

## Comments

### **SOLVING THE BLUIISH COLLAR PROBLEM: AN ANALYSIS OF THE DOL'S MODERNIZATION OF THE EXEMPTIONS TO THE FAIR LABOR STANDARDS ACT**

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“Who should be eligible for overtime is a hot economic and political issue.”<sup>1</sup>

The Fair Labor Standards Act (“FLSA”), passed in 1938, is the primary federal legislation governing national wage-and-hour standards.<sup>2</sup> Adopted to neutralize the “twin evils” of overwork and underpay,<sup>3</sup> the FLSA establishes substantive, nonwaivable rights to a minimum hourly wage and to overtime premium pay at a rate of 150% (“time and a half”) for work over forty hours in a workweek.<sup>4</sup>

Since the enactment of the FLSA, so called “white-collar” employees have been exempted from the overtime protections provided by the statute.<sup>5</sup> During the 1930s and 1940s, in a principally agrarian and manufacturing-oriented economy, the white-collar exemptions were easy to administer: white-collar workers had clearly defined decision making responsibilities, were closer to management, and were paid better than they are today.<sup>6</sup> These workers “were middle class in income, outlook, attitude, and life

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1. Ann Zimmerman, *Big Retailers Face Overtime Suits As Bosses Do More ‘Hourly’ Work*, WALL ST. J., May 26, 2004, at A1.

2. Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2000).

3. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942); see 81 CONG. REC. 4983-84 (1937) (statement of President Franklin D. Roosevelt) (stating that the FLSA’s purpose is to “help those who toil in factory and on farm” to obtain “a fair day’s pay for a fair day’s work”).

4. 29 U.S.C. §§ 206-207.

5. 29 U.S.C. § 213(a).

6. See Michael A. Faillace, *Automatic Exemption of Highly-Paid Employees and Other Proposed Amendments to the White-Collar Exemptions: Bringing the Fair Labor Standards Act into the 21st Century*, 15 LAB. LAW. 357, 358 (2000) (describing characteristics of white-collar workers at the time the FLSA was adopted).

style.”<sup>7</sup> By contrast, in today’s service-oriented economy,<sup>8</sup> white-collar workers are no longer middle class managers, but are more likely to share class traits typically associated with their blue-collar counterparts.<sup>9</sup> Modern white-collar jobs involve repetitive, mechanical duties, rather than intellectual or creative responsibilities.<sup>10</sup> Moreover, since most white-collar workers today “earn less than unionized blue-collar factory workers and skilled craftsmen,”<sup>11</sup> their exemption from the FLSA is arguably in conflict with Congress’ original intent in enacting the statute.<sup>12</sup>

The white-collar exemptions under the FLSA apply to “any employee employed in a bona fide executive, administrative, or professional capacity.”<sup>13</sup> The FLSA does not define these terms, but charges the United States Department of Labor (“DOL”) with the duty to promulgate rules delineating and defining the white-collar exemptions from “time to time.”<sup>14</sup> The DOL’s regulations determine the exempt status of an employee by applying three tests: a duties test, a salary basis test, and a salary level test.<sup>15</sup> The standards for this tripartite investigation differ for each category

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7. See Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 33 (2001) (describing class traits of white-collar workers during the early days of the FLSA).

8. See, e.g., U.S. GEN. ACCOUNTING OFFICE, WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE, GAO/T-HEHS-99-164, at 9-10 (1999) (noting that the service sector of the American economy nearly doubled between 1983 and 1998 and is the largest employment sector by percentage of full time workers).

9. See Miller, *supra* note 7, at 33 (contrasting white-collar workers of the 1930s with modern white-collar workers); see also Deborah C. Malamud, *Engineering The Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2214-15 (1998) (discussing “the role the law has played in constructing and maintaining American conceptions of class”).

10. Miller, *supra* note 7, at 33.

11. *Id.*

12. See *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728, 739 (1981) (“The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, ‘labor conditions that are detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.’”); see also discussion *infra* Part I (discussing the original intent of the FLSA overtime rules).

13. 29 U.S.C. § 213(a)(1) (2000).

14. See, e.g., Miller, *supra* note 7, at 3 (noting Congress’ grant of rulemaking authority to the DOL); see also 29 C.F.R. § 541.0–.710 (2003) (containing the DOL’s regulations on white-collar overtime exemptions).

15. See *Sec’y of Labor v. 3Re.com, Inc.*, 317 F.3d 534, 539 (6th Cir. 2003) (explaining that employees must satisfy a duties test, a salary basis test, and a salary level test in order to fit into the white collar overtime exemption). The United States General Accounting Office has published that:

Currently, employees must meet each of three tests to be classified as exempt white-collar workers: (1) the employee must be paid a salary, not an hourly wage (the salary-basis test); (2) the amount of the employee’s salary must indicate managerial or professional status (the salary-level tests); and (3) the

of employee (i.e. administrative, professional, or executive).<sup>16</sup>

Though at one time these tests were both practical and practicable, the DOL's failure to modernize the tests to reflect changing labor conditions has muddied the regulatory waters.<sup>17</sup> As the distinction between blue- and white-collar workers evaporated, the rules were in desperate need of revision.<sup>18</sup>

The political issues surrounding the overtime exemptions have not changed in over sixty years: employers seek to lower costs by broadening exemptions from labor standards requirements, while employees seek to retain protection by remaining within the purview of the FLSA.<sup>19</sup> There have been numerous calls from employers, employees, and the academic community to reform the FLSA and to dovetail the white-collar exemptions with modern workplace norms.<sup>20</sup> In a 1999 Report to the Subcommittee on Workforce Protections, the U.S. General Accounting Office ("GAO"), citing reported problems with the DOL's regulations, recommended that the Secretary of Labor comprehensively review and restructure the white-

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employee's job duties and responsibilities must involve managerial or professional skills (the duties tests).

U.S. GEN. ACCOUNTING OFFICE, WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE, GAO/HEHS-99-164, at 1-2 (1999).

16. See 29 C.F.R. § 541.1-541.3 (defining the requirements for being considered an administrative, executive, or professional employee).

17. See Michael Cicala, Note, *Equalizing Workers in Ties and Coveralls: Removal of the White-Collar Exemption to the Fair Labor Standards Act*, 27 SETON HALL LEGIS. J. 139, 148 (2002) (describing the white-collar exemptions as an "Inefficient, Under-protective Mess"); Robert D. Lipman et al., *A Call for Bright-Lines to Fix the Fair Labor Standards Act*, 11 HOFSTRA LAB. L.J. 357, 364-65 (1994) (describing some of the difficulties in applying the three tests).

18. See Cindy Skrzycki, *Labor Dept. to Propose New Overtime-Pay Rules*, WASH. POST, Mar. 27, 2003, at E1 ("Every White House since the Carter administration has made attempts to overhaul the rule, and all have failed because of the complexity of the regulations and political infighting.").

19. Miller, *supra* note 7, at 6.

20. See, e.g., Gretchen Agena, Comment, *What's So "Fair" About It?: The Need to Amend the Fair Labor Standards Act*, 39 HOUS. L. REV. 1119, 1120 (2002) (discussing why the FLSA should be reformed); Cicala, *supra* note 17, at 141 (arguing that the exemption should be eliminated); Faillace, *supra* note 6, at 359 ("Revolutionary changes in the workplace require a comprehensive revision of the FLSA in order to continue to achieve the original objectives of the Act and to create the flexibility necessary to accommodate the progressive employment practices of today's economy."); Garrett Reid Krueger, Note & Comment, *Straight-Time Overtime and Salary Basis: Reform of the Fair Labor Standards Act*, 70 WASH. L. REV. 1097, 1097 (1995) (arguing that the FLSA is outdated and needs to be revised); Miller, *supra* note 7, at 7 (proposing an adjustment to the FLSA maximum hours labor standards); Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI.-KENT L. REV. 157, 158 (1994) ("The nation's worktime legislation, the Fair Labor Standards Act, is not up to the task of regulating or governing these changing work patterns and realities.").

collar exemptions to better accommodate today's workplace and to better anticipate future workplace trends.<sup>21</sup> On March 31, 2003, in response to the GAO's report, the DOL published a proposed rule which contained revisions to the white-collar exemption tests.<sup>22</sup> After a lengthy battle on Capitol Hill,<sup>23</sup> spending for the proposed rule was approved by Congress on January 22, 2004.<sup>24</sup> During the ninety day public comment period, the DOL received more than 75,000 comments on the proposed rules.<sup>25</sup> This deluge of comments persuaded the DOL to scale back many of the more radical reforms contained in the proposed rule. As a result, the final rule differs substantially from the proposed rule,<sup>26</sup> yet retains many important changes to the white-collar exemptions.

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21. See U.S. GEN. ACCOUNTING OFFICE WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE, GAO/T-HEHS-99-164, at 16-33 (1999) (addressing both employer and employee concerns about the current DOL regulation. Employers cited: (1) potential liability arising from uncertain application of the various DOL tests, (2) the subjective nature of classification determinations under the DOL rules and consequent inconsistent results, and (3) the effect of technology on employment. Employees cited (1) the ossification of the salary-level test (which does not allow for periodic adjustments for inflation), and (2) inadequate protection for low income supervisory workers due to oversimplification of the duties test).

22. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15,560, 15,560-61 (proposed Mar. 31, 2003) (to be codified at 29 C.F.R. pt. 541) [hereinafter Defining and Delimiting]. For a discussion of the new rules see *infra* Part IV.

23. After the proposed rule was published, the FY2004 Labor, Health and Human Services, and Education Appropriations Bill was amended by Sen. Tom Harkin (D-Iowa) to deny funding for any DOL action that would exempt employees currently eligible for overtime pay. 149 CONG. REC. SA1580 (daily ed. Sept. 5, 2003). Shortly thereafter, the Office of Management and Budget ("OMB") issued a Statement of Administration Policy threatening a presidential veto of the Appropriations Bill if the amendment were to be attached. On September 10, 2003 the Senate passed the Harkin Amendment 54-to-45. The House of Representatives supported the ban in a non-binding vote. Despite bipartisan support from Congress, the stalemate over the Appropriations Bill threatened to cause a shutdown of the federal government. After the fiscal year 2004 Appropriations Bill for Labor, HHS, and Education was wrapped into an end of the year omnibus spending bill, the Harkin Amendment was withdrawn and the Bill was sent to the President. See [http://www.shrm.org/government/hrvoice/sec541factsheet\(leg04\).doc](http://www.shrm.org/government/hrvoice/sec541factsheet(leg04).doc)

24. See, e.g., Carl Hulse, *After Disputes, Congress Passes Spending Plan*, N.Y. TIMES, Jan. 23, 2004, at A1 (discussing the recent legislative history of the Appropriations Bill).

25. *Department of Labor Revises White-Collar Exemption Rules*, Empl. L. Briefing: White-Collar Exemption Revisions (CCH), at 1 (Apr. 24, 2004); see Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,121, 22,125 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541) [hereinafter Defining and Delimiting; Final Rule] ("The Department received comments from a wide variety of individuals, employees, employers, trade and professional associations, labor unions, governmental entities, Members of Congress, law firms, and others.").

26. See *Department of Labor Revises White-Collar Exemption Rules*, *supra* note 25, at 1 (noting that the final rule represents a "partial retreat" from the comprehensive restructuring of the white collar exemptions as envisioned in the March 2003 proposed rule).

This Comment will review the original congressional intent behind the white-collar exemptions, discuss some of the problems that arose under the old rules, and analyze the DOL's new rules. After thorough inquiry and analysis, this Comment argues that the new rules represent a significant step towards clarifying the FLSA's overtime regulatory regime and limiting its application to those workers Congress originally intended to cover. The new rules will ultimately benefit employees and employers alike.

## I. ORIGINAL INTENT OF THE FLSA OVERTIME RULES

The FLSA was passed largely in response to the Great Depression.<sup>27</sup> A product of the American Progressive movement and an important piece of New Deal Era legislation,<sup>28</sup> the FLSA was concerned primarily with providing a minimum subsistence wage and protection against oppressive working hours to employees with little bargaining power.<sup>29</sup> The overtime pay provisions of the FLSA were designed to advance three main policy goals: a shorter workweek,<sup>30</sup> compensation for overworked employees, and work spreading (or "work sharing"). Each of these goals was to be

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27. See Lipman, *supra* note 17, at 359.

28. Scholars have noted the relationship between Progressivism and legislation during the New Deal Era.

Progressivism was a middle-class response . . . to urban crisis . . . and concomitant political and social inequities during a period of economic prosperity. The New Deal was a response to serious economic depression. The political generation that matured during the age of the labor question in the Progressive Era . . . became leading labor reformers during the New Deal Era, developing labor standards to create stability under changing conditions.

Miller, *supra* note 7, at 9-10.

29. See Faillace, *supra* note 6, at 361 (discussing the comparative bargaining power rationale); Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 460 (1948) (explaining that the FLSA's "purpose was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost").

30. See Miller, *supra* note 7, at 10-14 (discussing the historical context and development of the short hours movement in the United States). For a more vivid account of historical working-conditions, see UPTON SINCLAIR, *THE JUNGLE* (James R. Barret ed., Prairie State Books 1988) (1906).

Trimming beef off the bones by the hundred-weight, while standing up from early morning till late at night, with heavy boots on and the floor always damp and full of puddles, liable to be thrown out of work indefinitely because of a slackening in the trade, liable again to be kept overtime in rush seasons, and be worked till she trembled in every nerve and lost her grip on her slimy knife, and gave herself a poisoned wound—that was the new life that unfolded itself before Marija. But because Marija was a human horse she merely laughed and went at it; it would enable her to pay her board again, and keep the family going.

achieved by requiring employers to pay a premium for overtime hours.<sup>31</sup>

The legislative history of the FLSA contains no explanation for the white-collar exemptions.<sup>32</sup> It is clear however, that the FLSA was never

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*Id.* at 102.

31. In establishing the FLSA provisions, there were many factors to weigh.

[T]he provisions of the act can be rationalized in terms of the divergence between private and social costs. Even if employers and their employees in the 1930s were satisfied with long workweeks, their private calculations ignored the social costs borne by the unemployed. The time and a half rate for overtime can be thought of as a tax to make employers bear the full marginal social cost of their hours decisions; it was meant to reduce the use of overtime hours . . . . Furthermore, if employees were not satisfied with long workweeks during the 1930s but, because of market imperfections, did not have the freedom to choose employment with employers who offered shorter workweeks, the direct payment of the tax to employees who worked longer workweeks can be understood as an attempt to remedy this imperfection.

RONALD G. EHRENBERG & PAUL L. SCHUMANN, *LONGER HOURS OR MORE JOBS?* 3-4 (Cornell Studies in Indus. and Labor Relations No. 22, Cornell Univ. 1982), *cited in* Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139, 147 (1993).

Courts have also noted the purposes of the Act.

[T]he purpose of the act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. Of course, this was one effect of the time and a half provision, but another and an intended effect was to require extra pay for overtime work by those covered by the act even though their hourly wages exceeded the statutory minimum. The provision of section 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum, wage. By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the beginning. 'A fair day's pay for a fair day's work' was the objective stated in the Presidential message which initiated the legislation.

*Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-78 (1942).

32. *See* U.S. GEN. ACCOUNTING OFFICE, *WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE*, GAO/T-HEHS-99-164, at 5 n.4 (1999) ("The legislative history for the FLSA contains no explanation for the [white-collar] exemption"); Faillace, *supra* note 6, at 361 (noting that the FLSA was not intended to cover all employees); DeChiara *supra* note 31, at 160-61 (noting that few courts or commentators have offered explanations for the exemption); *see also* Defining and Delimiting; Final Rule, 69 Fed. Reg. 22,121, 22,123 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541) (describing references to the exemptions in the legislative history as "scant").

intended to cover all employees.<sup>33</sup> It has been inferred that the white-collar exemptions served as a line-drawing tool between those workers in need of statutory protection and those whose skills, pay, and position provided them sufficient bargaining power to protect themselves.<sup>34</sup> While this “line-drawing” argument may have provided a logical rationale for the exemptions at the time the FLSA was first adopted, application of the DOL’s antiquated regulatory framework in the modern workplace has produced results at odds with this hypothetical policy.<sup>35</sup> Indeed, some commentators have argued that the white-collar exemptions have no legitimate rationale at all and should be abolished.<sup>36</sup>

## II. PROBLEMS WITH THE OLD RULES

The old rules were anachronistic,<sup>37</sup> difficult to apply,<sup>38</sup> and burdened employers with the threat of massive liability.<sup>39</sup> Under the old rules, in order to qualify an employee as exempt, the employer had the burden to prove<sup>40</sup> that the employee satisfied each of three tests: the salary level test,

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33. See Lipman, *supra* note 17, at 363 (“Congress was concerned that application of the FLSA to certain industries would destroy them altogether. It thus provided exemptions for these industries.”); DiChiara, *supra* note 31, at 161 (noting that the FLSA did not cover agricultural laborers or domestic workers).

34. See Faillace, *supra* note 6, at 361 (mentioning the comparative bargaining power theory behind the white-collar exemptions). This thesis is not entirely convincing. For example, if the FLSA is based on comparative bargaining power, with the Act protecting those on the short end of the bargain, why would the Act not cover agricultural workers while covering highly skilled blue-collar craftsmen and blue-collar employees who have union protection? See DiChiara, *supra* note 31, at 161-62 (attempting to discover the true legislative intent behind the white-collar exemptions).

35. See Lipman, *supra* note 17, at 360-61 (noting overtime exemptions for agricultural workers and low-wage sales employees belie a purported congressional intent to protect unprotected workers).

36. See DeChiara, *supra* note 31, at 160 (arguing that the white-collar exemptions have no legitimate rationale).

37. See ESA News Release, *U.S. Department of Labor Proposal Will Secure Overtime for 1.3 Million More Low-Wage Workers*, at <http://www.dol.gov/opa/media/press/esa/ESA2003146.htm> (last visited Nov. 21, 2004) (“The old regulations . . . mention job classifications that no longer exist, such as key punch operators, straw bosses, leg men and gang leaders.”); see also Scott D. Miller, *Work/Life Balance and the White-Collar Employee Under the FLSA*, 7 EMPLOYEE RTS. & EMP. POL’Y J. 5, 8 (2003) (mentioning that Labor Secretary Elaine Chao has described the old rules as “literally ancient” and “absurdly complex”).

38. See *Donovan v. Kentwood Dev. Co.*, 549 F. Supp. 480, 488 (D. Md. 1982) (“The case . . . is problematic, as FLSA cases often are, because of the lack of precision . . . [i]t is clear . . . this Court must simply do the best it can.”).

39. See Krueger, *supra* note 20, at 1123 (“The confusion and uncertainty caused by the current regulations and case law are creating potentially enormous liability traps for employers. . .”).

40. See *Defining and Delimiting*, 68 Fed. Reg. 15,560, 15,561 (proposed Mar. 31,

the salary basis test, and the duties test.<sup>41</sup> In the event that an employer misclassified an employee as exempt, employers could be held liable for up to three years of back pay plus liquidated damages.<sup>42</sup>

### A. *Old Salary Basis Test*

The salary basis test asks whether employees receive a predetermined level of compensation during each pay period without consideration of the quality or quantity of work performed.<sup>43</sup> This requirement reflects the historic notion that while the work of the “men in overalls” is divisible into hourly units, white-collar work is non-commodifiable.<sup>44</sup> Though the salary basis test is seemingly a straightforward inquiry, it has caused widespread confusion and has proven a rich source of litigation.<sup>45</sup>

2003) (to be codified at 29 C.F.R. pt. 541) (noting that employers have the burden of proving exempt status); *see also* *Arnold v. Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (“[T]hese exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.”).

41. *See* *Defining and Delimiting*, 68 Fed. Reg. at 15,560 (“To be considered exempt, employees must meet certain minimum tests related to their primary job duties and be paid on a salary basis at not less than specified minimum amounts.”).

42. *See* 29 U.S.C. §§ 216(b), 255 (2000) (establishing that employers in violation can be held liable for two years of back pay (three years if the violation is willful), unpaid overtime compensation, and liquidated damages); *see also* *Donovan*, 549 F. Supp. at 489 (noting that liquidated damages in an amount up to the amount of back wages are generally awarded).

43. 29 C.F.R. § 541.118(a) (2003).

44. *See* *Malamud*, *supra* note 9, at 2294 (“[T]he upper-level worker was expected not to be a ‘clock watcher’ or a ‘clock puncher.’ The upper-level worker was a noncommodified worker: his labor was total, not divisible into fungible hour-long bursts of energy to be channeled into pre-set processes.”).

45. Changes in employment practices have made the salary-basis test difficult to apply.

In 1938, when the FLSA was written, employees were generally not paid when they did not work . . . the [salary basis] test was defended because payment on a salary basis was considered ‘the only method of payment consistent with the status implied by the term ‘bona fide’ executive’ . . . . Now that paid time off policies have become so varied and sophisticated, the differences between salaried and hourly paid employees are almost indistinguishable. It is for this reason that the salary basis test is no longer an effective indicator for determining whether employees should receive overtime premium payments.

*Lipman*, *supra* note 17, at 366; *see also* *Faillace*, *supra* note 6, at 365-66 (noting that the salary basis test has “resulted in an inordinate amount of senseless litigation over minor technicalities that in no way reflect Congress’ original intent in passing the FLSA”); *see also*, Andrew M. Campbell, *When Is Employee Paid on “Salaried Basis” in Order to Qualify as Bona Fide Executive, Administrative, or Professional Employee Under Labor Regulations* (29 CFR §§ 541.1-541.3) *Exempting Such Persons From Minimum Wage and Overtime Provisions Under § 13(a)(1) of Fair Labor Standards Act* (29 U.S.C.S. §



Within the salary basis test, one rule that causes considerable consternation is the no-docking provision.<sup>46</sup> The no-docking rule prohibits employers from deducting an employee's pay based on partial day absences or other infractions,<sup>47</sup> and may apply whether or not an employee's pay was actually docked.<sup>48</sup> In an effort to soften the impact of the no-docking rule on unsuspecting or unknowing employers, the DOL created a statutory "window of correction" within which employers could maintain their employee's exempt status by reimbursing docked pay and promising to comply in the future.<sup>49</sup> Despite its inclusion for the benefit of employers, the "window of corrections" further eroded the administrability of the salary basis test and has given rise to yet more litigation.<sup>50</sup> Over time, the salary basis test degenerated into an intensely fact-specific inquiry and produced inconsistent and counterintuitive results.<sup>51</sup>

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213(a)(1)), 123 A.L.R. 485, 485-566 (noting some of the contradictory holdings under the salary basis test).

46. 29 C.F.R. § 541.118(a).

47. *Id.*; see also *Bankston v. Illinois*, 60 F.3d 1249, 1253 (7th Cir. 1995) ("Generally, an employer cannot show that an employee is exempt if the employer docks the employee's pay for partial day absences, violations of rules other than significant safety rules, and other barometers of the quantity or quality of the employee's work.").

48. See *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (holding that an employee's compensation could be subject to reduction even if deductions were not taken from his or her salary. The "subject to" standard is met whenever the employer maintains (1) an actual practice of impermissible deductions or (2) a policy that creates a significant likelihood of deductions, so long as the policy is "clear and particularized" so as to "effectively communicate" that deductions will be made in specified circumstances.").

49. 29 C.F.R. § 541.118(a)(6) states that:

The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

50. See *Defining and Delimiting*, 68 Fed. Reg. 15,560, 15,572 (proposed Mar. 31, 2003) (to be codified at 29 C.F.R. pt. 541) ("Unfortunately, the 'window of correction' has proved difficult for the Department to administer and has been the source of considerable litigation.").

51. See U.S. GEN. ACCOUNTING OFFICE, *WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE*, GAO/T-HEHS-99-164, at 17-21 (1999) (describing some of the problems arising from the complex salary basis test).

### B. *Old Salary Level Test*

The salary level test provides that an “employee must be paid at least a specified base salary level that is supposed to indicate managerial or professional status.”<sup>52</sup> The salary level test operates as a statutory switching station, bifurcating further inquiry into either “long” or “short” versions of the duties test.<sup>53</sup> A lower salary level triggers analysis under the long test, while a higher salary level requires analysis under the short test. By splitting the tests, the DOL sought to protect low salary level workers from exemption by requiring employers to meet the heightened requirements of the long test. Alternately, if the employee is paid at a higher salary level, the employer is required to carry the lighter burden of satisfying the short test.<sup>54</sup> After making the threshold determination as to whether the long<sup>55</sup> or short test applies, courts must determine the exempt/nonexempt status of the worker by reference to the employee’s actual work activities.<sup>56</sup> Since the salary level test was last adjusted in 1975 and is not indexed for inflation,<sup>57</sup> over time, more and more workers

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52. U.S. GEN. ACCOUNTING OFFICE, WHITE-COLLAR EXEMPTIONS NEED ADJUSTMENTS FOR TODAY’S WORKPLACE, GAO/T-HEHS-00-105, at 2 (2000).

53. See Defining and Delimiting, 68 Fed. Reg. at 15,561 (“The duties tests differ for each category of exemption.”).

54. See, e.g., U.S. Department of Labor Proposal to Strengthen Overtime Protection, Side-by-side Comparison, available at [http://www.natlclub.org/pdf\\_forms/usdol.pdf](http://www.natlclub.org/pdf_forms/usdol.pdf) (last visited Nov. 21, 2004) (containing a comparison of the long and short tests). A comparison of the long and short tests as applicable to an administrative employee is illustrative of the relative burdens under each respective test. An administrative employee that qualified for the “short test” was required to (1) have a “[p]rimary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer’s customers,” and (2) to “[c]ustomarily and regularly exercise[] discretion and independent judgment.” *Id.* If the same administrative employee qualified for the long test instead, the employer has to meet the criteria for the short test and additionally show that the employee (3) “[r]egularly and directly assists a proprietor, or exempt executive or administrative employee; or performs specialized or technical work requiring special knowledge under only general supervision; or executes special assignments under only general supervision,” and (4) “[d]oes not devote more than twenty percent (forty percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.” *Id.*

55. See Faillace, *supra* note 6, at 365 (illustrating further the old rule’s obsolescence by the fact that the “long test” salary level has been eclipsed by the pay required by the FLSA for a full-time employee earning the minimum wage).

56. See 48A AM. JUR. 2D *Labor and Labor Relations* § 3926 (1994) (“Whether an employee is exempt under the FLSA’s so-called ‘white collar’ exemption is determined by the employee’s actual work activities, not by an employer’s characterization of those activities through a job title, job description, or other formality, or by the nature of the employer’s business.”).

57. See Defining and Delimiting, 68 Fed. Reg. 15,560, 15,562 (proposed Mar. 31, 2003) (to be codified at 29 C.F.R. pt. 541) (discussing the old tests).

have qualified for the short test, increasing their odds of exemption.<sup>58</sup> This result runs against the intent of the statute: to protect those workers who, by virtue of their limited bargaining power, require statutory protection.

### C. *Old Duties Test*

The duties test asks whether the employee has duties and responsibilities generally associated with managerial, professional, or administrative work.<sup>59</sup> The duties test was last modified in 1949<sup>60</sup> and differs for each category of exemption, though some requirements are common to the three exemptions.<sup>61</sup> The separate “short” and “long” prongs of the old duties test were designed to reflect the notion that the higher the salary level, the more likely the employee will satisfy duties requirements for exemption, and that therefore the courts need not spend as much time analyzing the duties of such an employee.<sup>62</sup> In short, the DOL felt that salary level could serve as a strong indication of exempt status.<sup>63</sup>

The duties test proved to be particularly cumbersome for employers. For example, one of the duties requirements for exemption of administrative employees was that the employee “exercise independent judgment and discretion in carrying out his or her job duties.”<sup>64</sup> Whether or not such discretion was in fact part of the employee’s job involved investigation into both the general duties of the position and specific duties of the employee.<sup>65</sup> Particularly problematic was the fact that

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58. See *Defining and Delimiting*; Final Rule, 69 Fed. Reg. 22,122, 22,126 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541) (“Because of the outdated salary levels, the ‘long’ duties tests have, as a practical matter, become effectively dormant.”).

59. U.S. GEN. ACCOUNTING OFFICE, WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE, GAO/HEHS-99-164, at 6 (1999).

60. See *Defining and Delimiting*, 68 Fed. Reg. at 15,562 (discussing the old tests).

61. See 29 C.F.R. § 541.1-541.3 (2003) (setting forth duties requirements for executive, professional, and administrative employees).

62. See U.S. DEP’T OF LABOR, REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS FOR REGULATIONS, PART 541 22 (1949) (authored by Harry Weiss, Presiding Officer) (explaining the rationale behind the short tests).

63. See *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 698 n.16 (3d Cir. 1994) (noting that the short test was added because the DOL felt that salary level was a good proxy for establishing exempt status).

64. U.S. GEN. ACCOUNTING OFFICE, WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE, GAO/T-HEHS-99-164, at 23 (1999).

65. See *id.* at 24 (discussing the requirements for the old tests).

*the determination may hinge upon how an individual employee views his or her duties.* For instance, one administrative assistant may look at his job as answering telephone calls and following orders, while another person in the same position might describe the job as involving the independence to establish office procedures and respond to incoming client inquiries.<sup>66</sup>

The subjective nature of the duties test undermined employers' ability to ensure compliance with the FLSA and frequently resulted in litigation.

Another problem associated with the old duties test is the so-called "production versus staff dichotomy." This issue arises under both the short and long tests for administrative employees, where exemptions are only available for employees whose work is "directly related to management policies or general business operations."<sup>67</sup> In this situation, courts must assess whether the work in question is related to the administrative operations of the business (exempt), as distinguished from production operations (nonexempt), and whether the work is "of *substantial importance* to the management or operation of the business."<sup>68</sup> Although the distinction between production and administration (or "staff") was a viable one in the 1930s and 1940s, when American workers had clearly demarcated duties and responsibilities, it makes less sense in the twenty-first century workplace, where such boundaries have broken down.<sup>69</sup> For instance, is a human resources consultant working on multimillion dollar defined contribution retirement plans doing so in an "administrative" or "production" capacity—that is, is he or she supplying a "product" in the form of retirement plans or is he or she an administrative employee whose work is of substantial importance to the business?<sup>70</sup> These questions turn

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66. *Id.* (emphasis added).

67. See 29 C.F.R. § 541.205(c)(5) (2003) (noting that the test whether an employee's duties are "directly related to management policies or general business operations" is met by "many persons employed as advisory specialists and consultants of various kinds, credit managers, safety directors, claim agents and adjusters, wage-rate analysts, tax experts, account executives of advertising agencies, customers' brokers in stock exchange firms, promotion men, and many others.>").

68. See *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1125-26 (9th Cir. 2002) (analyzing DOL interpretive regulations to find that the phrase "directly related to management policies or general business operations" describes those types of activities relating to the administrative operations of a business as distinguished from "production" work (citing 29 C.F.R. § 541.28)).

69. See *Defining and Delimiting*, 68 Fed. Reg. 15,560, 15,566 (proposed Mar. 31, 2003) (to be codified at 29 C.F.R. pt. 541) (stating that "[t]he 'production versus staff dichotomy' . . . is difficult to apply uniformly in the 21st century workplace.>").

70. See *Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527, 540 (7th Cir. 1999) (holding that such an employee's work was not related to production despite the fact that it influenced internal business policies and operations).

on intensely fact specific investigations and are resolved only by artificially grafting inflexible, antiquated job parameters onto a flexible, modern workplace. The resulting misfit strains the courts and reveals the inherent unsoundness of using an outmoded statute to govern contemporary interactions.

Finally, the old duties test contains educational requirements that do not accurately reflect modern norms. For example, under the old test, a “learned professional” (a subset of the “professional” exemption) must have a “primary duty consist[ing] of work 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.”<sup>71</sup> This requirement raises the possibility that a person who has been working as an engineer for twenty years, but who narrowly missed completing his undergraduate degree in engineering, would be nonexempt, while an engineer who has only been working for two years, but who has earned his degree, would be exempt.<sup>72</sup> Courts evaded this illogical result by deeming some workers to have earned the equivalent of an undergraduate degree through on-the-job training.<sup>73</sup> Though judicial creativity remedied this statutory problem in isolated cases, uncertainty as to when a particular worker had earned his “equivalency” created broader compliance problems for employers, who could never be certain if a worker was an exempt “learned professional” or a nonexempt “blue-collar” worker. Moreover, the tension between the statute (an undergraduate degree is required for exemption) and the courts’ interpretation of the statute (an undergraduate degree is not required for exemption) severely undercut the regulatory authority of the old rules and confused employers.

### III. ANALYSIS OF THE OLD RULES

Revisions to the overtime pay provisions of the FLSA are long overdue. One of the ironic consequences of the ossification of the rules is that the regulatory burden placed on employers has raised costs and eroded competitive advantages.<sup>74</sup> Fringe benefits (such as health care and pension

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71. Defining and Delimiting, 68 Fed. Reg. at 15,567.

72. *But see* Leslie v. Ingalls Shipbuilding, Inc., 899 F. Supp. 1578, 1583 (S.D. Miss. 1995) (holding that an engineer was properly classified as an exempt professional despite never having earned his bachelor’s degree in engineering).

73. *See id.*

74. *See Hearing on Proposed Rule on Overtime Pay Before the Subcomm. On Labor, Health and Human Services, Education and Related Agencies of the Senate Appropriations Comm.*, 108th Cong. (2004) (statement of Ronald Bird, Chief Economist, Employment Policy Foundation), available at <http://www.epf.org/commentary/testimony/2004/RonaldBird541TestimonyWeb.pdf> (Jan. 20, 2004) (discussing the economic effects of the old rules).

plans) and the professionalization of new classes of workers<sup>75</sup> have further compounded employers' costs. These costs, along with the constant threat of litigation stemming from the uncertainty surrounding the rules, have led to a loss of manufacturing and production jobs to foreign competitors.<sup>76</sup> In its old age, the FLSA has begun to hurt those it was originally designed to protect.

#### IV. THE NEW RULES

The new rules significantly streamline and simplify the old tests, fusing both long and short test into one standard test.<sup>77</sup>

##### A. *New Salary Basis Test*

The new rule retains the salary basis requirement but includes two updates: disciplinary deductions and the safe harbor provision.<sup>78</sup>

Under the disciplinary deductions rule, an employer can dock the pay for full-day disciplinary suspensions. This provision represents an exception to the no-docking rule<sup>79</sup> and allows employers to hold exempt and nonexempt employees to the same standard of conduct.<sup>80</sup>

The safe harbor provision is an attempt to remedy the deficiencies of the "window of correction" rule.<sup>81</sup> Under the new safe harbor rule, if an employer has a written policy prohibiting improper pay deductions, notifies employees of the policy, and reimburses employees for improper deductions, then the employer would not lose the exemption for any employee unless the employer's policy prohibiting improper deductions is repeatedly and willfully violated.<sup>82</sup> This provision facilitates an employer's compliance with the Act and provides protections against improper pay deductions for employees.

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75. See Faillace, *supra* note 6, at 361-62 (noting that "[p]rofessionalization occurs when practitioners in particular occupations establish educational standards for entry into the field, organize a professional association, develop a code of ethics, and enlist other measures to raise the profession's stature.").

76. See Miller, *supra* note 7, at 18 (mentioning the loss of jobs to foreign nations).

77. See U.S. Department of Labor Proposal to Strengthen Overtime Protection, Side-by-side Comparison, available at [http://www.natlclub.org/pdf\\_forms/usdol.pdf](http://www.natlclub.org/pdf_forms/usdol.pdf) (last visited Nov. 21, 2004) (comparing the old and new tests).

78. See Defining and Delimiting, 68 Fed. Reg. 15,560, 15,572 (proposed Mar. 31, 2003) (to be codified at 29 C.F.R. pt. 541) (laying out the new tests).

79. See discussion *supra* Part II (discussing the no-docking rule).

80. See Defining and Delimiting, 68 Fed. Reg. at 15,572 (laying out the new tests).

81. See discussion *supra* Part II (discussing the "window of correction" rule).

82. See Defining and Delimiting, 68 Fed. Reg. at 15,572 (explaining the new tests).

### *B. New Salary Level Test*

The new salary level test (“standard test”) simply raises the minimum threshold salary level below which all employees are nonexempt.<sup>83</sup> This change guarantees statutory protection to employees who, under the old salary level test, may have qualified for exemption.

Although it was suggested that the new standard test replace the old salary level test by simply adjusting the old salary level rates for inflation, the DOL has identified a number of factors militating against such a mechanical adjustment.<sup>84</sup> Instead, the new rules adopt a set salary level based on both actual salary levels being paid in the economy and the percentage of salaried employees who would be automatically entitled to overtime pay under the new test.<sup>85</sup>

### *C. New Duties Test*

The revisions to the duties test originally promised to be the most effective section of the new rules. Under the proposed rule, much of the ambiguous language was purged from the regulatory text. However, after the intense public comment period, many of these changes were withdrawn or watered down. The final rule only partly remedies many of the underlying difficulties with the white-collar exemption’s duties test.

The new rules simplify the duties tests for each category of worker by defining individual responsibilities and by removing overly broad or vague requirements. For example, the old test’s requirement that administrative employees exercise “discretion and independent judgment” had been construed to deny exemptions to those employees who were required to follow a procedures manual, despite the fact that most employees in modern workplaces are required to operate within standard procedures.<sup>86</sup> The new test augments the “discretion and independent judgment” requirement with a new requirement that the employee (1) “have a primary

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83. *See id.* at 15,571 (raising the threshold salary level to \$455 a week, thereby securing overtime for employees in the lowest twenty percent of salary range).

84. *See id.* at 15,570-71 (discussing factors weighing against automatically adjusting old salary level tests for inflation). Some factors include (1) constructing the new “standard test” based on the old salary level rates presumes that the old salary test rates were correct; (2) adjusting for inflation may have incongruent effects on certain segments of industry and geographic regions which tend to pay lower salaries; (3) the regulatory history has typically looked to actual salaries, not inflation-adjusted amounts. *Id.* Moreover, based on the 1949 Weiss Report, the DOL rejects cost of living increases as a basis for adjusting the salary level test because changes in the cost of living are “not a measure of the rise in prevailing minimum salary levels.” *Id.*

85. *Id.*

86. *See id.* at 15,566 (noting problems with the application of the “discretion and independent judgment” requirement for the exemption of administrative employees).

duty of performing office or non-manual work ‘directly related to management or general business operations,’” and (2) that primary duty “must include ‘the exercise of discretion and independent judgment with respect to matters of significance.’”<sup>87</sup> These terms are further defined with illustrative examples to guide judicial interpretation.<sup>88</sup> The interpretive guidelines will assist courts in resolving the “production versus staff dichotomy” by providing a list of work areas that automatically satisfy the requirement for exemption, that the work be related to the management or general business operations of the employer or of the employer’s customers.<sup>89</sup>

The new duties rules also address the education “equivalency” problem for the “learned professional” exemption<sup>90</sup> by expressly adopting the judicially invented policy that modern workers may earn the equivalent of an undergraduate degree through on-the-job learning. Though the new rules preserve a residual uncertainty by not listing a specific formula for determining educational equivalency,<sup>91</sup> they bring the statute into line with modern notions of education and reclaim the statute’s authority by resolving the disconnect between the old statutory language and judicial interpretation.

By updating and streamlining<sup>92</sup> the definitional sections of the regulations, the DOL’s new rules attempt to eliminate the subjectivity that plagued the earlier version. Though this change will, to some degree, facilitate compliance and minimize litigation by clarifying employer and employee rights and obligations under the Act, the DOL’s capitulation to political pressures exerted through the public comment period has weakened the duties-test revisions.<sup>93</sup>

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87. Defining and Delimiting; Final Rule, 69 Fed. Reg. 22,122, 22,139 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541).

88. *See* Defining and Delimiting, 68 Fed. Reg. 15,560, 15,566-88 (proposed Mar. 31, 2003) (to be codified at 29 C.F.R. pt. 541) (containing guidance for interpretation of statutory language).

89. *See id.* at 15,566 (providing examples of work areas that would satisfy the requirement for exemption).

90. *Supra*, p. 132.

91. *See* Defining and Delimiting, 68 Fed. Reg. at 15,568 (“We have not proposed any specific formula in the regulations for determining the equivalencies of intellectual instruction and qualifying work experience, although some examples from the current rule have been included and expanded.”).

92. *See id.* at 15,563 (noting that the proposed rule will collapse the definitional and explanatory sections of the regulatory text into one, unified rule).

93. *See* Defining and Delimiting; Final Rule, 69 Fed. Reg. 22,122, 22,138-39 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541) (describing the “numerous, widely divergent comments” that the Department received regarding the proposed changes which ultimately lead the Department to delete “the proposed ‘position of responsibility’ requirement”).



## V. ANALYSIS OF THE NEW RULES

According to the DOL, the new rules will strengthen overtime protection for 6.7 million more low-wage earners<sup>94</sup> while 644,000 workers who currently receive overtime will lose the right to overtime pay because they will be converted to salaried employees.<sup>95</sup> Some Washington think tanks disagree. For example, the Economic Policy Institute (EPI)<sup>96</sup> estimates that the number of workers who will lose the right to overtime pay is closer to eight million.<sup>97</sup> However, the Employment Policy Foundation (EPF)<sup>98</sup> has attacked the EPI's estimates, declaring, "[t]o reach the 8 million conclusion, the EPI analysis necessarily is based on erroneous subjective judgments and misunderstanding of both the current and proposed regulations."<sup>99</sup>

Fears about workers losing their "protected" status under the FLSA may be overblown.<sup>100</sup> As Ronald Bird, Chief Economist for the EPF,

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94. *Id.* at 22,123.

95. Defining and Delimiting, 68 Fed. Reg. at 15,580.

96. See About EPI, at <http://www.epinet.org/content.cfm/about> (last visited Nov. 21, 2004) ("The Economic Policy Institute is a nonprofit, nonpartisan think tank that seeks to broaden the public debate about strategies to achieve a prosperous and fair economy."). It should also be noted that several EPI directors are presidents of major labor unions. The EPI report was highly influential and was cited by Congressmen during debates about the proposed rule.

97. See Testimony of Jared Bernstein, Ph.D., On the Department of Labor's Proposed Rule on Overtime Pay, available at [http://www.epinet.org/webfeatures/viewpoints/Overtime\\_pay\\_testimony\\_JB\\_01202004.pdf](http://www.epinet.org/webfeatures/viewpoints/Overtime_pay_testimony_JB_01202004.pdf) (Jan 20, 2004) (arguing that if two factors are taken into account ((1) that the DOL only examined a small subset of the affected group; and (2) that the estimated 2.7 million salaried workers who will be exempted are included), then "the DOL results reveal that about seven million employees would lose overtime coverage under the new rules," an estimate that is quite similar to the EPI estimate of eight million workers losing such protection).

98. See About EPF, at <http://www.epf.org/about/> (last visited Nov. 21, 2004) ("The Employment Policy Foundation (EPF) is a nonprofit, nonpartisan public policy research and educational foundation . . . focuse[d] on workplace trends and policies.").

99. The Facts on Who Gains or Loses Overtime Under the Proposed White Collar Regulations—644,000 or 8 Million, available at [http://www.epf.org/\\_newswatch/2003/pw20030709/FF20030709.pdf](http://www.epf.org/_newswatch/2003/pw20030709/FF20030709.pdf) (last visited Nov. 21, 2004).

100. See OPA News Release, Labor Secretary Elaine L. "Chao" Testifies in Support of Proposal to Update Overtime Protections for White-Collar Workers (Jan. 20, 2004), available at <http://www.dol.gov/opa/media/press/opa/OPA2004063.htm> (quoting Secretary Chao:

The Department's reform will strengthen overtime protections for millions of low-wage and middle-class workers, will empower workers to understand and insist on their overtime rights, will enable the Department of Labor to vigorously enforce the law, will prevent unscrupulous employers from playing games with workers' overtime pay, and will put an end to the lawsuit lottery that is delaying justice for workers and stifling our economy with billions of dollars in needless litigation.

explained during his testimony before the Subcommittee on Labor, Health and Human Services, Education and Related Agencies:

Sometimes discussions about FLSA status imply [that workers are disadvantaged] when it is said that the exempt worker is not “protected” from demands for extra hours or is not paid for the full amount of time committed to the job. However, this risk is tempered by the mobility of the employee in the labor market. Having education and skills that are in demand and being in a labor market where employment is growing and unemployment relatively low are important considerations that also protect employees from such risks. The main disadvantage is that the salaried employee may have to bear the transactions costs of re-negotiation with the current employer or of seeking other employment to redress the balance between his or her time preferences and wages.<sup>101</sup>

In other words, workers with sufficient bargaining power can protect themselves by exploiting their power in the labor market and are therefore not in need of the “protections” provided by the statute.

Despite the improvements contained in the new rule, the changes remain politically unpopular.<sup>102</sup> Some workers who were formerly entitled by the statute to overtime pay will become exempt under the new rules and therefore oppose the changes.<sup>103</sup> The popular antipathy towards the new rules is understandable. Over the course of the sixty years since their enactment, the overtime pay entitlements provided by the FLSA have become entrenched rights in the minds of many workers, even though such entitlements contradict Congress’ original intent in adopting the statute. For example, though a modern paralegal earning a \$35,000 salary has more economic bargaining power than did a wage-earning bituminous coal miner circa 1938, such a paralegal may have been nonexempt under the old rules.<sup>104</sup> Yet there is no evidence that Congress intended to provide modern

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(emphasis in original)).

101. Testimony of Ronald Bird, *supra* note 74, at 4.

102. See, e.g., Hulse, *supra* note 24 (noting that both houses of Congress opposed the Bill and that Democrats hoped to reverse the DOL rules).

103. See Ross Eisenbrey & Jared Bernstein, *Eliminating the Right to Overtime Pay*, ECONOMIC POLICY INSTITUTE BRIEFING PAPER (June 26, 2003), available at [http://www.epinet.org/content.cfm/briefingpapers\\_flsa\\_jun03](http://www.epinet.org/content.cfm/briefingpapers_flsa_jun03) (decrying the predicted loss of overtime coverage for various white collar workers).

104. See 29 C.F.R. § 541.1 (2003). A paralegal may satisfy the administrative employee salary basis and salary level tests, and may partially satisfy the duties test by having a primary duty of performing non-manual work related to the employer’s customers. However, if the paralegal does not customarily and regularly exercise discretion and

white-collar paralegals with rights to overtime pay. Indeed a stronger case is available to defend the paralegals' exemption.<sup>105</sup>

Some critics of the new rules contend that the changes represent little more than a stealth subsidy to corporate interests.<sup>106</sup> Their argument is that the new rules will create a series of catch-all exemptions designed to "pay back" the current administration's campaign contributors.<sup>107</sup> Yet these critics fail to acknowledge the costs of maintaining the old rules. Under the old rules, uncertainty begets litigation, which raises employers' costs. Employers, in turn, seek redress by outsourcing nonexempt jobs. The new rules seek to purge uncertainty from the rules, limit litigation costs, and facilitate a healthy and competitive domestic labor market.

This is not to say that the new rules are perfect. There are some pork-barrel provisions preserved in the new regulations.<sup>108</sup> Still, the DOL estimates that one-time implementation costs will be outweighed over time by employers' savings from staying out of court to litigate Part 541 back-

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independent judgment, he or she may be nonexempt under the old rules. *See also* *Hodgson v. Penn Packing Co.*, 335 F. Supp. 1015, 1021 (E.D. Pa. 1971) (citing *Rothman v. Publicker Indus., Inc.*, 201 F.2d 618, 620 (3d Cir. 1953)) (noting that "[t]he Act requires more than an exercise of 'those small discretions which normally inhere' in the type of work which one does."); *cf.* *Shaw v. Prentice Hall, Inc.*, 977 F. Supp. 909, 916 (S.D. Ind. 1997) (stating that plaintiff's exercise of discretion and judgment was "real and substantial" because "success of defendant's business depended in part on the effectiveness of plaintiff's troubleshooting." (citing *Orphanos v. Charles Indus.*, No. 95 C 4039, 1996 U.S. Dist. LEXIS 10849, at \* 9 (N.D. Ill. July 26, 1996)).

105. The reasons for exemptions of this sort are well-articulated:

The theory behind the exemptions . . . has been that these employees do not need the protections of the overtime requirements because of their higher base pay and their greater job security. In addition, to the extent that the overtime provisions were intended to cause employers to create more jobs by hiring more workers to perform the additional work, it appears that this option is less feasible in connection with the type of work performed by these categories of employees. Finally, the value to the employer of the work of executive, administrative or professional employees is thought to be generally unrelated to the number of hours worked by those employees, so that they are neither paid more for working more hours a week nor paid less for working less hours in a given week.

L. Camille Hébert, "Updating" the "White-Collar" Employee Exemptions to The Fair Labor Standards Act, 7 EMPLOYEE RTS. & EMP. POL'Y J. 51, 56-57 (2003).

106. *See* Miller, *supra* note 37, at 8 (arguing that "a review of the [new rules] demonstrates that the proposal capitulates to business interests, undermining the doctrinal basis for the existence of an exemption under \$65,000 and failing to improve society's quality of life").

107. *See* Press Release, Kerry-Edwards 2004, Inc., George W. Bush: Eliminating Overtime Pay for 6 Million Workers, at [www.johnkerry.com/pdf/pr\\_2004\\_0821.pdf](http://www.johnkerry.com/pdf/pr_2004_0821.pdf) (last visited Nov. 21, 2004).

108. *See* 29 U.S.C. § 213(j) (2000) (stating that sugar beet workers are exempted from the maximum hours legislation).

overtime claims.<sup>109</sup> If these savings are, in fact, passed onto workers in the form of new jobs, the revisions will be a significant boon to labor interests.

## VI. CONCLUSION

The DOL's modernization of the white-collar exemptions will benefit both employer and employee. Increased clarity will assist both sides in determining their respective rights and obligations under the FLSA, and litigation will consequently be curtailed. Employer savings will be passed onto workers in the form of higher salaries or increased hiring which will contribute to the fulfillment of Congress's original goals in passing the FLSA.

Most importantly, the new rules better reflect the objectives of the Act as originally contemplated by Congress. This is an essential aspect of the new rules. As Deborah C. Malamud has observed:

Any government action that draws lines on the basis of class-like criteria—income, occupation, education level, and so forth—is likely to have a significant effect on how we experience and debate the issue of class. . . . In such cases, the government must do everything it can to make clear to the regulated community that its classification scheme is “correct” only for the limited purposes for which it was designed.<sup>110</sup>

By updating the rules the DOL directly addresses this concern. The DOL is focused on ensuring a limited scope of application for rules that had leaked beyond the borders of their intended regulatory agenda. The old rules went too far in both directions—overprotecting in some cases and overexempting in others. By tapering the statute, the new rules will limit not only litigation costs, but those social and cultural costs associated with government regulated class line-drawing.

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109. Costs of the new rules are explained in the following manner:

Because the rules have not been adjusted in decades, the final rule does impose additional costs on employers, including up to . . . \$739 million in one-time implementation costs. However, updating and clarifying the rule will reduce Part 541 violations and are likely to save businesses at least an additional \$252.2 million every year.

Defining and Delimiting; Final Rule, 69 Fed. Reg. 22121, 22123 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541).

110. Malamud, *supra* note 9, at 2320.