Turnover?" *American Economic Review*, vol. 83, May 1993, p. 112.

<sup>20</sup> One study concluded that professionals experience less unemployment than persons in other occupations. Professionals were defined as professional, technical, and related workers as well as sales and clerical workers. Unemployment among professionals was compared to unemployment among service workers, craftsmen, and laborers. Mark Dynarski and Steven M. Sheffrin, "New Evidence on the Cyclical Behavior of Unemployment Durations," in Kevin Lang and Jonathan Leonard, eds., *Unemployment and the Structure of Labor Markets*, New York, Basil Blackwell, 1987, pp. 167-168.

<sup>21</sup> Variable labor costs also include payroll taxes that vary with earnings. Walter Y. Oi, "Labor as a Quasi-Fixed Factor," *Journal of Political Economy*, vol. 70, Dec. 1962, pp. 538-539. Hamermesh, *Labor Demand*, pp. 44-48. Lloyd G. Reynolds, Stanley H. Masters, and Colletta H. Moser, *Labor Economics and Labor Relations*, 11th ed., Englewood Cliffs, N.J., Prentice-Hall, 1998, pp. 94-95. (Hereafter cited as Reynolds et al., *Labor Economics and Labor Relations*.)

<sup>22</sup> Randall K. Filer, Daniel S. Hamermesh, and Albert E. Rees, *The Economics of Work and Pay*, 6th ed., New York, Harper Collins, 1996, pp. 195-197. (Hereafter cited as Filer et al., *The Economics of Work and Pay*.)

<sup>23</sup> Gary S. Becker, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education*, 2nd ed., New York, Columbia University Press, 1975, pp. 32-33.

<sup>24</sup> Fiscal and monetary policy are macroeconomic options for reducing involuntary unemployment during an economic slowdown or recession. In a downturn, reducing wages may be an alternative to layoffs.

<sup>25</sup> The employment effects of a penalty for overtime may be diminished if straight-time wages are adjusted downward, so that employees' total weekly pay is unchanged. Some evidence suggests that, after the FLSA was enacted in 1938, some employers reduced the regular hourly rate of pay so that the payment of overtime did not change their total wage (continued...)

## Overwork

Overtime may be voluntary or involuntary. Overtime is voluntary if workers have the option to accept or decline employer requests to work overtime. Overtime is involuntary if workers do not have the option to accept or decline employer requests to work overtime. The difference will generally depend on the degree to which labor markets fit the model of perfect competition. For example, one of the characteristics of the model of a competitive labor market is that there are many employers and many workers. If a labor market does not have many other employers offering similar work at similar wages, employees may have few alternative employment options and may work overtime when they would rather not.

**Model of Perfect Competition.** According to standard economic theory, competitive markets generally result in the most efficient allocation of resources, where resources consist of individuals with different skills, capital goods (e.g., computers, machinery, and buildings), and natural resources. If labor markets fit the model of perfect competition, workers are paid according to the value of their contribution to output. In competitive labor markets, wages include compensation for unfavorable working conditions. The latter theory, called the “theory of compensating wage differentials,” recognizes that individuals differ in their preferences or tolerance for different working conditions — such as the number of hours worked (including overtime), health and safety conditions, vacation time, and job security.<sup>26</sup>

If labor markets do not fit the model of perfect competition, overtime may be involuntary. In imperfect labor markets, requiring employers to pay time-and-a-half for overtime may either discourage employers from requesting, or requiring, overtime or ensure that workers who work overtime are paid a premium wage for overtime hours.

Reducing involuntary overtime may be a difficult policy to implement. First, identifying the appropriate labor market may be difficult. Labor markets can be local (e.g., for unskilled labor), regional, national, or even international (e.g., for top executives). Second, labor market competitiveness is difficult to measure.<sup>27</sup> Labor

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<sup>25</sup> (...continued)

bill. (U.S. Congress, House Committee on Ways and Means, *The National Recovery Administration: Message from the President of the United States*, House Document 158, 75th Cong., 1st sess. (Washington: GPO, 1937), p. 90; Nordlund, *A Brief History of the Fair Labor Standards Act*, p. 723.) A more recent study concluded that straight-time wages partially, but do not completely, adjust in response to premium pay for overtime hours. Stephen Trejo, “The Effects of Overtime Pay Regulation on Worker Compensation,” *American Economic Review*, vol. 81, Sept. 1991, pp. 735-736.

<sup>26</sup> Filer et al., *The Economics of Work and Pay*, pp 376-390. Ehrenberg and Smith, *Modern Labor Economics*, pp. 251-259.

<sup>27</sup> Requiring time-and-a-half for overtime may create an incentive for employees to work more hours. Some employees may, therefore, work overtime although they would otherwise prefer a shorter workweek. Some evidence suggests that workers want to work more (continued...)

markets may also change because of economic, technological, or policy changes. In addition, requiring time-and-a-half for overtime is intended to reduce involuntary unemployment and lessen overwork. In one case, time-and-a-half is required for less skilled workers who may be more likely than skilled workers to lose their jobs during an economic downturn. In the other case, time-and-a-half is required for workers in imperfect labor markets. The two groups of workers may not be the same. In an economic downswing, requiring time-and-a-half for less skilled workers may reduce involuntary unemployment. But requiring time-and-a-half to lessen involuntary overtime depends on the competitiveness of the relevant labor markets.

**Merit Goods.** Finally, some policymakers may believe that employees who voluntarily work overtime are not acting in their best interests or in the best interests of others. Policymakers who believe that a 40-hour work week is a merit good may favor limits on the number of hours worked or may favor incentives — such as time-and-a-half for overtime — that discourage employers from offering overtime. The general criticism of this view is that, in competitive markets, individuals are in a better position than governments to judge what is in their best interests.<sup>28</sup>

## Current and Proposed Regulations

The FLSA includes several exceptions and exemptions to the requirement that employers pay workers time-and-a-half for overtime. White-collar workers are the largest group of employees exempt from time-and-a-half for overtime. This section provides a brief summary of current and proposed regulations that administer the white-collar exemptions to the FLSA. (The tables in **Appendix A** provide more detail on the current and proposed regulations.)

Under current regulations, executive, administrative, and professional workers are generally exempt from time-and-a-half for overtime if they meet each of three tests: a salary basis test, a salary level test, and a job duties test.<sup>29</sup> Under the salary basis test, an employee must be paid a salary, and not an hourly wage. Salaried workers are employees who receive their full salary for any workweek in which they perform any work without regard to the number of days or hours worked.<sup>30</sup> Under

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<sup>27</sup> (...continued)

overtime than the amount that is offered by employers. Overtime hours may, therefore, be rationed, either by seniority or by rotating the opportunities for overtime among workers. Reynolds et al., *Labor Economics and Labor Relations*, pp. 62-63, 470.

<sup>28</sup> The view that governments may know what is in the best interests of individuals has been called paternalism. Stiglitz, *Economics of the Public Sector*, p. 87.

<sup>29</sup> According to DOL, "... the application of most exemptions [is] determined on a workweek basis." U.S. Department of Labor, Wage and Hour Division, *Handy Reference Guide to the Fair Labor Standards Act (FLSA)*. Available on the internet at [<http://www.dol.gov/esa/regs/compliance/whd/hrg.htm>].

<sup>30</sup> Executives must be paid on a salary basis; administrative and professional employees may be paid on a salary or fee basis. The salary basis test does not apply to executive, (continued...)

the job duties test, an employee's "primary duties" must involve, executive, administrative, or professional activities. Depending on an employee's salary, an employee must meet one of two duties tests, commonly called the "short test" and the "long test." The long test has more requirements than the short test. The long test applies to executive and administrative employees with weekly salaries of at least \$155 but less than \$250 and to professional employees with weekly salaries of at least \$170 but less than \$250. The short duties test applies to executive, administrative, and professional employees with weekly salaries of \$250 or more.<sup>31</sup> White-collar workers who are paid less than the minimum salary levels are nonexempt, regardless of their job duties. The duties tests have remained essentially unchanged since 1949. The salary levels in the short and long duties tests were last raised in 1975.<sup>32</sup>

A salary requirement does not apply to doctors, lawyers, and teachers. Regulations do not include a specific salary level test for academic administrative personnel. Under Section 13(a)(17) of the FLSA, certain employees in computer-related occupations are exempt from overtime pay if they are paid by the hour and their wage is \$27.63 or more an hour.<sup>33</sup>

The FLSA also exempts employers from paying overtime to outside sales workers. An outside sales worker is a salesperson who regularly works away from his employer's place of business and who does not devote more than 20% of work hours to work performed by nonexempt employees of the employer. Outside sales workers are not subject to a salary test.<sup>34</sup>

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<sup>30</sup> (...continued)

administrative, and professional employees in the motion picture producing industry. White-collar workers in the motion picture producing industry are exempt if they meet the appropriate job duties test and are paid a weekly base rate of at least \$250. Thus, for example, white-collar workers in this industry who meet the appropriate duties test are exempt if they are paid a daily rate that results in weekly pay of \$250 (calculated on the basis of a six-day workweek). (29 *CFR* 541.601.) The proposed regulations would raise this weekly base rate to \$650. (U.S. Department of Labor, *Defining and Delimiting Exemptions for Executive, Administrative, and Professional Employees*, p. 15597.)

<sup>31</sup> 29 *CFR* 541. A person working full-time, year-round at a weekly salary of \$155 earns \$8,060 annually; a person with a weekly salary of \$170 earns \$8,840 annually; and a person earning \$250 a week earns \$13,000 annually. For comparison purposes, an employee earning the federal basic minimum wage of \$5.15 an hour and working 40 hours a week year-round earns \$206 a week and \$10,712 annually.

<sup>32</sup> DOL proposed increases in the salary levels in 1981. By order of President Ronald Reagan, the increases were postponed indefinitely. U.S. General Accounting Office (GAO), *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place*, Report No. GAO/HEHS-99-164, Washington, GAO, Sept. 1999, p. 15.

<sup>33</sup> A person earning \$27.63 an hour and working 40 hours a week year-round earns \$57,470 annually. For a discussion of the origins of the statutory exemption for computer services workers, see CRS Report RL30537, *Computer Services Personnel: Overtime Pay Under the Fair Labor Standards Act*, by William G. Whittaker.

<sup>34</sup> 29 *CFR* 541.5.

The regulations proposed by the U.S. Department of Labor would make changes to each of the three tests.

- The proposed regulations would replace the separate long and short duties test terminology with a “standard” duties test and a test for “highly compensated” employees.
- The current minimum weekly salary levels for executive and administrative employees (i.e., \$155) and for professional employees (i.e., \$170) would be replaced with a single salary test of \$425.<sup>35</sup>
- “Highly compensated employees” would be exempt from overtime if they meet at least one of the standard duties tests. A highly compensated employee would be an employee who is paid at least \$65,000 annually (\$1,250 weekly) in total cash compensation.
- Under current regulations, executive, administrative, and professional employees, as well as outside sales workers, are not exempt from overtime if they spend more than 20% of their work hours on nonexempt activities. The proposed regulations would eliminate this requirement.
- The discretion and independent judgement tests found in the current job duties tests would be eliminated.<sup>36</sup> For administrative employees, the test would be replaced with a requirement that employees hold a “position of responsibility.”
- A new provision would be added that may exempt supervisors in retail establishments who spend a majority of their time on nonexempt work.
- An exemption would be allowed for “learned professionals” who acquire advanced knowledge through a combination of work experience and education. The learned professions include doctors, lawyers, teachers, engineers, accountants, chemists, registered nurses, and others.
- The proposed regulations would modify the “pay docking” rules under the current salary basis test. Employers would be allowed to suspend exempt employees without pay for disciplinary reasons for periods of a full day or more. The circumstances under which an improper pay deduction may cause an entire group of employees to become nonexempt would be changed: The exemption would be lost only if there is a pattern of improper deductions and only for

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<sup>35</sup> A person working full-time, year-round at a weekly salary of \$425 earns \$22,100 annually. If the salary level tests were adjusted to inflation (using the Consumer Price Index for Urban Consumers, or CPI-U), in 2002, the \$155 and \$170 salary levels under the long test and the \$250 amount under the short test would have been \$518, \$568, and \$836, respectively.

<sup>36</sup> Under current regulations, an executive employee is an employee who “customarily and regularly exercises discretionary powers” (under the long test), an administrative employee is an employee who “customarily and regularly exercises discretion and independent judgement” (under the long test) or whose work requires the “exercise of discretion and independent judgement” (under the short test), and a professional employee is an employee whose work requires the “consistent exercise of discretion and judgement” (under both the long and short tests).

employees in the same job classification and working for the same manager responsible for the improper deductions.

## Empirical Analysis

This section uses the economic framework described above to examine whether certain changes in the proposed regulations are consistent with the policy objectives of overtime pay and the white-collar exemptions. The section begins with a discussion of the difficulties in estimating the effects of the proposed regulations. Next, estimates are provided of the number of employees who may be affected by two of the changes included in the proposed regulations: the increase in the minimum salary level test and the change in the job duties tests that would allow an exemption for learned professionals who acquire advanced knowledge through a combination of work experience and education. The analysis categorizes employees as exempt or nonexempt based on their occupation, industry, and other information. Therefore, employees are described as *potentially* exempt or nonexempt. The section then compares recent cyclical changes in the levels of employment among exempt and nonexempt workers under both current and proposed regulations. The purpose of these comparisons is to examine whether changes in the levels of employment of employees who may change status under the proposed regulations are similar to the changes in the levels of employment of nonexempt and exempt employees under current regulations. Finally, using selected demographic, social, and labor market characteristics, employees who are exempt or nonexempt under current regulations are compared to employees who may have become exempt or nonexempt if the proposed regulations had been in effect in 2002. It is not possible here to identify and measure the competitiveness of the labor markets of exempt and nonexempt workers. Thus, the purpose of these comparisons is to examine whether employees who may become eligible or ineligible for overtime under the proposed regulations are similar to nonexempt or exempt employees under current regulations.

The analysis examines employed full-time wage and salary workers, using data from the monthly Current Population Survey (CPS). **Appendix B** provides a description of the methodology and assumptions used in this section of the report.

### Estimating the Number of Exempt and Nonexempt Employees

Estimating the potential effects of the proposed regulations is complicated by several factors. First, it is difficult to make estimates from available survey data. Second, many of the proposed changes are open to differences in interpretation. If the proposed regulations are issued as final regulations, the impact would depend, in part, on how the regulations are enforced by the Wage and Hour Division of DOL and how they are interpreted by the courts.<sup>37</sup> Third, the immediate impact of the regulations may differ from the long-term impact. This report considers estimates

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<sup>37</sup> For a discussion of issues of interpretation of the proposed regulations, see CRS Report RL31995, *The Fair Labor Standards Act: Exemption of the “Executive, Administrative and Professional Employees” Under Section 13 (a)(1)*, by William G. Whittaker, pp. 9-24.

prepared by DOL, the Economic Policy Institute (EPI), and the Congressional Research Service (CRS).

**Data Limitations.** Data limitations make it difficult to estimate the number of exempt and nonexempt workers. DOL, EPI, and CRS estimates of the potential effects of the proposed regulations rely, largely or in part, on data from the monthly Current Population Survey (CPS). The CPS is a monthly household survey conducted by the U.S. Bureau of the Census for BLS. The survey collects a wide range of labor market information and is the source of data for the monthly unemployment rate. But the CPS does not ask individuals if they are covered by the overtime provisions of the FLSA. Therefore, researchers use information on occupation, industry, earnings, education, or other variables to infer who may be exempt or nonexempt from overtime. These inferences can involve significant, often subjective, assumptions.

**Interpretation.** Some of the changes that would be made if the proposed regulations are issued as final regulations are open to different interpretations. This section examines three such changes.

First, under the proposed regulations, two job duties tests would be eliminated: the discretion and independent judgement tests (see footnote 36) and the 20% limits on nonexempt work. In a 1999 report, the General Accounting Office (GAO) stated that, for both employers and DOL compliance investigators, the discretion and independent judgement tests are difficult to administer. On the other hand, GAO stated that the compliance cases they reviewed “included a number of instances where the standard of independent judgement and discretion was key to determining the employee’s [exempt or nonexempt] status.”<sup>38</sup> In addition, in the case of administrative employees, the discretion and independent judgement test would be replaced by a requirement that an employee hold a “position of responsibility.” It is not clear whether an administrative employee who holds a position of responsibility would be more or less likely to be exempt than an employee who exercises discretion and independent judgement.

A second example of how it may be difficult to interpret the proposed regulations involves the concept of “primary duty,” which appears in the job duties tests under both current and proposed regulations. Current regulations state that:

The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50%, of the employee’s time.... Time alone, however, is not the sole test, and in situations where the employee does not spend

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<sup>38</sup> The GAO discussion refers to the discretion and independent judgement tests for administrative and professional employees. GAO, *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place*, pp. 23-24.

over 50% of his time in managerial duties, he might nevertheless have management as his primary duty....<sup>39</sup>

The proposed regulations state that:

The term ‘primary duty’ means the principal, main, major or most important duty that the employee performs.... The term ‘primary duty’ does not require that employees spend over fifty percent of their time performing exempt work.... However, the amount of time spent performing exempt work can be a useful guide, and employees who spend over fifty percent of the time performing exempt work will be considered to have a primary duty of performing exempt work.<sup>40</sup>

Whether, in practice, the revised definition would differ from the current definition is not certain.<sup>41</sup>

Finally, the proposed regulations make changes in the definition of learned professionals.<sup>42</sup> Current regulations state that:

The learned professions are ... those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education.... [G]enerally speaking, it must be knowledge which cannot be attained at the high school level.... The typical symbol of professional training ... is, of course, the appropriate academic degree....<sup>43</sup>

The proposed regulations state that the learned professions require:

... [K]nowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.... The phrase ‘knowledge of an advanced type’ means knowledge that cannot be attained at the high school level.

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<sup>39</sup> 29 *CFR* 541.103.

<sup>40</sup> U.S. Department of Labor, *Defining and Delimiting Exemptions for Executive, Administrative, and Professional Employees*, p. 15595.

<sup>41</sup> The 1999 GAO report cites two 1982 court decisions, involving the Burger King Corporation, that underscore how the 50% rule of thumb in current regulations is not a hard and fast rule. According to GAO, the court decisions found that the 50% rule “was only one factor to consider when determining employees’ primary duty, and that their managerial duties could be carried out at the same time they were performing manual work. Thus, assistant managers could be exempt executives even if they spent most of the day cooking hamburgers — as long as they were in charge of the restaurants during their shifts.” GAO, *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place*, p. 29.

<sup>42</sup> For a discussion of the definition of professional employees, see CRS Report RL32323, *The Fair Labor Standards Act: Defining “Professional” for Overtime Pay Purposes Under Section 13(a)(1)*, by William G. Whittaker.

<sup>43</sup> 29 *CFR* 541.301.



The proposed regulations go on to say that:

The phrase ‘customarily acquired by a prolonged course of specialized intellectual instruction’ generally restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession.... However, the word ‘customarily’ means that the exemption is also available to employees in such professions who have substantially the same knowledge level as the degreed employees, but who attained such knowledge through a combination of work experience, training in the armed forces, attending a technical school, attending a community college or other intellectual instruction.<sup>44</sup>

In the preamble to the proposed regulations, DOL states that “Although some flexibility to focus on the workers’ knowledge exists in the current regulation, it is very limited and rarely used.”<sup>45</sup> Thus, it appears that the intent of the combined education and work experience test for learned professions is to clarify that training and work experience can be substituted for formal education.

**Immediate Versus Long-Term Effects.** Finally, the long-term impact of the proposed regulations may be different from the short-term effects. For example, because of increases in wages (due to inflation and higher labor productivity), the relative number of white-collar employees who are nonexempt because they earn less than the current salary level tests has declined over time. Because the salary level tests in the proposed regulations are not indexed to inflation, the relative number of white-collar workers who may be nonexempt because they earn less than \$425 a week can also be expected to decline over time. On the other hand, the occupational and industrial composition of the economy may change, resulting in an increase in the relative number of white-collar employees.<sup>46</sup> Finally, the proposed regulations may affect employer or employee behavior. Some hourly workers may be converted to salaried workers, or vice versa. Similarly, the job duties of some employees may be changed, in order to more clearly distinguish between exempt and nonexempt employees.

## **DOL, EPI, and CRS Estimates of the Short-Term Effects of the Proposed Regulations**

Despite the difficulties in estimating the number of employees who may be directly affected by the proposed regulations, data from the CPS have been used to

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<sup>44</sup> U.S. Department of Labor, *Defining and Delimiting Exemptions for Executive, Administrative, and Professional Employees*, p. 15589.

<sup>45</sup> *Ibid.*, p. 15567.

<sup>46</sup> For an analysis of industrial (1939-1999) and occupational (1940-1999) changes in the U.S. economy, see Malcolm S. Cohen and Donald R. Grimes, *The “New Economy” and Its Impact on Executive, Administrative and Professional Employees*. A report prepared for the University of Tennessee under a contract with the Wage and Hour Division of DOL, Jan. 2001, Tables 2, 7, and 9. Available on the Internet at [<http://www.dol.gov/asp/programs/flsa/report-neweconomy/main.htm>].

estimate whether more or fewer employees may be exempt or nonexempt under parts of the proposed regulations.

Using 2001 CPS and other data, a study prepared for DOL estimated that, if the proposed higher salary level test of \$425 had been in effect in 2001, an additional 1.2 to 1.3 million employees who were exempt may have been nonexempt.<sup>47</sup> In addition, DOL estimated that 644,000 administrative and professional employees who are paid by the hour and work overtime may be converted to salaried workers.<sup>48</sup>

EPI has estimated that, under the proposed regulations, 2.5 million nonexempt salaried workers would become exempt. In addition, EPI has estimated that 5.5 million hourly workers earning \$425 or more a week (excluding doctors, lawyers, and most teachers) could be converted to exempt salaried workers. EPI's estimates are based on an analysis of 78 (of 257) occupations, including managerial, professional, and supervisory occupations and technical, sales, and administrative support occupations.<sup>49</sup>

According to CPS data, a large number of executive, administrative, and professional employees are paid by the hour. Presumably, if there are significant incentives under current regulations to do so, these hourly workers would be converted to salaried workers. If the proposed regulations create incentives that do not exist under current regulations, employers may convert some, or perhaps many, nonexempt hourly white-collar workers to exempt salaried workers. EPI cites several changes in the proposed regulations that it believes could create incentives for employers to convert hourly white-collar workers into salaried workers: the combined education and work experience test for learned professionals, the elimination of the discretion and independent judgement tests, the elimination of the 20% limits on nonexempt work, and changes in the definition of primary duty.<sup>50</sup>

CRS has attempted to estimate some of the potential effects of the proposed regulations. Given the difficulty in interpreting and quantifying the changes, however, only three estimates have been made: the number of white-collar employees earning between the current salary level tests and the proposed salary level of \$425, the number of learned professionals with at least a high school degree but less than a bachelor's degree, and the number of white-collar workers who report that they are paid by the hour.

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<sup>47</sup> CONSAD Research Corporation, *Economic Analysis of the Proposed and Alternative Rules for the Fair Labor Standards Act (FLSA) Regulations at 29 CFR 541*. A report prepared for DOL, CONSAD Research Corporation, Pittsburgh, PA., Feb. 10, 2003, p. 45. (This report is available from CRS or from the Wage and Hour Division of DOL.)

<sup>48</sup> U.S. Department of Labor, *Defining and Delimiting Exemptions for Executive, Administrative, and Professional Employees*, p. 15580.

<sup>49</sup> Ross Eisenbrey and Jared Bernstein, *Eliminating the Right to Overtime Pay*, Washington, Economic Policy Institute, pp. 5-11. Available on the Internet at [<http://www.epinet.org>]. EPI is a nonprofit economic research and education organization funded by foundation grants, labor unions, corporations, individuals, and others.

<sup>50</sup> *Ibid.*, p. 4.

CRS estimates indicate that, in 2002, an estimated 1.0 to 1.1 million employed full-time wage and salary executive, administrative, and professional employees earned more than the current weekly salary test levels (i.e., \$155, \$170, or \$250) but less than \$425. If they are exempt under current regulations they would be nonexempt and eligible for overtime pay under the proposed regulations. Some or many of these employees may not meet the job duties tests under current regulations and may, therefore, be nonexempt under both current and proposed regulations. The effect of the change in status would depend, in part, on the nature (i.e., competitiveness) of the labor markets involved. For employees newly entitled to overtime pay, weekly earnings may increase. But, because of the increased cost, some employers may offer or require less overtime (see footnote 18). Because of the premium for overtime, more employees may want to work overtime. Some salaried workers who work overtime may be converted to hourly workers. The hourly wage of some of these employees may leave their weekly earnings relatively unchanged (see footnote 25).

In its cost-benefit analysis, DOL assumed that six years of work experience is equivalent to a bachelor's degree. In 2002, an estimated 1.0 million full-time learned professionals with six or more years of work experience had at least a high school degree but had not earned a bachelor's or advanced degree.<sup>51</sup> Some or many of these employees may be exempt under current regulations. If not, they may become exempt and, therefore, ineligible for overtime pay under the proposed regulations.<sup>52</sup> Again, the effect of the change in status would depend on the nature of the labor markets involved. For some workers, the loss of time-and-a-half for overtime may result in lower weekly earnings. Because of the lower cost, some employers may offer or require more overtime, but because of the loss of time-and-a-half fewer workers may want to work overtime. Some learned professionals who work overtime and are paid by the hour may be converted to salaried workers. The weekly earnings of some of these employees may remain unchanged.

Finally, in 2002 an estimated 8.4 million full-time executive, administrative, and professional employees were paid by the hour.<sup>53</sup> If the proposed regulations create incentives that do not exist under current regulations, some or many of these hourly workers may be converted to salaried workers.

## Cyclical Changes in Employment

One of the objectives of requiring employers to pay time-and-a-half for overtime is to reduce involuntary unemployment. A CRS analysis of CPS data for 2001 and 2002 suggests that cyclical changes in the levels of employment among lower wage

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<sup>51</sup> Lower- and upper-bound estimates, based on six or more and eight or more years of work experience, were made of the number of learned professionals who may have been exempt in 2002 as a result of the combined education and work experience test. When rounded off, both methods resulted in an estimate of 1.0 million employees. (See **Appendix B**)

<sup>52</sup> Employees exempt from the FLSA requirement of time-and-a-half for overtime may receive premium pay for overtime under a collective bargaining agreement.

<sup>53</sup> Of the estimated 8.4 million white-collar workers who were paid by the hour in 2002, an estimated 1.2 million received overtime pay, commissions, or tips.

workers who may have been nonexempt instead of exempt and learned professionals who may have been exempt instead of nonexempt under the proposed regulations were consistent with the policy objective of reducing involuntary unemployment during an economic downturn.

During 2001 and 2002, the employment of full-time wage and salary workers reached a peak during the three-month period beginning June 2001 and fell to a low during the three-month period beginning December 2001.<sup>54,55</sup> From the three-month period beginning June 2001 to the three-month period beginning December 2001, employment among potentially nonexempt workers under current regulations fell by an estimated 3.4 million persons. On the other hand, employment among potentially exempt executive, administrative, and professional employees under current regulations increased by an estimated 94,000 persons. Under the proposed regulations, the changes in employment were similar for employees who may have become eligible or ineligible for overtime. Among employees who may have become nonexempt under the proposed regulations because of the proposed \$425 salary level test, employment fell by an estimated 65,000 persons. But employment among workers who may have become exempt because of the combined education and work experience test for learned professionals increased by an estimated 365,000 persons.<sup>56</sup> Thus, from peak to trough, changes in the levels of employment among employees who may have changed status under the proposed regulations — i.e., become nonexempt instead of exempt or exempt instead of nonexempt — were similar to the changes in employment among nonexempt and exempt employees under current regulations. An examination of a different time period or of other changes in the proposed regulations may yield different results.

An analysis of the number and kinds of jobs lost during an economic downturn may not be a good indicator of which workers should be eligible for time-and-a-half

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<sup>54</sup> The calculations are based on a three-month moving average. That is, average employment for Jan., Feb., and Mar. 2001 was compared to average employment for Feb., Mar., and Apr. 2001, and so on.

<sup>55</sup> According to the National Bureau of Economic Research (NBER), which dates the peaks and troughs of the business cycle, the last completed recession began in Mar. 2001 and ended in Nov. 2001. NBER considers real gross domestic product (GDP) as the best measure of aggregate economic activity. The trend in employment may differ from the trend in output. According to NBER, seasonally adjusted payroll employment reached a peak in Feb. 2001 and fell through July 2002. (NBER, *Business Cycle Dating Committee, National Bureau of Economic Research*, NBER, July 17, 2003. Available on the Internet at [<http://www.nber.org>].) Payroll employment consists of both part-time and full-time nonfarm wage and salary employment. The data exclude self-employed persons and military personnel. Persons who hold more than one job may be counted more than once. U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, vol. 50, Jan. 2003, pp. 218, 238.

<sup>56</sup> The 94,000 increase in employment among potentially exempt employees under current regulations and the 65,000 decrease in employment among persons who may have been nonexempt under the proposed regulations were not statistically significant. Nevertheless, under current regulations, employment among exempt workers did not fall. Under the proposed regulations, employment among workers who may have been nonexempt did not rise.

for overtime. Downturns differ in their depth and duration. Some may be relatively mild and short-lived. Others may be more severe and longer-lasting. The industries and occupations affected may also differ. For example, using a broader definition of white-collar workers than the one used in this report, some research has concluded that during the 1990-1991 recession white-collar workers experienced greater job losses relative to blue-collar workers than in previous recessions.<sup>57</sup> Finally, cyclical changes in employment may coincide with structural changes in employment. During an economic downturn, some workers may lose their jobs because of temporary layoffs; others may lose their jobs because of shifts in employment from one sector to another (e.g., a shift in employment from manufacturing to service industries).

## Characteristics of Potentially Exempt and Nonexempt Employees

The second objective of requiring time-and-a-half for overtime is to lessen overwork. As discussed above, in imperfect labor markets, requiring time-and-a-half for overtime may discourage employers from requesting overtime or provide employees with a higher rate of pay when they work more than 40 hours a week. Voluntary overtime may be discouraged for social reasons (e.g., to allow workers more time for family, education, and other matters) or to improve individual or public safety (i.e., tired workers may be a danger to themselves and others). This section does not attempt to identify or measure the competitiveness of labor markets for different workers. Rather, **Table 1** uses selected demographic, social, and labor market characteristics to compare potentially exempt and nonexempt employees under current regulations with workers who may have become exempt or nonexempt under the proposed regulations. The purpose of these comparisons is to examine whether employees who may gain or lose overtime eligibility under the proposed regulations are similar to, or different from, nonexempt or exempt employees under current regulations.<sup>58</sup>

The percentages in **Table 1** are based on estimates of the number of employees potentially exempt or nonexempt under current and proposed regulations. In 2002, there were an estimated 98 million full-time wage and salary workers (including, for the purposes of this analysis, employees of the U.S. Postal Service but not other federal employees). Under current regulations, an estimated 67 million employees

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<sup>57</sup> Jennifer M. Gardner, “The 1990-1991 Recession: How Bad Was the Labor Market?” *Monthly Labor Review*, vol. 117, June 1994, p. 9. Erica L. Groshen and Donald R. Williams, “White- and Blue-Collar Jobs in the Recent Recession and Recovery: Who’s Singing the Blues?” *Economic Review*, Federal Reserve Bank of Cleveland, vol. 28, Quarter 4, 1992, pp. 3-4, 6. In both studies, white-collar workers were defined as the sum of “managerial and professional speciality workers” and “technical, sales, and administrative workers.”

<sup>58</sup> Thus, no attempt is made to analyze whether the labor markets of workers who may gain overtime coverage are less competitive than the labor markets of exempt workers under current regulations. Similarly, no attempt is made to analyze whether the labor markets of workers who may lose overtime coverage are more competitive than the labor markets of nonexempt workers under current regulations.

were potentially nonexempt and an estimated 31 million were potentially exempt. The tables use the lower-bound estimates of the number of white-collar workers who may have been nonexempt instead of exempt or exempt instead of nonexempt if the proposed regulations had been in effect in 2002. The lower-bound estimate (i.e., 1.0 million) of the number of employees who may have been nonexempt because of the higher salary test is an estimate of the number of employees with weekly earnings of \$250 or more, but less than \$425. The lower-bound estimate (i.e., 1.0 million) of the number of learned professionals who may have been exempt because of the combined education and work experience test is an estimate of the number of learned professionals with at least a high school degree but less than a bachelor's and with eight or more years of potential work experience (see footnote 51).

### **Nonexempt Employees Under Current and Proposed Regulations.**

Column 1 of **Table 1** shows characteristics of potentially nonexempt employees under current regulations; column 2 shows characteristics of employees who may have gained eligibility for overtime in 2002 if the proposed \$425 salary level test had been in effect. Some of these employees may be eligible for overtime under current regulations.

**Table 1** shows that, in some ways, workers who may have been eligible for overtime in 2002 because of the higher salary level test were different from other nonexempt workers but, in other ways, they were much the same. In terms of age, race, and marital status, workers who may have gained eligibility for overtime were similar to other nonexempt workers.<sup>59</sup> However, by nature of the proposed change in the salary level test, employees who may have been nonexempt instead of exempt had lower weekly earnings than nonexempt workers under current regulations (i.e., they earned less than \$425 a week).<sup>60</sup> On the other hand, workers who may have become eligible for overtime had more formal education than nonexempt workers under current regulations: 32.3% had a bachelor's or advanced degree, compared to 15.1% of nonexempt workers under current regulations. Workers who may have gained overtime eligibility were more likely to be female, non-Hispanic, and nonunion. They were also more likely to be employed in retail trade; finance, real estate, and insurance; and professional services industries. (Professional services industries include hospitals, doctors offices, nursing homes, law offices, schools, and colleges and universities.)

### **Exempt Employees Under Current and Proposed Regulations.**

Column 3 of **Table 1** shows characteristics of potentially exempt employees under current regulations; column 4 shows characteristics of employees who may have lost overtime eligibility in 2002 if the combined education and work experience test for learned professionals had been in effect. Some of these employees may be ineligible for overtime under current regulations.

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<sup>59</sup> The median age was 39 for nonexempt workers under current regulations and for workers who may have been nonexempt in 2002 if the higher salary level test had been in effect.

<sup>60</sup> Unless stated otherwise, the differences discussed in the text between the percentages in columns 1 and 2 and columns 3 and 4 are significant at the 95% confidence level. See **Appendix B** for a discussion of confidence levels.

**Table 1** shows that, compared to exempt employees under current regulations, employees who may have lost overtime eligibility if the combined education and work experience test had been in effect in 2002 had less formal education than exempt workers under current regulations: although three-fourths (75.8%) had some college none had a bachelor's or advanced degree. By nature of the change in regulations, the employees who may have lost overtime eligibility were learned professionals. They had somewhat lower earnings than workers exempt under current regulations: 32.7% of workers who may have lost eligibility for overtime earned over \$1,015 a week, compared to 39.9% of other exempt workers.<sup>61</sup> Workers who may have lost overtime eligibility were more likely to be older, female, black, and non-Hispanic.<sup>62</sup> Compared to exempt workers under current regulations, they were more likely to be married, but they were also more likely to be widowed, divorced, or separated. They were more likely than currently exempt workers to be employed in professional services industries.

**Summary.** If the proposed regulations are issued as final regulations, some lower wage workers may gain eligibility for overtime as a result of the higher, \$425, salary level test. A change in status from exempt to nonexempt may raise the weekly earnings of some workers, reduce the amount of overtime, or both. Some salaried workers who work overtime may be converted to hourly workers. Some of these workers may experience little change in their weekly earnings. Because less skilled workers are more likely than skilled workers to be laid off during a recession, requiring time-and-a-half for more lower paid workers may, during an economic downturn, reduce the amount of involuntary unemployment. The effect on the overall unemployment rate may be small, however.

Some higher wage workers may lose eligibility for overtime as a result of the exemption for learned professionals who acquire advanced knowledge through a combination of education and work experience. A change in status from nonexempt to exempt may lower the weekly earnings of some workers, increase the amount of overtime, or both. Some learned professionals who work overtime and are paid by the hour may be converted to salaried workers. For some of these workers, becoming a salaried worker may have little effect on their weekly earnings. Because skilled workers are less likely to be laid off during a recession, the loss of time-and-a-half by learned professional may have a limited effect on the amount of involuntary unemployment during an economic downturn.

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<sup>61</sup> Median weekly earnings for exempt workers under current regulations were \$900, compared to \$830 for workers who may have been exempt in 2002 if the combined education and work experience test had been in effect. Median weekly earnings for nonexempt workers under current regulations were \$500.

<sup>62</sup> The median age was 41 for exempt workers under current regulations and 45 for workers who may have been exempt in 2002 if the combined education and work experience test had been in effect.

**Table 1. Characteristics of *Potentially Exempt* and *Nonexempt* Employees Under Current and Proposed Regulations, 2002**

	Eligible for overtime (i.e., nonexempt)		Not eligible for overtime (i.e., exempt)	
	Eligible under current regulations (1)	May have gained eligibility in 2002 if the higher salary level test had been in effect (2)	Not eligible under current regulations (3)	May have lost eligibility in 2002 if the combined education and work experience test had been in effect (4)
<b>Gender</b>				
Men	54.0%	43.9%	60.3%	53.8%
Women	46.0%	56.1%	39.7%	46.2%
Total	100.0%	100.0%	100.0%	100.0%
<b>Age</b>				
16-25	16.8%	15.2%	6.9%	(a)
26-35	24.1%	25.9%	25.5%	18.4%
36-45	27.5%	25.4%	30.3%	33.0%
46-55	21.5%	21.9%	26.5%	33.8%
56-65	8.8%	8.8%	9.6%	13.2%
Over 65	1.3%	2.8%	1.2%	1.7%
Total	100.0%	100.0%	100.0%	100.0%
<b>Race</b>				
White	81.1%	82.2%	86.1%	82.6%
Black	14.2%	12.6%	8.4%	13.8%
Other	4.7%	5.1%	5.6%	3.6%
Total	100.0%	100.0%	100.0%	100.0%
<b>Education</b>				
8 years or less	4.3%	1.4%	1.6%	
9-12 years	8.9%	6.6%	2.5%	
High school graduate	38.8%	28.1%	15.4%	24.2%
1-3 years college	32.9%	31.6%	18.3%	75.8%
Bachelor's degree	12.4%	22.8%	37.2%	
Advanced degree	2.7%	9.5%	25.0%	
Total	100.0%	100.0%	100.0%	100.0%
<b>Weekly earnings</b>				
Up to \$366	26.3%	52.3%	6.5%	5.7% (b)
Over \$366 and up to \$519	25.2%	47.7%	9.2%	10.8% (b)
Over \$519 and up to \$712	21.0%		17.8%	22.9%
Over \$712 and up to \$1,015	17.1%		26.6%	27.9%
Over \$1,015	10.5%		39.9%	32.7%
Total	100.0%	100.0%	100.0%	100.0%
<b>Occupation</b>				
Managerial and professional	14.3%	66.2% (c)	72.9%	100.0%
Technical, sales, & administrative support	34.9%	24.4%	11.9%	
Services	16.3%	4.1%	1.3%	
Precision production, craft, and repair	15.2%	4.5%	4.1%	
Operators, fabricators, and laborers	18.5%	0.6%	6.0%	
Farming, forestry, and fishing	0.7%	(d)	3.8%	
Total	100.0%	100.0%	100.0%	100.0%



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	Eligible for overtime (i.e., nonexempt)		Not eligible for overtime (i.e., exempt)	
	Eligible under current regulations (1)	May have gained eligibility in 2002 if the higher salary level test had been in effect (2)	Not eligible under current regulations (3)	May have lost eligibility in 2002 if the combined education and work experience test had been in effect (4)
<b>Industry</b>				
Agriculture	0.4%	(d)	3.9%	(d)
Mining	0.5%	(d)	0.4%	0.6%
Construction	8.6%	3.2%	2.9%	1.1%
Manufacturing	18.8%	7.7%	11.7%	17.0%
Transportation and public utilities	6.4%	4.1%	12.8%	6.8%
Wholesale trade	4.6%	3.6%	3.2%	0.9%
Retail trade	15.9%	25.9%	10.1%	2.8%
Finance, insurance, and real estate	6.8%	12.2%	8.2%	3.2%
Private household services	0.5%	(d)	0.1%	(d)
Other services	11.1%	13.1%	8.9%	6.6%
Professional services	21.6%	24.8%	34.3%	54.2%
Forestry	0.1%	(d)	0.1%	(d)
Public administration	4.7%	4.6%	3.6%	6.1%
Total	100.0%	100.0%	100.0%	100.0%
<b>Hispanic origin</b>				
Hispanic	14.2%	9.0%	7.1%	5.3%
Non-Hispanic	85.8%	91.0%	92.9%	94.7%
Total	100.0%	100.0%	100.0%	100.0%
<b>Marital status</b>				
Married	55.0%	57.0%	67.0%	71.9%
Widowed, divorced, or separated	16.7%	15.1%	12.8%	17.2%
Never married	28.3%	27.9%	20.2%	10.8%
Total	100.0%	100.0%	100.0%	100.0%
<b>Union membership</b>				
Union member	15.0%	3.9%	13.8%	12.6%
Not union member	85.0%	96.1%	86.2%	87.4%
Total	100.0%	100.0%	100.0%	100.0%

**Source:** Estimates calculated by CRS from the monthly Current Population Survey (CPS). See **Appendix B** for a description of the methodology and assumptions used in this table.

**Notes:** Details may not add to totals because of rounding.

- The calculations in this column are for workers with at least eight years of work experience. Therefore, no employees ages 16-25 were affected.
- Some professional employees (i.e., teachers, doctors, and lawyers) are not subject to a salary requirement. If the combined education and work experience test had been in effect in 2002, these employees may have been exempt although they earned less than \$425 a week.
- Employees not in managerial or professional occupations are supervisors.
- Percentages were not calculated for cells with fewer than 5,000 estimated employees.

## Appendix A: Salary Level and Job Duties Tests Under Current and Proposed Regulations

**Table A1. Summary of Current and Proposed Salary Level and Job Duties Tests for Executive Employees**

Current regulations	Proposed regulations
<b>A. Salary level test</b>	
<p>Executives with weekly salaries of at least \$155 (\$8,060 annually for a year-round employee) but less than \$250 (\$13,000 annually for a year-round employee) are subject to the long test, which consists of all the items in the job duties test below. Executives with weekly salaries of \$250 or more are subject to the short test, which consists of items a and b in the job duties test.</p>	<p>A “standard” job duties test would apply to executives with weekly salaries of \$425 (\$22,100 annually for a year-round employee) or more. Executives guaranteed total cash compensation of at least \$65,000 annually (\$1,250 a week) — that is, “highly compensated” executives — and who meet at least one of the standard duties tests would be exempt. Total cash compensation would include base salary, commissions, and nondiscretionary compensation.</p>
<b>B. Job duties test</b>	
<p>An executive is an employee:</p> <p>(a) whose primary duty consists of management of an enterprise or of a recognized department of such an enterprise;</p> <p>(b) who customarily and regularly directs the work of two or more employees;</p> <p>(c) who has the authority to hire or fire employees or to make recommendations regarding who is hired, fired, or promoted;</p> <p>(d) who “customarily and regularly exercises discretionary powers”; and</p> <p>(e) who does not devote more than 20% of work hours to nonexempt executive activities (40% for employees of retail or service establishments — for example, retail stores, hotels, restaurants, gas stations, and hospitals).</p> <p>The percentage limit on nonexempt work does not apply to an employee who holds at least a 20% interest in the enterprise in which he is employed or an employee who is in “sole charge” of an independent establishment.</p> <p>Working supervisors are not exempt if a substantial amount of their time is devoted to production work or other work that is not related to their supervisory activities.</p>	<p>An executive would be an employee:</p> <p>(a) whose primary duty consists of management of an enterprise or a recognized department of such an enterprise,</p> <p>(b) who customarily and regularly (i.e., normally every work week) directs the work of two or more employees, and</p> <p>(c) who has the authority to hire or fire employees or to make recommendations regarding who is hired, fired, or promoted.</p> <p>(The “customarily and regularly exercises discretionary powers” test would be eliminated.)</p> <p>(The limits on nonexempt work would be eliminated.)</p> <p>An executive would include an employee who is in sole charge of an independent establishment and an employee who owns at least a 20% equity interest in the enterprise in which the employee is employed. Employees who are 20% owners would not be subject to a salary level test.</p> <p>Working supervisors would not be exempt unless management is their primary duty.</p> <p>Supervisors in retail establishments who spend a majority of their time on nonexempt work may be exempt.</p>

**Sources:** 29 *CFR* 541; U.S. Department of Labor, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, *Federal Register*, vol. 68, no. 61, Mar. 31, 2003, pp. 15560-15597.

**Table A2. Summary of Current and Proposed Salary Level and Job Duties Tests for Administrative Employees**

Current regulations	Proposed regulations
<b>A. Salary level test</b>	
<p>Administrative employees with weekly salaries of at least \$155 (\$8,060 annually for a year-round employee) but less than \$250 (\$13,000 annually for a year-round employee) are subject to the long test, which consists of all items in the job duties tests below. Administrative employees with weekly salaries of \$250 or more are subject to the short test, which consists of item a in the job duties test and work requiring the “exercise of discretion and independent judgement.” A salary level test does not apply to academic administrative personnel who are paid at least the starting salary for teachers in the school system or educational establishment where they work.</p>	<p>A “standard” job duties test would apply to administrative employees with weekly salaries of \$425 (\$22,100 annually for a year-round employee) or more. Administrative employees guaranteed total cash compensation of at least \$65,000 annually (\$1,250 a week) — that is, “highly compensated” employees — and who meet at least one of the standard duties tests would be exempt. Total cash compensation would include base salary, commissions, and nondiscretionary compensation. A salary level test would not apply to academic administrative personnel who are paid at least the starting salary for teachers in the school system or educational establishment where they work.</p>
<b>B. Job duties test</b>	
<p>An administrative employee is an employee:</p> <p>(a) whose primary duty consists of office or nonmanual work directly related to the management policies or general business operations of the employer or employer’s customers <i>or</i> the performance of administrative work directly related to academic instruction in a school system or educational institution or of a department of a school system or educational institution;</p> <p>(b) who “customarily and regularly exercises discretion and independent judgement.” Exercising discretion and independent judgement is distinguished from the use of skill in applying prescribed procedures or specific standards. An employee who applies his knowledge in determining which procedures to follow (e.g., as may be described in a work manual) is not exercising discretion and independent judgement;</p> <p>(c) who regularly assists a proprietor or an individual employed in an executive or administrative capacity, <i>or</i> under general supervision performs specialized or technical work requiring special training, experience, or knowledge, <i>or</i> under general supervision conducts special assignments; and</p> <p>(d) who does not devote more than 20% of work hours to nonexempt administrative activities (40% for employees of retail or service establishments — for example, retail stores, hotels, restaurants, gas stations, and hospitals).</p>	<p>An administrative employee would be an employee:</p> <p>(a) whose primary duty consists of office or nonmanual work related to the management or general business operations of the employer or employer’s customers <i>or</i> the performance of administrative work directly related to academic instruction in a school system or educational establishment or department of a school system or educational establishment and</p> <p>(The “customarily and regularly exercises discretion and independent judgement” test would be eliminated.)</p> <p>(The limits on nonexempt work would be eliminated.)</p> <p>(b) holds a “position of responsibility” with the employer. An employee in a “position of responsibility” would be an employee who customarily and regularly (i.e., normally every work week) performs work of substantial importance or work requiring a high level of skill or training. Work of substantial importance (a concept that exists in current regulations) would be work that has a significant impact on an employer’s general business operations or finances. Work requiring a high level of skill or training would be work requiring specialized knowledge or advanced training. The high level of training could involve advanced academic instruction, advanced on-the-job-training, or both. Work requiring a high level of skill or training could include use of a reference manual that contains highly technical, scientific, legal, financial, or other complex information. Work requiring a high level of skill or training would include advisory work and special assignments but would not include work requiring an employee to look up information (e.g., from a handbook) to determine the correct response to an inquiry or set of circumstances.</p>

**Sources:** 29 *CFR* 541; U.S. Department of Labor, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, *Federal Register*, vol. 68, no. 61, Mar. 31, 2003, pp. 15560-15597.

**Table A3. Summary of Current and Proposed Salary Level and Job Duties Tests for Professional Employees**

Current regulations	Proposed regulations
<b>A. Salary level test</b>	
<p>Professional employees with weekly salaries of at least \$170 (\$8,840 annually for a year-round employee) but less than \$250 (\$13,000 annually for a year-round employee) are subject to the long test, which consists of all items in the job duties test below. Professional employees with weekly salaries of \$250 or more are subject to the short duties test, which consists of items a and b in the job duties test. Teachers, lawyers, doctors, and certain computer occupations paid on an hourly basis at a rate of \$27.63 or more an hour (\$57,470 annually for an employee working 40 hours a week year-round) are not subject to a salary level test.</p>	<p>A “standard” job duties test would apply to professional employees with weekly salaries of \$425 (\$22,100 annually for a year-round employee) or more. Professional employees guaranteed total cash compensation of at least \$65,000 annually (\$1,250 a week) — that is, “highly compensated” employees — and who meet at least one of the standard duties tests would be exempt. Total cash compensation would include base salary, commissions, and nondiscretionary compensation. Teachers, lawyers, doctors, and certain computer occupations paid on an hourly basis at a rate of \$27.63 or more an hour (\$57,470 annually for a person working 40 hours a week year-round) would not be subject to a salary level test.</p>
<b>B. Job duties test</b>	
<p>A professional employee is an employee:</p> <p>(a) whose primary duty consists of work in a field of science or learning requiring advanced knowledge customarily acquired by a prolonged course of specialized instruction and study (i.e., learned professions),</p> <p><i>or</i> work that is original and creative in character in a recognized artistic field, the result of which depends on the invention, imagination, or talent of the employee (i.e., creative professions),</p> <p><i>or</i> work consisting of teaching, tutoring, instructing, or lecturing;</p> <p><i>or</i> work that requires theoretical and practical knowledge in computer systems analysis, programming, and software engineering and who is employed as a computer systems analyst, computer programmer, software engineer, or in a similar computer software field;</p> <p>(b) whose work requires the “consistent exercise of discretion and judgement” (except for creative professionals under the short test);</p> <p>(c) whose work is predominantly intellectual and varied in character, as opposed to routine mental, manual, mechanical, or physical work; and</p> <p>(d) who does not devote more than 20% of work hours to nonexempt professional activities.</p>	<p>A learned professional would be an employee whose primary duty consists of office or nonmanual work in a field of science or learning requiring advanced knowledge customarily acquired by a prolonged course of intellectual instruction. The learned professions include occupations that have a recognized professional status based on the performance of work that is predominantly intellectual in character as opposed to routine, mental, manual, mechanical, or physical work. The advanced knowledge could be acquired through a combination of work experience and intellectual instruction. The latter could include training in the armed forces, instruction at a technical school or community college, or some other kind of intellectual instruction.</p> <p>A creative professional would be an employee whose primary duty consists of office or nonmanual work requiring invention, imagination, originality, or talent in a recognized artistic field.</p> <p>A teacher would be an employee whose primary duty consists of work consisting of teaching, tutoring, instructing, or lecturing.</p> <p>A computer professional would be an employee whose primary duty consists of the application of systems analysis techniques and procedures, the design and development of computer systems or programs, or the design and creation of computer programs related to machine operating systems.</p> <p>(The “consistent exercise of discretion and judgement” test would be eliminated.)</p> <p>(The limits on nonexempt work would be eliminated.)</p>

**Sources:** 29 CFR 541; U.S. Department of Labor, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, *Federal Register*, vol. 68, no. 61, Mar. 31, 2003, pp. 15560-15597.

## Appendix B: Methodology

The analysis in this report uses data from the monthly Current Population Survey (CPS). The CPS is a household survey conducted by the U.S. Bureau of the Census for the Bureau of Labor Statistics (BLS) of the U.S. Department of Labor. The monthly CPS is the main source of labor force data for the nation, including estimates of the monthly unemployment rate. The CPS collects a wide range of demographic, social, and labor market information. Each month, approximately 50,000 households are contacted to be interviewed, either in person or by phone. The CPS collects labor force data for civilians 15 and over. The official definition of the civilian labor force is ages 16 and over. The monthly CPS sample is representative of the civilian noninstitutional population; it does not include persons on active military duty.<sup>63,64</sup>

Each month, one-fourth of the CPS sample — called the Outgoing Rotation Group, or ORG — is asked questions about current hourly or weekly earnings. For **Table 1**, the ORG samples for each month from 2002 were combined to calculate a monthly average for the year.<sup>65</sup> Weekly earnings consist of usual earnings before taxes and other deductions, and include tips, overtime pay, and commissions usually received at a person's main job. Hourly earnings are reported for persons who are paid by the hour or who report their earnings on an hourly basis. Earnings reported for a period other than a week are converted by BLS to a weekly amount.<sup>66</sup>

The CPS does not ask workers if they are exempt or nonexempt from the overtime provisions of the FLSA. Therefore, the survey does not allow direct estimates of the number of exempt or nonexempt workers. Nevertheless, using information on an employee's occupation, industry, and, in some cases, weekly earnings and education, it is possible to use CPS data to estimate the number of employees who are *potentially* exempt or nonexempt.

The FLSA includes various exceptions and exemptions to the overtime provisions of the act. Some exemptions apply to certain employers (e.g., some seasonal amusement or recreational establishments). Other exemptions are allowed for workers in certain occupations (e.g., outside sales workers) or industries (e.g.,

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<sup>63</sup> U.S. Bureau of the Census, *Measuring 50 Years of Economic Change*, Current Population Reports, P60-203, Washington, Sept. 1998, p. D-1.

<sup>64</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Basic Monthly Survey*. Available at [<http://www.bls.census.gov/cps/bglosary.htm>].

<sup>65</sup> Households are in the CPS survey for four consecutive months, out of the survey for eight months, and back in the survey for four more months. The questions about earnings (and union status and hours worked) are asked of households leaving the survey (either permanently or for eight months). During a 12-month period, the observations on earnings are for unique individuals.

<sup>66</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, vol. 48, Jan. 2001, pp. 232, 236, 241. U.S. Department of Labor, Bureau of Labor Statistics, *Current Population Survey: Design and Methodology*, Technical Paper 63, Mar. 2000, pp. 1-1, 3-7 — 3-9, 5-4, 6-5.

forestry and lumber operators employing fewer than nine workers). In addition, the Wage and Hour Division of DOL administers the FLSA with respect to private employers, state and local governments, and certain federal employees (e.g., U.S. Postal Service, Library of Congress, and Tennessee Valley Authority), but the U.S. Office of Personnel Management (OPM) administers the FLSA for employees of the executive branch of the federal government.

The analysis in this report examines employed hourly and nonhourly wage and salary employees ages 16 and over who usually work full-time. Self-employed persons are not included. Using data from the CPS, the following employees were categorized as potentially exempt from the overtime provisions of the FLSA: agricultural and fishing workers; employees in the railroad and airline industries; outside sales workers; seamen; taxi drivers; newspaper deliverers; casual babysitters; computer professionals who are paid by the hour and earn more than \$27.63 an hour; drivers and mechanics in the bus and trucking service industries; salesmen employed by automobile, truck, aircraft, boat, and mobile home dealers; and mechanics employed by automobile or truck dealers. In addition, executive, administrative, and professional (with at least a bachelor's degree<sup>67</sup>) employees who meet the current weekly salary level tests for exemption are categorized as exempt. According to current regulations, executive employees generally perform "managerial and supervisory functions."<sup>68</sup> Therefore, persons categorized in the CPS as managerial and supervisory employees and who meet the weekly salary level test for executives are treated as exempt. Dental hygienists and health and medical technologists with at least a bachelor's degree are treated as exempt under current regulations. Dental hygienists with less than a bachelor's degree are treated as exempt under the proposed regulations if they meet the proposed work experience test.<sup>69</sup> Except for employees of the U.S. Postal Service, federal employees are excluded from the analysis.<sup>70</sup>

For analytical purposes, using the CPS to categorize employees who are potentially exempt and nonexempt may result in employees being misclassified. For example, a respondent who is classified as a "manager" in the CPS may not meet the requirements under current regulations to be classified as exempt. Likewise, an

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<sup>67</sup> Computer professionals were categorized as exempt, whether or not they held a bachelor's or advanced degree. With respect to computer professionals, current regulations state that "The level of expertise and skill required to qualify for this exemption is generally attained through combinations of education and experience.... [N]o particular academic degree is required for this exemption...." 29 *CFR* 541.303(c).

<sup>68</sup> 29 *CFR* 541.102.

<sup>69</sup> "Medical technologists" who meet certain educational requirements are generally exempt from the overtime provisions of the FLSA. (29 *CFR* 541.301.) In the CPS, medical technologists are grouped with medical technicians. Since it is not possible to separate technologists from technicians, it was assumed that workers in these categories with a bachelor's degree or better were exempt.

<sup>70</sup> Section 4(f) of the FLSA authorizes the U.S. Office of Personnel Management (OPM) to administer the FLSA with respect to federal agencies (except for the U.S. House of Representatives, U.S. Senate, Library of Congress, Congressional Budget Office, U.S. Postal Service, and certain other agencies).

employee who performs both exempt and nonexempt work may be categorized in the CPS as a worker who performs manual work. But, if the worker also supervises other employees, the employee may be exempt for overtime purposes. Similarly, white-collar employees earning \$250 or more may not be exempt from the overtime provisions of the FLSA if they do not meet the appropriate job duties test.

The estimates of the number of employees who may have been nonexempt if the proposed salary level test had been in effect in 2002 are based on the salary level tests in the current and proposed regulations. The lower-bound is an estimate of the number of employees earning \$250 or more per week, but less than \$425. The upper-bound is an estimate of the number of employees earning \$155 or more per week (\$170 for professional employees), but less than \$425.

The estimates of the number of learned professionals who may have been exempt in 2002 because they may have met the job duties test through a combination of work experience and education is for employees with at least a high school degree but less than a bachelor's degree. The estimates do not include creative professionals, but include learned professionals for whom there is no federal salary test (i.e., doctors, lawyers, and teachers). For other professionals, the estimates are for employees with usual weekly earnings of \$425 or more. Work experience was calculated as potential work experience: age, minus years of education, minus six. The estimates include persons who began work no earlier than age 18. An upper-bound estimate follows the approach described by the U.S. Department of Labor in its analysis of the impact of the proposed regulations: it was assumed that six years of work experience was equivalent to a bachelor's degree.<sup>71</sup> Because individuals may not work continuously or may not work continuously in the same job, a lower-bound estimate was calculated for persons with eight years of potential work experience. In both cases, when rounded off, the calculations resulted in an estimate of 1.0 million learned professionals with less than a bachelor's degree. The proposed regulations do not, however, provide a specific equivalence between years of work experience and a bachelor's or advanced degree. Therefore, the upper-bound estimate would be higher if it were assumed that fewer than six years of work experience is equivalent to a bachelor's degree. Similarly, the lower-bound estimate would be smaller if it were assumed that more than eight years of work experience is equivalent to a bachelor's degree.

The estimate of the number of full-time executive, administrative, and professional employees who are paid by the hour consists of white-collar employees who are paid an hourly wage or who report their earnings on an hourly basis. For workers subject to a salary level test, the estimate includes employees who earn \$425 or more a week. For computer professionals, the estimate includes employees who are paid by the hour, have weekly earnings of at least \$425, and are paid less than \$27.63 an hour. For learned professionals with less than a bachelor's degree but at least a high school degree, the estimate includes employees with six or more years of potential work experience.

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<sup>71</sup> U.S. Department of Labor, *Defining and Delimiting the Exemptions for Executive, Administrative, and Professional Employees*, p. 15577.

The earnings intervals used for weekly earnings in **Table 1** are based on equal quintiles of the earnings distribution. That is, among all full-time wage and salary workers in 2002, one-fifth earned \$366 a week or less, one-fifth earned more than \$366 but less than \$519, and so on.

## Confidence Levels

The comparisons discussed in the text of this report are statistically significant at the 95% confidence level. Estimates based on survey responses from a sample of households have two kinds of error: nonsampling error and sampling error. Examples of nonsampling error include information that is misreported and errors made in processing collected information. Sampling error occurs because a sample, and not the entire population, of households is surveyed. The difference between an estimate based on a sample of households and the actual population value is known as sampling error.<sup>72</sup> When using sample data, researchers typically construct confidence intervals around population estimates. Confidence intervals provide information about the accuracy of estimated values. With a 95% confidence interval and repeated samples from a population, 95% of intervals will generally include the actual value of a population characteristic.

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<sup>72</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, vol. 49, Nov. 2002, pp. 147-148.