“Moments Are the Elements of Profit”

Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act

Marc Linder

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Involuntary Overtime: The Case of Pseudo-Managers

Here again the power to define is the power to exclude.\(^1\)

In a subtle way, the boom in working hours has also helped keep inflation down. Millions of salaried Americans...are clocking 50-, 60- and 70-hour work weeks even though on paper they officially work just 40 hours. These workers often do not put in for overtime pay, and the result is that they are making a quiet, below-the-radar contribution to the economy. ... This, economists say, has contributed to the recent rise in the nation’s productivity rate.... This boost...has enabled American industry to keep profits high without having to resort to raising prices. ...

The overtime boom has created another source of tensions. Many corporate executives are unhappy about dishing out millions of dollars each week in time-and-a-half for overtime. As a result many companies are doing an end run around overtime laws by, for example, hiring thousands of workers as independent contractors who do not have to be paid time-and-a-half for every hour they work over 40.\(^2\)

1. Neo-Chiseling

From the socialistic point of view, our entire industrial system might be made to appear as one of unconscionable exploitation, but it is obvious that such a view would be of no value for practical legislative or judicial purposes. Given our capitalistic system as it is, exploitation or oppression as a subject of legislation must have reference to things not implied in the prevailing economic constitution.\(^3\)

In establishing the Department of Labor (DOL) in 1913, Congress stated that its purpose “shall be to foster, promote, and develop the welfare of the wage earners of the United States.”\(^4\) One significant example of the failure of the DOL

\(^1\) Twenty-Eighth Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30 1940 at 236 (1940) (Wage and Hour Administrator Philip Fleming discussing the definition of executive employees under the FLSA).

\(^2\) Many Workers Not Sharing Good Times: U.S. Is the Leader in Hours Per Year,” Patriot Ledger (Quincy, Mass.), Sept. 9, 1999, at 10 (Lexis).

\(^3\) Ernst Freund, Standards of American Legislation 121-22 (1965 [1917]).

\(^4\) An Act to Create a Department of Labor, ch. 141, § 1, 37 Stat. 736 (1913) (codified at 29 U.S.C. § 551 (1988)). The limited ambit of the federal Department of Labor at that time can be gauged by the fact that Woodrow Wilson, the first president to appoint a
during the Clinton administration to seize the opportunity to undo the damage done by a dozen years of de facto deregulation of labor standards by the blatantly pro-employer Reagan-Bush administrations involves employers' efforts to compel workers to work overtime without additional compensation merely by labeling them salaried managers.

In giving the notion of "free labor" a new dimension, employers have not limited themselves to this relatively subtle technique: "obsessed with profits in recent years," so many large firms have been engaging in the even more blatant but venerable practice of requiring hourly employees to work overtime "off the clock" that "the fight over illegal overtime has become one of the most significant workplace issues of the 1990s" as "dozens of companies like Taco Bell, Nordstrom's, Food Lion, Longs Drug Stores and Electric Boat have been forced to pay millions to shortchanged workers." As part of the settlement of

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Secretary of Labor—after lame-duck President Taft had reluctantly signed the bill—took the dogmatic view (in a book he had published as a professor, but also reprinted several times during both of his terms) that Congress had no power to "regulate the conditions of labor in field and factory.... Back of the conditions of labor in the field and in the factory lie all the intimate matters of morals and of domestic and business relationship which have always been recognized as the undisputed field of state law...." The opposed view he called "absurd extravagancies of interpretation...." Woodrow Wilson, Constitutional Government in the United States 171, 179 (1917 [1908]); Jonathan Grossman, "The Origin of the U.S. Department of Labor," Monthly Lab. Rev., Mar. 1973, at 3, 7.

5Alan Liddle, "Jury Finds Taco Bell Guilty in Wages Suit: Chain to Appeal Case's Class-Action Status," Nation's Restaurant News, Apr. 21, 1997, at 1 (Lexis). Workers have been able to file class-action lawsuits despite their prohibition under the FLSA by the Portal-to-Portal Act—see below chapter 3—by suing under state minimum wage and overtime laws.

6Almost from the FLSA's inception employers sought to evade it by having "workers punch out at the time required for apparent compliance and then...allow[ing] them to go on working 2 to 5 more hours." Irving Dilliard, "United States Wage and Hour Law: Survey of 18 Months of Operation," St. Louis Post-Dispatch, May 12, 1940, reprinted in 86 Cong. Rec. A3293, A3294 (1940).

7Andrew Murr, "Pay? How About a Pizza? Cost-Cutting Companies Want Employees to Give Something for Nothing," Newsweek, Apr. 20, 1998, at 42 (Westlaw). The Food Lion supermarket chain required employees (some of whom it claimed were excluded from coverage as assistant managers) to perform their work in a certain number of hours and enunciated a no-overtime policy; because many workers could not complete their assigned tasks within the time allocated, they had to work off the clock for fear of being fired; local management suffered and permitted this performance of unpaid overtime. See Lyle v. Food Lion, Inc., 954 F.2d 984 (4th Cir. 1992); Problems in the Labor Department's Enforcement of Wage and Hours Laws: Hearings Before the Employment and Housing Subcommittee of the Senate Committee on Government Operations, 102d Cong., 2d Sess. (1993). For other cases finding or alleging that employers required employees to work off the clock, see Reich v. Waldbaum, Inc., 833 F. Supp. 1037 (S.D.N.Y. 1993), rev'd on other grounds, 52 F.3d 35 (2d Cir. 1995); Realite v. Ark Restaurants Corp., 7 F. Supp.2d 303 (S.D.N.Y. 1998); Harper v. Lovett's Buffet, Inc., 185 F.R.D. 358 (M.D. Ala. 1999); Frank Swoboda, "Nordstrom Settles Suit On Overtime; Employees to Receive More Than $ 20 Million," Wash. Post, Jan. 12, 1993, at C1
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litigation involving as many as 150,000 current and former employees, Albertson's agreed to eliminate the hinge that made the scam possible—the "dollar-for-dollar reduction in managers' bonuses for exceeding the weekly allowable overtime amount."8

Mislabeling of workers as executives not entitled to overtime is particularly widespread in retail and service establishments such as grocery and convenience stores, and fast-food restaurants, which together employ a huge labor force of more than eleven million largely low-wage workers.9 During the 1980s, eating and drinking places and grocery stores were ranked first and third, respectively, with respect to the increase in the number of employees.10 The DOL's own Career Guides to Industries frankly observes that "[m]any workers" in restaurants earn the minimum wage "or less."11

Proliferating high-profile class-action litigation in the 1990s against Taco Bell, Wendy's, Albertson's, Shoney's, and other employers has underscored the prevalence of this unlawfully exploitative treatment of alleged managers.12 For example, the plaintiffs—misclassified as assistant managers although they mostly performed routine production work—in a class action filed against 27 Wendy's

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restaurants in California in 1998 complained that they worked six days a week often more than 12 hours a day and were even deprived of their statutorily mandated rest periods without receiving any overtime pay.\textsuperscript{13} For the five years from 1993 to 1997, DOL compliance actions show that restaurants accounted for the greatest number of minimum wage and overtime violations (20,382 cases) followed by grocery stores and supermarkets (4,662): “Violators were concentrated in the fast-food ind

The retail and service industries accounted for 60-70 percent of all employees owed back minimum wages and half of those owed overtime wages according to DOL compliance actions for the years through 1996, the most recent year for which data are available.\textsuperscript{15} In addition, retail and service employers are unique in lawfully employing as many as 80,000 full-time students at 85 per cent of the minimum wage.\textsuperscript{16} Indeed, more than one-fourth of the almost eight million employees in eating and drinking places are 16 to 19 years old—five times the average for all industries.\textsuperscript{17}

The imposition of mandatory unpaid overwork on restaurant workers who double as low-level supervisors is the paradoxical pendant to the proliferation of contingent employment in an industry whose “extraordinary profits...st[an]d like a giant inverted pyramid on the pinpoint of minimum wages.”\textsuperscript{18}

\begin{footnotes}
\textsuperscript{13}Hawley v. Wendy’s International, Inc., No. BC194235 (Los Angeles Superior Ct., July 14, 1998).


\textsuperscript{17}U.S. BLS, Career Guides to Industries: 1998-99 Edition at 111

\textsuperscript{18}Max Boas and Steve Chain, Big Mac: The Unauthorized Story of McDonald’s 81, 95
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side with upwards of 3,500,000 entirely nonunionized students and other largely young and female part-time employees who are paid the minimum wage for minimal hours without any additional non-statutory social wage supplements are so-called assistant managers.21 "In many fast-food restaurants...sixteen-year-old employees are supervised by eighteen- or nineteen-year-old ‘managers.’"20 In exchange for a fixed weekly wage that may equate to less than the minimum wage and statutory overtime, assistant managers are required to perform both supervisory and “grunt” work for as many as seventy to eighty hours per week.21

How has the law come to condone and even facilitate such perverse


21Managers at one chain—of combination gasoline station/convenience store/restaurant—who were required to live on the premises, alleged that they worked as many as 120 hours per week, as a result of which their fixed salaries amounted to less than the minimum wage. Murray v. Stuckey’s Inc., 939 F.2d 614, 616 (8th Cir. 1991). Even the BLS finally revealed in its Occupational Outlook Handbook that it “is common for restaurant and food service managers to work 50 to 60 hours or more per week.” U.S. BLS, Occupational Outlook Handbook: 1998-99 Edition at 77.
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2. Origins of an Exclusion

The Fair Labor Standards Act was designed “to extend the frontiers of social progress”.... Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed.... To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to...frustrate the announced will of the people.25

Ever since its enactment in 1938, the FLSA has excluded from its protection “any employee employed in a bona fide executive...capacity...(as such terms are defined and delimited by regulations of the [Wage and Hour] Administrator)”26

The choice of the term “Exemptions” as the title of the exclusions provision of FLSA is curious. After all, an exemption is “[f]reedom from a general duty or service; immunity from a general burden, tax, or charge.”27 Exclusions, in contrast, refer to the denial of a benefit or other desirable goods. It is therefore the employer who is exempt—from the burden of paying the minimum wage or mandatory overtime. Conversely, the employee is excluded from these same protections. This Pickwickian sense of exempt may be a vestige of nineteenth-

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century American judicial contractarianism, which struck down, in the name of freedom of and to contract, labor-protective statutes as unconstitutional interferences with employees' "liberty to compete for employment upon unfavorable terms." 28

This commingling of premodern and modern terms is exacerbated by the fact that the regulations, administrators, employers, and commentators commonly speak of "nonexempt" and "exempt" employees. 29 However, despite massive exclusions of vulnerable workers such as migrant farmworkers, 30 most employees in the United States are nevertheless protected by the FLSA—in 1996 64.9 percent and 60.5 percent of wage and salary workers were "subject to and not exempt from" the minimum wage and overtime provision, respectively. 31 And since exclusions from coverage are to be construed narrowly in favor of inclusion, 32 use of the paired categories nonexempt-exempt to designate the universe of affected workers inverts the purpose and spirit of the FLSA. 33 To characterize covered, protected workers negatively as "nonexempt" suggests a statutory baseline of exclusion—as if workers had the burden of rebutting a presumption that employers are exempt from complying with the Act unless and until proven subject to its duties. 34 In fact, "an employer must prove that any

28 Ernst Freund, Standards of American Legislation 124 (1965 [1917]). As an exemplar of such judicial views, see Godcharles v. Wigeman, 6 A. 354 (Pa. 1886).


31 The DOL's most recent estimate is that 79,422,000 and 74,044,000 of all 122,359,000 employed wage and salary workers in the civilian labor force were subject to the minimum wage and overtime provision, respectively, of the FLSA in 1996. U.S. Employment Standards Adm'n, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act: 1998 Report, tab. 1 at 13, tab. 2 at 14.

32 Phillips, Inc. v. Walling at 493.

33 The universe is, strictly speaking, not exhausted by these two categories because in addition to "exemptions," the FLSA contains a definitions provision, which excludes other groups of workers from the statutory category of "employees." 29 U.S.C. § 203(e)(4) (1988).

34 Edwards, Contested Terrain at 133, reports the linguistic usage but mistakenly attributes it to managerial practices rather than to the law itself.
exemption to the overtime provision applies. Proving the exemption is an affirmative defense; the statute assumes that an employee is covered."35 And as a representative of Big Business employers and the former DOL Solicitor told Congress in 1995, the FLSA "is written now so that there is a presumption that all employees are non-exempt...."36

Ironically, the source of this distortion may have been mere sloppiness in drafting. The original administration bill as introduced by Senator Black provided in its definitions section that "'[e]mployee'...shall not include any person employed in an executive, administrative, supervisory, or professional capacity...."37 These workers (together with agricultural laborers) constituted the totality of categorical exclusions. The bill also contained a provision titled, "Exemptions from Labor Standards with Respect to Wages and Hours," which required the proposed Labor Standards Board to issue a regulation providing that "any employer employing less than [blank] employees"shall not be deemed to be violating the law by paying "an oppressive or substandard wage...."38 In other words, the bill exempted small employers from the obligations imposed on larger employers. The radically revised bill that Black introduced two months later and that much more closely resembled the actual enactment removed the named categories of workers from the definition of "employee" and transferred them to a section now titled simply, "Exemptions." Unlike its predecessor, however, this new provision referred only to employees and not at all to their employers.39

In spite of this infelicitous terminology, Congress did not intend to give employers free reign to deprive their employees of minimum wage and overtime rights by arbitrarily calling them executives.40 It therefore required the DOL to issue regulations putting employers and employees on notice as to which groups of workers would be protected and which excluded. Since the word executive, which originated in the United States in the twentieth century,41 is used "to designate anyone who holds a high-ranking management position" and thus "has

38Id. § 6(a).
39S. 2475, 75th Cong., 1st Sess. §§ 3(e) & 11(a) (July 6, 1937).
status connotations,"42 courts quickly concluded that "[d]oubtless the main purpose of the definition was to avoid evasion of the statute by merely colorable titles given to employees by nominal classifications having no substantial basis in reality."43

Because Congress expressly delegated to the DOL the authority to fill the definitional gap, that is, to issue so-called legislative regulations elucidating the meaning of "bona fide executive," they "have the force of law as much as though they were written in the statute."44 Legislative regulations, however, "are as binding on the courts as if they had been directly enacted by Congress" only to the extent that they "are reasonable."45 Thus if the DOL issues a regulatory definition that either is originally or, through the passage of time, becomes "arbitrary, capricious, or manifestly contrary to the statute,"46 a federal court must declare it invalid, and cause the agency to begin afresh. In particular where "there is no longer a rational connection between the facts originally supporting the exclusion...and the regulation as it operates today[, t]he original purpose of the regulation...has become so detached from actual effect...as to make the current regulation arbitrary and capricious...."47

Exclusion of various executive, supervisory, professional, and clerical workers from state statutes limiting the hours of female employees had been widespread for decades before the FLSA.48 The International Labour Organisation’s 1919 eight-hours convention also excluded supervisory management and those working in a confidential capacity.49 Even the version of Senator Hugo

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44Helliwell v. Haberman, 140 F.2d 833, 834 (2d Cir. 1944).
45Fanelli v. United States Gypsum Co., 141 F.2d 216, 218 (2d Cir. 1944).
47Hazard v. Sullivan, 827 F. Supp. 1348, 1354 (M.D. Tenn. 1993), rev’d sub nom. Hazard v. Shalala, 44 F.3d 399, 404 (6th Cir. 1995). But see Gamboa v. Rubin, 80 F.3d 1338, 1343 (9th Cir. 1996) ("the Secretary's failure to adjust the automobile equity $1500 limit for inflation since its adoption almost 15 years ago has thwarted Congress's purpose in establishing the AFDC program and the Secretary's own rationale for adopting the $1500 limit"), vacated on other grounds sub nom. Gamboa v. Chandler, 101 F.3d 90 (9th Cir. 1996).
48Harry Millis and Royal Montgomery, Labor’s Progress and Some Basic Labor Problems 531 (1938).
49Constitution Limiting the Hours of Work in Industrial Undertakings to Eight Hours in the Day and Forty-Eight in the Week, art. 2(a) (1919). Even the rather stringent Labor Code of the former German Democratic Republic denied the overtime premium (of 25 percent) to managerial and professional workers, although the latter were entitled to corresponding time off, while the former were entitled to compensatory time off for
Black’s thirty-hours bill that passed the Senate in 1933 excluded “officers, executives, and superintendents, and their personal and immediate clerical assistants....” That approach conformed to the proposals of the president of General Motors, who urged Congress to exempt “[e]xecutives, managers, superintendents, and overseers, their assistants and staffs, also others engaged in a supervisory capacity....” Exclusions of higher-paid white-collar employees had also been common in collective bargaining agreements covering them. For example, the agreement entered into just a few weeks after the FLSA was enacted between Time, Inc. and the Newspaper Guild of New York, a local of the leftist CIO-affiliated American Newspaper Guild, provided that the employer “shall not be required to compensate for overtime...in the case of writers, photographers, and executives earning one hundred dollars or more per week”; instead, such employees “shall be granted annual vacations of four...weeks with full pay.”

Some light is shed on the purpose of the exclusion of executive employees from the protections of the FLSA by its New Deal progenitor—the President’s Reemployment Agreement (PRA) of 1933. The National Industrial Recovery Act (NIRA) authorized the President “to enter into agreements with, and to approve voluntary agreements between and among” workers, unions, firms, and industrial associations if he believed that the agreements would effectuate the NIRA’s policy and were consistent with the industrial codes of fair competition required by the NIRA. President Roosevelt used the PRA as a temporary blanket code until individual codes of fair competition were adopted for each industry. The PRAs, which, unlike the codes of fair competition, were not legally enforceable, contained child labor, minimum wage, and maximum hours provisions. They specified that the hours provisions, which, in an effort to reemploy the unemployed, limited an individual worker’s workweek to forty hours, did not apply to “employees in a managerial or executive capacity, who now receive more than $35 per week.” This salary was more than twice the weekly minimum wage (of $15-$16) guaranteed by the PRAs. Executives and supervisors were...
also almost universally excepted from the hours provisions of the codes of fair competition on the ground that such limitations were “not appropriate” for them.36

Despite the PRA’s “antisubterfuge” provision, which obligated employers not “to frustrate the spirit and intent of this Agreement which is...to increase employment by a universal covenant..., and to shorten hours and to raise wages for the shorter week to a living basis,”57 employers sought to give “meaningless titles to minor employees to exempt them from the hours provisions....”58 Consequently, Hugh Johnson, the National Recovery Administrator, soon found it necessary to issue a statement defining “manager” and “executive.” He declared that in approving exceptions for such persons from the codes’ maximum hours provisions, the National Recovery Administration did not intend “to provide for the exemption of any persons other than those who exercise real managerial or executive authority, which persons are invested with responsibilities entirely different from those of the wage earner and come within the class of the higher salaried employees.” Johnson also used the opportunity to emphasize that paying less than the threshold $35 weekly salary created an irrebuttable presumption that the employee was not “exempt.”59

Under the NIRA, then, both the salary level and the description of managerial duties established a clear divide between subordinate and superordinate employees. Although the PRA and the codes of fair competition, unlike the FLSA, did not expressly exclude managerial-executive employees from the minimum wage provisions, the high salary test functioned under both regimes as a super-minimum wage vis-à-vis any employer wishing to take advantage of the exemption. Moreover, whereas the FLSA merely gave employers a financial incentive to hire additional workers rather than to pay premium overtime to existing employees, the PRA sought to expand employment more directly by obliging employers not to work their workers more than forty hours.60

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56Leverett Lyon et al., The National Recovery Administration: An Analysis and Appraisal 369, 382 (1972 [1935]).
57PRA, ¶ 8, in NRA, What the Blue Eagle Means to You at 8.
5937 Monthly Lab. Rev. 1083 (1933). Johnson also issued an interpretation that so long as he was receiving more than $35 per week, the employee could act “primarily, although not wholly, in a managerial or executive capacity” without causing his employer to forfeit its exemption. Interpretation No. 15, in NRA, What the Blue Eagle Means to You at 17. For an example of a code that excepted all employees receiving more than $35 per week and executives and managerial and supervisory staffs from any hourly limitations, see Code of Fair Competition for the Automobile Manufacturing Industry, § III, in 1 NRA, Codes of Fair Competition 253, 255 (1933).
60Codes of fair competition did include premium overtime provisions. For a tabular
Nevertheless, freeing employers from this restriction with respect to their managerial employees had the same impact under both regimes—weakening the reemployment effect while ensuring that executive employees were sufficiently well-paid and closely allied with capital that they could be remitted to their own devices in warding off exploitation.

A similar regime would also have been established under the proposed National Textile Act, on which Congress held hearings in 1936 and 1937. In the 1936 bill, the flat ban on employing production employees more than 35 hours per week or more than 7 hours per day or clerical or office employees more than 40 hours weekly or 8 hours per day, did not apply to those engaged in a managerial or executive capacity at a salary of not less than $50. The 1937 bill excepted employees engaged in a managerial or executive capacity and receiving $40 or more per week from the mandatory time and a half provision for hours in excess of 7 per day or 35 per week. At one of the hearings on the bill, which took place just four days before the FLSA was introduced in May 1937, textile industry management informed the House Committee on Labor that it was “unalterably opposed” to the provision, which revealed the drafters’ ignorance of “industrial mill management”:

In every mill there are large groups of persons in charge of certain departments covering minor operations [sic], as department managers or executives, where $40 per week would be excessively high, and yet the need for these department heads and managers working in excess of 40 hours per week must be apparent. The efficient department manager interested in his work and in the development of his department never quits when the whistle blows. In fact, very often his best work is done during the brief period after the other employees have left the mill. This is the period in which he plans his work and studies his operation.

[I]t must be remembered that from these department managers and executives are frequently recruited the chief executives of the mills and their efficiency and development is controlled not by a desire to quit when the whistle blows, but to maintain contact with their work such hours as they find necessary for their own development.\(^6\)

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overview, see “Summary of Permanent Codes Adopted Under NIRA Up to November 8, 1933,” 37 Monthly Lab. Rev. 1333 (1933).

\(^6\)H.R. 9072, § 19, in To Rehabilitate and Stabilize Labor Conditions in the Textile Industry of the United States: Hearings Before a Subcommittee of the House Committee on Labor on H.R. 9072, 74th Cong., 2d Sess. 3, 7 (1936). Interestingly, the hours limitation applied even to proprietors doing production work. Id. § 3(5) at 3.

\(^6\)H. R. 238, §§ 13(d) & (e), 75th Cong., 1st Sess. (Jan. 5, 1937).

\(^6\)To Regulate the Textile Industry: Hearings Before the Subcommittee of the House Committee on Labor on H.R. 238, Pt. 6, 75th Cong., 1st Sess. 391 (1937) (testimony of Clement Driscoll, executive director, American Lace Manufacturers Association).
The industry witness requested that the salary cutoff be set at no more than $35—the level that had been established by the industry’s NRA code.64

Representative William Connery, who introduced the FLSA bills with Black on May 24, 1937, had also been associated with him in promoting thirty-hours legislation. The thirty-hours bill that Connery introduced in 1937 excepted “officers, executives, and superintendents, and their personal and immediate clerical assistants” from the five-day, six-hour maximum.65

A cavalier attitude about the need to protect nonproduction workers against overreaching seemed particularly out of place in the 1930s when even Personnel, the magazine of the American Management Association (AMA), stressed that the Depression had gone a long way toward dismantling differentials that had favored salaried workers:

Even social distinctions are disappearing with the increased number of high school and college graduates who voluntarily or under necessity have gone into manual labor. With this decline in class distinctions there has begun to grow up a community of interest between wage-earners and salaried employees. In some companies salaried workers have shown a desire for collective bargaining...either through their own organizations or by use of the same agencies that serve wage-earners.

These circumstances have convinced many employers that there is need to restudy the working conditions of salaried employees, if for no other reason than to avoid serious depreciation of the loyalty, efficiency, and morale of this class of workers.... The question of overtime work is being given serious thought in many business organizations, and earnest efforts are being made to eliminate the exploitation of the salaried rank and file.66

The need for unionization or statutory intervention was suggested by a 1937 AMA survey, which found that only 7.5 percent of employers paid any of their salaried workers any type of premium overtime.67 (A quarter-century later, it was still the case that fewer than a tenth of firms paid exempt employees time and one-half for overtime.)68 As Congress was preparing to debate the scope of FLSA coverage for white-collar workers, an industrialist inadvertently revealed in The New York Times precisely why the purposes of the overtime provision applied to them: employers would use labor-saving bookkeeping and accounting machines to counteract the overtime penalty.69

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64To Regulate the Textile Industry at 391.
65H.R. 1606, §1, 75th Cong., 1st Sess. (Jan. 5, 1937)
67Calculated according to “Overtime Work by Salaried Employees” at 91.
69N.Y. Times, Mar. 6, 1939, at 14, col. 6 (letter from Industrialist, Pittsburgh).
On the eve of Pearl Harbor, another management magazine, *Modern Industry*, warned employers that white collar workers had objectively and subjectively been incorporated into the working class:

A few years ago it could be fairly stated that white-collar jobs were preferable to factory jobs because of higher earnings, shorter working hours, modern working conditions, greater stability of employment, better chances of promotion.

Unionization and defense have reversed conditions. Today there is little question that the highest wages are paid to production workers. Working conditions—in terms of air conditioning, better lighting, washrooms, eating facilities, etc.—are better in some new factories than in the general offices of the same companies.... Union agreements assure greater security in employment and regular promotion. With the exception of hours—and for overtime work most production employees receive adequate compensation—there is little choice for the young person weighing his future between a factory job and a white-collar job. Improved working conditions and obvious economic advantages have seriously battered old prejudices against "hard work" as opposed to "soft jobs" in the office force....

Another significant trend is the growing unionization white-collar workers. Actual mechanization of clerical work, growing realization of a mutuality of interest, "de-classing" of white-collar and professional workers during years of depression unemployment, the example of economic gains won by factory workers through unionization, and very genuine dissatisfaction with present wages, hours, and working conditions, all have given impetus to union organization of these employees. 70

Elmer Andrews, the first Wage and Hour Administrator, hazily alluded to class alignments when, on September 29, 1938, in a sneak preview of the regulations that would be issued a few weeks later, he answered a question about the definition of executive, administrative, and professional "folks" at a meeting of the Southern States Industrial Council in Birmingham, Alabama, by noting that he had "had that in mind more than anything else.... I am very sympathetic toward your problem there, because I know a superintendent is not a clock watcher, nor does he punch a time clock. Certainly if he was the sort of fellow that you would take care of if he is sick or knicked out, if you think enough of him for that, I think that really indicates he is a part of the executive family." 71

The regulations that the DOL issued several days before the FLSA went into effect on October 24, 193872—and which had generated so much interest that *The
New York Times published them in full in the center of its front page—specified that a bona fide and hence excluded executive employee is engaged primarily in management, directs other workers, has authority to hire and fire, has discretionary powers, and does no substantial amount of work of the same kind as the employers’ covered employees. In addition to these criteria, the DOL prescribed a fixed salary level test, which the employer also had to satisfy. At $30 per week, it was a little less than three times the minimum wage for a full workweek.

With the law barely in effect and despite the Wage and Hour Administrator’s “Christmas gift” to the first violators—Andrews had postponed prosecutions until after the holidays—efforts were already underway to seek regulatory or statutory changes. At the end of November, Representative Ramspeck (D. Ga.), criticizing the hours provisions as inflexible, “suggested that it might be advisable to exempt all persons in higher wage brackets.” He recommended that the House Labor Committee review the FLSA to determine where the line should be drawn. A week later, Representative Fred Hartley (who in 1947 would gain abiding fame for his role in radically amending the National Labor Relations Act [NLRA]) told the Toy Manufacturers’ annual convention that he would urge amending the FLSA to “eliminate the provisions on hours...on the ground that the hours regulations have an ‘adverse effect upon salaried employees.’” A few days later, The New York Times reported that on his cross-country tour Andrews had heard employers frequently refer to the overtime provision and “not understand why men who might be earning as much as $300 a week should receive duties tests were not introduced until 1940.


time-and-a-half pay after forty-four hours of work in a week. ‘Business men...see no reason why the men in the higher range of income should be classed with those who punch the time clock.... They say that these men can go fishing when they like and have other advantages.’” The amendment that employers had most frequently proposed to him was that “salaried employees guaranteed $150 a week or more and who have vacations with pay should be excluded from the overtime provisions...” The intensity of employers' objections was sufficient to prompt Andrews to conclude that they “may lead to a suggestion to Congress that employees be classified by income.”79 Andrews also recounted that businessmen also wondered why “a fellow not actually an executive or a professional, but perhaps engaged to the Boss’ sister” should be treated like time-clock punchers.80 The following day it was reported that the figure Andrews had heard on his trip was $150 per month, not per week.81

A few days later the Wage and Hour Administrator announced that he was “inclined to favor exempting” “permanent and comparatively well-paid workers...earning $300 to $400 a month...if it could be done ‘without causing any harm.’” The harm Andrews had in mind was clear: “Certainly no class of workers needs the protection of this law more than the low-paid white-collar group.... But I am talking about the worker with a guaranteed monthly wage of $300 to $400 a month who has a certain amount of discretion and who does not have to punch a time clock.”” Andrews announced that he had asked his legal staff to “determine whether well-paid groups...might be exempted from the overtime provisions by amending the definition of ‘administrative’ and ‘executive’ employees.” If it was found that the definitions were too narrow, excluding many who should have been covered, he might hold hearings.82 After Andrews had announced in late January 1939 that he would schedule hearings within a few weeks, the apparent momentum receded in February when he stated that he was putting off the scheduling because he interpreted a lack of interest in the hearings as an absence of any need for the exemption of high-salaried employees.83

But at the beginning of March Andrews was again reported as favoring congressional change in the coverage of highly paid white-collar employees,84 and after a closed session of the House Labor Committee on March 14, he

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80“Proposal to Amend FLSA to Exempt Salaried Aides,” 1 Wage and Hour Reporter 410 (Dec. 19, 1938).
83“Salaried Employees,” 2 Wage and Hour Reporter 104 (Feb. 20, 1939).
announced that he was prepared to recommend several amendments including exemption from the overtime provision of all salaried employees with salaries in excess of $200 or $250 per month. House Labor Committee chairman Representative Mary Norton, who regarded the FLSA as one of her greatest achievements\(^5\) and was personally opposed to opening the statute to the amending process, drafted an omnibus FLSA amendment bill to make the law successful and popular and to ward off the emasculation she feared from its enemies and a repetition of the attacks that had been directed at the NLRA.\(^6\) Norton displayed no reluctance at all to amend one aspect of the FLSA:

"Take for instance, the inclusion under the hours provisions of the so-called white-collar workers, regardless of the wages or salaries they receive. Who thinks the Congress intended that white-collar workers receiving $2,000 or $2,400 a year be covered into [sic] this law. I don't think so and I know it didn't.

"When an office or other worker commands a salary of $2,000 or $2,400 a year, he should not be compelled to demand overtime at time-and-one-half pay if the exigencies of his work require him to remain on the job more than the allotted 44 hours.... On the contrary, he should expect to have to work overtime sometimes."\(^7\)

Norton added that a majority of her committee favored a $2,000 white-collar exemption threshold, while the next day Andrews said that a $200 per month threshold might be too low, declaring his preference for a $3,000 annual threshold for salaried employees, a level familiar from the Social Security Act.\(^8\) But two weeks later he endorsed the $200 figure.\(^9\)

Employers had objected to paying overtime to employees with weekly incomes of $150 to $300, which amounted to 14 to 27 times the new minimum wage for a forty-four hour week, while Andrews referred to a weekly threshold of $75 to $100 or seven to nine times the minimum wage. Yet the House Labor Committee reported out an amending bill that would have given employers far more than they had asked for by writing "a guaranteed monthly salary of $200 or more" directly into the Act. That sum was chosen because any lower amount "would undoubtedly exempt a considerable number of salaried workers to whom

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\(^7\)"Eight Changes for FLSA" at 148.

\(^8\)"Eight Changes for FLSA" at 148; "Wages-Hours Law Due to Be Changed," *N.Y. Times*, Mar. 17, 1939, at 36, col. 6.

the overtime benefits of the act should extend. In addition, as Norton explained on the House floor: "Of course, you gentlemen realize there is nothing in this act which limits the application of this exemption to clerical or so-called 'white collar' workers. If a ditch digger received $200 a month he would be similarly exempt under this provision." Even this weekly salary level of $50, or four and half times the weekly minimum wage, would have been more protective of alleged executive workers than the $30 that the Wage and Hour Administrator had incorporated into the regulations.

Much more radical amendatory bills introduced in early 1939 would have excluded "any clerical employees, such as bookkeepers, stenographers, pay-roll clerks, auditors, cost accountants, purchasing agents, statisticians, or other office help regularly employed on a straight salary basis and given vacations with pay." After meeting with President Roosevelt on March 29, Norton filed the omnibus FLSA amendments bill exempting from the overtime provision employers with respect to those employed on a monthly basis and guaranteed a monthly salary of at least $200. The Wage and Hour Administrator offered illuminating background data on the need for the change in a memorandum to Norton on the bill. Andrews sought to justify the higher income threshold by reference to the administrative problems of "numerous protests from employers" caused by the fact that the regulatory exemption was not applicable to many higher-salaried employees whose functions were not "clearly managerial or supervisory" or professional. The administrator found that it might be "an annoyance to all persons concerned, without contributing to any of the purposes which the Act was designed to achieve," to require overtime payments to highly paid nonsupervisory employees who worked long hours during emergencies, but who were free to leave early or absent themselves altogether during slack periods, and

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90 H.R. Rep. No. 522, 76th Cong., 1st Sess. 8-9 (1939). Norton's bill was H.R. 5435, § 5, 76th Cong., 1st Sess. See also H.R. 7133, § 5(a), 76th Cong., 1st Sess. (Rep. Barden, July 11, 1939) (guaranteed monthly salary of $150 or more or yearly salary of $1,800 or more "if such employee is not required by his employer to work any specific minimum number of hours in any workday, workweek, or other period"); H.R. 7349, § 5(a) 76th Cong., 1st Sess. (Rep. Ramspeck, July 24, 1939) (guaranteed monthly salary of $200 or more). Barden's earlier bill, H.R. 5347, in the same session, included no amendment concerning the white-collar exemptions.

91 84 Cong. Rec. 5459 (1939). Norton delivered exactly the same explanation the following year. 86 Cong. Rec. 5122 (1940).


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whose health and efficiency were "seldom jeopardized by poor working conditions." Andrews rejected revision of the regulatory definitions of the duties tests as unsatisfactory:

Among the types of employees as to whom it is most frequently urged that subjecting them to a time clock is irritating and undesirable [are] private secretaries, executive assistants, cashiers, buyers, and, in general, higher paid clerical workers. Any form of description used in an administrative definition, which would exempt such persons would also probably exempt the great mass of clerical workers or else the definition would be impossible to interpret in any given case. Thus, a relaxation of the existing definition might seriously undermine the broad coverage of the Act intended by the Congress.94

The administrator highlighted the importance of retaining coverage of the mass of clerical workers by reference to censuses conducted in 1934 in Pennsylvania and Michigan. In the latter, half of the clerical workers earned less than $1,000, while in the former, 42 percent, including 56 percent of all female clerical workers, earned less than $17.50 per week. Since salaries were above average in those states, a large proportion of all clerical workers nationally fell below the $16.00 per week standard that the FLSA would provide for when the minimum wage reached 40 cents. And since many clerical workers worked very long hours, "ordinary clerical workers" needed the protections of the law as any other covered group. Andrews estimated that in Michigan the $200 threshold would have exempted less than 3 percent of non-executive, non-professional clerical employees (5 percent of males and one-half of one percent of females), while less than one percent would have been excluded by a $250 threshold. With respect to individual occupations in Michigan, the $200 figure would have exempted one-third of male secretaries, less than one-twentieth of male stenographers, less than 2 percent of female secretaries, and hardly any female secretaries.95

The new industrial unions' umbrella organization, the CIO, immediately protested the pro-employer bias of the bill as a whole. The elimination of overtime protection for salaried workers was, in its view, objectionable both because the FLSA already excluded so many of these employees and because even those earning more than $200 monthly needed and deserved legal protection.96

At this point in the legislative process, the momentum in favor of excluding

95"Administrator's Explanation of FLSA Changes" at 172-73.
a broad swath of white-collar workers from the overtime provision was halted by the complex forces shaping the 1939 amendments, which focused primarily on vastly expanding the scope of agricultural processing exemptions and was driven by southern representatives. The FLSA amendments proposed by them were too radical for Norton, Andrews, and the Roosevelt administration. Norton declared that the president “will veto any bill that emasculates the law,” which she believed had “brought greater relief to the underprivileged than any other law on the books.” Andrews—who characterized all the amendments in the original Norton bill as “non-controversial”—expressed the fear that if agricultural packing and canning employers could establish the precedent of excluding large numbers of workers from the FLSA by sheer lobbying pressure “without a factual basis...no worker covered by this Act can long expect to receive its benefits. Such a legislative reward is an invitation to other employer pressure groups to secure a similar exemption for their workers.” (To be sure, Andrews’ apprehensions concerning exclusions driven by effective employer lobbying appeared a tad late in the day given the extensive list of such exclusions that employers had lobbied directly into the original FLSA...) Finally, the Wage and Hour Administrator argued that codifying “intolerably long hours...would handicap labor unions in securing reasonable hours in their collective bargaining agreements.”

Specifically with regard to the white-collar amendment in the more radical bill sponsored by Graham Barden, an extreme anti-labor southern congressman, which would have lowered the exclusionary salary threshold to $150 per month, Andrews observed that if workers earning between this amount and the $200 figure that he had supported “may be worked an unlimited number of hours without overtime compensation, the purpose of the bill to spread employment in this group will be defeated.” The Barden amendments, in addition to depriving hundreds of thousands of clerical workers of their right to overtime compensation—the majority of whom would presumably have been excluded by the Norton bill as well—would have excluded “all craft and skilled workers paid on a piece-rate or hourly scale where it would be to the employer’s advantage to guarantee the employee $150 a month.”

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97 Paulsen, A Living Wage for the Forgotten Man at 139-43.
98 FLSA, § 13, 52 Stat. at 1067.
99 “Receding Prospect of FLSA Change,” 2 Wage and Hour Reporter 283, 284 (June 12, 1939).
100 “Status of FLSA Amendments,” 2 Wage and Hour Reporter 343, 344 (July 24, 1939). In fact, the WHD could not furnish precise estimates on the number of workers who would be excluded from the FLSA if the various bills were enacted because it had abandoned a study to work up such data after discovering that they were unavailable. “Action on FLSA Changes,” 2 Wage and Hour Reporter 351, 352 (July 31, 1939).
The controversy that employers successfully had unleashed as soon as the FLSA went into effect focused on the scope of the overtime penalty in general—did it apply only to minimum wage workers and minimum wages or also to higher-paid employees?—and its applicability to white-collar workers in particular. Employers seized the upper hand in this struggle by implanting in public discourse the notion of the FLSA as merely “the Magna Charta of marginal workers in America....” Even liberal newspapers, such as the New York Post, lent credence to this image by characterizing the FLSA’s purpose as “put[ting] a floor under wages in some of the most shockingly underpaid industries...and...fix[ing] a limit to impossibly long hours.” In contrast, no counter-discourse succeeded in forging an equally compelling image conveying universal coverage. Consequently, the forces advocating broader applicability often fell back on legalisms, which were distinctly second-best rhetorical weapons.

One who rose above legalisms was Colonel Philip Fleming. During the short period between the time the FLSA went into effect in late 1938 and the accelerated military build-up in 1941, the Wage and Hour Administrator, who was responsible for enforcing the act, became a high-profile political-economic figure. Trying to propitiate law-abiding employers, while intimidating scoff-laws and energizing workers to file complaints against “chiselers”—as Roosevelt and others were wont to call them—he was continually engaged in “‘Selling’ Wage-Hour Law to Public” as “one of countless restrictions on free enterprise” and on a “market that always has functioned, and always must function, under a large number of restraints imposed by custom, voluntary organization, and law.” In particular, Fleming sought to justify state intervention in the labor market as merely applying the principle of the “reservation price” to human labor that had guided businesses. In addresses to two employers organizations and a union in June 1940, he observed that during the depression:

The sale of new automobiles would have been greatly stimulated if they had been priced at $10. But such a price would have been far below the cost of the materials used in their manufacture. The result of a $10 price simply would have been the transfer of capital from Henry Ford, General Motors and others who manufacture automobiles, to those who use them.

Similarly, if all restrictions upon the labor market had been removed—if all labor legislation had been repealed and labor unions wiped out—much more labor might have been employed. But it is quite curious, I think, that while no sensible person expects

101See above chapter 1.
102Dilliard, “United States Wage and Hour Law” at 3293.
automobile manufacturers to sell their wares at $10, many did advocate, and continue to advocate, that labor should be sold for any price it will bring, even though the result should be slow starvation. The worker's "capital" is his ability to produce, which is directly related to his health. And many people, who seem to think it is all right to destroy the worker's capital, would be horrified at the suggestion that the employer's capital should be wiped out. A seller's 'reservation price'—a price below which he will not sell—is wholly acceptable to common sense where material goods are concerned. It is no less sensible where human labor is concerned.

The Wage and Hour Law introduces such a "reservation price" into the labor market. The "reservation price" can be maintained here only by legislation strictly enforced, because in periods of widespread unemployment the worker could be forced to accept a wage below the minimum needed to maintain his "capital"—his health and efficiency—and far less than his requirements as a participant in a democratic order.

To make a reservation price for labor effective, an alternative to starvation must be provided, else many workers will ignore the Act and accept any wage, however low. A socially acceptable alternative to starvation is provided in the form of relief, unemployment insurance and other forms of social security.

The Wage and Hour Law...has the immediate social utility of preventing "capital-destroying" sales of labor, and the long run utility of shifting the employment of labor to economically justifiable enterprises—from those that cannot exist without subsidies provided by the public in the form of charity or relief....

[T]he Wage and Hour Law is a restriction... upon the "free enterprise system as a way of life" for the employer. It is also a restriction upon the "free enterprise system as a way of life" for the employee. It very drastically interferes with his freedom to work for ten cents an hour. It limits his freedom to work 60 hours a week for $5. 104

Fleming's position could not have appealed to many newspapers—which were hardly dispassionate observers since publishers themselves were contesting coverage of numerous employees such as reporters and news carriers 105—which were early and zealous propagandists of employers' constricted conception. *The New York Times*, for example, in July 1939 argued that even most congressmen who had voted for the FLSA thought it applied "only to submarginal labor. But by a combination of the so-called hours provisions with a joker inserted at the last minute by the conference committee the bill lent itself to a possible interpretation under which it fixed the hourly wages of all employes, no matter how high their compensation, except a few classes specifically exempted." 106 A year later the

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newspaper was still complaining that the hours provision "brought under the act the overwhelming mass of all workers." The New York Herald Tribune agreed that Congress intended to apply the act "only to sweatshop labor incapable of effecting through organization proper standards of its own devising." 

Not coincidentally, the claim that the law was designed to protect only "marginal labor" was coupled with undisguised hostility toward the statute altogether. Thus the Times repeatedly raised the issue of whether minimum wage regulation was the proper province of the federal government and would not be better left to the states. Since the whole point of federal intervention was to avoid a competitive race to the bottom and to act on behalf of workers in (especially southern) states whose legislatures would never enact any minimum wage legislation for men, the newspaper's argument made little sense that devolution to the states would terminate "the effort to force a procrustean uniformity on wage rates throughout the nation regardless of great differences in local conditions." The Times urged reexamination of the "so-called hours provisions" also on the grounds that "they are really disguised wage provisions which apply not merely to marginal or low-paid labor but to the overwhelming bulk of all labor. They have, moreover, been interpreted in such a way as in effect to set a different minimum wage for each employer." 

The Herald Tribune's call for repeal or devolution to the states was more concrete and incendiary and more accurately reflected non-sweatshop employers' impatience with a statute they had not realized would cost them anything. Though designed to "prevent sweatshop conditions in the so-called marginal trades," the law had been interpreted by the Wage and Hour Division in such a "fantastic" manner as to "govern all industry, marginal or other...." The editors illustrated what they viewed as the Labor Department's perverse enforcement policy by reference to a test case it had brought against a commercial building

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107 "Wage-Hour Rulings," N.Y. Times, Oct. 16, 1940, at 22, col. 3. The original FLSA bill reflected the interpretation favored by the Times, but that language failed to survive enactment: "it shall be the policy of the Board to establish such minimum wage standards as will affect only those employees in need of legislative protection without interfering with the voluntary establishment of appropriate differentials and higher standards for other employees in the occupation to which such standards relate." S. 2475, § 12(6), 75th Cong., 1st Sess. (May 24, 1937).


109 "Amending the Wage-Hour Law," N.Y. Times, Apr. 12, 1940, at 22, col. 2, 3. Even the Washington Post, which did not promote devolution to the states, agreed editorially that a "great mistake was made initially in providing for comprehensive coverage of industries in all parts of the country. The establishment of uniform minimum-wage rates and maximum-hour standards was likewise a blunder." It therefore urged revisions aimed at a "more workable and less rigid" law. "The Barden Bill," Wash. Post, Apr. 18, 1940, reprinted in 86 Cong. Rec. at 2202, 2203 (App.).
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owner in New York City, which paid, pursuant to a union contract, its building service employees an average weekly wage of $29, "far above the minimum required" by the law, for a 48-hour week. Since the FLSA at the time set 42 hours as the threshold for overtime premiums, the DOL demanded back overtime wages: "to blazes with the fact that these toilers are not engaged in a marginal industry, that by collective bargaining they have made their own terms...." As written and administered, the FLSA, in the Herald Tribune's view, would soon rival the NLRA in its destruction of free enterprise.110

The pro-states-rights stance of the metropolis's most respected dailies was puzzling since they were aligning themselves with the most reactionary opponents of the New Deal's modest intervention into capitalism's dysfunctionality—southern racists—who viewed the FLSA's main object as "overcom[ing]the splendid gifts of God to the South."111 What was odd about this overlap was the fact that southern opponents correctly "charged that the business interests of the industrial East were responsible for enactment of the law because they hoped it would kill off competition from the South and West."112 Yet these northern corporations were otherwise the New York newspapers' constituents.113

After more legislative wrangling between the House Labor and Rules Committees, Representative Ramspeck's so-called compromise bill deleted the $200 salary threshold from the Norton bill. Instead, it inserted a blanket exemption for all industries from the overtime provision with respect to employees not worked more than 160 hours per month..114 On July 27, 1939, Norton's House Labor Committee reported another bill containing this provision, which would simply have excluded "any employee employed at a guaranteed monthly salary in excess of that required by this Act who does not work more than one hundred and sixty hours per month."115 However, legislative efforts to reach a compromise on amending the FLSA in 1939 broke down in July when Andrews announced withdrawal of his support for the salary definition of excluded white-collar employees on the grounds that the unions (especially the Newspaper Guild) that supported him and his enforcement efforts opposed it.116

110“Wage-Hour Absurdities.”
116"Andrews Shifts on 'White Collar,''' N.Y. Times, July 21, 1939, at 5, col. 1; Paulsen,
In 1940 Congress again took up the issue of excluding higher-paid workers from the premium overtime provision together with other amendments that would have constricted coverage, excluding many agricultural processing workers.\textsuperscript{117} Supporters of these amendments were derisively known as "the dime-an-hour bloc."\textsuperscript{118} Of the three principal bills, both Norton's administration bill (H.R. 5435)—viewed by labor as "the least obnoxious"\textsuperscript{119}—and Representative Ramspeck's compromise bill (H.R. 7349) would have excluded all employees employed at a guaranteed monthly salary of at least $200, while Barden's openly pro-employer bill (H.R. 7133) would have excluded all white-collar employees with salaries of at least $150 monthly if they were not required to work any specified number of hours. The WHD conservatively estimated that the Norton and Ramspeck bills would exclude an additional 125,000 employees from the hours provision, while 325,000 would be excluded under Barden's bill.\textsuperscript{120}

As blatantly restrictive and antilabor as Barden's white-collar provision was, \textit{The New York Times} speculated that it might perversely expand the law's scope. Since the newspaper asserted "almost universal agreement" that the FLSA was not intended to apply to "highly paid workers," it feared that by "[restricting]" the FLSA to workers earning less than $150 monthly, Barden's bill had "the incidental effect of extending the application to all persons getting up to that amount. Instead of applying merely to the lowest paid workers, the act would then definitely cover much the greater part of our whole working population."\textsuperscript{121} "The most important needed amendment," from the perspective of the \textit{Times}, was "removal...of the mandatory blanket 'maximum hour' provisions...."\textsuperscript{122}

The renewed legislative wrangling in April 1940 augured success for the anti­labor southern congressional coalition that "seemed able to dictate terms to the New Dealers...."\textsuperscript{123} But by the end of the month, with the knowledge that

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\textit{A Living Wage} at 142. Nevertheless, when Andrews resigned two months later the \textit{Times} speculated that his administration had not greatly pleased some unions. "Andrews Out, Fleming In," \textit{N.Y. Times}, Oct. 19, 1939, at 22, col. 2.

\textsuperscript{117}"House to Consider Wage Act Changes Early Next Week," \textit{N.Y. Times}, Apr. 9, 1940, at 1, col. 1.


\textsuperscript{119}Henry Dorris, "Wage Law Revision Nears House Test," \textit{N.Y. Times}, Apr. 22, 1940, at 1, col. 5.

\textsuperscript{120}The Wage and Hour Administrator's useful section-by-section comparison of the bills was published by Representative Norton in 86 \textit{Cong. Rec.} at 2260-64 (App.). The estimates are explained at id., 2264 n.g.

\textsuperscript{121}"Wage-Hour Amendments," \textit{N.Y. Times}, Apr. 25, 1940, at 22, col. 3 (editorial).

\textsuperscript{122}"Wage-Hour Amendments," \textit{N.Y. Times}, Apr. 29, 1940, at 14, col. 2 (editorial).

\textsuperscript{123}Henry Dorris, "House Opens Way to Wide Changing of Wage-Hour Act," \textit{N.Y. Times}, Apr. 26, 1940, at 1, col. 3. On the complex agricultural-sectional forces behind
Congress would be unable to override a certain presidential veto of the drastic Barden amendments, neither side could muster a majority even in the House, and having recommitted the original Norton bill, "[t]here was a rush for the doors, many hastening to catch trains for Louisville to see the Kentucky Derby."\textsuperscript{124}

Although Norton's amendment failed in 1939 and 1940,\textsuperscript{125} it and other legislative proposals setting the salary threshold as high as $350 per month\textsuperscript{126} underscored the importance that Congress attached to "comparatively high" market-generated salaries as a guarantee against exploitation that rendered legislated protection against (unpaid) long hours unnecessary.\textsuperscript{127} To be sure, proemployer proponents like Representative Barden preferred the nonsensical argument that without the amendment, those "who have responsible jobs, and sometimes like to go to a baseball game, play golf, or take an afternoon for fishing, either must forego [sic] this pleasure or violate the act."\textsuperscript{128}

Even part of the press that in 1940 supported the FLSA in principle, such as the \textit{Washington Star}, editorialized that "the basic purpose of the act would not suffer if white-collar workers, earning $150 or $200 a month, were exempted...."\textsuperscript{129} The \textit{St. Louis Post-Dispatch}, which opposed "emasculatory amendments," agreed that the law unfairly penalized "employers who pay their employees well over the minimum scale, perhaps as much as several times the
minimum” by requiring them to pay overtime to boot. Indeed, the newspaper believed that the law also unfairly placed many employees “in an unfortunate position”: “They must either turn in memorandums for extra pay which they would prefer not to ask for or blink the time beyond the maximum which they may work in a week. ... In any case, persons earning approximately $2,000 a year are not those for whom Federal wage-hour legislation was intended. They may not be in the upper brackets, but they are not the bottom-rung workers in whose behalf the law was passed.”

The year 1940 also witnessed extensive DOL hearings on the exclusions of executive, administrative, and professional employees, culminating in the so-called Stein Report, which contains the most detailed official explanation of the purpose of the exclusion and the crucial function of the salary test in distinguishing between protected and unprotected employees. The DOL took as its point of departure that it “does not have the power to exempt all salaried workers” since “there is little advantage in salaried employment if it merely serves as a cloak for long hours [and] may well conceal excessively low hourly rates of pay.” Indeed, the DOL heard testimony in 1940 “that, as a result of the exemption from overtime payments accorded executives, employees in non-executive positions working the same number of hours and being paid at a lower rate will frequently surpass the executives in total compensation received.” Neglect of the need to protect non-bona fide executive employees was rooted in “a serious misreading of the Act [that] assume[d] that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum. Living conditions can be improved and work spread even where wages are comparatively high.” Moreover, the Stein Report concluded, “an astonishingly large percentage” of salaried white collar workers, many of whom were women, received low wages.

Finally, and most centrally, the Stein Report observed:

The term “executive” implies a certain prestige, status, and importance. Employees who qualify under the definition are denied the protection of the Act. It must be assumed that they enjoy compensatory privileges and this assumption will clearly fail if they are not

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130“The Wage-Hour Battle,” St. Louis Post-Dispatch, May 2, 1940, reprinted in 86 Cong. Rec. at 2721, 2722 (App.).

131U.S. DOL, “Executive, Administrative, Professional...Outside Salesman” Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 8, 7 (1940).

132Id. at 7 n.25.

133Id. at 8, 9. A survey conducted by the New York State Department of Labor in 1937 revealed that the average weekly earnings of male office workers in factories ($44.76) were double women’s ($22.41). “Earnings of Office Workers in New York State Factories, October 1937,” 46 Monthly Lab. Rev. 480 (1938).
paid a salary substantially higher than the wages guaranteed as a mere minimum under Section 6 of the Act. In no other way can there be assurance that Section 13 (a)(1) will not invite evasion of Section 6 and Section 7 for large numbers of workers to whom the wage and hour provisions should apply. Indeed, if an employer states that a particular employee is of sufficient importance to his firm to be classified as an "executive" employee and thereby exempt from the protections of the Act, the best single test of the employer's good faith in attributing importance to the employee's services is the amount of money he pays for them.\textsuperscript{134}

In October 1940, on the same day that the Wage and Hour Administrator made the Stein Report public, he also published a revised set of white collar regulations, which again merited coverage in the center of the front page of The New York Times.\textsuperscript{135} While declaring that "white-collar workers would continue to be protected from exploitation as to minimum wages and working hours," and especially from "long hours without overtime payment to make up for managerial inefficiency or to keep down payrolls," Administrator Philip Fleming stressed that "the new regulations were written under the belief held by him and his associates that the Wage and Hour Law was not to cover people like Hollywood stars or types of business administrators earning high salaries."\textsuperscript{136} Although the major revisions dealt with the exclusion of so-called administrative employees (and resulted in the exclusion of an additional 100,000 of them),\textsuperscript{137} the change made in the definition of executive employees is basically still in effect today.

In December, Fleming virtually boasted to the NAM of how accommodating he had been:

[1]Industry kept asking us about the important fellow in large organizations who didn't boss people—the assistant to the president, the personnel adviser, the purchasing agent. He is considered an executive. He eats in the executive dining room. Anyway, his salary is so high that he were paid time and half for overtime, he would have serious doubts he earned it.

We took care of that fellow in our new definitions. We termed him an administrative employee. We accepted the idea that his work is too important to measure in hours. But we asked that that importance be measured on the pay check. We required that the pay

\textsuperscript{134}U.S. DOL, "Executive, Administrative, Professional" at 19.


\textsuperscript{136}Stark, "Wage Head Revises White Collar Pay" at 1, col. 4, at 11, col. 1.

\textsuperscript{137}Stark, "Wage Head Revises White Collar Pay" at 1, col. 4. Two weeks later Fleming claimed that "the exemptions from the maximum hour limitations would not be so extensive as had at first been thought." "Wage Law Terms Put in New Light," \textit{N.Y. Times}, Oct. 28, 1940, at 19, col. 1.
check be at least $200 a month.  

The provision in the 1938 regulatory definition, under which an excluded executive employee could engage in "no substantial amount of work" of the same kind as covered employees, had "caused more questions than any other requirements."\textsuperscript{139} Fleming did relax this "exceedingly troublesome phrase"\textsuperscript{140} to read: "whose hours of work of the same nature as that performed by nonexempt employees do not exceed twenty percent of the number of hours worked in the workweek by the nonexempt employees under his direction." In addition, a proviso made even this limitation inapplicable to "an employee who is in sole charge of an independent establishment or a physically separated branch establishment."\textsuperscript{141} (The accommodation failed to satisfy the NAM, which in 1941 unsuccessfully requested that the WHD change its interpretation by using the employer in question rather than the industry as the standard by which to judge how much work putative managerial employees were performing of the same nature as that performed by nonmanagerial employees. The WHD rejected the proffered interpretation because it would have exempted many non-executive employees.)\textsuperscript{142} Fleming also rejected criticism of the $30 weekly threshold as too high because he believed that it was incorrect to describe anyone paid less than that amount as an executive; moreover, the new regulations no longer permitted exclusion of any hourly paid employee no matter how high his or her wages.\textsuperscript{143}

Employers in the wholesale distributive trades had been particularly eager to "convince the Wage-hour Administrator that the boss' secretary is an executive in her own right...." The "rub" arose from the "does no substantial amount of

\textsuperscript{138}Philip Fleming, Address before the NAM, New York City, Dec. 12, 1940, in 86 Cong. Rec. at 6693, 6694 (App.).

\textsuperscript{139}Stark, "Wage Head Revises White Collar Pay" at 11, col. 1.

\textsuperscript{140}Letter from Philip Fleming to Sen. Elbert Thomas (Nov. 19, 1940), in 86 Cong. Rec. at 6613, 6615 (App.).

\textsuperscript{141}29 C.F.R. § 541.1 (f), as published in 5 Fed. Reg. 4077 (1940). Currently, after the incorporation of retail and service employment, the provision reads: "Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the [supervisory] work described in paragraphs (a) through (d) of this section." 29 C.F.R. § 541.1 (e) (1999).

\textsuperscript{142}"Division Refuses to Redefine 'Executive,'" 4 Wage and Hour Reporter 509-10 (Sept. 22, 1941). The WHD gave as an example of an unjustified exemption an employee who performed supervisory work 1 or 2 hours daily and bookkeeping the rest of the day in a firm that had no other bookkeeper. H.R. 8624, 76th Cong., 3d Sess (1940), would have written the language suggested by the NAM directly into the definition of an employee employed in a bona fide executive capacity.

\textsuperscript{143}Letter from Fleming to Sen. Thomas, in 86 Cong. Rec. at 6615 (App.).
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work" clause: "The boss' secretary could meet all the other requirements, but by taking dictation or typing letters—work similar to that done by nonexempt employees—she must come under the act. Wholesalers urged that this clause be stricken from the definition...." 144 Fleming, in an effort to pressure employers not to work low-paid secretaries overtime, did not accommodate this particularly outlandish request. As he explained to the NAM:

[1]f there are employees in factories or offices who need the protection of an overtime penalty, the girl clerical worker is one of them.

We all know her. We all like her. We know the sound of her high heels clicking in at 9 o'clock. ... Your wife approves of the way she dresses and you know that is the highest compliment your wife can pay another woman. ... She decorates the office and makes it a pleasanter place to work.

There isn't much in the game for her. Yet she's as loyal and as willing to work long hours as the most ambitious of your junior executives.

And our inspections reveal that she frequently does work long hours. Usually because of inefficient supervision, and sometimes because some ambitious executive wants to make a record. She is unorganized and she was unprotected until the wage and hour law went into effect.

Well, now when she works more than 40 hours a week, she is paid time and a half for overtime. [C]ompliance is spreading and time and a half for overtime means that she is not going to work long hours often. Management is going to regard such overtime charges in the same light as demurrage on freight cars that could just as well have been unloaded. And I think this will make for greater efficiency. Your executive who gets going around 3 o'clock in the afternoon will have to get started closer to 9 a.m.145

More recently, employers' efforts to excuse their extraction of payless overwork from secretaries has stood the entire policy underlying the FLSA on its head by blaming the victim. Inverting and perverting the importance that the Stein Report attributed to "prestige," employers have sought to explain away their violation of the overtime provision by claiming: "Despite working overtime, many secretaries insist on being exempt because they view it as a sign of prestige...."146

These struggles over whether white-collar workers would be subject to wage

144 "Who's an Executive?" Bus. Wk., Apr. 20, 1940, at 34.

145 Philip Fleming, "Two Years of the Wage and Hour Law," in Wage and Hour Manual 70, 72 (1941 ed.) (address delivered Dec. 12, 1940 to the American Congress of Industry of the NAM).

146 This comment was made by the president of a firm that conducted a survey of 600 companies finding that 46 percent "exempt one or more of their secretarial levels from overtime pay" even though "27% of this group believe some exemptions wouldn't stand up to Labor Department scrutiny." Christopher Conte, "Labor Letter," Wall St. J., Mar. 9, 1993, at A1, col. 5 (Westlaw).
and hour regulation can be understood only in connection with the more fundamental campaign, analyzed in Chapter 1, that broad segments of the employing class were conducting against the premium overtime payment provision in the FLSA. Their principal objective was limiting time and a half liability to the minimum wage, thus relieving firms of any obligation to pay overtime on wages and salaries in excess of this largely sub-market rate. Even as employers pressed this position, the business press itself undermined their claims that exempt white collar workers neither needed nor expected overtime payments. For example, Nation's Business reported in 1941 that “until recently” the lack of overtime had been offset by advantages such as annual vacation, sick leave without deductions, holiday pay, time off to take care of personal matters, job security, and good chances for promotion:

But in recent years these differentials in favor of the salaried man have been gradually diminishing. ... This narrowing of the differentials between salaried employees and wage earners has been an important factor in fostering the growth of unions among foremen, clerical workers and other groups formerly considered distinct from manual labor.

It is natural, therefore, that many exempt employees question the fairness of putting in unlimited overtime without extra compensation....

The magazine went on to recommend payment of time and a half to “office workers in the lower exempted positions—those who are closest to the rank and file and whose duties differ only slightly from those of the non-exempts.... It is true that employees are closely related to management, but they may be even closer to labor. In the matter of compensation, they are likely to be more interested in the size of their pay checks than in the maintenance of their status in the managerial ranks. These employees have been subject to much exploitation in some companies.”147 (By the 1950s, voluntary payment of overtime to “exempt supervisors,” designed in part to “maintain adequate differentials between supervisors and the supervised,” was common though by no means universal.)148

Despite such insights, many employer associations continued adamantly to urge a vast expansion of the category of excluded white-collar workers. After World War II, some proposed elimination of the salary test altogether and complete reliance on a much broader definition of executive and professional employees taken from the recently enacted Taft-Hartley amendments to the


148Cowdrick, “When the Boss Works Late” at 114-15.

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At FLSA hearings in 1947, an umbrella organization of 46 industrial associations (which grew to 57 organizations by 1948 when it submitted the same testimony under the name National Industrial Council, an arm of the NAM) recommended adopting Taft-Hartley's definition of "supervisor" for executive employees under the FLSA. The increased scope is obvious from the wording: "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if...the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." These employers stressed that adoption of the NLRA definition also admirably served another purpose—"permitting employers freely to manage their enterprises without outside interference, in order to produce the great quantities of goods now needed not only for domestic consumption but for the entire world." The Chamber of Commerce of the United States also urged adoption of the NLRA definitions. However, after the WHD heard testimony on this issue in connection with proposed revisions of the regulation in 1947 and 1948, it concluded that the different purposes that the definitions served in the two statutes did not warrant adoption of a single definition, especially since the result would be denial of FLSA protection to supervisors already deprived of collective bargaining rights.

After employers had successfully prevailed upon Congress to eliminate the portal-pay suits in the first session of the Eightieth Congress, Senator Joseph Ball introduced the Republicans' abortive omnibus FLSA revision bill in March 1948, which would have excluded from the overtime provision any employee employed on a salary basis amounting to $100 or more per week. At the end

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155 See below chapter 3.

of 1949, the DOL reinforced the Stein Report’s concerns when, in response to a petition filed by the left-wing United Electrical, Radio and Machine Workers to raise the salary test to $500 per month—a standard that the American Newspaper Guild supported and publishers and editors denounced as “utterly fantastic” for small newspapers in 1948 at hearings on reporters’ status as professionals—it introduced, “for administrative convenience,” a so-called short test in association with a higher (“upset”) salary floor of $100 per week. The sole non-monetary requirements attached to it were (and remain) that the employee’s primary duty be management and that he customarily and regularly supervise at least two other employees.

3. Obsolescence of an Exclusion

Where a regulation’s rationality is dependent on current socioeconomic conditions periodic review is essential to preserve that rationality.160

In the wake of inflation caused by World War II, the WHD realized in the late 1940s that “more realistic” salary levels had to be set: “A $30 a week test for ‘executive’ is obviously obsolete, when office boys, for example, earn an average of $30.52 in New York City, $28.27 in Atlanta and $37.85 in San Francisco.”161 By periodically raising the mandatory minimum salary test level in tandem with increases in the statutory minimum wage itself between 1940 and 1975, the DOL adhered to the principle—which “has been recognized administratively and approved judicially” and which most employer groups also originally supported—that “the weightiest test is the amount of compensation paid by the employer.”162 During the first Nixon Administration, for example, the DOL noted

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162Jones v. Bethlehem-Fairfield Shipyards at 91 (quotation); Fritsch & Vandell,
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that:

If the salary tests are set at a level where virtually everyone who meets the other requirements for exemption has earnings in excess of that amount, and many nonexempt workers also have earnings in excess of that amount, then the tests are no longer a useful tool for separating those who are clearly nonexempt from those who are probably exempt.\textsuperscript{163}

Similarly, in justifying an increase in the executive salary threshold in the wake of increases in the minimum wage and the cost of living, the Ford Administration DOL stated that an interim increase was needed—pending completion of a study of salaries after which a further increase would be implemented—to insure that the test remain "realistic and effective as qualifying requirements for exemption from the Act’s monetary provisions...."\textsuperscript{164}

By 1978, after the ratio between the executive long-test salary and the weekly minimum wage had fallen to its second lowest level ever (1.5:1), President Carter’s Wage and Hour Administrator announced that the interim salary test “no longer provide[s] basic minimum safeguards and protection for the economic position of the low paid executive...employees as contemplated by section 13(a)(1)” of the FLSA and current regulations.\textsuperscript{165} Because neither the proposed increase to $225 in 1978 (which would have raised the ratio to 2.1:1) nor any other increase has ever again been implemented, by the time the minimum wage reached $4.25 in 1991, the ratio fell below 1:1. In other words, employers could perversely yet lawfully pay long-test executive employees salaries lower than the minimum wage, while requiring them to work overtime gratis.

Table 2-1 shows the course of the relationship between the minimum wage and the executive long- and short-test salaries from 1938 to the present.

Precisely such mathematical relationships expressly underlay the DOL’s calibration of the salary level during the thirty-five-year period of its uncontested validity. Thus in 1963, the Wage and Hour Administrator stated that setting the long-test salary at eighty times the hourly minimum wage was “not unreasonable,” but that a multiple of only sixty-four, that is, a ratio of 1.6:1,

which is no more than the minimum wage employee will earn for a 56-hour week, will not...be truly descriptive of the wages of executive...employees in retail and service establishments, nor will it serve as a useful criterion in identifying those who are

\textsuperscript{163}DOL, \textit{Earnings Data Pertinent to a Review of the Salary Tests} at 3.


employed in a bona fide executive...capacity. 166

Table 2-1: Ratio of Salary Tests to the Minimum Wage, 1938-97

<table>
<thead>
<tr>
<th>Year</th>
<th>Long-test salary ($/week)</th>
<th>Ratio to minimum wage</th>
<th>Short-test salary ($/week)</th>
<th>Ratio to minimum wage</th>
<th>Minimum wage ($/week)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1938</td>
<td>30</td>
<td>2.7</td>
<td>none</td>
<td>__</td>
<td>11</td>
</tr>
<tr>
<td>1939</td>
<td>30</td>
<td>2.4</td>
<td>none</td>
<td>__</td>
<td>12.60</td>
</tr>
<tr>
<td>1940</td>
<td>30</td>
<td>2.5</td>
<td>none</td>
<td>__</td>
<td>12</td>
</tr>
<tr>
<td>1945</td>
<td>30</td>
<td>1.9</td>
<td>none</td>
<td>__</td>
<td>16</td>
</tr>
<tr>
<td>1950</td>
<td>55</td>
<td>1.8</td>
<td>100</td>
<td>3.3</td>
<td>30</td>
</tr>
<tr>
<td>1956</td>
<td>55</td>
<td>1.4</td>
<td>100</td>
<td>2.5</td>
<td>40</td>
</tr>
<tr>
<td>1959</td>
<td>80</td>
<td>2.0</td>
<td>125</td>
<td>3.1</td>
<td>40</td>
</tr>
<tr>
<td>1961</td>
<td>80</td>
<td>1.7</td>
<td>125</td>
<td>2.7</td>
<td>46</td>
</tr>
<tr>
<td>1963</td>
<td>100</td>
<td>2.0</td>
<td>150</td>
<td>3.0</td>
<td>50</td>
</tr>
<tr>
<td>1967</td>
<td>100</td>
<td>1.8</td>
<td>150</td>
<td>2.7</td>
<td>56</td>
</tr>
<tr>
<td>1968</td>
<td>100</td>
<td>1.6</td>
<td>150</td>
<td>2.3</td>
<td>64</td>
</tr>
<tr>
<td>1970</td>
<td>125</td>
<td>2.0</td>
<td>200</td>
<td>3.1</td>
<td>64</td>
</tr>
<tr>
<td>1974</td>
<td>125</td>
<td>1.6</td>
<td>200</td>
<td>2.5</td>
<td>80</td>
</tr>
<tr>
<td>1975</td>
<td>155</td>
<td>1.8</td>
<td>250</td>
<td>3.0</td>
<td>84</td>
</tr>
<tr>
<td>1976</td>
<td>155</td>
<td>1.7</td>
<td>250</td>
<td>2.7</td>
<td>92</td>
</tr>
<tr>
<td>1978</td>
<td>155</td>
<td>1.5</td>
<td>250</td>
<td>2.4</td>
<td>106</td>
</tr>
<tr>
<td>1979</td>
<td>155</td>
<td>1.3</td>
<td>250</td>
<td>2.2</td>
<td>116</td>
</tr>
<tr>
<td>1980</td>
<td>155</td>
<td>1.25</td>
<td>250</td>
<td>2.0</td>
<td>124</td>
</tr>
<tr>
<td>1981</td>
<td>155</td>
<td>1.2</td>
<td>250</td>
<td>1.9</td>
<td>134</td>
</tr>
<tr>
<td>1990</td>
<td>155</td>
<td>1.0</td>
<td>250</td>
<td>1.6</td>
<td>152</td>
</tr>
<tr>
<td>1991</td>
<td>155</td>
<td>0.9</td>
<td>250</td>
<td>1.5</td>
<td>170</td>
</tr>
<tr>
<td>1996</td>
<td>155</td>
<td>0.8</td>
<td>250</td>
<td>1.3</td>
<td>190</td>
</tr>
<tr>
<td>1997</td>
<td>155</td>
<td>0.75</td>
<td>250</td>
<td>1.2</td>
<td>206</td>
</tr>
</tbody>
</table>

Sources: 29 U.S.C. § 206 (a)(1) (various years); U.S. Department of Labor, Earnings Data Pertinent to a Review of the Salary Tests, tab. 1 at 11. 167


167 The table includes every year in which either the minimum wage or the salary test was increased; the short-test salary was not introduced until 1950. The weekly minimum wage is computed as the product of the statutory hourly minimum wage and the maximum weekly number of sub-overtime hours (which was 44 in 1938-39, 42 in 1939-40, and 40 thereafter). The proposed increases that the Reagan Administration suspended indefinitely would have raised the long-test salary to $225 in 1981 and $250 in 1983; the ratio to the minimum wage would have risen to 1.7 and 1.9 respectively. Similarly, the proposed...
The following example shows how a regulation that may once have been reasonably designed to protect supervisory employees against inordinate overreaching, has, through the mere passage of time, become irrational. In 1975, when the minimum wage was $2.10 per hour, an "exempt" assistant manager earning $155 per week had to work twenty-two hours of overtime before her salary failed to cover the minimum wage plus overtime (on the basis of the minimum wage). By 1997, the same "bona fide executive" already reached this point after 30 hours of straight time. Seen from a different perspective: by 1991, only a weekly salary of $319.30, or more than double the salary test level, would have held her harmless against twenty-two hours of overtime (at the minimum wage). Indeed, by 1997, even the short-test salary, which is supposed to be high enough to avoid ambiguity in distinguishing bona fide from mala fide executives, had fallen to a mere 20 per cent above the minimum wage.

In spite of the manifest dysfunctionality of the 1975 interim salary test, which had already "become obsolete" by 1978, the Carter Administration, "[a]s a result of unexpected delays," the cause of which it did not reveal, waited another three years before it issued a final rule.168 In 1981 Donald Elisburg, the Assistant Secretary of Labor for Employment Standards Administration, stressed: "The purpose of the salary test has always been to prevent evasion of the FLSA by the designation of an excessive number of workers as executives,..., with minimal duties designed barely to meet the duties and responsibilities requirements of the exemption." Repeating the DOL’s forty-year-old position that the salary level is "the best single test" of employers’ bona fides in classifying their employees as executives—a position that management itself has adopted in developing personnel criteria for the voluntary payment of overtime to certain upper-level "exempt" employees169—Elisburg observed that in order to fulfill that function, the salary test "ha[s] to be increased periodically to take into account the higher salary levels that...are in fact paid to bona fide executive...employees."170 Because the exclusion of managers had always been based on the fact that they enjoy "compensatory privileges and benefits which are superior to those of other employees," the salary test level "must be periodically adjusted" to reflect not only increases in the minimum wage but also in average salaries of executive employees.171

increases in the short-test salary to $320 and $345 in 1981 and 1983 would have raised the minimum wage ratio to 2.4 and 2.6 respectively.

170Fed Reg. at 3011.
171Fed. Reg. at 3016.
In announcing a new executive long-test salary of $225 for 1981 and $250 for 1983 superseding the old salary test, which it variously described as "seriously outdated," "ineffective[172]," and "virtually useless as a guide for employers and the Department of Labor in determining FLSA exemption status," the DOL urged employers to understand that the increase would enhance regulatory certainty: "Formerly, employers could rely on the salary test as a good indicator of whether an employee was likely to be exempt or not. Now that the test levels are lagging so far behind actual salaries, employers who do so could be misled into inadvertent noncompliance with the FLSA."172 (The DOL apparently regards its own regulation as a guide for employers only, showing no concern for whether the test reliably instructs employees as to whether they are lawfully or unlawfully being "exempt" from the burden of being paid the minimum wage and premium wages for overtime.)173 Whether disingenuous or merely self-delusional, the DOL's obfuscatory assertion makes no sense: by complying with an "obsolete" salary test, employers assumed and (continue to assume) no risk whatsoever of being deemed in violation of the FLSA by the DOL—so long as their employees perform the aforementioned "minimal duties designed barely to meet the duties and responsibilities requirements of the exemption."174

Instead, employers have gained the certainty of immunity from liability under the FLSA for extracting unpaid overtime hours from employees without alternatives. This employer overreaching vis-à-vis low-paid hybrid supervisor-grunts is documented, for example, by appellate litigation against Burger King Corporation. Its "deliberate corporate policy" of requiring "exempt" assistant managers to spend more than half of their fifty-four hour workweeks performing the same work as their supervisees was driven by the firm's desire to avoid paying premium overtime rates or any wages at all: "Were the Assistant Managers to abstain from production work, more hourly employees would be needed, thereby "blowing payroll"—that is, spending more than the store's budgeted amount for hourly labor."175 Such practices directly subvert the mandatory overtime premium's goal of applying financial pressure on employers

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17246 Fed. Reg. at 3016.

173 Employers, in turn, prefer self-help: "It is not customary...to ask the [DOL] to classify all of a firm's employees, for...the agency is generally more liberal with overtime benefits than the average employer would be. Most employers classify their own personnel...." Gottlieb, Overtime Compensation at 7.


175 Donovan v. Burger King Corp., 675 F.2d 516, 518-19 (2d Cir. 1982) (citing the trial court opinion). See also Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir. 1982); Marshall v. Erin Food Services, Inc. d/b/a Burger King, 672 F.2d 229 (1st Cir. 1982). As the DOL describes employers' choices after a higher salary test has gone into effect: employers will pay the new rate "only if the resulting cost would be no more than paying this worker on an hourly basis with premium pay for overtime." 46 Fed. Reg. at 3017.
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"to spread employment to avoid the extra wage...."176

The niceties of the calculus entering employers' decisions as to whether to comply with the FLSA were made moot, however, by the Carter administration's waiting until the last week of its term to promulgate the new salary tests, which were scheduled to go into effect February 13, 1981. The three-year delay stemmed from opposition by the President's Council on Wage and Price Stability, which had "slapped down" the original proposal in 1978, and even in 1981 was arguing for a salary test of sixty times the minimum wage or $201. Despite employers' "outraged protests" and threats to sue to enjoin implementation of the regulation, Carter proceeded with the rule on January 7, the day after the Minimum Wage Study Commission (MWSC) had reported that employers violated the FLSA more often with regard to salaried than hourly-paid employees.177

Employers' "infuriat[ion] at this and other lame-duck decrees"178 swiftly vanished as President Reagan, in one of his first official acts, issued as part of his overall deregulatory program a memorandum on January 29, 1981, postponing for sixty days all pending final regulations.179 The same day, the DOL stayed the effective date of the regulation indefinitely, reopening the comment period.180 The new Secretary of Labor, Raymond Donovan, himself a construction firm executive, justified the suspension by reference to the "devastating" impact the increased salary test would have had on small businesses.181 Donovan's efforts to eliminate such "unwarranted obstacles which cost the economy billions of dollars a year" were applauded by the Chamber of Commerce of the United

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177A Raise for Low-Level Bosses," Bus. Wk., Jan. 19, 1981, at 23. According to Elisburg, who was the main force behind raising the salary level, the White House and the Office of Management and Budget caused the initial delay; at the end of Carter's term, when the president finally agreed to the increase, there were so many last-minute regulations pending that in the rush it was not possible to insure that the regulation went into effect before Reagan took office. The AFL-CIO's lukewarm support for what it viewed to be an inadequate increase left Elisburg with little political strength to fend off Administration opponents of any raise. Telephone interview with Donald Elisburg, Washington D.C. area (carphone), Nov. 17, 1993, 6:15 p.m. CST. John Zalusky, an economist with the AFL-CIO, confirmed that unions were not satisfied with the proposed salary test regulation. Telephone interview, Washington, D.C., Nov. 18, 1993, at 9 a.m. CST.


18046 Fed. Reg. 11,972 (1981). Because the DOL failed to give the proper notice period or to solicit public comment on its decision to stay indefinitely (or effectively to repeal) the regulation, the stay is arguably invalid. 5 U.S.C. §§ 551(5), 553(b) & © (1988).

States, which welcomed his "play[ing] hardball on regulatory reform." In March, the DOL, in the spirit of Reaganomic marketization that echoed employers’ complaints about the alleged burdensomeness of the salary test, specified that it was seeking public comments about "the probable economic impact of raising the salary tests to the revised levels...."

Not until Reagan’s second term did the DOL renew its interest in the salary tests. The trade press had reported in 1983 that "[u]pon reflection, the Reaganites concluded that the Carter-proposed salary test increases were not so unreasonable after all.” DOL officials were said to be preparing a redraft by the end of the year "(probably containing several key concessions to restaurant industry lobbyists concerned over the Government's unwillingness to recognize more than one overtime-exempt manager per food-service unit).” But this proposal, too, was postponed as mysteriously as it had been initiated. Deeming the intervening four years insufficient for a review of the regulations, the DOL once again reopened the comment period. This time it expressly solicited comments on whether the test should be eliminated altogether. After the comment period was extended yet again in 1986, employers’ organizations were unable to formulate a united deregulatory program. In the face of union demands for a doubling of the long-test salary to $320-$325, the National Mass Retailing Institute urged outright elimination of the test. The Association of General Merchandise Chains, however, declined to support this position, in part for fear that the alternative would be "'far more detailed and burdensome inquiry [by DOL enforcement agents] into exempt employees’ duties and responsibilities.'" Despite the retail trade press’s reports of the DOL’s accommodation of the employers’ proposed relaxation of the duties test, this clash of lobbyists, too, failed to produce any agency action.

Here the extremes met as the "if it ain’t broke don’t fix it" opposition to an


185Ken Rankin, “Labor Dept. Quietly Shelves Plans to Rewrite Labor Practices Rules,” Nation’s Restaurant News, Nov. 7, 1983, at 6 (Nexis). Although only one employee per establishment may fall under the “in sole charge of an independent establishment” exemption, more than one may qualify under the general duties test. 29 C.F.R. §§ 541.1(e), 541.113(d) (1993).


increase in the salary test mounted by Burger King and other employers\textsuperscript{189} was matched by the relief expressed by the AFL-CIO that the dreaded "brutaliz[ation]" of the test by the Reagan Administration had never materialized.\textsuperscript{190} Nevertheless, inaction systemically favored (and favors) employers: under the regulatory status quo the salary test is further eroded by inflation and minimum-wage increases, creating a de facto enforcement vacuum. By the end of the Bush Administration, which posted a "Next Action Undetermined" notice in its semi-annual DOL agenda,\textsuperscript{191} proposed rulemaking was no longer even rumored.\textsuperscript{192}

4. Consequences of an Exclusion

There is probably nothing more disturbing in the world than being an assistant manager of a restaurant working 60 or 70 hours a week—working for really not much more than the minimum wage—and not having much hope of moving up.\textsuperscript{193}

The number of "white collar" workers excluded from the FLSA is huge. The latest DOL estimates, for the year 1996, reveal that 32 million employees or 26 percent of all wage and salary employees fall under the excluded rubrics of executive, administrative, or professional employees.\textsuperscript{194} By far the largest contingent—almost two-fifths—of excluded white collar employees worked in the service industries, followed by state and local government, manufacturing, and retail trade. At 36 percent, the service industry displayed the third highest proportion of excluded white collar employees behind the federal government and finance, insurance, and real estate. Table 2-2 breaks these data down by industry.

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\textsuperscript{189}Nation's Restaurant News, Mar. 10, 1986, at 46; \textit{id.}, May 12, 1986, at 87 (Nexis).


\textsuperscript{191}54 Fed. Reg. 44,366-67 (1989); see also \textit{id.} at 16,443-44.

\textsuperscript{192}All the DOL could muster was a buried footnote that consideration of the salary tests "will be undertaken in connection with any future rulemaking." 57 Fed. Reg. 37,666 n.1 (1992).

\textsuperscript{193}Restaurant Business, May 1, 1981, at 175 (discussion contribution by Robert Emerson).

\textsuperscript{194}Because bona fide executive employees are protected by the Act's prohibition of sex discrimination (the Equal Pay Act), their employers are required to make, keep, and preserve certain wage and hour records. 29 U.S.C. §§ 206(d), 211(c), 213(a); 29 C.F.R. §§ 516.2, 516.3 (1993).
Table 2-2: Excluded Executive, Administrative, and Professional Employees as % of All Employees, by Industry, 1996

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


The number of executive employees is unknown, but if the MWSC’s twenty-year-old estimate that two-thirds of the excluded white-collar employees are executive is accurate, they number upwards of twenty million. The above-average rise in employment and in the proportion of excluded white collar employees in the service industry has in large part driven the economy-wide increase in the absolute and relative number of excluded white collar workers over the last two decades. Using a somewhat different data set—which produces a smaller universe of employment because it is restricted to full-time workers—the General Accounting Office (GAO) estimated that from 1983 to 1998, the number of excluded white collar workers rose from a range between 12 and 17 million to between 19 and 26 million. As a proportion of all full-time

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wage and salary workers, excluded white collar employees increased from between 17 percent and 24 percent in 1983 to the 20 to 27 percent range in 1998.196

The GAO also found that while women’s share in total full-time employment had remained stationary during this period, their share of excluded white collar employees rose from 33 percent to 42 percent, just about equal to their share in the work force.197 Older data generated by the MWSC (from 1977 and 1980) had revealed that although women accounted for only 11 per cent of all executive employees, they constituted 26 per cent of such workers in the retail industry and 38 per cent of the lowest-paid retail executive employees; in the service industry, women accounted for 53 per cent of the lowest-paid “exempt” executives. Not surprisingly, these two industries also employed the largest proportion of low-paid “exempt” executives who worked overtime—rising in retail trade to two-thirds.198

The GAO also made the unsurprising discovery that a much larger proportion of excluded white collar workers work overtime than employees who are protected by FLSA’s overtime provision. Whereas 35 percent of excluded white collar workers worked more than forty hours per week in 1983 and 44 percent in 1998, the corresponding figures for protected workers were only 15 percent and 19 percent, respectively. The gap among those working more than fifty hours was even greater: 10 percent and 15 percent for excluded white collar workers and only 4 and 5 percent, respectively, for protected employees.199 Equally unsurprising was the MWSC’s older finding of a “significant inverse relationship” between salary levels and the share of executive employees working overtime.200

The liberal protective purposes of FLSA require the courts to interpret exemptions narrowly and against employers201 and the Secretary of Labor to restrict the exemption to those who are “truly executives and not [mere] employees.”202 The socioeconomic rationale for excluding “bona fide” executives is said to lie in the fact that they are sufficiently well compensated and have sufficient control over their hours that they should not be entitled to subject their

197GAO, Fair Labor Standards Act, fig. 3 at 9.
199GAO, Fair Labor Standards Act, fig. 4 at 12.
202Ralph Knight, Inc. v. Mantel, 135 F.2d 514, 517 (8th Cir. 1943).
employers to an overtime penalty for hours worked at their own discretion. If, as the Wage and Hour Administrator who promulgated the executive employee regulations based on the Stein Report in 1940 noted, the essence of an exempt employee is that his "salary is so high that if he were paid time and a half for overtime, he would have serious doubts that he earned it," the extraordinarily capacious category that the DOL's inaction has irrationally created sweeps in millions of workers whose salary and autonomy are far removed from that model.

According to a 1990 survey by the National Restaurant Association (NRA), one-quarter of all assistant managers at fast-food restaurants earned less than $15,000. The NRA's 1998 survey revealed that the salary of one-quarter of assistant managers at fast-food restaurants fell below $18,600; at all types of restaurants with annual sales below $500,000 and between $500,000 and $1,000,000, one-fourth of assistant managers received salaries below $16,600 and $19,035, respectively. Night managers at fast-food restaurants were paid even less: their median salary was only $16,250, with one-fourth of them earning less than $14,000 and three-fourths receiving salaries below $18,388. Even the BLS *Occupational Outlook Handbook* observes that in 1996 the lowest 10 percent of restaurant and food service managers earned $240 a week or less.

203See, e.g., Brock v. Claridge Hotel & Casino, 846 F.2d 180, 184 (3d Cir. 1988); *Hearing on Fair Labor Standards Act: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education & Labor, 102d Cong., 2d Sess. 76* (Serial No. 102-122, 1992) (statement of Jonathan Hiatt, general counsel, Service Employees International Union); Gottlieb, *Overtime Compensation* at 5-6 ("exempt personnel are paid for their long-term contribution to the company not directly measurable in hours") (quoting company response to questionnaire).

204Fleming, "Two Years of the Wage and Hour Law" at 72.

205National Restaurant Association, *Compensation for Salaried Personnel in Food Services*, Exhibit 38 at 32 (1991) (as disclosed by NRA, Information Services, Washington, D.C., telephone interviews, Nov. 22-24, 1993). The annual salaries for assistant unit managers in fast-food restaurants ("limited menu no table service") for the upper quartile, median, and lower quartile (defined as the median of the lower half) were $19,731, $18,236, and $15,000 respectively for 1990.

206National Restaurant Association, *Compensation for Salaried Personnel in Restaurants—1998*, Exhibit 42 at 37 (1999). For fast-food restaurants, the upper quartile, median, and lower quartile salaries of assistant managers were $24,875, $21,500, and $18,600 respectively; for restaurants of all types and sizes, the figures were $30,000, $25,000, and $20,800, respectively; for restaurants of all types with annual sales below $500,000, the salaries were $24,000, $20,000, and $16,600, respectively; for restaurants of all types with annual sales between $500,000 and $1,000,000, the salaries were $25,000, $22,000, and $19,035, respectively. Unfortunately, the report does not cross-tabulate type and size of restaurant. There may be no enterprise coverage for employees in restaurants with annual revenues below $500,000; see below chapter 4.

These $200-$380/week overtime workers\(^{209}\) are precisely the employees whom President Clinton’s Wage and Hour Administrator had in mind when she conceded that “there’s something wrong with” excluding from the FLSA workers who are just “one step above the cashier.”\(^{210}\)

Ironically, the DOL’s failure to keep the definition current also privileges employers to subject mala fide executives to a greater degree of exploitation than their supervisees. In the sanitized language of personnel relations, when “faced with a problem of resolving a conflict between compensation theory and economic reality,” some firms are forced “to overcome the reluctance to treat exempt staff in the same manner as those who are nonexempt.” (But retail employers, the prime abusers of the exemption, succumb much less frequently to these pressures than do firms in other industries.)\(^{211}\) This legal privilege may, however, make it difficult for firms to maintain motivation and discipline where the “optimum salary differential”\(^{212}\) between first-line supervisors and their subordinates becomes deranged. For management “‘[i]t’s an awful situation when you have a man supervising 15 or 20 people and they are making more than he is.’”\(^{213}\) This inadvertent result of agency inaction gives a literal albeit unintended meaning to the MWSC’s claim that the executive exclusion was rooted in the fact that these employees receive “compensatory privileges which made up for the lack of premium pay for overtime”—including the privilege of exercising “authority over others.”\(^{214}\) In the real world, however, as Ronald Coase has observed, it is not necessary for managers to pay “to exercise control over others” because they are paid to do so.\(^{215}\)

Even in the economic boom of the late 1960s, a DOL study revealed that in 19 per cent of establishments, “the lowest paid exempt executive received a weekly salary that was below that of the highest paid nonexempt employee he supervised.” And 41 per cent of exempt executives who were being paid exactly the long-test salary received lower earnings than their covered supervisees.\(^{216}\)

\(^{209}\)For examples of salaries as low as $10,000, see Parcel & Sickmeier, “One Firm, Two Labor Markets” at 39; Leidner, \textit{Fast Food} at 53. Susan Aylward, Information Services, National Restaurant Ass’n, confirmed that salaried assistant managers work up to eighty hours per week. Telephone interview, Nov. 24, 1993, at 8 a.m. CST.

\(^{210}\)Telephone interview with Maria Echaveste, Washington, D.C., Nov. 22, 1993, 10 a.m. CST.


\(^{212}\)Weeks, \textit{Overtime Pay for Exempt Employees} at 9.

\(^{213}\)Gottlieb, \textit{Overtime Compensation} at 13 (quoting large defense products firm).


\(^{216}\)U.S. Department of Labor, \textit{Earnings Data Pertinent to a Review of the Salary Tests}
Again, in 1981, *Business Week*, which reported that employers were “incensed” about being required to pay overtime to “trainee managers,” confirmed that “some hourly employees...do make more than some assistant managers who work long hours.”217

The vast expansion of fast food restaurants and convenience stores, two major employers of so-called assistant managers, may have intensified this pattern of compensation inversion.218 Thus in the 1980s, “eating and drinking places” added almost two million new jobs, one-tenth of all new jobs in the United States and twice as many as any other industry, becoming the largest private-sector employer.219 From 1964 to 1995, supervisory employees in eating and drinking places rose by 474 percent—from 126,000 to 723,000—compared to 285 percent among nonsupervisors.220

McDonald’s alone may employ upwards of 100,000 assistant managers.221 With 284,000 employees in 1998, it was the eighth largest employer among the

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217“A Raise for Low-Level Bosses” at 24.

218According to a 1977 DOL survey, only 5 per cent of the lowest-paid executives supervised employees earning more than they did. This survey may have been skewed by the fact that it excluded executives who were (unlawfully) paid less than the long-test salary. Fritsch & Vandell, “Exemptions from the Fair Labor Standards Act” at 246, 253. At Food Lion, “a full-time stocker’s maximum weekly pay is eighty percent of an assistant manager’s minimum weekly salary.” Royster v. Food Lion, Inc., 1998 U.S. App. 11809, *15 Lexis (4th Cir. 1998)


The figures for supervisory employees were calculated as the difference between “all employees” and “nonsupervisory workers.” The BLS did not begin publishing data on nonsupervisory employees in this industry (SIC 58) until 1964. For an alternative estimate of 557,000 restaurant and food service managers in 1990 and 493,000 in 1996, see U.S. BLS, *Occupational Outlook Handbook* 58 (Bull. 2400, 1992); U.S. BLS, *Occupational Outlook Handbook: 1998-99 Edition* 77 (Bull. 2500, 1998).

221In 1993, McDonald’s stated that four to five assistant managers worked at each of the 9,200 McDonald's restaurants in the United States, which employed on average 55-60 workers; 85 per cent of these restaurants were franchises. Telephone interview with Ann Connolly, McDonald's Corp., Oak Brook, Illinois, Nov. 22, 1993, at 4 p.m. CST. Six years later, when the number of restaurants had risen to 12,529, McDonald's stated that an average of seven to nine assistant and swing managers worked in each restaurant, which employed about 50 workers. Telephone interview with Customer Service representative, McDonald’s Corp., Oak Brook, Illinois (Nov. 19, 1999); http://www.mcdonalds.com. On the unsuccessful attempt by the manager of a fast-food restaurant to sue the franchisor for failure to pay overtime, see Howell v. Chick-Fil-A, 127 Lab. Cas. (CCH) ¶ 33,051 (N.D. Fla. 1993).
Fortune 500, and boasts that it “has replaced the U.S. Army as the organization that trains most of our country’s young people—700,000 teens each year.” The company that claims that “one-eighth of the current American workforce has worked for” it was in 1992 the most profitable retail firm in the United States and in 1997 and 1998 the first and second most profitable food service firm, respectively, in the Fortune 1,000 with annual profits in excess of 1.5 billion dollars. What was true of a hotel in a small town in Washington State underpaying a chambermaid during the Great Depression applies with much greater force to McDonald’s: the most general legislative intent underlying the imposition of a wage floor, as the Supreme Court observed, remains that “[t]he community is not bound to provide what is in effect a subsidy for unconscionable employers.”

As a former assistant manager at Pizza Hut described the working life of one of these “exempt” executives:

“[T]he glow of being a manager and being in charge fades as you’re mopping the floor at two o’clock in the morning. ... As an assistant manager I was on a salary of $175. The cooks were paid by the hour. You had a manager who scheduled you. He had a profit line to work out with his district manager. He could either put on the cook and pay him the minimum wage plus overtime, or he could schedule the assistant manager who had to work all those crazy hours without any overtime. I usually worked about fifty hours, but there were people working sixty or seventy hours because their manager scheduled them that way. The assistant managers were making less than the minimum wage. ... As an assistant manager I generally spent the whole shift cooking. Late at night you generally just had a cook and a waitress. Somebody would have to mop the floor so I would do it. ... It didn’t matter who did it. The manager’s job was to assign someone to do it, including himself. When you’re young you have this concept of a manager. You sort of see him as a miniature Lee Iacocca, walking through the plant with his suit and tie on, directing people. After a while you realized you were a glorified cook.”

Despite the fact that the duties test is already more lenient for the retail trade and service sectors—permitting “executive employees” to spend as much as 40

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225 West Coast Hotel v. Parrish, 300 U.S. 379, 399-400 (1937).
Moments Are the Elements of Profit

... per cent of their time on grunt work before they forfeit their bona fides—and that the judiciary has interpreted short test’s requirement that an executive employee’s primary duty consist of management so limply that it was met even where Burger King assistant managers devoted more than half of their time to non-exempt work, employers complain that this restriction is discriminatory because their managerial employees, such as the one just quoted, must perform the same routine “nonexempt” work as their own subordinates while they are engaged in supervising the latter.

Advocates of this hybrid supervisor-worker model, which contravenes Tayloristic scientific management’s principle of the “strictly executive” work of “functional bosses,” must overcome a categorical obstacle in the form of the rigidly hierarchical division of labor associated with capitalism and labor standards legislation: “Doing routine menial labor is not acting in an executive capacity.” Many assistant managers “roll up their sleeves and help with the cooking, clearing of tables, or other tasks” and not only “[d]uring busy periods” or “[u]nder certain occasional emergency conditions.” But because they “spend most of their time doing the same duties as the crew: making burritos, waiting on customers and mopping the floor,” the DOL and the courts have frequently found that as nonexempt employees they are entitled to back overtime wages. The pay and working conditions of supervisor-workers undermine employers’ claims that the duties-salary test “does not affect poor people. We are

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227 When Congress brought the bulk of retail and service employees under the FLSA in 1961, it permitted the executives among them to devote as much as 40 per cent of their time to “activities not closely directly or closely related to the performance of executive...activities,” whereas all others are subject to the 20 per cent limit. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 65, 71 (1961) (codified at 29 U.S.C. 213(a)(1) (1988)). On Senator Williams’s unsuccessful effort to reduce the limit to 20 per cent, see S. 1861, § 7(a)(2), in Subcommittee on Labor of the Senate Committee on Labor & Public Welfare, 92d Cong., 2d Sess., Background Material on the Fair Labor Standards Act Amendments of 1972, at 27, 55 (1974).

228 Donovan v. Burger King, 675 F.2d at 520-22.

229 29 C.F.R. § 541.111(b) (1993).


231Frederick Taylor, Shop Management 98-100 (1911).


talking about executives."^{237}

What employers in fact are talking about is fending off a test that "would force" them to pay overtime.^{238} What they in fact got after the Burger King case was such an extraordinary relaxation of the duties test that a GAO study of 32 federal cases decided between 1994 and 1998 dealing with the executive duties test found "hardly any instances in which a court overturned an employer's classification of a lower-income supervisor as an exempt executive." The GAO also discovered that the Burger King decision had intimidated the DOL into requiring its investigators to consider percentage limitations as only one factor in determining the worker's primary duty.^{239}

At the same time, this kind of unstructured, unregulated, and often unpaid work schedule means that employers are able to preempt greater blocks of an employee's time, leaving an "exempt" executive with less time that he can "effectively use for his own purposes. It belongs to and is controlled by the employer."^{240} This trend parallels a pattern that has become increasingly prevalent among hourly production and service employees whose employers require them to remain "on-call" at all times outside of their scheduled working hours, tethered to pagers or telephones, "not far removed from a prisoner serving a sentence under slightly relaxed house arrest terms."^{241}

As the owners of fast-food chains and their franchisees have grown more concerned that the demographic changes limiting the pool of teenagers available for low-wage work will reduce profits,^{242} Wall Street believes that managers become increasingly "crucial for success in fast food."^{243} But managers of most fast food companies cannot be paid what they are really worth to their stores. Surely the entrepreneurial young person who works 80 or 90 hours per week for a salary of $10,000 or $12,000 per year is not receiving his or her full deserts. Enduring the gaff of dealing with the public, motivating teenage ingrates among his or her own employees, scrubbing the rest room floors, and receiving a wage that amounts to little

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^{241}Bright v. Houston Northwest Medical Center Survivor, Inc., 888 F.2d 1059, 1064 (5th Cir. 1989), rev'd, 934 F.2d 671 (5th Cir. 1991) (en banc). See also Owens v. Local No. 169, Ass'n of Western Pulp & Paper Workers, 971 F.2d 347 (9th Cir. 1992).


^{243}Luxenburg, Roadside Empires at 172.
more than the minimum wage when weekend and overtime hours are taken into account is not much of a job. However, some of the chains are still able to attract such people. How?

Much of the answer lies in the chains' ability to promise the hungry new store manager the opportunity to grow with the chain. In effect, the manager is told: "We'll pay you peanuts and make you work like a slave for now. But if you produce for us, in two years we'll have enough stores open to be able to make you a district manager, then a regional overseer, and then finally a statewide warlord or whatever." The young store manager is paid with promises, so to speak. This is fine for everyone involved so long as the chain continues to grow and advancement remains possible.244

"But when the chain stops growing the manager is left without any motivation."245 The partial collapse of this huge and profitable pyramiding transaction in the wake of the oversupply of fast-food restaurants may alter the structure of low-level managerial compensation and hasten re-regulation of "exempt" managerial employees.246 Such a shake-out may also inject greater realism into entry-level quasi-supervisors' career path self-assessments, dissuading them from acquiescing in what the trade calls paying their "dues" in the hope of "rise[ning] to the chief executive's slot"247 or transmogrifying their $12,000 annual salaries into the more than half-million dollar initial investment required to open a franchise restaurant.248 If front-line supervisors' so-called delayed-payment/bonding contracts249 are massively perceived as camouflaged exploitation, there may be fewer assistant managers like the one at McDonald's, who, ruefully agreeing that one of his hourly subordinates needed to work only forty-five hours to surpass his salary for as many as sixty-two hours, nevertheless justified the disparate treatment on the ground that as a management trainee he


245Luxenburg, Roadside Empires at 172.

246Krueger, "Ownership, Agency, and Wages" at 79.


249Krueger, "Ownership, Agency, and Wages" at 75-76.
would “soon be earning a good deal more.”  

In spite of this history of overreaching, even the most learned judge in the United States has opined that, if the original purpose of the overtime provision of FLSA “was to prevent workers willing...to work abnormally long hours from taking jobs away from workers who prefer to work shorter hours,” it is “no longer very likely” that workers do so “out of desperation.” Yet the Wage and Hour Administrator in the Ford Administration increased the short-test salary level (to $250) precisely because “certain employers are utilizing the high salary test to employ otherwise nonexempt employees (i.e., those who perform work in excess of the 20 percent tolerance for nonexempt work or the 40 percent tolerance allowed in...retail and service establishments) for excessively long work-weeks.”

Moreover, corporate “shedding” of older workers in recent years has created additional cohorts of vulnerable labor market applicants. Unlike their teenage competitors who still live at home, they are unable to survive on the income generated by the minimum wage at forty (or fewer) hours per week at McDonald’s, which is “inadequate to support one person, much less a family.” Yet “[o]lder workers who compete with students for jobs cannot demand much more.” When fast food chains such as McDonald’s, Burger King, and Kentucky Fried Chicken perceived a shortage of teenagers in the late 1980s, they “rapidly recogniz[ed] the benefits of hiring older workers....” Their diminished opportunities compelled many of them to acquiesce in low-paid “exempt” executive jobs precisely because the mandatory long hours were associated with salaries in excess of $170 (that is, the weekly minimum wage), even though they included no overtime premium and may not even have amounted to the minimum wage for every hour worked. In this regard, their “irrational” labor market

250 A Raise for Low-Level Bosses” at 24.

251 Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1176 (7th Cir. 1987) (per Posner, J.).


behavior uncannily resembled that of migrant farm workers. For these older workers, many of whom may have lost health-care benefits, the need for additional income supplants the desire to avoid long hours. In other words, fear of unemployment or lower-waged employment causes even those who "are not the marginal, non-unionized workers for whom" alone, in Judge Richard Posner's mind, "the overtime provisions were designed," to acquiesce in employers' drives "to exploit[] employees in a transitional stage in their promotion from hourly worker to executive function by obliging them to work both as an extra hand and as lower echelon management." An Acting Assistant Secretary for Employment Standards and Deputy Wage and Hour Administrator in the Clinton administration conceded the "absurdity of having a salary test that's lower than the minimum wage." Another high-ranking national DOL official characterized as "totally embarrassing" his agency's having permitted the test-salary to become obsolete. Taken together with the acknowledgment that "we're not out there looking for section 541 violations," the DOL's admissions against interest underscore the invalidity of the current version of the salary test.

As a result of long-term agency neglect and/or political stalemate, the justification for what may once have been a reasonable regulation has, through the mere passage of time, "long since evaporated." The fact that the minimum

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258 *Mechmet v. Four Seasons Hotel Ltd.*, 825 F.2d at 1177. In private correspondence, Judge Posner stated that the original article of which this chapter is an updated revision "is very interesting but I am not persuaded by your argument that assistant managers of fast-food outlets are being exploited. If one-quarter are being paid $15,000, three-quarters are being paid more and if they are mainly young people for whom the assistant manager's job really is the first step on the corporate ladder, albeit a ladder that does not lead to a corporate presidency or even a franchise, I don't see why they should complain. The effect of applying the overtime provisions of the FLSA to them might be actually to reduce their pay, as they would cost more to employ. If someone who works 50 hours a week is worth only $15,000, someone who work 40 hours a week must be worth less." Letter from Richard Posner to Marc Linder (Apr. 10, 1995). Judge Posner did not reply to the response that "it would be very difficult to enforce labor standards based on the principle implicit in your view that assistant managers have nothing to complain about. That principle seems to be that no unlawful exploitation exists where an employer self-servingly predicts that some relevant proportion of its employees are merely going through a corporate rite of passage on the other side of which they will reappear as highly paid real managers." Letter from Marc Linder to Richard Posner (Apr. 13, 1995).


260 Telephone interview with John Fraser, Washington, D.C., Nov. 19, 1993, at 9 a.m. CST.

261 Telephone interview with Ray Kamrath, Wage and Hour Division, Office of Policy, Planning, and Review, Washington, D.C., Nov. 8, 1993, at 11:00 a.m. CST.

wage has more than doubled during the intervening quarter-century has rendered
the salary test a “clearly obsolete”\(^{263}\) regulation so lacking in the requisite
rationality and reasonableness as not merely to be “unrelated to the tasks
entrusted by Congress” to the agency,\(^{264}\) but to have turned them on their head.
Other agencies’ failure to adjust similar monetary indexes for inflation during
shorter periods has prompted courts to declare welfare regulations invalid.\(^{265}\) The
Administrative Procedure Act’s mandate that federal courts invalidate agency
regulations found to be “arbitrary, capricious, [or] an abuse of discretion”\(^{266}\)
operates in such cases because, as here with regard to the salary test, they “are
contrary to the intent of Congress.”\(^{267}\)

5. Future of an Exclusion

I am from the state of Florida where I work in a store as a manager. I was hired with the
understanding that I would be required to work 45 hours/wk. Is there a limit to how many
hours I am required to work without being compensated? During my tenure with this
company, there have been weeks where I have been REQUIRED to work 70+ hours with
weeks to months with no days off. When base rate is divided by hours worked, some of
the managers are not even receiving minimum wage for the hours they work.

Rita Risser’s Response:

Guess what—they got you. As a manager, you are exempt from the law requiring
overtime. Minimum wage doesn’t apply. Federal law defines a manager as someone
whose primary duty is management and who receives at least $155 per week. And there’s
no limit on how many hours they can require you to work. ... I suggest you look for
another job that pays better.\(^{268}\)

Before his appointment as Secretary of Labor, Robert Reich realized that
“‘[c]ompared to the old blue-collar jobs that have been lost, these [minimum-


\(^{264}\) Walling v. Yeakley, 140 F.2d 830, 832 (10th Cir. 1944) (discussing the executive

\(^{265}\) Main Ass’n of Interdependent Neighborhoods v. Petit, 659 F. Supp. 1309, 1323 (D.
Me. 1987) (141 per cent increase in inflation over fourteen-year period invalidated
Medicaid resources regulation).


\(^{268}\) http://www.fairmeasures.com/asklawyer/archive/fall96/ask27.html (Fair Measures
Management Law Consulting Group).
wage fast-food] jobs represent a serious setback.'" Together with the knowledge that his own department's regulations authorize employers to pay overtime workers even less than the minimum wage, he acquired the power, but lacked the civil courage, to terminate that subsidy by increasing the salary test to a level beyond which concern with exploitation is dissipated. Recent congressional action setting that level at 6.5 times the minimum wage (currently $33.48) for computer systems analysts, software engineers, and computer programmers is one relevant model. Converted to weekly compensation based on forty hours, this $1,339 salary would be high enough to generate $20 per hour (straight-time) for executive employees working 57-hour weeks. Such a test might certify that the "noncommissioned officers of the industrial army,...the petty 'managers' of all sorts...enjoy...the privileges of exemption from the worst features of the proletarian situation...."

Unlike the federal DOL, state agencies administering comparable state wage and hour laws at least purport to be trying to keep their salary test up-to-date. In New Jersey, for example, the weekly executive salary threshold is $400, while Iowa has set its long-test salary at $310 and short-test salary at $500. California, which has conferred much greater attention and protection on assistant managers, in 1999 conditioned exclusion of executive employees from the state's overtime law on a monthly salary equivalent to twice the state minimum wage ($5.75 per hour) for full-time employment, which amounts to $1,978—far in excess of the previously effective thresholds of $900 and $1,150 in various industries.

If there is a widespread social conviction that unlimited overtime even at such salaries constitutes intolerable overreaching, several corrective programs are available. One is the blanket elimination of the exclusion of executive, administrative, and professional employees from the overtime provision of

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269 Koepp, "Big Mac Strikes Back" at 59.


Involuntary Overtime

FLSA. Another is an across-the-board increase in the statutory overtime premium from 50 per cent to 100 per cent or more. Finally, in the spirit of the recent worldwide resurgence of interest in shorter hours as a means of combating unemployment and/or increasing leisure, a return to the pre-New Deal state maximum hours statutes prohibiting workweeks beyond a specified length becomes imaginable. In contrast with these radical possibilities, a readjustment of the quarter-century-old obsolete salary test level is merely the rankest reformism—even if it is calculated, as the Wage and Hour Administrator declared in 1993, to “alienate the other interested parties” such as McDonald’s, which controlled one-sixth of the entire fast-food market and two-fifths of the burger business.

However, the initial and continuing confusion or lack of forthrightness in explaining the policies underlying the FLSA overtime premium has also come back to haunt workers as courts have felt freer to deny overtime coverage for some relatively highly paid professional and managerial employees—whose status as excluded is grey—on the grounds that their high incomes alone disqualify them for protection.

Big Business, eager to shed regulation of the duties of its putatively excluded white-collar employees and to avoid FLSA suits filed by “quite high level
executives...well-to-do individuals,”281 has shown some interest in setting a much higher salary test as the exclusive criterion for coverage. This initiative surfaced at a 1995 House Subcommittee on Workforce Protections hearing. William Kilberg, former DOL Solicitor, a corporate lawyer appearing on behalf of a coalition of “significant employers of white collar employees” such as accounting firms, computer companies, media outlets, and engineering consultants,282 argued that “[i]f the rationale for protecting certain employees is that they lack the bargaining power to protect themselves, then the exemptions should be designed to separate those who possess adequate bargaining power from those who lack it. ... One promising solution would be to base exempt status for white collar employees...on the amount paid to each employee....”283

Appearing on behalf of the Labor Policy Association, “an organization of the senior human resource executives of 220 of the nation’s largest corporations,” which employed 11 million workers or 12 percent of the nonfarm private-sector work force,284 Maggi Coil amplified and specified Kilberg’s suggestion:

We believe that the exempt/non-exempt rules need to be simplified. There should be some nexus between the amount of compensation earned by an employee and eligibility for the exemption. If an employee is highly paid, who cares whether he or she is engaged in production or management, or is exercising independent judgment or discretion. If an employee is being paid $40 per hour, to say that he or she must be paid $60 for each hour over forty because he or she is not being paid “on a salary basis” does not pass the common sense test.

We realize that this is easier said than done. What is the magic number that divides a well-compensated employee from one who is on the “lower rungs” of the economic ladder? ... There are no easy answers and you can be sure that no matter what you come up with there will inevitably be anomalies at the margins.

Despite these complexities, we believe the current crisis should compel you to pursue a solution because the current problems are well beyond “marginal.”285


283Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the House Committee on Economic and Educational Opportunities at 77-78 (statement of William Kilberg).

284Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the House Committee on Economic and Educational Opportunities at 18 (statement of Maggi Coil).

285Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on
The following year the Flexible Employment Compensation and Scheduling Coalition—which includes a heterogeneous group of employers and association of large and small employers employing a large proportion of the workforce such as the Boeing, Eastman Kodak, General Electric, Hewlett-Packard, the NAM, NRA, National Federation of Independent Businesses, and the Chamber of Commerce of the United States—submitted Coil’s statement verbatim at a Senate Labor and Human Resources Committee hearing on the FLSA. The Labor Policy Association also submitted to the congressional subcommittee a paper that called for “changing the white collar exemption to a ‘highly compensated employee’ exemption defined solely by salary or wages paid. This would retain the current approach of covering all employees not excepted but would simply state that, once an employee’s wages or salary reached a certain level, he or she no longer has a statutory entitlement to overtime premiums.”

With such proposals—Coil’s $40 an hour figure would equate to an annual salary of $80,000—Big Business ran into Labor’s open arms. Since Kilberg emphasized that “no one on our side of the table...is urging that the assistant deli manager be characterized as an exempt employee. We are concerned about accountants, engineers, paraprofessionals,” the United Food and Commercial Workers International Union (UFCW) representative, assistant general counsel

\[\text{Workforce Protections of the House Committee on Economic and Educational Opportunities at 23.}\]


\[\text{288 Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the House Committee on Economic and Educational Opportunities at 120. A few weeks later, Kilberg published an op-ed in the Wall Street Journal summarizing Big Business’s position. William Kilberg, “A 1938 Law that Hurts Workers More Than It Helps Them,” Wall St. J., May 10, 1995, at A19, col. 3. After having heard from Nick Clark, the UFCW attorney who testified at the hearing, about the testimony, the present author submitted a letter to the editor to the Wall Street Journal (with a copy to Kilberg) on May 10, 1995, responding to Kilberg and, tongue in cheek, calling on employers, if they were “seriously interested in deregulating labor relations,” to “seize the opportunity” to reach agreement with unions on a higher, dispositive salary level. Although the Journal did not publish the letter, on July 31 and Aug. 3, 1995, the author received a telephone call from Sandra Boyd, assistant general counsel of the LPA. Stating that she had read and liked the letter, she asked whether the author might be interested in testifying at the counterpart Senate hearings in the fall or spring since congressional committees like to hear testimony from academics. Boyd stated that LPA members might be able to accept a salary level cutoff of $40,000 to $50,000, though she conceded that restaurant owners were not enthusiastic about such a proposal. Finally, she observed that although the AFL-CIO wanted the salary level increased, it did not want to open the FLSA up for fear of other changes.}\]
Nick Clark, whose chief objective in testifying was to urge updating the obsolete salary level, perceived the common ground:

this morning, the employer proposals seemed to coalesce for a bright-line test to solve many of these problems. In other words, if the salary levels were sufficiently high..., then workers above that salary level would not have to worry about the salary basis test regulations.

Now that seems to be something we might be able to work with. Certainly, workers that are making over $100,000 a year, I think we can all agree, should be salaried and not have to worry about docking regulations. I think the figures that were floated out by Mr. Kilberg were six-figure incomes and things of that nature...

What we are concerned about is workers who have had their wages and salaries eroded over 20 years of inflation, and who are on the low end of the scale, not the highly compensated workers that make six-figure incomes that Mr. Kilberg referred to.289

The UFCW was so conciliatory that when Representative Lynn Woolsey (D. Cal.) asked the obvious question as to whether it would not be “simpler just to pay everybody overtime, except for business owners,” Clark declared: “we certainly are not suggesting that. We think that the salary exemption makes sense for a class of workers, and it’s always been there in the Act, and certainly I’m on salary, and I don’t have an objection to that.”290 Such acquiescence was remarkable since the MWSC had reported that on one view overtime exemptions had become “anachronistic” in light of the widespread approval of the 40-hour week; while the premium penalty’s employment-spreading effect had become irrelevant, universalizing it would “reinforce the acknowledged public acceptance of the 40-hour workweek and...provide additional compensation for inconvenience and added risk of injury associated with overtime work.”291 When Clark

289Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the House Committee on Economic and Educational Opportunities at 100.

290Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the House Committee on Economic and Educational Opportunities at 118. Oddly, the chief characteristic that Clark used to explain why the overtime claims of workers with six-figure incomes were not a concern to the UFCW was not their high standard of living or the bargaining power that made possible the high salary; rather the income was an indicator of workplace autonomy and self-direction: “The reason the employer is paying these six-figure incomes to these workers is because they expect to exercise judgment as to how they allocate their time. They pay for a job to be completed. They don’t tell the worker how to do the job, they say, here’s the job, you get it done...and you work the number of hours it takes....” Id. 114, 115. These criteria are traditionally used to identify independent contractors, who are not covered by the FLSA or other labor-protective statutes, whereas executive and administrative employees, no matter how highly paid, are universally recognized as controlled by the employer and thus in an employment relationship.

291Report of the Minimum Wage Study Commission at 120.
repeated that “we, on the side of labor, would entertain” exempting from overtime everyone with a six-figure income, chairman Cass Ballenger (R. N.C.) ended the hearing by observing that, regardless of whether Clark or Kilberg had brought up the $100,000 figure, “there might be a point of discussion there....”292

But when Clark returned four years later to testify on a different aspect of the FLSA before the same House Subcommittee on Workforce Protections, he was reduced to observing that although in 1995 committee members and employer representatives had agreed that the salary levels were obsolete, neither the committee nor any employer had proposed a bill rectifying the inequity.293

The only congressional initiative even remotely embodying Clark’s proposal was undertaken by Representative Thomas Petri (R. Wis.), who introduced identical bills in the 104th and 105th Congress in 1996 and 1997, which would have amended the exclusions and exemptions section of the FLSA to exclude from minimum wage and overtime coverage “any employee whose rate of annual compensation is not less than $40,000.”294 No action was taken on either of these bills—the first of which had no other supporters, and the second only three—which, like several bills in 1939-40, would have applied to all employees regardless of whether they fell into the three statutory white-collar categories. Ironically, Petri’s purpose was not to protect workers from overreaching employers; on the contrary, his proposal was designed to

create an income threshold that automatically exempts from FLSA scrutiny the highest paid strata of the workforce. This would directly reverse the trend toward questionable and irrational overtime awards for highly compensated employees. There is no reason that the FLSA, which was passed to protect laborers who “toil in factory and on farm,” and who are “helpless victims of their own bargaining weakness,” should ever be interpreted to protect workers making high five-figure or six-figure incomes.295

Even without correcting Petri’s tendentious legislative history, it is clear from his own arithmetic as well as from reality that many workers with intermediate five-figure incomes lack the bargaining power to resist employer demands to overwork free of charge. Nevertheless, despite his biased motivation,

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292Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the House Committee on Economic and Educational Opportunities, 104th Cong., 1st Sess. at 121.


Petri’s bills represent a step in the direction of drawing the coverage line on more rational, transparent, and easily administered bases.

The Clinton administration’s failure to undertake any initiative to raise the salary test level contrasts sharply with the alacrity with which the president himself asked Congress to raise another long unchanged threshold—that for social security coverage for domestic workers. As soon as the $50 per quarter threshold became politically embarrassing for him, when a number of his prominent nominees were revealed to have violated the Internal Revenue Code by having failed to pay Federal Insurance Contributions Act taxes on behalf of their maids and nannies, President Clinton informed Congress that “[t]he financial threshold in the law is outdated, having remained unchanged for the past four decades. It is time to amend the law.” Congressional inaction since 1950 with regard to this threshold had favored domestic workers—at least those who worked for the fewer than one-quarter of employers who complied with the law. Although it was on notice that tens of thousands of domestic workers would lose benefits, no “conflicting interests of the many and differing constituencies” deterred Congress from quintupling the threshold and relieving many affluent recipients of maid services of employment tax liability.

Similarly, when the DOL concluded that its regulation defining what it means

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for excluded white collar workers to be paid “on a salary basis” contradicted congressional intent as applied to public-sector employees, it promptly amended it to accommodate their employers.301 Thus it should behoove an allegedly labor-friendly Democratic administration to arrive at the same conclusion regarding the salary-test level and to put an end to employers’ efforts to appropriate unpaid labor in this particular manner by compelling workers to work supra-normal workweeks. As have many administrations before it, the Clinton Administration DOL repeatedly announced that § 541 is on its regulatory agenda.302 In 1994, it announced that the salary level tests “are outdated and offer little practical guidance in the application of the exemption. ... Because the regulations are sorely out-of-date, a comprehensive rulemaking is necessary. ... Legal developments in court cases are causing progressive loss of control of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices.”303

By 1999 even the GAO found the salary level to be universally regarded as “virtually meaningless” and in need of revision.304 Yet the Assistant Secretary of Employment Standards in the Clinton administration made brutally clear how hopeless the prospect for raising the salary level had become when he transmogrified employers into “constituencies” of the Department of Labor: “any change in the current regulatory structure requires balancing the diametrically opposed, conflicting interests of the many and differing constituencies that would be affected. The views of interested parties are intractably held on opposite sides of the various issues under these regulations.”305


