"Time and a Half’s the American Way"

A HISTORY OF THE EXCLUSION OF WHITE-COLLAR WORKERS FROM OVERTIME REGULATION, 1868-2004

Marc Linder

Fānpǐhuà Press
Iowa City
2004
"Time and a half's the American way": A History of the exclusion of white-collar workers from overtime regulation, 1868-2004

Marc Linder

xlvi, 1342 p.; 23 cm.
Includes bibliographical references and index.


HD5111.U5 L56 2004
331.2572—dc21
Library of Congress Control Number: 2004097418
Part I

Why No Overtime Dollars for White Collars?

Overtime payments at time and one-half add up to real money if much overtime is worked, and most hourly paid employees work plenty of overtime. The salaried workers receive very little of this money.¹

Elmer F. Andrews, Administrator of the Wage and Hours Act, during a visit here yesterday, told the Trade Association Executives Forum this definition of the term “executive.” “If a man has an office with a desk on which there is a buzzer, and if he can press that buzzer and have someone come dashing in response—then he’s an executive.”²

The term “executive,” while used in the FLSA and implementing regulations, is somewhat of a misnomer for this exemption. A more realistic title would be full supervisory employee.³


²“Andrews Defines ‘Executive,’” NYT, Dec. 10, 1938 (15:2). In his World War I-era novel on office work, Sinclair Lewis spoke of the “chiefs” as “the castes above the buzzer line,” whereas their private secretary was “not above the buzzer. She had to leap to the rattle-snake tattoo, when Mr. Ross summoned her....” Sinclair Lewis, The Job 232 (1994 [1917]).

"Good to the last drop!"

The office worker.
The impression is widespread that there is an inherent difference between the kind of work performed by the white-collar worker and that of the wage earner. I think it is fair to say that as between the work turned out in insurance companies, banks and other business offices, on the one hand, and in the big shipyards and munitions plants on the other, there is no essential difference. The situation in a large room or office building, or temporary building in which from 200 to 1,200 typists, calculators, and stenographers are assembled, involves the same kind of machine effort that is put in by the average industrial worker.¹

In a thoroughly pedestrian move for the most unabashedly pro-employer Republican administration since before Herbert Hoover’s,² the proposed and final regulations published by the U.S. Department of Labor in 2003 and 2004, respectively, revising the rules pertaining to white-collar workers’ overtime work, sought to make it easier for companies to avoid paying premium-penalty wages.³


²Joel Brinkley, “Out of Spotlight, Bush Overhauls U.S. Regulations,” NYT, Aug. 14, 2004 (A1:6, A10:1-6). The Bush administration’s regulatory changes with “A Pro-Business Tilt” had been so numerous and varied that this lengthy account failed even to mention the white-collar overtime regulations.

³See below chs. 16-17. Since changes in the white-collar regulations have been on the DOL’s agenda for more than two decades and on employers’ political agenda for even longer, the following rhetorical accusation by the president of the Communications Workers of America was preposterous: “Many predicted that a Bush presidential victory coupled with Republican control of the Congress would lead to assaults on workers’ rights and benefits. But even so, the Department of Labor’s sneak attack on the 40-hour workweek is stunning in its audacity and magnitude. ... The DOL is reworking the rules in a way that stands the FLSA on its head, denying overtime to millions of workers.... What’s particularly outrageous is that the administration is over-stepping its authority, changing policy established by Congress—actually reversing that policy to hand its corporate political supporters a bonanza—while condemning millions of workers to lower pay and sweatshop-like hours. Morton Bahr, “In My Opinion: DOL’s Scheme: Longer
Numbers

This action took place against the background of what the Los Angeles Times called a “tidal wave of class-action lawsuits” brought by “[l]ow-level managers whose long hours on straight pay helped fuel the economic boom” and then prompted them to accuse employers of “robbing them of overtime.” These and many other white-collar workers “see themselves as slaves to jobs they blame for leaving them stressed, worn out and rarely available for spouses, children and other pursuits.”

The partisanship of a Senator Hillary Clinton or Edward Kennedy was hardly required to draw the conclusion that the Bush administration was doing “the bidding of its corporate donors” in proposing “an unfair scheme to prop up business profits.” Labor unions quickly pointed out how the proposals would expand by millions the groups of workers already deprived of the right to extra pay for long workweeks. (The guesstimate of eight million additional excluded workers presented by the Economic Policy Institute became a mantra for unions and their congressional supporters.)

But what not even the labor movement questioned was the justification for the original exclusions going back to the Fair Labor Standards Act’s enactment in 1938. And while the AFL-CIO may have had plausible tactical reasons for concentrating on warding off further incursions rather than on rolling back 65-year-old encrustations, in fact, the union movement, like

---

4Lisa Giron, “Infuriated Managers Suing for Overtime—and Winning,” LAT, June 8, 2001 (A1:1) (Lexis) (discussing settlement of two suits against Rite Aide Corp. and U-Haul Co. for $25 and $7 million, respectively). As Deborah Greenfield, associate general counsel of the AFL-CIO and former DOL official, pointed out regarding employers’ complaints about the increase in FLSA litigation: “Let’s remember that this is a worker protection scheme, so that an increase in private litigation in which employees enforce their rights doesn’t mean that the protections should be relaxed. For us, it means that for some reason employers are emboldened to classify their employees in a way that allows them not to pay overtime.” Federalist Society, National Lawyers Convention 2002: “The Fair Labor Standards Act: Keeping Time with the 21st Century?” at 28 (Nov. 14, 2002).


6CR 149:S11066 (Sept. 4, 2003).


8In spite of the AFL-CIO’s tactical decision to ignore the fact that the existing regulations already excluded millions of white-collar workers from overtime protection, as late as 1993, the AFL-CIO did express concern about the growing number of excluded workers. Appearing before the House Subcommittee on Labor Standards, John Zalusky,
all other participants in the public debate, has come to take the exclusions themselves for granted. Moreover, the AFL-CIO’s political strategy has, perversely, entailed passing over in silence, and thus in effect withholding from public debate, the fact that a statute enacted by the New Deal Congress and regulations issued by the New Deal Wage and Hour Division have, according to the Labor Department itself, wound up excluding as many as 32 million white-collar workers. Typical of this distortion is the claim made by Democratic Representative Robert Andrews on the House floor that: “Seventy-six [sic] years ago, the Congress passed and the President signed a law which says that if you

head of the organization’s Office of Wages and Industrial Progress, observed that the DOL’s reports to Congress showed that in 1990 14 million or 15 percent of the private-sector workforce was exempt as administrative, executive, or professional employees—up from 9.3 million and 14.1 percent, respectively, in 1975. To him the evidence was “clear” that these “exemptions have been slowly eroding coverage.”

For example, testifying at a congressional hearing against the proposed exemption of inside sales workers, the deputy director of public policy at the AFL-CIO conceded that the original exemption of outside sales workers in 1938 had been “a fair and reasonable accommodation to a practical reality created by the nature of the job” because Congress justifiably “believed it was both unreasonable and unfair to expect employers to satisfy minimum wage and overtime requirements...when employers had no practical way to know how many hours these employees worked, and no real power to control their hours.”

In the course of exploratory negotiations over whether the AFL-CIO would help place for publication the author’s op-ed piece on the DOL’s proposed regulations, the AFL-CIO’s spokesperson suggested that the article “tease out more explicitly...that the DOL proposal moves in the exactly wrong direction, moving away from a narrow exception that would exclude few workers to a much broader exemption [sic] that would exclude more and more workers every year.” When the author countered that “it just ain’t so—there are 25-30 million white collar workers excluded now,” the spokesperson replied: “We think it’s less important to start out identifying how bad the FLSA is now to tighten [sic] up that the real problem is that the new proposals are going to make things worse.” Email between Kathy Roeder and Marc Linder (May 23, 2003).
Numbers

work more than 40 hours a week,...you get time and a half for that additional time. With some carefully reasoned and well-thought-out exceptions since then, it has been the law for every American worker under every circumstance.”

Why So Much More Is at Stake:
The Inexorable Increase in the Number and Proportion of White-Collar Workers

[W]e have been seeing a revolutionary blurring of the boundary line between white- and blue-collared people. The recent upheaval of our economic system has brought about this blurring. ... Just about every basis on which white-collared clerical people have claimed superior status to blue-collared workers...has been undermined in recent years.

The reason that controversy over the exclusion of white-collar workers from overtime regulation has become increasingly intense is that, with their steady increase in absolute numbers and as a proportion of the labor force, the volume of working hours that employers can potentially extract without additional pay has grown dramatically. As the Wage and Hour Administrator admitted to the House Subcommittee on Workforce Protections toward the end of the Clinton administration: the white-collar exemptions cover “an estimated 32 million workers, more than one-quarter of the total workforce, and this number has been increasing with the continuing growth of the service sector. [T]his group is increasing, and the assignment of overtime to this group of employees is increasing.” Thus with regard to the DOL’s regulatory exclusions, much more has come to be at stake for more workers.

13Big business was well aware of the stakes: as the EPF pointed out, of new full-time-private sector jobs between 1970 and 2002, 22.7 percent were executive, administrative, or managerial and 17.9 percent professional specialty. Employment Policy Foundation, “An Economic Primer to White Collar Reform,” in Backgrounder 4 (May 21, 2003), on http://www.epf.org.
Numbers

This fundamental structural point is blurred when, for example, the Detroit News (misled by its erroneous supposition that Congress enacted the FLSA "to protect unskilled workers from exploitation") editorialized that the "job distinctions" from 1938 "worked as intended as long as the American economy relied on manual labor," but that the regulations had to be revised once "technological changes...radically reshaped the workplace, making it difficult to distinguish protected blue-collar laborers from unprotected white-collar workers." It was not that identifying the two groups had become more difficult—after all, neither Congress nor the DOL had ever explained why either group should or should not be protected or even what they should be protected from—but, rather, that, with so many more millions of workers performing what passes for white-collar work and thus potentially excludible, labor and capital were struggling more intensively over how many of those millions would wind up outside of government regulation of overtime work and pay and subject exclusively to the forces of an anarchic labor market and employer fiat.

The extent of clerical employment—understood broadly as encompassing occupations bordering on business management and others primarily concerned with manual routine—was numerically insignificant until after the Civil War. But with the tripling of manufacturing output during the three decades preceding the Great Depression:

To create a demand for new goods and to keep manufacturing plants busy, a greatly expanded sales and clerical force became essential. The lack of opportunities in productive industries swelled the ranks of new workers seeking clerical employment and by the pressure of their numbers made available a quantity of comparatively cheap labor at just the time when the business structure could make use of great numbers of additional clerical workers.

The greatly augmented production of agricultural and manufactured goods required a market. Modern advertising, promotion, and salesmanship emerged to meet the needs. Where sufficient purchasing power did not exist to make cash sales possible, the financial

---


16H. Dewey Anderson and Percy Davidson, Occupational Trends in the United States 584-86 (1940). The authors perceived as common to the category, which included bookkeepers and accountants as well as office clerks and typists, being "directly related to the management of industry and trade without having final responsibility for its operations. Id. at 585. This definition was remarkably similar to that of "bona fide administrative" employee published by the Wage and Hour Division later in 1940 to mark off those excluded from overtime protection. See below chs. 2 and 13.
Numbers

structure was modified to allow part-payment sales.¹⁷

In 1930, at the last pre-FLSA census, the 14,319,793 white-collar workers accounted for 29.4 percent of the economically active civilian population¹⁸—this nonmanual share of all workers being the highest in the world at the time.¹⁹ In 1940, at the first post-FLSA census, the 16,081,569 white-collar workers accounted for 31.1 percent of the total; and in 1950, at the first postwar census, their numbers and share had risen to 21,600,921 and 36.6 percent, respectively. The Bureau of the Census defined the category of white-collar workers as consisting of four subcategories: professional, technical, and kindred workers; (nonfarm) managers, officials, and proprietors; clerical and kindred workers; and sales workers. Even if it is assumed that only the first two subgroups encompassed workers who could be plausibly excluded from FLSA protection, these professional and managerial employees increased from 6,924,385 and 14.2 percent in 1930, to 7,649,052 and 14.8 percent in 1940, to 10,235,929 and 17.3 percent by 1950.²⁰ In part, this

¹⁷Anderson and Davidson, Occupational Trends in the United States at 587.

¹⁸David Kaplan and M. Claire Casey, Occupational Trends in the United States 1900 to 1950, tab. 1 at 6, tab. 2 at 7 (Bureau of the Census, Working Paper No. 5, 1958). This average obscured significant differences between men (25.2 percent) and women (44.2 percent). Women’s overrepresentation in 1930 was especially prominent among clerical workers (20.9 percent versus 5.5 percent among men) and professional and technical workers (13.8 percent versus 4.8 percent among men). Id. Women thus accounted for 33.2 percent of all white-collar workers, 51.8 percent of all clerical workers, and 44.8 percent of all professional and technical workers. Id. tab. 4 at 9. Women’s overrepresentation among professional employees was a function of their concentration in two professions—teaching and nursing—which accounted for 77.1 percent of all female professionals. In contrast, the six largest male professional groups—(in descending order) engineers, teachers, accountants and auditors, lawyers and judges, physicians, and clergymen—accounted for only 56.6 percent of all male professionals. Id. tab. 6b at 22, tab. 6a at 16.

¹⁹“The Use of Office Machinery and Its Influence on Conditions of Work for Staff,” ILR 36(4):486-516, at 514 (Oct. 1937). In 1929, according to one international comparison, salaried employee density (“‘Angestelltendichtigkeit’”) was internationally highest in the United States at 15.9 salaried employees per 100 industrial workers, followed by Germany (15.4), Great Britain (10.8), and France (10.7). In Germany from 1907 to 1925 the number of industrial workers rose by 12 percent, while that of salaried workers (Angestellten) rose by 111 percent; in Great Britain the corresponding rates of increase between 1907 and 1924 were 7 percent and 56 percent. Emil Lederer, “Die Umschichtung des Proletariats,” Die neue Rundschau 40(II):145-61 at 150 (Aug. 1929).

²⁰Kaplan and Casey, Occupational Trends in the United States 1900 to 1950, tab. 1 at 6, tab. 2 at 7. This Census Bureau publication reworked and adjusted census data and
Numbers

expansion was fueled by the vast increase in the number of administrative employees in industry. In manufacturing alone, their numbers rose absolutely from 457,000 in 1899 to 1,562,000 in 1929 to 2,672,000 in 1947 and relative to production workers, from 9.9 percent to 18.5 percent to 22.2 percent, respectively.21 From 1900 to 1950,22 the total number of white-collar workers grew 322 percent compared with 103 percent for the economically active civilian population as a whole, resulting in a doubling of white-collar workers’ share from 17.6 to 36.6 percent. The explosion in the number of clerical workers accounted for a disproportionate share of this increase: during the first half of the twentieth century, they increased by 725 percent, more than quadrupling their share of total employment from 3.0 to 12.3 percent.23 This spectacular growth,24 which was filled in gaps. The absolute numbers are overstated because proprietors were not employees, but presumably, over time, managers increased more rapidly than proprietors.


23Kaplan and Casey, Occupational Trends in the United States 1900 to 1950, tab. 2 at 7, tab. 3 at 8. Again, the aggregate averages conceal different trends among men and women. From 1900 to 1950, as female white-collar workers increased by 809 percent, their share among all female workers tripled from 17.8 to 52.5 percent, and female white-collar workers as a proportion of all white-collar workers rose from 18.5 to 39.9 percent. The disproportionate increase in women’s share of white-collar workers and white-collar workers’ share of female workers was in large part a function of the 2,022-percent increase in the number of female clerical workers; consequently, from 1900 to 1950, clerical workers as a share of all female workers rose from 4.0 to 27.4 percent, while female clerical workers as a share of all clerical workers rose from 24.2 to 62.3 percent. Id. tab. 2 at 7, tab. 3 at 8, tab. 4 at 9.

24From the vantage point of the 1860s, Marx offered this account: “From the outset this office is always infinitesimally small compared to the industrial workshop. ... As the scale of production is extended, the commercial operations multiply which are constantly to be carried out for the circulation of industrial capital, both in order to sell the product existing in the shape of commodity-capital, and to transform the money that was made back into means of production and to keep account of the whole process. Calculation of prices, bookkeeping, cash bookkeeping, correspondence all belong here. The more developed the scale of production, the greater, though not at all proportionately greater,
Numbers

restrained by office mechanization, resulted in part from the new functions, such as various aspects of payroll accounting and compliance with government regulation, that white-collar workers performed.\(^\text{25}\) Indeed, it is a great irony that employers’ compliance with the FLSA itself contributed to the increase in white-collar employment.\(^\text{26}\) In large part, however, it was a function of Taylorist scientific management, which sought both to coordinate and separate various aspects of management that had previously been handled by foremen and bookkeepers—purchasing, production control, inventory records, payroll, and pricing—by creating a series of administrative units and departments that had barely existed before 1890: “Management’s overall purpose was to separate mental and manual work by extracting as much decision making as possible from production workers and transforming it into standardized tasks performed by clerks and managers.”\(^\text{27}\)

At the decennial censuses during the second half of the twentieth century, the number and proportion of white-collar workers continued to rise.\(^\text{28}\) In 1960, white-collar workers comprised 27.0 million or 39.8 percent of the civilian labor force, while in 1970 the figures rose to 37.9 million and 47.4 percent, respectively. For the professional and managerial subcategories, the corresponding figures were 12.8

---

the commercial operations of the industrial capital, and thus also the labor and other costs of circulation for realising the value and surplus-value. In this way the employment of commercial wage-workers, who make up the actual office staff, becomes necessary. ... The division of labor brings it about that these technical operations...are performed for the entire capitalist class as much as possible by a special section of agents or capitalists as their exclusive function or are concentrated in their hands. Here...there is division of labour in a two-fold sense. It becomes a special business, and because it is performed as a special business for the money-mechanism of the whole class, it becomes concentrated and conducted on a large scale; and then division of labor again takes place within this special business, both through division into various branches independent of one another, and through development of the workshop within these branches (large offices, numerous bookkeepers and cashiers, and far-reaching division of labor)...” Karl Marx, *Das Kapital: Kritik der politischen Ökonomie*, Vol. 3, in Karl Marx [and] Friedrich Engels, *Werke* 25:310, 328-29 (1964 [1894]). See also Karl Marx, *Das Kapital: Kritik der politischen Ökonomie*, Vol. 2, in Karl Marx [and] Friedrich Engels, *Werke* 24:135-36 (1963 [1885]).


\(^\text{26}\)C. Wright Mills, *White Collar: The American Middle Classes* 195 (1967 [1951]).


\(^\text{28}\)From a slightly different perspective, 1956 marked the first time in U.S. history that the number of persons producing goods ceased being a majority. Edwin Dale Jr., “Goods Producers Now U.S. Minority,” *NYT*, Mar. 31, 1957 (1:5)
million and 18.8 percent in 1960 and 18.0 million and 22.6 percent in 1970.\textsuperscript{29} Little wonder that by 1970, when \textit{Fortune} saw “platoons” of clerks, accountants, bookkeepers, and secretaries, who were once “a privileged few” and “the elite at every plant,” the magazine concluded that “the clerk rather than the man on the production line is the typical American worker.” Their proletarianization was signaled by the fact that “[w]orkers in this stratum cannot but notice that the federally defined poverty standard is climbing toward their level from below....”\textsuperscript{30}

Although the data from 1980 on are not completely comparable because of classificatory and methodological changes, by 1980 white-collar workers formed a majority of employed workers: the 51,882,000 accounted for 52.2 percent of all employed workers. The two subcategories of professional and technical workers and managers and administrators numbered 27,106,000 and comprised 27.3 percent of all employed workers.\textsuperscript{31} In 1990, the 30,657,000 managerial and professional specialty workers made up 26.0 percent of all employed civilians, while the 3,842,000 technicians accounted for another 3.3 percent. Although most of the 18,641,000 workers classified as “Administrative support, including clerical,” were clerical and presumably not excludible from overtime, 771,000 were supervisors and several hundred thousand were insurance adjusters and employed in related occupations, which the DOL now treats as generally exempt. Finally, 3,812,000 persons were classified as sales supervisors and proprietors, of whom at least hundreds of thousands and perhaps several million might have been treated as exempt executives. Overall, white-collar workers (consisting of the five occupational categories of managerial, professional, technical, sales, and administrative support employees) made up 57.1 percent of all employed civilians.\textsuperscript{32} By 2000, the 40,887,000 managerial and professional specialty workers accounted for 30.2 percent of all employed persons; the 4,385,000 technicians, 710,000 administrative support supervisors, and 4,937,000 sales supervisors and proprietors added several millions more to the pool of excludibles. All told, the 80,329,000 white-collar workers (consisting of managerial, professional, technical, sales, and administrative support employees) accounted for 59.4 percent of all employed


\textsuperscript{32}EE 38(1):tab. 21 at 184, tab. 22 at 185-87 (Jan. 2001). On the DOL’s treatment of insurance adjusters, see below ch. 2.
Numbers

Emblematically, more people worked in physicians’ offices than in automobile plants.34

After yet another revision based on somewhat different methods and categories, the data for 2003, the last year for which annual data are available, reveal that the 19,934,000 management and 27,995,000 professional workers together (totaling 47,929,000) accounted for 34.8 percent of all 137,736,000 employed persons, the former contributing 14.5 percent and the latter 20.3 percent. To the category of FLSA-excludible management employees must be added the many subcategories of “first-line supervisors/managers” listed within various white- and blue-collar occupations and industries: food preparation and service (667,000), housekeeping and janitorial service (166,000), landscaping, lawn service, and groundskeeping (223,000), gaming (131,000), personal service (162,000), retail sales (3,389,000), non-retail sales (1,388,000), office and administrative support (1,623,000), construction (897,000), installation, maintenance, and repair (340,000), production (939,000), and transportation and material moving (216,000). These various supervisors and managers numbered 10,141,000, bringing the total number of management employees to 30,075,000 and the total number of potentially FLSA-excludible employees to 58,070,000 or 42.1 percent of all employed persons. This proportion was about three times greater than at the time the FLSA went into effect in 1938. If to this number are added the 35,496,000 sales and office workers (minus the 6,400,000 first-line sales and office supervisors/managers already included), the total number of white-collar workers numbered 87,166,000 or 63.3 percent of all employed persons.35

It is this colossal sea-change in the number and proportion of potentially excludible white-collar workers—which employers characterize as “technological and organizational advances...has...blurred the definitional lines of many job responsibilities, qualifications and duties”36—that has animated employers to push for broader exemptions.

In order to get a sense of the inflated use of the term “executive” in the occupational data and the DOL’s white-collar regulations and the latter’s vastly

---

Numbers

understated salary thresholds, it is crucial to note that the Bureau of Labor Statistics also reported that in 2000 “top executives,” who “are among the highest paid workers,” numbered only about three million, 2.4 million of whom worked in the private sector. The median annual earnings in 2000 of general and operations managers were $61,160, with the middle 50 percent earning between $40,880 and $93,610; the median annual earnings of chief executives were $136,760.37

How Many White-Collar Workers Are Excluded?

Since passage of the Fair Labor Standards Act in 1938, overtime rights and the 40-hour work week have been sacrosanct, respected by Presidents of both parties.38

The estimated number of “white collar” workers excluded from the FLSA is also huge. The DOL’s estimates for the year 1996 revealed that of 122,359,000 wage and salary workers, 48,315,000 or 39.5 percent were “exempt from or not subject to” the Act’s overtime provision. 31,729,000 or almost two-thirds of all these excluded workers were “exempt under the executive, administrative, professional exemption” and accounted for 26 percent of all wage and salary employees.39 By far the largest contingent—almost two-fifths—of excluded white

39US ESA, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act: 1998 Report 14 (1998). The report reworked data going back to 1990, for which year it estimated 28,868,000 excluded executive, administrative, and professional workers. Id. tab. C1d90. This total exceeded by 8.5 million the previous estimate for the private sector and was 1.5 million lower than that for the public sector. Id. n.p. (136). One of the authors who developed the data stated that the DOL data from 1990 were a “black box,” behind which the new authors did not go, and might not be correct. Telephone interview with Daniel Hodge, Employment Research Corp., Ann Arbor (Nov. 12, 1999). The methodology of the 1998 Report was a black box in its own right. It was based on using the difference between total and non-supervisory employees “to reconcile with estimates of the exemption for executive, administrative, and professional employees....” The BLS Occupational Employment Survey matrix was used to “determine the level of executive, administrative, and professional employees, applying exempt probabilities to each potential exempt occupation. ... This matrix helped calculate how many employees were in typically exempt occupations for each industry.” US ESA, Minimum Wage and
collar employees worked in the service industries, followed by state and local government, manufacturing, and retail trade. At 36 percent, the service industry displayed the third highest proportion of excluded white-collar employees behind the federal government and finance, insurance, and real estate. Table 1 breaks these data down by industry.  

To be sure, these data must be viewed with caution because the DOL's methodology underlying the estimates identifying excluded white-collar employees and distinguishing them from their covered counterparts was opaque and highly questionable: the “refining estimates of the percentage of employment exempt in occupations generally exempt for executive, administrative, or professional...workers...were provided by knowledgeable Department of Labor staff and were primarily used to estimate professional exemptions, since a measure was already obtained of supervisory workers from” establishment-based data.  

This methodology constituted a black box because it failed to explain how anyone or even any group at the DOL could possibly know what proportion of workers in any, let alone, hundreds of occupations, met the regulatory duties tests that are the prerequisite for lawfully depriving white-collar workers of overtime protection under the FLSA.  

The methodology is even murkier because it suggests that the DOL


Table 1-3 are found at the end of ch 1.


Ronald Bird, chief economist at the pro-employer Employment Policy Foundation, indirectly corroborated this point at a House hearing on the new white-collar regulations by criticizing pro-labor estimates of the number of workers who would be exempted by various changes on the grounds that there was insufficient hard information on job descriptions to jump to such conclusions. Assessing the Impact of the Labor Department's Final Overtime Regulations on Workers and Employers: Hearing Before the Committee on Education and the Workforce House of Representatives (108th Cong., 2d Sess., Apr. 28, 2004), on http://edworkforce.house.gov/hearings/hrarchive.htm. During the 1950s, 1960s, and 1970s, DOL investigators, in connection with periodic increases in the salary-test levels, generated estimates of the number of excluded workers as a by-product of their
was at a loss to estimate the number of excluded administrative employees, who are neither professionals nor supervisors.\footnote{A WHD official who participated in preparing the report agreed that this methodology suggested that the researchers did not understand the regulatory definitions. Telephone interview with Richard Brennan, Deputy Director, Office of Enforcement Policy, WHD (Washington, D.C., Mar. 29, 2004). As the GAO had already noted, the CPS also suffers from the "major limitation[ ]" that its "occupational classifications do not distinguish between supervisory and nonsupervisory employees.... Therefore, one job title, 'managers and administrators,' could include the President of General Motors, but it may also include an office assistant." GAO, \textit{Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place} 42 (GAO/HEHS-99-164, 1999).}

The methodological difficulty inherent even in real (as opposed to speculative armchair) surveys is, as the Minimum Wage Study Commission—which itself lacked the money to conduct a similar survey—recognized, that: "The FLSA definitions of executives, administrators [sic], and professionals require an analysis of the duties performed on a particular job, do not correspond precisely to standard occupational classifications, and are not used in most, if any, government statistics."\footnote{Conrad Fritsch and Kathy Vandell, "Exemptions from the Fair Labor Standards Act: Outside Salesworkers and Executive, Administrative, and Professional Employees," in \textit{Report of the Minimum Wage Study Commission} 4:235-71, at 254 (1981).}

Using the same methodology based on second-hand speculation by DOL officials on the likelihood of exemption for 905 occupations,\footnote{To identify which of 905 occupational classifications included in the Current Population Survey data "would likely include exempt white-collar workers," the GAO "asked DOL officials to assess the likelihood of exemption for each occupation." They determined that 257 "would likely include exempt workers." For each of these 257 they} the General investigations in thousands of establishments; since the DOL stopped adjusting the salary levels, it also stopped conducting such surveys. See below ch. 15. Thus, the WHD's estimation methodology shifted from generating data from investigations of employers' actual classificatory practices to surveying its investigators' speculations about those practices regardless of whether they had had actual investigatory experience with every occupation. In 1975 the DOL conducted a survey of 10,300 establishments in which it identified excluded white-collar workers by comparing their duties and job descriptions (although the data may have been skewed by neglect of salaried employees paid less than the regulatory thresholds). The survey found a total of 8,396,000 white-collar workers in the private sector who were exempt from the FLSA and "lower-paid" with salaries below $350 a week. Of this total, 5,585,000 (66.5\%) were executives, 1,198,000 (14.3\%) administrative employees, and 1,613,000 (19.2\%) professionals. US ESA, \textit{Executive, Administrative and Professional Employees: A Study of Salaries and Hours of Work} 10, A-i (1977) (written by Robert L. Turner).
Accounting Office estimated in 1999 that in 1998 between 19 and 26 million full-time white-collar workers accounting for between 20 and 27 percent of all full-time wage and salary workers \(^{46}\) "would most likely be properly classified as exempt workers under the DOL exemptions." The GAO did not even try to estimate how many more workers were actually treated by their employers as not subject to the overtime regulations regardless of whether such treatment was lawful or not. \(^{47}\)

These numbers represented a significant increase over 1983, when, according to the GAO, between 12 and 17 million workers accounting for between 17 and 24 percent of all full-time workers had been estimated to be excluded white-collar employees. \(^{48}\)

In large part the GAO traced this increase back to above-average employment growth in the service sector, which employed an above-average proportion of excluded workers. The number of service industry employees almost doubled from 13 million in 1983 to 24 million in 1998, thus increasing their share of the total number of full-time wage and salary workers from 18 to 25 percent. During the same years, the increase in the number of excluded white-collar workers in the service sector rose by 3.6 million or 46 percent of the total increase of 8 million. Consequently, the service industries’ share of all such workers increased from 19 to 29 percent. \(^{49}\)

Ironically, the GAO reported that "[c]ritics of the FLSA" claimed that it was precisely this shift from manufacturing to services that had "left the FLSA and its regulations outdated and in need of revision." \(^{50}\)

Other than that employers preferred to work these additional millions of run-of-the-mill service-sector workers long hours without extra pay it is unclear why the FLSA should have lost any of its efficacy on account of this transition from the secondary to the tertiary sector of the economy.

---

\(^{49}\)US GAO, *Fair Labor Standards Act* at 8-10. GAO averaged its high and low estimates to arrive at these absolute numbers of excluded workers. The GAO included in the service industries business and repair, personal, entertainment, and recreation, and professional and related services. *Id.* at 9.  
\(^{50}\)US GAO, *Fair Labor Standards Act* at 1.
Using a somewhat different methodology and database, the DOL in 2001 derived somewhat lower estimates for 1999, which are displayed in Table 2.51 Although the DOL did not re-estimate disaggregated data for 1996, it did calculate that both the number and proportion of workers exempt from or not subject to the FLSA overtime provision rose from 1996 to 1999,52 and predicted that, given the forecast of continued rapid growth of professional specialty occupations, “the proportion of workers exempt from the FLSA” was likely to continue to increase.53 About three-fifths of the almost 40 million workers to whom the FLSA overtime provision did not apply were executive, administrative, and professional employees.54

For 1999 for the first time, the DOL published data from the Current Popu-

---

51 The main difference was that for 1999 the DOL used the Current Population Survey, which counts people only once, whereas for 1996 it had used the establishment-based Current Employment Statistics, which counted jobs. US DOL, WHD, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act 33 (Jan. 2001). When asked whether the first data set was “simply wrong and useless and should not be cited,” Malcolm Cohen, who was responsible for devising and implementing the methodology for both reports, replied: “I don’t think we should call the earlier reports wrong. If we use them to measure persons covered it would be an incorrect use of the data.” Email from Marc Linder to Malcolm Cohen (Mar. 26, 2004); email from Malcolm Cohen to Marc Linder (Apr. 28, 2004). In its 2001 report, the WHD failed to identify its methodology at all, merely asserting that it “developed estimates by occupation of the percent of wage and salary persons exempt due to their status as an executive, administrator, or professional.” US DOL, WHD, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act at 74 (Jan. 2001). When asked to open this black box, the person who had actually worked up the data for the report replied: “You are right there is no way to figure out the duties test from the CPS. What I did instead was to survey investigators and officials in DOL and ask them about percent exempt by occupation and combined this data with CPS data on percent working hourly.” Email from Malcolm Cohen, Employment Research Corp., to Marc Linder (Apr. 28, 2004). In 2004 the DOL admitted that “the CPS does not contain a variable that can be used to determine whether workers are...exempt or nonexempt” because none of the data variables it collects “either individually or in combination permit a precise mapping of a worker’s exempt or nonexempt status...because there is no information on the actual duties performed by a worker.” FR 69:22198 (Apr. 23, 2004).

lation Survey disaggregating the occupational structure of the excluded executive, administrative, and professional employees, as shown in Table 3. To be sure, the impression given by the data in Table 3 that administrative employees account for only 5 percent of all excluded white-collar workers is false: the category "administrative support" is misleading because, as the DOL itself cautions, the CPS "classifies most "administrative" jobs in a category labeled "management related.""\(^{55}\) In fact, the CPS labels the category "Business and financial occupations," which includes wholesale and retail buyer, purchasing agents, claims adjusters, appraisers, examiners, investigators, compliance officers, cost estimators, human resource specialists, compliance officers, management analysts, accountants and auditors, appraisers, loan officers, and tax examiners and preparers.\(^{56}\) The DOL later admitted that its underlying methodology was "not designed to estimate the number of exempt workers for each...exemption (executive, administrative, or professional)..."\(^{57}\)

A DOL-sponsored study estimated that in 1999 25,534,000 workers were "exempt" white-collar employees or 34.8 percent of all such employees. Of this number the executives, management-related and professional specialty employees, and computer programmers accounted for 21,205,000, who in turn accounted for 60 percent of the incumbents of these occupations; exempt supervisors accounted for 1,949,000 or 27 percent of all supervisors; other technicians and administrative support, and clerical workers accounted for only 677,000 excluded employees, who in turn made up only 3 percent of this group; salesworkers contributed 1,703,000 excluded workers, who accounted for 17 percent of all salesworkers.\(^{58}\)

The Preliminary Regulatory Impact Analysis done for the DOL in connection with the George W. Bush administration's proposed regulations estimated, using a similar methodology, that the total number of exempt white-collar workers in 2001 ranged from a minimum of 18.2 to a maximum of 21.4 million.\(^{59}\) This figure,

however, omitted an additional 8,064,298 employees (physicians, lawyers, and teachers) who are not subject to the salary test.\textsuperscript{50} If this group is added to the aforementioned ranges, the total becomes 26.3 million to 29.5 million. Finally, the DOL’s own Regulatory Impact Analysis the following year estimated, using the same methodology, that in 2002 19,439,391 white-collar workers earning $155 or more per week and subject to the salary tests were exempt; adding the 7,554,250 who were not subject to the salary test brings the total to 26,993,641.\textsuperscript{61}

To be sure, all these data were all derived from guesses by “a group of experienced WHD employees” assembled in 1998 (for the GAO) to estimate ranges of probability that workers in 499 different occupations were exempt. How this staff based on its “expert judgment” and “collective experience” arrived at these probability ranges remains a black box.\textsuperscript{62} Those who applied this methodology neither contended that the WHD employees had in fact conducted investigations involving all 499 occupations nor stated how many employees performing each type of work they had ever investigated.\textsuperscript{63} John Fraser, the Deputy Wage and Hour Administrator from 1990-2000, shared this skepticism.\textsuperscript{64} The economist in the DOL’s Office of the Assistant Secretary for Policy who was in charge of working up the background data for the 2003-2004 regulatory revisions, when asked about the accuracy of this method, evasively replied that they were the best available.\textsuperscript{65}

Although these official DOL data on the number of excluded are huge enough in their own right, an alternative set of data suggests an even larger group of potentially excluded white-collar workers. In 1991, when DOL establishment surveys estimated that 19.1 percent of private non-farm employees worked in

\textsuperscript{50}Telephone interview with and email from Frederick Rueter, CONSAD, Pittsburgh (June 22, 2004).
\textsuperscript{60}FR 69:22201 (tab. 3-3), 22209 (tab. 3-7) (Apr. 23, 2004).
\textsuperscript{61}FR 69:22198 (Apr. 23, 2004).
\textsuperscript{62}According to the Deputy Assistant Secretary of Labor for Employment Standards, who had not been there in 1998, a group of three to twelve investigators and former investigators was convened (none of whom he believed still worked at the DOL); they discussed the various occupations orally. In response to a series of questions concerning the informants’ knowledgeability he insisted that the probability ranges (0-10%, 10-50%, 50-90%, 90-100%) were so broad that lack of detailed familiarity with individual occupations would not have been fatal. Telephone interview with Dixon Mark Wilson, Washington, D.C. (Sept. 15, 2004).
\textsuperscript{63}Telephone interview with John Fraser, South Otselic, NY (July 14, 2004).
\textsuperscript{64}Telephone interview with Mario Distasio, Washington, D.C. (Aug. 16, 2004).
nonproduction or supervisory jobs and the household survey estimated that 18.7 percent of the same universe were categorized as employed in managerial or supervisory occupations, the nationally representative Class Structure Survey, which asked participants whether they supervised others, whether their position was considered managerial or supervisory, and what kinds of authority they exercised over co-employees, found roughly twice as many: 38.9 percent (or 35 million) reported that they supervised the work of other employees or told others what work to do, while 36.3 percent identified their position as managerial or supervisory. In addition, 27.7 percent responded that they had the authority directly to discipline subordinates for poor work or misconduct. The magnitude of these alternative data is reinforced by the fact that they do not even encompass professional occupations, although 29.1 percent of professionals reported that they also exercised managerial or supervisory responsibilities.\footnote{David Gordon, \textit{Fat and Mean: The Corporate Squeeze of Working Americans and the Myth of Managerial "Downsizing"} 38-40 (1996). Gordon tabulated these data from the survey organized by the Comparative Project on Class Structure and conducted by the Survey Research Center of the University of California at Berkeley. \textit{Id.} at 260 n. 19. According to James Smith, "Supervisory Duties and the National Compensation Survey." \textit{CWC} 5(1):9-20 (Spr. 2000), in 1997, 21 percent of full-time workers were first-, second, or third-line supervisors or team leaders.}

These alternative data are merely suggestive. But because the DOL data do not represent counts based on DOL investigations of how employers actually classified and paid their employees in terms of the FLSA overtime provisions, and because employers may in fact use the aforementioned indicia of managerial/supervisory responsibility to deny overtime pay to an even broader swath of employees, the alternative data set may capture an aspect of prevalence not reflected in the official data.\footnote{Assessment of the DOL’s white-collar overtime data constructed during the George W. Bush administration must take into account the Department’s dogmatic markets-know-best basic assumption that labor’s claim that “employers..., in the absence of government protections, commonly exploit workers by requiring them to work many hours of overtime without adequate or any compensation” can be valid “only...in labor markets...dominated by a single employer who has substantial monopsony power: the prototypical company town.” CONSAD Research Corp., “Final Report: Tasks and Analyses Performed in Support of Development of the Regulatory Impact Analysis of the Revised Rules for the Fair Labor Standards (FLSA) Regulations at 29 CFR 541” at 31 (May 14, 2004).}
Table 1: Executive, Administrative, and Professional Employees Excluded from the FLSA Overtime Provision as % of All Employees, by Industry, 1996

<table>
<thead>
<tr>
<th>Industry</th>
<th>All employees (in 000s)</th>
<th>Excluded white-collar employees (in 000s)</th>
<th>Excluded white-collar employees as % of all employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>122,359</td>
<td>31,729</td>
<td>26</td>
</tr>
<tr>
<td>Private sector</td>
<td>102,912</td>
<td>25,495</td>
<td>25</td>
</tr>
<tr>
<td>Agriculture/forestry/fishing</td>
<td>1,907</td>
<td>252</td>
<td>13</td>
</tr>
<tr>
<td>Mining</td>
<td>574</td>
<td>95</td>
<td>17</td>
</tr>
<tr>
<td>Construction</td>
<td>5,400</td>
<td>736</td>
<td>14</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>18,457</td>
<td>3,230</td>
<td>18</td>
</tr>
<tr>
<td>Transportation/public utilities</td>
<td>6,261</td>
<td>1,413</td>
<td>23</td>
</tr>
<tr>
<td>Wholesale trade</td>
<td>6,483</td>
<td>1,580</td>
<td>24</td>
</tr>
<tr>
<td>Retail trade</td>
<td>21,625</td>
<td>3,049</td>
<td>14</td>
</tr>
<tr>
<td>Finance/insurance/real estate</td>
<td>6,899</td>
<td>2,706</td>
<td>39</td>
</tr>
<tr>
<td>Services</td>
<td>34,377</td>
<td>12,434</td>
<td>36</td>
</tr>
<tr>
<td>Private households</td>
<td>929</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Public sector</td>
<td>19,447</td>
<td>6,234</td>
<td>36</td>
</tr>
<tr>
<td>Federal govt.</td>
<td>2,757</td>
<td>1,233</td>
<td>45</td>
</tr>
<tr>
<td>State/local govt.</td>
<td>16,690</td>
<td>5,002</td>
<td>30</td>
</tr>
</tbody>
</table>

Table 2: Executive, Administrative, and Professional Employees Excluded from the FLSA Overtime Provision as % of All Employees, by Industry, 1999

<table>
<thead>
<tr>
<th>Industry</th>
<th>All employees (in 000s)</th>
<th>Excluded white-collar employees (in 000s)</th>
<th>Excluded white-collar employees as % of all employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>118,963</td>
<td>23,830</td>
<td>20</td>
</tr>
<tr>
<td><strong>Private sector</strong></td>
<td><strong>100,025</strong></td>
<td><strong>16,860</strong></td>
<td><strong>17</strong></td>
</tr>
<tr>
<td>Agriculture/forestry/fishing</td>
<td>1,754</td>
<td>92</td>
<td>5</td>
</tr>
<tr>
<td>Mining</td>
<td>531</td>
<td>119</td>
<td>22</td>
</tr>
<tr>
<td>Construction</td>
<td>6,230</td>
<td>546</td>
<td>9</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>19,323</td>
<td>3,515</td>
<td>18</td>
</tr>
<tr>
<td>Transportation/public utilities</td>
<td>7,317</td>
<td>1,208</td>
<td>17</td>
</tr>
<tr>
<td>Wholesale trade</td>
<td>4,573</td>
<td>813</td>
<td>18</td>
</tr>
<tr>
<td>Retail trade</td>
<td>20,098</td>
<td>1,533</td>
<td>8</td>
</tr>
<tr>
<td>Finance/insurance/real estate</td>
<td>7,588</td>
<td>2,118</td>
<td>28</td>
</tr>
<tr>
<td>Services</td>
<td>31,675</td>
<td>6,911</td>
<td>22</td>
</tr>
<tr>
<td>Private households</td>
<td>938</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td><strong>Public sector</strong></td>
<td><strong>18,938</strong></td>
<td><strong>6,969</strong></td>
<td><strong>37</strong></td>
</tr>
<tr>
<td>Federal government</td>
<td>3,264</td>
<td>840</td>
<td>26</td>
</tr>
<tr>
<td>State/local government</td>
<td>15,674</td>
<td>6,129</td>
<td>39</td>
</tr>
</tbody>
</table>

*Source: U.S. DOL, WHD, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act, tab. 4 at 28 (Jan. 2001).*
Tab. 3: Executive, Administrative, and Professional Employees Excluded from the FLSA Overtime Provision, by Occupation, 1999 (000s)

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Total wage and salary employment</th>
<th>Total excluded EAP</th>
<th>Excluded as % of all EAP in occupation</th>
<th>% of all excluded EAP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>118,963</td>
<td>23,830</td>
<td>100</td>
<td></td>
</tr>
<tr>
<td>Executive</td>
<td>11,624</td>
<td>7,293</td>
<td>63</td>
<td>31</td>
</tr>
<tr>
<td>Management related</td>
<td>4,376</td>
<td>2,023</td>
<td>46</td>
<td>8</td>
</tr>
<tr>
<td>Professional specialties</td>
<td>18,693</td>
<td>11,598</td>
<td>62</td>
<td>49</td>
</tr>
<tr>
<td>Technicians</td>
<td>4,187</td>
<td>403</td>
<td>10</td>
<td>2</td>
</tr>
<tr>
<td>Sales</td>
<td>13,451</td>
<td>1,361</td>
<td>10</td>
<td>6</td>
</tr>
<tr>
<td>Administrative support</td>
<td>17,875</td>
<td>883</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Other</td>
<td>48,757</td>
<td>268</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>