# OVERWORKED, UNDERPAID, AND UNDER ATTACK:

## THE BUSH ADMINISTRATION PLAN TO DENY OVERTIME PAY TO SIX MILLION AMERICANS

A Report Prepared by the Democratic Staff of
The House Appropriations Committee and
The Education and the Workforce Committee
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**DAYS BEFORE LABOR DAY, PRESIDENT BUSH WILL DELIVER A PAY CUT TO 6 MILLION HARDWORKING AMERICANS.** The Bush Administration is poised – in a few short weeks – to implement the most sweeping, anti-worker revision of the Fair Labor Standards Act (FLSA) since its inception in 1938. The overtime pay requirements of the FLSA, which guarantee for most workers "time and a half" pay for hours worked beyond a standard 40-hour work week, are one of the nation's bedrock worker protections. The FLSA's overtime provisions cover approximately 115 million workers – about 85 percent of the nation's workforce.

On August 23rd, 2004, the Labor Department's final overtime regulations will go into effect, allowing businesses to deny millions of workers their overtime pay. These regulations redefine who is considered a professional, administrative, or executive employee based on salary and job duties and, thereby, exempted from overtime pay. The regulations also update the annual salary level – from $8,060 to $23,660 – below which salaried workers are guaranteed overtime pay.

According to a recent analysis by the Economic Policy Institute (EPI), at least 6 million workers – some of whom earn only $5,000 more than a poverty income – will lose their overtime rights under the Administration's final overtime rule.[1] The same analysis concludes that only about 400,000 low-income workers – not the 1.3 million low-income workers claimed by the Administration – will gain overtime protection due to an increase in the protective salary threshold. In other words, the number of workers who will be harmed under the Administration's rule is nearly 16 times greater than the number of workers who will benefit.

**OVERTIME PAY HELPS WORKING FAMILIES MAKE ENDS MEET**. For families who received overtime pay in 2000, overtime earnings accounted for about 25 percent of their income or about $8,400 a year. Overtime compensation is essential to their ability to pay mortgages, medical bills, and make ends meet. Under the Department of Labor's final regulation, more of these workers will be working in excess of 40 hours a week, but will not be receiving any additional pay for those extra hours at work. They will be working longer, working harder, and earning less at a time when families are already squeezed by a decline in real wage growth.

**DESPITE 75,280 COMMENTS, NO PUBLIC HEARINGS**. The Labor Department failed to hold a single public hearing on one of the most controversial regulations in the history of the Department, despite receiving 75,280 comments on its proposals. The Department of Labor even provided information to employers in its initial regulation on how to escape overtime pay requirements as part of a concerted campaign to reclassify workers and deny them overtime pay,

> "*Affected employers would have four choices concerning potential payroll costs: (1) Adhering to a 40 hour work week; (2) paying statutory overtime premiums for affected workers' hours worked beyond 40 per week; (3)*

[1] Ross Eisenbrey, Economic Policy Institute, "Longer Hours, Less Pay", July 14, 2004.

> *raising employees' salaries to levels required for exempt status by the proposed rule; or (4) converting salaried employees' basis of pay to an hourly rate (no less than the federal minimum wage) that results in virtually no (or only a minimal) changes to the total compensation paid to those workers. Employers could also change the duties of currently exempt and nonexempt workers to comply with the proposed rule*."[2]

Rather than balancing the interests of employers and employees in crafting the new rules, the Labor Department sided with the desires of corporations and other employers. One law firm that summarized the Administration's initial proposals for its clients approvingly concluded, "*Thankfully, virtually all of these changes should ultimately be beneficial to employers*."[3]

**EVEN REPUBLICANS REJECT THE BUSH ADMINISTRATION'S CLAIMS ON OVERTIME.** The Administration claims that the final overtime regulation will expand and strengthen overtime protections. However, even the Republican-led Senate voted 99 to 0 in favor of an amendment offered by Senator Judd Gregg to protect overtime rights in 55 job classifications – including blue-collar workers, registered nurses, police officers, and firefighters – because they had no confidence in the Administration's claims.

**EXPERTS REJECT THE BUSH ADMINISTRATION CLAIM THAT FINAL RULE WILL REDUCE LITIGATION.** Three experts who formerly administered the FLSA in the Department of Labor during both Republican and Democratic administrations disagreed with the Bush Administration and reached exactly the opposite conclusion,

> "*Further, in our view, the Department has written rules that are vague and internally inconsistent, and that will likely result in a profusion of confusion and court litigation – outcomes that the Department explicitly sought to avoid*." [4]

For example, the former DOL experts observed that,

> "*The team leader provision in new Sec. 541.203 (3) is an entirely new regulatory concept that is also fraught with ambiguity. This provision is not based on case law, but is purportedly an attempt to reflect modern workplace practices…. Furthermore, the regulations do not address the very real possibility that team leaders may be working on a number of different short- or long-term projects, simultaneously or in succession, some of which would be major and directly related to the performance of management or general business operations and some of which would not. Evaluating the team leader's primary duty in that instance will be very*

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[2] Federal Register, Vol. 68, No. 61, March 31, 2003, page 15576.

[3] Proskauer Rose, "Client Alert: New Proposals Would Significantly Change Overtime Pay and Compensatory Time Off Under the FLSA", April 2003.

[4] John Fraser, Monica Gallagher, and Gail Coleman, "Observations on the Department of Labor's Final Regulations *Defining and Delimiting the [Minimum Wage and Overtime] Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees"*, July 2004.

*difficult at best. Would the employee, for example, move in and out of exempt status from one week to the next? How this provision will operate in practice can only be imagined, but one can surmise that employers will seek to apply this provision to large numbers of employees to whom the exemption was never intended to apply*."[5]

**ADMINISTRATION'S OVERTIME REGULATION AN OPEN INVITATION TO DISPUTE.** The Labor Department has replaced longstanding, objective criteria by which employers and employees could clearly understand who qualifies for overtime pay and who does not with ambiguous concepts and criteria. These changes will require subjective judgments by employers that no doubt will be made based on the employers' economic interests to the detriment of workers. Practically the only instances in which the Labor Department "clarified" the rules are by declaring virtually entire classes of workers – for example, financial services workers, insurance claims adjusters, athletic trainers, funeral directors and embalmers, and employees earning more than $100,000 – ineligible for overtime pay.

**OVERTIME REGULATION JUST THE LATEST BUSH ADMINISTRATION ATTACK ON WORKERS.** Since the start of the Bush Administration, 1.8 million private sector jobs have been lost. Despite modest job creation in the last few months, 8.2 million Americans remain unemployed, 2.3 million (38 percent) more than when President Bush entered office. Further, more unemployed individuals are out of work for longer periods of time. In June 2004, 1.7 million individuals had been unemployed for over 6 months; nearly triple the number of long-term unemployed at the start of the Administration.

**UNDER THE ADMINISTRATION'S POLICIES, THE UNEMPLOYED HAVE ESSENTIALLY BEEN LEFT OUT AND LEFT BEHIND.** The Administration has refused to push for an extension of temporary extended unemployment compensation for the record 2 million individuals who had exhausted all regular unemployment benefits at the end of June 2004.[6] To add insult to injury, unemployed Americans can expect to receive even less help to get a job under the Administration's FY 2005 budget, which would:

- Cut funding for job search and placement assistance through the Employment Service by $88 million (10 percent);
- Reduce funding for dislocated worker training by $71 million (5 percent);
- Slash funding for vocational and career training by $316 million (24 percent); and
- Derail funding for activities that promote workers' rights around the world, which in turn help workers here at home, by $79 million (72 percent).

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[5] Ibid.

[6] Isaac Shapiro, Center on Budget and Policy Priorities, "Despite Job Growth, A Record 2 Million Unemployed Have Gone Without Benefits", June 28, 2004.

**THE HOUSE OPPOSED THE BUSH ADMINISTRATION ANTI-WORKING FAMILY OVERTIME REGULATION.** Last year, the House voted 221 to 203 in favor of the Obey-Miller Motion instructing conferees on the FY 2004 Labor-HHS bill to agree to the Senate amendment offered by Senator Tom Harkin. The Harkin amendment would have prevented the Bush Administration from rolling back the 40-hour workweek. Despite the expressed will of both the House and the Senate, the Republican leadership stripped the Harkin language from the final FY 2004 omnibus appropriations bill, allowing the Labor Department to proceed with its anti-worker regulation.

**REPUBLICAN LEADERS BLOCK THE PRO-WORKER DEMOCRATIC AMENDMENT.** Despite the urgent need to halt the Bush Administration's assault on workers, on July 14, 2004, the House Appropriations Committee rejected the Democratic amendment, offered by Congressman David Obey, to the FY 2005 Labor-HHS appropriations bill by a party line vote of 29 to 31. The Democratic amendment would forbid enforcement of the final overtime rule with one exception: it would allow the long overdue and non-controversial increase in the salary threshold to guarantee overtime rights for low-income workers. Moreover, the House Republican leadership has refused to bring the Labor-HHS appropriations bill to the House floor in order to block the entire House from considering the Democratic amendment.

**THE DEMOCRATIC AMENDMENT WOULD PROTECT MORE THAN 6 MILLION WORKERS.** The EPI analysis indicates that at least 6 million employees in manufacturing, retail, insurance, financial services, and other industries can expect to see their jobs reclassified as ineligible for overtime pay. Indeed, an even larger number of workers are likely to be harmed by the Administration's final overtime rule because EPI examined only 10 of the hundreds of occupational categories covered by the anti-worker regulation.

The Democratic amendment would protect:

- 2.3 million workers who lead a team of other employees assigned to major projects – even if these team leaders have no direct supervisory responsibilities for other employees on the team. About 40 percent of employers with 50 or more employees routinely use work teams. Under the Labor Department's final regulation, however, even more employers can be expected to take advantage of this new exemption with enormous negative consequences for employees;

- Nearly 2 million low-level working supervisors in fast food restaurants, lodging and retail stores. Under the Labor Department's final regulation, these employees could lose 100 percent of their overtime eligibility even though only a small percentage of their time is spent on managerial work. For example, a low-paid Burger King assistant manager who spends nearly all of his or her time cooking hamburgers and serving customers, with no authority to hire or fire subordinates, could lose all of his or her overtime pay. Moreover, it will now be easier for employers to evade the rules by converting hourly employees to exempt salaried employees;

- More than 1 million employees who lack a college or graduate degree, or who will be considered "artistic professionals." Most of these employees will now be exempt from overtime pay as professional employees because employers will be able to substitute work experience for a degree under the Labor Department's final regulation.

  Moreover, the Labor Department has not resolved the question of whether training in the military can be considered substitute work experience. Despite the Labor Department's denials, many veterans employed in engineering, accounting, and technical occupations could lose overtime pay. For example, the Boeing Corporation observed, "*…many of its most skilled technical workers received a significant portion of their knowledge and training outside of the university classroom, typically in a branch of the military service…*"[7];

- 30,000 nursery school and Head Start teachers. These already low-paid employees, who currently receive overtime pay because their jobs do not require them to exercise sufficient discretion and judgment to be considered professional employees, will lose the right to extra pay under the Labor Department's final regulation;

- 160,000 mortgage loan officers and hundreds of thousands of additional workers in the financial services industry. These employees will lose their overtime rights because of a blanket industry exemption in the Labor Department's final regulation for financial service employees who work at such duties as collecting customer financial information, providing information and advice about financial products, or marketing financial products;

- Nearly 90,000 computer employees, funeral directors and licensed embalmers. These employees will become exempt and lose their right to pay under the Labor Department's final regulation; and,

- Nearly 400,000 workers earning more than $100,000 annually. Under the Labor Department's final regulation, these highly compensated employees will lose overtime pay under a new blanket exemption if they perform only a single exempt task "customarily or regularly," such as suggesting discipline, promotion or assignment of other employees perhaps as infrequently as twice a year. Over time, as incomes grow, the number of employees bumped into this new exclusion from overtime pay will increase.

Attached to this report are a series of charts on the Administration's final overtime regulation.

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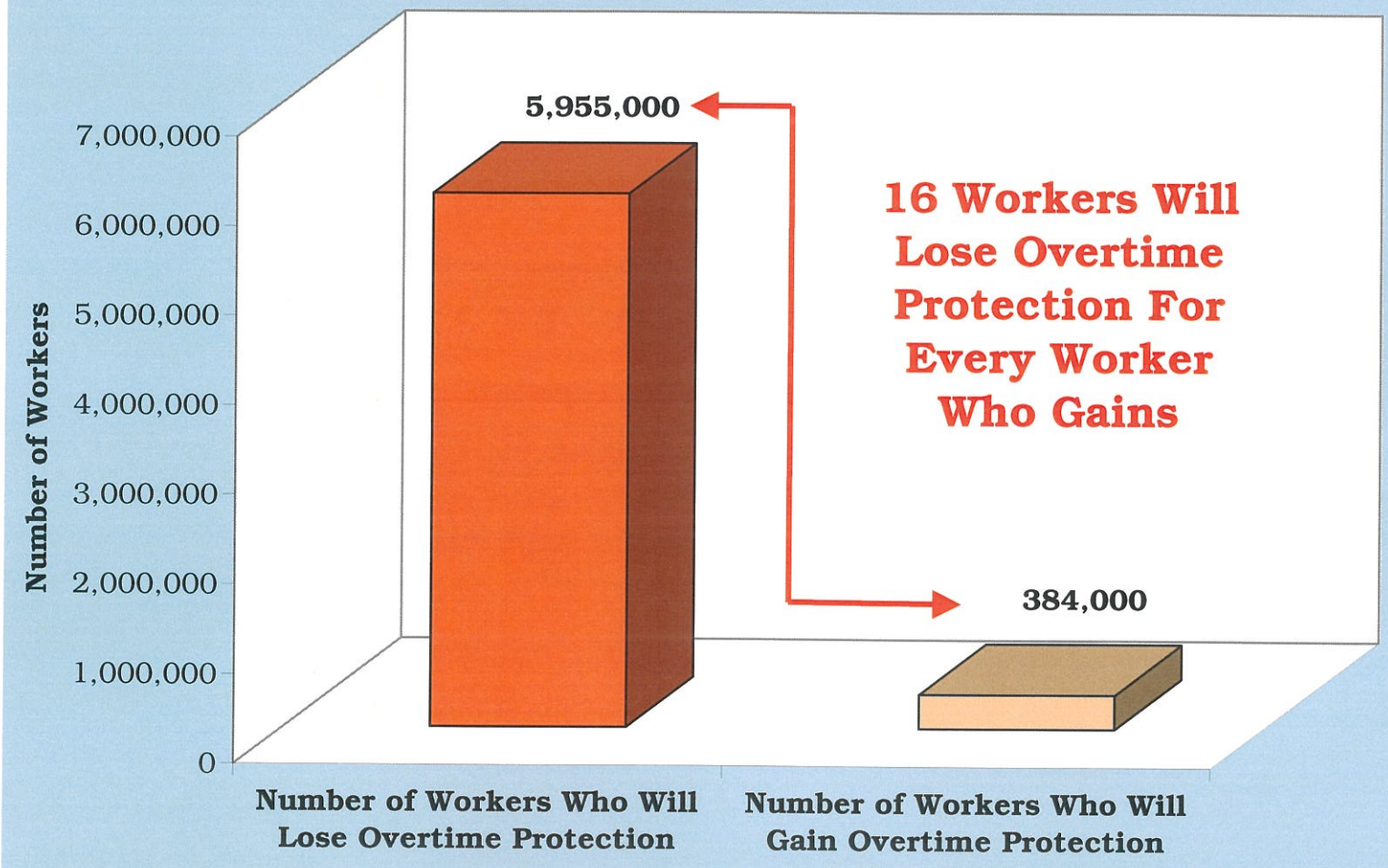
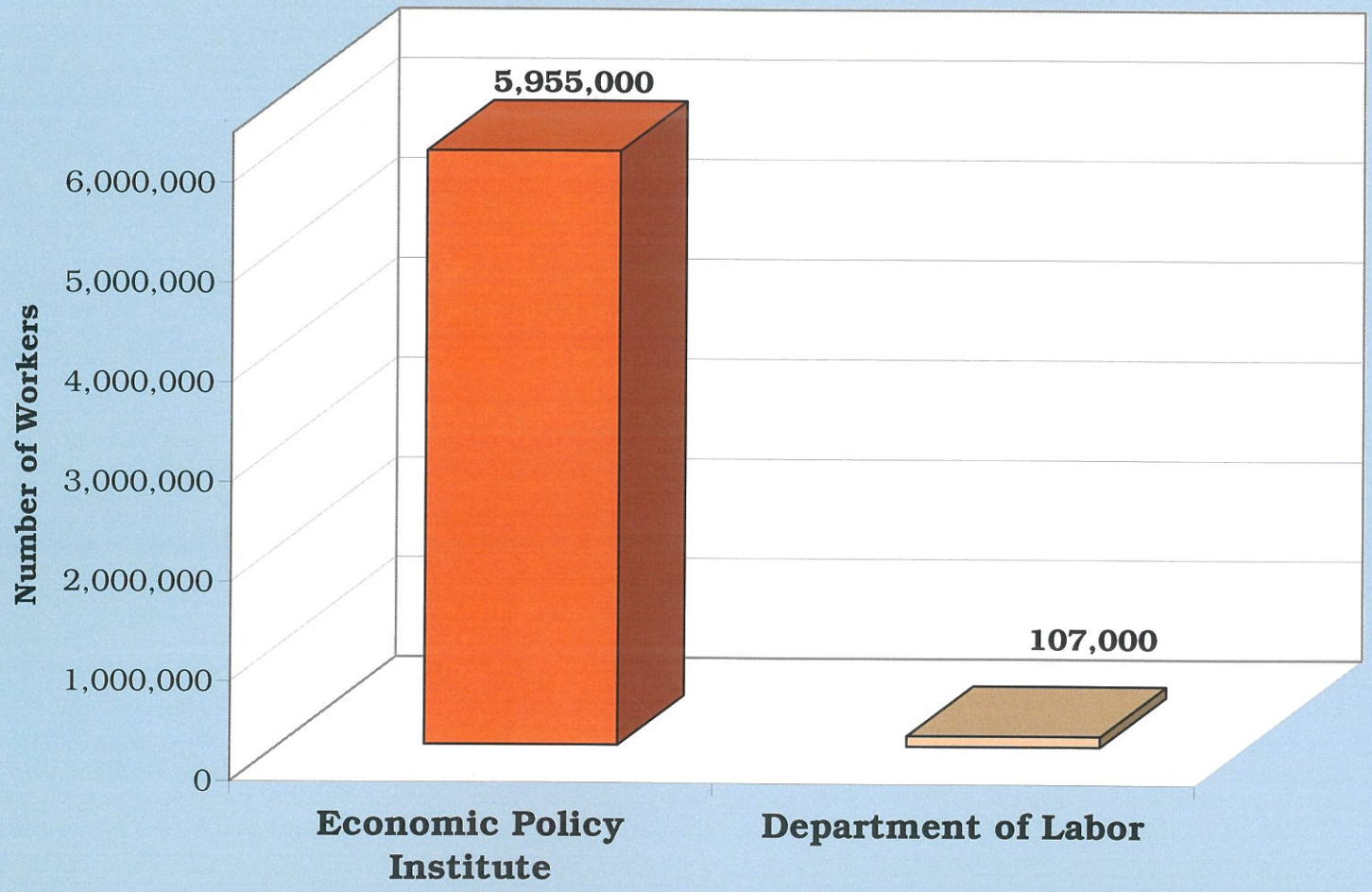
[7] Cheryl A. Russell, Boeing's director of federal affairs as quoted in The Washington Post, January 29, 2004.

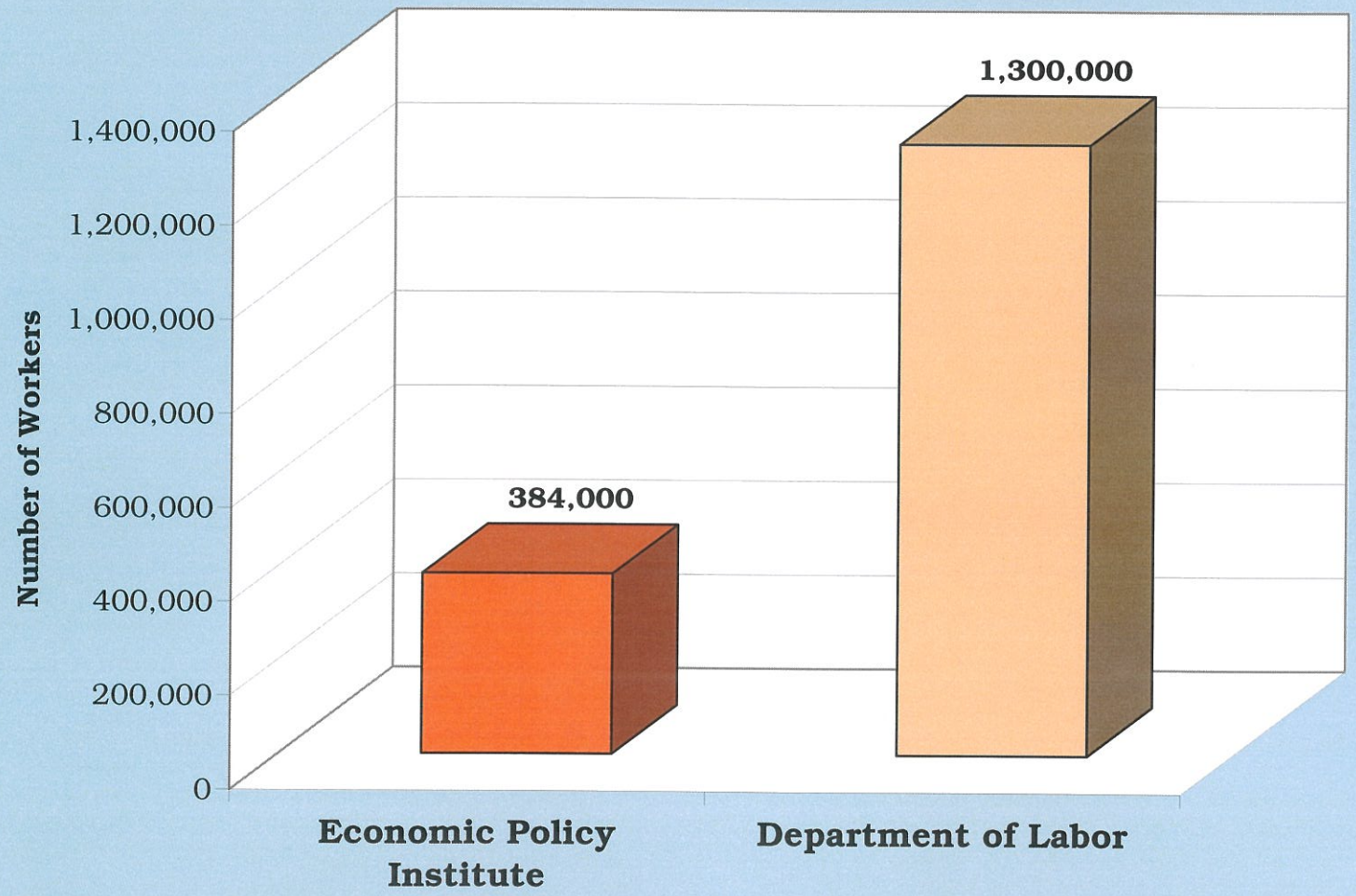
## FAR MORE WORKERS WILL BE HARMED THAN HELPED UNDER THE ADMINISTRATION'S OVERTIME RULE



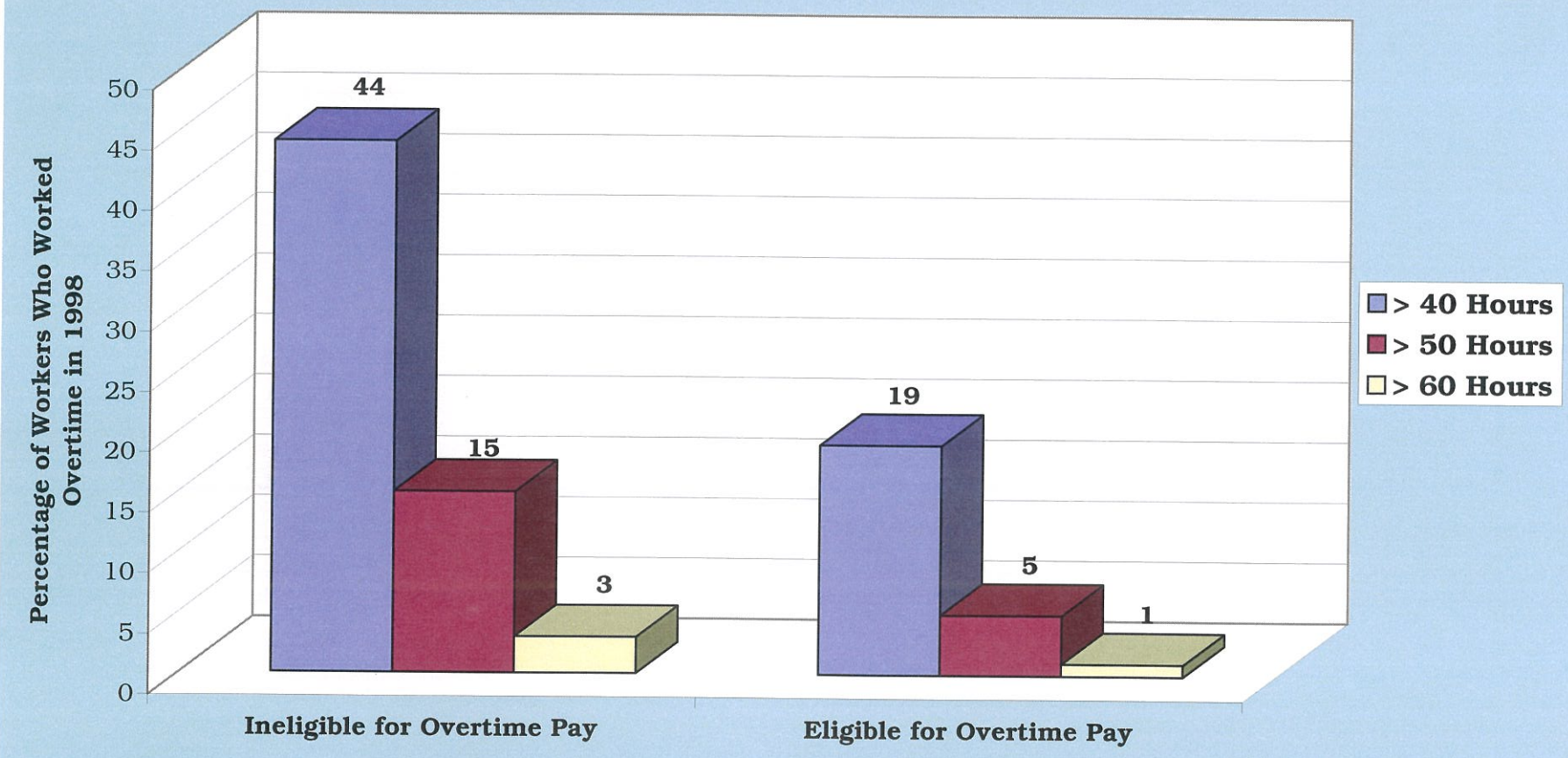
## THE ADMINISTRATION UNDERESTIMATES THE NUMBER OF WORKERS WHO WILL LOSE OVERTIME PROTECTION



## THE ADMINISTRATION OVERESTIMATES THE NUMBER OF WORKERS WHO WILL GAIN OVERTIME PROTECTION

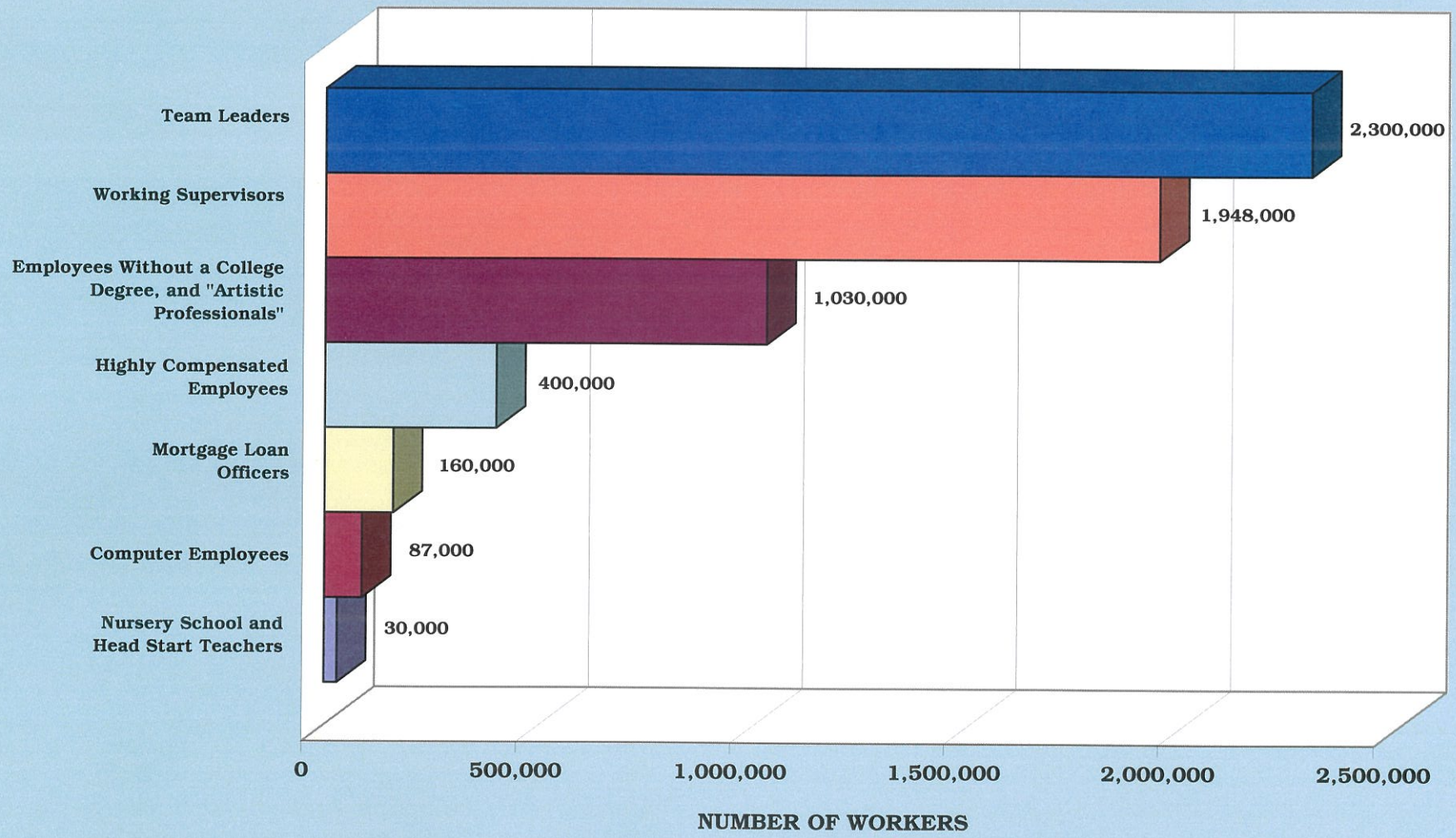


## WORKERS WHO ARE INELIGIBLE FOR OVERTIME PAY ARE MUCH MORE LIKELY TO WORK OVER 40 HOURS A WEEK




Source: GAO, *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place*, September 1999.

# THE REPUBLICAN-LED SENATE VOTED 99:0 TO PROTECT OVERTIME RIGHTS FOR WORKERS IN 55 JOB CATEGORIES BECAUSE THEY HAD NO CONFIDENCE IN THE ADMINISTRATION'S CLAIMS

- Any work paid on an hourly basis
- Blue collar workers
- Any work provided overtime under a collective bargaining agreement
- Team Leaders
- Computer programmers
- Registered Nurses
- Licensed practical nurses
- Nurse midwives
- Nursery school teachers
- Oil and gas pipeline workers
- Oil and gas platform workers
- Refinery workers
- Steel workers
- Shipyard and ship scrapping workers
- Teachers
- Technicians
- Journalists
- Chefs
- Cooks
- Police Officers
- Firefighters
- Fire sergeants
- Police sergeants
- Emergency medical technicians
- Paramedics
- Waste disposal workers
- Day care workers
- Maintenance employees
- Production line employees
- Construction employees
- Carpenters
- Mechanics
- Plumbers
- Iron Workers
- Craftsmen
- Operating engineers
- Laborers
- Painters
- Cements masons
- Stone and brick masons
- Sheet metal workers
- Utility workers
- Longshoremen
- Stationary engineers
- Welders
- Boilermakers
- Funeral directors
- Athletic trainers
- Outside sales employees
- Inside sales employees
- Grocery store managers
- Financial services industry workers
- Route drivers
- Assistant retails managers

# THE DEMOCRATIC AMENDMENT WILL PROTECT 6 MILLION WORKERS IN A BROAD RANGE OF INDUSTRIES