Atrophied Rights: Maximum Hours Labor Standards under the FLSA and Illinois Law

Scott D. Miller

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Atrophied Rights: Maximum Hours Labor Standards under the FLSA and Illinois Law

SCOTT D. MILLER*

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* Staff counsel, American Federation of State, County and Municipal Employees (AFSCME Council 31); former Chief Legal Counsel, Illinois Department of Labor. The views expressed in this article are solely the author’s.

Related articles by the author include, Scott D. Miller, Revitalizing the FLSA, 19 HOFSTRA LAB. & EMP. L.J. 1 (2001) [hereinafter Revitalizing the FLSA]; Scott D. Miller, Work/Life Balance and the White-Collar Employee Under the FLSA, 7 EMP. RTS. & EMP. POL’y J. 5 (2003) [hereinafter Work/Life Balance]. Portions of Parts I, II.B, V.C, V.E.4.b and 5.b are reprinted with permission from these articles.
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I. INTRODUCTION

Fighting and dying for the right to shorter work hours and more free time, labor activists and reformers during the Progressive and New Deal Eras of the late nineteenth and early twentieth centuries argued that shorter work hours would advance society’s quality of life by protecting public health and safety (reducing occupational injuries by reducing worker fatigue), welfare (reducing labor strife and providing workers with more time for personal, home community and cultural life) and morals (eradicating overwork and sweat shops). Their efforts culminated in labor contracts providing shorter work hours and the enactment of state and federal maximum hours labor standards.
The primary federal statute setting maximum hours labor standards is the Fair Labor Standards Act of 1938 (FLSA). The last act of the New Deal, the FLSA provides the national labor standards for minimum hourly wages (section 6) and the maximum number of hours an employer can employ an individual per week (section 7(a)) before it must pay the worker a penalty (overtime pay—150% of the employee’s regular rate of pay). The two provisions work together as maximum hours labor standards advancing the underlying policies and purposes of the FLSA— for society to work less, live more, and spread the wealth by employing more people working shorter hours, rather than employing fewer people working longer hours. Congress charged the U.S. Department of Labor (USDOL) with the duty to administer and enforce the FLSA.

“minimum term” laws: laws which attempt to force employers to meet some external (as opposed to contractual) standard on wages, hours or other conditions of employment . . . . [Such laws] impose[] liability standards that differed from the common law, which supplied the background rules for the employment relationship, when it was enacted.


Congress did not intend the FLSA to occupy the entire maximum hours labor standards field, thereby preempting all state and local maximum hours labor standards. For example, private enterprises must have $500,000 in annual gross sales to be subject to the FLSA.\(^{10}\) Of critical importance is section 18(a) of the FLSA (the Savings Clause), which expressly permits states to have more generous minimum wage and/or maximum hours labor standards:

No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter . . . .\(^{11}\)

Applying the Savings Clause, the Ninth U.S. Circuit Court of Appeals in *Pacific Merchant Shipping Association v. Aubry*\(^{12}\) held that the FLSA § 213(b)(6) overtime exemption for seamen did not bar California from applying its state overtime pay law to maritime workers.\(^{13}\) Significantly, the court determined that “Congress did not ‘delegate’ authority to the states through section 218, but simply made clear its intent not to disturb the traditional exercise of the states’ police powers with respect to wages and hours more generous than the federal standards.”\(^{14}\) California, therefore, merely exercised its “traditional police powers firmly in place before Congress enacted the FLSA.”\(^{15}\)

Illinois has regulated wages and hours since 1819.\(^{16}\) Illinois labor standards providing more generous minimum wage and maximum hours than the federal standards represent an exercise of “traditional police powers” which firmly existed before the FLSA. Per FLSA § 18(a), such standards are not preempted by the federal standards.

A growing body of empirical evidence demonstrates that maximum hours labor standards are as relevant today as they were when first en-

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10. *Id.* § 203(s)(1)(ii).
11. *Id.* § 218(a). *See also* Pettis Moving Co. v. Roberts, 27 Wage & Hour Cas. (BNA) 945, 946 (2d Cir. 1986) (finding that the FLSA § 213(b)(1) overtime exemption for motor carriers did not preempt New York State’s overtime requirements).
13. *Id.* at 38.
14. *Id.* at 42.
15. *Id.*
16. *See infra* Part VI.A (discussing early Illinois maximum hours labor standards).
acted.\textsuperscript{17} Taking a long-term view of work hours, the most favorable post-World War II work hours estimates appear positive only when compared to work hours during the mid-1800s—a period when people worked the longest hours in history. Examining eight centuries of annual work hours (using English research for pre-capitalism statistics), researchers estimate that people worked 1620 hours per year in 1200, 1980 hours in 1600, 3650 hours in 1850 and 1949 hours in 1987.\textsuperscript{18}

Time-diary data sets from 1985 through 2003\textsuperscript{19} demonstrate that Americans perform more market and non-market (home) labor and have less leisure time than other G-7 nations.\textsuperscript{20} According to a 2002 International Labour Office study, “work hours in the United States are only surpassed by Thailand, Hong Kong, and South Korea.”\textsuperscript{21} Recent studies show that college educated American men and women between the ages of thirty-four

\begin{itemize}
\item \textsuperscript{17} For a review and analysis of “time-squeeze” (the shortage of leisure time resulting from long work hours) in popular and academic literature, see Revitalizing the FLSA, supra note *, at 46-105; Work/Life Balance, supra note *, at 33-42 (same).
\item \textsuperscript{18} Schor, supra note 1, at 43-45 (attacking the “myth” that capitalism reduces human toil).
and fifty-four are more likely than younger and older Americans, and their less educated U.S. counterparts, to work overtime hours. American male white-collar employees are more likely to work over fifty hours per week than they were twenty-five years ago, reversing the trend over the past century in the declining work-week. In a 2004 review of research papers, the National Institute of Occupational Safety and Health reported a relationship between overtime work and poor health, increased injury rates, illness and mortality.

Organized labor has revitalized its fight for collective bargaining agreements providing shorter work hours and more free time for "what we will." Neither the FLSA, nor Illinois law, however, can achieve their


24. See Caruso et al., supra note 21, at 27 (summarizing findings); see generally Tosh Anderson, Overwork Robs Workers' Health: Interpreting OSHA's General Duty Clause to Prohibit Long Work Hours, 7 N.Y. CTRY L. REV. 85 (2004) (arguing for a shift in public consciousness to identify work hours as a health and safety concern).


26. Quoting a portion of the labor movement anthem (circa 1880), "Eight hours for work, eight hours for rest, eight hours for what we will!" Rev. Jesse Henry Jones & I. G.
statutory goals of providing workers with shorter work hours and more meaningful time away from work for personal, home, community and cultural life. This article argues that maximum hours labor standards have atrophied under the FLSA. Illinois provides more generous (albeit, not particularly strong) maximum hours labor standards than the FLSA because it recently took steps to stop their deterioration. Per FLSA § 18(a), employers must therefore comply with the State, over the federal, standards in Illinois. This article proves its thesis by examining the evolving political history of, and then comparing, federal and Illinois minimum wage standards and their respective maximum hours standards for white-collar workers.

II. EVOLVING POLITICAL HISTORY OF THE FLSA MINIMUM WAGE STANDARD

The FLSA minimum wage provision (section 6) is a maximum hours labor standard with three goals: supporting a minimum living standard, redistributing wealth and shortening the workweek. Initially twenty-five cents per hour (automatically increasing to forty cents in two years), Congress increased the wage rate twenty-six times between 1938 and the $5.15 per hour rate in 1997.27

Upon winning control of the House and Senate from Republicans in the November 2006 mid-term elections, Democrats declared that they would enact a minimum wage increase in 2007.28 On May 25, 2007, President Bush signed H.R. 2206, the emergency funding bill for the Iraq war.29 Title VIII of the bill (the Fair Minimum Wage Act of 2007) was Senator Edward Kennedy’s (D-Mass.) amendment to provide a three stage increase in the minimum wage (from $5.15 to $7.25) over two years.30 It also provided $4.84 billion in tax breaks for small business.31 The first step in the wage increase (to $5.85 per hour) took effect sixty days after enactment

30. Id. at subtit. A, § 8102.
(July 24, 2007). The second increase (to $6.55 per hour) began twelve months after the first increase. The third wage increase (to $7.25 per hour) began twenty-four months after the first.32

The National Restaurant Association objected to the measure, arguing that the tax relief did not contain enough breaks for restaurants.33 Among the Association’s talking points was its contention that “85 percent of those who would benefit from a minimum-wage hike are teens living with their working parent; adults living alone; or second earners.”34

This section demonstrates that H.R. 2206 preserved a key (and insidious) tax break for restaurants, providing tax relief to employers whose employees receive more than half of their minimum wage in tips. It also discusses the minimum wage standard’s three goals. This shows that the National Restaurant Association’s talking points are wrong. It also demonstrates that the minimum wage cannot meet its three goals under the Fair Minimum Wage Act of 2007.

A. THE TIP CREDIT AND ITS TAX BREAK

The following examines the credit employers receive against the minimum wage rate for the tips patrons give their employees. It also explores the tax break employers obtain for paying less than 50 percent of the minimum wage to their tipped employees.

1. The Tip Credit and its History

The FLSA credits employers with the tips its employees receive from patrons to satisfy a portion of the minimum wage rate, e.g., the “tip credit.”35 The tip credit dates back to the 1942 U.S. Supreme Court decision, Williams v. Jacksonville Terminal Co.36 In Williams, the sole pre-FLSA remuneration case, “Red Caps” (Porters) earned at the Jacksonville, Florida railroad terminal were tips they received from passengers. Upon the passage of the FLSA, the terminal issued a written notice to each Red Cap assuring him that he would retain his tips. It further guaranteed compensa-

36. 2 Wage & Hour Cas. (BNA) 17 (U.S. 1942).
tion that, together with his tips, would not be less the minimum wage rate.\textsuperscript{37} At issue was whether the FLSA required employers to pay tipped employees the minimum wage without regard to their receipt of tips.\textsuperscript{38} The FLSA text did not address this question.\textsuperscript{39} The Court construed the FLSA to permit consideration of tips in computing the amount of minimum wage compensation. It required, however, the existence of an agreement between the employer and the employee that tips should be kept by the employee.\textsuperscript{40}

Congress amended the FLSA in 1966 to prevent employers from using tips to satisfy more than 50 percent of the applicable minimum wage rate.\textsuperscript{41} Congress amended section 203(m) in 1974 to limit the tip credit to employment relations where the employer explains the FLSA tip provision to its employees and the employees retain all tips they received.\textsuperscript{42} The 1996 amendment to the FLSA that raised the minimum wage from $4.25 per hour to $4.75 beginning October 1, 1996, and $5.15 on September 1, 1997, also fixed the minimum portion of the minimum wage paid by employers to tipped employees at $2.13 per hour.\textsuperscript{43}

2. Tax Breaks for Employers with Tipped Employees

Employers obtain a tax break for paying tipped employees less than 50 percent of the minimum wage. Section 8212 of the Fair Wage Act of 2007 preserves this tax break.\textsuperscript{44}

Per the 1993 amendments to the Internal Revenue Code, an employer receives a tax credit on the social security taxes it pays on the tips an employee receives during any month when the tips "exceed the amount by which the wages (excluding tips) paid by the employer to the employee during such month are less than the total amount which would be payable at . . . the minimum wage rate."\textsuperscript{45} The credit was applicable only for tips an

\textsuperscript{37} Id. at 18-19.
\textsuperscript{38} Id. at 17.
\textsuperscript{39} Id. at 18.
\textsuperscript{40} See id. at 21-22.
\textsuperscript{41} See 29 U.S.C. § 203(m) (1966); see also Shultz v. William Len Hotel Co., 19 Wage & Hour Cas. (BNA) 209, 212-13 (W.D. Tenn. 1969) (analyzing and applying the 1966 amendment).
\textsuperscript{44} See supra U.S. Troop Act, note 29, at subtit. B, § 8212.
employee received for food and beverages consumed on the employer’s premise, e.g., restaurants and bars.\textsuperscript{46}

Section 1112 of the Small Business Jobs Protection Act of 1996 (the same statute that amended the FLSA in 1996 to increase the minimum wage to $5.15 per hour and fix the tip credit at $2.13 per hour) extended the 1993 tax credit to employers of tipped employees who deliver food and beverages, e.g., pizzerias.\textsuperscript{47} John B. Anderson showed in his 1998 article, \textit{Campaign Finance: The Impact on the Legislative and Regulatory Process},\textsuperscript{48} that the tax break cost $165 million.\textsuperscript{49} Its primary beneficiaries were Pizza Hut, Domino’s Pizza and Godfather’s Pizza.\textsuperscript{50} Ironically, Walter John Wessels demonstrated in his 1997 article, \textit{Minimum Wage and Tipped Servers},\textsuperscript{51} that job growth for tipped employees increases significantly when there is an increase in an employer’s share of the minimum wage rate.\textsuperscript{52}

Pay tips with cash. When a patron pays a tip on a credit card, the FLSA permits an employer to pay the tipped employee his/her tip, less the fee the employer must pay to the credit card company for processing the sale.\textsuperscript{53}

\textbf{B. THE THREE GOALS OF THE MINIMUM WAGE}

As stated above, the federal minimum wage has three goals: supporting a minimum living standard, redistributing wealth and shortening the workweek. It cannot meet these goals under the Fair Minimum Wage Act of 2007.

The first goal addresses the historic purpose of the standard, maintaining a minimum standard of living to lessen the need for government aid to families and preventing disputes between management and labor.\textsuperscript{54} The literature addressing the subject strongly contradicts the National Restau-

\textsuperscript{46} Id. at § 45B(b)(2).
\textsuperscript{49} Id. at 94 (discussing the connections between campaign contributions, minimum wage, and tax breaks).
\textsuperscript{50} Id.
\textsuperscript{52} Id. at 346-47 (empirical analysis showing tipping is like profit sharing; there is less pay out per worker when the employer hires more workers. The employer thus has to raise its wages).
rant Association’s talking points concerning the identity of minimum wage earners.

On a national level, William J. Carrington and Bruce C. Fallick identified in their 2001 article, *Do Some Workers Have Minimum Wage Careers?*, a national “subpopulation of workers [women, minorities and less educated individuals who have permanently left school] whose lifetime income and employment is likely to be associated with minimum wages.” The Families and Work Institute reported in 2006 that most Americans “who earn less than $9.73 per hour or live in households with annual incomes below 200 percent of the poverty level are white non-Hispanics and are married or living in committed long-term relationships.”

On a regional level, Jim Campbell observed in his 2006 article, *Proportion of Workers in Selected Pay Ranges by Region and State, 2005*, that 2.5 percent of the 75.6 million U.S. wage and salary workers earned the $5.15 per hour federal wage or less in 2005. Southern states recorded the highest proportion of such workers (3.1 percent), while the Western states reported the lowest share (1.5 percent).

On the state level, the Center for Urban Economic Development (University of Illinois at Chicago) observed in its 2003 report, *Raising and Maintaining the Value of the State Minimum Wage: An Economic Impact Study of Illinois*, that one-third of Illinois families with workers earning


59. *Id.* at 66.

60. *Id.*

61. RON BAUMAN ET AL., *RAISING AND MAINTAINING THE VALUE OF THE STATE MINIMUM WAGE: AN ECONOMIC IMPACT STUDY OF ILLINOIS* (Ctr. for Urban Econ. Dev.,
between $5.15 and $6.50 per hour receive all their income from jobs with such wage rates. These workers are more likely than others to live in a household with young children. Nearly one-third of such wage earners are heads of households.62 New wage payments between $5.15 and $6.50 per hour would trigger $900 million in sales for Illinois business.63 Increasing workers’ earning between $6.50 and $7.50 per hour would raise the sales figure to $1.2 billion.64 The cost to business for the first wage increase would be only 0.35 percent of total wages Illinois businesses paid in 2001. The second wage increase would be 0.49 percent.65 A review of the fifty States and the District of Columbia over the period of 1983 and 2001 showed no statistical relationship between the value of the minimum wage and employment growth in low-wage industries.66 Maintaining the value of the minimum wage with an automatic cost-of-living adjustment (COLA) did not reduce employment growth in retail trades or eating and drinking establishments.67

Addressing the second and third goals, empirical evidence suggests that the minimum wage is a method to redistribute income and shorten the work-week.68 Dora L. Costa and Oren M. Levin-Waldman observed in separate working papers that the minimum wage has a greater impact in southern and other right-to-work states with lower wage structures than it does in regions with high union density.69 Costra found evidence that the initial drop in work hours (1938-1950) resulting from the FLSA was greater


62. Id. at 7 (profiling the minimum wage workforce in Illinois).
63. Id. at 17 (examining the impact a new minimum wage would have on businesses).
64. Id.
65. Id. at 14.
66. Id. at 20-26.
67. Id. at 26-28 (analyzing Oregon and Washington State).
69. See Levin-Waldman, supra note 68, at 4-15 (reviewing regional wage structures).
in the south than the north because southern employers were less able to adjust straight-time wages—the FLSA raised wages in the south more than it did in the north. This supports Levin-Waldman's observation that the political opposition to the minimum wage is greater in the South and other right-to-work States.

There is considerable elasticity in the marketplace to absorb minimum wage increases. Analyzing data from 1996-2002, Scott Adams and David Neumark reported in their 2003 working paper, *Living Wage Effects: New and Improved Evidence*, that living wage standards (laws requiring employers to pay employees above the poverty rate) boost the wages of the lowest-wage workers, at the cost of some disemployment, but on net reduce urban poverty. Examining data from the period of 1979 to 2000, Kosali Ilayperuma Simon and Robert Kaestner demonstrated in their 2003 working paper, *Do Minimum Wages Affect Non-Wage Job Attributes? Evidence on Fringe Benefits and Working Conditions*, that variations on federal and state minimum wages "had no discernible effect on fringe benefits (e.g., offers and receipt of health insurance, receipt of pensions, vacation pay, and quality of working conditions)." These observations are consistent with the finding in Oren M. Levin-Waldman’s 1999 policy note, *The Minimum Wage Can Be Raised: Lessons from the 1999 Levy Institute Survey of Small Business*, that more than 60 percent of small businesses would not be affected by a $7.25 per hour minimum wage.

Given the elasticity in the marketplace to absorb minimum wage increases (low business costs and net increases in poverty reduction), Congress could have, and should have, done more in 2007 than increase the minimum wage rate by $2.10 per hour over two years (per the Fair Mini-
mum Wage Act of 2007) to address the atrophy of the standard resulting from their failure to increase the wage rate over the past ten years. Barry Bluestone and Bennett Harrison observed in their 2000 book, Growing Prosperity: The Battle for Growth with Equity in the Twenty-First Century, that the inflation-adjusted (real) value of the minimum wage (at $5.15 per hour) dropped steadily from its peak in the late 1960s to its real value in 2000 – 18 percent below what it was in 1979. By 2004, Business Week reported in its cover story, Working...And Poor, that the “federal minimum wage, too, long served as a bulwark against low pay by putting a floor under the bottom as the rest of the workforce gained ground. At $5.15 an hour, it remained 30% less than it was in 1968, after inflation adjustments.”

In their 2006 report, The Hidden Public Cost of Low-Wage Work in Illinois, Nik Theodore and Marc Doussard found that approximately 475,000 year-round working families in Illinois (supported by full-time workers earning $10 per hour and less) received public assistance. Seventy-nine percent of such households were supported by one full-time worker earning such wages. Ninety-two percent of the dual-worker households receiving public assistance were supported by more than seventy hours of weekly employment. This accounted for $2.211 billion dollars, or 37 percent of all public benefits spending in Illinois. Businesses with 1000 or more employees (mostly in the health services, retail and arts and entertainment services) employed such workers.

79. Id. at 194 (discussing the long-term inequality in wages generated by the “Wall Street” model for economic growth).
81. Id.
83. Id. at 13-17.
84. Id.
85. Id. at 10-13.
86. Id. at 16-23. See generally Andrew Herrmann, Census figures show more jobs, more poverty: Chicago trails only Philly in big-city poverty rate, CHI. SUN-TIMES, Aug. 31, 2005, at 12 (observing that Chicago’s poverty rate in 2004 was 21.1 percent, while the nation’s was 12.7 percent, or approximately 37 million people, one-third being children); Illinois Poverty Summit, 2005 Report on Illinois Poverty (finding that an additional 31 percent or 373,000 Illinoisans lived in poverty in 2003, than they did in 2000, with 46 percent – compared to 42 percent in 1999 – living in deep poverty, e.g. at less than 50 percent of the federal poverty threshold), available at http://www.heartlandalliance.org/creatingchange/documents/2005RptonILPoverty.pdf;
Business Week observed in its November 2004 article, Minimum Wage: The States Get It, 87 that thirteen states and the District of Columbia had set their own minimum wage rate higher than the federal standard (then $5.15 per hour). Florida joined Washington and Oregon in 2004 to raise its minimum wage above the federal standard and index the rate to inflation (its electorate voted 52 percent for George Bush to become President and 72 percent to increase their minimum wage). 88

The minimum wage was the “hot-button” issue in the States during 2005 and 2006. 89 As of January 1, 2007, twenty-seven states, the District of Columbia and the territories of Guam and the Virgin Islands had higher minimum wage rates than the $5.15 per hour federal standard. 90

Specifically, on January 1, 2007, Alaska’s minimum wage rate was $7.15 per hour, Arizona’s was $6.75, Arkansas’s was $6.25, California’s was $7.50 (raising to $8.00 on January 1, 2008), Colorado’s was $6.85, Connecticut’s was $7.65, Delaware’s was $6.65 (raising to $7.15 on January 1, 2008), the District of Columbia’s was $7.00, Florida’s was $6.67, Hawaii’s was $7.25, Illinois’ was $6.50 (raising to $8.25 in four annual $0.25 per hour raises—each on July 1st—by July 1, 2010), Guam’s was $5.75, Iowa’s was $6.20 (automatically replaced with the federal rate if it becomes higher than the State’s), Maine’s was $6.75 (raising to $7.00 on October 1, 2007), Massachusetts’ was $7.50, Michigan’s was $6.95 (raising to $7.15 on July 1, 2007 and $7.40 on July 1, 2008), Minnesota’s was $6.15 ($5.25 for employers with annual receipts less than $625,000), Missouri’s was $6.50, Montana’s was $6.15 ($4.00 for businesses with gross annual sales of $110,000 or less), Nevada’s was $6.15 (employers may pay $5.15 per hour if they provide their employees with a recognized health care plan), New Jersey’s was $7.15, New York’s was $7.15 (automatically re-


88. Id.


placed with the federal rate if it becomes higher than the State’s), North Carolina’s was $6.15, Ohio’s was $6.85, Oregon’s was $7.80, Pennsylvania’s was $7.15, Rhode Island’s was $7.40, Vermont’s was $7.53, Virgin Islands’ was $6.15 ($4.30 for businesses with gross annual receipts of less than $150,000), Washington’s was $7.93, West Virginia’s was $5.85 (increasing to $6.55 on July 1, 2007, and $7.25 on July 1, 2008), and Wisconsin’s was $6.50.91

III. EVOLVING POLITICAL HISTORY OF ILLINOIS MINIMUM WAGE STANDARDS

The State of Illinois has enforced minimum wage standards since the 1931 enactment of the Prevailing Wage Act (PWA),92 a statute empowering the Illinois Department of Labor (IDOL) to ascertain and enforce minimum wage rates that an employer must pay laborers, workers and mechanics on public works construction.93 Analogous to the PWA, the Illinois General Assembly enacted the Wages of Women and Minors Act (WWMA) in 1945.94 The statute empowered IDOL, through a wage board appointed by the Director of Labor, to ascertain minimum fair wage rates for women and minors per occupation. IDOL implemented the wage board’s findings through rule-making and by issuing directory and mandatory minimum fair wage orders.95 The Illinois Supreme Court declared the WWMA’s rate setting process unconstitutional in Vissering Mercantile Co. v. Annunzio.96 A dead letter since Vissering, the 1971 Illinois Commission on Labor Laws (comprised of legislators, and labor representative, management, academia and IDOL staff) recommended that the Illinois General Assembly repeal the WWMA and enact a statute, analogous to the FLSA, that would set (instead of creating a mechanism for ascertaining) a minimum wage

91. Id.
92. 1941 Ill. Laws 703 (codified as amended at 820 ILL. COMP. STAT. 130/0.01-12 (1941)). The current Prevailing Wage Act is the codification of a 1941 enactment. See 1941 Ill. Laws 703, 703-09, §§ 1-12. It replaced the 1931 and 1939 prevailing wage statutes. See Bradley v. Casey, 114 N.E.2d 681, 683 (1953) (holding that the 1941 PWA cured the problems identified in Reid v. Smith, 30 N.E.2d 908, 911-12 (1940), and Mayhew v. Nelson, 178 N.E.2d 921, 924 (1931) (finding the 1939 and 1931 PWA statutes, respectively, were unconstitutional on due process and non-delegation grounds)).
94. 1945 Ill. Laws 814 (codified as amended at 820 ILL. COMP. STAT. 125/0.01-17 (1945)).
95. Id. at §§ 4, 7, 10.
96. 115 N.E.2d 306 (1953).
rate. The General Assembly enacted the Minimum Wage Law (MWL) in 1971. Its original text reflected the Legislature’s acceptance of the 1971 Commission on Labor Laws’ recommendations to enact a minimum wage statute. The General Assembly did not, however, repeal the WWMA.

Analogous to section 2 of the FLSA, section 2 of the MWL states the historic purpose for creating a minimum wage standard, maintaining a minimum standard of living to lessen the need for government aid to families and prevent disputes between management and labor. The MWL initially provided a $1.40 per hour minimum wage (section 4(a)) beginning January 1, 1972. The Legislature amended section 4(a) in 1989 so that “[at] no time shall the wages paid by every employer . . . be less than the federal minimum hourly wage.”

Until December 31, 2004, the statute incorporated the federal minimum wage rate. Effective January 1, 2005, Illinois severed itself from the federal standard and set its own rate at $5.50 per hour, increasing to $6.50 on January 1, 2005. Raising the minimum wage was a cornerstone of Governor Blagojevich’s campaign for his first term in office. Citing the Center for Urban Economic Development’s 2003 report, Raising and Maintaining the Value of the State Minimum Wage: An Economic Impact Study of Illinois for the proposition that the real value of the federal minimum

97. See ILL. COMM’N ON LABOR LAWS, REPORTS & RECOMMENDATIONS TO THE GOVERNOR & THE GEN. ASSEMBLY 60 (Apr. 1971).
98. See 1971 Ill. Laws 2631 (codified as amended at 820 ILL. COMP. STAT. 105/1-12 (1971)).
99. Compare 1971 Ill. Laws 2631, supra note 98, with ILL. COMM’N ON LABOR LAWS, supra note 97, at 58-61. It “is a well settled rule that the report of a commission on a revision of statutory law provides evidence of legislative intent.” 2A NORMAN J. SINGER, SUTHERLAND STAT. CONSTR. § 48.09 (5th ed. 1992); see also People v. Easley, 519 N.E.2d 914, 916 (1988) (stating “[i]n studying the legislative history, courts may consider the notes and reports of the commission pursuant to which a statutory provision was adopted.”); Metro. Distrib., Inc. v. Ill. Dep’t of Labor, 449 N.E.2d 1000 (Ill. App. Ct., 1st Dist. 1983) (recognizing that the Illinois Wage Payment and Collection Act, 820 ILL. COMP. STAT. 115/1 et seq. reflects the Commission on Labor Laws’ recommendations).
100. See 1971 Ill. Laws, supra note 98.
104. See Public Act 93-0581 (codified as amended at 820 ILL. COMP. STAT. 105/4 (a) (1971)).
106. See supra notes 61-67 and accompanying text (discussing the report, RAISING AND MAINTAINING THE VALUE OF THE STATE MINIMUM WAGE: AN ECONOMIC IMPACT STUDY OF ILLINOIS).
wage rate was at an all-time low, and that raising the rate $5.15 to $6.50 would trigger $900 million in sales for Illinois business, Governor Blagojevich signed the legislation on August 21, 2005.107 The National Federation of Independent Businesses and fast food restaurant owners predicted that the measure would damage them economically.108

Governor Blagojevich advanced a second minimum wage increase during the fall 2006 veto session. Increasing the wage rate was a campaign issue for his second term in office.109 Sponsored by Emil Jones, Jr., (President of the Senate), the bill increased the rate to $7.50 per hour beginning July 1, 2007. Starting January 1, 2008, it would adjust the minimum wage rate annually with the consumer price index.110

The Illinois General Assembly passed a compromise measure on November 30, 2006.111 The legislation did not contain an automatic adjustment for inflation. Instead, the statute increased the minimum wage in one year increments from $6.50 an hour to $7.50 on July 1, 2007, to $7.75 on July 1, 2008, to $8.00 on July 1, 2009, and to $8.25 on July 1, 2010.112 Governor Blagojevich signed the measure on December 18, 2006, observing that despite dire predictions that the 2003 minimum wage increase would harm Illinois’ economy, the State led the Midwest in job growth, and Illinois’ unemployment had dropped, since the rate increase went into effect.113

The MWL has always provided employers with a tip credit. Paralleling the FLSA, the MWL tip credit was originally 50 percent of the applicable minimum wage rate.114 The Legislature amended the statute in 1983 to decrease the tip credit from 50 percent to 45 percent on the effective date of


108. See Barbara Rose & John Chase, Wage Rises; Debate Continues, CHI. TRIB., Jan. 4, 2005, § 3, at 1-2 (quoting a McDonald’s outlet owner, “I’m not willing to go half-a-million [dollars] in the hole because the governor said I have to. Next week my prices will go up”).


111. See Illinois General Assembly Approves Bill for Wage Increase to $8.25, 180 LAB. REL. REP. 446 (Dec. 11, 2006).


the amendment, and to 40 percent on July 1, 1984. Per the MWL and its regulations, an employer must, for example, pay a tipped employee at least 60 percent of the $7.50 per hour minimum wage effective July 1, 2007 ($4.50) if the employer can prove that the employee: (1) is engaged in an occupation in which gratuities are customarily recognized as part of the remuneration; (2) received at least $20 per month in gratuities; (3) the balance of the minimum wage was received by the employee in tips; (4) was on notice; and (5) the employee retains all tips that s/he received.

IV. COMPARING THE FLSA AND THE MWL MINIMUM WAGE STANDARDS

As a traditional exercise of state police power, Illinois' minimum wage standard compares favorably with its sister states. It also compares favorably with the FLSA, providing a more generous minimum wage rate than the federal standard at each July wage increase the respective statutes mandate, beginning in July 2007: $7.25/$5.85, $7.50/$6.55 and $7.75/$7.25. The MWL provides two additional $0.25 per hour annual wage increases, ending with $8.25 on July 1, 2010. Thus, per FLSA section 18 (a) (the Savings Clause), employers must pay workers in Illinois no less than the State, rather than the federal, minimum wage rate.

The MWL is particularly more generous than the FLSA concerning tipped employees. Since 1984, the MWL's tip credit is set at 40 percent of the applicable minimum wage rate. A tipped employee's rights have atrophied under the FLSA since 1996, requiring an employer to pay only $2.13 per hour to tipped employees. Thus, beginning in July 2007, Illinois employers must pay their tipped employees at least $4.50 per hour (60 percent of $7.50), compared to employers subject only to the FLSA, who must pay tipped employees only $2.13 per hour (36.41 percent of the applicable $5.85 per hour wage rate). In addition, employers subject to the FLSA tip credit will receive a tax break for paying less than fifty percent of the minimum wage to its tipped employees. Illinois employers will grow more

115. See 1983 Ill. Laws 4126, 4127, § 4(c).
117. See supra Part III (discussing the evolving history of Illinois minimum wage standards).
118. See supra note 91 and accompanying text.
119. See supra notes 30-32, 104 and 112 and accompanying text.
120. See supra note 115 and accompanying text.
121. See supra note 43 and accompanying text.
jobs by paying a larger portion of the minimum wage to its tipped employ-
ees.\footnote{122} Given Nik Theodore’s and Marc Doussard’s 2006 findings in, \textit{The Hidden Public Cost of Low-Wage Work in Illinois},\footnote{123} neither the FLSA nor the MWL can claim to support a minimum living standard, redistribute wealth and shorten the workweek. Both statutes mandate less than $10 per hour, thus subjecting households that rely on such wage earners to living on public assistance.\footnote{124} Life on the federal minimum wage would, however, subject a minimum wage earner to a deeper level of poverty than if s/he worked in Illinois earning the State’s minimum wage rate.

\section*{V. EVOLVING POLITICAL HISTORY OF THE FLSA MAXIMUM HOURS STANDARD FOR WHITE-COLLAB WORKERS}

\subsection*{A. 1938 - 1949 RULEMAKING FOR THE FLSA WHITE-COLLAB EXEMPTIONS}

Section 7 of the FLSA initially provided a forty-four hour ceiling on the maximum hours per workweek that an employer could work its employees before it had to pay them a penalty (overtime pay—150\% of their regular rate of pay). It decreased the ceiling on maximum hours to forty-two hours per workweek in 1939 and forty hours per workweek in 1940.\footnote{125} Section 13(a)(1) of the FLSA exempts employees employed in a bona fide executive, administrative or professional capacity (white-collar employees) from minimum wage and overtime pay.\footnote{126} John Fraser, Monica Gallagher and Gail Coleman (retired high-ranking USDOL officials)\footnote{127} noted in their 2004 paper, \textit{Observations on the Department of Labor’s Final Regulations “Defining and Delimiting the [Minimum Wage and Overtime] Exemptions for Executive, Administrative, Professional, Outside Sales and

\begin{itemize}
\item \textit{See supra} notes 44, 51 and 52 and accompanying text.
\item \textit{See supra} note 82 and accompanying text.
\item \textit{See supra} notes 83-86 and accompanying text.
\item \textit{See 29 U.S.C. § 207(a) (1938); see also HUNNICUTT, supra note 6, at 246-47 (discussing the passage of the FLSA and its automatic escalator for the minimum wage—increasing from $0.25 to $0.40 over its first four years—and prescribed decrease in the ceiling for maximum hours from forty-four to forty per week during the same period).}
Computer Employees'\textsuperscript{128} that, while Congress "precisely defined other 'special-interest' exemptions" (such as "certain computer related occupations"), it charged the USDOL with the duty to promulgate rules delineating and defining the scope of the white-collar exemptions from minimum wage and overtime pay.\textsuperscript{129}

Between 1938 and 1949, the USDOL promulgated regulations for the white-collar exemptions (2003 Rules),\textsuperscript{130} labeled general rules (Subpart A – 29 C.F.R. §§ 541.0–541.52) and interpretative rules (Subpart B – 29 C.F.R. §§ 541.99-541.602).\textsuperscript{131} The product of extensive formal hearings under section 553 of the Administrative Procedure Act,\textsuperscript{132} the general rules set forth the white-collar exemptions to the maximum hours labor standard, and the interpretive rules defined and delimited the terms in the general rules.\textsuperscript{133}

Marc Linder observed in his 2004 book, "Time and a Half's the American Way" A History of the Exclusion of White-Collar Workers from Overtime Regulation, 1868-2004,\textsuperscript{134} that Congress said virtually nothing about the purpose or the scope of the white-collar exemptions during its extensive 1937 hearing on the FLSA (1200 pages) or its "protracted" 1937-38 debate (600 double-columned pages). This yielded a "vacuous legislative and puzzling regulatory history."\textsuperscript{135}

According to Deborah C. Malamud in her 1998 article, Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation,\textsuperscript{136} the white-collar exemptions reconcile the FLSA goal of work-spreading with the assumptions that government intervention to provide shorter work hours for upper-level workers was incompatible with their social status and the unique, noncommodifiable and nondivisible nature of their work:

\textsuperscript{128.} See Fraser et al., supra note 127.
\textsuperscript{129.} See Fraser et al., supra note 127; see also 29 U.S.C. § 213(a)(1) (2007).
\textsuperscript{131.} See 29 C.F.R. §§ 541.0-541.602 (2007).
\textsuperscript{133.} See infra Part V.A.1-4 (discussing the 1938, 1940 and 1949 regulations for the white-collar exemptions).
\textsuperscript{135.} Id. at 385-437 (examining the FLSA's 1937-38 legislative and regulatory history).
The regulations [for the white-collar exemptions] reflect that by the late 1930s the highest-level executives, administrators, and professionals drew their high social status from their role as the engineers of the industrial process; the lower-level members of their ranks were, like ordinary workers, being engineered by it. The upper-level exemption regulations, in sum, were predicated on an understanding that if an upper-level line must be drawn, it needed to be drawn within the ranks of those who were viewed as professionals, executives, and administrators. That understanding is as appropriate today as it was in the 1930s, and it is no more popular with the business community today than it was in the 1930s. It should not be abandoned.  

The USDOL acknowledged in the Preamble to its 2003 proposed regulations for the white-collar exemptions (Proposed Rules) that the exemptions were premised on the assumption that white-collar workers: (1) enjoyed a higher status than non-exempt workers; and (2) performed work that was not commodifiable, thus making overtime enforcement difficult and “generally precluding the potential job expansion intended by the FLSA’s time-and-a-half overtime premium.”

The following examines the USDOL’s 1938, 1940 and 1949 rulemaking for the white-collar exemptions. This examination is not intended to be definitive, but rather, to provide an evolving political history to evaluate the 2003 Proposed Rules and the 2004 Final Rules.

1. The 1938 White-Collar Rules

The USDOL issued its first set of regulations defining and delimiting the white-collar exemptions on October 20, 1938, four days before the October 24, 1938, effective date of the FLSA. A “striking feature” of the rulemaking was that the USDOL defined “executive” and “administrative” together, inserting “and” in brackets between the terms:

The term “employee employed in a bona fide executive [and] administrative . . . capacity” . . . shall mean any em-

137. Id. at 2316.
140. LINDER, supra note 134, at 428 (discussing the original white-collar regulations).
ployee whose primary duty is the management of the establishment, or a customarily recognized department thereof, in which he is employed, and who customarily and regularly directs the work of other employees therein, and who has the authority to hire and fire other employees or whose suggestions and recommendations as to the hiring and firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and who customarily and regularly exercises discretionary powers, and who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer, and who is compensated for his services at no less than $30 . . . for a workweek.\(^{141}\)

The rules also defined an exempt professional employee as a worker who customarily and regularly engaged in work that was "[p]redominantly intellectual and varied in character as opposed to routine, mental, manual, mechanical, or physical."\(^{142}\) Such work must require "the constant exercise of discretion and judgment both as to the manner and time of performance, as opposed to work subject to active direction and supervision."\(^{143}\) It must have "such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time."\(^{144}\) Ultimately, an exempt professional's work must be:

Based upon educational training in a specially organized body of knowledge as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, mechanical or physical processes in accordance with a previously indicated or standardized formula, plan, or procedure . . . .\(^{145}\)

Deborah C. Malamud opined in her 1998 article, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*,\(^{146}\) that the USDOL's decision to write the term "administrative" out of the FLSA reflected its goal of narrowing the exceptions and a concern regard-

\(^{141}\) 3 Fed. Reg. 2518 (Oct. 19, 1938) (codified at 29 C.F.R. § 541.100 (1939)).
\(^{142}\) Id. (codified at 29 C.F.R. § 541.301 (1939)).
\(^{143}\) Id.
\(^{144}\) Id.
\(^{145}\) Id.
\(^{146}\) See Malamud, *supra* note 136, at 2212.
ing the administrability of the term, “administrative,” which had no National Recovery Administration (NRA) history to build upon.\textsuperscript{147}

Marc Linder differed with Malamud’s analysis in his 2004 book, “Time and a Half’s the American Way” A History of the Exclusion of White-Collar Workers from Overtime Regulation, 1868-2004.\textsuperscript{148} He identified “numerous NRA codes [that] exclude[d] administrative employees from hours regulations.”\textsuperscript{149} Linder suggests that the USDOL did not write the term “administrative” out of the FLSA, but rather, defined the term under the contemporaneous usage of the word as employees who overlapped with executives, e.g. persons who administer, manage, direct and execute.\textsuperscript{150}

2. The 1940 White-Collar Rules (Stein Report)

Between April 10 and July 29, 1940, Harold Stein (Assistant Director of the USDOL, Wage and Hour Division’s Hearings Branch) convened fourteen days of regulatory hearings on the white-collar exemptions.\textsuperscript{151} He accumulated 2216 pages of transcript, and accepted 180 briefs and 127 appearances from representatives of labor, management and other interests.\textsuperscript{152} Stein received testimony, questioned witnesses and entertained questions from interested persons (such as labor representatives questioning employers concerning their testimony).\textsuperscript{153}

For example, Solomon Lischinski (representing the Amalgamated Clothing Workers and the Textile Workers Union) engaged in the following colloquy with John Harrington (Associate Counsel of the Illinois Manufacturers Association):

Mr. Lischinsky: What do we usually mean by the terms “administrative,” “administrator?” We usually think of a

\textsuperscript{147} Id. at 2295.
\textsuperscript{148} LINDER, supra note 134.
\textsuperscript{149} LINDER, supra note 134, at 428.
\textsuperscript{150} LINDER, supra note 134, at 428-32 (citing sources ranging from the 1933 edition of the Oxford English Dictionary to the fourth edition (1991) of the USDOL’s Dictionary of Occupational Titles as evidence that the term “administrator” overlaps with “executive”).
\textsuperscript{152} LINDER, supra note 134 at 540-41.
\textsuperscript{153} LINDER, supra note 134 at 541-655.
person as administrator who allots work to other people to be done, do we not?

Mr. Harrington: No, I don’t think that is – I think that administrative is part of the management of a business. The executive is the head and gives the orders: administrative, they carry out the orders, and those who are not administrative are those who actually perform the work. They go between the executive and those ones who actually do the work.

Mr. Lischinsky: There are also people that we consider administrative who don’t have anyone under them.

Mr. Harrington: There are also people that we consider administrative who don’t have anyone under them.

Mr. Lischinsky: That is just what we are after.

Mr. Harrington: Yes.

Mr. Lischinsky: Would you ordinarily think of that person as an administrative person if it wasn’t a question of getting him exempted?

Mr. Harrington: Yes, I think you undoubtedly would. I think there are a lot of people that I think are in administrative capacity that I can’t think up a definition to cover them. I think that administration is very possibly a much broader term than any of these definitions. I don’t think I would go as far as some of the suggestion here, that it covers everyone outside of production, but I do think there are a lot of employees engaged in the administrative functions of the business who don’t necessarily have anyone operating under them. They may be a full one-man department in themselves. . . .

Mr. Lischinsky: You can’t have an administrator without an administratee, can you?
Mr. Harrington: I think you could very easily.154

Stein issued his report on October 10, 1940.155 He began by refuting the widespread (and current) employer argument that FLSA maximum hours protections are only for low wage workers:

It is a serious misreading of the act to assume 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.156

Stein’s “most lasting achievement”157 was bifurcating the executive/administrative exclusion, confining “executive” to employees exercising “some form of managerial authority,” and “administrative” to workers earning a $200 per month salary and:

(B)(1) Who regularly and directly assists an employee employed in a bona fide executive or administrative capacity . . . , where such assistance is nonmanual . . . and requires the exercise of discretion and independent judgment; or

(2) Who performs under only general supervision, responsible non-manual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience or knowledge, and which requires the exercise of discretion and independent judgment; or

(3) Whose work involves the execution under only general supervision of special non-manual assignments and tasks directly related to management policies or general business operation involving the exercise of discretion and independent judgment.158

154. Lindern, supra note 134, at 565-66 (quoting 1940 WHD HEARINGS TRANSCRIPT at 303-04 (Apr. 11, 1940)).
156. Id. at 8.
As for the professional exemption, Stein introduced the salary test ($200 per month) to the exclusion.\footnote{\textit{STEIN REPORT}, supra note 155, at 42.} \footnote{\textit{STEIN REPORT}, supra note 155, at 35, 42.} Without any public comment on the subject, Stein created an artistic professional exclusion, separate and distinct from the learned professional exclusion defined in the 1938 regulations\footnote{\textit{STEIN REPORT}, supra note 155, at 55.} for workers engaged in work that was/is:

[p]redominantly original and creative in character in a recognized field of artistic endeavor as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training, and the result of which depends primarily on the invention, imagination, or talent of the employee . . . .

The USDOL published its revised regulations for the white-collar exemptions on October 12, 1940, the same day it published the Stein report.\footnote{Compare 5 Fed. Reg. 4077 (codified at 29 C.F.R. § 541.1 (1950)), with \textit{STEIN REPORT}, supra note 155.} The rules were effective October 24, 1940, the same day the maximum hours ceiling in section 7 of the FLSA lowered from forty-two to forty hours per week.\footnote{Compare 5 Fed. Reg. 4077 (codified at 29 C.F.R. § 541.1 (1950)), with 29 U.S.C. § 207(a) (1938).} In pertinent part, the regulations adopted verbatim Stein’s bifurcated definitions for exempt executive, administrative\footnote{Compare \textit{STEIN REPORT}, supra note 155, at 23-24, with 29 C.F.R. 541.2(b) (1940).} and professional\footnote{Compare \textit{STEIN REPORT}, supra note 155, at 35, 42, with 29 C.F.R. § 541.3 (1940).} employees.

3. \textit{The 1949 Revisions to the White-Collar Rules (Weiss Report)}

In October 1947, the USDOL announced in the \textit{Federal Register} that, based on “changes in economic conditions” since 1940, the USDOL would consider amendments to the regulations for the white-collar exemptions.\footnote{See 12 Fed. Reg. 6896 (Oct. 22, 1947) (codified at 29 C.F.R. pt. 541).} Harry Weiss (the Wage and Administration’s Director of Research and Statistics) convened twenty-two days of hearing in 1947 and 1948 on the white-collar exemptions. He heard from more than one hundred witnesses,
accumulated at least 3679 pages of transcript and accepted 140 briefs and statements.\textsuperscript{167}

Weiss released his report in June 1949.\textsuperscript{168} He began by rejecting employer proposals to replace the primary duties and salary tests for the bona fide executives and professionals exempt from the FLSA with the supervisor and professional definitions from the Taft-Hartley Act of 1947.\textsuperscript{169} Weiss explained that the policy assumptions were different for the respective statutes' terms. Supervisors under Taft-Hartley do not have a right to organize, while professionals have a right to organize and form separate bargaining units if they elect not to bargain together with non-professionals.\textsuperscript{170} Alternatively, Congress chose to exclude bona fide executives and professionals from minimum wage and overtime protection under the FLSA.\textsuperscript{171} Because Congress excluded supervisors from collective bargaining rights, it was:

\begin{quote}
[I]ncreasingly important . . . to distinguish carefully between those whom the Congress meant to exempt as “bona fide executives” because they do not need . . . [FLSA protection], . . . and those who, though they may perform some supervisory duties . . . [need FLSA protection] . . . because they do not have the privileges and benefits which normally accrue to bona fide executives.\textsuperscript{172}
\end{quote}

Weiss’s “chief innovation”\textsuperscript{173} was to create the “Special Provisos for High Salaried” white-collar employees.\textsuperscript{174} Rejecting employers’ call to have a high salary as the sole criteria for exemption,\textsuperscript{175} Weiss increased the minimum salary level for the existing (standard) White-Collar exemptions (commonly referred to as the long-test), and established special provisos to the standard exemptions under which higher paid executives, administrators

\begin{itemize}
\item \textsuperscript{167} See Harry Weiss, Report and Recommendations on Presiding Officer at Public Hearings on Proposed Revisions of Regulations, Part 541, 88 (1958) [hereinafter Weiss Report].
\item \textsuperscript{168} Id.
\item \textsuperscript{170} Weiss Report, supra note 167, at 6-7. See also Taft-Hartley, 29 U.S.C. § 159(b)(1) (2007) (providing that the National Labor Relations Board shall not decide bargaining unit appropriateness of a mixed—professional and nonprofessional—unit unless a majority of the professionals vote for inclusion in the unit); Globe Machine & Stamp Co., 3 N.L.R.B. 294 (1937) (providing the same result under the National Labor Relations Act).
\item \textsuperscript{171} See Weiss Report, supra note 167, at 5-6.
\item \textsuperscript{172} Weiss Report, supra note 167, at 5-6.
\item \textsuperscript{173} Linder, supra note 134, at 773 (discussing the Weiss Report).
\item \textsuperscript{174} See Weiss Report, supra note 167, at 22-23.
\item \textsuperscript{175} Weiss Report, supra note 167, at 22-23.
\end{itemize}
and professionals would be exempt from the FLSA through more lenient duties standards and a higher salary level (commonly referred to as the short-test). \textsuperscript{176} Weiss explained:

At the higher salary levels in such classes of employment, the employees have almost invariably been found to meet all the other requirements of the regulations for exemption. In the rare instances when these employees do not meet all the other requirements of the regulations, a determination that such employees are exempt would not defeat the objectives of section 13 (a) (1) of the act. The evidence supported the experience of the Divisions, and indicated that a short-cut test of exemption . . . would facilitate the administration of the regulations without defeating the purpose of section 13 (a) (1). \textsuperscript{177}

In December 1949, the USDOL issued final general regulations (effective January 25, 1950) containing Weiss’s recommendations. \textsuperscript{178} Four days later, it issued interpretative regulations for the white-collar exemptions. The interpretive rules are drawn (in large part) verbatim from the STEIN and WEISS REPORTS. \textsuperscript{179}

4. The 1949 General and Interpretive White-Collar Rules

This section sets forth pertinent provisions of the general and interpretive rules defining and delimiting the primary duty and salary tests for bona fide executive, administrative and professional employees exempt from the FLSA.

a. The Bona Fide Executive

The general rules (section 541.1) defined a bona fide executive under the standard (long) test as an employee:

\textsuperscript{176} WEISS REPORT, supra note 167, at 22-23.
\textsuperscript{177} WEISS REPORT, supra note 167, at 22-23.
\textsuperscript{178} Compare WEISS REPORT, supra note 167, with 14 Fed. Reg. 7705 (codified at 29 C.F.R. §§ 541.0-541.52 (1950)).
\textsuperscript{179} Compare STEIN REPORT, supra note 155, and WEISS REPORT, supra note 167, with 29 C.F.R. §§ 541.600-541.602 (1950); see also LINDER, supra note 134, at 781 n.268 (observing that 29 C.F.R. § 541.303(f) concerning newspaper writers came from a 1943 guidance document).
(a) Whose primary duty consists of management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercise discretionary powers; and

(e) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section . . . ; and

(f) Who is compensated for his services on a salary basis at a rate of not less that $55 per week . . . .

The general rules (section 541.1(f)) also stated the Special Proviso for High Salaried Executives:

[A]n employee who is compensated on a salary basis at a rate of not less than $100 per week . . . and whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

The interpretive rules (section 541.119(a)) explained that the Special Proviso:

Section 541.1 contains an upset or high salary proviso for managerial employees . . . . Such a highly paid employee

180. 29 C.F.R. § 541.1(a)-(f) (1950).
181. Id. at § 541.1(f).
is deemed to meet all requirements in paragraphs (a) through (f) of § 541.1 if his primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof and includes the customary and regular direction of the work of two or more other employees therein. If an employee qualifies for exemption under this proviso, it is not necessary to test his qualification in detail under paragraphs (a) through (f) . . . .\(^{182}\)

To determine whether management is an employee's primary duty, the interpretive rules (section 541.103) stated:

The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time . . . . Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent facts are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees from the kind of nonexempt work performed by the supervisor . . . .\(^ {183}\)

The interpretative regulations (section 541.104(a)) clarified that the purpose of the phrase "a customarily recognized department or subdivision" was to

[D]istinguish between a mere collection of men assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. In order properly to classify an individual as an executive he must be more than merely a supervisor of two or more employees; he must be in charge of and have as his primary duty the man-

\(^{182}\) ld. § 541.119(a).
\(^{183}\) ld. § 541.103.
agement of a recognized unit which has a continuing function.184

b. The Bona Fide Administrative Employee

In pertinent part, the general rules (section 541.2) defined a bona fide administrative employee under the standard (long) test as any employee:

(a) Whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity . . . or

   (2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

   (3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c). . . ; and

(e) Who is compensated for his services on a salary . . . rate of not less than $75 per week . . . 185

The general rules (section 541.2(e)) also stated the Special Proviso for High Salaried Administrative Employees:

(e) [A]n employee who is compensated on a salary . . . at a rate of not less than $100 per week . . . and whose primary duty consists of the performance of [work described in paragraph (a) of this section], which includes work requiring the exercise of discretion and independent judgment,

184. id. § 541.104(a).
185. id. § 541.2(a)-(e).
shall be deemed to met all the requirements of this section.\footnote{186}

The interpretive rules (section 541.214) explained that the Special Proviso:

Section 541.2 contains a special proviso including within the definition of "administrative" an "employee who is compensated on a salary . . . basis at a rate of not less than $100 per week . . . and whose primary duty consists of either the performance of office or nonmanual work directly related to management policies or general business operations of his or his employer's customers . . . which includes work requiring the exercise of discretion and independent judgment." Such a highly paid employee having such work as his or her primary duty is deemed to meet all the requirements in paragraphs (a) through (e) of § 541.2.\footnote{187}

The interpretative rules (section 541.206) further explained that the principles for ascertaining an employee's primary duties under the definition of "executive" are applicable under the definition of "administrative."\footnote{188} As for defining the phrase, "directly related to management policies or general business operations," the interpretive rules (section 541.205(a)) set forth a "production versus staff" dichotomy that:

[D]escribes those types of activities relating to the administrative operations of a business as distinguished from "production" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.\footnote{189}

The interpretative rules did not limit the production versus staff dichotomy to work in "tangibles manufacturing," distinguishing traditional blue-collar (factory) workers from traditional white-collar (office) work-

\footnotesize{\begin{itemize}
  \item \footnote{186} 29 C.F.R. § 541(e) (1950).
  \item \footnote{187} Id. § 541.214.
  \item \footnote{188} Id. § 541.206.
  \item \footnote{189} Id. § 541.205(a).
  \item \footnote{190} Martin v. Cooper Elec. Supply Co., 30 Wage & Hour Cas. (BNA) 793, 797 (3d Cir. 1991).
\end{itemize}}
ers. Instead, the analysis differentiated employees whose primary duty was to service the business by "administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market." Examples of "servicing a business" (section 541.205(b)) were "advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control." In other words, the test was whether the worker was engaged in running the business or carrying out the business’ day-to-day activities. Under this analysis, courts found sales persons, escrow closers, and television news producers to be production, not administrative, employees.

The interpretive regulations further narrowed the exemption by limiting its coverage to employees who perform work “of substantial importance to the management or operation of the business of his employer or his employer’s customers.” For example (section 541.205(a)(1)), “bank teller[s] . . . bookkeepers, secretaries, and clerks of various kinds hold the run-of-the-mill positions in any ordinary business and are not performing work directly related to management policies or general business operations.” Only individuals “whose work substantially affect[s] the structure of an employer’s business operations and management may be characterized as administrative workers.” A worker’s job may be “indispensable,” or his/her performance may make a significant impact on the employer’s profitability, and yet the worker’s primary duties may still not be of “substantial

191. See Shaw v. Prentice Hall Computer Publ’g, Inc., 4 Wage & Hour Cas. 2d (BNA) 1412, 1416 (7th Cir. 1998) (citing Martin, 30 Wage & Hour Cas. (BNA) at 797; Dalheim v. KDFW-TV, 30 Wage & Hour Cas. (BNA) 113, 119-20 (5th Cir. 1990).
192. Reich v. Chi. Title Ins. Co., 2 Wage & Hour Cas. 2d (BNA) 151, 153 (D. Kan. 1994) (quoting Dalheim, 30 Wage & Hour Cas. (BNA) at 120 (applying 29 C.F.R. § 541.205(b)).
193. 29 C.F.R. § 541.205(b) (relating directly to management policies or general business operations).
195. Martin, 30 Wage & Hour Cas. (BNA) at 797.
196. Reich, 2 Wage & Hour Cas. 2d (BNA) at 153-56 (chastising the defendant, noting the analysis examines an employee’s actual duties rather than “legal conclusions” and “creative vocabulary”).
197. Dalheim, 30 Wage & Hour Cas. (BNA) at 119-20.
198. Reich, 2 Wage & Hour Cas. 2d (BNA) at 155 (quoting 29 C.F.R. § 541.205(a)).
199. 29 C.F.R. § 541.205(c)(1) (1950).
200. Reich, 2 Wage & Hour Cas. 2d (BNA) at 155 (citing 29 C.F.R. § 541.205(c)(1)).
importance" to meet the directly related element of the exemption.201 At issue was "the nature of the work, not its ultimate consequence."202

c. Bona Fide Professional Employee

The general rules (section 541.3) defined a bona fide executive under the standard (long) test as an employee:

(a) Whose primary duty consists of the performance of work:

(1) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or

(2) Original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee; or

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) . . . and;

201. See, e.g., Dahlheim, 30 Wage & Hour Cas. (BNA) at 121.
202. Id. (quoting Clark v. J.M. Benson Co., 789 F.2d 282, 287 (4th Cir. 1986)).
(e) Who is compensated for his services on a salary . . . at a rate of not less than $75 per week . . . 203

The general rule (section 541.3(e)) contained a proviso stating that the standard (long) test did not apply to a licensed or certified attorney or medical doctor (or to someone who was engaged in an internship or residency pursuant to a medial practice), or was “employed and engaged as a teacher” as defined in paragraph (a)(3). 204 It also stated the Special Proviso for High Salaried Professional Employees:

[An employee who is compensated on a salary . . . not less than $100 per week . . . and whose primary duty consists of the performance of work either requiring knowledge of an advanced type in a field of science or learning, which includes work requiring consistent exercise of discretion and judgment, or requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all the requirements of this section.205

The interpretive rules (section 541.315) explained that the Special Proviso for High Salaried Professional Employees:

Under this proviso, the requirements for exemption in paragraphs (a) through (e) of § 541.3 will be deemed to be met by an employee who receives the higher salary or fees and “whose primary duty consists of the performance of work either requiring knowledge of an advanced type in a field of science or learning, which includes work requiring the consistent exercise of discretion and judgment, or requiring invention, imagination, or talent in a recognized field of artistic endeavor.” Thus, the exemption will apply to highly paid employees employed either in one of the “learned” professions or in an “artistic” profession and doing primarily professional work . . . .206

The interpretative rules (section 541.304(a)) further explained that the principles for ascertaining an employee’s primary duties under the definition of “executive” are applicable under the definition of “professional.”207 They also enumerated (section 541.304) the “recognized fields of artistic

203. 29 C.F.R. § 541.3(a)-(e) (1950).
204. Id. at § 541.3 (e).
205. Id.
206. Id. § 541.315.
207. Id. § 541.304(a).
endeavor . . . as music, writing, theater, and the plastic and graphic arts," 208 and defined the phrase "learned professions" to include:

[T]hose requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes.

... . . .

Generally speaking, the professions which meet the requirement will include law, medicine, nursing, accountancy, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, and so forth. The typical symbol of the professional training and the best prima facie evidence of its possession is . . . the appropriate academic degree, and in these professions an advanced academic degree is a standard (if not absolutely universal) prerequisite. 209

d. Guaranteed Salary

Pursuant to section 541.118(a) of the interpretive regulation, an employee is paid "on a salary basis" if:

[U]nder his employment agreement he regularly receives each pay period on a weekly, or less frequently basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. The employee must receive his[her] full salary for any week in which he performs any work without regard to the number of days or hours worked. 210

Section 541.118(b) of the regulations does, however, acknowledge that additional compensation ("minimum guarantee plus extras") is not neces-

208. Id. at § 541.3(b).
210. 29 C.F.R. § 541.118(a) (1950).
sarily inconsistent with the salary basis of compensation.\textsuperscript{211} Arrangements subject to this exception include commissions based on sales, bonuses based on profits (in addition to a guaranteed minimum weekly salary), and paying employees on a daily or shift basis (when the employee is guaranteed the minimum salary per regulation when s/he performs any work that week).\textsuperscript{212} For example, the Fourth U.S. Circuit Court of Appeals in \textit{McReynolds v. Pocahontas Corp.} held that a coal company’s guarantee of three shifts per week complied with the salary basis test.\textsuperscript{213} In addition, an employer’s pro-rata payment of an employee’s weekly salary for his/her initial and terminal weeks of employment is not inconsistent with the salary basis when such payment is for the time the employee actually worked that week.\textsuperscript{214}

There is a “basic tension . . . between the purpose behind a salary requirement and any form of hourly compensation.”\textsuperscript{215} For example, the Third U.S. Circuit Court of Appeals upheld the Secretary of Labor’s interpretation of the salary basis test in \textit{Brock v. Claridge Hotel & Casino},\textsuperscript{216} finding that supervisors were not paid on a salary basis (and were therefore not \textit{bona fide} executives exempt from overtime pay) when they receive a $250 per week guaranteed salary plus additional wages calculated by multiplying the number of hours they worked.\textsuperscript{217} The hourly compensation was regularly much higher than the guaranteed minimum.\textsuperscript{218} The court determined that the payment practice did not comply with section 541.118(b):

Salary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. In other words, the salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it. With regards to hourly employees, it is the employer who decides the worth of a particular task, when he determines the amount to pay the employee performing it . . . Claridge’s method of computing “salary” differs significantly from commissions and profit-bonuses, the first two

\textsuperscript{211} Id. at § 541.118(b).
\textsuperscript{212} Id.
\textsuperscript{213} 10 Wage & Hour Cas. (BNA) 485, 486 (4th Cir. 1951).
\textsuperscript{214} 29 C.F.R. § 541.118(c) (1950).
\textsuperscript{216} Brock, 846 F.2d at 184.
\textsuperscript{217} See id. at 185.
\textsuperscript{218} Id.
examples provided in the regulation. In both examples, the employee is paid a clear, fixed sum for his work; the additional compensation is truly added on, providing an incentive for the employee to perform better. The "additional" compensation claimed by Claridge, on the other hand, varies with the number of hours worked. If an incentive at all, it does not encourage the supervisor to make better use of his time, but only to work more hours. Such encouragement is inconsistent both with salary payment and executive employment. Where, as here, the employee's usual weekly income far exceeds the "salary" guarantee, the guarantee can have no impact on the employee's performance or his status.219

In 1997, the U.S. Supreme Court in Auer v. Robbins220 resolved the dispute between the U.S. Circuit Courts of Appeals over the meaning of the phrase “not subject to reduction” in the salary basis test.221 The plaintiffs in Auer were St. Louis police sergeants and a lieutenant. The plaintiffs alleged that they were hourly employees entitled to overtime pay because they were subject to a police department manual permitting wage reductions for a variety of disciplinary infractions.222 Specifically, the manual nominally subjected all department employees to a list of fifty-eight possible rules violations and a range of sanctions, including disciplinary deductions in pay.223 A single sergeant was subject to actual disciplinary deductions.224 Relying on an amicus brief filed by the Secretary of Labor, the Court interpreted the salary basis test:

[T]o deny exempt status when employees are covered by a policy that permits disciplinary or other deductions in pay “as a practical matter.” That standard is met . . . if there is either an actual practice of making such deductions or an employment policy that creates a “significant likelihood” of such deductions. [This] approach rejects a wooden re-

219. Id. at 184-85.
220. 3 Wage & Hour Cas. 2d (BNA) 1249 (U.S. 1997).
221. Id. at 1251, 1253-54 (surveying Circuit Court decisions). See also Yourman v. Dinkins, 3 Wage & Hour Cas. 2d (BNA) 524, 524 (2d Cir. 1996) (same); Balgowan v. N.J. Dep’t of Transp., 3 Wage & Hour Cas. 2d (BNA) 488, 492-93 (3d Cir. 1996) (same). But see Robert L. Levin, Salaried or Hourly: Do Your Exempt Employees Meet the “Salary Test” Under the FLSA?, 11 LAB. LAW. 25, 34 (1995) (noting that “the federal courts [were] in complete disagreement on how to apply the salary test under the FLSA”).
222. Auer, 3 Wage & Hour Cas.2d at 1251-52.
223. Id. at 1254.
224. Id. at 1253.
quirement of actual deductions, but in their absence it requires a clear and particularized policy—one which “effectively communicates” that deductions will be made in specified circumstances. This avoids the imposition of massive and unanticipated overtime liability . . . in situations in which a vague or broadly worded policy is nominally applicable to a whole range of personnel but is not “significantly likely” to be invoked against salaried employees.225

The Court concluded that the plaintiffs were not “subject to reduction”:

[T]he manual does not “effectively communicate” that pay deductions are an anticipated form of punishment for employees in petitioners’ category, since it is perfectly possible to give full effect to every aspect of the manual without drawing any inference of that sort. If the statement of available penalties applied solely to petitioners, matters would be different; but since it applies both to petitioners and to employees who are unquestionably not paid on a salary basis, the expressed availability of disciplinary deductions may have reference only to the latter.226

The Court also held that the City could apply the “window of correction” defense to preserve the exempt status of the sergeant subject to the one-time wage reductions. The Court noted that the USDOL regulations (section 541.118(a)(6)) provides an opportunity for correction to an employer who reimburses an employee for an inadvertent deduction and promises future compliance.227 The regulation defined inadvertence as “made for reasons other than lack of work.”228 The Court further relied on the Secretary of Labor’s amicus brief to hold that the City did not have to reimburse the sergeant immediately upon discovering the improper deduction.229 As a result, the City was entitled to preserve the exempt status of the sergeant by complying with the corrective provisions of the regulations.230

The General Accounting Office reported in September 1999 that Auer “reduced employers’ potential for liability from . . . lawsuits. . . . [O]ur re-

225.  Id. at 1254 (internal citations omitted).
226.  Id.
227.  Auer, 3 Wage & Hour Cas. 2d at 1255.
228.  Id.
229.  Id. at 1254-55.
230.  Id. at 1255.
view of 42 federal cases following Auer showed that 30 were decided in favor of the employers."231

Subsequently, the Ninth U.S. Circuit Court of Appeals in Klem v. Santa Clara County (2000),232 the Second Circuit in Yourman v. Giuliani (2000),233 and the Seventh Circuit in Whetsel v. Network Property Services (2001),234 held that an employer cannot use the "window of correction" rule to cure its long-standing practice of suspending allegedly exempt employees without pay for periods shorter than one work week.235 Relying on the Secretary of Labor's interpretation of the provision, the respective appellate courts determined that the "window of correction" rule is available only to an employer that had demonstrated an "objective intention" to pay its employees on a salaried basis. It was therefore only applicable to cure inadvertent or isolated violations of the salary basis regulations.236

B. OSSIFICATION OF THE RULES FOR THE WHITE-COLLAR EXCEPTIONS

Since 1949, changes in the regulations for the white-collar exemptions have primarily involved adjusting the salary level (1958, 1963, 1970, and 1975), addressing statutory amendments, such as the repeal of a separate retail trade exemption, and the inclusion of an exemption covering certain high paid computer professionals.237 President Reagan ordered the USDOL to stop its last attempt to increase the salary level in 1981.238

The salary thresholds for the white-collar exemptions ossified at their 1975 levels ($155 for the standard (long) test and $250 for the Special Proviso for High Paid White-Collar workers, e.g., the short-test).239 The maximum hours standard thus atrophied as inflation eroded the salary thresholds for the long and short tests, qualifying more employees under the white-

231. U.S. GENERAL ACCOUNTING OFFICE, supra note 130, at 18 (discussing employers' "perceived difficulties of salary-basis test").
232. 5 Wage & Hour Cas. 2d (BNA) 1796 (9th Cir. 2000).
233. 6 Wage & Hour Cas. 2d (BNA) 673 (2d Cir. 2000).
234. 6 Wage & Hour Cas. 2d (BNA) 1544 (7th Cir. 2001).
235. Klem, 5 Wage & Hour Cas. 2d at 1804 (holding that the rule was not applicable to cure 53 disciplinary suspensions); Yourman, 6 Wage & Hour Cas. 2d at 677-78 (remanding to determine whether the city had an actual practice of imposing impermissible disciplinary deductions from workers it designated as managerial employees); Whetsel, 6 Wage & Hour Cas. 2d at 1550 (remanding to determine whether at least eight partial day deductions from four workers' wages reflected a practice and policy of improper deductions).
236. Klem, 5 Wage & Hour Cas. 2d at 1800-02; Yourman, 6 Wage & Hour Cas. 2d at 677-79 (relying on the Secretary of Labor's amicus brief, after determining the regulations were ambiguous under Christensen); Whetsel, 6 Wage & Hour Cas. 2d at 1547-50 (same).
237. U.S. GENERAL ACCOUNTING OFFICE, supra note 130, at 15-16.
238. Id. at 15.
239. Id. at 15.
collar exemptions.\textsuperscript{240} The U.S. General Accounting Office (GAO) observed in its 1999 report, \textit{Fair Labor Standards Act: White-Collar Exemptions in the Modern Workplace},\textsuperscript{241} that thirty percent of the full time workforce in 1975 was automatically nonexempt, e.g., paid under the $155 per week salary threshold for the long test. This figure was only one percent in 1998, virtually nullifying the long-test.\textsuperscript{242} In 1975, approximately forty percent of the full-time workforce could qualify with the application of the short-duties test. In 1998, that figure was ninety-one percent.\textsuperscript{243}

Ultimately, the GAO found that “[n]early everyone we talked to—employers, employees, and experts—agreed that the current salary-test levels are too low and should be increased to higher, more reasonable levels. However, they disagreed sharply on whether the duties tests should remain the same after the salary-test levels were raised.”\textsuperscript{244}

Echoing the USDOL’s 1947 public notice for revising the white-collar rules, the GAO proposed that the USDOL “comprehensively review the regulations . . . and make necessary changes to better meet the needs of both employers and employees in the modern work place.”\textsuperscript{245} The GAO acknowledged, however, that the conflicting and competing interests of employers and employees make any resolution difficult.\textsuperscript{246}

C. THE 2003 PROPOSED RULES FOR THE WHITE-COLLAR EXEMPTIONS

Without providing public hearings to take testimony and allow a hearing officer and interested parties to question witnesses before promulgating regulations, the Bush administration’s USDOL issued proposed formal rules on March 31, 2003 to “update and revise” the regulations for the white-collar exemptions under the FLSA, e.g., to replace the existing regulations.\textsuperscript{247} Per APA § 553,\textsuperscript{248} the USDOL would take written public com-

\textsuperscript{240} \textit{Id.} at 25 (highlighting that “inflation has effectively eliminated important aspects of the regulatory tests”).
\textsuperscript{241} \textit{Id.} at 22.
\textsuperscript{242} \textit{Id.} at 28. \textit{See also} Shaw v. Prentice Hall Computer Publ’g, Inc., 151 F.3d 640, 643 n.2 (7th Cir. 1998) (observing that that “low threshold has rendered the long test generally inapplicable in today’s dollars”).
\textsuperscript{243} \textit{See} U.S. \textit{GENERAL ACCOUNTING OFFICE}, \textit{supra} note 130, at 28.
\textsuperscript{244} \textit{Id.} at 32.
\textsuperscript{245} \textit{Compare} U.S. \textit{GENERAL ACCOUNTING OFFICE}, \textit{supra} note 130, at 32, with WEISS REPORT \textit{supra} note 167 and accompanying text (quoting the USDOL’s October 1947 announcement in the \textit{Federal Register} that, based on “changes in the economic conditions” since 1940, it would consider amendments to the regulations for the White-Collar exemptions).
\textsuperscript{246} U.S. \textit{GENERAL ACCOUNTING OFFICE}, \textit{supra} note 130, at 4, 30.
\textsuperscript{247} \textit{See} Preamble and Proposed Rules, \textit{supra} note 138, at 15,560.
ments and issue final regulations.\textsuperscript{249} The final rules would have the force and effect of law.\textsuperscript{250}

The USDOL's proposed rules would accelerate the atrophy of maximum hours protections for white-collar workers. As discussed in Part V.A.3, the 1949 rules reduced maximum hours protection for white-collar workers by creating special provisos to exempt high salaried executive, administrative and professional employees (short-tests) with more lenient duties testing than the standard (long) tests.\textsuperscript{251} As discussed in Part V.B, the maximum hours standard further atrophied as inflation eroded the salary thresholds for the long and short tests between 1975 and 2003.\textsuperscript{252}

The 2003 rulemaking proposed further reductions in maximum hours protections for white-collar employees by eliminating the original standard (long) tests and using the short-tests as the baseline for creating new "standard tests."\textsuperscript{253} The USDOL argued that, because the long-test had been inoperative for many years (resulting from its ossified salary threshold), reintroducing these requirements would "add new complexity and burdens to the exemption tests."\textsuperscript{254} L. Camille Hebert objected to the USDOL's logic for eliminating the long-test in her 2003 article, "Updating" the "White-Collar" Employee Exemptions to the Fair Labor Standards Act.\textsuperscript{255}

\begin{quote}
[T]he Department should not be able to justify its elimination of the requirements based on its own failure to keep the exemptions current; the fact that certain aspects of the exemptions have fallen into disuse is a cause for concern that the regulations are no longer meeting the purposes of which they are promulgated, not an excuse for eliminating those requirements altogether. If the requirements are to be eliminated, it should be because the Department believes that those requirements no longer serve a relevant purpose, not because of its concern that reintroducing those requirements will reintroduce "burdens" — presumably the
\end{quote}

\begin{itemize}
\item \textsuperscript{249} See Preamble and Proposed Rules, supra note 138, at 15,560.
\item \textsuperscript{250} See Long Island Care at Home v. Coke, 12 Wage & Hour Cas. 2d. (BNA) 1089, 1096-97 (U.S. 2007) (holding that the USDOL regulations for FLSA companionship services exemptions—which the agency promulgated under APA § 553 and labeled general and interpretive—were binding APA rules).
\item \textsuperscript{251} See supra Part V.A.3 (discussing the 1947 rulemaking).
\item \textsuperscript{252} See supra Part V.B (discussing the ossification of the White-Collar exemption rules).
\item \textsuperscript{253} Preamble and Proposed Rules, supra note 139, at 15,564 (providing the structure and organization of the current regulatory proposal).
\item \textsuperscript{254} Preamble and Proposed Rules, supra note 139, at 15,564-66.
\item \textsuperscript{255} L. Camille Hebert, "Updating" the "White-Collar" Employee Exemptions to the Fair Labor Standards Act, 7 EMP. RTS. & EMP. POL'Y J. 51 (2003).
\end{itemize}
burden on employers to comply with the more demanding existing requirements of the exemptions.\textsuperscript{256}

In a nutshell,\textsuperscript{257} the new standard tests would contain “compensation requirements” and primary duty tests. The compensation requirements would raise the salary threshold from $250 under the short-tests to $425 per week for the new standard tests.

The rulemaking also proposed creating a new “highly compensated employees” rule to replace the function of the “Special Provisos for High-Salaried” white-collar employees (e.g., the short-tests). It would exempt employees paid $65,000 per year or more from FLSA protection with even more lenient duty testing than those found in the 1949 short-cut tests\textsuperscript{258} - a white-collar employee need only perform non-manual work with at least one identifiable function from the standard duty tests for executive, administrative or professional employees.\textsuperscript{259}

The proposed primary duties for the new standard tests would extend the coverage of the white-collar exemptions. For example, the USDOL proposed a hybrid executive exemption, taking the two elements from the short-test (managing the enterprise or department or sub-department thereof, and directing two or more employees) and adding a third element from the long-test (hiring and firing).\textsuperscript{260} It would also eliminate the prohibitions against devoting more than 20/40 percent of the time to non-exempt work and the discretionary powers requirements in the original standard (long) test.

Addressing the administrative exemption, the rulemaking proposed “reduce[ing] the emphasis on the so-called ‘production versus staff’ dichotomy for distinguishing between exempt and non-exempt workers.”\textsuperscript{261} Citing \textit{Piscione v. Ernst & Young},\textsuperscript{262} the USDOL explained that the change was necessitated by emerging case law.\textsuperscript{263} A review of \textit{Piscione} demon-

\textsuperscript{256} Id. at 124-25.
\textsuperscript{257} For a more complete analysis of the 2003 Proposed Rules, see \textit{Work/Life Balance, supra} note *, at 25-33 (“focus[ing] on how the proposal advances business interests, undermining the doctrinal basis for the existence of the exemptions under $65,000 and failing to improve society’s quality of life”).
\textsuperscript{258} See Preamble and Proposed Rules, \textit{supra} note 138, at 15,571; Preamble and Proposed Rules, \textit{supra} note 138, at 15,592-93, § 541.601 (highly compensated employees).
\textsuperscript{259} Preamble and Proposed Rules, \textit{supra} note 138, at 15,563-66 (summary of regulatory proposal); Preamble and Proposed Rules, \textit{supra} note 138, at 15,585-87 (§§ 541.100-541.107, Executive Employees).
\textsuperscript{260} Preamble and Proposed Rules, \textit{supra} note 138, at 15,566. See also Preamble and Proposed Rules, \textit{supra} note 138, at 15,587 (29 C.F.R. § 541.200, general rule for administrative employees).
\textsuperscript{261} See Preamble and Proposed Rules, \textit{supra} note 138, at 15,566.
\textsuperscript{262} 5 Wage & Hour Cas. 2d (BNA) 361 (7th Cir. 1999).
\textsuperscript{263} See Preamble and Proposed Rules, \textit{supra} note 138, at 15,566.
strates, however, that the Seventh Circuit correctly applied the 2003 Rules (thus not compelling a change in the administrative exemption), when it held that a staff consultant who assumed client management of defined benefit and contribution plans was an exempt administrative employee whose primary duty related to the policy and general business operations of his employer’s client.264

The USDOL also proposed a dramatic expansion of the definition for exempt “learned professionals” from workers “where specialized academic training is a standard prerequisite for entrance into the profession,”265 to include workers “who have substantially the same knowledge level as the degreed employees, but who attained such knowledge through a combination of work experience, training in the armed forces, attending a technical school, attending a community college or other intellectual instruction.”266 This would broaden the occupations excluded from the maximum hours labor standards from professions such as the law, medicine, theology, teaching, and physical, chemical, and biological sciences, to capture dental hygienists and sous chefs.267 The USDOL invited public comments on exempting athletic trainers and funeral directors as learned professionals.268

D. LEGISLATIVE RESPONSE TO THE 2003 PROPOSED RULES FOR THE WHITE-COLLAR EXEMPTIONS

On September 10 2003, the Republican controlled Senate voted 54-45 to approve Senator Tom Harkin’s (D-Iowa) amendment to a $822 billion spending bill (funding eleven federal agencies—including the USDOL—and dozens of programs) that would block the 2003 Proposed Rules.269 House and Senate negotiators ultimately removed the amendment from the bill. Congress approved the bill on January 22, 2004.270 The Chicago Tribune observed that the bill “allow[ed] new rules in which employers can

264. Piscione, 5 Wage & Hour Cas. 2d at 369-72.
265. See Preamble and Proposed Rules, supra note 138, at 15,589 (section 541.301(d), Learned Professionals).
267. Preamble and Proposed Rules, supra note 138, at 15,589 (29 C.F.R. § 541.301(a), (e)).
268. See Preamble and Proposed Rules, supra note 138, at 15,564.
269. See T. Shawn Taylor, Senate Spurns Overtime Plan, CHI. TRIB., Sept. 11, 2003, § 3, at 1.5 (observing that the amendment would protect white-collar workers and the White House threatened to veto the measure); Amendment Approved to Block DOL’s Proposed Overtime Rule, 173 LAB. REL. REP. (BNA) 84 (Sept. 22, 2003) (reporting that Secretary of Labor Chao reacted to the Senate amendment by issuing a statement that the USDOL would continue to work on its proposed rules).
reclassify many middle-income workers as white-collar, making them exempt from overtime pay.” 271

E. THE 2004 FINAL RULES FOR THE WHITE-COLLAR EXEMPTIONS

The USDOL issued its Final Rules for the white-collar exemptions on April 23, 2004. 272 The rules were effective August 23, 2004. 273 Characterized as a “retreat” 274 and “scale[d] back,” 275 the Final Rules increased the salary threshold for the new standard tests from $425 to $455, 276 and the annual remunerations for the new highly compensated employees rule from $65,000 to $100,000. 277 The USDOL also claimed that the Final Rules would be more protective for police, firefighters and other first responders. 278 Republicans praised 279 and business groups welcomed the rulemaking. Democrats and organized labor were skeptical. 280

There was good cause to be skeptical about the Final Rules. They codified the atrophy of maximum hours protections 281 for white-collar workers that the USDOL set forth in its 2003 Proposed Rules. 282

271. Id.
273. Id.
274. David Espo & Leigh Strope, Bush to Keep Workers’ Eligibility for Overtime, CHI. SUN-TIMES, Apr. 30, 2004, at 34 (reporting that, “[r]etreating under pressure, the Bush administration intends to revise a proposed overtime regulation to preserve eligibility for most white-collar workers making up to $100,000 a year . . .”).
276. See Preamble and Final Rules, supra note 272, at 22,163 (explaining the increase in the salary level between the proposed and final rules).
277. Preamble and Final Rules, supra note 272, at 22,172 (explaining the increase in the annual remuneration level between the proposed and final rules).
278. Preamble and Final Rules, supra note 272, at 22,121 (discussing the new Section 541.3(b) provision stating that the exemptions do not apply to police, firefighters, paramedics, emergency medical technicians and other first responders). For a discussion of Section 541.3(b) in context with the USDOL’s economic impact analysis of the Final Rules, see infra Part V.E.6.
This section begins by examining pertinent provisions of the Final Rules for the white-collar exemptions and its Preamble. It includes analysis from retired high-ranking USDOL officials. The section then discusses the USDOL's economic impact analysis of the rulemaking in the Preamble. This demonstrates that the Final Rules further atrophied maximum hours labor protections for white-collar employees.

I. **Bona fide Executive Employees**

The following reviews and analyzes pertinent provisions of the Final Rules for the executive exemption and its Preamble.

a. **Review of the Final Rules for the Executive Exemption and its Preamble**

The Final Rules (section 541.100) define executive employees as those:

(a) (1) Compensated on a salary basis at a rate of not less than $455 per week . . . .;

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

283. Per APA § 553, the Preamble to the USDOL's publication of the Final Rules in the Federal Register contains the agency's summary of the public comments concerning the Proposed Rules and its response to them. As the agency's interpretation of its own rules, it is entitled to judicial deference, "unless plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 3 Wage & Hour Cas. 2d (BNA) 1249, 1254 (U.S. 1997) (addressing the USDOL's interpretation of the phrase, "not subject to reduction" in the salary basis test in the regulations for the White-Collar exemptions at 29 C.F.R. § 541.118(a)). A review of the Preamble demonstrates that the USDOL engaged in significant revisionist history, rendering the document plainly erroneous and thus entitled to little judicial deference. See Robert A. Anthony & Michael Asimov, *The Court's Deference—a Foolish Inconsistency*, 26 ADMIN. & REG. LAW NEWS 10 (Fall 2000) (arguing that Skidmore should apply to all agency interpretations contained in non-legally binding formats); William Funk, *Supreme Court News: Interpretive Rules & Statements of Policy Do Not Qualify for Chevron Deference*, 25 ADMIN. & REG. LAW NEWS 9 (Summer 2000) (discussing Christensen v. Harris County, 5 Wage & Hour Cas. 2d 1825, 1826-29 (U.S. 2000), in which the Court refused to defer to a USDOL opinion letter addressing the FLSA and its concomitant regulations concerning compensatory time); Note, *The Two Faces of Chevron*, 120 HARV. L. REV. 1562 (2007) (comparing Circuit Courts of Appeals' application of *Chevron* and *Skidmore's* deference to Supreme Court doctrine).
(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.284

The term, "primary duty" (section 541.700) means:

(a) [T]he principal, main, major or most important duty that the employee performs . . . .

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work . . . may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register . . . .285

The phrase, "customarily and regularly" (section 541.701) means:

[A] frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed "customarily and regularly" includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.286

Addressing the issue of a manager performing exempt and nonexempt duties concurrently, the rules (541.106) explain:

284. 29 C.F.R. § 541.100(a)(2)-(4) (2007).
285. Id. § 541.700(b)-(c).
286. Id. § 541.701.
(a) Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met . . . . Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods . . . .

(b) For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager’s primary duty is management . . . .

The rules (section 541.103) defined “department or subdivision” to distinguish:

(a) [B]etween a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function . . . .

(d) An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units, if other factors are present that indicate that the employee is in charge of a recognized unit with a continuing function.

In the Preamble, the USDOL addressed Union objections to its elimination of the 20/40 percent limitation on nonexempt work. Reiterating its position from the 2003 Proposed Rules, the USDOL observed that the standard (long) test was effectively dormant and that “reactivating the former strict percentage limitations on nonexempt work . . . could impose significant new monitoring requirements (and, indirectly, new recordkeeping burdens) and require employers to conduct a detailed analysis of the substance of each particular employee’s daily and weekly tasks in order to de-
termine if any exemption applied."\textsuperscript{290} Citing case law counter to its previous position on the subject (including \textit{Donovan v. Burger King Corp.}),\textsuperscript{291} the USDOL concluded that "such finite determinations would become even more difficult in light of developments in case law that hold that an exempt employee's managerial duties can be carried out at the same time the employee performs nonexempt manual tasks."\textsuperscript{292}

Citing \textit{Donovan} in support of its definition of the term "concurrent duties" (in which the appellate court ruled against the USDOL's previous position on the subject), the agency explained that it "continue[d] to believe that this case law accurately reflects the appropriate test . . . ."\textsuperscript{293} It further cited \textit{Donovan} when it rejected Union comments that the term "primary duty" should include a "bright-line" 50 percent test. The USDOL explained that:

Federal courts . . . recognize that the current regulations establish a 50 percent "rule of thumb" – not a "bright-line" test. Federal Courts have found many employees exempt who spent less than 50 percent of their time performing exempt work. An inflexible 50-percent rule has the same flaws as an inflexible 20-percent rule.\textsuperscript{294}

\textit{b. Analysis of the Final Rules for the Executive Exemption and its Preamble}

The Final Rules failed to observe the WEISS REPORT'S ever-timely insight that, because Congress excluded supervisors from collective bargaining rights under the Taft-Hartley Act of 1947, it is particularly important to carefully distinguish the bona fide executives Congress intended to exclude from FLSA protection from "those who, though they may perform some supervisory duties . . . [need FLSA protection] . . . because they do not have the privileges and benefits which normally accrue to bona fide executives."\textsuperscript{295} John Fraser, Monica Gallagher and Gail Coleman (retired high-ranking USDOL officials) observed in their 2004 paper, \textit{Observations on the Department of Labor's Final Regulations "Defining and Delimiting the [Minimum Wage and Overtime] Exemptions for Executive, Administrative,}

\textsuperscript{290} Preamble and Final Rules, \textit{supra} note 272, at 22,127.
\textsuperscript{291} Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir. 1982).
\textsuperscript{292} Preamble and Final Rules, \textit{supra} note 272, at 22,127.
\textsuperscript{293} Preamble and Final Rules, \textit{supra} note 272, at 22,127.
\textsuperscript{294} Preamble and Final Rules, \textit{supra} note 272, at 22,186.
\textsuperscript{295} See \textit{supra} note 172 and accompanying text (discussing and quoting the WEISS REPORT).
Professional, Outside Sales and Computer Employees," that the Final Rules "weaken the criteria – and broaden eligibility – for [the executive] exemption." They were particularly concerned with the USDOL's expansion of the concept of "concurrent duties" and its relationship with the new primary duty test.

In their critique, Fraser, Gallagher and Coleman acknowledged that some courts disregarded the 50 percent "rule of thumb" to find assistant managers who spend the vast majority of their time performing nonexempt work exempt executives. Addressing Donovan, however, they noted that the court applied the concurrent duties concept only to employees under the short-test, and explicitly rejected its application under the long-test.

Fraser, Gallagher and Coleman opined that the USDOL was not constrained by case law construing the 2003 Rules (such as Donovan) against the agency and "could have either clarified the old regulation or promulgated a new and 'improved' method for testing whether what is claimed about an employee's primary duty matches the reality of the employee's work." The USDOL, however, rejected the "unequivocally" objective 20/40 percent tolerance test for the "inherently subjective" new primary duty test in which time was deemphasized as only one of several factors to ascertain an employee's "principal, main, major or most important duty." As a result, "a so-called 'manager' spends the vast majority of his or her time working side-by-side with hourly workers performing the same tasks, but is passively supervising other employees in the sense that there is always the possibility that he or she may be called upon to perform some management task."

Fraser, Gallagher and Coleman argued that the USDOL further expanded the exemption by "apparently eliminating" the requirement from the 2003 Rules (section 541.104) that a manager must be "in charge of and have as his primary duty the management of a recognized unit which has a continuing function." The Final Rules (section 541.103(d)) refer to employees "in charge" of a subdivision, but do not state that s/he must be "in charge" to be exempt. The new language may thus:

296. See Fraser et al., supra note 127.
297. Fraser et al., supra note 127, at 17.
298. See Fraser et al., supra note 127, at 17.
299. Fraser et al., supra note 127, at 17.
300. Fraser et al., supra note 127, at 18, n.35.
301. Fraser et al., supra note 127, at 18.
302. Fraser et al., supra note 127, at 18.
303. See Fraser et al., supra note 127, at 17.
304. See Fraser et al., supra note 127, at 17.
305. See Fraser et al., supra note 127, at 19 (quoting the 2003 Rules at 29 C.F.R. § 541.104).
[P]ermit several executives to be working in one department at the same time, performing the same or different management duties, as long as they each supervise at least two employees. At a minimum this change will likely engender litigation and, if the courts conclude that the regulation no longer requires that an executive be in charge of a department or subdivision, would significantly broaden eligibility for this exemption.306

As a result, maximum hours protection for white-collar workers who may perform some supervisory duties atrophied under the Final Rules.

2. Bona fide Administrative Employees

The following reviews and analyzes pertinent provisions of the Final Rules for the administrative exemption and its Preamble.

a. Review of the Final Rules for the Administrative Exemption and its Preamble

The Final Rules (section 541.200) define administrative employees as those:

(a) (1) Compensated on a salary ... of not less than $455 per week ...;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.307

The phrase “directly related to the management or general business operations” (541.201(a)) means “work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.”308 The regulations (541.201(b)) provide examples of such work:

306. See Fraser et al., supra note 127, at 19.
308. Id. § 541.201(a).
[T]ax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.\textsuperscript{309}

The Final Rules (section 541.203(c)) also introduced a new concept, the “team leader:”

An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implement productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.\textsuperscript{310}

The Preamble reflects that employer organizations (such as the Society for Human Resource Management and the Chamber of Commerce) strongly supported the “diminution of the production versus staff dichotomy” in the Proposed Rules.\textsuperscript{311} Organized Labor objected, “stating that minimizing or deleting the dichotomy would deprive the administrative exemption of its meaning.”\textsuperscript{312} The USDOL adopted the Proposed Rule, stating that it “struck the proper balance . . . We do not believe that it is appropriate to eliminate the concept entirely from the administrative exemption, but neither do we believe that the dichotomy has ever been or should be a dispositive test for exemption.”\textsuperscript{313}

The USDOL explained in the Preamble that the “team leader” concept was a response:

To [employer] commenters who expressed concern that the executive exemption fails to reflect the modern practice of a company forming cross-functional or multi-department teams to complete major projects. Several commenters suggest that the manager or leader of such teams should be

\textsuperscript{309} Id. § 541.201(b).
\textsuperscript{310} Id. § 541.203(c).
\textsuperscript{311} Preamble and Final Rules, supra note 272, at 22,140.
\textsuperscript{312} Preamble and Final Rules, supra note 272, at 22,141.
\textsuperscript{313} Preamble and Final Rules, supra note 272, at 22,141.
treated as exempt even if the leader did not have traditional supervisory authority over the other members of the team. Although . . . the Department does not believe that the executive exemption applies, an employee who leads teams to complete major projects may qualify for exemption under the existing administrative regulations.314

b. Analysis of the Final Rules for the Administrative Exemption and its Preamble

The principal impact of the Final Rules on the administrative exemption was to deemphasize the production versus staff dichotomy (discussed in the Lischinsky (Labor) and Harrington (Management) colloquy during the 1940 Stein hearings)315 contained in the regulations for the white-collar exemptions since 1940.316 Part V.E.2.a demonstrates that the USDOL did not have a compelling basis to effect such a drastic change in its enforcement of the FLSA.

Fraser's, Gallagher's and Coleman's primary critique of the new administrative exemption was that "the final rule significantly broadens the exemption by gutting the 'production versus staff' dichotomy that has been the linchpin of Labor Department enforcement."317 Citing Wage and Hour Opinion letters from 1988 through 2001, and cases such as Martin v. Cooper Elec. Supply Co.,318 Reich v. State of New York,319 Reich v. John Alden Life Ins. Co.320 and Reich v. Chicago Title Ins. Co.,321 they noted that the USDOL consistently applied the dichotomy in its administration and enforcement of the Act since 1988.322 It was their experience that the "essential distinction between the 'staff' functions of a business and the 'production' or 'line' functions . . . has proven to be a useful, relatively objective, and reasonably reliable test to administer."323

Fraser, Gallagher and Coleman also opined that the Final Rules enlarged the exemption by relegating the concept, "exercise discretion and independent judgment," from the focus of an exempt administrative employee's primary duty (per the 2003 Rules) to only "matters of signifi-

314. Preamble and Final Rules, supra note 272, at 22,146.
315. See supra note 155 and accompanying text.
316. See supra Part V.A.4.b.
317. Fraser et al., supra note 127, at 21.
318. 940 F.2d 896 (3d Cir. 1991).
319. 3 F.3d 581 (2d Cir. 1993), cert. denied, 510 U.S. 1163 (1994).
320. 126 F.3d 1 (1st Cir. 1997).
322. See Fraser et al., supra note 127, at 21-22 n.46.
323. Fraser et al., supra note 127, at 21.
cance.”324 They also believed that the “team leader” concept was “fraught with ambiguity . . . [and] evaluating the team leader’s primary duty . . . will be very difficult at best.”325 As a result, maximum hours protection for white-collar workers atrophied under the Final Rules.

3. **Bona fide Professional Employees**

The following reviews and analyzes pertinent provisions of the Final Rules for the professional exemption and its Preamble.

**a. Review of the Final Rules for the Professional Exemption and its Preamble**

The Final Rules (section 541.300) define professional employees as:

(a) (1) Compensated on a salary . . . basis at a rate of not less than $455 per week . . . ; and

(2) Whose primary duty is the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.326

The primary changes that the Final Rules made to the professional exemption occurred in the learned professional component of the definition (section 541.300(2)(i)).327 For example, the Final Rules (section 541.301(b)) state that the phrase “work requiring advanced knowledge” means:

Work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work . . . . Ad-

324. Fraser et al., supra note 127, at 22.
325. Fraser et al., supra note 127, at 23.
327. Id.
vanced knowledge cannot be attained at the high school level. 328

The phrase “field of science or learning” (section 541.301(c)) includes:

The traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades . . . 329

The purpose of the phrase “customarily acquired by a prolonged course of specialized intellectual instruction” (section 541.301(d)) is to:

Restrict the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word “customarily” means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. . . . [It] is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, [or] with knowledge acquired through an apprenticeship . . . 330

Under this definition, the USDOL declared that workers, such as registered nurses and dental hygienists are learned professionals. 331 The USDOL also determined that chefs, athletic trainers and funeral directors or em-

328. Id. § 541.300(b).
329. Id. § 541.300(c).
330. Id. § 541.300(d).
331. Id. § 541.300(e)(2), (e)(3).
balmers were exempt learned professionals. Chefs (section 541.301(e)(6)) are exempt if they are:

[E]xecutive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program . . . . The learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work.

Per the Final Rules (section 541.301(e)(8)), athletic trainers are exempt if they:

[S]uccessfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification . . . .

A funeral director or embalmer (section 541.301(e)(9)) is exempt if s/he is:

[L]icensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education. . . .

The definition (section 541.303(b)) of an exempt teacher now includes "teachers of . . . nursery school pupils." Ultimately, the Final Rules (section 541.301(f)) state that the "areas in which the professional exemption may be available are expanding":

When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations . . . may be created in the future. Such organizations may develop similar specialized curriculums and certification programs

332. 29 C.F.R. § 541.300(e) (2007).
333. Id. § 541.300(e)(6).
334. Id. § 541.300(e)(8).
335. Id. § 541.300(e)(9).
336. Id. § 541.303(b).
337. 29 C.F.R. § 541.301(f) (2007).
which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.338

The Preamble indicates that employer organizations (such as the National Association of Manufacturers and the U.S. Chamber of Commerce) supported the Proposed Rule’s definition of an exempt learned professional (workers “who have substantially the same knowledge level as the degreed employees, but who attained such knowledge through a combination of work experience, training in the armed forces, attending a technical school, attending a community college or other intellectual instruction”)339 because it “focus[ed] on the employee’s knowledge and application of that knowledge, not on how the employee acquired such knowledge.”340 Organized Labor strongly objected to the proposal, arguing that it “would greatly and unjustifiably expand the scope of the professional exemption.”341 The USDOL did not believe that the proposal would “have caused substantial expansion of the professional exemption.”342 It, nonetheless, modified the text in the Final Rules.

The USDOL explained in the Preamble that declaring chefs to be learned professionals did not depart from its position, or current case law, that cooks and bakers are not exempt executives, administrators or professionals, “regardless of how highly skilled or paid such employees may be.”343 Addressing the National Restaurant Association’s argument that “certain chefs qualify as creative professionals,” the USDOL opined that, “to the extent a chef has a primary duty of work requiring invention, imagination, originality or talent, such as that involved in regularly creating or designing unique dishes and menu items, such chef may be considered an exempt creative professional.”344

The USDOL acknowledged in the Preamble that it previously took the position that athletic trainers were not exempt learned professionals.345 The final rules reflect the USDOL changed its position in light of the Fifth U.S. Circuit Court of Appeal’s decision in Owsley v. San Antonio Indep. School Dist.346 The Owsley court disagreed with the USDOL, holding that a licensed athletic trainer in Texas was an exempt professional because the

338. Id.
339. See Preamble and Final Rules, supra note 272, at 22,148 and accompanying text (discussing Section 541.301(d)).
340. Preamble and Final Rules, supra note 272, at 22,149.
341. Preamble and Final Rules, supra note 272, at 22,149.
342. Preamble and Final Rules, supra note 272, at 22,149 (emphasis added).
345. Preamble and Final Rules, supra note 272, at 22,155.
346. 187 F.3d 521 (5th Cir. 1999).
State of Texas required trainers to have a bachelor's degree in any field, take courses in anatomy and physiology, perform a three year apprenticeship, and have a CPR certificate. The Final Rules also relied on commenter submissions in the rulemaking process "that athletic trainers are nationally certified and that a specialized academic degree is a standard prerequisite for entry into the field."

The USDOL also acknowledged in the Preamble that it submitted an amicus curiae brief in Rutlin v. Prime Succession, Inc., arguing that funeral directors were not exempt learned professionals. The Rutlin court disagreed, holding that licensed funeral directors in the State of Michigan were exempt learned professionals because they had to complete one year of mortuary science instruction, two years of college (including classes in chemistry and psychology), pass national board tests covering embalming, pathology, anatomy, and cosmetology, completing a one year apprenticeship, and pass a state exam. The Final Rules reflect such case law. It also relied on information from the National Funeral Directors Association (NFDA) that sixteen states require at least two years of college plus graduation from and an accredited mortuary science college (which requires two years of study), plus twelve states also require passage of a state or national exam for licensure.

b. Analysis of the Final Rules for the Professional Exemption and its Preamble

The USDOL’s reliance on Owsley and Rutlin to substantiate its new position concerning athletic trainers, funeral directors and embalmers is misplaced. Per the Final Rules (section 541.301(d)) an occupation is not an exempt professional field when the work requires knowledge that is customarily acquired without a degree (Rutlin), or through a degree in any field (Oswley), and through an apprenticeship program (Oswley and Rutlin). The employers in Owsley and Rutlin may thus violate the Final Rules. Under such circumstances, it appears that the NFDA accomplished through the back-door (lobbying the USDOL during its rulemaking to re-write the regulations construing FLSA § 13 (a) (1)), what it could not effect through the

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347. See Owsley, 187 F.3d at 527.
348. Preamble and Final Rules, supra note 272, at 22,155.
349. 220 F.3d 737 (6th Cir. 2000).
350. Preamble and Final Rules, supra note 272, at 22,155.
351. See Rutlin, 220 F.3d at 750.
352. Preamble and Final Rules, supra note 272, at 22,156.
front-door (lobbying Congress to amend FLSA § 13(a)(1)),\textsuperscript{353} obtaining exempt status for its workforce.

Fraser, Gallagher and Coleman criticized the rulemaking, arguing that the USDOL articulated a standard for ascertaining exempt status ("only occupations that customarily require an advanced specialized degree are considered professional fields under the final rules"),\textsuperscript{354} and then proceeded to ignore, bend or violate the standard by declaring certain occupations exempt, thus expanding the scope of the exemption "in what must be seen as a blatant (if incoherent) effort to achieve particular results serving certain special interests."\textsuperscript{355} For example, the USDOL premised its determination that athletic trainers were exempt learned professionals by adopting: (1) case law (Owsley) against its previous position on the subject; and (2) statements from the industry without making "any effort to independently verify [its] assertions...."\textsuperscript{356}

As for the USDOL’s declaration that funeral directors and embalmers are exempt learned professionals, Fraser, Gallagher and Coleman observed that the agency "simply ignore[d] the clear evidence in its own record that— in fact - no advanced, specialized degree is customarily required for entry into employment in either profession."\textsuperscript{357} They had the same critique for the exempt status for chefs, noting "there is no evidentiary showing that such an ‘advanced specialized degree’ is a customary, even common, requirement for entry into the profession, and there is not even the ‘fig leaf of a licensure or certification requirement.’"\textsuperscript{358} Fraser, Gallagher and Coleman were also concerned about the elimination of the "exercise discretion" requirement for exempt teachers, noting that "the effect of this change in the duty test—if any—could only be to broaden eligibility for the exemption."\textsuperscript{359}

Karen Dulaney Smith is another former USDOL official who provided insight into the Final Rules. A wage and hour consultant (primarily for business), Smith was a USDOL wage and hour investigator from 1987 to

\textsuperscript{353} See H.R. 648, 107 Cong. (Feb. 14, 2001), \textit{available at} http://thomas.loc.gov (proposing an amendment to FLSA § 13 (a) that inserts an exemption for “any employee employed as a licensed funeral director or a licensed embalmer”).

\textsuperscript{354} Preamble and Final Rules, supra note 272, at 22,149.

\textsuperscript{355} Fraser et al., supra note 127, at 24.

\textsuperscript{356} Fraser et al., supra note 127, at 25. \textit{Compare} Preamble and Final Rule, supra note 272, at 22,155 and accompanying text (discussing commenter assertions concerning athletic trainers), \textit{with} Parts V.A.1 and 2 (discussing the adjudicative process Stein and Weiss used to test commenter assertions).

\textsuperscript{357} Fraser et al., supra note 127, at 26.

\textsuperscript{358} Fraser et al., supra note 127, at 26.

\textsuperscript{359} Fraser et al., supra note 127, at 27.
1999. Smith also expressed concerns during her Congressional testimony regarding the coverage of nursery school teachers as exempt professionals. Such workers were previously entitled to overtime because their jobs did not require independent discretion and judgment. As an investigator, Smith recalled nursery school teachers spending their days “changing diaper, giving snacks, holding and corralling small children from 7 a.m. until 6 p.m. . . . [W]e didn’t exempt these employees; most often they had no degree and exercised little discretion and judgment.” Thus, by declaring such workers exempt in the Final Rules, the USDOL substantiated Fraser, Gallagher, and Coleman’s concern that the deletion of the “exercise discretion” requirement from the primary duty test for teachers expanded the scope of the exemption.

Smith observed that the teachers in her own child’s preschool were degreed. She also noted that this is not a “universal standard, nor is it a standard required by the employer and therefore, any exemption should be on a case by case basis. Instead, the Department has issued a blanket rule.” Such expansion to the scope of the professional exemption contributed to the atrophy of maximum hours protection for white-collar workers under the FLSA.

361. Id. at 51.
362. Id. at 50.
363. Id.
364. Id.
4. The Salary Basis Test

The following reviews and analyzes pertinent provisions of the Final Rules for the salary basis test and its Preamble. This includes a discussion of the USDOL’s surprising rulemaking that permits private sector employers to remunerate their employees with compensatory time. It shows that the USDOL’s changes to the salary basis test contributed to the atrophy of maximum hours protection for white-collar workers under the FLSA.

a. Review of the Final Rules for the Salary Basis Test and its Preamble

The Final Rules (section 541.602) maintained the general rule from the 2003 regulations\(^{365}\) that, subject to exceptions set forth in paragraph (b) permitting deductions:

[A]n employee will be considered to be paid on a ‘salaried basis’ . . . if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensating, which amount is not subject to direction because of variations in the quality or quantity of the work performed.\(^{366}\)

Ellen C. Kearns observed in her 2004 article, *New Overtime Regulations Go Into Effect*, “one of the most dramatic changes in the new regulations is a ’safe harbor’ provision found in subsection 541.603 (b) and (d).”\(^{367}\) In pertinent part, section 541.603(b) states:

If the facts demonstrate that the employer has an actual practice of making improper deductions, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same manager responsible for the actual improper deductions. Employees in different job classifications or who work for different managers do not lose their status as exempt employees.\(^{368}\)

Section 541.603(d) states in pertinent part:

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366. 29 C.F.R. § 541.602(a) (2007).
368. 29 C.F.R. § 541.603(b) (2007).
If any employer has a clearly communicated policy that prohibits improper pay deductions . . . and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. If any employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions.369

The Final Rules (section 541.603(e)) explained that the safe harbor provision “shall not be construed in an unduly technical manner so as to defeat the exemption.”370 The Final Rules (section 541.604(a)) expanded the concept of “minimum guarantee plus extras”:

[T]he exemption is not lost if an exempt employee who is guaranteed at least $455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or other basis), and may include paid time off.371

The Preamble reflects that employer organizations (such as the National Association of Manufacturers (NAM)) supported the safe harbor concept.372 Organized Labor objected to the concept, arguing that “it eviscerated the salary basis requirement by permitting an employer to avoid overtime liability even after making numerous impermissible deductions.”373

The USDOL opined that it needed to replace the “window of correction” regulation (§ 541.118(a)(6)) from the 2003 Rules because it became a “source of considerable litigation.”374 The USDOL believed that the safe

369. Id. § 541.603(d).
370. Id. § 541.603(e).
371. Id. § 541.604(a) (emphasis added).
373. Id. at 22,182.
374. Id. at 22,181.
harbor concept was "an appropriate mechanism to encourage employers to adopt and communicate employment policies prohibiting improper pay deductions, while continuing to ensure that employees whose pay is reduced in violation of the salary basis test are made whole."\textsuperscript{375}

The USDOL acknowledged that the safe harbor provision requiring "an actual practice of making improper deductions" for an employer to lose the exemption is a departure from its position in \textit{Auer v. Robbins}.\textsuperscript{376} As discussed in Part V.A.4.d, the Supreme Court in \textit{Auer} deferred to the USDOL's amicus brief when it held that an employee was not paid on a salary basis when "there is either an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions."\textsuperscript{377} The USDOL observed that "nothing in \textit{Auer} prohibits the Department from making changes to the salary basis regulations after appropriate notice and comment rulemaking."\textsuperscript{378}

Citing \textit{Brock v. Claridge Hotel & Casino},\textsuperscript{379} the USDOL clarified in the Preamble that, per its long-standing enforcement policy, there must still be a reasonable relationship between an employee's actual remuneration and his/her guaranteed salary for an employer to be in compliance with the salary basis test under minimum guarantee plus extras concept.\textsuperscript{380} The inclusion of compensatory time within the guaranteed plus extras concept came from a suggestion NAM made in its comments:

NAM gave the specific example of an employer who allows an exempt worker to take a day off as a reward for hours worked on a weekend outside the employee's normal schedule. . . . We agree that the example[] . . . would not violate the salary basis test.\textsuperscript{381}

\textit{b. The Comp-Time Gift}

The USDOL gave NAM, and private sector employers generally, a significant gift (without notice and comment)\textsuperscript{382} that the employer community could not achieve through legislation, the section 541.604(a) proviso

\textsuperscript{375} \textit{Id.} at 22,182.  
\textsuperscript{376} \textit{Id.} at 22,180.  
\textsuperscript{377} \textit{Id.} at 22,180 (quoting \textit{Auer v. Robbins}, 3 Wage & Hour Cas.2d 1249, 1253 (U.S. 1997)).  
\textsuperscript{378} \textit{Id.} at 22,180.  
\textsuperscript{379} See supra notes 215-21 and accompanying text (discussing \textit{Brock v. Claridge Hotel & Casino}, 846 F.2d 180 (3d Cir. 1988)).  
\textsuperscript{380} See Preamble and Final Rules, supra note 272, at 22,183.  
\textsuperscript{381} Preamble and Final Rules, supra note 272, at 22,183.  
\textsuperscript{382} The Proposed Rules and their Preamble did not mention compensatory time. See generally Preamble and Proposed Rules, supra note 138.
allowing private sector employers to remunerate their employees with compensatory time (comp-time). Comp-time is time off in lieu of overtime pay for hours worked over forty in a workweek. Per FLSA § 207(o), it applies only to the public sector.383 The USDOL enforced a blanket prohibition on private sector comp-time before the effective date of the Final Rules.384

Prior to the Final Rules, Senator Judd Gregg (R-N.H.) introduced comp-time legislation for the private sector on February 5, 2003.385 Representative Judy Biggert (R-IL) introduced a House version of the legislation on March 6, 2003.386 Such legislation followed then-Senator (now-retired U.S. Attorney General) John Ashcroft’s (R-Mo.) 1997 comp-time bill.387 None of this legislation became law.

It is important to note that the reason for permitting comp-time in the public sector was unrelated to the underlying policies and purposes of the FLSA maximum hours labor standards – increasing the cost for buying and selling long work hours. Congress adopted comp-time for the public sector in 1985 to ease the application of the FLSA in state and local governments, and to soften its tax impact, following the U.S. Supreme Court’s 1985 decision in Garcia v. San Antonio Metropolitan Transit Authority,388 that the Tenth Amendment to the Constitution did not preclude FLSA coverage of municipal transit employees.389 It is also important to note that “[c]omp-time was . . . already widely used by public agencies [the FLSA did not apply to the public sector until 1966]390 and incorporated into labor agreements when Congress authorized public sector comp time in 1985, while it has never been an established practice in the private sector.”391

Lower labor costs fueled the business agenda for comp-time. For example, Six Flags Adventure in New Jersey (a proponent of Representative Biggert’s 2003 comp-time bill) observed that “the company previously couldn’t offer extra hours to workers because overtime was too expensive. The change [comp-time] would allow employees to work extra hours if they want and give the company more flexibility to staff the amusement park.”\footnote{Michael L. Diamond, \textit{OT Bill Pits Unions, Women’s Groups Against Business}, \textit{Chi. Sun-Times}, June 8, 2003, at 43A.} Six Flags was echoing the National Federation of Independent Business’s 1997 testimony in support of then-Senator Ashcroft’s comp-time bill, which stated that “small business ‘can’t afford to pay their employees overtime. [Comp-time] is something they can offer in exchange that gives them a benefit.’”\footnote{Lobbyist Remarks Fuel Dem Criticism of Comp Time Plan, \textit{Nat’l J.’s Congress Daily}, Feb. 19, 1997.}

Research shows that comp-time makes the workplace “more family unfriendly than friendly . . . driv[ing] up employer demand for average overtime hours per employee [due to reduced short-run marginal cost of overtime].”\footnote{Lonnie Golden, \textit{Better Timing?: Work Schedule Flexibility Among U.S. Workers and Policy Directions, in Working Time: International Trends, Theory and Policy Perspectives} 212, 228 (Lonnie Golden & Deborah M. Figart eds., 2000).} Even with significant union representation, public sector employees have had increasing trouble with employers improperly denying their request for comp-time.\footnote{See Speaker Says Employer Mistakes in Applying FLSA Are Widespread, 169 \textit{Lab. Rel. Rep.} (BNA) 386, 387 (Apr. 29, 2002) (reporting on FLSA lawsuits regarding public sector employers denying comp-time requests); Leibig, supra note 389, at 528-35 (same).} Given the private sector’s poor compliance record with FLSA overtime pay and evidence that the USDOL cannot effectively enforce the standard, in the absence of union protection of comp-time procedures (approximately forty-three percent of the public sector was covered by collective bargaining agreements in 1996, compared to eleven percent of the private sector),\footnote{See Walsh, supra note 391, at 103-110, 112.} it is highly likely that the Final Rules will result in private sector employees being denied their right to overtime pay and use of comp-time.\footnote{Walsh, supra note 391, at 124.} Ultimately, comp-time does not advance the underlying policies and purposes of the FLSA – for society to work less, live more, and spread the wealth.\footnote{See supra note 8 and accompanying text.} It merely juggles increased work hours (in the form of an interest-free loan of employee time to employer) instead of reduced work time.\footnote{See Golden, supra note 394, at 213, 228; see also Walsh, supra note 391, at 101.}
c. Analysis of the Final Rules for the Salary Basis Test and its Preamble

The safe harbor provisions (permitting employers to make deductions from an employee's salary) and the guaranteed minimum plus extras provisions (permitting employers to pay employees overtime and comp-time in addition to their salary) in the Final Rules are inherently incompatible with a fundamental premise of the white-collar exemptions—that bona fide executive, administrative and professional employees perform work that is unique, noncommodifiable and nondivisible, thus making overtime enforcement difficult and precluding the work expansion goals of the FLSA. As the Third U.S. Circuit Court of Appeals observed in Claridge Hotel & Casino, "there is a basic tension . . . between the purpose of the salary requirement and any form of hourly compensation."

A mirror image of Fraser, Gallagher and Coleman’s opinion that the USDOL was not constrained by case law inconsistent with its construction of the 2003 Rules when it promulgated the Final Rules, the USDOL opined that it was not bound by Auer v. Robbins when it published the Final Rules for the salary basis test. Thus, the USDOL adopted case law in the Final Rules which was inconsistent with its pre-2003 positions concerning the executive, administrative and professional exemptions, and promulgated Final Rules for the salary basis test that were incompatible with case law upholding its previous position on the subject—namely, Auer and its progeny. In the process, the USDOL failed to address the GAO’s 1999 report that Auer “reduced employers’ potential for liability from . . . lawsuits . . . [O]ur review of 42 cases following Auer showed that 30 were decided in favor of the employers.” Instead, the USDOL declared the “window of correction” rule a source of considerable litigation and replaced it with the even more employer-friendly safe harbor provision. The USDOL’s pattern of following pro-employer case law and distinguishing the rulemaking from pro-worker decisions adopting its previous enforcement policies, broadened the exemptions and narrowed the protective scope of the FLSA.

400. See Preamble and Proposed Rules, supra note 138, at 15,561; Malamud, supra note 136, at 2,316.
402. See supra note 301 and accompanying text.
403. See supra Part V.E.1-3.
404. See Auer v. Robbins, 3 Wage & Hour Cas. 2d (BNA) 1249 (U.S. 1997). For a discussion of Auer, and Section 541.118(a) of the 2003 Rules in general, see supra Part V.B.4.d.
405. U.S. GENERAL ACCOUNTING OFFICE, supra note 130, at 17-18 (discussing the employers’ “perceived difficulties of salaried-basis test”).
To clarify the employer-friendly nature of the rulemaking, the USDOL stated in the Final Rules that the safe harbor “shall not be construed in an unduly technical manner so as to defeat the exemption.”406 This addressed the “stir in the employer community”407 generated by Martin v. Malcolm Pirnie, Inc.408 The Second U.S. Circuit Court of Appeals in Malcolm Pirnie agreed with Labor Secretary Martin’s position that a group of accountants, administrators, architects, engineers, scientists and supervisors earning up to $70,000 per year were not exempt white-collar employees because their remuneration was subject to deduction and thus they were not paid on a salaried basis.409

Fraser, Gallagher and Coleman opined that the safe harbor text in section 541.603(d) rendered the salary basis test inoperative:

This section so effectively limits the risk of having to pay overtime that it seems that an employer who adopts a policy along the lines described can get away with ignoring the question of whether any deductions made are permissible or not – shifting to the employees the responsibility to figure out whether their deductions are impermissible and then complain to that effect.410

Fraser, Gallagher and Coleman concluded their review of the new salary basis test with an analysis of section 541.603(e). They characterized the provision as:

[A] new exemption-saving concept. Instead of reasserting its historic view that the burden of proving any exemption falls strictly on the employer claiming it, the new rule provides that the provisions regarding the effect of improper deductions from salary “shall not be construed in any unduly technical manner so as to defeat the exemption” (emphasis added). The Department by this provision gives the benefit of a generous construction of the rule to the em-

407. Peikes, supra note 216, at 125.
408. 949 F.2d 611 (2d Cir. 1991).
409. Id. at 617.
ployer rather than the employee, in a manner that seems in-
consistent with the Department’s core mission.\textsuperscript{411}

5. \textit{Highly Compensated Employees Rule}

The following reviews and analyzes pertinent provisions of the Final
Rules for the highly compensated employee rule and its Preamble.

\textbullet{} \textit{Review of the Final Rules for the Highly Compensated Em-
ployees Rule and its Preamble}

The Final Rules (section 541.601(a)) define a highly compensated em-
ployee exempt under FLSA § 13(a)(1) as “[a]n employee with total annual
compensation of at least $100,000 . . . if the employee customarily and
regularly performs any one or more of the exempt duties or responsibilities
of an executive, administrative or professional employee. . . .”\textsuperscript{412}

The Final Rules (section 541.601(b)) explains that the phrase, “total annual compensation”

(b) (1) must include at least $455 per week paid on a salary
or fee basis. Total annual compensation may also include
commissions, nondiscretionary bonuses and other nondis-
cretionary compensation earned during a 52-week period . .

(2) If an employee’s total annual compensation
does not total at least the minimum amount estab-
lished in paragraph (a) of this section by the last
pay period of the 52-week period, the employer
may, during the last pay period or within one
month after the end of the 52-week period, make
one final payment sufficient to achieve the re-
quired level . . . .\textsuperscript{413}

The Final Rules (section 541.601(c)) clarify the primary duty compo-
nent of the highly compensated employee rule:

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\textsuperscript{411} Fraser et al., \textit{supra} note 127, at 40 (emphasis in original). \textit{See also} Auer v. Robbins, 3 Wage & Hour Cas. 2d (BNA) 1249, 1254 (U.S. 1997) (reiterating the rule that the “exemptions are to be ‘narrowly construed against . . . employers’ and are to be withheld except as to persons ‘plainly and unmistakably within their terms and spirit’”).

\textsuperscript{412} 29 C.F.R. § 541.601(a) (2007).

\textsuperscript{413} \textit{Id.} § 541.601(b)(1)-(2).
A high level of compensation is a strong indicator of any employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties. Thus, a highly compensated employee will qualify for exemption if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee. For example, if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements for the executive exemption under §541.100.414

The Preamble reflects that Organized Labor characterized the highly compensated employee rule “as a ‘salary-only’ test.”415 Employer organizations “generally supported the new provision.”416 The USDOL rejected Labor’s view, referencing the rule’s “any one or more exempt duties or responsibilities” primary duty test.417 It also cited Malumud’s 1998 article, Engineering the Middle Class: Class Line-Drawing in New Deal Hours Legislation,418 for the proposition that Congress rejected a salary-only test.419 The USDOL further stated that the 1949 WEISS REPORT’s rationale for the special provision for high salaried employees (“[t]he experience of the Division has shown that... the higher the salaries paid the more likely the employees are to meet all the requirements for exemption, and the less productive are the hours of inspection time spent in analysis of the duties performed”) are still valid.420

b. Analysis of the Final Rules for the Highly Compensated Employees Rule and its Preamble

The USDOL’s citation in the Preamble to Malumud’s 1998 article, Engineering the Middle Class: Class Line-Drawing in New Deal Hours Legislation,421 was ironic. Malumud observed that the two part test for the white-collar exemptions arose out of lessons learned from the National Recovery Administration’s (NRA) efforts to limit work hours between 1933

414. Id. § 541.601(c).
415. See Preamble and Final Rules, supra note 272, at 22,173.
416. Preamble and Final Rules, supra note 272, at 22,173.
418. See Malumud, supra note 136.
419. See Preamble and Final Rules, supra note 272, at 22,173.
421. See Malumud, supra note 136.
and mid-1935. With the goal of spreading work, the NRA administered the National Industrial Recovery Act (NIRA) under President Roosevelt’s directive that the NIRA would cover all business, and “[b]y ‘business’ I mean the whole of commerce as well as the whole of industry; by workers I mean all workers—the white collar class as well as the men in overalls.”

The NRA exempted “executives” receiving $35 per week from maximum hours protections. The exemption did not define an executive’s duties. As a result, unscrupulous employers raised workers wages by a few dollars, labeled the employees executives and worked them unlimited hours per week, evading “the intent of the codes through misleading classification.” An essential lesson learned from this NRA history was that:

Fraud and evasion could not be avoided without two elements that eventually became central to the FLSA approach to upper-level exemptions: a “duties” test—that is, a commitment on the part of the government to scrutinize the actual duties performed by someone whose job is labeled exempt—and a minimum salary test—used to make sure that the employer’s representations that a job is highly valued is matched by its compensation.

422. See generally Malumud, supra note 136; see also A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 536-51 (1935) (holding that sections 703 through 712 of the NIRA were an unconstitutional delegation of legislative authority to the executive branch).

423. See Nat’l Archives & Records Admin., Records of the National Recovery Administration: (Record Group 9) 1927-37, http://www.archives.gov/research/guide-fed-records/groups/009.html (last visited February 17, 2007) (providing internet access to NRA textual records); YODER, supra note 1, at 284-85 (discussing the impact of the NRA codes and providing a chart on the changes of working hours reported by the National Industrial Conference Board); Bureau of Labor Statistics, U.S. DEP’T OF LABOR, PROCEEDINGS OF THE SECOND NATIONAL CONFERENCE ON LABOR LEGISLATIONS: 1935 59-62 (1936), reprinted in PROCEEDINGS OF THE NATIONAL CONFERENCES ON LABOR LEGISLATION (1992) (providing Secretary Perkin’s statements on the impact of the NRA codes regulating work hours); LABOR RESEARCH ASS’N, LABOR FACT BOOK III 63-64 (1936) (reporting substantial increases in work hours nationally upon the demise of the NRA code).


425. Malumud, supra note 132, at 2254 (quoting President Roosevelt’s speech on the day the NIRA became law).

426. Malumud, supra note 132, at 2255.

427. Malumud, supra note 132, at 2266 (quoting Nat’l Consumer’s League’s Proposed Principles for Labor Provisions of NRA Codes 2 (Dec. 7, 1933) (Roosevelt Archives, Official File 466, NRA, Box 6, Codes Misc. 1934)).

428. Malumud, supra note 132, at 2266.
It appears that the USDOL forgot this essential lesson from NRA history. Citing the WEISS REPORT’S explanation for a lenient short-cut test (short-test) from the standard (long-test) for high salaried white-collar employees, the USDOL failed to provide evidence that further leniency (the weak primary duty test for the highly compensated employee rule) “would [in the WEISS REPORT’S words] facilitate the administration of the regulations without defeating the purpose of section 13(a)(1).”429 Instead, the USDOL selectively quoted the WEISS REPORT, failing to follow its rejection of the salary-only exemption.430 As a result, the Final Rules raise the specter of modern day unscrupulous employers effecting similar fraud and evasion concerning employees who earn at least $100,000 per year.

Specifically, Fraser, Gallagher and Coleman observed that the primary duty provision of the new rule is easily achieved with very little employer manipulation, exempting an employee earning at least $100,000 per year if s/he performs only one exempt duty (such as directing two or more employees) “customarily and regularly,” e.g., “a frequency ‘greater than occasional.’”431 They further observed that the “topping up” provision enables an employer to “make an easy year-end calculation whether . . . it will be less expensive to pay the overtime owed or to add a ‘final payment’ to reach the level of pay necessary to exempt the employee from the overtime requirement.”432

Fraser, Gallagher and Coleman concluded that “it is easy to imagine (and not at all incautious to predict, despite the Department’s assertions to the contrary) that virtually every ‘white collar’ employee now earning $100,00 or more will quickly be made exempt by assignment of one exempt duty.”433 It thus appears that the USDOL chose not to follow the holding in Overnite Motor Transportation Co. v. Missel,434 that employees are not to be deprived of the benefits of the Act simply because they are well paid.435 The highly compensated employees rule thus contributed to atrophying maximum hours protection for white-collar workers under the FLSA.

429. See WEISS REPORT, supra note 167, at 22-23.
430. See supra note 169 and accompanying text.
431. See Fraser et al., supra note 127, at 15.
432. Fraser et al., supra note 127, at 15-16.
433. Fraser et al., supra note 127, at 16.
434. 316 U.S. 572 (1942).
435. Id. at 578. See also supra note 155 and accompanying text (discussing the STEIN REPORT’S repudiation of the employer position that the purpose of the FLSA is only to protect low wage workers).
6. Economic Impact Analysis for the Final Rules

Per section 801 of the Small Business Regulatory Enforcement Fairness Act of 1996,436 and Executive Order 12866,437 the USDOL provided a cost-benefit analysis of the Final Rules (regulatory impact analysis) in the Preamble of the rulemaking.438 Under this analysis, the USDOL stated that the Final Rules would reduce overtime litigation by clarifying workers' rights and employers' responsibilities.439 Attorneys who litigate such cases observed, however, "that while the issues may change [as a result of the Final Rules], the number of lawsuits will probably not decrease."440

The USDOL’s regulatory impact analysis confirmed that the rulemaking atrophied maximum hours protections for white-collar workers. Specifically, the USDOL conceded that the regulations strengthen worker protection through only two of its changes: (1) creating a $455 salary level requirement for the standard tests, compared to the $250 threshold under the previous short-tests;441 and (2) requiring workers under the new standard test for executives to “have the authority to hire or fire . . . [etc.],” compared to the short-test.442

The regulatory impact analysis further clarified the protective effect of the new provision (section 541.3(b))443 concerning overtime rights for police, firefighters and other first responders. In pertinent part, section 541.3(b) states:

(1) The section 13 (a) (1) exemptions and the regulations in this part . . . do not apply to police officers . . . fire fighters, paramedics . . . ambulance personnel . . . and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes . . . or other similar work.

(2) Such employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise. . . . Thus, for example, a police officer or

438. See Preamble and Final Rules, supra note 272, at 22,191-259.
441. See Preamble and Final Rules, supra note 272, at 22,192.
442. Preamble and Final Rules, supra note 272, at 22,193.
443. 29 C.F.R. § 541.3(b) (2007).
firefighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13 (a) (1) of the Act merely because the police officer or firefighter also directs the work of other employees in the conduct of an investigation or fighting a fire.

(3) Such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business of the operations of the employer or the employer’s customers.

(4) Such employees do not qualify as exempt professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

The regulatory impact analysis acknowledged that the “authority to hire or fire” requirement under the new standard test for bona fide executives was the sole basis for the USDOL’s statement that the rulemaking was more protective for first responders than the short-test. The USDOL otherwise conceded that section 541.3(b) merely reflected the case law concerning first responders under the short-tests of the 2003 Rules. The agency confirmed this analysis in a 2005 opinion letter, when it opined that high-ranking police officers and firefighters were exempt from overtime because their primary duty was management.

Addressing administrative employees and learned and creative professionals, the regulatory impact analysis stated that “very few, if any, workers will lose their right to overtime as a result of updating the current short-test with the final standard duties test. However, this number is too small to estimate quantitatively given the data limitations.”

The regulatory impact analysis ultimately acknowledged that nearly seventy-two million people, or approximately fifty-three percent of the U.S.

444. *Id.* § 541.3(b)(1)-(4).
447. See Preamble and Final Rules, *supra* note 272, at 22,193 (administrative employees); see also Preamble and Final Rules, *supra* note 272, at 22,194 (learned and creative professionals).
workforce, may be exempt under the Final Rules.\textsuperscript{448} It further observed that nineteen million white-collar workers who earn $155 or more per week were already exempt under the prior regulations.\textsuperscript{449} This led Fraser, Gallagher and Coleman to conclude in their 2004 paper that the “new rule could conceivably extend exempt status to as many as 53 million more workers . . . or about 40 percent of the total U.S. workforce.”\textsuperscript{450}

VI. EVOLVING POLITICAL HISTORY OF ILLINOIS MAXIMUM HOURS STANDARDS

A. EARLY LEGISLATION

Illinois has regulated maximum hours of work since its first General Assembly (1819) enacted a law subjecting any person to a two dollar penalty plus costs for “doing or performing any worldly employment or business” on Sunday - except ferrymen, travelers away from their families, or work of necessity or charity.\textsuperscript{451} The statute reflected “moral and religious feeling of the time, and [was] not enacted because of demands by labor organizations or for economic reasons.”\textsuperscript{452}

In 1866, workers in Illinois launched an eight hour day movement and organized an eight hour league supporting candidates favoring eight hour laws.\textsuperscript{453} As a result, the Illinois General Assembly\textsuperscript{454} enacted the Eight Hour Work Day Act in 1867, a statute making eight hours a legal day’s work.\textsuperscript{455} This was the first of a series of such statutes passed in various States.\textsuperscript{456} The law (which is still on the books) has little practical value, excluding large sections of the workforce from its scope and providing no penalty for violators or system of enforcement.\textsuperscript{457} Between 1884 and 1890, the Illinois State
Federation of Labor consistently demanded the "enactment and enforcement of a real eight-hour law."\(^\text{458}\) The Illinois Commission on Labor Laws recommended repealing the law in 1971 to the Governor and the General Assembly, observing that the statute "has long been a dead letter."\(^\text{459}\)

In 1893, the Illinois General Assembly enacted the Sweat Shop Act.\(^\text{460}\) The statute was drafted by Legislators who took a tour given by Florence Kelly of Hull-House\(^\text{461}\) through Chicago factories and workshops employing children and women.\(^\text{462}\) In part, the statute restricted child labor (the foundation for Illinois' current Child Labor Law, prescribing age, hours and other conditions of employment\(^\text{463}\)) and limited the hours worked by women to eight per day.\(^\text{464}\) Governor Altgeld (the Governor who pardoned the remaining Haymarket defendants) appointed Ms. Kelley as Illinois' first Factory Inspector, charging her with the administration and enforcement of the statute.\(^\text{465}\) The Illinois Supreme Court in *Ritchie v. Illinois*\(^\text{466}\) invalidated

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\(^\text{458.}\) BECKNER, supra note 3, at 180.

\(^\text{459.}\) ILL. COMM'N ON LABOR LAWS, supra note 97, at 55 (discussing the Commission and their recommendation to enact the Minimum Wage Law).

\(^\text{460.}\) See 1893 Ill. Laws 99; BECKNER, supra note 3, at 153.

\(^\text{461.}\) See ADDAMS, supra note 3, at 117-35 (discussing pioneer labor legislation in Illinois); BORIS, supra note 3, at 74-77 (discussing how Governor Altgeld's "commission created to appease labor and provide rural legislators a 'junket to Chicago' succumbed to Hull House hospitality and the women's 'personally conducted visits to sweat shops.' Florence Kelley later described how the "committee emerged with 'a report so compendious, so readable, so surprising that they presented it with pride to the Legislature.'") (internal citation omitted).


the eight hour provision of the Sweat Shop Act, holding that it was "a purely arbitrary restriction upon the fundamental rights of the citizen to control his or her own time and faculties." 467

Soon after the U.S. Supreme Court upheld the constitutionality of Oregon's ten hour per week ceiling on factory work for women in Muller v. Oregon, 468 the Waitresses' Union No. 484 of Chicago and the Women's Trade Union League prepared legislation for Illinois to duplicate the Oregon law. 469 The Illinois General Assembly enacted the Illinois Female Employment Act in 1909, a statute limiting the number of hours women could work in mechanical establishments, factories, or laundries, to ten hours per day. 470

In a decision that Professor (later Justice) Felix Frankfurter described as "[a] heroic effort . . . to distinguish the first Ritchie case," 471 the Illinois Supreme Court upheld the statute as a valid exercise of police power in Ritchie & Co. v. Wayman. 472 Upon the passage of Title VII of the 1964 Civil Rights Act, 473 an employer's compliance with the Illinois Female Employment Act was unlawful sex discrimination. 474 The Illinois Legislature repealed the act in 1977. 475

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466. 40 N.E. 454 (Ill. 1895).

467. Id. at 457.

468. 208 U.S. 412 (1908).

469. See, e.g., Beckner, supra note 3, at 190-94 (discussing the renewed struggle to restrict hours by law).

470. See 1909 Ill. Laws 212.

471. Felix Frankfurter, Hours of Labor and Realism in Constitutional Law, 29 Harv. L. Rev. 353, 356 (1916) (observing that "the two cases are, in fact, irreconcilable in their underlying point of view").

472. 91 N.E. 695 (Ill. 1910) (holding the 1909 Act did not violate the Due Process Clause of the 1870 Illinois Constitution). See also Illinois v. Bowes-Allegretti Co., 91 N.E. 701 (Ill. 1910) (same); Andrew Alexander Bruce, The Illinois Ten-Hour Law for Women, 8 Mich. L. Rev. 1, 2 (Nov. 1909) (arguing in support of the Ten-Hour Law: "the [first Ritchie] case was decided at a time when the question was a new one, at a time when an unthinking and unscientific individualism was rampant in America, at a time when there was only one adjudicated case to be found in the reports on the particular question, and when there was a paucity of scientific investigation and research upon the subject.").


474. See Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974) (holding that an employer's compliance with the Illinois Female Employment Act provisions on overtime was evidence of liability under Title VII); Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304 (S.D. Ill. 1970) (holding the Illinois Female Employment Act was void and unenforceable against employers because it was repugnant to Title VII); Note, Sex discrimination; state protective laws v. Title VII of the Civil Rights Act of 1964, 1968 Law Forum 418.

B. CURRENT ILLINOIS MAXIMUM HOURS LABOR STANDARDS

1. One Day Rest in Seven Act

A tangible result of Illinois’ desire for shorter work hours and its concern over unemployment was the 1935 passage of the One Day Rest in Seven Act (ODRISA). The statute provides private sector employees with the right to at least twenty-four consecutive hours of rest every calendar week, in addition to the regular period of rest at the end of each work day.

A 1973 amendment provided employees with a twenty minute meal break between the third and fifth hour of a seven and one-half continuous hour day. The meal break provision was amended in 1974 to exclude employees with meal periods established through a collective bargaining agreement. To protect hotel room attendants in Cook County from overwork, the legislature amended ODRISA again in 2005 to provide such workers “2 15-minute paid rest breaks and one 30-minute meal period in each workday on which [s/he] works at least 7 hours.”

476. See BECKNER, supra note 3, at 186-87; HUNNICUTT, supra note 1, at 49-50, 53, 57, 186-87.
477. See 1935 III. Laws 1558 (codified as amended at 820 ILL. COMP. STAT. 140/1-9 (2006)).
478. 820 ILL. COMP. STAT. 140/2 (2006). ODRISA does not expressly exclude public sector coverage. An examination of its evolving political history supports this construction. In 1971, the Commission on Labor Laws recommended amending the statute to (in pertinent part): (1) provide a meal break between the third and fifth hour of any continuous seven and one-half hour work period; and (2) cover state and local government. See 1971 Ill. Laws 2631, with ILL. COMM’N ON LABOR LAWS, supra note 97, at 55-56. The Legislature amended ODRISA to provide employees with the meal break. See supra note 473 and accompanying text. It did not, however, adopt the Commission’s recommendation to expand ODRISA to the public sector. See 820 ILL. COMP. STAT. 140/1-9 (2006).
480. See Public Act 78-1105, 1974 Ill. Laws 695, 696-97, §§ 2, 3; see also Public Act 88-73, § 3, 1993 Ill. Laws 1065 (codified at 820 ILL. COMP. STAT. 140/3 (2006)) (amending section 3 to exclude employees who monitor developmentally disabled and/or mentally ill individuals).
481. See 820 ILL. COMP. STAT. 140/3.1(b) (2006). (“[t]his Section applies only to hotels... located in a county with a population greater than 3,000,000”).
483. Public Act 94-593 (codified as amended at 820 ILL. COMP. STAT. 140/3.1(c) (2006)).
2. Pre-April 2004 Maximum Hours Standards under the Minimum Wage Law

In 1976, the Illinois General Assembly amended the Minimum Wage Law (MWL)\(^{484}\) to regulate maximum hours of work (section 4a(1)) by requiring the payment of overtime, e.g., time and one-half for all hours an employer works an employee over 40 hours during a work week.\(^{485}\) The amendment also subjected employers to the MWL (section 3(d)(1)) when it employs four or more employees “exclusive of the employer’s parent, spouse or child or other members of his immediate family,” unless specifically exempt under the statute.\(^{486}\) The standard did not, however, cover governmental bodies.\(^{487}\)

The exemptions from overtime (section 4a(2)) did not originally provide employers an exemption for employees employed in a white-collar capacity.\(^{488}\) The Illinois General Assembly amended the MWL in 1976 (providing section 4a(2)(E)) to exempt employees employed in a bona fide executive, professional or administrative capacity, as defined by the FLSA.\(^{489}\)

The General Assembly amended the MWL again in 1977 (providing section 4a(3)) to state that it had always intended the white-collar exemptions to be in force on the effective date of the MWL.\(^{490}\) The Legislature removed the section 4a(3) white-collar proviso from the MWL in 1985.\(^{491}\) By 1998, the U.S. District Court, Northern District of Illinois in \textit{Baudin v. Courtesy Litho Arts}\(^{492}\) held that because “Illinois courts subject the state statute to the same interpretation and application as its federal counterpart . . . [t]his Court therefore treats the two statutes as co-extensive.”\(^{493}\)

\(^{484}\). 820 ILL. COMP. STAT. 105/1-5 (2006).
\(^{485}\). \textit{See} Public Act 79-1436, 1976 Ill. Laws 1364, 1367, \S 4a(1).
\(^{486}\). \textit{Id. at} 1365, \S 3(d)(1). \textit{See also} ILL. ADM. CODE tit. 56 \S 210.110 (defining “immediate family”).
\(^{487}\). \textit{See} supra note 486 (providing four exemptions).
\(^{488}\). \textit{See} supra note 486 (providing four exemptions).
\(^{489}\). \textit{See} supra note 486 (providing four exemptions).
\(^{490}\). \textit{See} supra note 486 (providing four exemptions).
\(^{491}\). \textit{See} supra note 486 (providing four exemptions).
\(^{492}\). 4 Wage & Hour Cas. 2d (BNA) 1830 (N.D. Ill. 1998).
3. **Post-April 2004 Maximum Hours Standards under the Minimum Wage Law**

Amid concerns that the USDOL’s 2004 Final Rules for the white-collar exemptions would “cause an estimated 375,000 people in Illinois to lose overtime rights,” 494 State (now U.S.) Senator Barack Obama (D-IL) introduced Senate Bill 1645 on February 20, 2004, in the Illinois General Assembly. 495 He advanced the bill after blocking House Bill 4462, a similar measure that his rival for the U.S. Senate in the 2004 Democratic primary (Daniel Hynes, the Illinois Comptroller) drafted and State Representative Brandon Phelps introduced on February 2, 2004. 496 Debating Senator Obama’s bill on the House floor (as its House sponsor) after the primary elections, Representative Phelps stated that the purpose of the measure was to “just maintain[] the status quo of the federal overtime.” 497

In pertinent part, the bill: (1) extended overtime coverage to employees of governmental bodies; (2) preserved the rules for the white-collar exemptions under the FLSA to the regulations in effect on March 30, 2003, except to incorporate any subsequent increases in the salary thresholds; and (3) permitted governmental bodies to provide compensatory time per sections 7(k) and (o), or section 13(b)(20) of the FLSA. 498

Addressing the white-collar exemptions, the provision amended Section 4a(2)(E) of the MWL to exclude from overtime pay:

> Any employee employed in a bona fide executive, administrative or professional capacity ... as defined by or covered by the Federal Fair Labor Standards Act of 1938 and the rules adopted under that Act, as both exist on March 30, 2003, but compensated at the amount of salary specified in subsections (a) and (b) of Section 541.600 of Title 29 of the Code of Federal Regulations as proposed in the Federal


498. See BILL STATUS OF SB 1645, supra note 495.
Register on March 31, 2003 or a greater amount of salary as may be adopted by the United State Department of Labor . . . .

Governor Blagojevich signed the bill on April 2, 2004. Upon enactment, Illinois park districts immediately stopped working "seasonal laborers, such as life guards" over 40 hours per week to avoid paying them overtime.

The Illinois Department of Labor (IDOL) subsequently posted a chart on its website to provide guidance for applying MWL § 4a(2)(E) as amended. According to IDOL, employees earning less than $455 per week are "guaranteed overtime." Overtime rights for employees earning between $455 and $100,000 are dictated by the "Salary Test and Long Duties Test in 29 CFR Part 541 as in effect as of March 30, 2003." The same applied to employees earning $100,000 or more per year.

Illinois courts give substantial deference to a reasonable "interpretation of an ambiguous statute by the agency charged with the administration and enforcement of the statute." An agency implements its statutory interpretation in compliance with the Illinois Administrative Procedure Act (IAPA) through rulemaking, case-by-case adjudication, or by simply announcing new principles or policies in press releases.

Virtually every agency produces guidance documents (such as guidelines, rulings, opinion letters, etc.) without using pre-adoption notice-and-comment procedures explaining to their staff and the public the meaning of

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499. BILL STATUS OF SB 1645, supra note 495 (emphasis indicates new language).
500. BILL STATUS OF SB 1645, supra note 495, at Public Act 93-0672.
503. Id.
504. Id.
505. Id.
language in statutes and regulations. Michael Asimow opined in his article, *Guidance Documents in the States: Toward a Safe Harbor*, that this process is "enormously important to members of the public who seek to plan their affairs to stay out of trouble and minimize transaction costs."

IDOL's guidance material for applying MWL § 4a(2)(E) complies with the IAPA. It is not, however, reasonable.

The plain language and political history of the 2004 amendment to MWL § 4a(2)(E) supports an interpretation requiring employers to comply with the long and short tests of the 1949 rules for the white-collar exemptions, as amended through March 30, 2003, with the salary threshold for the long-tests increased to $455 per week (and any subsequent increases in salary level), and the salary threshold for the short-tests increased to $100,000 per year (and any subsequent increases in salary level) pursuant to the USDOL's 2004 Final Rules for the white-collar exemptions. This preserves the "status quo" of the white-collar exemptions, while also rescuing the maximum hours labor standard from atrophy (the ossification of the 1975 salary thresholds for the long and short tests discussed in Part IV, in which more employees fell under the exemptions as inflation nullified the $155/$250 salary levels). Instead, IDOL interpreted MWL § 4a(2)(E) is a mirror image of USDOL's interpretation of FLSA § 13(a)(1). IDOL eliminated the highly paid provisos from the white-collar exemptions. USDOL eliminated the standards tests. The plain language and the evolving political history of the FLSA and MWL support neither interpretation.

4. Prohibition Against Mandated Overtime for Nurses

More analogous to the Eight Hour Day Law and the ODRISA than the overtime pay provision of the Minimum Wage Law, the Illinois General Assembly amended the Hospital Licensing Act in 2005 to pro-

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510. Id.
511. Id. at 632.
512. See supra note 499 and accompanying text.
513. See supra notes 494-97 and accompanying text.
514. See supra Part V.A.3 (discussing the WEISS REPORT).
515. See supra Part V.B (discussing the ossification of the white-collar exemptions).
516. See supra Part V.E (discussing the 2004 Final Rules).
517. See supra Part V.B (discussing the ossification of the white-collar exemptions).
518. See supra Part VI.A (discussing early Illinois maximum hours labor standards).
519. See supra Part VI.B.1 (discussing ODRISA).
520. See supra Parts VI.B.2, 3 (discussing the political evolution of the MWL overtime standards).
hibit (in pertinent part) mandated overtime (overtime in excess of "an agreed-to, predetermined work shift") for a nurse (defined as an advanced practice nurse, a registered nurse or licensed practical nurse) paid on an hourly basis, except in cases of "unforeseen emergent circumstances," e.g., a declared federal, state or local disaster or catastrophic event, or when patient care requires specialized nursing skills through the end of a procedure.522 Successfully lobbied by the Illinois Nurses Association,523 the Illinois Department of Public Health administers and enforces the measure.524 The legislation further provides that mandated overtime cannot exceed four hours,525 nurses mandated to work up to twelve consecutive hours must have at least eight consecutive hours of "off-duty time immediately following the completion" of the shift,526 and prohibits any retaliation against a nurse for refusing to work prohibited mandated overtime.527

VII. COMPARING THE FLSA AND ILLINOIS MAXIMUM HOURS STANDARDS

As a traditional exercise of state police power,528 Illinois provides employees with greater maximum hour protection than the FLSA does under the Final Rules for the white-collar exemptions. Thus per FLSA § 18(a) (the Savings Clause), employers in Illinois must adhere to Illinois', rather than the federal, maximum hours standards.529

For example, the MWL (as amended April 2, 2004) increased maximum hours protection for white-collar employees by requiring employers to

523. See Michael Bologna, Measures Supported by Organized Labor Win Approval in Illinois, 12 UNION L. REP. (BNA) 93 (June 17, 2005).
524. See 210 ILL. COMP. STAT. 85/10.9(e) (2006).
525. Id. § 10.9(b).
526. Id. § 10.9(c).
527. Id. § 10.9(d).
528. See supra Part VI (discussing the evolving political history of Illinois maximum hours standards since 1819).
529. See, e.g., David K. Hasse & Ross H. Friedman, Final Overtime Rules, NAT'L L. J., May 24, 2004, at 14 (observing that "on April 2, Illinois Governor Rod Blagojevich signed legislation making Illinois the first state specifically to reject some of the DOL's changes"); Edward Renner and Ethan Zelizer, The New FLSA Regulations: What Illinois Employers and Employees Need to Know, CBA REC. 55 (May 2004) (observing that the 2004 MWL amendments "preempted" the Final Rules for the White-Collar exemptions); Postol, supra note 410, at 20 (suggesting that "[e]mployers must be wary of state FLSA requirements that go beyond the federal FLSA").
comply with the standard (long) and the more lenient special provisos for high-salaried employees (short) tests of the 2003 Rules, with the salary threshold for the long-tests increased from $155 to $455 per week (and any subsequent increases in salary level), and the salary threshold for the short-tests increased from $250 per week to $100,000 per year (and any subsequent increases in salary level). The amendment also requires employers to comply with the salary test under the 2003 Rules. This preserved the "status quo" of the white-collar exemptions, while rescuing the labor standard from atrophy (the ossification of the 1975 salary thresholds discussed in Part IV, in which more employees fell under the exemptions as inflation nullified the $155/$250 salary levels).

Alternatively, effective August 23, 2004, the FLSA (under the Final Rules for the white-collar exemptions) atrophied maximum hours protections for white-collar employees by eliminating the original standard (long) test and using the lenient short-tests as the baseline for the new standard tests. The new standard tests have a $455 per week salary threshold. The Final Rules also provided a new salary basis test that: (1) makes it easier for employers to dock employees' salary without loosing the exemption, and (2) legalizes comp-time in the private section. In addition, the Final Rules created a new (and even more lenient) "highly compensated employee" rule to replace the function of the special provisos for high-salaried employees under the 2003 Rules. It has a $100,000 per year compensation threshold. Workers under the new highly compensated employees rule lose their right to overtime if they perform only one exempt duty on a "greater than occasional" basis.

A point-by-point comparison between the MWL and the FLSA is not necessary to demonstrate that the Illinois standards are more generous to workers than the FLSA. The USDOL's economic impact analysis for the Final Rules acknowledged that its replacement of the 2003 Rules through the rulemaking (the MWL incorporated the 2003 Rules by reference in

530. See supra Part VI.B.3 (discussing the post-April 2004 overtime standards under the MWL).
531. See supra Part VI.B.3.
532. See supra Part V.E.1-3 (reviewing and analyzing the Final Rules for the executive, administrative and professional exemptions).
533. See supra Parts V.E.4.a, c (reviewing and analyzing the Final Rules for the salary basis test).
534. See supra Part V.E.4.b (discussing the USDOL's comp-time gift to private sector employers).
535. See supra Part V.E.5 (discussing the highly compensated employee rule).
536. See supra Part V.E.5.
2004) weakened maximum hours protection for white-collar employees under the FLSA.537

The FLSA and the MWL do not prohibit employers from working employees to death via excessive hours. The two statutes merely require employers to pay workers overtime when they do so.538 Illinois, however, has taken steps to cap work hours. For example, the One Day Rest in Seven Act (ODRISA) requires daily rest breaks and at least twenty-four consecutive hours of rest every calendar week for private sector employees.539 The Hospital Licensing Act prohibits (with a few exceptions) mandatory overtime for advanced practical nurses, registered nurses and licensed practical nurses paid on any hourly basis.540

Thus, while neither the FLSA nor Illinois maximum hours standards are particularly strong, Illinois law is more protective than the FLSA.

VIII. CONCLUSION

The underlying policies and purposes of maximum hours labor standards (for society to work less, live more and spread the wealth by employing more people working shorter hours, rather than employing fewer people working longer hours) are as relevant today and in the foreseeable future as they were when labor activist and reformers fought and died for these rights during the late nineteenth and early twentieth centuries. Maximum hours labor standards have, however, atrophied under the FLSA. Illinois provides workers with greater (albeit, not particularly strong) maximum hours labor protection than the FLSA because it took recent steps to stop their deterioration. Thus per Section 18(a) of the FLSA (the Savings Clause), employers in Illinois must adhere to Illinois, rather than the federal, maximum hours labor standards.

537. See supra Part V.E.6 (discussing the economic impact analysis for the final rules).

538. Mary Williams Walsh, As Hot Economy Pushes Up Overtime, Fatigue Becomes a Labor Issue, N.Y. TIMES, Sept. 17, 2000, § 1, at 32 (discussing the State of Maine's legislation capping work hours following the death of a lineman who was electrocuted on the job after "clambering up and down poles for almost [twenty-four] hours straight").

539. See supra Part VI.B.1 (discussing ODRISA).

540. See supra Part VI.B.4 (discussing the Hospital Licensing Act).