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**SAGA OF REFORM:
REGULATION OF
WORKER OVERTIME**

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PREFACE

The Fair Labor Standards Act (FLSA) is a 1938 federal law whose most well known requirements are the payment of a minimum wage and one and one half times an employee's regular rate of pay for hours worked over 40 per week. The FLSA exempts from its overtime pay requirements certain classes of employees, including "white collar" executives, administrators, and professionals. The task of defining those exemptions has been delegated to the Secretary of Labor.

The Bush administration recently promulgated substantial revisions to the regulations defining these "white collar" exemptions, which had not previously been updated in any substantial way since 1954. While prior administrations of both parties had promised to reform the outdated 1954 regulations, none had been able to do so. The Bush administration's action has prompted strong reactions—both positive and negative—and has been the subject of much recent publicity.

In this *Briefly*, William Kilberg and Jason Schwartz describe the white collar exemptions to the FLSA's overtime requirements under both the 1954 regulations and the newly revised regulations, with an emphasis on issues that have given rise to significant litigation. Kilberg and Schwartz also examine the controversy surrounding the reform process and the ways in which that controversy affected the outcome. The authors conclude that the end product, while not perfect, is a significant achievement that will enhance protections for low-wage workers and provide greater certainty in the application of this 1938 law to the modern workforce.

Like all other publications of the National Legal Center, this monograph is presented to encourage a greater understanding of an important issue affecting the private sector. The views expressed in this monograph are those of the authors and do not necessarily reflect the opinions of the advisers, officers, or directors of the Center.

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SAGA OF REFORM: REGULATION OF WORKER OVERTIME

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The Bush Labor Department succeeded this year in accomplishing something that prior administrations—both Republican and Democrat—had promised but had been unable to do: revising the 50-year-old regulations that define “white collar” employees exempt from the overtime requirements of the Fair Labor Standards Act (FLSA). The long, arduous path to that goal, and the ways in which that path influenced the outcome, is the subject of this issue of *Briefly*.

I. THE WHITE COLLAR EXEMPTIONS UNDER THE 1954 REGULATIONS

The FLSA was enacted in 1938 to provide “protection to those who toil in factory and on farm to obtain a fair day’s pay for a fair day’s work.”¹ Its principal requirements are the payment of a minimum wage and the payment of time and a half for hours worked over 40 per week.² These measures were designed “to raise the wages of the most poorly paid workers and to reduce the hours of those most overworked.”³ Consistent with the view that some workers, but not all, lack sufficient bargaining power to fend for themselves, the Act exempts from its overtime pay requirements various categories of employees, including those “employed in a bona fide executive, administrative, or professional capacity.”⁴ The Act does not define these so-called white collar exemptions, instead leaving that task to the Secretary of Labor.⁵

¹Franklin D. Roosevelt, Message to Congress (May 24, 1937).

²29 U.S.C. §§ 206, 207.

³H.R. REP. NO. 1452, 75th Cong., 1st Sess. 9 (1937).

⁴29 U.S.C. § 213(a)(1).

⁵*See id.* The Act also exempts, among others, outside salespersons. *See id.* The treatment of the outside sales exemption in the new regulations is not addressed herein.

The Secretary of Labor's regulations governing the white collar exemptions have not been updated in any substantial way since 1954. The 1954 regulations provide for a salary threshold, a duties test, and a salary basis test. An exempt executive or administrative employee must earn a minimum of \$155 per week, and an exempt professional must earn at least \$170 per week.⁶ Employees earning less than these amounts would not qualify for the white collar exemptions.⁷ Employees earning at least these minimum salaries must satisfy so-called long duties tests particular to each of the three exemptions.⁸ The regulations also establish a \$250 per week threshold (\$44 more than the current federal minimum wage) for the application of less rigorous "short" duties tests for "high salaried" white collar employees.⁹ As might be expected, the "long" tests have been dormant given their outdated salary levels.

The short duties test for the executive exemption under the 1954 regulations requires that an employee's "primary duty consist[] of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof," and that it "include[] the customary and regular direction of the work of two or more other employees therein."¹⁰

The short duties test for the administrative exemption requires that an employee's "primary duty consist[] of" "[t]he performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers" and that it "include[] work requiring the exercise of discretion and independent judgment."¹¹

⁶Old 29 C.F.R. § 541.1 (executive); § 541.2 (administrative); § 541.3 (professional). (Citations throughout this issue of *Briefly* will be to (a) the "old" 1954 regulations, codified at 29 C.F.R. pt. 541, and in force until August 23, 2004; (b) the "proposed" regulations, published at 68 Fed. Reg. 15,559 (Mar. 31, 2003); and (c) the "new" regulations, published at 69 Fed. Reg. 22,121 (Apr. 23, 2004), to be codified at 29 C.F.R. pt. 541, effective August 23, 2004.)

⁷*Id.*

⁸*Id.*

⁹*Id.*; see also old 29 C.F.R. § 541.119 ("high salaried executives"); § 541.214 ("high salaried administrative employees"); § 541.315 ("high salaried professional employees").

¹⁰Old 29 C.F.R. § 541.1(f).

¹¹Old 29 C.F.R. § 541.2(e)(2). In addition, certain academic administrative

The professional exemption includes both “learned professionals” and “artistic professionals.”¹² The short duties test for the learned professional exemption requires that an employee’s “primary duty consist[] of” “the performance of work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study[,]” and that it “include[] work requiring the consistent exercise of discretion and judgment.”¹³ The short duties test for the artistic professional exemption requires that an employee’s “primary duty consist[] of the performance . . . of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.”¹⁴

If an employee meets the salary threshold and satisfies the applicable duties test, he or she must also be paid on a “salary basis” in order to qualify for one of the white collar exemptions.¹⁵ Generally, payment on a salary basis—as distinguished, for example, from payment on an hourly basis—means that the employee is entitled to a preestablished salary in every work week in which the employee performs any work, regardless of the quantity or quality of that work.¹⁶

II. THE NEED FOR REFORM

personnel fall within the scope of this exemption. *See id.*

¹²Old 29 C.F.R. § 541.3. The exemption also includes teachers. *See* old 29 C.F.R. § 541.3(a)(3). In addition, there is a special exemption for certain computer professionals. *See* old 29 C.F.R. §§ 541.3(a)(4), 541.303.

¹³Old 29 C.F.R. § 541.3(e).

¹⁴*Id.*

¹⁵*See* old 29 C.F.R. §§ 541.118, 541.212, 541.312. Physicians, lawyers, and teachers are excluded from this requirement. Old 29 C.F.R. § 541.314. In addition, certain exempt employees may be paid on a fee basis in lieu of salary, old 29 C.F.R. §§ 541.213, 541.313, and certain computer employees paid at least \$27.63 per hour may qualify for the computer professional’s exemption. *See* old 29 C.F.R. §§ 541.3(a)(4), 541.303.

¹⁶Old 29 C.F.R. § 541.118. There are certain exceptions to this rule that permit deductions from the salary of an exempt employee under particular circumstances. *See id.*

There has been bipartisan agreement that the Secretary of Labor's 50-year-old regulations identifying those "white collar" employees exempt from the FLSA's overtime requirements are in dire need of updating.¹⁷ As noted by the United States General Accounting Office (GAO), the investigative arm of Congress, "Since [the FLSA's] enactment in 1938, the industrial profile of the American economy has shifted dramatically, changing from predominantly manufacturing to increasingly service-oriented,"¹⁸ and the complex, wooden, and outdated white collar exemption regulations have been difficult to apply in the modern workforce. Secretary of Labor Elaine Chao further commented, "The old rule . . . reflected the structure of the workplace, the type[s] of jobs, the education level of the workforce, and the workplace dynamics of an industrial economy that has long since changed. With each passing decade of inattention, the overtime regulations became increasingly out of step with the realities of the workplace and provided less and less guidance to workers and employers."¹⁹ Thus, the illustrations provided by the Labor Department to clarify the meaning of these regulations became meaningless themselves over time. One would be hard-pressed, for example, to find employees with titles such as "legman" or "straw boss" in 2004.²⁰

The statute increasingly became a "gotcha" mechanism, allowing employees and their counsel to collect windfall judgments as a result of technical noncompliance by employers. In *Reich v. Malcolm Pirnie, Inc.*,²¹ for example, the Labor Department obtained a judgment in excess of \$500,000 for a group of 400 otherwise exempt employees

¹⁷See, e.g., William J. Kilberg, *The Fair Labor Standards Act: Forcing 1938 Job Categories on the Modern Economy*, in BRIEFLY (Nat'l Legal Center for the Public Interest, May 2001).

¹⁸United States General Accounting Office, Report to the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, "Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place," No. GAO/HEHS-99-164 (Sept. 1999) (hereinafter referred to as "GAO Report") at 1.

¹⁹Statement of the Honorable Elaine L. Chao, Secretary of Labor, Before the Comm. on Education and the Workforce, U.S. House of Representatives (Apr. 28, 2004) (hereinafter referred to as "Chao Statement").

²⁰See old 29 C.F.R. §§ 541.115(b), 541.302(f)(2).

²¹821 F. Supp. 905 (S.D.N.Y. 1993).

because 24 of them had experienced a total of \$3,300 in technically improper pay deductions. Between the confusion caused by the outdated regulations and the potential for substantial awards based on technical violations, there has been an explosion of FLSA litigation. The number of opt-in collective actions under the FLSA has tripled since 1997, outpacing discrimination lawsuits in the federal courts.²² These cases often are brought in state court as well, where state wage and hour laws may permit more expansive remedies and traditional class action opt-out procedures not authorized by the FLSA. And the size of potential damages awards is astronomical. For example, in a recent California state law case (which purported to apply federal law concepts) involving the exempt status of insurance claims adjusters, a jury awarded more than \$90 million in damages.²³

In recent years, the problems caused by attempting to put the round peg of the modern white collar workforce in the square hole of the 50-year-old FLSA exemption definitions have been highlighted in numerous congressional hearings and by the GAO.²⁴ In September 1999, the GAO recommended “that the Secretary of Labor comprehensively review current regulations and restructure white-collar exemptions to better accommodate today’s workplace and to anticipate future workplace trends.”²⁵ Because of the politically charged nature of the statute’s overtime protections, however, reform efforts never made it past the starting block. While there was near-universal, bipartisan agreement that the salary floors should be

²²See Chao Statement; *see also* Nancy Montwieler, “Wage Hour Collective Actions Jumped 70 Percent Since 2000, Analysis Shows,” BNA Daily Labor Report (Mar. 26, 2004).

²³*Employer Held to Have Broken Law on Overtime*, NAT’LLJ., Feb. 4, 2002, at C9 (describing *Bell v. Farmers Ins. Exch.*, 105 Cal. Rptr. 2d 59 (Ct. App. 2001)). Many cases settle before trial for substantial sums. For example, Radio Shack paid \$29.9 million to approximately 1300 current and former California store managers in settlement of a state law overtime class action. *See Attorneys Explore Reasons for Surge in Wage and Hour Lawsuits, Offer Strategies*, BNA DAILY LABOR REPORT (Dec. 12, 2002).

²⁴*See, e.g., Hearing Before the House Comm. on Education and the Workforce, Subcomm. on Workforce Protections*, 106th Cong. 2d Sess. (May 3, 2000); GAO Report.

²⁵GAO Report at 4.

increased (with the amount of the proposed increase varying widely between employer and employee advocates, and even within the employer community itself), and that substantive reform of the 1954 exemption rules was necessary, there was strong disagreement about the form such changes should take.

In 1981, the Labor Department “stayed indefinitely” its last proposal to readjust the FLSA’s salary thresholds in response to public comments urging a more comprehensive review of the regulations.²⁶ In 1985, the Department published an advance notice of proposed rulemaking seeking comments from the public on all aspects of the regulation.²⁷ From that time until the publication of the new proposal in March 2003, the Department semiannually published statements of regulatory priority prominently featuring reform of the exemption regulations.²⁸ In May 2002, for example, the Department explained (as it had previously), “Legal developments in court cases are changing the guiding interpretations under this exemption and creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. Clear, comprehensive, and up-to-date regulations would provide for central, uniform control over the application of these regulations and ameliorate many concerns.”²⁹ Importantly, many of the challenges posed by the implementation of the outdated 1954 regulations were addressed in case law, but, as noted by the Department, these cases did not provide a comprehensive, predictable system of rules on which employers and employees could consistently rely. Instead, there existed an atmosphere of uncertainty that provided fertile ground for plaintiffs’ counsel.

III. THE PROPOSED CHANGES TO THE REGULATION

The Bush Labor Department indicated early in its tenure that it was

²⁶See 46 Fed. Reg. 18,998 (Mar. 27, 1981).

²⁷50 Fed. Reg. 47,696 (Nov. 19, 1985).

²⁸See, e.g., 65 Fed. Reg. 23,014, 23,029 (Apr. 24, 2000); 65 Fed. Reg. 73,303, 73,408 (Nov. 30, 2000); 66 Fed. Reg. 25,679, 25,687 (May 14, 2001); 66 Fed. Reg. 61,125, 61,222 (Dec. 3, 2001); 67 Fed. Reg. 33,307, 33,314 (May 13, 2002); and 67 Fed. Reg. 74,057, 74,170 (Dec. 9, 2002).

²⁹67 Fed. Reg. 33,307, 33,315 (May 13, 2002).

serious about reform of the white collar exemption regulations.³⁰ After holding meetings with more than 40 “stakeholder” groups representing employers and employees, the Labor Department published a proposed rule in the *Federal Register* on March 31, 2003.³¹ The reforms proposed in the *Federal Register* Notice were, in many respects, radical departures from the existing regulatory text.

The proposal contemplated a substantial reformatting of the entire white collar exemption framework. It would have increased the minimum salary level for exemption from \$155 per week (\$8,060 per year) to \$425 per week (\$22,100 per year).³² This \$22,100 salary floor was very controversial, with labor unions advocating a much higher figure and certain retail and restaurant industry employers (particularly in the convenience store and fast-food sectors) lobbying for a lower amount. The proposal also would have created a special, streamlined test for certain “highly compensated” employees earning at least \$65,000 per year.³³ Under this provision, a highly compensated employee performing nonmanual work would be exempt if he or she performs at least one identifiable exempt duty under the executive, administrative, or professional duties test,³⁴ a test viewed by some as an almost automatic exemption to those earning \$65,000 or more. The rationale for applying less scrutiny to the duties of such employees, of course, is that their salaries are presumed to indicate the importance of their work.³⁵

For those employees in the middle range between \$22,100 and \$64,999, the Department proposed a “standard duties test” for each of the white collar exemptions, relying primarily on the 1954 short tests

³⁰Key players in this effort included Secretary Chao, Assistant Secretary for Employment Standards Victoria Lipnic, then-Wage and Hour Administrator Tammy McCutchen, and then-Solicitor of Labor Eugene Scalia.

³¹Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Proposed Rule, 68 Fed. Reg. 15,559 (Mar. 31, 2003).

³²Proposed 29 C.F.R. § 541.600.

³³Proposed 29 C.F.R. § 541.601.

³⁴Proposed 29 C.F.R. § 541.601(a), (c).

³⁵Proposed 29 C.F.R. § 541.601(c). In addition, employees in this category would not need to be paid on a “salary basis.” Proposed 29 C.F.R. § 541.601.

and largely eliminating the defunct long test criteria.³⁶ Among other jettisoned elements of the long tests, the new standard tests would not include the long tests' strict limitations on the percentage of nonexempt work that an exempt employee could perform, instead, relying on the more flexible "primary duty" test.³⁷ Thus, an exempt employee need not be restricted to performing no more than a certain amount of nonexempt work, provided that his or her most important function (although not necessarily the one on which he or she spends the most time) remains the performance of exempt executive, administrative, or professional duties.³⁸

The standard duties test for administrative employees earning between \$22,100 and \$64,999 posed the most serious challenges. As is evident from its text, the 1954 administrative short test was the most confusing of the three white collar exemptions, with regulatory language that is almost incomprehensible to employers and employees alike.³⁹ The proposed standard test for the administrative exemption would have retained the most confusing element of the previous test, the so-called administrative-production dichotomy. The dichotomy, an analytic tool used to separate nonexempt line production workers from exempt administrative staff workers, did not weather the transition from a manufacturing to a service economy very well. Although it could readily distinguish between assembly-line workers and labor relations managers in a factory, it was not as able to discern clear lines in a service-oriented workplace, where virtually every employee, in some sense, "produces" the services of the employer.

For example, a literal reading of this standard led the Labor Department to challenge the exempt status of insurance company marketing representatives who promoted sales of their company's insurance products, arguing that such efforts constituted "production" of sales; this position was rejected by the First Circuit in its seminal decision in *Reich v. John Alden Life Insurance Co.*⁴⁰ In *Carpenter v.*

³⁶See 68 Fed. Reg. at 15,564-15,568.

³⁷See *id.*

³⁸Proposed 29 C.F.R. § 541.700.

³⁹See old 29 C.F.R. § 541.2(e)(2) old § 541.214.

⁴⁰126 F.3d 1 (1st Cir. 1997).

R.M. Shoemaker Co.,⁴¹ however, a district court recently held that a project superintendent for a construction firm who was paid \$90,000 per year was nonexempt because he was engaged in the production work of his company. And in a misapplication of these federal principles, in *Bell v. Farmers Insurance Exchange*,⁴² a California state court purporting to apply them held that insurance claims adjusters were nonexempt production workers because, among other reasons, the adjusters “produced” the adjusting services that were the product of the branch claims offices in which they worked.⁴³

Recognizing that the administrative/production dichotomy “is difficult to apply uniformly in the 21st century workplace,” the Department “reduce[d] the emphasis” placed on it, endorsing the approach of the court in *Piscione v. Ernst & Young L.L.P.*,⁴⁴ in which an employee benefits consultant was found to be performing administrative work, notwithstanding the fact that he could be said to be “producing” the consulting product of his employer.⁴⁵

The Department’s initial proposal would have jettisoned the additional requirement that an exempt administrative employee exercise discretion and independent judgment in favor of a requirement that such an employee hold a “position of responsibility.”⁴⁶ The Department explained that the discretion and independent judgment requirement had “generated significant confusion and litigation,”⁴⁷ noting that “[t]his rule has been interpreted to deny the exemption to an employee who follows a procedures manual, even though most employees in the modern workplace are required to operate within standard procedures.”⁴⁸ In the often-cited case *Hashop v. Rockwell Space Operations Co.*,⁴⁹ for example, the

⁴¹2002 WL 987990 (E.D. Pa. May 6, 2002).

⁴²105 Cal. Rptr. 2d 59, 61 (Ct. App. 2001).

⁴³The decision ignored the relation of the claims adjusters’ duties to the functions of the larger corporate organization and those of its customers, analyses required even under the 1954 regulations. *See* old 29 C.F.R. § 541.205(d).

⁴⁴171 F.3d 527 (7th Cir. 1999).

⁴⁵68 Fed. Reg. at 15,566.

⁴⁶Proposed 29 C.F.R. § 541.200.

⁴⁷68 Fed. Reg. at 15,566.

⁴⁸*Id.*

⁴⁹867 F. Supp. 1287, 1298-99 (S.D. Tex. 1994).

court held that NASA space shuttle instructors did not satisfy the less stringent “discretion and judgment” standard of the professional exemption (much less the “discretion and *independent* judgment” standard of the administrative exemption) because they relied on a manual, notwithstanding the fact that the manual would be incomprehensible to a layperson. This result would be avoided in future cases through the elimination of this requirement.

This would have been a substantial change from current law, removing a significant barrier to exempt status *not only* for those who rely on manuals, *but also* for others whose jobs involve administrative tasks but who are not empowered to make or recommend important decisions. The proposed alternative to the discretion and independent judgment requirement, known as the “position of responsibility” test, would be satisfied by demonstrating that an employee “customarily and regularly perform[s] work of substantial importance *or* perform[s] work requiring a high level of skill or training.”⁵⁰ This would have expanded the administrative exemption to include highly skilled “knowledge workers” who were largely excluded from the existing exemption, which drew a distinction between those employees who use skills and those who exercise discretion and independent judgment.⁵¹ Thus, for example, a technical specialist with advanced skills might qualify for exemption based on his or her high level of skill or training, even if his or her job did not require any sophisticated decision making.

With respect to the learned and computer professional exemptions, the Department also proposed the elimination of the discretion and judgment requirement, noting that it had “proven difficult . . . to apply

⁵⁰Proposed 29 C.F.R. § 541.202 (emphasis added).

⁵¹*See* old 29 C.F.R. § 541.207(c)(1) (“Perhaps the most frequent cause of misapplication of the term ‘discretion and independent judgment’ is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment . . .”).

uniformly.”⁵² This requirement presented the same problems as the analogous requirement under the administrative exemption, discussed in detail previously. Many modern professionals, such as the shuttle instructors in *Hashop* or post-Sarbanes Oxley corporate auditors, must comply with detailed guidelines, procedures, or manuals in the performance of their work. The elimination of the discretion and judgment requirement would ensure that such professionals are not inappropriately denied exempt status.

In addition, the proposal emphasized language in the existing regulation that permits employees to qualify for the learned professional exemption if they attain professional knowledge through a combination of education and experience instead of through more traditional academic channels.⁵³ This would permit, for example, the exemption of nondegreed engineers who attained through alternate, nonacademic means the same level of knowledge, and who perform the same work, as their degreed peers. Although this concept is recognized under the 1954 regulations, the proposal would have made it much more explicit.

The Department also proposed three significant revisions to the salary basis requirement. The first revision would have added to the list of permissible deductions from the salary of an exempt employee those deductions made for unpaid disciplinary suspensions for infractions such as sexual harassment or workplace violence.⁵⁴ The old regulations permitted deductions for “infractions of safety rules of major significance,” and these revisions would expand that notion to allow for consistent application of discipline to exempt and nonexempt employees for other, nonsafety related violations.⁵⁵

The remaining two revisions were designed to address the potential for significant liability arising from minor, technical violations of the existing salary basis regulations—the “gotcha” element. In order to examine this element of the regulations, it is important to understand its history. From its origins in the 1940s, the Department conceived of

⁵²68 Fed. Reg. at 15,567.

⁵³*Id.* at 15,567-15,568.

⁵⁴Proposed 29 C.F.R. § 541.602(b)(5).

⁵⁵68 Fed. Reg. at 15,572.

the salary basis requirement as an essential indicator of white collar status:

The Department . . . has determined over the course of many years that executive, administrative and professional employees are nearly universally paid on a salary basis. This practice reflects the widely-held understanding that employees with the requisite status to be bona fide executives, administrators or professionals have discretion to manage their time. Such employees are not paid by the hour or task, but for the general value of services performed.⁵⁶

For many years, the test was treated in the same manner as the other requirements for exempt status—it was evaluated on an individualized basis, with those employees who were not paid on a salary basis not being entitled to the exemption.⁵⁷ In the early 1990s, however, the Labor Department and private litigants began to pursue a broader strategy, seeking to convert entire classes of exempt employees to nonexempt status based on the mere theoretical possibility that they might suffer improper deductions from salary. This argument relied on the regulatory requirement that an exempt employee’s salary not be “subject to” improper deductions.⁵⁸

In *Abshire v. County of Kern*,⁵⁹ for example, the court held that fire department battalion chiefs whose pay could be reduced for absences of less than a day under county policy were “subject to” improper deductions and therefore not paid on a salary basis, even though no chief had actually suffered such a deduction. And in *Martin v. Malcolm Pirnie, Inc.*,⁶⁰ the court of appeals endorsed the Department’s

⁵⁶Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Final Rule, 69 Fed. Reg. 22,121, 22,176-77 (Apr. 23, 2004).

⁵⁷See, e.g., Wage and Hour Administrator Opinion Letter (Jan. 15, 1986).

⁵⁸Old 29 C.F.R. § 541.118(a) (requiring that an exempt employee’s salary not be “subject to reduction because of variations in the quality or quantity of the work performed”) (emphasis added).

⁵⁹908 F.2d 483 (9th Cir. 1990).

⁶⁰949 F.2d 611 (2d Cir. 1991).

view that technically improper deductions in the amount of \$3,300 from the salaries of 24 exempt employees who had mistakenly followed inartfully drafted time sheet instructions rendered 400 employees who were theoretically “subject to” such deductions nonexempt and entitled to back overtime pay (which was subsequently awarded in the amount of \$515,000). The deductions at issue involved 100 hours of work over a 19-month period; the 400 employees awarded back overtime pay worked well over one million hours during that same period of time.⁶¹ Although the regulations provided for a “window of correction” that would allow an employer to escape such liability by repaying its mistaken deductions, the court found that the window of correction was not available to Malcolm Pirnie because it had a “policy” authorizing the improper deductions.⁶²

The Department articulated a slightly more reasonable position in an *amicus curiae* brief submitted to the Supreme Court in *Auer v. Robbins*.⁶³ In that case, the Supreme Court, deferring to the newly developed views of the Department, held that liability would be found “if there is either an actual practice of making [improper] deductions or an employment policy that creates a ‘significant likelihood’ of such deductions.”⁶⁴ This new approach, while better than its predecessor, still permitted the recovery of massive overtime awards by otherwise exempt employees who never actually experienced an improper deduction from their salaries. Moreover, the availability of the “window of correction” has been subject to varying and confusing interpretations, in many cases precluding it from serving its intended purpose.⁶⁵

⁶¹Dole v. Malcolm Pirnie, Inc., 758 F. Supp. 899, 907 (S.D.N.Y.), *rev’d sub nom.* Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991).

⁶²See *Malcolm Pirnie*, 949 F.2d at 616-17.

⁶³519 U.S. 452, 461 (1997). The circuit split that followed *Abshire* prompted the Supreme Court to grant *certiorari*. Compare *Abshire*, 908 F.3d 483, with *Atlanta Prof. Firefighters Union v. City of Atlanta*, 921 F.2d 800 (11th Cir. 1991) (despite city ordinance requiring partial day docking, the fact that no fire captain had actually been docked demonstrated that a captain’s pay was not improperly “subject to” deduction).

⁶⁴See *Auer*, 519 U.S. at 461.

⁶⁵See 69 Fed. Reg. at 22,181 (comparing *Moore v. Hannon Food Service, Inc.*, 317 F.3d 489 (5th Cir. 2003) (declining to defer to the Labor Department’s narrow interpretation of the circumstances under which the window of correction would be

The Department's March 2003 proposal would have narrowed the scope of potential liability for technical salary basis violations and reaffirmed the ability of employers to correct such violations before incurring substantial liability. The proposal stated that "the exemption would be lost only if there is a pattern and practice of improper deductions, and then only for employees in the same job classification and working for the same manager who is responsible for the improper pay docking decision or policy."⁶⁶ The proposal also would have created a "safe harbor" under which, "if an employer has a written policy prohibiting improper pay deductions, notifies employees of that policy, and reimburses employees for any improper deductions, then that employer would not lose the exemption for any employees unless the employer's policy prohibiting deductions is repeatedly and willfully violated."⁶⁷

Finally, the proposals with respect to the executive exemption, widely viewed as the area of the regulations least in need of reform, were, predictably, the least controversial. The new standard duties test for the executive exemption would have preserved the elements of the current short test and incorporated an additional element from the long test—the employee would have to possess "the authority to hire or fire other employees or [his or her] suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees [would have to be] given particular weight."⁶⁸ The proposal also would have recognized as exempt executives those individuals who are in "sole charge" of a discrete establishment as well as those who own at least 20 percent of a business.⁶⁹

Thus, with some limited exceptions, the Department proposed a fairly aggressive rewrite of the 1954 regulations.

available) with, *inter alia*, *Klem v. County of Santa Clara*, 208 F.3d 1085 (9th Cir. 2000) (accepting the Labor Department's narrow interpretation of the window of correction)).

⁶⁶68 Fed. Reg. at 15,572.

⁶⁷*Id.*

⁶⁸Proposed 29 C.F.R. § 541.100(a)(4).

⁶⁹Proposed 29 C.F.R. §§ 541.101, 541.102.

IV. THE PUBLIC RESPONSE

The Bush Labor Department's proposed solutions to the long-festering problems under the white collar regulations were highly controversial. The Department received a remarkable 75,280 comments during the 90-day regulatory comment period, which ended in June 2003.⁷⁰ Of those comments, only 600 were substantive, and the remainder were form letters.⁷¹

Perhaps more important, the public debate raged on in the media and in Congress. The proposed changes drew intense criticism and were portrayed as an effort by business groups and their Republican allies to deprive middle and lower income Americans of their overtime payments—to make them work harder for less money. The AFL-CIO described the regulatory effort as “[t]he Bush administration’s . . . drive to take away millions of U.S. workers’ overtime pay protections . . . to make it easier for employers to avoid paying overtime to their employees.”⁷²

The Economic Policy Institute, which is funded by organized labor, issued a much-cited study predicting that, in contrast with the Labor Department’s estimate of 644,000, the proposed regulations would cause more than 8 million employees to lose overtime.⁷³ The viewpoint of the study’s creators is perhaps best summarized by the principal author’s Labor Day 2003 editorial, in which he wrote, “The 8-hour day and 40-hour week that our great-grandparents fought for during a 50-year struggle and finally won in the New Deal will be nothing but a memory if the administration and its big business allies succeed in their stealth attack on this key labor protection.”⁷⁴

⁷⁰69 Fed. Reg. at 22,125.

⁷¹*Id.*

⁷²*Save Overtime Pay!*, available at <<http://www.aflcio.org/yourjobeconomy/overtimepay/>>.

⁷³Ross Eisenbray & Jared Bernstein, *Eliminating the Right to Overtime Pay: Department of Labor Proposal Means Lower Pay, Longer Hours for Millions of Workers*, ECONOMIC POLICY INSTITUTE (June 26, 2003), available at <www.epinet.org>.

⁷⁴Ross Eisenbray, *Sad Labor Day for Working Americans*, MONTEREY HERALD, Aug. 31, 2003.

This kind of rhetoric energized the public debate. Although there was little focus on the substance of the rule, there was quite a bit of attention to the broad assertion that the Bush administration was “taking away overtime.” The Economic Policy Institute study was widely cited in editorials and news articles concerning the proposed rule. A sampling of headlines shows the success of the public relations onslaught: *Bush Chips Away at Overtime Pay*; *Bush Plan May Cut Overtime for Millions*; *Bush Administration Rewriting Overtime Safeguards*; *Many White-Collar Workers Would Lose Eligibility, But Others May Gain*; *Bush Administration’s New Overtime Pay Rules Could Exclude Millions from Overtime Pay*; *Overtime Plum or Ploy? Bush Move Seems Suspicious*.⁷⁵ One letter writer to the *Arizona Republic* opined, “Under President Bush’s psychology, garbage men would be elevated to chief sanitary engineers, one per truck. Each cashier would hold the title of manager of his or her cash register.”⁷⁶ Even the regulation’s economic impact analysis, which examines potential (and lawful) employer responses to the new requirements, was attacked as a ploy. In a January 6, 2004, article, the Associated Press reported, “The Labor Department is giving employers tips on how to avoid paying overtime to some of the 1.3 million low-income workers who would become eligible under new rules”⁷⁷

⁷⁵Dan Haar, *Bush Chips Away at Overtime Pay*, HARTFORD COURANT, Apr. 4, 2003; Leigh Strobe, *Bush Plan May Cut Overtime for Millions*, ASSOCIATED PRESS, June 25, 2003; John Roberts & Wyatt Andrews, *Bush Administration Rewriting Overtime Safeguards*, CBS NEWS, June 30, 2003; Carlos Tejada, *Many White-Collar Workers Would Lose Eligibility, But Others May Gain*, WALL ST. J., July 2, 2003; *Bush Administration’s New Overtime Pay Rules Could Exclude Millions from Overtime Pay*, NBC NEWS, Sept. 1, 2003; Sylvester Brown, Jr., *Overtime Plum or Ploy? Bush Move Seems Suspicious*, ST. LOUIS POST-DISPATCH, Jan. 6, 2004.

⁷⁶Ernest A. Citron, *Eliminating Overtime Is Another Bad Bush Idea*, ARIZONA REPUBLIC, July 6, 2003.

⁷⁷Leigh Strobe, *Officials Tell How to Avoid Overtime Pay*, ASSOCIATED PRESS, Jan. 6, 2004. In a January 17, 2004, letter, Assistant Secretary of Labor Lipnic responded, What [the article] refers to as “tips” for employers are actually legally required elements of the economic impact analysis By law, the department is required to anticipate how employers may react to lawfully comply with a new rule. Nothing in the economic analysis included in our proposed rule provides instructions on how to avoid paying overtime. . . . [M]isleading stories like this one only make it more difficult for us to ensure that the overtime rules

This public debate was carried out in Congress as well. Opponents of the rule offered numerous legislative vehicles designed to prevent the Labor Department from moving forward with the rulemaking. Despite several close calls, none of these efforts succeeded.⁷⁸ Backed by the threat of a presidential veto, the Labor Department successfully persuaded lawmakers to allow it to consider and to respond to the comments received during the rulemaking process in its final rule.⁷⁹

V. THE FINAL (WE THINK) PRODUCT

The Labor Department responded to the public and congressional commentary on a number of levels. As an initial matter, the final rule addressed a few occupations that had become central examples in the debate over the proposal. It made expressly clear what was implicit in the proposal—that it did not intend to include blue collar workers, first responders, and nondegreed nurses within the scope of the white collar exemptions, and that it did not intend automatically to deem veterans

adequately protect millions of American workers.

⁷⁸See *Bush Administration's Plan on Overtime Pay Upheld by House*, NBC NEWS: TODAY, July 11, 2003; David Rogers, *Senate Votes Down Overtime Plan*, WALL ST. J., Sept. 11, 2003; Juliet Eilperin, *In a Switch, House Rejects Bush Overtime Proposal*, WASH. POST, Oct. 3, 2003; Alan Fram, *Bush Wins Fight on Overtime Rule*, ASSOCIATED PRESS, Nov. 22, 2003; Richard Simon, *Senate Oks \$328.5-Billion Spending Bill; Measure Allows Bush to Move Ahead with Controversial Rules that Would Limit Overtime Pay and Let Media Giants Buy More TV Stations*, L.A. TIMES, Jan. 23, 2004.

⁷⁹Notably, however, Illinois's state legislature did not wait for the final rule to act. In anticipation of the federal changes, Illinois enacted legislation that would preserve the existing exemption definitions for purposes of state law. See News Release, Gov. Blagojevich signs new law protecting Illinois workers' overtime compensation: Illinois becomes first state to decouple from new federal overtime rules (Apr. 2, 2004) available at <www.illinois.gov>. See also Julie Forster, *Minnesota Senate Approves Bill to Override Bush-Backed Overtime Rules*, ST. PAUL PIONEER PRESS, Apr. 16, 2004. The FLSA permits states to regulate the wages and hours of employees in ways more restrictive than the federal statute. See 29 U.S.C. § 218(a). Some state statutes adopt the federal exemption definitions verbatim as state statutory language, others incorporate them by reference, and still others have modified the definitions in various respects. See, e.g., ALASKA ADMIN. CODE tit. 8, § 15.910 (setting forth exemption definitions similar to FLSA long tests); D.C. CODE § 32-1004(a) (incorporating federal exemption definitions by reference); MD ADMIN. CODE § 09.12.41.01, .05, .17 (setting forth exemption definitions similar to FLSA short tests).

to be professionals on the basis of their military training. Secretary Chao explained, “In recent months, there has been a tremendous amount of misinformation about the likely impact of the Department’s new rule on employees such as blue-collar workers, police officers, nurses and veterans. The Department never had any intention of taking overtime rights away from such employees, and the final rule makes this clear beyond a shadow of a doubt.”⁸⁰

The final rule contains special sections clarifying that “manual laborers or other ‘blue collar’ workers” and “police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees” are not within the scope of the white collar exemptions.⁸¹ The final rule also reaffirms the Labor Department’s current position that only registered nurses qualify for the learned professional exemption, *not* licensed practical nurses or other similar health care workers without degrees.⁸² The rule also omits broad language from the proposal regarding the substitution of work experience and training for formal education in order to satisfy the professional duties test, retaining, instead, the narrower language of the current regulations.⁸³ This change was designed to address the concerns raised about the potential for significant widening of the professional ranks and the inclusion of veterans as learned professionals on the basis of their military training.⁸⁴ However, the rule continues to recognize, as the current regulations do, that some professionals will attain the requisite knowledge through means other than formal education.⁸⁵

In connection with the issuance of the final rule, the Department also published *FairPay Fact Sheets* addressing these issues. For example, Fact Sheet #17I states, “The exemptions provided by FLSA

⁸⁰Chao Statement.

⁸¹New 29 C.F.R. § 541.3.

⁸²New 29 C.F.R. § 541.301(e)(2).

⁸³New 29 C.F.R. § 541.301(d).

⁸⁴*See* 69 Fed. Reg. at 22,150.

⁸⁵*See id.*

Section 13(a)(1) [the white collar exemptions] do not apply to manual laborers or other ‘blue collar’ workers who perform work involving repetitive operations with their hands, physical skill and energy . . . no matter how highly paid they may be.”⁸⁶ Fact Sheet #17J explains that “first responders” are not exempt under the white collar exemptions. Fact Sheet #17N explains that while “[r]egistered nurses who are paid on an hourly basis should receive overtime pay[,] registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption, and if paid on a salary basis of at least \$455 per week, may be classified as exempt.” The Fact Sheet further explains that “[l]icensed practical nurses and other similar health care employees . . . generally do not qualify as exempt learned professionals” Fact Sheet #17K explains that “[m]ilitary training . . . generally is not sufficient to meet the requirements for the professional exemption. . . . No amount of military training can turn a ‘blue collar’ occupation or technical field into a profession.” Presumably, however, if a veteran obtained highly technical training and on-the-job experience while in the military, and applied that training and experience in a profession typically populated by degreed individuals to perform the same work, using the same knowledge, as those individuals, the veteran could qualify as an exempt professional.

Furthermore, in response to the public and congressional commentary, the Department retreated from some of the more significant revisions to the administrative and professional duties tests. The inclusion of employees in “sole charge” of an establishment within the executive exemption, regardless of whether they manage employees, was abandoned.⁸⁷ With respect to the administrative exemption, the Department jettisoned its proposed “position of responsibility” test, acknowledging that it would have simply replaced one confusing standard (which at least had the benefit of a body of case law interpreting it) with another, equally ambiguous standard.⁸⁸ And in both the administrative and professional exemptions, the Department

⁸⁶These fact sheets are available at <www.dol.gov/fairpay>.

⁸⁷See 69 Fed. Reg. at 22,132-22,133.

⁸⁸See *id.* at 22,138-22,139.

reinstated the discretion and (for the administrative exemption, independent) judgment requirements, closing the door on any potential expansion of the exemptions to highly skilled technicians and other “knowledge workers” not considered exempt under the 1954 regulations.⁸⁹

Perhaps most important, the Department preserved in the final rule its overall proposed structure, with a minimum salary level, a standard duties test, and a streamlined test for certain highly compensated employees. Moreover, it retained certain revisions, and adopted others, designed to accomplish the core goals of the rulemaking—to protect the lowest paid workers, and to provide clarity to employees and employers and thereby reduce litigation.

To accomplish the first goal, the Department increased the minimum salary required for exemption from its current level of \$155 per week (\$8,060 per year) to \$455 per week (\$23,660 per year), \$1,560 more on an annual basis than the \$425 per week (\$22,100 per year) initially proposed.⁹⁰ The Department also elevated the threshold level for the highly compensated employee test to \$100,000 per year, \$35,000 higher than the amount initially proposed, requiring that at least \$455 per week of that amount be paid on a salary basis, and further requiring that such employees “customarily and regularly” perform at least one exempt duty.⁹¹ This latter change was designed to ensure that those earning \$100,000 or more would not automatically be exempt, but, rather, would still have to perform exempt duties on a consistent basis.

To accomplish the second goal, the Department included in the final rule and its Preamble a number of clarifications, interpretations, and examples, many of which rely on existing case law, and all of which were designed to address common sources of confusion. In so doing, the Department has taken a major step toward improving and modernizing the law. These measures will not likely move employees from non-exempt to exempt (or vice versa), but, rather, will clarify their status and minimize the likelihood of costly and unnecessary

⁸⁹See *id.* at 22,139, 22,151-22,152.

⁹⁰New 29 C.F.R. § 541.600.

⁹¹New 29 C.F.R. § 541.601.

litigation.⁹²

In the standard duties test for the executive exemption, applicable to employees earning between \$23,600 and \$99,999, the Department adopted the holdings of the leading cases involving multitasking assistant managers, providing that “[c]oncurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption”⁹³ Thus, “[f]or example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but the performance of such nonexempt work does not preclude the exemption if the assistant manager’s primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption.”⁹⁴ The regulation contrasts this type of exempt employee with a relief supervisor or working supervisor whose primary duty is performing non-exempt production work.⁹⁵ The Department recognized the common sense nature of this rule in the modern workplace: “The Department continues to believe that this case law accurately reflects the appropriate test of exempt executive status and is a practical approach that can be realistically applied in the modern workforce, particularly in restaurant and retail settings.”⁹⁶

In the standard duties test for the administrative exemption, the

⁹²Nonetheless, there will undoubtedly be significant litigation in the short term as the new terms and phrases are tested. As this litigation unfolds, the regulatory history of the final rule, including its Preamble, as well as the views of the Labor Department as expressed in opinion letters and *amicus* briefs, will be of great importance in developing authoritative interpretations of the new rule. Indeed, the Department has invited parties to private litigation to seek its *amicus* participation when appropriate as part of its Overtime Security *amicus* program. Parties to such litigation should be mindful of these sources as they begin to define the contours of the new regulations.

⁹³New 29 C.F.R. § 541.106(a). *See also* 69 Fed. Reg. at 22,136-22,137 (citing *Jones v. Virginia Oil Co.*, 2003 WL 21699882, at *4 (4th Cir. 2003); *Murray v. Stuckey’s, Inc.*, 939 F.2d 614, 617-20 (8th Cir. 1991); *Donovan v. Burger King Corp.*, 675 F.2d 516, 521 (2d Cir. 1982); *Donovan v. Burger King Corp.*, 672 F.2d 221, 226 (1st Cir. 1982); *Horne v. Crowne Central Petroleum, Inc.*, 775 F. Supp. 189, 190 (D.S.C. 1991)).

⁹⁴New 29 C.F.R. § 541.106.

⁹⁵*See id.*

⁹⁶69 Fed. Reg. at 22,137.

Department clarified that, while it was retaining the “administrative/production dichotomy,” the test was not intended to be dispositive in all cases, and should not be applied in an illogical manner to exclude otherwise exempt employees of services firms who might be said to perform the “production” work of those firms. Presumably under this common sense approach, anomalous results like that in *Carpenter*, in which a \$90,000 per-year project superintendent was deemed to be a nonexempt production worker, will be less likely. Toward that end, the Department endorsed the holding of *Bothell v. Phase Metrics, Inc.*,⁹⁷ that “the ‘production versus staff’ dichotomy is ‘one analytical tool’ that should be used ‘toward answering the ultimate question,’ and is only determinative if the work ‘falls squarely on the production side of the line.’”⁹⁸

The Department offered numerous examples to clarify the types of administrative functions that would satisfy this standard, including 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, and legal and regulatory compliance.⁹⁹ It also reemphasized the point made in existing regulations that the administrative nature of an employee’s work may be examined in relation to the business of the employee’s employer or its customers, so that consultants performing administrative work for their employer’s clients would not be disqualified from the exemption.¹⁰⁰

The Department also retained, but clarified, the discretion and

⁹⁷299 F.3d 1120, 1126 (9th Cir. 2002).

⁹⁸*See id.* at 22,141. The Preamble also cites with approval *John Alden Life Ins. Co.*, 126 F.3d at 9-10, in which, as noted above, the Department’s then-position that marketing representatives who promoted sales of insurance products were nonexempt production workers was rejected. 69 Fed. Reg. at 22,140. *See also id.* at 22,141 (citing with approval *Piscione*, 171 F.3d at 538-39 (finding a consultant to be an exempt administrative employee, not a production worker); *Spinden v. GS Roofing Prods. Co.*, 94 F.3d 421, 428 (8th Cir. 1996) (finding a plant controller to be an exempt administrative employee)).

⁹⁹New 29 C.F.R. § 541.201(b).

¹⁰⁰New 29 C.F.R. § 541.201(c).

independent judgment standard of the administrative exemption, and the discretion and judgment standard of the professional exemption. In particular, the Department rejected case law holding that reliance on manuals and procedures would defeat exempt status because it demonstrates a lack of the requisite discretion and judgment. The Department went so far as to describe *Hashop*, the case involving the NASA space shuttle instructors, as “demonstrat[ing] the absurd result from too literally applying the current ‘discretion and judgment’ requirement to a 21st century job.”¹⁰¹ Thus, the new rule explains that

[t]he use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption The [white collar] exemptions are not available, however[,] for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.¹⁰²

In addition to these types of clarifications contained in the final rule and its Preamble, the Department also included numerous examples of exempt and nonexempt jobs, including several that have been the subject of litigation. In the administrative exemption, the Department addressed *Farmers v. Bell Insurance Exchange*, the California state law case that held, much to the surprise of the insurance industry, that claims adjusters were nonexempt production workers, by identifying claims adjusters as exempt administrative employees.¹⁰³ This example is consistent with the Department’s long-standing position and the near-unanimous view of the case law.¹⁰⁴ The Department likewise identified financial services employees as positions that would

¹⁰¹69 Fed. Reg. at 22,152.

¹⁰²New 29 C.F.R. § 541.704.

¹⁰³New 29 C.F.R. § 541.203(a).

¹⁰⁴Old 29 C.F.R. § 541.205(c); U.S. Dep’t of Labor Wage-Hour Op. Ltr. No. 226 (Nov. 19, 2002).

generally qualify for the administrative exemption.¹⁰⁵ In addition, although the Department did not expand its definition of management under the executive exemption to include modern concepts of team leadership, it did identify team leaders of major projects as examples of exempt administrative employees.¹⁰⁶

In the professional exemption, as noted above, the Department distinguished between licensed practical nurses and registered nurses, with only the latter qualifying for exemption.¹⁰⁷ The final rule also identifies registered or certified medical technologists, degreed dental hygienists, degreed physician assistants, certified public accountants and others performing similar work, degreed chefs, degreed athletic trainers, and degreed funeral directors and embalmers as examples of typically exempt professional positions.¹⁰⁸ It identifies accounting clerks, bookkeepers, cooks, paralegals, and legal assistants as examples of positions that would not qualify for the professional exemption.¹⁰⁹ Importantly, it also recognizes that “[t]he areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science and learning.”¹¹⁰

The Department also addressed the “gotcha” character of the current salary basis requirements in the final rule. In place of the complex “pattern and practice” requirement of the initial proposal, which would

¹⁰⁵New 29 C.F.R. § 541.203(b). In *Casas v. Conseco Finance Corp.*, 2002 WL 507059, at *9 (D. Minn. 2002), the court held that loan originators were not exempt because their primary duty was “to sell [the company’s] lending products on a day-to-day basis” to consumers. The Department distinguished this decision by noting its holding that the employees’ *primary duty* was inside sales, observing that “many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to consumers[,]” when their primary duty includes “[s]ervicing existing customers, promoting the employers[’] financial products, and advising customers on the appropriate financial product to fit their financial needs[.]” 69 Fed. Reg. at 22,146.

¹⁰⁶New 29 C.F.R. § 541.203(c).

¹⁰⁷New 29 C.F.R. § 541.301(e)(2).

¹⁰⁸New 29 C.F.R. § 541.301(e).

¹⁰⁹*Id.*

¹¹⁰New 29 C.F.R. § 541.301(f).

have created the potential for complicated “mini-trials” in each salary basis case, the final rule provides that employees would only be deemed nonexempt if an employer engaged in “an actual practice of making improper deductions,” thus demonstrating its intent not to pay employees on a salary basis.¹¹¹ In such cases, liability would be limited to the time period of the practice, and to employees in the same job classification working for the same managers responsible for the improper deductions.¹¹² The final rule further states that improper deductions that are either isolated or inadvertent will not result in loss of the exemption if the employer reimburses employees, providing employers with a greater opportunity to correct these types of technical payroll errors without incurring substantial liability.¹¹³ Furthermore, the final rule directs that the salary basis requirements “shall not be construed in an unduly technical manner so as to defeat the exemption.”¹¹⁴

Finally, the rule adopts the proposed safe harbor, whereby employers who (a) clearly communicate a policy prohibiting improper deductions from the salary of exempt employees, (b) provide for a complaint mechanism, (c) reimburse employees for improper deductions, and (d) commit to comply in the future will be immune from liability unless the employer “willfully violates the policy by continuing to make improper deductions after receiving employee complaints.”¹¹⁵ Interestingly, this latter provision borrows familiar concepts from the case law developed under the civil rights laws—the affirmative defenses to sexual harassment claims set forth in *Farragher v. City of Boca Raton*,¹¹⁶ and *Burlington Industries, Inc. v. Ellerth*¹¹⁷—for use under the FLSA. This is an example of the benefit of a current revision of the exemption regulations, which can rely on such well-developed and tested principles understood by human

¹¹¹New 29 C.F.R. § 541.603.

¹¹²*Id.*

¹¹³*Id.*

¹¹⁴New 29 C.F.R. § 541.603(e).

¹¹⁵New 29 C.F.R. § 541.603(d).

¹¹⁶524 U.S. 775 (1998).

¹¹⁷524 U.S. 742 (1998).

resources professionals in the modern workplace.¹¹⁸

Thus, the final rule is a compromise product that addresses many of the concerns (real or imagined) raised in response to the initial proposal, while still increasing protections for low-paid employees, providing a greater measure of certainty for employers and employees, and reducing the risk of inefficient, “gotcha” litigation.

VI. RESPONSE TO THE FINAL RULE

Despite the Department’s earnest and substantial effort to respond to the concerns raised regarding its initial proposal, and notwithstanding its significant retreat from some of the more radical revisions it had proposed, the final rule has been surprisingly controversial.¹¹⁹

The AFL-CIO and its allies continue to depict the rule as an effort to deprive employees of overtime. In an AFL-CIO-commissioned study released in July 2004, three former Labor Department officials concluded that “the Department has systematically and effectively weakened virtually [all] of [the white collar] exemptions, and thus substantially broadened the class of employees who will be exempt”¹²⁰ Moreover, the union-financed Economic Policy Institute issued a revised version of its earlier study, claiming that six million employees would lose overtime eligibility under the final rule.¹²¹

¹¹⁸Similarly, the final rule relies on the definition of “tangible employment action” developed under the civil rights law to clarify those decisions about which an exempt executive’s recommendations must carry “particular weight.” See 69 Fed. Reg. at 22,131.

¹¹⁹An editorial in the PITTSBURGH POST-GAZETTE noted, “Democrats may still make political hay of the changes during the fall election season. But the Bush administration responded to pressure, and politics is the art of the possible, not the art of perfection. The new rules may not be ideal, but they are better than the previous plan.” *Overtime Makeover: The New Bush Plan Is Better than the Original*, PITTSBURGH POST-GAZETTE, May 3, 2004.

¹²⁰John Fraser et al., *Observations on the Department of Labor’s Final Regulations “Defining and Delimiting the [Minimum Wage and Overtime] Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees”* (July 2004), available at <www.aflcio.org>.

¹²¹Ross Eisenbray, *Longer Hours, Less Pay: Labor Department’s New Rules Could*

In this election year, Congress has been sensitive to the public perception that the new overtime rules will have such an effect. Recently passed Senate amendments would block certain portions of the new regulation deemed “less protective” of overtime than existing regulations.¹²² One amendment, authored by Senator Harkin, would permit the increase in the minimum salary for exemption, but would block any portion of the regulations that would exempt an employee who is currently nonexempt. Another amendment, authored by Senator Gregg, delineates occupations and classes of employees for which certain new regulations would not take effect. The patchwork of new and old regulations that would be created by either amendment would be extremely difficult for the Labor Department to administer and for employers and employees to understand. As of this writing, the fate of both amendments remains uncertain. In the House of Representatives, Representative Obey, the ranking Democrat on the Appropriations Committee, announced his intent to sponsor an amendment to the Labor Department’s appropriations bill blocking the new rules.¹²³ Barring further action by Congress or a successful legal challenge, the rules are scheduled to go into effect on August 23, 2004.

VII. CONCLUSION

The development of revised white collar exemption regulations is a long-awaited and significant achievement. The end product, while not perfect, addresses many of the concerns raised by employee and employer advocates; will enhance protections for low-wage workers; and should provide greater certainty in the application of the law to the modern workforce.

Strip Overtime Protection from Millions of Workers, ECONOMIC POLICY INSTITUTE (July 14, 2004), available at <www.epinet.org>; see also Fawn H. Johnson, *Obey Preparing Amendment to Halt Enforcement of DOL’s Overtime Rule*, BNA DAILY LABOR REPORT (July 14, 2004).

¹²²*Senators Reject Bush’s Overtime Regulations*, ASSOCIATED PRESS, May 5, 2004; Leigh Strope, *House Republicans Block Vote on Overtime Rules*, ASSOCIATED PRESS, May 13, 2004.

¹²³Johnson, *supra* note 121.