“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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Fānpihuà Press
Iowa City
2004
Exemption on the ground of exercise of confidential or managerial functions is worthy of notice, for a more or less liberal interpretation of these terms would exclude a large number of employees from the scope of the regulations. ... It is apparent that there is an advantage in being as precise as possible on this point unless it is desired to make the regulations limiting hours of work inapplicable to large numbers of employees.¹

The last model of treatment of white-collar workers for purposes of working-hours legislation that Congress had available to draw on in 1937 was the set of standards codified by the International Labor Organization² in its Hours of Work (Industry) Convention of 1919, Hours of Work (Commerce and Offices) Convention of 1930, and Forty-Hour Week Convention of 1935. The industrial hours convention may have been most present to the congressional mind since it had been debated and adopted at the first annual meeting of the League of Nations International Labor Conference, which had taken place in Washington, D.C., and over which Secretary of Labor William Wilson had presided, even though the United States ultimately never joined the League or ratified the convention.³


²The International Labor Organization is a specialized agency of the United Nations, which was established in 1919 by the Versailles Treaty, which also created the League of Nations. The International Labor Office is the permanent secretariat of the ILO. The International Labor Conference is the annual meeting of the member states of the ILO. See Treaty of Versailles, Art. 387-420 (June 28, 1919). The governments of the states represented at the conference guaranteed that they would present the conference recommendations to their national legislatures for approval. “Labor Conference Closing Its Work,” *NYT*, Nov. 24, 1919 (5:2-5 at 3-4).

³“Secretary Wilson Heads Conference,” *NYT*, Nov. 1, 1919 (9:1). In 1934 Congress authorized the president to accept membership in the ILO, its first stated purpose having been that progress toward solving the problem of international industrial competition could be made through international action regarding wage earners’ welfare. S. J. Res. 131, ch. 676, 48 Stat. 1182 (June 19, 1934). For the details of the Roosevelt administration’s
Against the background of labor union agitation and governments’ fear of Bolshevism in the wake of World War I and the Russian Revolution, the Treaty of Versailles, in creating the International Labor Organization, declared:

Whereas the League of Nations has for its object the establishment of universal peace, and such a peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice, hardship, and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required: as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of freedom of association, the organisation of vocational and technical education and other measures;

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries;

The HIGH CONTRACTING PARTIES, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, agree to the following:

A permanent organisation is hereby established for the promotion of the objects set forth in the Preamble.

The Treaty scheduled the first meeting of the annual labor conference for decision to join the ILO in 1934, see Frances Perkins, *The Roosevelt I Knew* 337-46 (1946).


Treaty of Versailles, Part XIII, § 1 and Art. 387 (June 28, 1919).
October, 1919, in Washington, D.C., requested the government of the United States to convene it, and placed as the first item on its agenda “Application of principle of the 8-hours day or of the 48-hours week.” In its “General Principles,” the Treaty then explained:

The High Contracting Parties, recognising that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme international importance, have framed, in order to further this great end, the permanent machinery provided for in Section 1 and associated with that of the League of Nations.

They recognise that differences of climate, habits, and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labour difficult of immediate attainment. But, holding as they do, that labour should not be regarded merely as an article of commerce, they think that there are methods and principles for regulating labour conditions which all industrial communities should endeavour to apply, so far as their special circumstances will permit.

Among these methods and principles, the following seem to the High Contracting Parties to be of special and urgent importance: ...

Fourth. The adoption of an eight hours day or a forty-eight hours week as the standard to be aimed at where it has not already been attained.

The ILC in Washington was, from the vantage point of contemporary labor advocates, “merely one part of a very great movement of immense social importance which took place for the shortening of the working hours in 1919-20.” Before the Treaty instructed the ILC to draft its eight-hour day or 48-hour week convention in 1919, 21 countries, during or in the immediate aftermath of the war, had embodied the principle in their legislation or constitutions. Only Sweden,

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8 Treaty of Versailles, Art. 427. In February 1919, the U.S. delegates on the Commission on International Labor Legislation of the Peace Conference proposed as one of the fundamental principles to be incorporated into the treaty that “the work day in industry and commerce shall not exceed eight hours per day, except in case of extraordinary emergency, such as danger to life or property.” “Americans Submit Labor’s Peace Ideas,” NYT, Feb. 9, 1919 (2:7). Samuel Gompers was the general chairman of the commission, which drafted the language cited in the text above. “Report on Labor to Plenary Session,” NYT, Apr. 12, 1919 (5:1). In general, see “Report of the Commission on International Labor Legislation to the Peace Conference” (Mar. 24, 1919), in MLR 8(5):1227-52 (May 1919).
9 166 H.C. Debates 5 Ser. 253 (July 3, 1923) (Charles Buxton).
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however, had “anticipated the international convention by specifically excluding persons employed in a managerial capacity and in positions of confidence.” In fact, the Swedish law, which King Gustav had signed only two weeks before the conference began, excluded foremen 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 Organizing Committee for the first ILC, created by the Treaty to assist the host government (in fact the United States) in preparing documents to be submitted to the Conference, did profess to proceed from the principle of the actual eight-hour day or 48-hour week, which will not be merely a “standard” or “basic” week on which normal wages will be calculated and which determines the point at which overtime pay at increased rates is to begin. Such a standard leaves the number of hours of work unlimited except insofar as may be agreed upon between the employers and workers or the enhanced rate of payment may make the employer less willing to work the longer hours. It therefore fails to provide the protection against undue fatigue, to ensure the reasonable leisure and opportunities for recreation and social life, which it is the purpose of the Treaty to secure to all workers.

The Committee also clearly recognized that:

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Questionnaire 10 (1929). Austria, Finland, the Netherlands, Russia, Sweden, and Switzerland limited the amount of overtime.

11Magnusson, “Comparison of Foreign Eight-Hour Laws” at 781.

12Lag om arbetstidens begränsning, § 2 and § 1(j) (Oct. 17, 1919), in Svensk Författningssamling, Nr. 652 at 1787-91 at 1787 (1919). For a somewhat wooden English translation, see BILO 14(1-3):199-205 at 200 (1919). 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. Folke Schmidt, Tjänsteavtalet 216-17 (1959).

13Treaty of Versailles, Part XIII, § 1, ch. III, Art. 424 and Annex. The United States was one of seven members of the committee, the others being Great Britain, France, Italy, Japan, Belgium, and Switzerland; four of the seven national representatives were government officials, the other three professors. The U.S. representative was Prof. James Shotwell, who was then replaced by Samuel Gompers. League of Nations, Report I: Report on the Eight-Hours Day or Forty-Eight Hours Week (Item I of the Agenda): Prepared by the Organising Committee for the International Labour Conference, Washington, 1919, at 148, 13 (n.d. [1919]).

Except where the workers are very highly organised and strong enough to prevent any encroachments by the employer, enforcement of a statutory limitation of working hours is impossible unless the daily hours of work are ascertained and published beforehand. A Government inspector cannot check effectively the hours that are being worked in a particular factory, unless the times for work each day are definitely fixed and work outside those times...made illegal.\footnote{League of Nations, Report on the Eight-Hours Day at 131.}

In spite of these important insights, the Organizing Committee nevertheless not only advocated solely the 48-hour week,\footnote{League of Nations, Report on the Eight-Hours Day at 136, 142.} but expressly left it up to the Conference to choose either the 48-hour week or, alternatively, the eight-hour day.\footnote{League of Nations, Report on the Eight-Hours Day at 3. The Committee also took the position that it was to deal only with industrial workers and not at all with commerce or agriculture. \textit{Id.} at 3-4.} The Committee's departure from the fundamental requirements of hours standards legislation and its sympathetic understanding for national laws "[t]o ensure such elasticity in the application of the principles as will allow industry to adjust itself to technical and commercial exigencies"\footnote{League of Nations, Report on the Eight-Hours Day at 36.} may in part have been a function of the extensive information that it solicited from the various national governments on the existing state of the law on which it based its recommendations "as to the extent to which an agreement between the States may be found to be possible at the present time."\footnote{League of Nations, Report on the Eight-Hours Day at 2.} The hundred pages of summarized legislative eight- and 48-hour regimes that the Committee published constituted unmistakable proof of a broad spectrum of regulatory approaches almost all permeated with and perforated by an overwhelming number of exceptions and exclusions.\footnote{League of Nations, Report on the Eight-Hours Day at 5-104.} Significantly, with the exception of Siam, whose royal government contemplated taking no legislative measures at that time,\footnote{League of Nations, Report on the Eight-Hours Day at 108.} the United States was the only government that failed to state whether (let alone that) it was prepared to adopt a limit of eight hours a day or 48 hours a week.\footnote{League of Nations, Report on the Eight-Hours Day at 105-108, 153. In addition to numerous countries that had already adopted such laws, the United Kingdom stated that it was prepared to do so (although it did not), while Canada, Australia, and New Zealand either expressed interest or stated that these hours regimes already prevailed. In contrast, the U.S. government merely summarized the existing (inadequate) state of the law without taking a stand on the issue.}
The Organizing Committee prepared a "Draft Convention," which excluded "persons holding positions of supervision or management or employed in a confidential capacity who are not usually employed in manual labor." Intriguingly, this exclusion appears to have been prompted by the objection of a single country. The Organizing Committee had solicited responses from the various governments to the question as to whether it would be "necessary to except from the limit" of eight and/or 48 hours any industries, branches of industries, or "[p]articular classes of workers," and if so for what reasons. Only the United Kingdom—whose numerous requests for various exemptions accounted for about 40 percent of the replies the Committee published—responded straightforwardly that among the "particular classes of workers needing exemption" were "[p]ersons who hold positions of supervision or management, or are employed in a confidential capacity, including foremen and overlookers." This wording, which was adopted almost verbatim by the Organizing Committee and has remained in the convention into the twenty-first century, was ironically requested by a state that neither ratified the convention nor ever enacted its own general hours statute. Nor did the

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28 The House of Commons voted that it was "not expedient" to proceed with legislation to give effect to the convention. PD, HC (5th ser.) 142:471-552 at 535-38 (May 27, 1921). Only 52 countries have ratified the convention, of which one (New Zealand) later denounced it; four countries (Austria, Italy, Latvia, and France) registered meaningless conditional ratifications. Belgium, Luxemburg, Portugal, Romania, and Spain are the principal European ratifiers. http://www.ilo.org

29 On Aug. 18, 1919, the Minister of Labour, Robert Horne, presented a 48-hour bill (permitting overtime at a one-and-a-quarter premium), which excluded "persons employed in a confidential capacity who are not usually employed on manual labour" and "persons holding responsible positions of supervision or management, who are not usually employed in manual labour, or...persons who are in receipt of upstanding [i.e. fixed] wages which have been fixed upon a basis of hours equal to or less than the statutory working week, and which cover overtime necessarily worked to enable such persons to perform their duties to their employers and to the workers under their charge." A Bill to Regulate the Number of Hours of Employment, Bill 197, in Bills, Public: Two Volumes, Session 4 February 1919 - 23 December 1919, Vol. I (1919). It made no progress. See also A Bill to Regulate Conditions of Employment, Bill 77 (May 12, 1919), in id. Another bill was
British government furnish a reason for the exclusion, as it at least attempted to do, for example, with “[l]aboratory chemists and persons engaged in research work and testing work. It is impossible to break off such work until it is finished.”

Otherwise, only the state of Queensland in Australia suggested that hours limitation should not apply to men engaged on “management works and superintendents.” Not even Sweden, which, as noted, was in the process of enacting an hours law that expressly excluded the same categories whose exclusion Britain demanded, mentioned them in the long list of requested exemptions that it submitted. The United States government modestly raised the mere possibility that transportation, agriculture, and seasonal employments “may call for exemptions generally or for special consideration.”

The rather capacious and vague definition that the Draft Convention devised must be gauged against a whole array of broad definitions and exclusions that significantly constricted the coverage of the hours limitation. First, the convention applied only to industrial undertakings and left it to individual national laws to...

introduced in the House of Commons on July 3, 1923, both to carry out an agreement reached in April 4, 1919 at the National Industrial Conference, held under government auspices, of employees and employers to regulate the working hours of all employees, and to effectuate the Washington Convention, but the bill “made no progress....” League of Nations, *International Labour Conference: Twelfth Session: Geneva — 1929*, Vol. I — First, Second and Third Parts 98 (1929) (Joseph Hallsworth, workers’ adviser, British Empire, and secretary general of the National Union of Distributive and Allied Workers).


draw the line between covered industry and excluded commerce and agriculture. Second, the entire panoply of exclusions was driven by a notion of "elasticity" and the practice of hours-averaging that subverted the principledness of a maximum hours regime. The eight-hour day itself was abandoned in favor of the 48-hour week for the sake of "more elasticity in the arrangement of the hours of work...."34 (By the late twentieth century, employers’ favored hours-regulation doctrine had been renamed "flexibility."盘)35 Employers were empowered to work shift workers more than 48 hours a week subject to an average 48-hour week over a month. Continuous process industries were also empowered to exceed 48 hours, provided that the average workweek did not exceed 56 hours. Sixty-hour weeks were authorized for workers "who have to come in before the normal hour for beginning work, or to remain after the day’s work is over," such as boiler attendants and electricians, as well as for maintenance and repair workers; 60-hour weeks were also the maximum for laboratory chemists and those engaged in research or testing work. Annual overtime of 150 hours (at one and a quarter time) was permitted for seasonal industries as well as for those "liable to sudden press of orders arising from unforeseen events" such as the clothing industry.36

The committee, characterizing the decision facing the ILC on overtime in other industries as "perhaps the most important" that it had to make, recommended, in light of the fact that "overtime is not an economical means of increasing production," that the conference not permit such overtime, but that if the ILC decided that during the postwar reconstruction period "the power to work overtime...can not be entirely taken away,"37 employers in other industries should be permitted to work their employees as many as 150 overtime hours annually during the following five years and up to 100 hours annually thereafter.38

Two interconnected controversies ran through the debates at the first ILC in November 1919. One dealt with the more general issue of whether it was more important to limit, for all covered workers, the workweek to 48 hours or the workday to eight hours; the other involved the more specific question of the coverage of office workers.

At the session on November 4, George Barnes,39 one of Great Britain’s govern-

38Art. 6(b), in League of Nations, Report on the Eight-Hours Day at 143. Employees had to be paid at least time and a quarter for overtime work.
39Barnes (1859-1940), had been chairman of the Labour Party in 1910-11, but left to
ment delegates and a former Labour Party chairman, opened the discussion by setting a general framework for understanding the debate: "In some respects...the eight-hour day has figured more and lingered longer in the minds of the workers of the world than any other industrial topic.... Labor...is ceasing to be regarded as a commodity and is being thought of more and more in terms of sentient human beings. ... The principle has been generally conceded that labor is entitled to leisure, that the workers are entitled to live their lives outside of the workshop, are entitled outside of working hours to time for recreation, for education, and for the discharge of social and family duties." The short-term reason for adopting shorter hours, however, was that governments had to keep their promise because throughout World War I workers had “kept to their work, in the hope and belief” that their hours would be reduced afterwards. At the same time, Barnes also made it clear that “whole-hearted cooperation in the largest possible production of goods” was “due from labor” in order to reconstruct the “accumulation of wealth of generations” that had been “blown from the cannon’s mouth....” He then sought to reconcile these two aspects by arguing that the way to obtain that desired productive effort was not through long hours, but by “better organization of labor” and “humanizing the conditions of labor.”

In contrast to the exclusionary tenor of the Organizing Committee’s draft and recommendations, Barnes stressed that:

[I]t is not a mere basic 8-hour law or 8-hour rule with additional pay for additional hours of work that we are after. That would not give us what we want. What we want is leisure, and we must therefore keep that in mind all the time. We are after leisure rather than pay. Moreover, even if we arranged for additional pay to be made to the workers for additional time (inasmuch as wages...tend to certain levels, determined by many things apart from hours of labor), the additional pay would disappear from the very moment it began to be paid. Therefore, what I want to impress upon the conference in the first place is that we are now discussing how to get more leisure for workers and not how to get more pay for them.

Notwithstanding this principled call for a maximum hours limitation, Barnes join the National Democratic Party.

Each member was to have four representatives, two of whom were government delegates; the other two were to be delegates representing the employers and “workpeople” of each member. Treaty of Versailles, Art. 389.


then did an about-face and urged the adoption of a 48-hour week instead of an eight-hour day: “That is to say, I should adopt the principle of averages.” He saw “no reason” why the eight-hour day should be spread uniformly over the week “if industries can be better served otherwise.” Without any explanation, he asserted that averaging would help “avoid or prevent troubles arising from overtime.” In general, Barnes believed that the need for overtime had been “much exaggerated,” and left it to “friendly discussion afterwards” to reconcile this position with employers’ feeling that the draft was “not sufficiently elastic” and needed to be improved by “provisions for a larger amount of overtime....”

Finally, in an expansive interpretation bereft of any socio-economic grounding, Barnes contended that the Organizing Committee’s draft convention “except[s] those who are in...confidential positions as distinct from manual workers. That is to say, it...excludes the clerk or manager or superintendent or person of confidential character in a factory....” Given the virtually infinite plasticity of the term, if even clerks—who were not expressly mentioned by the committee—in “confidential” positions were to be excluded, the convention would have hugely magnified the scope of exclusions.

At the outset of the following day’s proceedings, Great Britain’s employer delegate, D. S. Marjoribanks (the managing director of Sir W.G. Armstrong Whitworth & Co.), claiming to speak on behalf of all the member states’ employers’ delegates, declared: “We felt that the draft convention did not fully meet the present conditions under which both employers and workpeople must work....” Among the more radical points in his extensive catalog of proposals deviating from the draft, Marjoribanks included a demand for 300 hours of overtime annually.

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44League of Nations, *International Labour Conference: First Annual Meeting* at 34. As U.S. Labor Secretary Frances Perkins pointed out in the 1930s, the absence of a daily maximum made enforcement more difficult: “The only way you can enforce any labor law that has to do with hours of labor is to fix a maximum working day. It is almost impossible to enforce a work week that does not run to a maximum on the day. The only way to enforce any of these provisions is to post a schedule of hours for every plant.” If there was a schedule for each individual worker, her mere presence there outside of those hours would be a prima facie violation. *Thirty-Hour Week Bill: Hearings Before the Committee on Labor House of Representatives on H.R. 7202, H.R. 4116, and H.R. 8492*, at 124-25 (73d Cong., 2d Sess., Feb. 8-23, 1934).


47League of Nations, *International Labour Conference: First Annual Meeting* at 40. Contradicting Marjoribanks, the Dutch employers’ delegate stated that he did not agree with the proposals. *Id.* at 41.

Léon Jouhaux, the long-time general secretary of the Confédération Général du Travail, spoke as the French workers’ delegate when he challenged Barnes regarding not only retention of the eight-hour day, but also the stress on production, which did “not depend solely on the presence of labor in the workshop,” but also on the organization of labor and improvement of machinery. Consequently, on behalf of all labor delegates Jouhaux wished “that at the beginning of its work the conference state explicitly that it has done with that human slavery which binds the worker to his factory.”

Samuel Gompers, who was an unofficial labor representative, insisting that workers would not even debate the abandonment of the eight-hour day—“and when we say the 8-hour day we say it as a maximum workday”—and pointing out that employers had not yet understood that “a long workday does not yield the greatest product,” declared that when Marjoribanks proposed up to 300 extra hours per year, it was the first time in his life that Gompers had ever heard the suggestion that the work period be calculated not on week or month, but year, a system under which employers could work employees 168 days a year 16 hours a day and let them go idle the rest of the year. Jouhaux, reinforcing Gompers’ point, sarcastically observed that employers’ proposal of 300 hours of overtime annually was the equivalent of saying: “Article 1. We establish an eight-hour day.

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49 Jouhaux was the head of the CGT from 1909 to 1947 and of the CGT-Force Ouvrière from 1947 to 1954; he received the Nobel Peace Prize in 1951.


51 His status was unofficial because the United States had not ratified the treaty.


54 League of Nations, International Labour Conference: First Annual Meeting at 45. Gompers did recognize the necessity to perform overtime in extraordinary emergencies. Id.


In fact, the recently enacted national laws of Czechoslovakia, Finland, the Soviet Union, Sweden, and Switzerland all permitted overtime on an annual basis, Finland permitting as many as 350 hours per year. Magnusson, “Comparison of Foreign Eight-Hour Laws.” For the Czech law permitting 240 hours, see Act respecting the Eight-Hour Working Day, § 6(4) (Dec. 19, 1918), in BILO 14(1-3): 26-31 at 28. H. G. Halfred von Koch, a Swedish government delegate, pointed out that the new Swedish law permitted 150 hours of overtime work annually and an additional 75 by special authorization. League of Nations, International Labour Conference: First Annual Meeting at 55.
Article 2. We establish a nine-hour day."

On the second anniversary of the Bolshevik revolution, the workers’ delegations presented their own amendments. Although they began with the proposal that the scope of the draft convention be extended to cover commercial undertakings and generally reduced the various categories of overtime work permitted by the draft, they retained verbatim the exclusion of supervisory, managerial, and confidential employees.

On November 10, after the general discussion in the plenary session, the conference voted unanimously to refer for consideration and report the draft convention together with the proposed amendments submitted by the employers’, workers’, and government delegates to a commission. In addition to declaring that both the eight-hour day and the 48-hour week were controlling principles and introducing a few compromises regarding overtime, the Commission on Hours of Work on November 24 revised the Organizing Committee’s draft by striking the phrase “not usually employed in manual labor” because “[s]everal members were afraid that this would be wrongly interpreted and tended to exclude, quite wrongly, the office and similar personnel of industrial establishments from benefiting by this

58The Commission was composed of 15 members, five each from the government, employers’, and workers’ delegates, and was chaired by the British workers’ delegate Tom Shaw. League of Nations, *International Labour Conference: First Annual Meeting* at 77.
59"Report of a Draft Convention to the Eight-Hours Day and the Forty-Eight Hours Week,” in League of Nations, *International Labour Conference: First Annual Meeting* at 222-26 at 223-25. That these compromises retained the bias in favor of elasticity for employers is illustrated by the Commission’s revised Art. 5, which authorized governments to give regulatory force to collective bargaining agreements permitting daily hours beyond eight “over a longer period of time,” subject to the condition that “[t]he average number of hours worked per week over the number of weeks covered by any such agreement shall not exceed forty-eight.” The International Labor Office later commented: “Where this Article...applies, there is no international limit to the number of weeks over which hours may be averaged. ... The International Labour Office was asked on behalf of the Swiss Government whether the number of weeks covered by such an agreement might extend over the entire year. On 11 May 1920 the International Labour Office advised as follows: ‘Nothing in the Convention indicates the length of the period over which the agreement should operate. However desirable it may appear that this period should be reduced to the absolute minimum possible, I think that Article 5...gives your country all the necessary facilities.” International Labour Office, *The International Labour Code 1939: A Systematic Arrangement of the Conventions and Recommendations Adopted by the International Labour Conference 1919-1939*, at 66-67 n.2 (1941).
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Although the Commission observed that the convention covered the entire personnel of an industrial establishment, including “the office which has charge of correspondence,” it stressed that it was not proposing to extend the draft convention to include commercial establishments...inasmuch as banks and administrative offices with their numerous personnel are not subject to the convention. In refusing to extend the benefits of the eight-hour day to commercial establishments at the present time, the majority of the commission based their decision on the fact that its application would be difficult in shops and small stores, and also on the fact that the question was not yet ripe, and deserved special study.

Since seven of the aforementioned countries (Ecuador, France, Poland, Portugal, Kingdom of the Serbs, Croats, and Slovenes, Sweden, and Uruguay) with newly enacted eight-hour laws had already included commercial and office workers, it is unclear why the commission, which adopted this decision by a vote of 9 to 6, found the issue in need of further study.

On November 25, requesting the floor to discuss the wording of the white-collar exclusion, the Swiss workers’ delegate, Conrad Ilg (a National Counsellor and secretary of the Swiss Federation of Metal and Clock Workers), moved to omit “supervisory and confidential capacity,” leaving only “managerial capacity.” Ilg asked: “What is meant by ‘supervisory’ ‘confidential capacity’? There are perhaps as many supervisors as workers, and it is not clearly understood just what is meant by ‘confidential capacity.’ That is why I move that it be struck out, and the word ‘managerial’ left.” Because his motion had not been seconded, the presiding officer ruled that it was not before the conference and gave the floor to Arthur Fontaine, a French government delegate (as director of the Labor Department of...
the Ministry of Labor and chairman of the executive committee of the French State Railways), who was the reporter for the Commission on Hours of Work (as well as having been chairman of the Organizing Committee), who explained:

The paragraph is certainly worded in a rather elliptic fashion, but that arises from the fact that our worker colleagues requested that the last words be omitted, and for good reasons. The article was originally worded: “Providing that they are not engaged in manual labor.”

They considered this provision dangerous, as it seemed to create a sort of prejudice against employees, and they believed that if this phrase were adopted it would result in including in this class of persons all employees of offices, etc. That is the only reason for omitting the words which were contained in the text of the Organizing Committee. There is thus no danger of the comprehensive interpretation feared by our colleague, Mr. Ilg. The commission examined the text with care, and it would be difficult for us to come back with a new text. We request that the text be adopted with this explanation and this interpretation.66

With no further opposition recorded, the conference had completed its discussion of and left this point.67 The provision ultimately adopted—the vote on the entire convention was 82 to 268—that read that the convention with its eight-hour day and 48-hour week “shall not apply to persons holding positions of supervision or management, nor to persons employed in a confidential capacity.”69 Despite the fact that neither the United States nor the major European countries ratified the convention before World War II, it came into force in 1921 and was in force for 18 ILO member states by the start of the war.70 During the interwar period the International Labour Office was also requested on several occasions to interpret it, thus giving a more nuanced sense of the scope of the exclusion. In one instance, for example, it stressed the crucial role of the “responsibility” required of the position’s incumbent rather than its intellectual demands:

70France ratified but subject to the (unfulfilled) condition that Germany and Britain ratify; Italy ratified subject to an even more elaborate (unfulfilled) condition. International Labour Office, The International Labour Code 1939 at 54 n.2.
The International Labour Office was asked whether the effect of this paragraph is to exclude private employees whose work is principally, if not exclusively, of an intellectual character, and advised: That as the convention does not apply to commerce, the majority of private employees are not covered by it, but as regards employees in industrial undertakings, who are included within the scope of application of the convention, this paragraph applies to them only if their jobs involve a fair degree of responsibility and are really posts of supervision or management or confidential posts. The criterion is not the intellectual character of the work but the nature of the post.\footnote{International Labour Office, \textit{The International Labour Code 1939} at 62 n.6 (cont. from 61).}

Rather early on the International Labor Office was also asked on behalf of the Swiss government whether the exclusion applied to the following occupations: on railways, the general administrative staff, those entrusted with the supervision of the maintenance of the permanent way, of goods despatch and train services, locomotive, and depot, and accessory services; in postal services, the general administrative staff and those entrusted with directing and supervising construction, maintenance, and repair work; and in telegraph and telephone services, the staff entrusted with directing and supervising construction, maintenance, and repair work, and the general administrative staff and staff entrusted with supervising the regular working of the services. On May 11, 1920, International Labor Office advised that the following groups would be excluded: On the railways—general administrative staff, employees supervising way-maintenance, dispatching and the train services; in the postal service—general administrative staff and employees supervising the ordinary work; and in telegraph and telephone service—employees charged with controlling and supervising direction, maintenance and repair, general administrative staff, and those supervising the ordinary work.\footnote{International Labor Office, \textit{OB} 3(12):386 (Mar. 23, 1921).} More generally, the International Labor Office commented that the provision:

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 applies exclusively...to persons occupying a post involving responsibility in a considerable degree. ...

On the railways, posts, telegraphs and telephones, only the workers who carry out real functions of direction should be left outside the scope of the Convention, and not employees carrying out the ordinary work of the offices. On the railways, for example, Article 2 (a) is applicable to...foremen... and to all who, occupying a managing post, do not take part in the execution of the work. The original draft indicated this in a precise manner, but the indication was omitted out of a fear that it might be used as a pretext for withdrawing from the scope of the Convention the ordinary office employees in industrial establishments.

There is no doubt that a foreman (of a gang) working with his comrades, and an
employee on the clerical staff (in an office) which is part of an industrial establishment should benefit by the same regulations of hours as the workmen in the same establishment.73

Subsequent ILO conventions also emphasized the notion of responsibility. Thus the Reduction of Hours of Work (Textiles) Convention of 1937 permitted the exclusion of “classes of persons who by reason of their special responsibilities are not subjected to the normal rules governing the length of the working week,”74 while the Proposed Convention Concerning the Reduction of Hours of Work in Industry of 1939 and the Proposed Draft Convention Concerning the Reduction of Hours of Work in Commerce and Offices of 1939 excluded “classes of persons who by reason of their special responsibilities are not subject to the normal rules governing hours of work.”75

Hours of Work (Commerce and Offices) Convention (1930)

[T]he social space in which we still find modern slavery...is today no longer the factory, in which the great mass of the workers work, rather this social space is the office....76

75Proposed Convention Concerning the Reduction of Hours of Work in Industry, Art 3(a), in International Labour Office, The International Labour Code 1939 at 858; Proposed Draft Convention Concerning the Reduction of Hours of Work in Commerce and Offices, Art. 3(a), in id. at 862, 863. These two proposed conventions effectively transformed maximum-hours conventions into mere FLSA-like overtime regimes: “In any country in which it is not desired to place a fixed number of hours of overtime in the year at the disposal of undertakings, the competent authority may permit the limits of hours authorised by the preceding Articles to be exceeded, subject to the condition that all time worked in virtue of this paragraph shall be paid for at not less than one-and-a-half times the normal rate.” Proposed Convention Concerning the Reduction of Hours of Work in Industry, Art. 12.3, in International Labour Office, The International Labour Code 1939 at 860; Proposed Draft Convention Concerning the Reduction of Hours of Work in Commerce and Offices, Art. 12.3, in id. at 863.
The question of the regulation of the hours of commercial workers, which the Commission on Hours of Work had not deemed ripe for discussion in 1919, had, despite employer resistance, advanced to that point by the latter half of the 1920s. At the 1925 ILC session several workers' delegates submitted a draft resolution suggesting that private (salaried) employees' working conditions should be placed on the agenda of the next ILC session, but the Conference officers, deciding that, absent a clearly defined question, it was not desirable to ask the Conference to consider it, declared that in the interim the International Labor Office could investigate the subject further. Following passage of a resolution by the first congress of the International Association for Social Progress in 1926 declaring the need to limit salaried employees' daily hours to eight, at the tenth session of the ILC in June 1927 the Swiss workers' delegate proposed a resolution, which the Conference adopted by a vote of 60 to 24, asking the ILO's executive council, the Governing Body of the International Labor Office, to consider the possibility of placing on the agenda of an early session of the ILC the question of the regulation of commercial employees' hours, since the Treaty of Versailles provided that all workers' hours should be regulated and some countries had regulated commercial employees' hours of work. Then in October 1927, the Governing Body voted to include the subject of the working hours of employees outside of industry among possible items on the agenda of the 1929 session of the ILC, and in February 1928 it voted 12 to 9 to place the matter on the agenda for twelfth session in 1929.

To provide the twelfth session of the ILC with a comprehensive overview of the state of legal regulation of the salaried employees' working hours throughout the whole world, the International Labor Office prepared a very detailed classificatory report. After surveying the pertinent national legislation, the Office con-

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78 International Labour Office, *International Labour Conference, Tenth Session, Geneva, 1927*, at 363-64, 382-84, 533-34, 683-84 (1927). The delegate, Ch. Schürch, was the secretary of Swiss Federation of Trade Unions. The British government's delegate was the most prominent speaker in opposition, contending that extension was "premature." *Id.* at 382. See also International Labour Office, *International Labour Conference, Twelfth Session, Geneva, 1929: Hours of Work of Salaried Employees: Report and Draft Questionnaire: First Discussion 2* (1929).


81 It was in part based on "Regulation of Hours of Work in European Industry," *ILR* 18(1-5): 58-74, 216-40, 375-405, 574-610 (July-Nov. 1928).
cluded that it appeared “to be inevitable that for the moment it is impossible to arrive at a definition [of salaried employee] which would both meet all cases and be applicable in all countries.”\(^\text{82}\) This conclusion derived from the perceived deficiencies of the existing statutory definitions:

> [A]ny theoretical definition of the salaried employee resting on the mental or non-manual nature of his work would be inadequate, in that it would fail in many cases as a clear test for determining whether a particular person was a salaried employee or a manual worker. Nor is the distinction that has been drawn more recently in France and Italy, the criterion of which is the participation of the worker in the management of the undertaking, precise enough. ... The exclusion in Germany of persons in receipt of an annual salary of 8,400 marks from the application of the Act cannot be regarded as a criterion upon which a definition of the salaried employee can be based.\(^\text{83}\)

That the International Labor Office thought it “impossible,” at least for the time being, to provide a precise definition of “salaried employee”\(^\text{84}\) in an international convention did not mean that it recommended against drafting a convention; rather, this definitional inadequacy merely meant that instead of breaking with tradition and shifting to a personal-functional approach, the ILC should continue to base hours conventions on classes of firms, such as industry, mercantile marine, and agriculture, this time adding commercial enterprises.\(^\text{85}\)

In preparation—“in accordance with the double-discussion procedure”\(^\text{86}\)—for the fourteenth session in 1930, the twelfth session referred to a special Committee


\(^{84}\)Indeed, the Office considered that it was also “impossible to find an English equivalent for the French term ‘employé.’” The English word “employee” means any employed person, and there is no comprehensive term in English which covers all the various categories of workers denoted by ‘employé.’” International Labour Office, *International Labour Conference: Twelfth Session: Geneva, 1929: Hours of Work of Salaried Employees: Report and Draft Questionnaire* at 178.


on Hours of Work of Salaried Employees for revision a draft questionnaire (which had been prepared by the International Labor Office)\(^87\) to be submitted to the member governments on the basis of the replies to which the convention could be formulated.\(^88\) In the course of the committee's proceedings, the Italian workers' adviser proposed deleting question 2—which asked whether the governments considered that the scope of the convention should be based on a general definition of “salaried employee” and if so, what definition—“lest a definition of the term...should be found to be too difficult or of too restrictive a nature, his intention being to extend measures of protection to all persons not covered by the Washington Convention.” After this amendment was overwhelmingly rejected (with only three yes votes), a number of advisers to workers' delegates and government delegates, “contemplat[ing] the impossibility of finding a sufficiently exact definition,” submitted amendments that were eventually combined in one and adopted with only two negative votes: “If it is found impossible to reach a sufficiently exact definition of the term ‘salaried employee’, to what categories of workers do you consider the scope of application should extend?”\(^89\)

In light of the importance of the issue, the ILC held a general discussion in June 1929 on whether to send a questionnaire to the member governments. Employers' and workers' representatives expressed opposed views, with the former contending that the matter was still not ripe for international action,\(^90\) while the latter did not shy away from asserting that the question of salaried employees' working hours “concerns the foundation itself of the construction of modern societies, of their culture and civilization.”\(^91\) With obvious Schadenfreude, the


British employers' delegate, who opposed the entire project, took glee in reporting the conclusion of the Committee on Hours of Work of Salaried Employees “that it is impossible internationally to find a definition of the term ‘salaried employee’. It is somewhat a sad commentary to think that the Governing Body placed on the Agenda for this Conference the question of the regulation of the hours of a class of people whom no one can describe or define.”

Not all governments supported even proceeding with the questionnaire, while others were willing to approve the questionnaire without taking a position on whether ultimately they would vote for a convention. For example, the Swedish government, claiming that salaried employees’ working conditions were already as favorable as those that the Washington Convention had set forth for industrial workers, contended that recourse to voluntary agreements between employers and workers was preferable to legislation “in spite of the resistance of one or other party.” Although the British government did not outright oppose the effort—as it had when the Governing Body discussed the issue—its delegate emphasized the empirical and conceptual difficulties facing the drafters, positing that “the industrial workers on the whole are a homogeneous quantity. It is not true that the commercial workers can be equally so described. It is truer...that there is as much difference between one of the commercial workers’ class and the other as there is between the whole class taken together and that of the industrial workers.”

Having voted 92 to 15 to adopt, without amendments, the entire questionnaire as revised by the Committee, the twelfth session of the ILC, following a brief and uninspired debate, voted 103 to 17 (with employers’ delegates accounting for all the no votes) to place the question of salaried workers’ hours on the agenda of the fourteenth session for 1930.

Intriguingly, the vast majority of governments that replied to the specific question agreed that devising a general definition was either impossible, probably
impossible, extremely difficult, or impracticable. A total of six countries (Chile, Cuba, Finland, Greece, Luxemburg, and New Zealand) proposed formulations that stressed the predominance of mental or intellectual over physical, manual, or mechanical effort, two of them (Chile and Luxemburg) being able to cite their own statutes, which already contained such language.

In addition, the questionnaire asked the member countries: "Which categories of staff...should be excluded from the scope of the Draft Convention...?" In an addendum to this question (not included in the questionnaire, but inserted so that countries could respond if they chose), members were asked: "Do you not consider that persons occupying a post of a confidential, managerial or supervisory character should be excluded?" All countries from Austria to Uruguay responded that


98Decree No. 857 [to approve the text of the Act respecting salaried employees] (Nov. 11, 1925), § 2, in LS 1925 - Chile 1 ("salaried employees shall be deemed to mean all persons...who perform work in which the intellectual effort predominates over the physical effort required...").

99Gesetz vom 31. Oktober 1919 betreffend die gesetzliche Regelung des Dienstvertrages der Privatangestellten, § 3, in LS 1920 - Lux. 2-4 ("if not exclusively of an intellectual nature, is mainly so").

100The proposals were as follows: "intellectual predominates over physical effort" (Cuba); "primarily of a mental nature in the widest sense of that word" (Finland); "either exclusively or mainly mental work" (Luxemburg, Act of Oct. 31, 1919, § 3), in [International Labour Office], International Labour Conference, Fourteenth Session, Geneva, 1930, Report II: Hours of Work of Salaried Employees at 26, 33-34, 52; "mainly requires mental effort for its performance" (Greece); "person performing other than manual or mechanical work" (New Zealand), in [International Labour Office], International Labour Conference, Fourteenth Session, Geneva, 1930, Report II (Supplementary): Hours of Work of Salaried Employees at 9, 10; "of a mental rather than a physical character (Chile, decree of Nov. 11, 1925), in [International Labour Office], International Labour Conference, Fourteenth Session, Geneva, 1930, Report II (Second Supplement): Hours of Work of Salaried Employees at 4.


102[International Labour Office,] International Labour Conference: Fourteenth
managers should be excluded and some added those in supervisory and confidential positions as well. Several governments made it clear that they meant only higher management. For example, Denmark observed that by management it meant employer-like officials with hire- and fire-power. Finland specified those who “can regulate the organisation of their working hours as they think best themselves.” France favored excluding higher managerial officials, but not subordinate confidential, managerial, or supervisory employees. Germany proposed excluding employees engaged in scientific, artistic, spiritual or religious activities, while India suggested as a criterion a salary exceeding a level fixed by each state.

In summarizing these replies, the ILC concluded that very few countries had proposed excluding people holding supervisory positions because it would, “owing to the extent to which supervisory functions, though often of a subordinate kind, are entrusted to salaried employees, open the door to the exclusion of many classes of the latter whom there is no real reason to exempt....” One illustration of these dangers was the large department store employing a few hundred assistants at counters and in the accounting and secretarial departments. Similarly, the ILC concluded that the exclusion of those in a confidential capacity was also proposed by only a very few countries because it, too, “might lead to considerable misunderstanding or even abuse, in view of the large numbers of more or less subordinate employees engaged in the establishments to be covered by the present regulations (e.g. clerks, typists, secretaries, etc., particularly in offices), whose work may be more or less of a confidential nature.” In contrast, the universal support for excluding those holding positions of management was linked to “the untroubled position” that this formulation had held during the previous ten years “in international labour legislation as the result of its being contained in the Washington Convention...”


Based on these survey findings, the Proposed Draft Convention concerning the Regulation of Hours of Work in Commerce and Offices declared that it was open to each country to exclude management. Supplementary surveys revealed that several countries did not support exclusion of any employees from the protection of the convention. Chile and Canada/Manitoba took this position. Czechoslovakia did not consider that certain categories of employees, especially those mentioned in the aforementioned addendum, should be excluded. Since almost every salaried employee in commerce had some confidential or supervisory function, excluding such persons "would be tantamount to excluding the majority of salaried employees in commercial establishments." Moreover, excluding them "would have an unfavourable effect on the working hours of the persons under their control." 

Some insight into employers' mind-set can be gleaned from the speeches at the fourteenth session of the ILC in June 1930 of their chief spokesman on this issue, the British employers' delegate, John Ballingall Forbes Watson, who was director of the National Confederation of Employers' Organizations. He emphasized "not only...complexity but also...diversity" as the principal obstacles to achieving an international convention on salaried employees' hours:

We know that all the time we are taking for granted the service of those who help us to do our work, but I doubt if we realise...that all our lives are not lived in the same way; that each of us here has a social life in his own country which is different from that in other countries. For we are all the children and the result of our environment. We are what our hills and plains have made us, and the waters that wash our coasts, and when you sit down to think for one moment of putting within an iron circle the whole intimate routine of daily


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life not in one country but in all countries, I say you are setting out to put on record the most glaring example of international make-believe that the world has ever seen.114

In contrast to this undifferentiated and diffuse attack, which could just as well have served to resist an eight-hour convention for manual workers, G. J. A. Smit, Jr., president of the Dutch General Federation of Commercial and Office Employees and the workers’ delegate from the Netherlands, speaking on behalf of a class of workers numbering tens of millions of whom it seemed to be very difficult to give a “scientific definition,” centered his remarks on the fact that “nous avons été prolétarisés”: the growth of large firms, even in retail, and the concomitant decline of patriarchal relations had totally altered the position of salaried employees, who had also become subjected to intensification of their work as a result of mechanization and rationalization; this development had, in addition, lowered their economic level to that of manual workers.115

The original text proposed by the International Labor Office had limited national governments’ discretion to exclude only persons occupying management positions,116 retention of which was approved 54 to 34. In the course of the conference, numerous proposals were made to add various groups of workers, but only the addition of persons employed in a confidential capacity was approved (45 to 43). Proposals failed to add the following groups: persons occupying positions of supervision (45 to 31); persons whose work was of a scientific or artistic nature (50 to 38); persons whose work was technical or administrative (50 to 37); and persons employed in establishments pertaining to the liberal professions (50 to 37). Finally, “[c]ertain members of the Committee on Hours of Work of Salaried Employees considered that these words [“management” and “confidential”] imply a well-defined and continuous responsibility of the employee to his employer.”117

In addition, the Committee reviewed several proposals by employers’ representatives to make the optional exclusion obligatory, rejecting them by narrow margins. For example, it rejected by a vote of 43 to 39 the Italian employers’ representa-

the compulsory exclusion to employees in positions of management and supervision and in confidential positions, while the Belgian government’s representative’s proposal encompassing only management and confidential employees was barely defeated 42 to 41.118

As the Swiss workers’ delegate Conrad Ilg had already pointed out in 1919, the term “confidential” opened the way to extraordinarily expansive exclusionary interpretations. In 1930, Joseph Hallsworth, workers’ adviser from the British Empire and secretary general of the National Union of Distributive and Allied Workers, resumed that debate by complaining that “we have gone a very long way indeed from the position from which we started and have excluded large bodies of people whom we contemplated having within this Convention last year and since. [T]he time is ripe for a Convention for commercial and office employees—those who serve us and minister to our most intimate needs. They deserve and ought to have the same measure of protection that has been accorded in so many places to industrial employees. [W]e have excluded large bodies of people whose hours of work are atrocious.” He then asked: “Is not every commercial employee in every country more or less in a confidential capacity? If you admit that, you have gone a very long way towards saying that this Convention will exclude the greater body of those for whom it was intended; and if you fail to define management, then tens of thousands of people in minor posts of management will also be excluded.”119

Instead, Hallsworth submitted as a substitute amendment, “Persons occupying higher positions of management,” and went on to explain:

[U]nless you delete these words “or employed in a confidential capacity”, you are going
to exclude an enormously large class from the Convention. Take the ordinary shorthand-typist, a person employed in a confidential capacity. Is a shop assistant employed in a confidential capacity? He is supposed under the law to keep his employer’s secrets. He is not supposed to tell other employers anything about his employer’s business. Surely, therefore, in a Convention which is supposed to provide for commercial and office employees, there will scarcely be a single grade of which it cannot be stated that the persons are employed in a more or less confidential capacity. For that reason we think it is very unfair to have words like this in a Convention which is supposed to be for the benefit of those named at the head of it.

Then with regard to persons occupying positions of management: what sort of management is intended? Surely it is not intended to exclude from the benefit of the

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Convention large classes of persons occupying minor positions of management? Surely it is only intended that persons in the highest positions of management shall be excluded here; people who control their own conditions of employment and who are therefore not subject to anybody else as to those conditions. But there are tens of thousands of managers and manageresses in charge of shops; they are not in positions of the highest form of management. But, as the Convention stands, without the word "management" being qualified, it is possible that you will have in many of these establishments the ordinary shop assistant included (unless he is ruled out on the ground being in a confidential capacity), while the shop managers themselves would not have the benefit of the limitation of their hours of work. 120

After this amendment was rejected 59 to 54, the Conference discussed the amendment by the workers' group to delete "or employed in a confidential capacity." Smit, noting that the phrase had not been in the original draft of the International Labor Office and had been inserted by an amendment121 approved by a vote of 45-43, contended: "I am certain that this amendment was adopted by mistake. It is true that one also finds this clause in the Washington convention, but that is easily understandable because the Washington convention dealt with manual workers, to the exclusion of salaried employees. Here, it is a question precisely of a convention for the salaried employees."122 Smit went on to explain why salaried employees were by the very nature of their positions occupying confidential positions—why a convention protecting them but excluding those serving in a confidential capacity would be as ridiculous as building a horse stable but specifying that horses were not to be admitted:

Un correspondant, un dactylographe, un comptable, un caissier et ses assistants, l'employé même qui fait le service de messager seraient exclus, puisque tous occupent un poste de confiance. Cette règle s'appliquerait également aux gérants des entreprises à succursales multiples, aux chefs de rayons dans un magasin et à leurs remplaçants.123

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In contrast, chief factory inspector H. J. Scholte, a Netherlands government technical adviser, sought to alert the workers’ delegates to how the real world worked. He was not unaware that they hated the exceptions, but he also knew that it had never yet been possible to enforce any serious regulation of working hours without a considerable number of exceptions: “The more one restricts the possibility of exceptions, the less one makes a serious application possible. ... I am cautioning you, gentlemen, about the fact that the more you eliminate or restrict the exceptions from this convention, the more you will contribute to making its application and ratification impossible.”

Joseph Bribosia, director of the Ministry of Industry, Labor, and Social Welfare, and a Belgian government technical adviser, offered additional support for voting against the proposed amendment to strike the confidential employees. He believed that for the same reasons as in the case of the 1919 hours convention, it was right to exclude people in positions of confidence, such as secretaries, chief accountants, holders of the power of attorney—namely, that they bore an important share of the responsibility in the exercise of their powers from the point of view of running the establishment. Moreover, there were many fewer of them than of those in supervisory positions. Their functions meant that they collaborated in managing the firm and gave them a responsibility distinguishing them completely from supervisory personnel. After the workers’ amendment was narrowly voted down 59 to 56, Article 1 in its entirety was adopted 80 to 19.

On its first vote, the fourteenth session of the ILC adopted a draft convention fixing working hours in commerce and offices at eight and 48. With employers’ delegates voting against, workers’ delegates for, and government delegates either favoring it or abstaining, the vote was 78 to 31. Although the convention, which came into force in 1933, did not directly exclude any workers on an occupational...
(as opposed to a workplace) basis, it did provide that “[i]t shall be open to the competent authority in each country to exempt...persons occupying positions of management or employed in a confidential capacity.”129

**Forty-Hour Week Convention (1935)**

The application of social legislation to “salaried employees” is rendered extremely difficult by the absence in most countries of a clear definition of what is covered by that term. ... The term...is taken to apply to commercial and industrial workers entrusted by their employer with work requiring mental rather than physical effort. But this distinction is not absolute or universal. Moreover, in addition to the distinction between salaried employees and manual workers, a line has to be drawn between salaried employees and those of a higher category, and this line is not drawn at the same level in every country.130

By the early 1930s it was clear to the ILO both that “unemployment has become so widespread and long continued that there are at the present time many millions of workers throughout the world suffering hardship and privation for which they are not themselves responsible and from which they are justly entitled to be relieved” and that “a continuous effort should be made to reduce hours of work in all forms of employment to such extent as is possible.”131 The textual consequence was the adoption in June 1935 by the nineteenth ILC of the Convention Concerning the Reduction of Hours of Work to Forty a Week. ILO members that ratified the convention thereby declared their approval of “the principle of a forty-hour week applied in such a manner that the standard of living

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129 Draft Convention concerning the regulation of hours of work in commerce and offices, Art. 1.3(c), in League of Nations, *International Labour Conference: Fourteenth Session* Vol. 1 — Third Part (Appendices) 877, 878 (1930); Hours of Work (Commerce and Offices) Convention, 1930, Art. 1.3(c). The convention also gave members discretion to exclude workers engaged in “the administration of public authority.” *Id.* Art. 1.3(b). The convention did directly exclude certain classes of establishments including hospitals, hotels, restaurants, and theaters. *Id.* Art. 1.2.


131 ILO, Forty-Hour Week Convention, 1935 (C47).
is not reduced...."132 Because this conference was the first ILC to which the United States had sent delegates since joining the ILO the previous year, *The New York Times* devoted almost daily coverage to it. With the U.S. Supreme Court’s Schechter decision striking down the NIRA having been issued just one week before the conference opened, the paper reported that the idea was gaining ground within the U.S. governmental delegation that the government’s “treaty-making power might provide a way out of the NRA difficulties”: since treaties become the supreme law of the land under the constitution, “the basic features of the NRA might be incorporated in an international convention.”133

If this notion of the internationalization of U.S. labor standards and Americanization of international standards did not immediately strike observers as fantastic,134 reality set in soon enough.135 The *Times*, overlooking the Hours of Work (Commerce and Office) Convention, called the adoption of the convention “easily the most important and most unexpected advance the I.L.O. has made in the field of hours reduction” since the Washington 48-hour convention of 1919. Without revealing any real-world political-economic framework for such an impact, the newspaper observed that backers attributed importance to the convention “because it gives workers everywhere a strong talking point in negotiating hours reductions in their own countries and industries.” Nevertheless, although adoption left workers’ delegates, the U.S. delegation, and the ILO “jubilant,”136 it was understood from the outset that the convention was essentially aspirational. In fact, the International Labor Office had expressed its view to the ILC that “the convention form


134The following day it was reported that “European worker delegates fear the NRA decision has weakened their chances of getting reductions in hours.” Clarence Streit, “Americans to Aid Work Hours Study,” *NYT*, June 5, 1935 (4:4). The U.S. delegation, including the employers’ delegate, supported the convention “because since the United States has a forty-hour week or less already in many industries, its competitive and marketing positions in the world will benefit from helping foreign workers not to cheapen themselves.” Streit, “40-Hour Week Pact Adopted by I.L.O.”

135In contrast, editorially, the *Times* was very skeptical of the convention. “Forty Hours in Principle,” *NYT*, June 25, 1935 (18:3).

136Clarence Streit, “40-Hour Week Pact Adopted by I.L.O.,” *NYT*, June 23, 1935 (17:1). The reporter’s reliability was severely challenged by his claim that the 48-hour convention “had never gone into force largely through the British Government’s failure to ratify...” *Id.* In fact, the convention went into effect on June 13, 1921 and has remained in effect ever since. http://www.ilo.org/ilolex/english/convdisp1.htm. Streit, who covered the League of Nations for ten years for the *Times*, later had a prominent career as an author and promoter of Atlantic Union. http://www.loc.gov/rr/mss/text/streit.html
was inappropriate for what was in substance a proclamation of future policy" and that the principle should instead be embodied in a special resolution, but the ILC "preferred to give the intended declaration of principle greater solemnity of form...." Ratification of the convention, as the *Times* itself reported, did not even bind a ratifying member country to ratify any of the industry-by-industry implementing conventions, without which the Forty-Hour Week Convention remained impotent. In the event, only one country (New Zealand) ratified the convention before World War II, the convention did not go into effect until 1957, after the three Soviet Republics had ratified, and to this day only 14 countries have ever ratified it.

Of relevance here, especially since U.S. Government and especially DOL officials had now become involved in the ILO and U.S. policy makers thus became institutionally linked to the formulation of international approaches to labor standards, is how the Forty-Hour Week Convention was to apply to white-collar workers. With regard to a reduction-of-work convention, as early as 1933 the International Labor Office composed a list of points on which it considered that the ILC should request it to consult the member governments to indicate the persons to exclude or whom it might be possible to exclude from the regulations; prominent among the points was the exclusion, once again, of those employed in a supervisory, managerial, or confidential capacity. For the Eighteenth Session of the ILC in 1934, the International Labor Office prepared draft conventions

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138 Streit, "40-Hour Week Pact Adopted by I.L.O." The convention stated that a ratifying country "undertakes to apply this [40-hour] principle to classes of employment in accordance with the detailed provision to be prescribed by such separate Conventions as are ratified by that Member." Forty-Hour Week Convention, Art. 1.

139 [http://www.ilo.org/ilolex/english/convdisp1.htm](http://www.ilo.org/ilolex/english/convdisp1.htm)

140 Isador Lubin, the Commissioner of Labor Statistics, was the first U.S. representative to address the Governing Body of the International Labor Office in January 1935, when he expressed the U.S. government’s support for applying the 40-hour principle to as many industries as practicable. “U.S. Supports Move for 40-Hour Week,” *NYT*, Jan. 31, 1935 (6:5). The DOL’s contact work with the ILO continued to be through Commissioner Lubin. *Twenty-Seventh Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30, 1939*, at 83 (1939). A member of Roosevelt’s brain trust, Lubin was once called the president’s favorite economist. John Hess, “Isador Lubin Dies, 82,” *NYT*, July 8, 1978 (22:3). At the first ILC attended by U.S. delegates, Charles Wyzanski, Jr., the Solicitor of Labor, was a member of the ILC committee that drafted the Forty-Hour Week Convention. “Forty-Hour Week Written in Draft,” *NYT*, June 16, 1935 (20:1).

concerning the 40-hour week in industry and commerce and office: the former provided for the exclusion of all three categories and the latter of employees in a managerial and confidential capacity.\textsuperscript{142}

Then, however, in sharp contrast to their failed efforts with the earlier conventions, workers' delegates succeeded in radically shrinking the white-collar exclusions. First, they submitted an amendment that reduced the supervisory/managerial category only to "[p]ersons occupying the highest posts of management."\textsuperscript{143} After this amendment was adopted 56 to 31, they were able to gain adoption of an amendment excluding only "exceptionally confidential positions."\textsuperscript{144} The Draft Convention concerning the Forty-Hour Week in Industry thus incorporated these two definitions,\textsuperscript{145} while the Draft Convention concerning the Forty-Hour Week in Commerce and Office instead used "high managerial positions" and "exceptionally confidential character."\textsuperscript{146}

This more restrictive method was, however, nullified by the different regulatory approach taken by the ILC in 1935, which entailed removing such details from the principal convention, which established the principle of the 40-hour week, and transferring them to the industry-by-industry implementing conventions. The ILC was set to vote on five of them—public works, iron and steel, building and contracting, coal mines, and glass bottles—of which even the optimistic \textit{Times} reporter predicted that only the last seemed likely to secure the required two-thirds majority.\textsuperscript{147} In fact, by the beginning of World War II, the ILC had adopted only three conventions providing for the application of the 40-hour principle: glass-bottle workers (1935), public works (1936), and textiles (1937). Proposed conventions for building, iron and steel, coal mines,\textsuperscript{148} the chemical industry, and


\textsuperscript{147}Streit, "40-Hour Week Pact Adopted by I.L.O."

\textsuperscript{148}The proposed draft conventions for building and construction and iron and steel prepared by the International Labor Office gave the individual member states discretion to exclude those employed in supervisory, management, and confidential capacities, while the exclusion was limited to supervisors in coal mining. League of Nations, \textit{International
the printing industry all failed of adoption in 1935, 1936, and 1937. ¹⁴⁹

The 1937 textile convention—which was never ratified by any country, never came into force, and was withdrawn in 2000¹⁵⁰—used, as already noted, the expansively spongy definition of “classes of persons who by reason of their special responsibilities are not subjected to the normal rules governing the length of the working week.” The proposed draft public works convention prepared by the International Labor Office in 1935 left it up to the member states to exclude those employed in supervisory, management, and confidential capacities.¹⁵¹ As adopted the following year, the Reduction of Hours of Work (Public Works) Convention, effectuated the 40-hour principle as an average;¹⁵² the individual member states were then given the discretion to “determine the number of weeks over which this average may be calculated and the maximum number of hours that may be worked in any week.”¹⁵³ The Twentieth ILC narrowed the scope of excludable white-collar employees to “persons occupying positions of management who do not ordinarily perform manual work,”¹⁵⁴ but this refinement was moot since this convention, too, never was ratified by any country or went into force and was finally withdrawn in 2000.¹⁵⁵ Finally, the Reduction of Hours of Work (Glass-Bottle Works) Convention, 1935 is irrelevant here because it applied only to (certain) production workers.¹⁵⁶

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¹⁵⁰http://www.ilo.org/ilolex/english/convdisp1.htm
¹⁵²Reduction of Hours of Work (Public Works) Convention, 1936, Art. 2.1, on http://www.ilo.org/ilolex/english/convdisp1.htm
¹⁵³Reduction of Hours of Work (Public Works) Convention, 1936, Art. 2.4.
¹⁵⁴Reduction of Hours of Work (Public Works) Convention, 1936, Art. 1.3(b).
¹⁵⁵http://www.ilo.org/ilolex/english/convdisp1.htm
¹⁵⁶Oddly, the convention “[c]onfirm[ed] the principle laid down in the Forty-Hour Week Convention” by setting forth a 42-hour week averaged over four weeks. Reduction of Hours of Work (Glass-Bottle Works) Convention, 1935, preamble, and Art. 2.2 and 2.3.
The ILO’s View of the Sociological Convergence of Blue- and White-Collar Workers During the Great Depression

Albert Thomas, Director of the International Labor Office of the League of Nations,...voiced his disapproval of attempts...in some circles to make these salaried workers believe that they formed a sort of new middle class.

In reality... there had always been a growing feeling among the white collar men that they really belong with the manual workers. Day by day they were becoming more and more specialized, so that they did only a part and not the whole of any task. This might be a tragedy for them in a certain sense, but it also meant that their organization was becoming more important as a factor in the final emancipation of the working class.157

As DOL officials became increasingly involved in the ILO during the second half of the 1930s, they became increasingly familiar with the approaches developed by the international labor standards agency for dealing with white-collar workers. They should also have begun to perceive the need to assimilate office workers to the same types of protective regimes that already covered production workers: after all, by the latter half of the 1930s, as the world-wide depression dragged on seemingly interminably, the ILO began emphasizing that the impact of machinery and mechanization on office work and workers was analogous to that in industry.158

For example, in 1936 its Advisory Committee on Salaried Employees declared that to protect office employees from some of the effects of mechanization, steps should be taken, including the introduction of variety into the duties of employees in charge of machines, the application of motive power to operation of most machines, the elimination of noise and vibration, “and above all, the reduction and better arrangement of hours of work.”159 Two years later, an International Labor Office draft in advance of a session of the Advisory Committee on Salaried Employees became even more explicit: “[T]he position of manual workers and salaried employees has tended to become more uniform in recent years since the

157“Clerical Workers Rising in Industry,” NYT, Nov. 11, 1928 (58:5).
159“The Influence of the Use of Office Machinery on the Conditions of the Work of Staff” (Resolution Adopted by the Advisory Committee on Salaried Employees at Its Fourth Session (Geneva, 18-19 November 1936), in International Labour Office, The International Labour Code 1939 at 630.
workers have been granted advantages similar to those formerly granted only to salaried workers, particularly as regards notice of dismissal, holidays with pay, and social insurance.\textsuperscript{160}

After noting that the monotony of mechanized office work was due to its uniformity and lack of technical interest and that this uniformity and simplicity resulted from an extreme division of labor, the ILO Advisory Committee on Management adopted the following conclusions in 1938:

The evolution of office work as a result of mechanisation has introduced a much clearer distinction than formerly between managing staff and executive staff. Some of the workers—a minority—are normally required to solve problems and take decisions; a somewhat larger group carries out material tasks which nevertheless require highly specialised training; the great mass of employees is increasingly employed on uniform tasks with machines in which every detail is fixed in advance. The first group requires analytical ability and a sense of initiative, but practically all that is required of the third group is rapidity and accuracy in their work. This group is daily becoming numerically more important at the expense of the other two. The growth of this structure, which is entirely analogous to that which has long existed in the workshop, necessarily brings office workers closer to those engaged in the actual work production. There are at present in any large office...specialised manual workers who have merely had a rapid training or often simply an explanation of their duties.\textsuperscript{161}

As a result of this development, workers engaged with machinery had become more "interchangeable":

In spite of the considerable differences...from the technical, physiological and psychological point of view between office work and that carried out in a workshop, it would seem that from the occupational angle present developments make it increasingly difficult to separate one category of workers from the other. Consequently, the social guarantees of every kind recognised as due to industrial workers should be granted equally to office employees, more especially by a general extension of social legislation and of the system of collective agreement.\textsuperscript{162}

\textsuperscript{160} The Problem of Defining a ‘Salaried Employee,’” \textit{ILR} 37(6):764-87 at 764 (June 1938) (draft in advance of the Fifth Session of the Advisory Committee on Salaried Employees (Apr. 23, 1938)).


\textsuperscript{162} Advisory Committee on Management, Third Session (Geneva, May 2-3, 1938), in 84 International Labour Office, \textit{Minutes of the Eighty-Fourth Session of the Governing
By the mid-1930s the ILO had also turned its focus on professional workers, on whose unemployment, as an aspect of world economic depression, the rearrangement of working hours would have a positive effect. Nevertheless, since the "overcrowding of the professions" had reached such a "critical" stage that the ILO sought a safety valve: "It would be well to give increasing facilities for the settlement of professional workers in colonies and undeveloped countries."\textsuperscript{163}

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\textsuperscript{163}ILO, \textit{Minutes of the Seventy-Fourth Session of the Governing Board} 136-37 (Feb. 20-22, 1936).