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### Blackberrys and the Fair Labor Standards Act: Does a Wireless Ball and Chain Entitle White-Collar Workers to Overtime Compensation?

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**BLACKBERRYS AND THE FAIR LABOR STANDARDS ACT:  
DOES A WIRELESS BALL AND CHAIN ENTITLE WHITE-COLLAR  
WORKERS TO OVERTIME COMPENSATION?**

*“[M]ore men are killed by overwork than the importance of this world justifies.”*<sup>1</sup>

INTRODUCTION

A few short decades ago, the American office worker spent the hours of nine to five at the office. At the end of the day, he could leave his work behind him and ignore it until the next morning. With the exception of the occasional holiday party or impromptu happy hour, he could easily distinguish between his work at the office and his life at home. In many industries, this worker exists only in the past, as the modern work environment includes the office, the home, the car, and anywhere within range of a wireless signal.

Rapid technological advancements have enabled millions of Americans to work outside the office. Most employees are reachable after hours by cell phone or email. In fact, more than twenty-eight million Americans have home offices that allow them to work remotely.<sup>2</sup> The convenience (or burden) of home offices has resulted in 18% of employed adults working from home on a daily basis.<sup>3</sup> A 2006 study by the Massachusetts Institute of Technology (MIT) revealed that many employees check their work emails every eight minutes—even on nights and weekends.<sup>4</sup> Indeed, career-advice website Careerbuilder.com discovered that 25% of employees stayed in touch with their offices via smartphones when they were supposedly on vacation.<sup>5</sup> Perhaps unsurprisingly, in 2006, Webster’s New College Dictionary’s word-of-the-year was *crackberry*: a noun describing a person addicted to his BlackBerry.<sup>6</sup>

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1. RUDYARD KIPLING, *THE PHANTOM RICKSHAW* 13 (1899).

2. Marilyn Gardner, ‘No, Don’t Bother Coming in . . .’, *CHRISTIAN SCI. MONITOR*, Nov. 26, 2007, at 13. By 2010, as many as 100 million Americans may work from home. *Id.*

3. MARY MADDEN & SYDNEY JONES, *PEW INTERNET & AMERICAN LIFE PROJECT, NETWORKED WORKERS* 3 (2008).

4. Whitney Stewart, *Workday Never Done*, *WASH. TIMES*, June 30, 2008, at B1.

5. Michael Starr & David K. Li, *ABC News ‘Berrys’ Hatchet With Staff*, *N.Y. POST*, June 17, 2008, at 3.

6. Stewart, *supra* note 4, at B1.

Undeniably, employers have benefited from a workforce that is accessible around the clock. Employees are starting to wonder, however, what is in it for them. This question made national headlines in June 2008, when ABC news writers demanded overtime compensation for answering work emails after hours.<sup>7</sup> In attempts to avoid an “unpaid 24–7 workplace,” the writers refused to sign a contract waiving overtime pay.<sup>8</sup> Similarly, across the globe, managers and specialists in the United Kingdom created a BlackBerry blackout.<sup>9</sup> Thirteen-thousand union members went on a pseudo-strike where they refused to work beyond their contractual thirty-six-hour workweek.<sup>10</sup> During the blackout, the employees turned off their BlackBerrys at the close of business to prevent their employer from benefiting from their unpaid overtime.<sup>11</sup>

While overtime compensation demands are making global headlines, employees have yet to flood the nation’s courts with lawsuits seeking compensation for after-hours phone calls, emails, and general BlackBerry use.<sup>12</sup> Experts, however, predict that it is only a matter of time before plaintiffs’ attorneys start “trolling up” class action lawsuits demanding overtime compensation for such use.<sup>13</sup> This Comment will illustrate the white-collar worker’s struggle with electronic overtime.<sup>14</sup> First, Part I will discuss the adverse consequences that technology has inflicted on the white-collar workforce. Part II will apply the Fair Labor Standards Act (FLSA) to electronic overtime, and Part III will explain its inefficacy. Finally, Part IV will recommend relief opportunities for the overworked white-collar worker.

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7. Ellen Wulforst, *BlackBerrys, Blogs Create Overtime Work Disputes*, USA TODAY, June 25, 2008, available at [http://www.usatoday.com/tech/products/2008-06-25-blackberry-blogs-overtime-pay\\_N.htm](http://www.usatoday.com/tech/products/2008-06-25-blackberry-blogs-overtime-pay_N.htm).

8. *Id.* Despite the writers’ refusal, the parties ultimately reinstated the waiver of overtime compensation. *Id.* Indeed, the writers will only be compensated for overtime work if they perform substantial work after hours. *Id.* Significantly, their contract does not allow overtime compensation when the writers casually check their BlackBerrys on their own time. *Id.*

9. *BlackBerry Blackout in BT Dispute*, UNION NETWORK INT’L NEWS BULL. (June 23, 2008), <http://www.union-network.org/UniTelecom.nsf/0/4DE273277551AE70C1257471002BA BE6?OpenDocument>.

10. *Id.*

11. *Id.*

12. Tresa Baldas, *Overtime Suits May Ripen with BlackBerrys*, NAT’L L.J., April 28, 2008, at 6 (“[A] new wave of wage-and-hour litigation is just around the corner, in which employees will claim overtime for all the hours they’ve spent clicking away on their BlackBerrys or other digital communication devices.”).

13. *Id.*

14. “Electronic overtime” refers to after-hour phone calls, emails, and general smartphone use.

### I. BLACKBERRYS AND SMARTPHONES: THE NEW BALL AND CHAIN

In recent years, Americans have rapidly filled their personal leisure time with work, and the workday has become increasingly long.<sup>15</sup> This trend has thrown white-collar workers into the midst of a revolution that has transformed their offices and cubicles into their own sweatshops.<sup>16</sup> In fact, “[W]hite-collar middle class workers are working harder and longer hours now than they ever have in the past.”<sup>17</sup> In 2000, Americans averaged more working hours per year than workers in any other advanced capitalist country.<sup>18</sup> Indeed, more than twenty-five million Americans currently work more than forty-nine hours each week—most of them white-collar professionals.<sup>19</sup>

The augmented workday cannot be explained by any single factor. But the blurring of life inside and outside the office is a contributing factor, which allows employers to disguise the increased hours and demands.<sup>20</sup> Work responsibilities are no longer forgotten when employees leave the office for the day. Instead, the work spills into morning and evening commutes, after-hour emails and voicemails, and late-night readings of proposals and memos.<sup>21</sup> Such “seepage . . . [is] the dirty secret behind many a corporation’s thriving bottom line,”<sup>22</sup> because now employees are working around the clock at no additional cost to their employers.<sup>23</sup>

Undeniably, technological advancements have increased employee productivity.<sup>24</sup> Technology, however, has also intensified the overwork

15. See *infra* notes 16–43 and accompanying text.

16. See generally JILL ANDRESKY FRASER, *WHITE-COLLAR SWEATSHOP* (2001) (comparing the corporate demands on white-collar workers to industrial sweatshops).

17. Michael Cicala, Note, *Equalizing Workers in Ties and Coveralls: Removal of the White-Collar Exemptions to the Fair Labor Standards Act*, 27 SETON HALL LEGIS. J. 139, 139 (2002).

18. MARC LINDER, *THE AUTOCRATICALLY FLEXIBLE WORKPLACE: A HISTORY OF OVERTIME REGULATION IN THE UNITED STATES* 7 (2002) [hereinafter *AUTOCRATICALLY FLEXIBLE WORKPLACE*] (“[B]y the year 2000, workers in the United States worked the longest annual hours (1,979) in the advanced capitalist world.”); Shirley Lung, *Overwork and Overtime*, 39 IND. L. REV. 51, 52 n.11 (2005) (“Between 1979 and 2000, as most other industrialized countries brought down their average hours worked per year, the United States increased its average hours by thirty-two hours.”).

19. FRASER, *supra* note 16, at 20–21 (“Nearly 12 percent of the workforce, about 15 million people, report spending forty-nine to fifty-nine hours weekly at the office; another 11 million, or 8.5 percent, say they spend sixty hours or more there.”).

20. *Id.* at 24–25.

21. *Id.* at 25.

22. *Id.*

23. *Id.*

24. Andy McCue, *Users Try to Keep the ‘Berry in Balance,’* USA TODAY, July 19, 2007, [http://www.usatoday.com/tech/products/cnet/2007-07-19-blackberry-in-balance\\_N.htm](http://www.usatoday.com/tech/products/cnet/2007-07-19-blackberry-in-balance_N.htm) (last visited Feb. 15, 2009).

trend.<sup>25</sup> Ninety-six percent of employed adults use communication technology at work.<sup>26</sup> While 80% of these employees claim the technology has improved their productivity, 46% complain that the technology increases the number of hours they spend working.<sup>27</sup> Technology impacts BlackBerry users more severely. Although only 19% of American workers use BlackBerrys, smartphones, or similar gadgets for work,<sup>28</sup> 63% report that the technology has resulted in more demanding hours.<sup>29</sup> Indeed, one study found that the average BlackBerry user loses one hour of leisure to productive work time every day.<sup>30</sup>

For many, BlackBerrys and smartphones have become wireless balls and chains, keeping users tethered to the office. For example, BlackBerrys not only make it easier for workers to contact their colleagues, but they also make it more difficult for workers to ignore their emails.<sup>31</sup> Consequently, half of all employed email users check their work emails over the weekend.<sup>32</sup> In fact, 25% of regular internet users report that the internet “increased the [amount of] time they spent working at home without reducing the time spent at work.”<sup>33</sup> Unfortunately, in many workplaces, such dedication is not a choice, but a requirement.<sup>34</sup> Twenty-two percent of employed email users are expected to check their work emails after hours.<sup>35</sup> A BlackBerry only increases this expectation: 48% of BlackBerry owners are required to respond to work emails on nights and weekends, and 70% are required to respond to after-hours phone calls.<sup>36</sup> Perhaps workers should blame the marketers for their employer-directed advertising campaigns that declare: “Your employees don’t have to be in the office to stay productive.”<sup>37</sup>

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25. *Id.* Workers admit that technology has increased their productivity, but it has also negatively impacted their work–life balance.

26. MADDEN & JONES, *supra* note 3, at 4.

27. *Id.* at 35.

28. *Id.* at 17.

29. *Id.* at 35–36.

30. McCue, *supra* note 24 (discussing a study performed by BlackBerry manufacturer Research in Motion).

31. See FRASER, *supra* note 16, at 26; MADDEN & JONES, *supra* note 3, at 24.

32. MADDEN & JONES, *supra* note 3, at 24.

33. John Markoff, *A Newer, Lonelier Crowd Emerges in Internet Study*, N.Y. TIMES, Feb. 16, 2000, at A1.

34. For example, America Online “occasionally announces e-mail-free weekends, usually around a holiday, when employees are not expected to check e-mail. On all other weekends, of course, they are expected to check their e-mail.” Katie Hafner, *For the Well Connected, All the World’s an Office*, N.Y. TIMES, Mar. 30, 2000, at G1.

35. MADDEN & JONES, *supra* note 3, at 27.

36. *Id.*

37. See Hafner, *supra* note 34 (discussing the Sprint PCS slogan for cellular phones and the wireless workplace).

If night and weekend emails are not intrusive enough, employees often remain under “electronic siege” while vacationing with their families.<sup>38</sup> As many as 55% of BlackBerry users stay connected to their offices during vacation.<sup>39</sup> Consider how easily an afternoon poolside can turn into a “floating office.”<sup>40</sup> For example, the “Delano Hotel in Miami . . . has a desk and a chair permanently set up in the shallow end of the pool.”<sup>41</sup> In Beverly Hills, a cabana comes complete with two phone lines, a fax, and a laptop hookup.<sup>42</sup> Of course, the “floating office” is only available to those fortunate enough to vacation at all. More than half of American workers fail to use all of their vacation time.<sup>43</sup>

Working around the clock is more than an inconvenience. Attempts to stay connected to a 24/7 workplace may have adverse consequences ranging from the emotional, to the physical, to the downright bizarre. For example, in a study performed by the MIT Sloan School of Management, nearly half of the surveyed BlackBerry users reported “long term negative consequences associated with using a BlackBerry.”<sup>44</sup> Sleep disorder psychologists now recognize smartphone use as a contributing cause of stress-induced, chronic insomnia.<sup>45</sup> In fact, medical findings suggest that “Americans are literally working themselves to death—as jobs contribute to heart disease, hypertension, gastric problems, depression, exhaustion, and a variety of other

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38. Amy Harmon, *Plugged-In Nation Goes on Vacations In a New Territory*, N.Y. TIMES, July 13, 1997, at A1. Even before smartphones and BlackBerrys, 41% of cell phone owners used their phones to check in with the office while on vacation. FRASER, *supra* note 16, at 78. Currently, 34% of employed email users check their work email on vacation. MADDEN & JONES, *supra* note 3, at 24.

39. MADDEN & JONES, *supra* note 3, at 25.

40. June Fletcher, *Really Casual Friday: the Floating Office*, WALL ST. J., June 5, 1998, at W1.

41. *Id.*

42. *Id.*

43. Michelle Conlin, *Do Us a Favor, Take a Vacation*, BUS. WK., May 21, 2007, at 88; Karen Erger, *Taking (Back) Your Vacation*, 95 ILL. B.J. 322, 322 (2007) (“Too much work to do, fears about job security, and a corporate culture that looks down on workers who do take vacation were cited as some of the reasons” that employees fail to use all their vacation.).

44. Melissa Mazmanian et al., *Ubiquitous Email: Individual Experiences and Organizational Consequences of BlackBerry Use*, in PROC. OF THE 65TH ANN. MEETING OF THE ACAD. OF MGMT., 1, 4 (2006), available at [http://seeit.mit.edu/Publications/BlackBerry\\_AoM.pdf](http://seeit.mit.edu/Publications/BlackBerry_AoM.pdf).

45. Patricia Kitchen, *Sharing Bedtime with Your BlackBerry*, NEWSDAY, Sept. 18, 2008, at A42.

ailments.”<sup>46</sup> The International Labour Office correctly predicted that stress would be “one of the most serious health issues of the twentieth century.”<sup>47</sup>

Similarly, orthopedists now diagnose “overuse syndrome” or “BlackBerry thumb” for smartphone users who develop carpal tunnel or tendinitis.<sup>48</sup> Amusingly, upscale spas now offer “Crackberry Treatment” packages to pamper and massage overworked hands.<sup>49</sup> It seems that work-related injuries are no longer reserved for the factory floor. Instead, they now pervade the white-collar cubicle because of the stress caused by mobile communication technology.<sup>50</sup> Indeed, “Workplace stress costs the nation more than \$300 billion each year in healthcare, missed work, and the stress-reduction industry.”<sup>51</sup>

Although the term “crackberry” is a lighthearted acknowledgment of the gadget’s addictive qualities, professionals could benefit from some rehabilitation. In fact, researchers at Rutgers University-Camden and University of Northampton in England “found that a third of BlackBerry users show signs of addiction ‘similar to alcoholics.’”<sup>52</sup> Some users suffer quasi-hallucinations and feel their gadget vibrating even when no one is calling.<sup>53</sup> Despite their gadgets’ unwanted side effects, users want more. When 1500 smartphone users were asked what (or whom) they would prefer to live without: their smartphone, their significant other, or their pet,<sup>54</sup> perhaps surprisingly, most would surrender their spouse or pet before their gadget.<sup>55</sup>

As “crackberry” addictions and BlackBerry-related ailments become increasingly common, it begs the question why employees willingly surrender

46. JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 11 (1991).

47. Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI.-KENT L. REV. 157, 161 (1994) (quoting INT’L LABOUR OFFICE, *WORLD LABOUR REP.* 65–67 (1993)).

48. Amy Joyce, *For Some, Thumb Pain is BlackBerry’s Stain*, WASH. POST, Apr. 23, 2005, at A1.

49. Glenn Jeffers, *BlackBerry Pain? Try a Crackberry*, CHI. TRIB., Dec. 13, 2007, at 3B; see also Stephanie Armour, *Growth of PDA Injuries a Concern for Companies; Firms Could Face Liability, Worker’s Comp Issues*, USA TODAY, Nov. 10, 2006, at 5B.

50. Joyce, *supra* note 48. (“According to the Bureau of Labor Statistics, ergonomic disorders are the fastest-growing category of work-related illnesses for which it receives reports.”).

51. John Schwartz, *Always on the Job, Employees Pay with Health*, N.Y. TIMES, Sept. 5, 2004, at N1.

52. Patricia Pearson, *Are BlackBerry Users the New Smokers?*, USA TODAY, Dec. 12, 2006, at 21A.

53. Rebecca Dube, *Beyond BlackBerry Thumb*, GLOBE AND MAIL, July 14, 2008, at L1; *Phantom Vibrations; Imaginary Buzzes Haunt BlackBerry, Cell-Phone Users—When They’re Not There*, CHI. TRIB., Oct. 12, 2007, at 7.

54. Kitchen, *supra* note 45, at A42.

55. *Id.*

to a 24/7 workplace. The answer is relatively simple. In a suffering economy, rampant with unemployment, fear is an effective tool for getting workers to perform for less.<sup>56</sup> There is always someone waiting to take their jobs.<sup>57</sup> As white-collar jobs quickly follow blue-collar jobs overseas, white-collar workers must justify their salaries with high productivity.<sup>58</sup> Moreover, most white-collar workers receive a salary rather than an hourly wage, which makes these “[e]xtra hours . . . essentially free to the employer.”<sup>59</sup> The opportunity for free labor motivates the employer to demand longer hours,<sup>60</sup> and the fear of unemployment motivates the employee to comply.<sup>61</sup> Consequently, for many, the threshold for *enough work* is no longer measured by the “length of the workday but by the limits of human endurance.”<sup>62</sup>

## II. ELECTRONIC OVERTIME AND THE FAIR LABOR STANDARDS ACT (FLSA)<sup>63</sup>

In recent years, claims for overtime compensation have multiplied.<sup>64</sup> As increasing numbers of employees become electronically tethered to their offices, some disgruntled employees are beginning to ask about compensation for their electronic overtime.<sup>65</sup> A quick Internet search on the subject produces numerous results illustrating employee complaints and curiosity.<sup>66</sup> The rank-

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56. See SCHOR, *supra* note 46, at 65.

57. *Id.* at 71 (“For every aspiring [white-collar worker] determined to limit his or her hours, there are usually many more willing to give the company whatever time it demands.”).

58. Keith Bradsher, *Skilled Workers Watch Their Jobs Migrate Overseas*, N.Y. TIMES, Aug. 28, 1995, at A1.

59. Schor, *supra* note 47, at 170.

60. *Id.*

61. FRASER, *supra* note 16, at 24.

62. SCHOR, *supra* note 46, at 70.

63. The Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2006)).

64. Lung, *supra* note 18, at 65 (“Class action lawsuits brought by managers and other white-collar workers challenging forced unpaid overtime have tripled since 1997.” (citing Laurence Viele, *Overtime Lawsuits by White-Collar Workers Surge*, HOUS. CHRON., May 27, 2004, at 1)); see Michael Orey, *Wage Wars: Workers—From Truck Drivers to Stockbrokers—are Winning Huge Overtime Lawsuits*, BUS. WK., Oct. 1, 2007, at 50; see also Michelle Conlin, *Revenge of the “Managers”: Many So-Called Supervisors are Suing for Overtime Pay*, BUS. WK., Mar. 12, 2001, at 60 (commenting that white-collar workers are filing suit “at a time when many of the overtired and overworked, now fearful of losing their jobs in the slowdown, are becoming fed up”).

65. Tammy Joyner, *BlackBerry Use Overtime or Overripe?*, ATLANTA J.-CONST., July 7, 2008, at F1, available at <http://www.ajc.com/business/content/printedition/2008/07/06/bizoffbeat.html>. (“Workers in Ohio and California have already sued their employers for compensation under state overtime law for time spent on their BlackBerrys and other workplace tools such as laptops.”)

66. See, e.g., *Overtime Pay For BlackBerry Use?—Discussion Forum for HR People*, HRGuru, <http://www.hrguru.com/topics/358-overtime-pay-for-blackberry-use/posts> (last visited



and-file workers of the white-collar proletariat, however, will face one ominous obstacle in their quest for compensation: the FLSA.

Since its passage in 1938, the FLSA has remained the primary federal legislation governing national wage and hour standards.<sup>67</sup> Specifically, the FLSA requires an employer to pay its employees 150% of their hourly wage for any work exceeding forty hours in a workweek.<sup>68</sup> At first glance, the FLSA appears to grant substantial rights to workers. The Depression-era statute, however, is riddled with loopholes and exemptions that deny the modern worker any considerable protection. Consequently, employers can freely shackle their employees to laptops, BlackBerrys, and other modern gadgets without any increase in labor costs.

#### A. *Limited Scope of the FLSA*

Currently, the FLSA only regulates two aspects of overtime pay. It establishes a forty-hour workweek and requires employers to pay time-and-a-half for any time worked in excess of forty hours.<sup>69</sup> Although the Act requires employers to pay for overtime work, it completely fails to limit the amount of overtime hours an employer may demand from its workforce.<sup>70</sup> Thus, an employer may call, email, or BlackBerry-message his employees around the clock, even if such long hours interrupt the employees' lives and induce stress-related maladies.

What is worse, an employer is free to fire, demote, or otherwise punish any employee that resists overtime—even if the hours are unreasonable.<sup>71</sup> If an employer chooses to fire or otherwise retaliate against employees that refuse overtime, affected employees are unlikely to succeed on retaliation claims.<sup>72</sup> To date, there is no recognized right to refuse overtime work.<sup>73</sup> Consequently,

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Feb. 15, 2010); Posting of Al Sacco to Mobile WorkHorse, [http://advice.cio.com/al\\_sacco/should\\_blackberry\\_users\\_demand\\_overtime\\_pay\\_some\\_lawyers\\_advise\\_drafting\\_corporate\\_use\\_policies\\_now](http://advice.cio.com/al_sacco/should_blackberry_users_demand_overtime_pay_some_lawyers_advise_drafting_corporate_use_policies_now) (June 25, 2008, 13:22 EDT); Al Sacco, Should BlackBerry Users Demand Overtime Pay, [http://www.pcworld.com/businesscenter/article/147604/should\\_blackberry\\_users\\_demand\\_overtime\\_pay.html](http://www.pcworld.com/businesscenter/article/147604/should_blackberry_users_demand_overtime_pay.html) (last visited Feb. 15, 2010).

67. Although the FLSA is the primary federal legislation governing overtime, it has a savings clause that allows state laws or municipal ordinances to establish broader wage and hour protection. 29 U.S.C. § 218(a) (2006).

68. *Id.* § 207(a)(1).

69. *Id.* The FLSA only requires employers to pay nonexempt employees for overtime. *See* discussion *infra* Part II.B.

70. *See* Lung, *supra* note 18, at 55; *Missel v. Overnight Motor Transp. Co.*, 126 F.2d 98, 104 (4th Cir. 1942) (“Not only may an employee be worked twenty-four hours per day; but one hundred and twenty-four hours of overtime per week would not violate the law so long as the employee was paid for all such overtime at the required rate.”).

71. Lung, *supra* note 18, at 58–59.

72. *Id.* at 59.

73. *Id.*

employers can easily fire workers who resist long hours under the at-will employment doctrine.<sup>74</sup> For example, Massachusetts courts have already dismissed wrongful discharge claims predicated on an employee's refusal to work overtime.<sup>75</sup> The Supreme Court of Massachusetts found that there is no clear public policy that prevents employers from demanding long hours from workers.<sup>76</sup> Accordingly, an employee that refuses overtime may be giving his employer cause to fire him.

Although the FLSA is supposed to govern overtime work, it lacks both an hour cap and a right to refuse overtime. Workers have no legal right to turn off their BlackBerrys at the end of the day or hit the "Ignore" button when they see a work-related incoming call. At best, these workers can hope to receive overtime compensation for additional hours. Most white-collar workers, however, work overtime "not for time and one-half, but for *nothing*," because they are exempt under the FLSA.<sup>77</sup>

#### B. *Employees Exempt From the FLSA*

The FLSA currently exempts millions of workers from its protection. In 1996, for example, the Department of Labor (DOL) estimated that 39.5% of the workforce was exempt from the FLSA's overtime regulations.<sup>78</sup> If an employee is exempt from the FLSA, he is not entitled to any additional compensation for overtime—regardless of how much he works.<sup>79</sup> Specifically, the FLSA does not apply to anyone "employed in a bona fide executive, administrative, or professional capacity."<sup>80</sup>

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74. TODD D. RAKOFF, *A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE* 136–37 (2002).

75. *See, e.g.*, *Upton v. JWP Businessland*, 682 N.E.2d 1357, 1359–60 (Mass. 1997).

76. *Id.* at 1360 (finding no cause of action for wrongful discharge when employer terminated single mother for refusing to work newly imposed long hours).

77. MARC LINDER, *TIME AND A HALF'S THE AMERICAN WAY: A HISTORY OF THE EXCLUSION OF WHITE-COLLAR WORKERS FROM OVERTIME REGULATION, 1868–2004*, at xxvi (2004) (quoting J. Howard Hicks and Paul Hutchings, *The White Collar Worker*, AM. FEDERATIONIST, Sept. 1942, at 14–16 (written by the president and secretary-treasurer of the International Council of the Office of Employees Unions)).

78. *Id.* at 13.

79. *Id.*

80. 29 U.S.C. § 213(a)(1) (2006). In 2004, the DOL carved out an additional exemption for highly compensated individuals. 29 C.F.R. § 541.601 (2000) ("An employee with total annual compensation of at least \$100,000 is deemed exempt . . . if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee . . ."). This Comment, however, will not focus on the highly-compensated individual exemption because employees earning six-figure salaries are well-compensated for their electronic overtime. Instead, this Comment focuses only on the exemptions for workers employed in bona fide executive and administrative capacities.

Generally, these exemptions are known as the “white-collar exemptions.”<sup>81</sup> Although these exemptions are not defined by the Act, the DOL has promulgated job criteria that qualify an employee as exempt if the employee is a bona fide executive, administrative or professional worker.<sup>82</sup> The statute presumes that all employees are nonexempt, and the employer bears the burden of proving otherwise.<sup>83</sup> To qualify an employee as exempt, an employer must satisfy a two-pronged test: a salary test<sup>84</sup> and a duties test.<sup>85</sup> Although the burden lies with the employer, most employees wishing to collect additional compensation for electronic overtime will easily satisfy the DOL’s requirements for exemption.

### 1. Salary Test

Employees that use smartphones and BlackBerrys for work are likely to meet the salary requirement for the FLSA white-collar exemptions. Under the salary test, “an employee must be compensated on a salary basis at a rate of not less than \$455 per week.”<sup>86</sup> An employee is paid on a salary basis if he receives a predetermined amount of compensation each pay period.<sup>87</sup> Consequently, any employee earning an annual salary of at least \$23,660 passes FLSA’s salary test. Comparatively, in 2009, the poverty level for a family of four within the continental United States was \$22,050.<sup>88</sup>

According to an occupational earnings study performed by the U.S. Census Bureau, very few occupations have median earnings that fall below FLSA’s salary threshold.<sup>89</sup> Although more than 400 occupations were studied, only

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81. Lawrence P. Postol, *The New FLSA Regulations Concerning Overtime Pay*, 20 LAB. LAW. 225, 228 (2004). Executive, administrative, and professional employees are not the only employees exempt from FLSA protection; see 29 U.S.C. § 213(a)(1). This discussion, however, will focus only on the white-collar exemptions as those are the exemptions most relevant to electronic overtime.

82. Postol, *supra* note 81, at 228 (citing 29 C.F.R. §§ 541.100–700 (2004)).

83. LINDER, *supra* note 77, at xxv (citing *Hearings on the Fair Labor Standards Act: Hearings Before the Subcomm. on Workforce Protections of the H. Comm. on Economic and Educational Opportunities*, 104th Cong. 113 (1996) (testimony of William Kilberg); 150 CONG. REC. 129, S11187 (2004) (statement of Sen. Talent)).

84. See 29 C.F.R. §§ 541.600–602.

85. See generally *id.* §§ 541.100–541.304 (describing the duties prong of the test to determine if employees are exempt).

86. *Id.* § 541.600(a). Administrative and professional employees may also be paid on a fee basis. *Id.*

87. See *id.* § 541.602.

88. Annual Update of the HHS Poverty Guidelines, 74 Fed. Reg. 4199, 4200 (Dep’t of Health and Human Services Jan. 23, 2009).

89. See ALEMAYEHU BISHAW & JESSICA SEMEGA, U.S. CENSUS BUREAU, INCOME, EARNINGS, AND POVERTY DATA FROM THE 2007 AMERICAN COMMUNITY SURVEY 32–42 (2008) [hereinafter CENSUS DATA], available at <http://www.census.gov/prod/2008pubs/acs-09.pdf>.

twenty-seven of these compensated their employees with median earnings of less than \$23,660 annually.<sup>90</sup> The occupations that fell below the FLSA threshold were concentrated in the food-service, cleaning, grounds maintenance, and personal care industries.<sup>91</sup> Workers in these occupations are not likely to use a BlackBerry or smartphone to respond to work-related calls and emails.<sup>92</sup> It is hard to imagine a restaurant waitress feeling obligated to check her BlackBerry for a late-night email from her employer.

Instead, workers that use a BlackBerry or smartphone to stay connected to the office are likely to earn well above the FLSA salary requirement.<sup>93</sup> Digital Life America reported that BlackBerry users earn 50% more than the United States average salary.<sup>94</sup> This finding is consistent with employee surveys, which indicate that employees who closely monitor work email are relatively well-compensated.<sup>95</sup>

Employee surveys also indicate that workers in professional, managerial, and executive positions are most likely to use a BlackBerry or similar gadget.<sup>96</sup> Although job titles are facially ambiguous, it is highly unlikely that an employee considered a professional, manager, or executive earns less than

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90. Specifically, only workers in the following occupations were estimated to have earned less than \$23,660 in 2007: cooks, food preparation workers, combined food preparation and serving workers, counter attendants, waiters, non-restaurant food servers, cafeteria and bartender attendants, dishwashers, housekeeping cleaners, grounds maintenance workers, miscellaneous personal appearance workers, child care workers, home care aides, miscellaneous personal service workers, cashiers, hotel desk clerks, miscellaneous agricultural workers, construction assistants, repair assistants, laundry and dry cleaning workers, textile and garment workers, sewing machine operators, miscellaneous motor vehicle operators, parking lot attendants, service station attendants, vehicle cleaners, and packagers. *Id.*

91. *Id.*

92. Although these occupations are unlikely to use BlackBerrys and smartphones to respond to work-related calls and emails after hours, it is not inconceivable. Ten percent of service workers (waiters, hairstylists, policemen, janitors, and nurses' aides, etc) and 7% of semi-skilled workers (assembly line workers, truck drivers, and bus drivers, etc) own BlackBerrys or another form of PDA. MADDEN & JONES, *supra* note 3, at 19. It is possible, therefore, that some workers suffering from electronic overtime will fail the salary test, either because they earn a salary below \$23,660, or because they are paid on an hourly basis.

93. See Richard Karpinski & Amy Larsen Decarlo, *BlackBerry Users Work Longer and Earn More*, NETWORK COMPUTING, Feb. 21, 2007, <http://www.networkcomputing.com/wireless/blackberry-users-work-longer-and-earn-more.php> (discussing a study by Digital Life America that reported 54% of owners of BlackBerrys and similar gadgets have an average income of \$94,000).

94. *Id.*

95. See MADDEN & JONES, *supra* note 3, at 23.

96. See *id.* at 18. Thirty percent of workers holding those job titles own a BlackBerry. Inasmuch as only 19% of all employed Americans own BlackBerrys, BlackBerry ownership is most concentrated in the professional, managerial, and executive positions. *Id.*

\$23,660 a year.<sup>97</sup> In fact, data from the U.S. Census Bureau supports this presumption. In 2007, professionals such as lawyers, doctors, and businessmen earned a median salary of \$120,400,<sup>98</sup> \$181,200,<sup>99</sup> and \$64,965,<sup>100</sup> respectively.<sup>101</sup> Management occupations boasted median earnings of \$71,949.<sup>102</sup> And, in 2007, chief executives earned a median salary of \$116,800.<sup>103</sup> In sum, a shrewd analysis of BlackBerry-user salaries indicates that they earn more than \$23,660 a year. Although it would be improper to generally assert that all BlackBerry users meet the salary requirement, earnings studies and common sense suggest that most satisfy the requirement.

## 2. Duties Test

After clearing the first hurdle of the FLSA salary test, an employee must satisfy the duties test in order to be exempt from the FLSA.<sup>104</sup> Like the salary test, however, the employees likely to accrue electronic overtime easily will satisfy the duties test. The FLSA's white-collar exemptions exempt employees whose primary duties<sup>105</sup> are executive, professional, or administrative.<sup>106</sup>

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97. See CENSUS DATA, *supra* note 88. None of the twenty-seven occupations found by the U.S. Census Bureau to compensate their employees below the FLSA threshold may reasonably be considered "professional," "managerial," or "executive." *Id.*

98. CENSUS DATA, *supra* note 88, at 34.

99. *Id.* at 35.

100. *Id.* at 18.

101. No evidence or data was found that suggested these workers are not paid on a salary basis as required for most professions under the FLSA exemptions. Note, outside salesmen, doctors, lawyers, and computer professionals need not be paid on a salary basis to meet the FLSA exemptions. Postol, *supra* note 81, at 229 (citing 29 C.F.R. §§ 541.600–606 (2004)).

102. CENSUS DATA, *supra* note 88, at 18.

103. *Id.* at 32. This Comment recognizes that the chief executive position is not the only job title that may reasonably be classified as "executive." Therefore, the chief executive salary figure cannot fully reflect the median earnings of "executives" that carry BlackBerrys and similar gadgets. None of the 27 occupations, however, found by the U.S. Census Bureau to compensate their employees below the FLSA threshold may be reasonably be classified as "executive," which strongly suggests the executives carrying BlackBerrys and similar gadgets meet the salary requirement for a FLSA exemption. See *supra* note 89.

104. See 29 C.F.R. §§ 541.100–304 (2009).

105. An employee's primary duty refers to the "main, major or most important duty that the employee performs." *Id.* § 541.700.

Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

*Id.*

106. 29 U.S.C. § 213 (2006).

Regrettably for the white-collar worker, the breadth of these duties swallows any hope of electronic overtime compensation.

The first exemption under the FLSA is for employees working in bona fide executive capacities.<sup>107</sup> Under the FLSA, an employee is considered an executive if (1) his primary duty is to manage an enterprise or subdivision thereof;<sup>108</sup> (2) he “customarily and regularly directs the work of two or more other employees;”<sup>109</sup> and (3) he has the authority to hire or fire employees or substantially influence the decision to take such action.<sup>110</sup>

Second, the FLSA exempts workers employed in a bona fide professional capacity.<sup>111</sup> A professional employee is one whose primary duty is the performance of work requiring either (1) advanced knowledge acquired by the prolonged course of specialized intellectual instruction;<sup>112</sup> or (2) “[r]equiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”<sup>113</sup>

These first two exemptions for executive and professional employees will easily exempt most BlackBerry and smartphone users from FLSA protection, simply because these gadgets are heavily concentrated among executives and professionals.<sup>114</sup> While job titles alone are insufficient to classify an employee as exempt, BlackBerry users are expected to satisfy the DOL duties criteria.<sup>115</sup> For example, workers that supervise others (an element of the executive exemption) are almost twice as likely to own a BlackBerry as workers with no supervisory responsibility.<sup>116</sup> Additionally, workers with college educations are more likely to use the Internet for work.<sup>117</sup> Significantly, the same education that makes workers more likely to use the Internet for work also

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107. See 29 C.F.R. § 541.100.

108. *Id.* § 541.100(a)(2).

109. *Id.* § 541.100(a)(3).

110. *Id.* § 541.100(a)(4).

111. See *id.* § 541.300.

112. 29 C.F.R. § 541.300(2)(i).

113. *Id.* § 541.300(2)(ii).

114. Thirty percent of executive and professionals own BlackBerrys and similar gadgets; comparatively, 19% of employed Americans own a BlackBerry or similar gadget. MADDEN & JONES, *supra* note 3, at 18. It’s important to note that PIPs study on BlackBerry market concentration categorized workers according to their job titles and not by the DOL’s definitions. Therefore it is possible that BlackBerry concentration among executives may be over or underestimated.

115. See 29 C.F.R. § 541.2 (providing that job titles alone are insufficient to qualify employees for a white-collar exemption).

116. Twenty-five percent of workers who supervise other workers own a BlackBerry or other PDA. MADDEN & JONES, *supra* note 3, at 20. Comparatively, only 15% of workers who do not supervise others own a BlackBerry or other PDA. *Id.*

117. See *id.* at 16.

helps qualify them as exempt professionals under the FLSA.<sup>118</sup> In sum, the workers who are most likely to suffer electronic overtime are most likely exempt executives and professionals under the FLSA.

If an employer cannot exempt his workers from the FLSA as either executive or professional employees, there remains the classification of exempt administrative employees. The administrative exemption is arguably the easiest exemption to satisfy because it is often liberally construed.<sup>119</sup> Specifically, an employee qualifies as an administrative employee if (1) his primary duty is to perform office or non-manual work that is directly related to the management or general business operation of his employer;<sup>120</sup> and (2) his primary duty “includes the exercise of discretion and independent judgment with respect to matters of significance.”<sup>121</sup>

The first prong of the administrative test is easily satisfied because most employees assume some managerial or operational duties.<sup>122</sup> Additionally, under the DOL’s broad guidelines, this prong may be satisfied if the employee works in any of the following areas: “tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network; internet and database administration; legal and regulatory compliance; and similar activities.”<sup>123</sup>

The second prong of the administrative exemption requires the exercise of discretion and independent judgment. Generally, this prong requires “the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.”<sup>124</sup> The employee, however, must simply make independent decisions to meet this requirement.<sup>125</sup> He will still qualify for the exemption even if his decision is reviewed at a higher level and ultimately ignored.<sup>126</sup> Accordingly, any assistant will meet the exemption so long as he is often delegated authority regarding matters of significance.<sup>127</sup> If an employee uses his BlackBerry or other gadget to work away from the office, the lack of supervision suggests that the employee is exercising independent judgment on a regular basis.

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118. See *infra* note 112 and accompanying text.

119. Cicala, *supra* note 17, at 158.

120. 29 C.F.R. § 541.200(a)(2).

121. *Id.* § 541.200(a)(3).

122. Cicala, *supra* note 17, at 158–59.

123. 29 C.F.R. § 541.201(b).

124. *Id.* § 541.202(a).

125. *Id.* § 541.202(c).

126. *Id.*

127. *Id.* § 541.203(d).

It is difficult to estimate with any certainty how many BlackBerry and smartphone users will qualify for the administrative exemption. Economists admit that such predictions are impossible without concrete employee job descriptions.<sup>128</sup> Yet, the scope of the exemption itself suggests that many will qualify. Indeed, many commentators have criticized the fact that any employee satisfying the salary test will also satisfy the administrative duties test.<sup>129</sup> For example, Marc Linder has opined that the administrative exemption “embraces such a huge universe of . . . employees that it challenges the imagination to name any white-collar occupation so lowly that it would not even rise to the level of genuine administrative employment.”<sup>130</sup>

In sum, the white-collar exemptions promulgated by the DOL will render most employees suffering from electronic overtime exempt from overtime compensation. Perhaps this conclusion is not surprising given the sheer number of exempt employees. Before the FLSA was amended in 2004, it was estimated that 20% of the workforce—or roughly 26 million workers—qualified for a white-collar exemption.<sup>131</sup> With so many white-collar exemptions, the DOL attempted to modernize the FLSA in 2004.<sup>132</sup> Unfortunately, the DOL estimated that the 2004 amendments will only remove 6.7 million workers from exempt status—leaving more than 19 million workers exempt.<sup>133</sup> As white-collar BlackBerry users are likely to find themselves among the 19 million exempt workers,<sup>134</sup> it is doubtful that BlackBerry thumbs will flood the courthouses with electronic overtime suits in the near future.

### C. *Employees Not Exempt From the FLSA*

In the improbable event that an employee suffering from electronic overtime is not exempt from the FLSA, his claim for overtime compensation remains difficult. Although the FLSA mandates additional compensation to

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128. LINDER, *supra* note 77, at 14–15 (citing *Assessing the Impact of the Labor Department’s Final Overtime Regulations on Workers and Employers: Hearings Before the H.Comm. on Education and the Workforce*, 108th Cong. 24 (2004) (statement of Ronald Bird, chief economist, Emp. Pol’y Found.)).

129. See, e.g., Mark J. Ricciardi & Lisa G. Sherman, *Exempt or Not Exempt Under the Administrative Exemption of the FLSA . . . That is the Question*, 11 LAB. LAW. 209, 216 (1995).

130. LINDER, *supra* note 77, at 50.

131. BUREAU OF LABOR STATISTICS, available at <ftp://ftp.bls.gov/pub/suppl/empstat/ceseeb1.txt> (documenting statistics for white-collar exemption qualified workers); *Department of Labor Revises White-Collar Exemption Rules*, EMPL. L. BRIEFING: WHITE-COLLAR EXEMPTIONS REVISION (CCH), at 1 (2004) available at <http://www.cch.com/press/news/2004/EmploymentLawBriefing.pdf>.

132. *Department of Labor Revises White-Collar Exemption Rules*, *supra* note 131.

133. *Id.*

134. See *supra* notes 82–128 and accompanying text.



nonexempt employees working in excess of forty hours a week, it does not require employers to pay their employees “for small amounts of time that are insubstantial or insignificant.”<sup>135</sup> Instead, the DOL authorizes an employer’s payroll to disregard work time that is indefinite or that involves only a few seconds or minutes.<sup>136</sup> Interpreting this language, in *Anderson v. Mt. Clements Pottery Co.*, the Supreme Court carved out an additional exception to the FLSA for *de minimis* work.<sup>137</sup> The Court reasoned that it would be an administrative nightmare to record trifles of time for payroll purposes.<sup>138</sup> In light of the *de minimis* doctrine, overtime compensation is only available when the after-hours work requires the employee to give up a substantial measure of his time and effort.<sup>139</sup>

For the nonexempt white-collar worker (assuming one exists), this begs the question whether or not his electronic shackles require him to give up a substantial measure of his time and effort. In answering this question, courts will consider the following factors: “(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work.”<sup>140</sup> These factors suggest that employees who answer only a few phone calls or emails after hours cannot demand overtime compensation.<sup>141</sup> On the other hand, a nonexempt employee that responds to numerous calls and emails likely can demand overtime compensation.<sup>142</sup>

The first factor, administrative difficulty, weighs against compensation for electronic overtime. For example, in *Lindow*, the Ninth Circuit denied overtime compensation to employees who worked seven or eight minutes before their shifts started.<sup>143</sup> The court noted that it would be administratively difficult for the employer to monitor and record such small increments of time.<sup>144</sup> Similarly, in *Reich v. Monfort*, the Tenth Circuit denied overtime compensation to employees who remained at work when their shifts ended in order to remove their work safety gear.<sup>145</sup> The *Reich* court considered it administratively difficult to compensate employees for this time because the

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135. Jeffrey M. Schlossberg & Kimberly B. Malerba, *Tech Tock*, N.Y. L.J., May 21, 2007, at 9, 13 (citing 29 C.F.R. § 785.47).

136. 29 C.F.R. § 785.47 (2009).

137. *Anderson v. Mt. Clements Pottery Co.*, 328 U.S. 680, 692 (1946).

138. *Id.*

139. *Id.*

140. *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984).

141. Schlossberg & Malerba, *supra* note 135, at 13.

142. *Id.*

143. *Lindow*, 738 F.2d at 1064.

144. *Id.* at 1062.

145. *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1334 (10th Cir. 1998).

time varied between employees.<sup>146</sup> These cases are easily analogized to white-collar workers suffering electronic overtime. Like the *Lindow* workers, an employee might spend only a few minutes answering a phone call or replying to an email. Similar to *Reich*, this time is likely to vary significantly among employees. Consequently, courts have authority to reject electronic overtime suits as *de minimis* simply because it is administratively difficult to monitor and record BlackBerry and other gadget use.

Next, the *de minimis* doctrine considers the aggregate amount of overtime worked. In *Barvinchack v. Indiana Regional Medical Center*, a case from the Western District of Pennsylvania, the plaintiff sought overtime compensation because other employees “regularly and frequently” called her after hours with questions.<sup>147</sup> Although the plaintiff failed to document the length or frequency of such calls, another employee testified that these calls only lasted a “few minutes.”<sup>148</sup> The *Barvinchack* court denied compensation after concluding that the brevity of the phone calls rendered them *de minimis*, independent of the administrative difficulty analysis.<sup>149</sup> Although there is no magic number that qualifies time as *de minimis* rather than compensatory, many courts consider ten minutes *de minimis*.<sup>150</sup> Consequently, this factor may weigh either in favor or against workers suffering electronic overtime, depending on the duration of their work-related calls and email exchanges.

Last, courts consider the regularity of the additional work. Although the first two factors might influence a court to deny overtime pay for after-hours calls and emails, the court may grant compensation if the calls and emails are pervasive. In the past, “Courts have granted relief for claims that might have been minimal on a daily basis but, when aggregated, amounted to a substantial claim.”<sup>151</sup> For example, in *Addison v. Huron Stevedoring Corp.*, \$1.00 of unpaid overtime was not considered *de minimis* by the Second Circuit because the employer failed to compensate the employee for \$1.00 of overtime each week.<sup>152</sup> Likewise, applying the FLSA, the Iowa Supreme Court considered

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146. *Id.*

147. No. 3:2006-69, 2007 WL 2903911, at \*17 (W.D. Pa. Sept. 28, 2007).

148. *Id.*

149. *Id.*

150. *See, e.g.*, *E.I. Du Pont De Nemours & Co. v. Harrup*, 227 F.2d 133, 135–36 (4th Cir. 1955) (finding ten minutes of work *de minimis*); *Green v. Planters Nut & Chocolate Co.*, 177 F.2d 187, 188 (4th Cir. 1949) (same); *Smith v. Cleveland Pneumatic Tool Co.*, 173 F.2d 775, 776 (6th Cir. 1949) (finding one to twelve minutes *de minimis*); *Lindow v. United States*, 738 F.2d 1057, 1064 (9th Cir. 1984) (finding ten to fifteen minutes *de minimis*); *Carter v. Panama Canal Co.*, 314 F. Supp. 386, 392 (D.D.C. 1970) (finding two to fifteen minutes *de minimis*); *but see Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) (recognizing that as little as ten minutes might not be *de minimis*); *Usery v. City Elec., Inc.*, No. A-71-CA-67, 1976 WL 1697, at \*1 (W.D. Tex. Dec. 14, 1976) (finding fifteen to twenty minutes not *de minimis*).

151. *Lindow*, 738 F.2d at 1063.

152. 204 F.2d 88, 95 (2d Cir. 1953).

fifteen minutes compensable rather than *de minimis*, when the employees worked an additional fifteen minutes on a daily—rather than isolated—basis.<sup>153</sup> These cases are promising for workers suffering electronic overtime. While a five-minute phone call is likely *de minimis* and, therefore, noncompensable in isolation, an employee who receives a five-minute phone call every day might have a compensable claim.<sup>154</sup> Accordingly, nonexempt workers should carefully log their electronic overtime so they can prove the overtime is not *de minimis* in the aggregate.

In sum, the success of an electronic overtime suit under the FLSA will depend not only on the exempt status of the worker, but also on the duration and frequency of the overtime. Although the FLSA generally grants employees the right to compensation for overtime work, what the FLSA gives, it easily takes away. Indeed, the FLSA provides not only the basis for overtime claims, but also an obstacle. For most employees, the obstacle will be unconquerable; white-collar exemptions will render them ineligible for FLSA protection, and their employers will continue demanding electronic overtime. Additional compensation for electronic overtime, however, is possibly available to those few employees who are not exempted by their white-collar status and whose electronic overtime is not *de minimis*.<sup>155</sup>

### III. INTRODUCING THE FLSA TO THE 21ST CENTURY

Although the FLSA was passed in 1938, before cell phones, emails, laptops, and BlackBerrys, the legislation has remained relatively unchanged for the past century. Accordingly, many critics have questioned the DOL's reasoning in allowing a Depression-era statute to govern the twenty-first century workplace.<sup>156</sup> Indeed, as one critic has noted, "Few, if any, areas of employment law have proven themselves less adaptable to an evolving work force than the so-called white-collar exemption to the FLSA."<sup>157</sup> According to former Secretary of Labor, Elaine Chao, the DOL's regulations for the white-

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153. *Schimerowski v. Iowa Beef Packers, Inc.*, 196 N.W.2d 551, 555–56 (Iowa 1972).

154. *Lindow*, 738 F.2d at 1063 ("[It] would promote capricious and unfair results . . . [to compensate] one worker \$50 for one week's work while denying the same relief to another worker who has earned \$1 a week for 50 weeks.").

155. Although this article concerns itself only with the FLSA, most states have enacted their own wage and hour laws. See Daniel V. Yager & Sandra J. Boyd, *Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace*, 11 LAB. LAW: 321, 323 (1996). Some states have prescribed narrower exemptions for white-collar workers than those promulgated by the DOL. *Id.* If an employee resides in a state with more generous overtime treatment, his overtime compensation will be governed by the state legislation rather than the FLSA. *Id.*

156. *Id.* at 322; see also, Cicala, *supra* note 17, at 148 (referring to the white-collar exemptions as an "[i]nefficient, [u]nder-protective [m]ess").

157. Yager & Boyd, *supra* note 155, at 331.

collar exemptions are “literally ancient.”<sup>158</sup> Regrettably, the FLSA’s white-collar exemptions have failed to evolve. Consequently, their application to the modern workplace defies the legislation’s original intent. Despite the compelling need for revision, it is unlikely that the white-collar exemptions will change to meet the demands of the modern workforce.

A. *The FLSA No Longer Serves Its Original Purpose*

Born in the midst of the Great Depression, the FLSA was largely designed to revitalize the nation’s struggling economy. Because many believed overproduction caused the Great Depression, the legislation’s call for shorter hours was intended to decrease production in factories.<sup>159</sup> Additionally, the legislators hoped that shorter hours would spread employment among more workers because employers would prefer to hire a second employee rather than suffer the wage premium of overtime work.<sup>160</sup> While national economic recovery was the predominant goal of the FLSA, it was not the only one.<sup>161</sup> Additionally, President Franklin D. Roosevelt intended “to help those who toil in [the] factory and on [the] farm” by obtaining “a fair day’s pay for a fair day’s work.”<sup>162</sup> Roosevelt believed that “all workers—the white-collar class as well as the men in overalls” should be free from oppressive overtime.<sup>163</sup>

1. Explaining the White-Collar Exemptions

The legislative history of the FLSA shows its intent to protect workers who had little bargaining power to protect themselves from oppressive hours.<sup>164</sup> Although the legislative history includes no explanation for the white-collar

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158. *Chao Promises Reform of FLSA Rules; Delay on Wage Hike Urged*, 170 Lab. Rel. Rep. (BNA) 444 (Sept. 30, 2002). Although the DOL updated the white-collar exemptions in 2004, the only significant change was the increase in the minimum salary requirement. *See Department of Labor Revises White-Collar Exemption Rules*, *supra* note 131. The duties tests, which qualify workers as executive, professional, or administrative was only slightly altered. *Id.*

159. Cicala, *supra* note 17, at 145.

160. *Id.*

161. *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36 (1987) (“[I]mproving working conditions was undoubtedly one of Congress’ concerns . . .”).

162. 81 CONG. REC. 4983–84 (1937).

163. Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2254 (1997) (quoting National Recovery Administration Bulletin No. 1, Statement by the President of the United States of America Outlining Policies of the National Recovery Administration, in LEWIS MAYERS, A HANDBOOK OF NRA LAWS, REGULATIONS, CODES 27 (1933)).

164. Michael A. Faillace, Comment, *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, 361 (2000).

exemptions,<sup>165</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 . . . [with] sufficient bargaining power to protect themselves.”<sup>166</sup>

At the time of the FLSA’s passage, white-collar workers were a “small and exclusive class, identifiable as high-level and highly paid executives.”<sup>167</sup> They identified with their bosses, and their extra hours resulted in economic advancement.<sup>168</sup> In the 1930s, office paternalism governed the white-collar employment relationship.<sup>169</sup> Corporations promised to take care of their employees in exchange for company loyalty.<sup>170</sup> Blue-collar workers envied the security and perquisites of white-collar employment and dreamed to one day join the white-collar ranks.<sup>171</sup> White-collar work was stress free and promised “careers of steadily increasing responsibilities and rewards.”<sup>172</sup>

It is doubtful that FLSA contemporaries could have predicted the excessive hours currently plaguing white-collar workers.<sup>173</sup> For example, in her book *White-Collar Sweatshop*, Jill Fraser identified two types of white-collar workers in the post-World War II economy: those climbing the corporate ladder and “*The Man in The Grey Flannel Suit*.”<sup>174</sup> Specifically, overtime demands were limited to those at the top of the corporate ladder.<sup>175</sup> On the other hand, the men in grey flannel suits “generally worked 9 to 5 . . . and expressed great contentment with . . . their lives.”<sup>176</sup> Indeed, the white-collar worker was never expected to suffer overtime. Up until the 1970s, experts overwhelmingly predicted that work time would shrink as technological advancements would reduce the need for work.<sup>177</sup> Amusingly, leisure

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165. U.S. GEN. ACCOUNTING OFFICE, FAIR LABOR STANDARDS ACT: WHITE-COLLAR EXEMPTIONS NEED ADJUSTMENT FOR TODAY’S WORK PLACE 3 (2000), available at <http://www.gao.gov/new.items/00105t.pdf>.

166. Regan C. Rowan, *Solving the Bluish Collar Problem: An Analysis of the DOL’s Modernization of the Exemptions to the Fair Labor Standards Act*, 7 U. PA. J. LAB. & EMP. L. 119, 125 (2004).

167. Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 32 (2001).

168. Cicala, *supra* note 17, at 144.

169. CHARLES HECKSCHER, WHITE-COLLAR BLUES: MANAGEMENT LOYALTIES IN AN AGE OF CORPORATE RESTRUCTURING 6 (Basic Books 1996).

170. *Id.*

171. *Id.* at 4.

172. *Id.*

173. See discussion *supra* Part I.

174. FRASER, *supra* note 16, at 106–08 (citing SLOAN WILSON, *THE MAN IN THE GRAY FLANNEL SUIT* (1955)).

175. *Id.* at 108.

176. *Id.* (citing WHITE-COLLAR BLUES, *supra* note 169).

177. Schor, *supra* note 47, at 157. Social critics predicted a two-hour workday by the 21st century. Miller, *supra* note 167, at 3. Experts estimated that by the 1990s, Americans would either have a twenty-two hour workweek, six months of vacation, or a retirement age of thirty eight. *Id.*

programs were even developed to help employees cope with their boredom.<sup>178</sup> So when the FLSA was enacted, it was widely believed that white-collar workers were able to protect their own interests and did not require statutory protection.<sup>179</sup>

## 2. Growth of the United States' Service Industry Creates the White-Collar Blues

In the 1930s, white-collar office workers enjoyed a class status superior to their blue-collar counterparts in manufacturing.<sup>180</sup> Today, however, this distinction is virtually nonexistent. Manufacturing no longer dominates the U.S. economy; instead the workforce has shifted to a service economy.<sup>181</sup> Unfortunately, when blue-collar workers moved from manufacturing positions to service positions, many lost their FLSA protection because they now performed white-collar job duties.<sup>182</sup> But the loss in FLSA protection is unwarranted. Although yesterday's blue-collar worker now toils in a comfortable office, rather than a dilapidated factory, his bargaining power has not changed.

Sociologists and social commentators widely remark, "There is little difference today between white-collar managers and administrators and blue-collar workers."<sup>183</sup> As early as 1959, Vance Packard noted that "[j]ust about every basis on which white-collared [workers] have claimed superior status to blue-collared workers . . . has been undermined."<sup>184</sup> In today's service economy, white-collar workers "are more likely to share class traits typically associated with their blue-collar counterparts."<sup>185</sup> Similar to the factory workers of the past, today's white-collar jobs often involve repetitive and mechanical tasks.<sup>186</sup> For example, mortgage brokers have been characterized as "crank[ing] out loan applications in assembly line operations."<sup>187</sup> Some companies even install conveyor belts to carry documents and papers from

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178. Schor, *supra* note 47, at 157.

179. Faillace, *supra* note 164, at 362; *see also* L. Camill Hebert, *Updating the "White-Collar Employee Exemptions" to The Fair Labor Standards Act*, 7 EMP. RTS. & EMP. POL'Y J. 51, 56–57 (2003).

180. *See supra* notes 163–68 and accompanying text.

181. GAO REPORT, *supra* note 129, at 3 ("[An] increase in white-collar exempt positions between 1983 and 1998, and much of the growth in these positions can be attributed to the expansion of the services industries . . .").

182. *Id.*

183. Miller, *supra* note 167, at 32.

184. VANCE PACKARD, *THE STATUS SEEKERS: AN EXPLORATION OF CLASS BEHAVIOR IN AMERICA AND THE HIDDEN BARRIERS THAT AFFECT YOU, YOUR COMMUNITY, YOUR FUTURE* 33 (David McKay Co. Inc. 1989) (1959).

185. Rowan, *supra* note 166, at 120.

186. *Id.*

187. Orey, *supra* note 64, at 54.

desk to desk.<sup>188</sup> The phrase white-collar sweatshop has quickly entered American vernacular as authors characterize white-collar workers as the new wage slaves.<sup>189</sup> The comic strip *Dilbert*—which depicts the life of one such white-collar wage slave—certainly would not enjoy such widespread success if workers did not relate to the character.<sup>190</sup> The most-cited description of the white-collar transition remains that of Herbert Applebaum, when he described the white-collar class as

office, technical, administrative, and professional workers. It is a carryover from the past when clerks and office workers were people in managerial positions in enterprises and firms. They were close to owners, were usually well paid, and many eventually went into their own businesses. They were middle class in income, outlook, attitude, and life style. This is no longer true. Most white-collar workers today are workers, not middle-class managers. In income and life style they are closer to blue-collar workers than to owners, and most of them earn less than unionized blue-collar factory workers and skilled craftsmen. Most office work is repetitive, manual, monotonous, and mechanical rather than intellectual and mentally creative.<sup>191</sup>

The erosion of the distinction between blue-collar and white-collar workers is well-documented by social scientists. Although the blurring of the collars is clear in hindsight, it is doubtful that Roosevelt or his Congress anticipated it when they carved out the FLSA's white-collar exemptions. Notably, the growth in white-collar positions predominantly resulted from the economy's shift to a service-oriented economy.<sup>192</sup> When the FLSA was enacted, only 48% of the nation's workforce was employed by a service-producing sector.<sup>193</sup> Comparatively, "Today, the service sector's share of the U.S. economy has risen to roughly 80 percent."<sup>194</sup> Indeed, research suggests that blue-collar manufacturing workers began shifting their employment to service industries

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188. LINDER, *supra* note 77, at xxxiii–iv (quoting John Livingston, *The Transitional World of the White Collar*, AM. FEDERATIONIST, at 6, 9 (March 1961)).

189. See *supra* notes 15–23 and accompanying text.

190. FRASER, *supra* note 16, at 35. "Dilbert appears in 2,000 newspapers in 70 countries, making it one of the most successful comic strips in history." The official Dilbert website—About Scott Adams, <http://www.dilbert.com/about/> (last visited Jan. 20, 2009).

191. HERBERT APPLEBAUM, *THE AMERICAN WORK ETHIC AND THE CHANGING WORK FORCE: AN HISTORICAL PERSPECTIVE* 168 (1998).

192. GAO REPORT, *supra* note 129, at 3 (finding employment growth in the service sector accounts for almost 50% of the overall growth in exempt employees); see also *supra* notes 177–78 and accompanying text.

193. MARTIN FELDSTEIN, NATIONAL BUREAU OF ECONOMIC RESEARCH, *THE UNITED STATES IN THE WORLD ECONOMY* 383 (1988).

194. Douglas B. Cleveland, *The Role of Services in the Modern Economy*, U.S. DEP'T OF COMMERCE 1 (1999) available at <http://www.ita.doc.gov/td/sif/PDF/ROLSERV199.pdf>.

in the 1960s—decades after the FLSA’s enactment.<sup>195</sup> Consequently, FLSA contemporaries could not have envisioned the modern white-collar workforce.

### 3. Modern White-Collar Workers Lack Bargaining Power

While the FLSA’s legislative history fails to explain the white-collar exemptions, many commentators believe white-collar workers were exempted from overtime protection simply because they did not need it.<sup>196</sup> The modern white-collar worker, however, resembles the blue-collar worker of the 1930s.<sup>197</sup> To preserve President Roosevelt’s vision of a “fair day’s pay for a fair day’s work”<sup>198</sup> the FLSA’s coverage should extend to the modern white-collar workforce because they are no longer able to protect themselves from excessive overtime.

During the 1930s, white-collar workers possessed substantial bargaining power and long hours promised career advancement.<sup>199</sup> Today, neither is true. Employee surveys demonstrate that most employees “would choose to exchange some portion of present or future income for some additional nonwork time.”<sup>200</sup> “The very fact that white-collar employees work excessive hours [despite their preference for fewer hours] attests to their lack of bargaining power.”<sup>201</sup>

Today’s white-collar employees work long hours inspired not by company loyalty or dreams of advancement, but by the fear of job insecurity.<sup>202</sup> White-collar workers are significantly more likely than nonexempt workers to take overtime.<sup>203</sup> Yet for many, the long hours will not result in economic advancement.<sup>204</sup> Instead, white-collar jobs are quickly following blue-collar jobs overseas.<sup>205</sup> According to Forrester Research, “[I]n the next 15 years, American employers will move about 3.3 million white-collar jobs and \$136 billion in wages abroad.”<sup>206</sup> In fact, national unemployment was at a fifteen-

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195. FELDSTEIN, *supra* note 193, at 382.

196. Rowan, *supra* note 166, at 124–25.

197. *See supra* notes 167–79 and accompanying text.

198. 81 CONG. REC. 4983 (1937) (message of President Roosevelt).

199. *See supra* notes 164–69 and accompanying text.

200. ANN HARRIMAN, THE WORK/LEISURE TRADE OFF: REDUCED WORK TIME FOR MANAGERS AND PROFESSIONALS 91 (1982).

201. Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139, 167 (1993).

202. *See supra* notes 56–62 and accompanying text.

203. GAO REPORT, *supra* note 129, at 4.

204. Bob Herbert, Op-Ed., *White Collar Blues*, N.Y. TIMES, Dec. 29, 2003, at A17.

205. *Id.*

206. Stephanie Armour & Michelle Kessler, *USA’s New Money-Saving Export: White Collar Jobs*, USA TODAY, Aug. 5, 2003, at 1B, available at [http://www.usatoday.com/money/workplace/2003-08-05-outsourcing\\_x.htm](http://www.usatoday.com/money/workplace/2003-08-05-outsourcing_x.htm).



year high in 2008.<sup>207</sup> Unemployment among college graduates has increased the fastest, and the threat of unemployment makes white-collar workers “eager to comply with, or even exceed, their employers’ demands.”<sup>208</sup> If a white-collar worker is fortunate enough to keep his job, he will likely suffer slashed wages and benefits because of foreign competition.<sup>209</sup> Indeed, white-collar workers have already experienced cuts in health insurance, pension plans, and paid vacations.<sup>210</sup>

Workers that fear unemployment, salary cuts, and slashed benefits lack substantial bargaining power in their employment relationships. Although white-collar workers wielded substantial power in the 1930s, today they have largely assumed the identity of the blue-collar workers of the Depression-era.<sup>211</sup> The elite qualities that originally motivated Congress to exempt white-collar workers no longer exist.<sup>212</sup> Lacking bargaining power and FLSA protection, the modern white-collar worker is subject to the overtime conditions the FLSA sought to prevent.<sup>213</sup> Consequently, the FLSA exemptions are inept to govern today’s workforce and should be modified. Perhaps if employers were required to compensate workers at a premium for their electronic overtime, employees would live more and resent their gadgets less.

#### B. *FLSA Will Not Be Amended*

Although many FLSA critics have advocated for abolishment or drastic modification of the white-collar exemptions, appeals for electronic overtime compensation will not be successful in the near future.<sup>214</sup> First, employer interests will successfully lobby against compensation for electronic overtime. Second, clashing political factions will prevent any considerable substantive changes to the FLSA.

While Part I of this comment focused on the adverse consequences that BlackBerrys and similar gadgets have inflicted on white-collar workers, it did

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207. At the close of 2008, “the unemployment rate reached 6.7 percent, a 15-year high.” *Jobless Claims at Highest Level in 26 Years*, N.Y. TIMES, December 11, 2008, at A4.

208. DeChiara, *supra* note 201, at 167; Patrick McGeehan, *Job Losses in City Reach Up Ladder*, N.Y. TIMES, Dec. 11, 2008, at A1 (reporting that unemployment is growing fastest among college graduates).

209. Armour & Kessler, *supra* note 206.

210. FRASER, *supra* note 16, at 58–74 (commenting that white-collar workers are working more and receiving fewer benefits).

211. *See supra* notes 159–95 and accompanying text.

212. Miller, *supra* note 167, at 63.

213. *See supra* notes 192–97 and accompanying text.

214. *See, e.g.*, Cicala, *supra* note 17, at 139; DeChiara, *supra* note 201, at 267; Schor *supra* note 47, at 191; Yager & Bond, *supra* note 151, at 323.

not consider the employer's perspective.<sup>215</sup> Technological advancements have not only made employees accessible around the clock, but have also allowed them to shirk more during working hours.<sup>216</sup> For example, 54% of employees who have Internet access at work check their personal email accounts during working hours.<sup>217</sup> Moreover, 22% of them use the Internet to shop at work.<sup>218</sup> Indeed, "almost one-fourth of an employee's time spent online is on nonwork-related activities."<sup>219</sup> Further studies suggest that workers "with online access spend up to [ten] hours per week sending personal email or visiting Internet sites unrelated to work."<sup>220</sup> In addition to harming work productivity, employee shirking has resulted in "poor customer service, lost business, unnecessary overstaffing, high overheads, and lost profits."<sup>221</sup> Arguably, if employees are filling the hours from nine to five with personal emails and web surfing, it is not unreasonable for a work-related call or email to occasionally interrupt their nights and weekends.

Additionally, Part II of this comment demonstrated the employee's inability to refuse overtime work.<sup>222</sup> It did not, however, consider the pressures of global competition that motivate many employers to demand it. As early as the 1840s, employers recognized that overtime is "necessary to compete with . . . foreigner[s]."<sup>223</sup> Today, for example, an employer could replace many white-collar Americans earning six-figure salaries with foreign employees willing to work for \$20,000 a year.<sup>224</sup> If an employer chooses to keep white-collar jobs in the United States, despite such salary differentials, he is disadvantaged compared to both American employers who ship their jobs overseas, and foreign competitors.<sup>225</sup> Consequently, any effort to reduce overtime work would further disadvantage American businesses that must compete with "the world beyond the paternal control of the Congress of the

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215. See *supra* notes 15–62 and accompanying text.

216. Jay P. Kesan, *Cyber-Working or Cyber-Shirking?: A First Principles Examination of Electronic Privacy in the Workplace*, 54 FLA. L. REV. 289, 290 (2002).

217. MADDEN & JONES, *supra* note 3, at iv.

218. *Id.* at vi.

219. Kesan, *supra* note 216, at 314.

220. Amy Rogers, *You've Got Mail But Your Employer Does Too: Electronic Communication and Privacy in the 21st Century Workplace*, J. TECH. L. & POL'Y 1, 20 (2000).

221. Kesan, *supra* note 216, at 314.

222. See *supra* notes 63–77 and accompanying text.

223. LINDER, *supra* note 18, at 18 (quoting J. Binns, *Prize Essay on Systematic Overtime Working and Its Consequences, Moral, Physical, Mental, and Social* 7 (1846)).

224. Armour & Kessler, *supra* note 206.

225. *Id.*; Mark Gongloff, *U.S. Jobs Jumping Ship, Cheap Offshore Labor is Not Just for Manufacturing Anymore—Is Your Job Heading Overseas, Too?*, March 13, 2003, [http://money.cnn.com/2003/03/13/news/economy/jobs\\_offshore/](http://money.cnn.com/2003/03/13/news/economy/jobs_offshore/).

United States.”<sup>226</sup> Accordingly, the realities of employee shirking and global competition give employers justifiable grounds to lobby against FLSA revision.

While the cry for white-collar overtime compensation likely will find both support and opposition, ultimately, any substantive change to the FLSA requires action from either Congress or the DOL.<sup>227</sup> Practically speaking, an overhaul that would require employers to pay white-collar employees time-and-a-half for their electronic overtime is currently unattainable. In 2004, the DOL amended the duties tests which qualify employees for white-collar exemptions.<sup>228</sup> Although the amendments helped clarify the FLSA regulations, they were unable to drastically overhaul the white-collar exemptions.<sup>229</sup> Even though “[e]very White House since the Carter Administration has made attempts to overhaul the rule . . . all have failed because of the complexity of the regulations and political infighting.”<sup>230</sup>

Despite the relatively minimal changes, the DOL struggled to find bipartisan support for its proposed 2004 revision.<sup>231</sup> Although the workforce had changed since the Depression-era, the political lines surrounding the white-collar exemptions remained the same.<sup>232</sup> Predictably, business-backed Republicans sought to lower labor costs by expanding the FLSA exemptions, and Democrats sympathetic to labor sought to narrow them.<sup>233</sup> Indeed,

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226. LINDER, *supra* note 18, at 18 (quoting *Hours of Labor for Workmen, Mechanics, Etc., Employed Upon Public Work of the United States*, Sen. Doc. No. 318, 55th Cong., 2d. Sess. 5 (1898) (testimony of Joseph McCammon)).

227. The Fair Labor Standards Act, 29 U.S.C. § 204(d)(1) (2006).

228. Postol, *supra* note 81, at 225.

229. Notably, the changes mostly clarified the existing rules, rather than substantively changing them. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; 69 Fed. Reg. 22,121, 22,125 (Dep’t of Labor Apr. 23, 2004) (final rule) [hereinafter Defining and Delimiting the Exemptions] (“The proposed changes to the duties tests were designed to ensure that employees could understand their rights, employers could understand their legal obligations, and the Department could vigorously enforce the law.”).

230. Cindy Skrzycki, *Labor Dept. to Propose New Overtime-Pay Rules*, WASH. POST, March 27, 2003, at E1. Although the DOL under the Bush Administration amended the FLSA in 2004, the DOL removed the radical reforms from its proposal after a lengthy battle on Capitol Hill. Rowan, *supra* note 166, at 121.

231. Margaret M. Clark, *Hard Lines Drawn in FLSA Regulatory Battle About OT*, HR MAGAZINE, Aug. 1, 2003, at 30, available at [http://findarticles.com/p/articles/mi\\_m3495/is\\_8\\_48/ai\\_107526607/](http://findarticles.com/p/articles/mi_m3495/is_8_48/ai_107526607/).

232. Rowan, *supra* note 166, at 121.

233. *Id.*; see also Skrzycki, *supra* note 230.

dissatisfied Democrats even attempted to deny funding to the DOL to promulgate its rule changes.<sup>234</sup>

Funding was not the only obstacle for the FLSA revisions. When the DOL provided a 90-day comment period on its proposed amendments, the Department received more than 75,000 comments from “employees, employers, professional associations, small business owners, labor unions, government entities, law firms and others.”<sup>235</sup> Indeed, the “proposal prompted vigorous public policy debate in Congress and the media.”<sup>236</sup> In response, the DOL abandoned its radical amendments to the FLSA and proposed changes that clarified rather than overhauled the white-collar exemptions.<sup>237</sup> Later, Senator Judd Gregg commented that the DOL “significantly pared back, sifted off, [and] sugared off [its] proposal.”<sup>238</sup>

Even though the DOL planned for nearly twenty-five years to drastically overhaul the FLSA exemptions, political infighting motivated the DOL to settle predominantly for employer-friendly clarifications rather than drastic revisions.<sup>239</sup> As recent history is apt to repeat itself, it is highly unlikely that a FLSA white-collar overhaul is on the horizon. After all, it seems to take twenty-five years to propose a change, and the political wounds of 2004 have not yet healed. Consequently, white-collar workers suffering electronic overtime will need to look beyond the FLSA for relief.

#### IV. RECOMMENDATIONS FOR WHITE-COLLAR WORKERS

Although white-collar workers suffering from electronic overtime are likely exempted from the FLSA, their exempt status does not require them to forfeit all hope for electronic overtime relief and compensation. These workers should explore both their state overtime laws and their personal job duties.<sup>240</sup> First, white-collar workers should determine whether their state

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234. Rowan, *supra* note 166, at 121. They abandoned this attempt after the White House threatened a veto on any appropriations bill that denied the DOL funding. Carl Hulse, *After Disputes, Congress Passes Spending Plan*, N.Y. TIMES, Jan. 23, 2004, at A1.

235. Defining and Delimiting the Exemptions, 69 Fed. Reg. 22,122.

236. *Id.*

237. *See id.* (summarizing 2004 changes to the FLSA); Rowan, *supra* note 166, at 123; White-Collar Exemption Revisions, *supra* note 158, at 1 (noting that the 2004 amendments represent a “retreat” from the comprehensive restructuring of the white-collar exemptions proposed in March 2003).

238. 150 CONG. REC. S4792 (daily edition May 4, 2004) (statement of Sen. Gregg).

239. *DOL Issues Proposal for Changing FLSA Overtime Exemption Requirements*, HR MAGAZINE, May 2003, at 25, available at [http://findarticles.com/p/articles/mi\\_m3495/is\\_5\\_48/ai\\_101568979/](http://findarticles.com/p/articles/mi_m3495/is_5_48/ai_101568979/); Margaret M. Clark, *Proposed ‘White Collar’ Regulation Mostly Good News for Employers*, HR MAGAZINE June 2003, at 25, available at [http://findarticles.com/p/articles/mi\\_m3495/is\\_6\\_48/ai\\_102946829/](http://findarticles.com/p/articles/mi_m3495/is_6_48/ai_102946829/); Steven Greenhouse, *Labor Dept. Revises Plans to Cut Overtime Eligibility*, N.Y. TIMES, Apr. 21, 2004, at A14.

240. *See supra* notes 78–103 and accompanying text.

regulates overtime work. Specifically, thirty-four states have enacted overtime legislation.<sup>241</sup> While many of these state statutes simply mirror the FLSA regimen, others are significantly different.<sup>242</sup> In the event that a state law is more labor-friendly than the FLSA, the state law will apply.<sup>243</sup> Under the FLSA, for example, an employee is exempt if his *primary duty* is executive, professional, or administrative.<sup>244</sup> The DOL has defined *primary duty* as “the principal, main, major or most important duty that the employee performs.”<sup>245</sup> Significantly, a duty may be considered *primary* regardless of the amount of time the employee spends performing it, so long as an employer can prove the duty is important.<sup>246</sup> California’s overtime legislation uses similar language. Specifically, California employees are ineligible for overtime compensation if the individual is *primarily engaged* in executive, professional, or administrative duties.<sup>247</sup> California, however, defines *primarily* as “more than one-half of the employee’s worktime.”<sup>248</sup> Consequently, a California worker exempted by the FLSA may still be entitled to state overtime protection if he spends less than half of his worktime performing exempt duties. Some California workers are using this subtle nuance in California law successfully to sue their employers for overtime compensation, even though they are otherwise exempt under the FLSA.<sup>249</sup> Accordingly, white-collar employees suffering from electronic or traditional overtime should explore their state statutes for broader coverage.

Second, white-collar workers should scrutinize their personal job duties and salaries. Experts predict that as many as half of U.S. corporations classify their employees as exempt when their job duties or salaries fail the FLSA

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241. LINDER, *supra* note 77, at 1204–08 (providing an organized chart to summarize the present law of each state).

242. *See id.* For example, overtime statutes in California, Colorado, Hawaii, and Oregon, significantly differ from the FLSA. Postol, *supra* note 81, at 240. Additionally, Alaska, Arkansas, Connecticut, Illinois, Kentucky, Maryland, Minnesota, Montana, New Jersey, North Dakota, Oregon, Pennsylvania, Washington, West Virginia, and Wisconsin have all enacted exemption standards that differ from the federal FLSA. *Id.*

243. 29 U.S.C. § 218(a) (2006); *see also* Yager & Bond, *supra* note 155, at 323.

244. 29 C.F.R. §§ 541.601, 541.700 (2009).

245. *Id.* § 541.700.

246. *Id.*

247. CAL. LAB. CODE § 515(a) (West 2000).

248. *Id.* § 515(e).

249. Although white-collar overtime suits are being filed across the country, most of them are being filed in California. Conlin, *supra* note 64, at 61. California’s overtime laws are considered the most worker-friendly, and more than 175 class-action suits have been filed in California since 2000. Gillian Flynn, *Over Time Lawsuits Are You at Risk?*, HUMAN RESOURCE MANAGEMENT, Oct. 2001, [http://findarticles.com/p/articles/mi\\_m0FXS/is\\_10\\_80/ai\\_79352430/pg\\_2?tag=artBody:col1](http://findarticles.com/p/articles/mi_m0FXS/is_10_80/ai_79352430/pg_2?tag=artBody:col1) (last visited Feb. 15, 2010).

exemption requirements.<sup>250</sup> From 2001 to 2006, overtime lawsuits doubled in federal courts, and the bulk of the cases involved employee misclassification.<sup>251</sup> Stock brokers, for example, received \$500 million settling overtime suits because technically they were paid commissions and not salaries—as required by the FLSA salary test.<sup>252</sup>

Additionally, job titles alone are insufficient to qualify a worker as exempt.<sup>253</sup> Consequently, white-collar workers currently classified as exempt should verify that they meet the FLSA duties test. For example, employees that are called “managers” or “executives” should confirm that they satisfy the three-pronged test for the executive exemption. A manager that is unable to influence personnel decisions should not be classified as exempt, even though he might regularly supervise others and direct the enterprise.<sup>254</sup> Simply put, workers should not accept their job title or current exempt status at face value, because employers have every incentive to classify their workers as exempt. As one commentator has noted, “Even defense attorneys admit that vast numbers of companies are violating the law.”<sup>255</sup> As such, white-collar workers enduring overtime—electronic or otherwise—should self audit their salary and duties to ascertain whether their employer is complying with the FLSA and state overtime regulations.

#### CONCLUSION

Although technological advancements generate convenience, entertainment, and productivity, they have also rendered it impossible for many white-collar workers to escape the office. The laptops and BlackBerrys that were supposed to liberate the workforce instead operate as wireless balls and chains that tether white-collar employees to their work. While this phenomenon has triggered much discussion and curiosity concerning overtime pay, most workers suffering electronic overtime are not entitled to any additional compensation.

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250. Conlin, *supra* note 64, at 61.

251. Orey, *supra* note 64.

252. *Id.* The DOL later closed the stock broker loophole by issuing an opinion letter in 2006 stating that stock brokers are exempt under the FLSA. Empl. Stand. Admin. Wage & Hour Div., U.S. Dep’t of Labor, FLSA 2006-43 (Nov. 27, 2006), available at [http://www.dol.gov/esa/WHID/opinion/FLSA/2006/2006\\_11\\_27\\_43\\_FLSA.pdf](http://www.dol.gov/esa/WHID/opinion/FLSA/2006/2006_11_27_43_FLSA.pdf).

253. 29 C.F.R. § 541.2 (2009) (“A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee’s salary and duties meet the requirements of the regulations in this part.”).

254. See Mina Kimes, *Overtime Pay: A Ticking Time Bomb*, FORTUNE, Jan. 22, 2008, available at [http://money.cnn.com/2008/01/21/smbusiness/overtime\\_lawsuits.fsb/index.htm](http://money.cnn.com/2008/01/21/smbusiness/overtime_lawsuits.fsb/index.htm).

255. Orey, *supra* note 64.

The FLSA has remained the primary legislation governing overtime compensation since 1938. Like many laws, however, it failed to anticipate technological change and remains riddled with exemptions that render most white-collar workers ineligible for overtime pay. Although many social commentators believe the exemptions no longer serve the FLSA's legislative intent, bipartisan politics will prevent any substantial overhaul in the FLSA regimen. Consequently, the vast majority of white-collar workers will remain without a remedy for their electronic overtime, their BlackBerry thumbs, and their crackberry addictions. It seems that once again, "The hare of science and technology lurches ahead . . . [while] [t]he tortoise of the law ambles slowly behind."<sup>256</sup>

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256. Michael Kirby, *Medical Technology and New Frontiers of Family Law*, 1 AUST. J. FAM. L. 196, 212 (1987).

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