"Time and a Half's the American Way"

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

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Part VI

American Exemptionalism in International Perspective

I am not much concerned with the exemptions. They must not be so many that labor will be discouraged or disgusted. They must not be greater in volume or amount than to make up the invariable exception that proves the rule—the rule being in this case universal wage and hour levels at a fair standard throughout America.¹

The Exclusion of White-Collar Workers from Overtime Regulation in the Rest of the World

In Central European countries today members of the professional and salaried classes, all save the top layer of the exceptionally successful, are included by the designation white-collared proletariat.¹

Almost every foreign country has enacted laws limiting hours of work generally and also fixing minimum standards to enable the state to exercise a general supervision over conditions of employment. [I]n most foreign countries regulations of this kind have been applied to industry in general, there being no question of constitutional powers involved, as in this country. In other words, foreign countries have been able to deal with these problems on a national scale by general enactment, except those countries which have a constitutional form of government with limited powers vested in the central or federal government.²

Because bosses of larger departments can check the adherence to the workday by the subordinates only if they are employed longer than the latter, they are not supposed to be subject to the rules of the working time regime.³

The burden of this chapter is straightforwardly to document the FLSA’s extraordinarily capacious exclusion of white-collar workers from overtime regulation. In particular, the FLSA’s broad exclusion of so-called administrative employees is internationally unique. The U.S. lead in exclusionism is significantly heightened by the fact that the proportion of workers employed in administrative and managerial occupations in the United States is two to four times higher than

the corresponding share in Western Europe and Japan and that this ratio grew during the last decades of the twentieth century. At the same time, however, the information assembled in this chapter underscores that the exclusion of some white-collar workers from national hours regulation is virtually universal.

To be sure, it is necessary to bear in mind that, regardless of such formal legal exclusions, to a much greater degree than in the United States, managers in western European countries have been represented by organizations that engage in collective bargaining on their behalf. For example, as long ago as the mid-1980s, the Italian Confederation of Managers of Enterprises represented 95 percent of senior managers (dirigenti) in Italy. In the United Kingdom in 1994, 20 percent of all managers and 50 percent of all professionals were unionized. And more generally, in France, Germany, Italy, Sweden, and the United Kingdom, while some collective bargaining agreements have contained provisions on working hours that “still stem from the idea that managerial and supervisory staff must devote whatever time is necessary to their duties,...some agreements...show a trend towards putting them on the same footing as other workers (compensatory rest or leave, the right to overtime under certain conditions).” Indeed, the Council of European Professional and Managerial Staff (Eurocadres), which was founded in 1993 and is associated with the European Trade Union Confederation, has more than five

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4David Gordon, *Fat and Mean: The Corporate Squeeze of Working Americans and the Myth of Managerial “Downsizing”* 42-48 (1996). Gordon relied on reworked and standardized data in ILO, *Yearbook of Labour Statistics*; unfortunately, by the mid-1990s, a number of European countries switched to a different occupational classification system, which no longer made it possible to segregate managerial and administrative employees.

5The Confédération général des cadres (CGC), which was founded in 1944, by 1970 admitted any employee with “une parcelle d’autorité.” Paul Meunier, “Le Syndicalisme des cadres en France,” *DS* 33(11):506-16 at 509 (Nov. 1970). By 1974, the French Communist Party was seeking an alliance with these cadres, engineers, and technicians, whose role was “complex”: “At the same time producers of surplus value and collectors of surplus value, they are not responsible for the mechanism of exploitation, to which they are also subjected.” Joë Metzger, “Les Cadres et le changement démocratique,” *CC* 50(9):31-40 (Sept. 1974).


8Delamotte, “Managerial and Supervisory Staff in a Changing World” at 9.
**Exclusion of White-Collar Workers in the Rest of the World**

million members whom it supports and represents in a variety of forums, including collective bargaining.\(^9\) Of particular relevance here is that Eurocadres, which is recognized by the European Commission as a social partner, has been involved in official consultations concerning the EU’s Working Time Directive. It has, for example, called for the abolition of the latter’s so-called opt-out provision, which has been abused, especially by employers in the UK, to circumvent the limits on the maximum length of the workweek.\(^10\)

The first section offers a tabular overview of U.S. state overtime laws, showing that all states with an overtime law have adopted some version of the FLSA’s administrative, executive, and professional exclusions.\(^11\) The second section presents a comprehensive overview from a large number of countries; without the ambition of being complete or totally up to date, this set nevertheless identifies essential trends. Finally, the third section explores in greater detail the content and history of the white-collar exclusions in several of the larger countries or of laws of special relevance.

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\(^11\) Abbreviations for this section: “bf”=bona fide; “AEP”=administrative, executive, professional. For a similar tabular listing for the mid-1970s, see US ESA, *Executive, Administrative and Professional Employees: A Study of Salaries and Hours of Work*, tab. Q at 105-12 (May 1977). For an analysis of the impact of the DOL’s 2004 regulations on state overtime laws, see “DOL’s Overtime Final Rule Is Not Final Word on Eligibility in 18 States,” *DLR*, No. 102, at B-1-B-2 (May 27, 2004). Several states that lack an overtime law have nevertheless adopted the FLSA or FLSA-like regulations to exclude many white-collar workers from their minimum wage law: Delaware: bf AEP (Del. Code, tit. 19 § 901(5)(c)); Idaho: bf AEP (Idaho Code § 44-1504); Iowa: in detail and en masse virtually all the DOL Part 541 regulations, but setting the salary thresholds at $310/500 (347 Iowa Adm. Code ch. 218); Nebraska: bf AEP or as a superintendent or supervisor (Rev. Stat. Neb. § 48-1202(3)(c)); New York: bf AEP (NYCL Labor Law art. 19 § 651.5); Oklahoma: bf AEP (Okla. Stats. title 40, §197.4(e)(8)); Wyoming: bf AEP (Wyoming Stats. Ann. § 27-4-201(a)(iv)(C)). In addition, Georgia excludes “clerical force” from its maximum 60-hour week for the cotton and woollen manufacturing plants (34-3-1 Official Code of Georgia Ann.).

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# State Overtime Laws: Criteria for Excluding White-Collar Workers

<table>
<thead>
<tr>
<th>State</th>
<th>Content/Code section</th>
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</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Alaska</td>
<td>bf AEP (AK Stats. § 23.10.055(9)) + supervisory (§ 23.10.060)</td>
</tr>
<tr>
<td>Arizona</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Arkansas</td>
<td>bf AEP (AR Code Ann. § 11-4-203(7)(A))</td>
</tr>
<tr>
<td>California</td>
<td>AEP: similar to FLSA (stricter re primary duty) and monthly salary = at least 2x state min. wage; or profession of law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting. (Industrial Welfare Commission Order #1-2001Regulating Wages, Hours, and Working Conditions in Mfg Industries, § 1(A). <a href="http://www.dir.ca.gov/IWC/IWCArticle1.html">http://www.dir.ca.gov/IWC/IWCArticle1.html</a>)</td>
</tr>
<tr>
<td>Colorado</td>
<td>AE(or Supervisor)P. A: “directly serves the executive, and regularly performs duties important to the decisionmaking process of the executive.” Regularly exercises discretion/indep. judgment in matters of significance, primarily nonmanual, directly related to management policies or general business operations. E/Supervisor: earns in excess of the equivalent of min. wage for all hours worked in workweek. Wage order for retail, service, commercial support services, food/beverage, health/medical (7 CO Code Regs 1103-1: MW Order No. 22 § 5(a)-(c))</td>
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<tr>
<td>State</td>
<td>Description</td>
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<tr>
<td>---------------</td>
<td>-----------------------------------------------------------------------------</td>
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<tr>
<td>Connecticut</td>
<td>bf AEP; regs like FLSA w/ $125/175 long and short tests (§ 31-58(f) Conn Gen Stats; §§ 31-60-14, 15, 16 Regs Conn State Agencies)</td>
</tr>
<tr>
<td>Delaware</td>
<td>No overtime law</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>bf AEP as defined by FLSA (DC Code § 36-220.3(1))</td>
</tr>
<tr>
<td>Florida</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Georgia</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Hawaii</td>
<td>bf AEP + supervisor (HI Rev. Stats. § 38-1(5)); guaranteed comp. $1250/mo (38-1(1))</td>
</tr>
<tr>
<td>Idaho</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Illinois</td>
<td>bf AEP as defined by FLSA (820 ILCS 105/4a (2)(E)), but Senate Bill 1645 (Apr. 2, 2004), amended this provision to adopt the higher salary thresholds but to opt out of whatever expansions of the exclusions the DOL issues after Mar. 30, 2003</td>
</tr>
<tr>
<td>Indiana</td>
<td>AEP “who have the authority to employ or discharge” and earn more than $150/wk (Ind Code § 22-2-2-3(n))</td>
</tr>
<tr>
<td>Iowa</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Kansas</td>
<td>bf AEP (KS Stats. Ann. § 44-1202(e)(3)). Definitions: E: (like FLSA long test) (KS Adm. Regs. § 49-30-1(i)). A: when performance is of office/nonmanual work directly related to office management policies or general business operations and such individual supervises at least 2 others [no salary $ mentioned] (KAR § 49-30-1(j)). P like FLSA (KAR § 49-30-1(k)).</td>
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<tr>
<td>State</td>
<td>Description</td>
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<td>--------------</td>
<td>-----------------------------------------------------------------------------</td>
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<tr>
<td>Kentucky</td>
<td>Supervisory (KY Rev. Stats. § 337.010(2)(a)(2)). Reg. def of AEP like FLSA</td>
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<tr>
<td></td>
<td>(803 KY Adm. Regs. 1:070 §§ 1-3). Definition of Supervisory: customarily/</td>
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<td></td>
<td>regularly directs work of 2 or more employees, does not devote more than</td>
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<td></td>
<td>20% of time to activities performed by supervisees; $155. At $250 needs</td>
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<td>only supervise 2 or more (803 KAR 1:070 § 4)</td>
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<tr>
<td>Louisiana</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Maine</td>
<td>AEP and whose annual compensation exceeds 3000x min wage (ME Rev. Stats.</td>
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<tr>
<td></td>
<td>§ 663 3.K.)</td>
</tr>
<tr>
<td>Maryland</td>
<td>AEP (Ann. Code MD § 3-403(1))</td>
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<tr>
<td>Massachusetts</td>
<td>AEP (MA Gen. Laws Ann. ch. 151 § 1A(3))</td>
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<tr>
<td>Michigan</td>
<td>AEP (MI Compiled Laws § 408.384a(4)(a))</td>
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<tr>
<td>Minnesota</td>
<td>AEP (MN Stats § 177.23 subd. 7(6)). Reg. definition: similar to FLSA but</td>
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<tr>
<td></td>
<td>somewhat stricter re discretion and recommendations (MN Adm. Code R.</td>
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<td></td>
<td>5200.0180, 0190, 0200, 0210)</td>
</tr>
<tr>
<td>Mississippi</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Missouri</td>
<td>AEP (MO Rev. Stats. 290.500(3)(a))</td>
</tr>
<tr>
<td>Montana</td>
<td>AEP (MT Code Ann. § 39-3-406(1)(j))</td>
</tr>
<tr>
<td>Nebraska</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Nevada</td>
<td>AEP (NV Rev. Stats. Ann. § 608.018.2(e))</td>
</tr>
<tr>
<td>State</td>
<td>Criteria</td>
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<td>---------------</td>
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</tr>
<tr>
<td>New Hampshire</td>
<td>no express criteria (NH Rev. Stats. Ann. 279:21.VIII(b)), but employers are not required to keep hours records for employees exempt under FLSA § 213(a); NH Code of Adm. Rules ch LAB § 803.04(g); and all salaried employees are exempt from overtime (NH W&amp;H Div., tel interview, Feb. 12, 2004)</td>
</tr>
<tr>
<td>New Mexico</td>
<td>bf AEP or foremen, superintendents, supervisors (NM Stats. Ann. § 50-4-21(C)(2))</td>
</tr>
<tr>
<td>New York</td>
<td>Min. wage orders (including overtime): similar to FLSA but $318.75 salary (e.g. restaurant industry, NY Code of Rules § 137-3.2(c)(1))</td>
</tr>
<tr>
<td>North Carolina</td>
<td>bf AEP as defined in FLSA (Gen. Stats. NC § 95-25.14(b)(4))</td>
</tr>
<tr>
<td>North Dakota</td>
<td>bf AEP (ND Adm. Code § 46-02-07-02.4.a). Def like FLSA but no salary levels (46-02-07-01.1,.6,.9)</td>
</tr>
<tr>
<td>Ohio</td>
<td>bf AEP as defined in FLSA (OH Rev. Code Ann. § 4111.01(D)(4))</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Oregon</td>
<td>AEP: performs tasks predominantly intellectual, managerial or professional, exercises discretion/independent judgment, paid on salary basis (OR Rev. Stats. § 653.020(3)(a)-(c)). Definition like FLSA but salary level is min. wage ($6.50) (OR Adm. Rules § 839-020-0005(1)-(3))</td>
</tr>
</tbody>
</table>
### Exclusion of White-Collar Workers in the Rest of the World

<table>
<thead>
<tr>
<th>State</th>
<th>Definition and Calculation Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pennsylvania</td>
<td>bf AEP (PA Stats. § 333.105(a)(5)). Reg. definition like FLSA incl. salary levels (PA Adm. Code tit. 34 § 231.82-.84)</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>AEP (PR Laws Ann. tit. 29 §288)</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>bf AEP as defined by FLSA and at least $200/wk (Gen. Laws RI § 28-12-4.3(a)(4)), unless the wages if computed on hourly basis would violate applicable min. wage law (Gen. Laws RI § 28-12-4.3(a)(5))</td>
</tr>
<tr>
<td>South Carolina</td>
<td>No overtime law</td>
</tr>
<tr>
<td>South Dakota</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Tennessee</td>
<td>No overtime law</td>
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<tr>
<td>Texas</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Utah</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Vermont</td>
<td>bf AEP (VT Stats. Ann. tit. 21 § 383(2)(E))</td>
</tr>
<tr>
<td>Virgin Islands</td>
<td>bf AEP also for more than 8 hours/day (VI Code Ann. tit. 24 ch. 1 § 2(2))</td>
</tr>
<tr>
<td>Virginia</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Washington</td>
<td>bf AEP (Rev. Code WA § 49.46.010(5)(c)). Reg. definition like FLSA (WA Adm. Code §§ 296-128-510, -520, -530)</td>
</tr>
<tr>
<td>West Virginia</td>
<td>bf AEP (WV Code § 21-5C-1(f)(6))</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>AEP; reg. definition similar to FLSA (WI Adm. Code § DWD 274.04(1))</td>
</tr>
<tr>
<td>Wyoming</td>
<td>No overtime law</td>
</tr>
</tbody>
</table>
Exclusion of White-Collar Workers in the Rest of the World

Exclusion of White-Collar Workers from Hours of Work and Overtime Pay Laws in All Countries Listed in the ILO Legislative Series

1966—Albania 1: Act No 4170 to Promulgate a Labor Code for the People’s Republic of Albania (Sept. 12, 1966): § 21: “Wage and salary earners engaged in work which by its nature cannot be done within a specified period of time shall not be deemed to work overtime.”
1993—Albania 1: Act No. 7724 of 22 June 1993 relating to the Regulation of Hours of Work, Rest Periods and Holidays: § 2: “The provisions of this Act shall apply without exception to all categories of workers and employers.”
- 1975—Algeria 2
- 1978—Algeria 1
- 1981—Algeria 1
- 1981—Angola 1
- 1982—Angola 2
1929—Argentina 1: Act and Decree: Hours of Work. Ley no. 11,544 (Jornada de ocho horas de trabajo): § 3: Exceptions shall be authorized (a) in the case of persons holding positions of supervision or management.
1933—Argentina 1: Decreto numero 16115: Reglamentación de la ley 11544 sobre jornada legal del trabajo. § 11(a): Management/supervision includes the head, manager, director, principal person in charge of the undertaking. (b) superior managing or technical employees who replace persons in (a); assistant manager, liberal professions, secretarial staff employed for purposes of management or supervision and not merely in a subordinate capacity; foremen.
- 1976—Argentina 2
1969—Austria. 4: Bundesgesetz vom 11. Dezember über die Regelung der

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12Since World War I, the ILO has published a comprehensive series of (English translations of) the texts of national labor laws and regulations indexed according to subject matter. The following alphabetical list—if there is more than one entry for a country, the laws are listed chronologically—includes all laws indexed as incorporating “hours of work” or “overtime” provisions. The symbol ○ before the entry means that the text of the law or regulation does not mention an exclusion of white-collar workers. Since the ILO published many statutes without accompanying regulations, and since legislatures in many countries empower the relevant labor-protective agencies to issue regulations excluding groups of workers from various statutory provisions, the mere fact that a statute does not expressly exclude any group of white-collar workers does not necessarily mean that none is excluded. The details of statutes, codes, and regulations lacking an express exclusion of white-collar workers have been omitted. In the early 1990s, the ILO replaced its Legislative Series with Labor Law Documents. In a few instances laws are included from sources other than the ILO.
Exclusion of White-Collar Workers in the Rest of the World

Arbeitszeit (Arbeitszeitgesetz)/A Federal Act to Regulate Hours of Work: § 1.(2)8: Does not apply to “salaried employees in managerial positions [leitende Angestellte] who are entrusted with high-level duties involving the direction of the work of other persons on their own responsibility.”

1976—Bahrain 1

1921—Belgium. 1: Loi du 14 juin 1921 instituant la journée de huit heures et la semaine de quarante-huit heures: § 2: excludes persons invested with directive or confidential functions to be defined by royal order.

1923—Belgium. 2: Arrêté royal du 28 février 1922: Loi du 14 juin 1921—Détermination des personnes investies d’une poste de confiance. Appendix T: Directive/confidential functions; managers, undermanagers, factors and works superintendents; holders of power of attorney; engineers, chiefs and assistant chiefs of managing, commercial or technical services, chief chemists, laboratory directors and their assistants, head foremen, works foremen; department managers, shop foremen, electricians, maintenance workers; managing or private secretaries, and staff engaged exclusively in secretariat department.

1971—Belgium. 2: Labour Act (Mar. 16, 1971): Ch. 1, 3, § 1.6: Hours provisions do not apply to physicians, veterinarians, surgeons, dentists, pharmacists, or chemists.

1939—Bolivia. 1: Supreme Decree to Issue the Labor Code (May 26, 1939): § 2: “Salaried employees” means those employed in offices whose work consists mainly of an intellectual character. § 45: Hours provision does not apply to salaried employees in supervisory, management, or confidential position, but it is unlawful to employ them more than 12 hours a day.

1943—Brazil. 1: Leg Decree No. 5452 to Approve the Consolidated Labour Laws 1 May 1943: § 62(c): Hours sections do not apply to managers, meaning “a person who holds a position of authority and performs managerial duties in pursuance of a legal instrument and who on account of the higher rate of his remuneration is in a different category from the other employees; managers shall be guaranteed a weekly rest period.”

1985—Brazil. 1: Legislative Decree No. 5452 to Approve the Consolidation of Labour Laws (May 1, 1943) § 62(c): Hours of work provision does not apply to “managers; the term ‘manager’ shall be deemed to mean a person who holds a position of authority and performs managerial duties in pursuance of a legal instrument and also on account of the higher rate of this remuneration is in a different category from the other employees.”

1951—Bulgaria. 2

1958—Bulgaria. 3

1974—Cameroon. 1

1965—Canada. 1: An Act respecting hours of work, minimum wages, annual vacations, and holidays with pay in federal works, undertakings, and businesses,
Exclusion of White-Collar Workers in the Rest of the World

Mar. 18, 1965: § 2(c): Coverage of employees performing skilled or unskilled manual, clerical, technical, operational or administrative work. § 3(3): The Act does not apply to employees who are managers or superintendents or who exercise managerial functions; or to professions to be designated.

1934—Canada. 8: British Columbia: Act to Amend and Consolidate the “Hours of Work Act, 1923” Mar. 29, 1934: § 4: Hours provision does not apply to “persons holding positions of supervision or management or employed in confidential capacities” (the same provision was already contained in 1923 act).

1935—Canada 7: Nova Scotia: An Act respecting the limitation of the hours of work in certain industrial undertakings, Apr. 30, 1931: § 4: does not apply to supervision, management, or confidential capacity.

1935—Canada. 13: British Columbia: An Act to Amend the Hours of Work Act, 1934: § 4: [adds] “so long as the duties performed by him are entirely of a supervisory or managerial character and do not comprise any work or duty customarily performed by other employees.”


1971—Canada. 3: An Act to Amend the Canada Labour (Standards) Code (June, 30, 1971): § 3(3)(a): Does not apply to employees who are managers or superintendents or exercise management functions.

©1954—Ceylon. 1
©1966—Chad 1

1924—Chile 2: Lei numero 4053, que dispone que el contrato de trabajo se rejira por las disposiciones de la lei que se expresa/Act no. 4,053 providing that contracts of employment shall be regulated by the provisions laid down therein (Sept 8, 1924): § 1: does not apply to work performed in commercial business. § 11: Normal hours of 8 and 48 do not apply to persons occupying posts with supervisory, directive or confidential functions.

1925—Chile 1: Decreto no. 857 que aprueba el texto de la Ley de Empleados Particulares/To Approve the Text of the Act Respecting Salaried Employees (Nov. 11, 1925): § 1: Regulates the relations between employers and salaried employees, “whatever the nature of the employment, its importance within the establishment, or the system of remuneration.” Salaried employees “perform work in which the intellectual effort predominates over the physical effort required....” § 17: 8 and 48 hours.

1978—Chile 1: Decreto-ley núm. 2200 por el cual se fijan normas relativas al contrato de trabajo y a la protección de los trabajadores (Legis. Decree No. 2200 to make provision for contracts of employment and the protection of workers), May 1, 1978, in Diario Oficial, June 15, 1989, No. 30090, p. 1 at 4: § 34: Normal hours of 48 per week shall not apply to managers or administrators [administradores],

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workers holding power of attorney, and all other persons working without any immediate supervision.

- 1984—Chile 1
- 1994—China 1
- 1967—Congo (Kin.) 1
- 1933—Cuba 4
- 1934—Cuba 1, 4

1984—Cuba 1: Act No. 49 to Promulgate the Labour Code (Dec. 28, 1984): § 78: “Managers and other workers with special characteristics stated by the law shall be excluded” from overtime compensation.

1934—Columbia 1: Decreto núm. 895 (abril 26 de 1934): § 2(a): Hours provision does not apply to supervision, management, or confidential employees.

- 1975—Czechoslovakia 2
- 1967—Dahomey 1


1992—Dominican Republic 1: Act No 16-92 of May 29, 1992, promulgating the Labour Code: § 150(1) and (2): Hours provisions do not apply to representatives or agents of the employer or to managers or inspectors.

1928—Ecuador 2: Act respecting the maximum duration of the daily hours of work and weekly rest (Oct. 6, 1928): § 6.3: Hours provision excludes positions of trust, management, and supervision.

1978—Ecuador 1: Labour Code (June 30, 1978): § 57: “Time worked in excess of the ordinary working day shall not be regarded as overtime for purposes of remuneration in the case of employees who have positions of trust or managerial functions, namely: employees who in any way represent or replace the employer....”


1975—Ethiopia 1: Labour Proclamation No. 64 of 1975 (Dec. 6, 1975): “Worker” shall not include manager or deputy manager of an undertaking or any of its branches or all those officials accountable to such manager or deputy manager.
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1993—Ethiopia 1: Labour Proclamation No. 42/1993: § 3(c): Proclamation does not apply to “contracts relating to persons holding managerial positions who are directly engaged in major managerial functions of an undertaking and giving decisions within the power delegated by the law to the employer....”

1917—Finland: Act respecting the eight-hour day (Nov. 27, 1917), in BILO 13(1-10):36 (1918): Excludes commercial and office work.

1946—Finland. 4: An Act respecting hours of work, No. 604 (Aug. 2, 1946): § 3: “This Act shall not apply to any employee belonging to the managerial staff or carrying out duties of supervision, who takes no part, or takes part only occasionally, in the work performed by the employees placed under his direction or supervision.”

1955—Finland. 1: An Act to Amend the Act Regulating Hours of Work (Feb. 11, 1955): § 3 of the 1946 act was amended to: “This Act shall not apply to any person in a [leading] managerial post in a business, establishment, or undertaking.” “This Act, with the exception of sections 10, 13, and 14, shall apply to every employee whose principal duties consist in personally directing or supervising work, and also takes no part, or takes part only occasionally, in the work performed by employees placed under his direction or supervision.”

1980—Finland. 1(B): Act respecting Hours of Work in Commercial Establishments and Offices (May 26, 1978): § 1(2): Does not apply to “work done by the manager of an undertaking or by any person in a managerial position who takes part as the manager’s direct subordinate in the management of an undertaking or establishment.”

1996—Finland: Working Hours Act No. 605/1996 (June 1996): § 2(1): “[T]his act does not apply...to work which must considered management of an undertaking, corporation or foundation or an independent part thereof by virtue of the relevant duties and of the employee’s position otherwise, or independent work directly comparable to such management.”

1977—German Democratic Republic. 1: Labour Code of the GDR (June 16, 1977): § 178(1): (1) “Managers of undertakings, manager associates and other workers holding particularly responsible posts shall not be entitled to” overtime remuneration. (2) Salaried employees not covered by (1) whose jobs require them to have been trained at a college or technical school shall be granted corresponding time off.

1932—Greece. 2A: Hours of Work (Commercial Establishments) (Apr. 8, 1932): § 18: Salaried employees with salaries in excess of 5,000 drachmas monthly are excluded from supplementary compensation.

1961—Guatemala. 1: Decree No. 1441 Labour Code (May 5, 1961) § 124(a): Does not apply to persons who exercise directive or managerial functions in the
employer's name such as managers, directors, administrators.

1960—Guinea 1
1948—Haiti. 2


1961—**Haiti.** 1: Labor Code: § 107(c): Does not apply to employees in management or confidential capacity.

1984—**Haiti.** 1: Decree to Revise the Labor Code (Feb. 24, 1984): § 104(b): Overtime hours provision does not apply to persons holding managerial positions or employed in a position of trust.

1959—**Honduras.** 1 Labour Code (June 1, 1959: § 325(a): Does not apply to managerial or supervisory posts or positions of trust.

1948—**Hungary.** 1

1967—**Hungary.** 2D: Decree No 6 of Minister of Labour respecting Certain Questions related to Hours of Work and Rest (Oct. 8, 1967): § 3(2): “Workers in managerial posts and those who organise their own work hours and work shall not be entitled to any compensation for overtime worked.”

1952—**Iceland.** 1: An Act respecting Safety Precautions in Workplaces, No. 23 (Feb. 1, 1952): § 1: “This Act shall not apply to...ordinary office work.” § 28: “Work shall be so arranged that each worker can have not less than eight consecutive hours of rest from his work in every 24-hour period.”

1971—**Iceland:** Act No. 88 of 1971 on 40-Hour Work Week (Dec. 24, 1971), on http://www.althingi.is/lagas/nuna/1971088.html: § 1: Does not apply to managers or special confidential [employees] in jobs in which supervision of working hours is not possible.

1936—**Irish Free State.** 1

1951—**Indonesia.** 1

1959—**Iran** 1

1987—**Iraq**

1951—**Israel.** 2: Act respecting Hours of Work and Rest: § 30: “This Act shall not apply to... (5) persons holding managerial posts or positions of trust; (6) persons employed in work which by its nature and conditions does not permit the employer to supervise hours of work and rest.” (The Israeli Ministry of Labour and Social Affairs website translates subsect. 5 differently: “persons employed in administrative duties or duties requiring a special degree of confidence.” http://molsa.gov.il/ZhuitOvdim/LaborRel/documents/pdf/7.pdf.)

1923—**Italy.** 1: Decree of Eight-Hour Day (Mar. 15, 1923), nr 692: § 1: Maximum hours do not apply to managing staff.
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1923—**Italy** 7: Regio Decreto Sept. 10, 1923 nr 1955: § 3(2): Does not apply to managing staff defined as “persons in charge of the technical or administrative management of the undertaking or a branch thereof, who are directly responsible for the conduct of the work, i.e., administrators, managers, technicians or managing directors, chief clerks (*capi ufficio*) and section heads (*capi reparto*) who perform manual work in exceptional cases only; it shall not include shop assistants and other salaried employees of lower grades....”


1960—**Jordan**. 1: Labor Code Law No. 21 (May 14, 1960): § 43(1): Council of Ministers may issue regulations specifying that the hours provision does not apply to supervisory, management, or confidential employees.

1994—**Laos** 1

1922—**Latvia**. 1: Act respecting hours of work (Mar. 24, 1922): § 1: Normal hours of work of wage earners in manual labor are eight. § 2: Normal hours of work of nonmanual workers shall be six hours. Note: Hours of nonmanual workers shall be equal to hours of those engaged in manual work insofar as former’s work is inevitably dependent on latter’s work hours

1946—**Lebanon**. 1

1967—**Lesotho**. 1: An Act to Amend and Consolidate the Law relating to the Employment and Recruitment of Employees to Lesotho No. 22 of 1967: § 57(1)(ii): Does not apply to management or confidential employees.

1970—**Libya** 1: Labour Code (May 1, 1970): § 90: Regulations may prescribe that hours do not apply to supervisory, management, or confidential or special employees. Regulations shall fix maximum hours for them.

1980—**Luxemburg** 1: Consolidated Text of the Acts respecting the Legal Regulation of the Contracts of Service of Salaried Employees in Private Employment: § 17(c): Hours provision does not apply to “persons occupying positions of actual management and senior staff whose presence in the undertaking is necessary for its operation and supervision.”

1975—**Madagascar**. 1

1982—**Malaysia**. 2

1962—**Mali** 1

1963—**Mauritania**. 1

1975—**Mauritius**. 1: An Act to Amend and Consolidate the Law relating to Labour (Dec. 24, 1975): § 2: Covered worker does not include person whose basic wage/salary exceeds 18,000 rupees/year
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- 1969—Mexico
- 1959—Mongolia
- 1985—Mongolia

1931—Moroccan Spain: Regulation respecting the Statutory Daily Hours of Work (Sept. 7, 1931): § 8.2: Does not apply to directors, managers, and high officials in undertakings, who owing to the nature of their duties cannot be subjected to a strict limitation of their hours.

- 1985—Mozambique
- 1992—Namibia
- 1992—Nepal

1922—Netherlands: Decree promulgating the text of the Labour Act, 1919, as amended (July 21, 1922): § 91: It may be stipulated by public administrative regulations that chapter IV (including hours) shall not apply to (a) the work of persons exclusively or mainly responsible for management of the undertaking or department or for scientific research or scientific supervision; (b) work of persons whose annual income in the undertaking they work in exceeds the limit indicated by Royal Decree but not less than 3,000 gulden.

1937—Netherlands: Hours of Work Decree for Offices (May 8, 1937): § 7: Does not apply to heads of office or department, chief clerks, heads of managing departments, chief accountants, chief cashiers, heads of drawing office, persons responsible for scientific work necessitating a scientific education meaning a university degree; person whose remuneration exceeds 3,000 gulden.

1962—Netherlands: Hours of Work (Shops) Decree (May 15, 1962): § 17: Does not apply to the head of a shop or department, chief clerk, head of department services, or chief accountant.

1952—Netherlands Antilles: Ordinance to Regulate Hours of Work (Aug. 22, 1952): § 1(1)(a): Does not apply to managers (c) or those with incomes of 10,000 florins/mo.

1945—Nicaragua: Labour Code (Jan. 12, 1945): § 99(1): Hours provision does not apply to supervisory or management position or those of trust.

1974—Nigeria

1967—Norway: An Act to Amend the Act of 7 Dec. 1956 respecting the Protection of Workers. No. 2 of 10 May 1968: § 18: Hours provision does not apply to (1) managerial or supervisory positions (except foremen) or (2) particularly confidential positions.

1995—Norway: Act No. 4 of Feb. 4, 1977 respecting Workers’ Protection and the Working Environment amended to Act No. 2 of Jan. 6, 1995: § 41(a): Hours provisions do not apply to work of a managerial nature and work performed by others who have particularly independent positions.

1969—Pakistan: An Ordinance to Amend and Consolidate the Law relating to the Hours and Other Conditions of Work and Employment of Persons Employed in
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1914—Panama: Ley 6a de 1914 por la cual se reglamenta el trabajo de los obreros y los empleados de comercio (Oct. 29, 1914), in BILO 11(1, 2): 24-25 (1916): Eight-hour working day: No person shall be bound to work a greater number of hours. All hours beyond those stipulated in this act are overtime and “shall be remunerated accordingly.”

1981—Panama

1961—Paraguay. 1: Act No. 729 to Promulgate the Labour Code (Aug. 31, 1961): § 24: The Code does not apply to managing directors, managerial staff “or other employees who, on account of their character representative [sic] of the undertaking, their high technical qualifications, the amount of their remuneration and the nature of their work, may be considered to be independent in the manner in which they carry out their duties.” § 206: Hours provision does not apply to people in mentioned in § 24 or those in supervisory or trust positions.

1974—Philippines. 1A: Presidential Decree No. 44 Instituting a Labour Code (May 1, 1974): § 82: Hours provision does not apply to managerial employees—those whose primary duty consists in management of the enterprise or department or subdepartment or other officers or members of the managerial staff.

1974—Poland 1: Labour Code (June 26, 1974): § 136: Overtime pay provision does not apply to “workers whose hours of work, in view of the nature of their jobs and their conditions of work, can only be determined by the extent of their tasks. The tasks of such workers shall be determined in such a way that the workers concerned are able to perform them within the limits of the normal hours of work.”

1969—Portugal. 1: Legis Decree No. 49408 to Approve a New Set of Rules Governing Individual Contracts of Employment (Nov. 21, 1969): § 50(3): Overtime pay “can be waived by workers not working under a schedule who are exercising managerial functions in the undertaking.”

1971—Portugal 1: Legis Decree No. 409 to Establish New Statutory Provisions respecting Hours of Work (Sept. 27, 1971): § 13: At the employer’s request, employees holding managerial, confidential, or supervisory posts may be exempted from the working schedules (and thus from overtime § 17(a)).


1922—Russia 1: Kodeks Zakonov o trude 1922 goda (Labour Code of the R.F.S.S.R. (1922 ed.)), in Kodeks zakonov o trude: C prilozhaniem obzora kratkikh raz’yanenii i vazhneishikh raspyoryazhenii po trudu (Prakticheskii Kommentarii) (E. N. Danilova comp. 1923), § 95 at 46 (went into effect Nov. 15, 1922; originally in Sobranie Uzakonenii, 1922, No. 70, Art. 903): § 94: Normal hours in production and accessory work necessary to it shall not exceed eight hours. Note:
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Narkomtrud in agreement with the All Russian Central Council of Trade Unions may specify the “groups of responsible workers in political, trade union, and council offices whose work shall not be subject to the restriction of hours specified in section 94.” § 95: Duration shall not exceed six hours (a) for persons 16-18 years old; (b) for persons employed in intellectual or office work [lits, zanyatykh ymstvennym i kontorskim trudom], other than those who work in direct connection with production. Less than three years later, the press reported that until then, manual workers had been considered proletarian and white-collar workers bourgeois, but that the Central Executive Committee of the Communist Party had eliminated the distinction. Walter Duranty, “Bourgeois Russians to Have New Rights,” NYT, Aug. 25, 1925 (4:2-3).

1936—Russia 1: Labor Code with amendments to May 1, 1936: § 95 (same as 1922)


○1967—Rwanda. 1

○1963—Salvador, El. 1

1961—San Marino 1: Act No. 7 respecting the Protection of Labor and of Workers (Feb. 17, 1961): Schedule A: Hours provision does not apply to: “Persons entrusted with the technical or administrative management of the undertaking or with a section of the latter and directly responsible for the smooth running of the same.”


○1969—Saudi Arabia 1

1922—Serb-Croat-Slovene Kingdom: Workers Protection Act (Feb. 22, 1922): § 3: Does not apply to persons to whom duties of a relatively high grade are
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entrusted (managers, bookkeepers, cashiers, engineers).


1972—Somalia. 1

1920—Spain. 4-5: Real orden de 15 enero de 1920 estableciendo las normas generales de aplicación de la jornada maxima de ocho horas/Royal order issuing general rules for the adoption of the maximum working day of eight hours: § 1: Directors, managers, and other higher officials of undertakings, who owing to the nature of their duties cannot be subject to a strict limitation of their hours shall be exempt

1931—Spain. 9: Decree to Fix the Maximum Statutory Daily Hours of Work at Eight Hours (July 1, 1931): § 2.1: Does not apply to directors, managers, and high officials “who on account of the nature of their duties cannot be subjected to a strict limitation of their hours of work.”


1977—Sweden 4: Working Environment Act (Dec. 19, 1977): ch. 4 § 3: Work shall be so arranged that an employee can take any necessary breaks in addition to his rest periods.


1972—Thailand 2A: Announcement of the Ministry of the Interior respecting Labour Protection (Apr. 16, 1972): § 36: Excludes from overtime pay any employee doing “(1) any types of work in which the employee has the title of director, managerial, departmental head or supervisor and is authorised to act on behalf of the employer with regard to hiring, the reduction of wages, the termination of employment, the grant of rewards, disciplinary action, and the settlement of grievances.”

1966—Tunisia 1

1983—Turkey 3

1975—Uganda. 1: A Decree to Regulate Employment (June 2, 1975): § 38(5): Hours provision does not apply to supervisory, management, or confidential employees.

1980—United Arab Emirates 1: Federal Law to Regulate Employment Relationships No. 8 of 1980: § 72: Hours chapters shall not apply to “1. persons holding responsible managerial or supervisory positions, if such positions confer upon the holders the powers of an employer over employees.”
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1920—Uruguay 3-5: Decree Issuing New Regulations under the Act Respecting Hours of Work (May 21, 1920): § 2: Actual hours of those who direct the work of others and act independently of continuous and direct supervision of the employer are equal to the hours of the staff under them. § 6: Does not apply to directors or managers of commercial or industrial undertakings or technical directors of industrial processes, when their duties do not involve regular hours of work.

1944—Uruguay. 1

1957—Uruguay 1: Hours of Work in Industry, Commerce and Offices (Oct. 29, 1957): § 1(3): Does not apply to directors, managers, heads or principal representatives of commercial or industrial undertakings or supervision or management.

1970—USSR. 1: Act No. 2.VIII of the Supreme Soviet of USSR to Approve Final Principles Governing the Labor Legislation of the USSR and the Union Republics

1945—Venezuela. 1: Act to Amend the Labor Act in Certain Respects (Apr. 4, 1945): § 4: Salaried employee (empleado) “in whose work intellectual effort predominates over physical effort.” § 52: Normal hours are 8 and 48 for wage and salary workers, but hours of work of salaried employees in commercial undertakings and offices shall not exceed 44 in the week. § 53: Maximum hours (8 and 48) shall not apply to supervisory, management, or confidential employees. “Nevertheless such persons shall not remain at work more than twelve hours a day, and shall be entitled to a break of not less than one hour during the day.”

1983—Venezuela 1: Labor Act, as Amended up to 30 June 1983: § 61: Maximum hours section “shall not apply to persons holding positions of supervision or management or employment in a confidential capacity.”

1994—Vietnam. 1
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More Detailed Examination of Selected Countries’ Laws

Canada

Alberta

The hours of work, overtime, and overtime pay provisions of the Employment Standards Regulation do not apply to “(a) an employee who is employed in (i) a supervisory capacity, (ii) a managerial capacity, or (iii) a capacity concerning matters of a confidential nature and whose duties do not, other than in an incidental way, consist of work similar to that performed by other employees who are not so employed.”

British Columbia

The Employment Standards Regulation defines a “manager” as “(a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or (b) a person employed in an executive capacity.

Excluded from the Employment Standards Act entirely is an employee who is (a) an architect, as defined in the Architects Act, (b) a member, other than an honorary member, of the Institute of Chartered Accountants under the Accountants (Chartered) Act or a person enrolled as a student under that Act, (c) a member of the Law Society of British Columbia under the Legal Profession Act or a person enrolled as an articled student under that Act, (d) a person registered under the Chiropractors Act, (e) a member of the College of Dental Surgeons under the Dentists Act, (f) a professional engineer, as defined in the Engineers and Geoscientists Act, or a person who is enrolled as an engineer in training under the bylaws of the council of the Association of Professional Engineers and Geoscientists of the Province of British Columbia, (g) a person licensed as an insurance agent or adjuster under the Financial Institutions Act, (h) a member in good standing of the Corporation of Land Surveyors of the Province of British Columbia under the Land Surveyors Act or a person admitted as an articled pupil under that Act, (i) a member of the College of Physicians and Surgeons of British Columbia under the Medical Practitioners Act, (j) a naturopathic physician, as defined in the Naturopaths Act, (k) an optometrist, as defined in the Optometrists Act, (l) a person authorized to practise podiatry under the Podiatrists Act, (m) a person licenced as an agent or salesman under the Real Estate Act, (n) a person registered under section 35 of the...

13 Employment Standards Regulation, Alberta Reg 14/97, § 14(1)(a).
Securities Act, (o) a member of the British Columbia Veterinary Medical Association under the Veterinarians Act, or (p) a professional forester as defined in the Foresters Act, so long as that person is carrying on the occupation governed by the Acts referred to in paragraphs (a) to (p).15

The hours of work and overtime requirements of the Employment Standards Act do not apply to any of the following: (a) a fishing or hunting guide; (b) a person, other than a percussion drill or diamond drill operator or a helper of either operator, employed in any of the following activities while exploring for minerals other than oil or gas: (i) staking; (ii) line cutting; (iii) geological mapping; (iv) geochemical sampling and testing; (v) geophysical surveying or manual stripping; (c) a teacher; (d) a person employed as a noon hour supervisor, teacher’s aide or supervision aide by (i) a board as defined in the School Act, or (ii) an authority as defined in the Independent School Act; (e) a person employed part time by an institution that (i) provides training or instruction in a trade, occupation, vocation, recreational activity or hobby, and (ii) is owned or operated by a municipality, regional district or the government; (f) a manager;...(j) a police officer employed by a municipal police board established under the Police Act; (k) a fire fighter employed by a paid fire department as defined in the Fire Department Act; (l) a commercial traveller who, while travelling, buys or sells goods that (i) are selected from samples, catalogues, price lists or other forms of advertising material, and (ii) are to be delivered from a factory or warehouse;...(r) any of the following who are employed by a charity to assist in a program of therapy, treatment or rehabilitation of physically, mentally or otherwise disabled persons: (i) a counsellor; (ii) an instructor; (iii) a therapist; (iv) a childcare worker;...(s) a faculty member as defined in the University Act or the University of Northern British Columbia Act; (t) a professor as defined in the Royal Roads University Act; (u) an instructor, counsellor, librarian or administrator who is employed by an institution as defined in the College and Institute Act or by the British Columbia Institute of Technology; (v) a senior tutor, or tutor, who is employed by the Open Learning Agency; (w) a night attendant; (x) a residential care worker; (y) a live-in camp leader; (z) a teaching staff member as defined in the Technical University of British Columbia Act.16

To be sure, according to a former official of the B.C. Employment Standards Branch: “Employees who are ‘managers’ within the meaning of the Employment Standards Regulations are not entitled to overtime but are entitled to extra wages (at regular wage rate) for extra work—if the employment contract stipulates, for example, the employee is to be paid $40,000 a year for a 40 hour work week, but the employee works in excess of 40 hours a week, the employee is entitled to be

15Employment Standards Regulation, B.C. Reg. 396/95, § 31.
16Employment Standards Regulation, B.C. Reg. 396/95, § 34.
paid for that additional work. The Interpretation Act and the Courts require regulations to be read down—as the Courts have said—it requires the clearest possible language to deny an employee access to basic standards of compensation. Only those employees who can control their hours of work, such as managers, are not entitled to overtime because of the potential conflict between being efficient for the sake employer’s business and getting other than efficient for the sake of increasing one’s wages.”

**Manitoba**

The hours of work and overtime provisions of the Employment Standards Code do not apply to an “employee who is qualified to practise and is practising or employed in a profession that is governed under an Act of the Legislature that applies solely to the profession.”

Weekly day of rest provision does not apply to “employees employed in supervisory, managerial or confidential positions.”

Logically, these provisions suggest that supervisory, managerial, and confidential employees are covered by the hours of work and overtime provisions. This conclusion is correct, according to Dave Dyson, the executive director of the Manitoba Employment Standards Division, but subject to two major limitations. First, the Employment Standards Division itself advises employers that they can avoid the applicability of the overtime provision to these (as well as any other) employees by simply “building into the employment contract” an agreement that the firm will, for example, pay the employee $1,000 a week—there is in fact no exclusionary salary level and in principle an employee may be entitled to overtime pay regardless of how high his salary is—and the employee, in turn, will work up to 70 hours per week; as long as the firm then pays the employee $1,000 a week, even when the employee works fewer than 70 hours a week, no premium pay is owing for the hours between 40 and 70 because the Division recognizes as valid the justification that employers everywhere have always offered—namely, that the overtime pay has already been built into the salary. The Division finds this arrangement acceptable because it enables the employee at the time of hire to calculate how much he is actually being paid per hour for a 70-hour week and to decide whether this amount is acceptable to him. If he works more than 70 hours per week, he is entitled to overtime pay, but only if the employer (at the very least implicitly) authorized the overtime work and/or was aware of it. Thus, if the

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17 Email from Graeme Moore (July 21, 2003).
worker simply took work home unbeknownst to the employer and then announced after the fact that he had worked hours beyond 70, the employer would not be liable for extra pay.20

The second limitation removes the managers in question entirely from the applicability of the hours and overtime provisions. Because the Employment Standards Code defines an “employer” as a “person that has control or direction of, or is directly or indirectly responsible for, the employment of an employee or the payment of wages to an employee,”21 the Division takes the position that any manager who “has true self-direction and control and direction and control of his staff” is excluded from the Code not because he is a manager, but an employer. Dyson observed that the test for such employer status was similar to that for an independent contractor. The manager of a McDonald’s restaurant would, for example, not be an excluded manager because that firm is sufficiently centralized that it directs and controls its restaurant managers; by the same token, however, managers of other retail or service establishments might well qualify as employers as would a plant manager.22

Dyson stated that these exclusionary interpretations were not embodied in any regulations or internal directives; instead they derived from rulings of the Manitoba Labor Board, of which he cited two. The first, from 1986, was decided under the earlier Payment of Wages Act, which included a definition of “employer” almost identical to that of the Employment Standards Code.23 Unlike the Code, however, the Payment of Wages Act also specified that “employee” did not include an employer as defined above;24 in contrast, the Code—into which the Payment of Wages Act was folded in 1998—merely states that “‘employee’ means an individual who is employed by an employer to do work...but does not include a director of a corporation in relation to that corporation.”25 Consequently, the Code does not expressly preclude an employer from being an employee for purposes of

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20Telephone interview with Dave Dyson, Winnipeg (Feb. 23, 2004).
22Telephone interview with Dyson.
23When the Payment of Wages Act was first enacted in 1970, its definition of “employee” did not include the exclusion of employers, whereas its definition of “employer” was as it remained. Payment of Wages Act, Acts of Manitoba, 1970, ch. 44, §§ 1(c) and (d), at 383. The Employment Standards Act when first enacted in 1957 contained the same structure as later. Employment Standards Act, Acts of Manitoba, 1957, ch. 20, §§ 2(h) and (i), at 119, 120.
24Payment of Wages Act, Acts of Manitoba, 1985-86, ch. 52, § 1(c), at 1731 (July 11, 1985).
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ove time pay. And indeed, in 1981 the Manitoba County Court held in an appeal of a Payment of Wages Act case from the Board—which had ruled in the manager’s favor—that “a person employed in a managerial capacity may, at the same time be an employee...depending on the circumstances....” The Board in 1986, dealing with a self-described production and personnel manager, found that he met the definition of “employer” under an act that “prevents anyone who is an employer...from being an employee” and that therefore the act’s provisions were not available to him. To be sure, the Board, noting that the issue was one of first impression (following the 1985 amendments), was “concerned that the legislation, as it is written, disenfranchises many individuals who ought to be able to have access to the Act.” The second decision under the Payment of Wages Act merely stated conclusorily that the responsibilities and authority of three managers brought them within the statutory definition of “employer,” thus triggering dismissal of their claims.

Finally, Dyson noted that although in principle highly paid managers’ entitlement to overtime pay was not and should not be means-tested, since his mission was to enforce minimum standards and prevent exploitation, overtime (or other) complaints from such employees would “go to the bottom of the pile”—despite the lack of any legislative authority for such a policy.

Newfoundland

The Labour Standards Act does not cover an employee qualified in or training

26Dyson acknowledged that in general it was possible for a managerial “employer” also to be a covered “employee” under the Code, but insisted that the overtime provision could constitute an exception to this coexistence because the employer had to authorize the overtime. While conceding that this authorization requirement was neither statutory nor regulatory, he contended that it could not be gotten around because otherwise it would not be possible to hold the employer liable. When confronted with the FLSA’s “suffer or permit to work” standard as a much more capacious marker of employment, he readily agreed, adding that the doctrine of implicit authorization used by his Division was akin to it. Telephone interview with Dave Dyson (Feb. 24, 2004).

27Halbrick v. Sutherland, 14 Manitoba Reports 418, 423 (1981). The court found that it was not a reasonable interpretation of the language and objectives of the law to conclude that it was intended to protect “the controlling minds of the company, which would include the directors.” Id. at 425.


30Telephone interview with Dave Dyson (Feb. 24, 2004).
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for qualification in and working for an employer in the practice of (i) accountancy, architecture, law, medicine, pharmacy, professional engineering, surveying, teaching, veterinary science, and (ii) other professions and occupations that may be prescribed.31

Nova Scotia

The hours of labor provisions of the Labour Standards Code do “not apply to persons holding positions of supervision or management, nor to persons employed in a confidential capacity.”32 Excluded by regulation are “[d]uly qualified practitioners or students while engaged in training for (a) architecture; (b) dentistry; (c) law; (d) medicine; (e) chiropody; (f) professional engineering; (g) public or chartered accounting; (h) psychology; (i) surveying; (j) veterinary science.”33

Ontario

The hours, overtime pay, minimum wage, holidays, and vacations provisions of the Employment Standards Act “do not apply to a person employed, (a) as a duly qualified practitioner of, (i) architecture, (ii) law, (iii) professional engineering, (iv) public accounting, (v) surveying, or (vi) veterinary science; (b) as a duly registered practitioner of, (i) chiropody, (ii) chiropractic, (iii) dentistry, (iv) massage therapy, (v) medicine, (vi) optometry, (vii) pharmacy, (viii) physiotherapy, or (ix) psychology; (c) as a duly registered practitioner under the Drugless Practitioners Act; (d) as a teacher as defined in the Teaching Profession Act;... (g) as a registered salesperson of a broker registered under the Real Estate and Business Brokers Act; (h) as a salesperson, other than a route salesperson, who is entitled to receive all or any part of his or her remuneration as commissions in respect of offers to purchase or sales that (i) relate to goods or services, and (ii) are normally made away from the employer’s place of business.” The hours provisions of the Act do not apply to “(a) a person employed as a firefighter as defined in section 1 of the Fire Protection and Prevention Act, 1997; (b) a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis;...(f) a person employed

31Labour Standards Act RSNL 1990 ch. L-2, § 2(b).


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as an embalmer or funeral director."34

Prince Edward Island

The Employment Standards Act does not appear to have any white-collar exclusions. According to the provincial Chief Labour Standards Inspector, the regulations are very minimal and do not address the issue. He stated that the problem was that if the employer and the salaried employee failed to contract on the number of hours in the workweek, and if the actual number of hours fluctuated or rose constantly (e.g., if the worker said that he had been hired to work 48 hours but in fact the weekly hours kept rising from 48 to 60), the labor standards enforcement agent would have no way of determining what the regular rate was on which to figure time-and-a-half pay. The result is that salaried employees get nothing. Asked how the government could acquiesce in such a ruse, the Chief Labour Standards Inspector replied that, in principle, if a salaried top manager were making $5000 a week and worked 48 hours a week according to an agreement and were suddenly required to work 60 hours, he would be entitled to 1.5 x $5000/48 for hours 48 to 60, but the agency has never had such a case during his 32-year tenure. The foregoing is merely the agency’s written internal policy. Although the inspector stated that the PEI statute was copied from Nova Scotia’s, the latter does expressly exclude managers.35

Quebec

Managerial personnel are excluded from the Act respecting Labour Standards.36

Saskatchewan

The hours provision of the Labour Standards Act, Rev. Stat. Sask. Ch. L-1: § 4(2): “does not apply to an employee who performs services that are entirely of a managerial character.”37 By regulation the hours provision does not apply to “employees who are professional practitioners registered or licensed in accordance with any Act or who, while learning their profession, are interns, students-at-law,

34Employment Standards Act 2000, Ontario Regulation 285/01, §§ 2(1) and 4(1).
students in accountancy or other trainees or students."^{38}

Yukon Territory

The hours of work section of the Employment Standards Act "does not apply to...an individual whose duties are primarily of a supervisory or managerial character."^{39} According to the Labour Services Branch, since "'primarily' is defined in Webster’s dictionary as ‘for the most part’ or ‘in the first place,’...an employee would be excluded from the provisions of Part 2 only if their primary or main duties are supervisory or managerial and if those duties occupy over 50% of their time.” The Branch applies the following tests to determine supervisory or manager status: "Does the employee have the authority to: 1. supervise and/or discipline other employees; 2. hire and/or fire other personnel; 3. expend funds on behalf of the employer and to what extent; 4. make decisions as to when and where work is to be done and by whom; 5. participate in policy or management planning?"^{40}

Czechoslovakia

The eight-hour working time law of 1918, which applied to enterprises subject to the Commercial Code as well as to agricultural and forestry enterprises, mentioned no exclusions.^{41} The official interpretation of the law provided that it regulated the hours of all workers and applied not only to workmen in the narrower sense, but to officials, manual and professional workers, as well as to agricultural and domestic service. In the industrial world it applied to: persons engaged in production and commerce; persons employed in law courts, and by notaries, stockbrokers, civil engineers, in doctors’ consulting rooms, hospitals, banks and insurance offices, public places of entertainment, in connection with the production of periodical publications, to cooperative societies, commercial travellers, firemen, and school attendants.^{42}

^{40}Yukon Territory, Labour Services Branch, Branch Policy Statement: Supervisor/Manager (March 21, 1985).
^{41}Gesetz vom 19. Dezember 1918 über die achtstündige Arbeitszeit, §§ 1.1 and 1.4, Sammlung der Gesetze und Verordnungen des Čechoslovakischen Staates, Nr. 91 (1918).
^{42}Circular of the Ministry of Social Welfare to All Administrative Authorities respecting the Interpretation of the Provisions Relating to the Eight-Hour Day, §1 (Mar. 21, 1918).
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European Union

The EU’s 1993 Working Time Directive\(^{43}\) required the member states to insulate that the workweek not exceed 48 hours—averaged over a reference period that can extend as long as four months (and up to 12 months by collective agreements).\(^{44}\) Even from this weak protection the member states are permitted to “derogate...when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of...managing executives or other persons with autonomous decision-taking powers.”\(^{45}\)

The EU has created even greater scope for subversion of protection of white- and blue-collar workers by including a so-called opt-out provision, which empowered employers for seven years (through 2003, at which time the Council of the European Union was required to reexamine the matter) to dispense with the 48-hour average workweek if they have “obtained the worker’s agreement to perform such work” and the employer does not subject the worker to any detriment “because he is not willing to give his agreement....”\(^{46}\) Unsurprisingly, a large proportion of

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\(^{46}\)Council Directive 93/104/EC of 23 November 1993 Concerning Certain Aspects of
professional and managerial staff received no compensation (in money or time off) for their overtime work.  

Although the Commission of the European Union has paid lip service to the need for "[e]nsuring compatibility between work and family life," its insistence on "greater flexibility" for "companies, which need to be able to respond to user and customer demand for extended operating hours or to adapt rapidly to sharp fluctuations in demand," has resulted in inaction.  

In response, the European Parliament in February 2004 voted 275 to 229 to call on the Commission to phase out the opt-out provision.  

The Commission was conflicted by its goal of giving "companies and Member States greater flexibility in managing working time" and avoiding "imposing unreasonable constraints on companies," while allowing "greater compatibility between work and family life...."  

In May the Commission stated that

the Organization of Working Time, Art. 18(1)(b)(i), in OJ L 307/22. The opt-out provision had been demanded by the UK and was used primarily by UK employers; see below.


if the social partners failed to enter into negotiations, it envisaged proposing: a tightening of the conditions for the individual opt-out to strengthen its voluntary nature; a stipulation that derogations from the maximum weekly hours be possible only through collective agreements; and phasing out the opt-out as soon as possible.51

The Council of European Professional and Managerial Staff reacted with “astonishment” to the Commission’s document both because it had failed to “recognise the abuses of law that have led, mainly in the United Kingdom, to a generalised use of the opt-out provision which was originally intended to be exercised on an individual basis,” and because it had ignored the problems of the wording in the aforementioned derogation clause in the Directive, “which is far too vague and permits the waiving of most of the provisions in the case of managing executives or other persons with autonomous decision-taking powers.”52 Eurocadres insisted that excluding managerial and professional staff from the Directive’s protections “has the effect of increasing work overload, with inevitable consequences for health and safety.”53 Another organization, the European Confederation of Executives and Managerial Staff/Confédération Européenne des Cadres, which represents 1.5 million executives and professionals in national federations,54 went even further, taking the position that the derogation should apply only to CEOs and senior managers.55

France

The draft bill that the French government published in July 1999 for a second


54http://www.cec-managers.info/english/cec-presentation.php

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35-hour statute\textsuperscript{56} setting forth more detailed provisions excluded large numbers of professional and managerial employees (cadres).\textsuperscript{57} The bill created three catego-

\textsuperscript{56}The first was Loi no 98-461 du 13 juin 1998 d'orientation et d'incitation relative à la réduction du temps du travail. Following the election of a conservative government in 2002, a law was passed on Jan. 17, 2003, which, while formally retaining the 35-hour week, increased the annual overtime quota from 130 to 180 hours and permitted employers to pay only a 10-percent premium rather than 25 percent through the end of 2005. Michel Husson, “Les 35 heures en question” (Aug. 26, 2004), on http://www.eiro.eurofound.eu.int/2004/08/word/fr0408108fr.doc.

\textsuperscript{57}The translator of a French sociological study of “cadres” treated it (including in the title) “as though it were an English word” on the grounds that the dictionary definitions (“salaried staff,” “officials,” “executives, managers, managerial staff”) “are all misleading.... One point of the book is that terms of social classification are never natural or neutral and hence should always be approached as though taken from a foreign language; the impossibility of translation should drive this point home for English-speaking readers.” Luc Boltanski, The Making of a Class: Cadres in French Society xiii (Arthur Goldhammer tr., 1987 [1982]). The Paris-based International Herald Tribune reported that what cadres, who included both top executives and nearly all skilled professionals, and almost one-fourth of the French workforce, had in common was a “quasi-executive social status—and a tradition of working long, often irregular hours without claiming overtime.” It was precisely to “end this practice as part of its campaign to force companies to shorten hours and create more jobs” that the socialist-led government enacted the 35-hour law. Joseph Fitchett, “French Workaholics Beware: The Law Is Moving In,” IHT, June 12, 1998, at 18. According to the 1999 census, the liberal professions, public function cadres, intellectual and artistic professions, and company cadres numbered about 3 million or 13 percent of a total working population of 22.8 million; company cadres accounted for 9.7 percent of industrial employment and 6.1 percent of commercial employment. http://www.recensement.insee.fr/EN/ST_ANA/F2/EMPALLEMP3EMP3AF2EN.html. At the time of the 1968 census, the two million cadres, technicians, and engineers—whom the French Communist Party regarded as intermediate salaried strata who at the same time produced and collected surplus value—had accounted for only 10 percent of the active population. Le Capitalisme monopoliste d'état: Traité marxiste d'économie politique 1:231, 238 (1971). An earlier study estimated the number of cadres in industry and commerce in the early 1950s at 250,000 to 350,000 or 3.75 to 4 percent of total employment. François Jacquin, Les Cadres de l'industrie et du commerce en France 64-69, 72 (1955). The term, which was borrowed from the army, first began to be used at the time of the Popular Front in 1936 and was given official legal existence during the Vichy regime and then by the arrêté Parodi (of Sept. 22, 1945). Nevertheless, it has remained fluid without explicit or unanimously recognized membership criteria or distinct boundaries. Luc Boltanski, Les Cadres: La Formation d'un groupe social 66, 128, 473 (1982); Jacquin, Les Cadres de l'industrie et du commerce en France at 243. For an overview of the social politics surrounding the special treatment of cadres in French social legislation, see Peter Baldwin,

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ries to be incorporated into the Labor Code (Code du Travail): (1) senior executives (les cadres dirigeants) to whom are entrusted responsibilities whose importance implies great independence in organizing their work schedule, who are entitled to make decisions in a largely autonomous manner, and who receive compensation at the highest levels in their firm or establishment; to be sure, such higher staff (cadres supérieurs), who are numerically a very small group, had long been excluded from French hours legislation on the grounds that they either exercised "true managerial power" in an enterprise or, by the very nature of their functions, enjoyed great independence in the organization of their work and, moreover, benefited from compensation that was calculated taking into account, implicitly, the time necessary for the accomplishment of their functions; (2) so-


60 Traité de droit du travail (G. Camerlynck ed.), vol. 3: Jean Blaise, Réglementation du Travail et de l’emploi 37-38 (1966). However, according to Michaël Amado, prior to the Lex Aubry (the 35-hour law), even senior executives were covered by working time laws if they were CEO (président) of a Société Anonyme, but are now excluded as cadre dirigeant; the CEO (gérant) of a Société à Responsabilité Limitée owning more than 50 percent of the shares was and is not covered by the working time laws. Email from Michaël Amado (Mar. 16, 2004). The first French eight-hour law of general applicability was enacted in the aftermath of World War I and in anticipation of the International Labor Organization convention. Loi du 23 avril 1919 sur la journée de huit heures, in JORF 76:4266 (Apr. 25, 1919). See also Ministère du Travail, Circulaire du 28 mai 1919, in JORF 51:5510-12 (May 28, 1919). See generally, David Saposs, The Labor Movement in Post-War France 230-35 (1931). The scope of the law’s coverage, which encompassed all personnel without exception of all industrial and commercial enterprises, was “as comprehensive as possible” and reproduced the coverage of the day of rest law of 1906. J. Cavaillé, La Journée de huit heures: le Loi du 23 avril 1919, at 53 (1919). The Loi établissant le repos hebdomadaire en faveur des employés et ouvriers of July 13, 1906 did not protect employers or heads of companies, agricultural workers, or—because their occupations lacked a commercial character—professors, lawyers, physicians, veterinarians, dentists, artists, or domestic servants. Lois annotées ou lois décrets, ordonnances (n.s.)
called integrated *cadres*, who constitute the largest group and are subject to collective agreements; and (3) an intermediate group, which must benefit from reductions in the duration of work. The draft bill excluded the senior executives from the provisions on working time; the integrated group working within a team according to the employer’s collective work timetable (les *cadres intégrés dans une unité de travail et suivant des horaires collectifs*) were included in all the regulations governing working time, just like other employees—i.e., the statutory 35-hour week, overtime, night work, time off, holidays and supervision of working time; finally, the intermediate managerial and professional staff were covered by a 217-day a year rule, subject only to a compulsory 11-hour daily rest between one working day and the next. By September 1999, three studies had been published confirming that all these groups of workers both worked longer hours than other employees (46 versus 41 hours) and perceived their hours as excessive. Unions, too, were critical of the government’s approach, complaining that it was regressive for managerial workers and permitted employers to work them 13 hours a day, 78 hours per week, and up to 2,800 hours annually (in contrast to the then prevailing maximum 10-hour day, 44-hour week, and 1,730-hour year). Instead, the unions called for equality with other workers and organized a large demonstration of *cadres* on October 12, 1999, while the National Assembly was debating the bill. In spite of further union demonstrations in November, the law as passed in January 2000 contained the provisions to which the unions had objected.

The Confédération Française de l’Encadrement-Confédération Générale des Cadres, a national union confederation, which organizes only managerial and professional staff, technicians, and supervisory staff, has sought the intervention of supra-national European bodies to annul the statute. Claiming that the law discriminated against managerial and professional employees, the union first brought suit before the European Court of Human Rights, which, however, was not ex-
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expected to produce a ruling for two to three years. The CFE-CGC also filed a complaint with the Council of Europe’s European Committee of Social Rights, which is charged with verifying that the Council’s European Social Charter is correctly applied. The CFE-CGC asked the Committee for a ruling that the law passed in 2000 violated certain provisions of the European Social Charter and to order the French government to pay 78 billion francs in damages suffered by the profession collectively. The union argued that the law violated Article 2 paragraph 1 of the Charter, by which the member states undertake to “provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit,” on the grounds that the law failed to provide for any daily or weekly limits on working time, so long as the maximum number of 217 annual working days was not exceeded; the only legal limits were the daily rest of 11 hours and weekly rest of 24 hours. The union also complained of discrimination because the managerial staff’s weekly working time, unlike other workers’, had not been reduced. In reply, the French government contended that since the law’s purpose was to reduce working time and the proportion of affected workers was less than 5 percent, it had complied with its obligation to apply the Charter to “the great majority of workers concerned.” In addition, the government maintained that managers’ particular situation justified reducing their work time by means affording “fair and realistic treatment” compared to that of other workers. The Committee found that the aforementioned daily and weekly rests permitted managers to work as many as 78 hours a week, which was “manifestly excessive” and thus violated the Charter. The union also complained that the law violated Article 4 paragraph 2 of the Charter, under which the member states undertake to “recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases,” inasmuch as the practical abolition of any reasonable limit to daily or weekly hours associated with the regime of 217 annual working days eliminated the possibility of overtime pay for managers. While acknowledging that the law created a system not subject to the obligation to pay for overtime work, the French government urged that this exception applied to only very few workers and was thus encompassed by the Charter’s permissible exemptions. The Committee found another violation of the Charter because the number of hours worked and not paid for at a higher rate was “abnormally high” and the hours-averaging period of one year was “excessive.” On the other hand, the Committee rejected without explanation the union’s demand for monetary damages.


66 European Committee of Social Rights, Complaint No. 9/2000: Confédération Fran-
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On March 26, 2002, the Committee of Ministers adopted a resolution, which, even if it had accepted the findings that the law violated the Charter, would still not have bound the French government. Instead, however, it merely:

1. Takes note of the fact that the aim of the measures in question is to enable autonomous managerial staff, whose working hours cannot be determined in advance, to benefit from a real reduction in their working time;
2. Notes that these managerial staff represent only a minority of salaried workers (approximately 5%);
3. Notes that under French law, the rules governing the working time of the workers in question must be laid down in an agreement drawn up between the social partners;
4. Notes that the provisions of ordinary law on working time have been brought into line with the system based on the number of days and that in particular the law establishes a maximum annual number of days and leaves it up to employees and employers to monitor actual working time;
5. Notes that the provisions of ordinary law on pay have also been brought into line with the system based on the number of days and that the pay awarded to the managerial staff is commensurate with their workload and working time.

Germany

The exclusion of white-collar employees from labor-protective laws in Germany has a long and unbroken tradition of focusing on the group of so-called leitende Angestellte. The Commercial Code of 1897 and the amendments to the...
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Industrial Code of 1900 excluded salaried employees with an annual salary of 5,000 marks or more from protection against dismissal on the grounds that there was no need to cover people in such an economic and social position. Until then the salary limit of 1,200 marks in the Garnishment Law of 1869, and of 2,000 marks in the Bismarckian Sickness Insurance Law of 1883, Accident Insurance Law of 1884, and Disability and Old-Age Insurance Law of 1889 had marked the upper limit of the working class. At this point, as the social question also began to encompass salaried employees, the boundary of the need for protection shifted from workers/salaried employees to salaried employees leitende Angestellte. For the first time it was not the function as the employer’s deputy that was the starting point, but the lack of need for protection; the exclusions thus affected salaried employees who were not managers or bosses, but enjoyed a comparable socioeconomic position. In other words, for the first time, too, salaried employees in proliferating staff positions were legally categorized together with their line counterparts. Given the small number of those with salaries above 5,000 marks, insurance-financial considerations were presumably not decisive in the adoption of this new regulatory approach; rather, the legislature may have identified this stratum as qualitatively distinct from the rest of the salaried employees.

Then in 1911, for the first time, leitende Angestellte were expressly mentioned term he found to be the Spanish alto directivo. Rolf Birk, “Der leitende Angestellte—Einige rechtsvergleichende Bemerkungen,” RA 41(4):211-17 at 213 (July-Aug 1988).

Handelsgesetzbuch, May 10, 1897, § 68, RGB 219, 233 (excluding clerks (Handlungsgehilfen) with an annual salary in excess of 5,000 marks from § 67 requiring at least one month’s notice).

Gewerbe Ordnung für das Deutsche Reich, July 7, 1900, §§ 133a, 133aa, 133ab, RGB 871, 959 (excluding plant officials (Betriebsbeamten), foremen (Werkmeister), and technicians who manage or supervise an establishment or department and those performing higher technical services such as machine and construction technicians, chemists, and draftsmen, from the requirement of at least one month’s notice).

Gesetz betreffend die Beschlagnahme des Arbeits- oder Dienstlohnes, June 21, 1869, § 4 (4), BGB des Norddeutschen Bundes 242, 243 (does not apply to the salary of persons permanently employed in private service insofar as the sum exceeds 400 talers).

Gesetz betreffend die Krankenversicherung der Arbeiter vom 15. Juni 1883, § 1, RGB 73, 74 (covering Betriebsbeamte with salaries up to 6 and two-thirds marks per day).

Unfallversicherungsgesetz vom 6. Juli 1884, § 1, RGB 69.


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(as "Angestellte in leitender Stellung") and included in the occupational disability, old age, and survivors insurance law for salaried employees, which also embraced plant officials, foremen, and other salaried employees in a similar "elevated or higher position," as well as salaried office employees insofar as they were not occupied with inferior or merely mechanical services.\textsuperscript{77} By 1919, however, in the wake of the social-political transformation wrought by Germany’s defeat in World War I, the statutory introduction of the eight-hour day for salaried employees—following by four months its achievement by industrial workers\textsuperscript{78}—expressly excluded "Angestellte in leitender Stellung, who are the supervisors of, as a rule, at least twenty salaried employees or fifty employees or whose annual labor earnings exceed seven thousand marks."\textsuperscript{79} Wolfgang Hromadka, the leading legal historian of the treatment of \textit{leitende Angestellte}, viewed this "generously" expansive exclusion—which affected virtually all higher salaried employees—as a quasi-

\textsuperscript{77}Versicherungsgesetz für Angestellte vom 20. Dezember 1911, § 1, \textit{RGB} 989. The use of the term had become necessary because on the one hand the legislature wanted to include in the new insurance all salaried employees with an annual salary of no more than 5,000 marks, but on the other hand the Reichsversicherungsamt had found that persons "in leitender Stellung" with autonomous responsibility such as company directors could not be subsumed under any of the occupational groups in the catalog of § 1 of the older 1889 Disability and Old-Age Insurance Law. Hromadka, \textit{Das Recht der leitenden Angestellten} at 103.

\textsuperscript{78}Anordnung über die Regelung der Arbeitszeit gewerblicher Arbeiter vom 23. November 1918, \textit{RGB} I:1334. Already one day after the armistice, the Rat der Volksbeauftragten declared that the political leadership of the government that had emerged from the revolution was "purely socialist" and that it was setting about to implement its "socialist program," which by January 1, 1919, would include the eight-hour maximum working day. Aufruf des Rates der Volksbeauftragten an das deutsche Volk, Nov. 12, 1918, \textit{RGB} I:1303-1304.

\textsuperscript{79}Verordnung über die Regelung der Arbeitszeit der Angestellten während der Zeit der wirtschaftlichen Demobilmachung vom 18. März 1919, § 12.2, \textit{RGB}. I:315, 318. The salary limit was keyed to the obligatory insurance limit. Also excluded were general managers or general agents (\textit{Generalbevollmächtigte}) and the registered corporate representatives. \textit{Id.} § 12.1. The eight-hour law also provided for a half-hour break after six hours (§ 2); the eight-hour norm did not apply to work that had to be undertaken immediately in emergencies, in the public interest, or to prevent the destruction of goods (§ 4); on 20 days a year the employer was permitted to employ salaried employees up to 10 hours (§ 5); it was permissible for collective bargaining agreements to deviate from these norms so that 48-hour weeks or 96-hour biweekly periods were permitted and on at most 30 days per year overtime could be performed, unless the overtime was compensated for by short hours at certain times of the year (§ 7); coverage extended to a broad group of office employees (§ 11). Hromadka, \textit{Das Recht der leitenden Angestellten} at 146.
foregone conclusion since an employee's freedom to shape his hours was considered one of the chief characteristics of autonomy, which in turn was characteristic of the activities of leitende Angestellte. Then collecting contradictory reasons for the exclusion, Hromadka added that protection was unnecessary because their working hours were as a rule not longer but shorter than those of covered workers; contrariwise, however, to promote their careers, they also had to keep open the possibility of extra working hours.80

The length of the workday and workweek was a focal point of class struggle in Germany during the Weimar Republic in ways that found no counterpart in the United States. Actuated by what they declared to be the impossibility of sustaining on the basis of an eight-hour day the requisite profits, standard of living, and reparations payments to the victors of Versailles, powerful employer interests tenaciously resented and resisted the revolutionary imposition of the eight-hour day and continuously pushed for a restoration of the pre-World War regime. The intensity of this specific conflict with the labor movement, which was primarily concerned with the negative impact on employment of overtime work during periods of high and rising unemployment, formed an important and integral part of the shifting party-political composition of successive national coalition governments during the 1920s. Because the original eight-hour laws were explicitly characterized as provisional measures of the economic demobilization period, as early as 1919 the government began work on a permanent statute. An analysis of the evolution of the numerous iterations of such a law under complex political constraints is unnecessary to rehearse here,81 especially because the legal treatment of white-collar workers, not being contentious, underwent virtually no change, not only during the Weimar Republic,82 but also during the Nazi period and the post-World War II

80Hromadka, Das Recht der leitenden Angestellten at 145-46. Though hardly peculiar to leitende Angestellte, Hromadka also alluded to “practical considerations” such as that not every type of mental work could be forced into a time table and that some activities like maintaining contacts could not be pressed into fixed time limits. Id.

81For a detailed archive-based reconstruction of the course of the numerous unenacted and enacted drafts of the working time law from 1918 to 1933, see Sabine Bischoff, Arbeitszeitrecht in der Weimarer Republik (1987). On the more detailed provisions of drafts that failed to become law in 1923, see Hromadka, Das Recht der leitenden Angestellten at 147-50.

82The only change occurred in 1923, when the law, which was promulgated reserving subsequent “definitive” regulation, was amended to permit overtime work of two hours a day on 30 days a year; the salary limit of 7,000 marks was eliminated and instead keyed to the maximum annual earnings set in the Insurance Law for Salaried Employees. Verordnung über die Arbeitszeit vom 21. Dezember 1923, §§ 3, 14, RGB I:1249, 1251. This provision was retained in the Bekanntmachung der neuen Fassung der Arbeitszeit-
Federal Republic of Germany.

Of greatest relevance in this context was the draft of a comprehensive labor protective law—of which the regulation of working hours was the core component at a time when the linkages between high and rising unemployment and overtime work were gaining attention—the inception of which dated back to 1926. Although the considerably revised draft that the Social Democratic Minister of Labor Rudolf Wissel submitted to the parliament in January 1929 never became law because political and economic events, especially catastrophic unemployment, rendered labor protective legislation moot, its proposed statutory provisions excluding certain groups of white-collar workers and the extensive accompanying justificatory discussion shed important light on the grand coalition party government’s reasons for treating these workers differently than their manual-labor counterparts.

The draft excluded from the definition of covered employees and thus from the proposed law altogether “general managers, plant managers, and other higher salaried employees, whose activity requires a special responsibility or who are to a considerable extent empowered to make autonomous decisions, and salaried employees who work in a confidential position for a leading figure [leitende Persönlichkeit] of the plant.” In addition, the provisions on working hours did not apply

verordnung vom 14. April 1927, § 14, RGB I:110, 112. A Ministry of Labor draft law from 1920 would have excluded “persons who exercise supervision or occupy a managing or confidential position.” Entwurf des Reichsarbeitsministeriums zu einem Gesetz über die Regelung der Arbeitszeit gewerblicher Arbeiter vom 14. September 1920, reprinted in Bischoff, Arbeitszeitrecht in der Weimarer Republik at 167. The draft as a whole and this provision in particular were designed to comply with the provisions of the 1919 ILO convention. Id. at 42-48. Bischoff did not report on any archival materials explaining why the Labor Ministry chose to reproduce the convention’s more exclusionary white-collar provision in lieu of the more protective coverage of the 1919 law. The draft did not become law and Germany also failed to ratify the convention. The only other draft document discussed by Bischoff that dealt with white-collar workers—another Labor Ministry product—was a 1921 working time law for salaried employees that apparently at one point had contained a provision excluding salaried employees engaged in “higher mental activity [höherer geistiger Tätigkeit],” but unions objected to this kind of “elastic clause” on the grounds that employers would use it to withhold the eight-hour day from numerous employees, and the phrase (and eventually the draft itself) was dropped. Id. at 70-71.


Entwurf eines Arbeitsschutzgesetzes, § 2(2), at 3.
to the “employment of salaried employees with scientific, artistic, instructional, pedagogical, pastoral, or religious activity” or to the patient-care or housekeeping personnel in hospitals and patient-care institutions.86

In explaining the reasons or grounds for these exclusions, the Labor Minister observed that the higher-salaried employees were excluded from the concept of “the employee” because, based on the entirety of their activity or their social position, they did not need labor protection. Removing this group from “the necessarily schematic provisions of a general labor-protective statute” was an “absolute necessity” since the people who worked in closest touch with the entrepreneur and often took his place had to have the same freedom in engaging in their activity that he did. Moreover, the ILO Washington Convention of 1919 (which Germany did not ratify) provided for the same exemption.87 Although the salaried employees’ superior position generally found expression in their salary level, it could not, according to the Labor Minister, be used as a general conceptual marker. Finally, with regard to people in confidential positions such as private secretaries who worked directly for a leading figure, who necessarily had to rely on them in their activity, this necessary cooperation with those not covered by the law compelled the exemption of such assistants as well.88

Significantly, the Working Time Law bills that parliamentary members of the Communist Party of Germany introduced in 1924, 1925, and 1926 included no exclusions whatsoever.89 When the Nazis promulgated the first version of an executive decree on working time (Working Time Code) in 1934, the provision on salaried employees in a leading position was identical with the wording of the original law from 1919.90 And the final working time law issued four years later differed only in dropping the alternative definitions of supervising 20 salaried employees or 50 employees in favor of 20 members of the following (Gefolg-

86Entwurf eines Arbeitsschutzgesetzes, § 10(1), at 5-6.
87“Begründung zum Entwurf eines Arbeitsschutzgesetzes” in Entwurf eines Arbeitsschutzgesetzes at 34.
88“Begründung zum Entwurf eines Arbeitsschutzgesetzes” in Entwurf eines Arbeitsschutzgesetzes at 60.
89VRSB vol. 382, no. 303 (June 27, 1924); VRSB vol. 397, no. 100 (May 1, 1925); VRSB vol. 411, no. 2691 (Nov. 23, 1926). Whereas the last bill was titled, Draft of a Law regarding Working Time for All Wage- and Salary-Earners, the first two expressly applied to all industrial and agricultural workers, commercial and technical salaried employees, and officials, domestic employees, hospital personnel, restaurant employees, all government employees, and ship and fishing crews (§ 1).
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schaffsmitglieder) in the Nazis' pseudo-medieval jargon for the collectivity of a plant's employees. In turn, this law remained in effect throughout the entire existence of the Federal Republic of Germany.

By the 1960s, leitende Angestellte were, according to Hromadka, at least in one respect, worse off than other employees: increasing pressure to legitimate themselves through performance and the fear of losing their occupational and social position and possibly even being exposed to economic privation led to extended working hours, more intensive work, and often longer hours than those of other workers. The resulting extreme stress ("manager disease") was a constantly recurring theme in their journal. Indeed, excessively long working hours became so characteristic for leitende Angestellte that they even turned into an indicator of their jobs.

For the first time during the economic crisis of 1966-67—which punctured the myth of the post-World War II economic miracle—leitende Angestellte were significantly affected in terms of dismissal; the accompanying public discussion of the threat of loss of social position was quickly linked to the discovery that leitende Angestellte were also in need of the protection of labor law. This shift was signaled in 1967 when the obligatory insurance limit as an alternative salary-level definition of leitende Angestellte in the Working Time Order was voided, in effect bringing about the incorporation of a large segment of leitende Angestellte into the statute. Recognition of their need for legal protection was reinforced two years later when the Law on Protection Against Unfair Dismissal was amended to include them. At this point, as their conditions of employment increasingly approximated those of other workers, while top management moved further upwards, leitende Angestellte drifted downward from an industrial upper stratum to middle management. That leitende Angestellte in the 1970s nevertheless continued to rank overly long working time first on their list of complaints may be linked to the perception that the Working Time Code was a "dead letter."
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Following the reunification of Germany, the Weimar- and Nazi-era Working Time Code was finally replaced by the Working Time Law in 1994, which does not apply to "leitende Angestellte within the meaning of subsection 5(3) of the Works Constitution Act and senior medical officers" or to "leitende Angestellte in the public service and their deputies, and workers in the public service who are authorized to make independent decisions in personnel matters." The Works Constitution Act, in turn, defines a leitender Angestellter (whom it also largely excludes) as one

who by contract of employment and position in the enterprise or works

1. is authorized independently to hire and dismiss employees in the works or in the works department, or

2. has a general power of attorney or full power of representation, and the full power of representation is also not insignificant in relation to the employer, or

3. regularly attends to other duties that are of importance for the existence and the development of the enterprise or of a works and the performance of which presupposes special experience and knowledge, if in doing so he either essentially makes decisions free of directives or substantially influences them; this can also be the case with given standards, especially those based on legal provisions, plans or guidelines as well as when cooperating with other leitenden Angestellten.

In keying exclusions from the regulation of working hours to those from the Works Constitution Act, the legislature imposed the purposes of the latter on the former’s. The intent of the exclusion from the Works Constitution Act is to exclude employees who “assume important executive functions in the company...and thus by their very functions are very close to management and consequently cannot both act on behalf of the entrepreneur and elect or be elected to the works council.” Regardless of whether employees close to management should have the individual protection and more toward macroeconomic considerations of limiting the supply of labor. Id. at 331.


right to vote for or be elected to the works council—a question that is itself contested—it is unclear why proximity to management per se should deprive employees of protection against mandatory overtime work. In terms of the relative numbers of leitende Angestellte, those with hire- and fire-power are small, since that power has largely been assigned to other bodies within the firm; indeed, such centralization has made the criterion obsolete. In contrast, those grouped under the aforementioned third heading “who perform executive functions of...an economic, technical, organisational, staff or scientific nature” comprised the majority. These senior staff duties “have to be performed on a level which is subordinated to the management (e.g. production, sales, operation); mere ‘important duties’, or those relating to preplanned entrepreneurial decisions or to a mere supervisory function are not sufficient.” If these executive duties are performed in a partial sector of the firm, it must be one that is “still important for the well-being of the whole company or the establishment” and “leaves sufficient room for individual creativity....” Two dimensions, however, that have not played a significant part in identifying leitende Angestellte are income and academic qualifications. Unlike the law governing bona fide executive or administrative employees under the FLSA, under the German law the execution of entrepreneurial decisions does not constitute the requisite entrepreneurial management task excluding a salaried employee from coverage.

German labor law scholars have repeated for decades that leitende Angestellte are “less in need of protection” in large part because their great importance for their firms as well as their commercial skills mean that they occupy a completely different position vis-à-vis their employer than the other employees and therefore as

102By the end of 1988, 400 firms had voluntarily created committees for executives in order to permit them to represent their interests in relation to the employer; in 1988 the statutory executives committees became mandatory. Halbach et al., Labour Law: An Overview at 329; Gesetz zur Änderung des Betriebsverfassungsgesetzes über Sprecherausschüsse der leitenden Angestellten und zur Sicherung der Montan-Mitbestimmung vom 20. Dezember 1988, BGB I S. 2312-13, 2316-24.
103Hromadka, Das Recht der leitenden Angestellten at 332.
104Halbach et al., Labour Law: An Overview at 329-30. Nevertheless, a survey conducted in the early 1970s of firms with at least 2,000 employees revealed that only leitende Angestellte received an annual salary of 55,000 marks or more. This finding prompted the researchers to remark that income was an appropriate identifying criterion; moreover, although its relevance was almost uncontested, it was not a causal, but an after-the-fact identifying characteristic. Eberhard Witte (with the assistance of Rolf Bronner), Die leitenden Angestellten: Eine empirische Untersuchung 54-59, 92-97 (1974).
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a rule are sufficiently capable of looking after their own interests.106 On the other hand, by the 1970s, the justification for the exclusion was coming increasingly under attack.107 One of Germany’s leading labor law treatises recently observed that legal developments had revealed that the lack of a social need for protection was no longer a viewpoint on which to base classification as *leitende Angestellte*. Consequently, they had in principle been incorporated into the social protective regime covering employees—with the exception, to be sure, of the working time law.108 And with respect to hours regulation, labor-protective considerations were irrelevant and could not trump a finding that an employee is a *leitender Angestellter*.109

In 1957 the number of *leitende Angestellte* was estimated at most at 1 percent of all employees; in 1965 the estimate was 1-2 percent at a time when the average gap between their income and that of other workers was in decline.110 During the 1970s a spate of studies came up with estimates of the number of *leitende Angestellte* in Germany ranging from 80,000 to 500,000. According to one estimate, they comprised 1 to 2 percent of all employees and as many as 5 percent in research-intensive branches such as the chemical and electrical industries. Another study estimated that 2.14 percent of employees and 6.03 percent of salaried employees were *leitende Angestellte*. At Daimler Benz 1,380 *leitende Angestellte* accounted for 4.8 percent of all salaried employees and 1.2 percent of all employees, while at the large Farbenwerke Bayer, Leverkusen, of 60,000 employees 3,100 or 5.2 percent were *leitende Angestellte*.111 In the late 1970s, one scholar estimated the number of *leitende Angestellte* at 0.4 million or 2 percent of the 19.3 million employees and 4.8 percent all salaried employees. Unsurprisingly, labor unions gravitated toward the lower estimates and employers to the higher estimates.

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110 Hromadka, *Das Recht der leitenden Angestellten* at 205-206. Hromadka also adduced estimates ranging from 100,000 in 1952 to 600,000 in the 1970s during a time when their numbers were increasing. *Id.* at 255 n.100.
111 Hoffknecht, *Die leitenden Angestellten im Koalitions- und Arbeitskampfrecht* at 16-17. Wolfgang Däubler, *Das Arbeitsrecht 2: Leitfaden für Arbeitnehmer* 842 (11th ed. 1998), pointed to a new study showing that the proportion of *leitende Angestellte* fluctuates between 0.4 and 5.1 percent.
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ones. Since the legal definition itself is amorphous and subject to intense controversy reflecting unions' and employers' self-regarding political goals, such data collection can hardly lay claim to objectivity or reliability. Some German labor lawyers have observed that identifying leitende Angestellte was difficult because the statutory criteria were imprecise, but nevertheless stressed that in practice their numbers were relatively few and confined to top management. But the confusion caused by the conceptual vagueness has prompted others to include middle management among them as well.

There is in fact no unanimity as to how far downwards the category of leitende Angestellte extends. According to one broad view, it encompasses not only those, like personnel managers, who attend to typical employer functions, but also all who are simply engaged in a highly qualified and responsible activity of importance for the establishment. This approach would include staff who advise the corporate management as well as those engaged in relatively autonomous work in research departments (thus incorporating several dimensions of the FLSA’s administrative and professional exclusions). On the other hand, another much narrower view, includes among leitende Angestellte only those who appear as the antagonist of the workforce und the works council. Nevertheless, Germany’s highest labor court,

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113According to Witte and Bronner, Die leitenden Angestellten at 21-23, unions regarded leitende Angestellte as employees who regularly, in place of the entrepreneur or the employer, took care of his managerial tasks independently; employers expanded the concept to include those who independently made decisions, supervised their execution, and provided top management with professional advice and information.
114Email from Gleiss Lutz Law Firm (Dr. Alexander Klett) (June 12, 2003). Delamotte, “Managerial and Supervisory Staff in a Changing World” at 3, characterized leitende Angestellte as senior managers. Klett also observed that neither the manager of a McDonald’s restaurant nor a claims representative like the one discussed in ch. 2 could qualify as leitende Angestellte.
115Birk, “Der leitende Angestellte” at 213, is certainly wrong in asserting that the term “supervisor” and “professional employee” in the Taft-Hartley Act are certainly...leitende Angestellte within the meaning of German law on the grounds that a supervisor is essentially equivalent to a Personalchef (personnel manager) in a German firm.
116Däubler, Das Arbeitsrecht 2: Ein Leitfaden für Arbeitnehmer at 389 (1979). Some scholars have questioned whether even the head of a company research department qualifies as a leitender Angestellter. BetrVG: Betriebsverfassungsgesetz 356 (Wolfgang Däubler, Michael Kittner, and Thomas Klebe eds., 7th ed. 2000). For a catalog of Bundesarbeitsgericht decisions finding and denying that employees were leitende Angestellte, see id. at 365-68. According to Witte and Bronner, Die leitenden Angestellten at 6, the only prevailing universal agreement was that those ranking immediately below the
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due to the Bundesarbeitsgericht, has held that a leitender Angestellter need not necessarily occupy an immediate supervisory position; consequently, staff as well as line positions are potentially work sites for leitende Angestellte.117

According to Wolfgang Däubler, a leading German labor law scholar, the Works Constitution Act does not so much offer a definition of the concept of leitende Angestellte as presuppose one. He arrived at this conclusion from the ad absurdum argument that otherwise the aforementioned relatively capacious subsection 3 of the definition would exclude from the protection of the act a large proportion of all salaried employees, whereas in fact the Bundesarbeitsgericht has clearly sought to confine the scope of the category within relatively narrow limits. Däubler has argued that this implied concept of leitende Angestellte has three components. First, a leitender Angestellter must have polar-opposite interests to those of the other employees and, in terms of the functions he performs, be their antagonist. Second, he must engage in entrepreneurial functions in the sense that he exerts decisive influence on the economic, technical, commercial, organizational, personnel, or scientific management of the enterprise. And third, he has to have considerable discretion, which, for example, a branch manager would be lacking who merely executes the central headquarters’ directives.118 Once again, it remains unclear why this type of antagonistic relationship to the rest of the workforce should justify depriving such higher-ranked employees of protection from overreaching superiors.

Leitende Angestellte, who have the right to join unions and some of whom have done so, are high earners and occupy the top rungs of the income hierarchy, yet their income is not so high that they can live on interest. Because they are excluded from the Working Time Law and are obligated to perform uncompensated overtime work, in many cases they cannot even count on sufficient leisure time; consequently, their higher earnings, in Däubler's view, are, as a rule, bought at the expense of a considerable expenditure of labor power. Thus, as with dependent employees, leitende Angestellte face job insecurity and the risk of premature wear and tear of their labor power.119 The extent to which employers take seriously the

corporate executive or managing body and representing the firm vis-à-vis the workers and outside contract partners were leitende Angestellte.


118 Däubler, Das Arbeitsrecht 2: Ein Leitfaden für Arbeitnehmer at 389-90 (1979). According to Günter Schaub Arbeitsrechts-Handbuch: Systematische Darstellung und Nachschlagewerk für die Praxis 1750 (8th ed. 1996 with 1999 Supp.), “Leitende Angestellte are...only such persons who can influence enterprise planning,” not, however, those who, for example, merely execute it.

119 Däubler, Das Arbeitsrecht 2: Ein Leitfaden für Arbeitnehmer at 391-93. Never-
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exclusion of leitende Angestellte from hours regulation is indicated by a survey revealing that 94 percent of firms offered no offset for additional work, with only 3 percent providing time off and three percent compensation. This practice reflects the longstanding objections of German employers—which has been echoed in the United States and elsewhere—in negotiations and mediations to paying for overtime on the grounds that the additional work had already been taken into consideration in determining salaries, in which consequently “the overtime compensation was already included.”

Finally, it should be noted that in contrast to the situation under the FLSA, although there is no public-law recourse for those excluded from Working Time Law, general civil law principles may be of help. For example, a contractual agreement that demands from an employee a task that exceeds general human capacities and the limits of reasonable expectations may be null and void.

Italy

As early as 1923 Italy excluded the managing staff (personale direttivo delle aziende) from its eight-hour legislative decree. The implementing decree of the
same year went far beyond today's understanding of excluded higher managers (dirigenti) by specifying that the law also did not to apply to chief clerks (capi ufficio) and section heads (capi reparto).\textsuperscript{124} It defined "managing staff" as "persons in charge of the technical or administrative management of the undertaking or a branch thereof, who are directly responsible for the conduct of the work, i.e., administrators, managers, technicians or managing directors, chief clerks and section heads who perform manual work in exceptional cases only; it shall not include shop assistants and other salaried employees of lower grades...nor persons who, though they are entrusted with the technical direction of a process, take part in the actual manual work involved in its execution."\textsuperscript{125}

In Italy, as elsewhere, the predominating protective principle was limited in this case because the dirigenti, on the basis of their bargaining power, qualifications, and compensation levels, were deemed less in need of protection than other workers.\textsuperscript{126} Italian labor law scholars have been divided over the purpose of this exclusion. Some authors have argued that the work performed by executives was of an irregular character and thus associated with less wear and tear. Others have considered the view more persuasive that—especially the highest-level—executives were in a better position effectively to take care of their health, family, and social interests vis-à-vis employers' excessive expectations. But in Italy even those managers who are excluded from working time regulation cannot be obligated to work to an unlimited extent. The Constitutional Court, dealing with the question of whether the exclusion is reconcilable with the principle of equality in article 3 of the constitution and that of appropriate compensation in article 36, has found a quantitative limit in the necessity of maintaining the dirigenti's health. Even in the absence of a statutory or contractual maximum number of hours, an upper limit is set by the constitutional guarantee of health and physical and psychic integrity. In addition, although there is no statutory prescription of overtime pay for dirigenti,

\textsuperscript{124}Erhard Hernichel, \textit{Die leitenden Angestellten (dirigenti) im italienischen Arbeitsrecht} 56 n. 176 (1999).

\textsuperscript{125}Regio Decreto, Sept. 10, 1923, § 3(2).

\textsuperscript{126}Hernichel, \textit{Die leitenden Angestellten (dirigenti) im italienischen Arbeitsrecht} at 17.
case law has created a basis for payment where there is an agreement as to the normal working time or a plant custom or the employer unilaterally sets it. The employer must pay for overtime work in those cases in which the scope of the demanded performance is expanded inappropriately in a way that produces an oppressive impact and wear and tear exceeding the limits on the protection of their health.  

Finally, in 2003 Italy issued a legislative decree embodying the EU’s directive including its permissive exclusions for managers and others with autonomous decision-making power, the duration of whose working time cannot be predetermined or can be determined by these employees themselves.  

Luxemburg

The hours provision (§ 17(c)) of the Consolidated Text of the Acts respecting the Legal Regulation of the Contracts of Service of Salaried Employees in Private Employment does not apply to "persons occupying positions of actual management and senior staff whose presence in the undertaking is necessary for its operation and supervision." According to case law, these exclusions presuppose that the employees in question actually exercise managerial power, that their tasks confer a certain authority, that they enjoy great independence in organizing their work and their working time, and that they receive appropriate compensation, which, at least implicitly, has been fixed with regard to the time required for carrying out these tasks. The employee who must direct and control other employees, secure relations with third parties and suppliers, and generally look after the smooth running of the employer’s business, occupies a position of management and of superior rank and


129 See also Loi du 1er août 1988 concernant le repos hebdomadaire, § 23: "Les dispositions du présent article ne sont pas applicables...c) aux personnes occupant un poste de direction effective ainsi qu’aux cadres supérieurs dont la présence à l’entreprise est indispensable pour en assurer le fonctionnement et la surveillance."
therefore has no claim to payment for overtime work. In contrast, an assistant manager lacks the freedom of action in organizing work, independence in service, and compensation of such excluded positions.\textsuperscript{130}

**Netherlands**

The working hours law that the Netherlands enacted in 1919 did not apply to the “work of persons exclusively or mainly in charge of the management of an undertaking or part of it or of the scientific research or scientific control of it” or to the “work of persons whose annual income in the undertaking in which they work exceeds a limit indicated by Royal Decree which limit, however, shall not be fixed” at less than 3,000 gulden.\textsuperscript{131} The 1937 decree covering office work did not apply to office or department heads, chief clerks, heads of managing departments, chief accountants, chief cashiers, drawing office heads, persons responsible for scientific work requiring a scientific education (meaning a university degree), and to persons whose remuneration exceeded 3000 gulden.\textsuperscript{132} This tradition of using salary levels as a definitional exclusionary principle has been retained in the most recent (1995) Working Time Law,\textsuperscript{133} from whose hours and overtime provisions are excluded employees who are exclusively or mainly executives (including top management) with an annual wage at least twice the minimum wage (which, as of Jan. 1, 2003, was 32,400 euros, which, at an exchange rate of 1.13, amounted to $36,612) as well as “higher personnel” with an annual wage at least three times the minimum wage (which equaled 48,600 euros or $54,918).\textsuperscript{134}


\textsuperscript{131}Act Providing for the Regulation of Hours of Labor, § 91 (Nov. 1, 1919), in *BILO*, 14(1-3):150-81 (1919). In January 1920 the highest listed minimum weekly wages in guilders in collective bargaining agreements for Amsterdam were 42.75 for machine compositors, which for 52 weeks would have amounted to 2,223 guilders. C. Zaalberg et al., *The Netherlands and the World War: Studies in the War History of a Neutral*, Vol. II (fold-out chart opposite p. 342) (1928).

\textsuperscript{132}LS 1937—Netherlands. 2: Hours of Work Decree for Offices, § 7 (May 8, 1937). With the exchange rate of a Dutch gulden at 54.88 cents on May 8, 1937, 3000 gulden was about $1,646.40. "Foreign Exchange Rates," *NYT*, May 10, 1937 (34:1).


\textsuperscript{134}Besluit van 4 December 1995 houdende nadere regels inzake de arbeids- en rusttijden, art. 2.1:5.1.a. and d, 2.1:6, on http://www.sodm.nl/Data/nieuw%20data/ arbeids-
To be sure, as pointed out by Frank Tros, an expert on the regulation of employment conditions in the Netherlands, the fact that the working hours law excludes managers earning twice the minimum wage and workers earning three times the minimum wage does NOT mean that employers can require them to work unlimited hours because: these groups are also protected by the general doctrine of "fair employership" (or "fair practise of employment") in private law; 85% of Dutch employees - inclusive executives and higher salaried personnel - are under collective agreements (mostly only the very very high executives are excluded from the CA). These CA regulate general standards on working hours which are specifications of the standards in the Act and are mostly stricter norms than the legal norms. So, it is true that in cases of these workers' categories, employers cannot be sanctioned by public authorities, but that it is the responsibility of these workers to complain to trade unions or go to court. The trade unions are not making a point of the exclusion of higher categories of personnel. These workers are a small minority of their members. There is a general societal/political norm that these workers are able to have the responsibility to arrange their terms and conditions of employment without the protection of law or CA. The average gross income of employees in the NL was in 2002 23,200 Euro.135

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tijdenbesluit.pdf; http://www.nvbr.nl/cms/show/id=447326. In 2000, gross employee income per hour in manufacturing was 35.81 fl, which at an exchange rate of 2.2 with the euro equaled 32,555 euros for 2000 hours, which, however, is far more hours than Dutch workers work. http://www.cbs.nl/en/figures/keyfigures/sip_410z.htm. According to Ministerie van Sociale Zaken en Werkgelegenheid, Arbeidstijdenwet: Een regeling voor bedrijven en overheid 9 (Mar. 2003), on http://www.szw.nl, in order not to fall under the rules for working time, an executive has to earn on an annual basis more than twice the minimum wage (32,400 euros as of Jan. 1, 2003) and higher personnel have to earn three times (48,600). As of Jan. 1, 2004, the monthly minimum wage for an adult was 1,264.8 euros, which equaled 15,177.6 euros annually; to this must be added an 8 percent vacation supplement, bringing the annual total to 16,391.81 euros, which by regulation is rounded to the nearest 100. Thus the two- and three-fold amounts were 32,800 and 49,200 euros. http://home.szw.nl/navigatie/rubriek/dsp_rubriek.cfm?link_id=34293&doctype_id=15#2928100; http://home.szw.nl/navigatie/rubriek/dsp_rubriek.cfm?rubriek_id=3&subrubriek_id=300&link_id=1557. At a euro/dollar exchange rate of 1.2663 (Feb. 23, 2004), these amounts were $41,534.64 and $62,301.96. http://www.xe.com/ucc/convert.cgi

135 Email from Frank Tros (Sept. 1, 2003). Tros is a senior researcher at the Hugo Sinzheimer Institute, an interdisciplinary research center on labor and law at the University of Amsterdam.
Spain

The Worker’s Charter (Estatuto de los Trabajadores) of 1980 excludes employment relationships of a special nature including senior managerial staff (personal de alta dirección), although it still requires the regulation of their employment relationships to respect the basic rights conferred by the constitution. In 1985 a royal order was promulgated defining such senior managers and explaining the legal regulation of their working time. This group included “those workers who exercise powers inherent in the juridical ownership of the enterprise and relative to its general objectives, with autonomy and full responsibility limited only by the criteria and direct instructions emanating from the person or the higher organs of governance and administration of the Entity which respectively occupies that ownership.” The order provided that working time in terms of the working day, schedules, holidays, and leaves, as well as for vacations, “shall be that fixed in the provisions of the contract, provided they do not constitute performance on the part of the employee that markedly exceeds that which is customary in the relevant professional field.”

Sweden

The Act Concerning the Limitation of Working Hours of 1919 excluded fore-
men or other officials in a superordinate position, draftsmen, bookkeepers, and persons in a similar position, and porters or other subordinate office assistants, as well as shop assistants. The need for regulation of white-collar workers' working hours in Sweden was said to be less urgent because, with the exception of shop clerks, they worked shorter hours than manual laborers. The claim that salaried workers were employers' special confidential employees also played a part in the resistance to including them in the law.

United Kingdom

The UK is the only member of the EU that took full advantage of the aforementioned opt-out provision of the Working Time Directive so that its hours limitation "shall not apply in relation to a worker who has agreed with his employer in writing that it should not apply in his case...." In addition, UK regulations made the EU's already expansive exclusion of white-collar workers even broader by providing that: "Where part of the working time of a worker is measured or predetermined or cannot be determined by the worker himself but the specific characteristics of the activity are such that, without being required to do so by the employer, the worker may also do the work the duration of which is not measured or predetermined or can be determined by the worker himself," the maximum workweek provision "shall apply only to so much of his work as is measured or predetermined or cannot be determined by the worker himself."

In tandem with the UK government, which was reportedly "determined to retain the opt-out," the Confederation of British Industry launched a campaign in 2003 to subvert what was left of the (only six-year-old) first modest effort ever in the UK to regulate the working hours of adult men. Its guiding propagandistic principle was a voluntaristic perspective directly contradictory of labor standards legislation: "workers must retain the right to say no, but they must also retain the right to say yes to work longer hours."

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140Folke Schmidt, Tjänsteavtalet 216-17 (1959).


while conceding that “the UK has the longest working hours in Europe” and that “longer hours are most common among managerial and professional staff,” the CBI could find no better self-contradictory justification for this “‘long hours culture’” than that there was “no evidence that they are forced to work these hours, rather they choose to do so voluntarily, for career reasons, for reasons of professional pride or commitment to their work.”

The rhetorical vacuity of this allegation was underscored by a government survey revealing that “[t]he most common reason for working long hours, mentioned by 42% of employees who worked overtime, was because they had too much work to do in their normal working day.”

That the CBI “pledged to ‘fight tooth and nail’” against the European Commission’s aforementioned proposal to phase out the opt-out provision was no surprise, but the Labour government’s adoption of the same voluntarism that is antithetical of mandatory labor standards was breathtaking: “The Government believes strongly that the UK’s competitiveness should not depend on people working long hours but equally that people should be free to determine their own working patterns.”

Equally astonishingly, whereas an empirical study of the opt-out provision had concluded that “[b]ecause the UK lacks effective mechanisms of employee representation, it does not have the means needed to implement the continental European model of annualisation and reduction of working time,” the


149Catherine Barnard, Simon Deakin, and Richard Hobbs, “Opting Out of the 48-Hour Week: Employer Necessity of Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK,” ILJ 32(4):223-52 at 252 (Dec. 2003). Pessimistically, the authors also noted the likelihood that even if the individual opt-out were eliminated, “employers would shift their attention to the derogation for ‘unmeasured’ working time.” Id. at 251. This strategy would also have its most severe impact on white-collar workers. For a less critical view of the use of the opt-out provision published by the Labour Government, see Fiona Neathey and James Arrowsmith, Implementation of the Working Times Regulations 33-38 (Dept. of Trade and Industry, Employment Relations Research Series No. 11, 2001), on http://www.dti.gov.uk/er/embr/ wtr.pdf.
Labour government turned this argument on its head: with only 30 to 35 percent of the UK workforce covered by collective agreements, it would not be "fair" to exclude the other 65 percent from individually opting out of hours regulation. The consequences of such atomization of the labor market were predictable: the two occupational groups with the highest proportion of full-time employees working more than 48 hours a week—managers/senior officials (34 percent) and professional occupations (29 percent)—were also the two groups with the highest proportion preferring to work shorter hours (74 and 73 percent, respectively).

**Uruguay**

An Act Limiting the Daily Work of Workers, Employees, etc., to Eight Hours Throughout the Territory of the Republic of 1915 covered workers in factories, construction, and employees or assistants in industrial and commercial establishments. The Decree to Make Regulations under the Labour Laws Respecting the Limitation of the Hours of Work in Industry, Commerce and Offices of 1957 provided that the maximum hours prescribed in the laws and the International Labor Convention (No. 1 and 30), under which these regulations were made, did not apply to directors, managers, heads or principal representatives of commercial or industrial undertakings or persons holding positions of supervision or management, or to technical directors of industrial departments, in which they were not required to work according to a regular schedule. The following persons were deemed to occupy a position of management or supervision or to be employed in a confidential capacity: managers, undermanagers, accountants, consultants of every kind, senior administrative or technical employees replacing managers, undermanagers, heads or principal representatives in direction or charge of the workplace; secretarial employees assigned to duties of direction or management.

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152 Ley por la cual el trabajo diario de los obreros, dependientes, etc., se fija legalmente en ocho horas en todo el territorio de la República § 1 (Nov. 17, 1915), in *BILO* 11(1,2):29-30 (1916). The law also provided that workers shall not be employed anywhere if they have already worked the maximum number of hours elsewhere (§ 5); while the employer was subject to a fine of 10/15 pesos for violations, workers could be fined up to the amount they earned by extra work (§ 6). The eight-hour law of 1915 and other labor legislation were in part inspired by a Bismarckian attempt to integrate the urban working class into the Colorado party. M. Finch, *A Political Economy of Uruguay Since 1870*, at 41, 44 (1981).
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and who were more than mere subordinates; persons in charge of a section, department, workshop, shift, mechanics, boiler personnel or a gang, and assistant chiefs for such time as they did the work of chiefs. Only employees with a salary of 1500 pesos per month or more were covered by this article. In the case of employees holding a management position or not subject to the continuous and direct supervision of the employer or owner, the hours of actual work were the normal working time of the personnel under their orders.\textsuperscript{153}

\textsuperscript{153}§§ 1(3) and (4), 5, and 7 (Oct. 29, 1957) in \textit{LS} 1957--Ur. 1.