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ASSESSING THE IMPACT OF THE LABOR DEPARTMENT'S FINAL OVERTIME REGULATIONS ON WORKERS AND EMPLOYERS

HEARING

BEFORE THE

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

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ASSESSING THE IMPACT OF THE LABOR DEPARTMENT'S FINAL OVERTIME REGULATIONS ON WORKERS AND EMPLOYERS

Wednesday, April 28, 2004
U.S. House of Representatives
Committee on Education and the Workforce
Washington, DC

The Committee met, pursuant to notice, at 10:35 a.m., in room 2175, Rayburn House Office Building, Hon. John Boehner (Chairman of the Committee) presiding.

Present: Representatives Boehner, Petri, Ballenger, Hoekstra, McKeon, Castle, Johnson, Norwood, Isakson, Biggert, Platts, Tiberi, Keller, Wilson, Cole, Porter, Kline, Carter, Blackburn, Gingrey, Burns, Miller, Kildee, Owens, Payne, Andrews, Woolsey, Hinojosa, McCarthy, Tierney, Kind, Kucinich, Wu, Holt, Davis of California, McCollum, Grijalva, Majette, Van Hollen, Ryan, and Bishop.

Staff present: Kevin Frank, Professional Staff Member; Ed Gilroy, Ed, Director of Workforce Policy; Donald McIntosh, Staff Assistant; Jim Paretti, Professional Staff Member; Molly Salmi, Deputy Director of Workforce Policy; Kevin Smith, Communications Counselor, and Jo-Marie St. Margin, General Counsel; Jody Calemine, Minority Counsel Employer-Employee Relations; Margo Hennigan, Minority Legislative Assistant/Labor; Tom Kiley, Minority Press Secretary; John Lawrence, Minority Staff Director; Marsha Renwanz, Minority Legislative Associate/Labor; Amy Rosenbaum, Minority Special Assistant for Policy; Peter Rutledge, Minority Senior Legislative Associate/Labor; Michele Varnhagen, Minority Labor Counsel/Coordinator; and Mark Zuckerman, Minority General Counsel.

Chairman BOEHNER. A quorum being present, the Committee on Education and the Workforce will come to order. We are meeting today to hear testimony on assessing the impact of the Labor Department's final overtime regulations on workers and employers overtime regulations. For those who are standing and who would prefer to sit, the Committee has made available 2257 directly upstairs as an overflow room where you'll be able to hear and see the testimony that the Committee will receive today.

Opening statements are limited to the Chairman and the Ranking Member. If other Members have statements, they can be sub-

mitted for the record. And with that, I ask unanimous consent for the hearing record to remain open for 14 days to allow Member statements and any other extraneous material referenced during the hearing to be submitted for the official hearing record, and without objection, so ordered.

STATEMENT OF HON. JOHN BOEHNER, CHAIRMAN, COMMITTEE ON EDUCATION AND THE WORKFORCE

Chairman BOEHNER. Good morning, Madam Secretary and all of our guests today. Thanks for coming. Today our focus will be on evaluating the Labor Department's final regulations on overtime pay, its impact on workers and employers, and how these rules will work in practice.

There's been a lot of information and misinformation about this proposal, and this is why we're here today, to hear directly from the Secretary of Labor and other distinguished witnesses.

For years we've known that the Fair Labor Standards Act regulations governing overtime are complex, confusing and often incite needless litigation. As a result, these outdated rules make it next to impossible for workers to know whether they are entitled to overtime, for employers to know how to pay their employees, and for the Labor Department to enforce these workforce protections. Moreover, millions of low wage workers who should be earning overtime pay currently are not.

Modernizing these decades-old regulations has been on the agenda of every administration, Republican and Democrat, for the last 20 years.

In March of 2003, the Department began this difficult effort by offering a draft proposal to update these outdated rules, which have not been substantially changed in 54 years. Unfortunately, the American people were subjected to a campaign of misinformation based on fear, distortions and untruths. Some attempted to paint this draft proposal as an attack on workers, falsely claiming it would eliminate overtime pay for millions, which is simply not true.

After reviewing more than 75,000 public comments on the draft proposal, both positive and negative, the Department published its final rule last week, and I'm pleased that Secretary Chao is here with us today to tell us more about the facts. As Joe Friday said, "just the facts, ma'am."

It's important that we come into this hearing I think with an open mind and ready to listen. It's troubling that some seem to have reached conclusions about the final rule even before it was issued last week. It appears that the Labor Department has worked very hard to address legitimate concerns raised by both workers and employers, but I want to hear directly from the Secretary and other witnesses, and this is why we're holding this meeting today.

Numerous changes were made to the final rule issued last week. For example, the final regulation ensures that workers making less than $23,600 annually will automatically be entitled to overtime pay. It's unacceptable that today's outdated regulations would allow someone earning as little as $8,060 to qualify as a white collar employee and therefore prevented from receiving overtime.

According to the Department's analysis, the final regulation will extend new overtime rights to an estimated 1.3 million American workers and strengthen existing overtime protections for 5.4 million working Americans.

The Department's economic analysis of its final overtime rule indicates few, if any, workers making less than $100,000 per year will be adversely affected by the final regulation. The Department estimates the only workers who will likely be affected are those making more than $100,000 annually whose white collar job responsibilities qualify them as exempt from overtime. According to the Department, no more than 107,000 workers nationwide fall into this highly compensated category.

And finally, and I think most importantly, the Department's final rule protects the overtime rights of blue collar workers, union workers, nurses, veterans, firefighters, policemen and similar public safety workers and responds to concerns raised with the earlier draft regulations during the comment period by ensuring the overtime rights of these workers are not affected under the final rule.

Our focus here today should be putting more money into the pockets of working Americans, not trial lawyers. Because of confusion over these outdated rules, class action overtime lawsuits are now the fastest growing category of employment litigation. I had dinner on Saturday night with a labor attorney who basically represents employers, and he told me, he said, "If it weren't for the job that I have, I'd be a plaintiff's attorney out filing these litigation suits, class action suits on FMLA, because they are so outdated, there's so much confusion, and I could make a whole lot of money." I said, "Well, thank you for not doing it."

Doing nothing would be a victory for the trial lawyers who have lined their own pockets with gotcha class action lawsuits. Clearer rules will reduce the cost of litigation, encourage employers to hire more workers, and strengthen current law overtime protections for American workers. This is especially important for the millions of low wage workers who will receive new overtime pay protections under the final rule.

I want to commend the Department for its willingness to make adjustments in the final regulation and urge everyone to listen to the facts and put election year politics aside. I think the Department has taken great steps and exhibited great courage in doing something that administrations for 20 years have attempted to do but never gotten very far. This is good for American workers. It's good for American employers, and good for the American economy.

And I'll now yield to my friend and colleague, Mr. Miller.

[The prepared statement of Chairman Boehner follows:]

Statement of Hon. John A. Boehner, Chairman, Committee on Education and the Workforce

Good morning, thank you for coming and special thanks to our witnesses for being here. Today our focus is evaluating the Labor Department's final regulations on overtime pay, its impact on workers and employers, and how these rules will work in practice. There has been a lot of information and misinformation about this proposal, and this is why we're here today: to hear directly from the Secretary of Labor and other distinguished witnesses.

For years, we've known that Fair Labor Standards Act regulations governing overtime are complex, confusing, and often incite needless litigation. As a result, these outdated rules make it next to impossible for workers to know whether they are entitled to overtime, for employers to know how to pay their employees, and for the Labor Department to enforce these workplace protections. Moreover, millions of low-wage workers who should be earning overtime pay currently are not.

Modernizing these decades-old regulations has been on the agenda of every Administration, Republican and Democrat, for the last 20 years. In March 2003, the Department began this difficult effort by offering a draft proposal to update these outdated rules, which have not been substantially changed in 54 years. Unfortunately, the American people were subjected to a campaign of misinformation based on fear, distortions, and untruths. Some attempted to paint this draft proposal as an attack on workers, falsely claiming it would eliminate overtime pay for millions, which is simply untrue.

After reviewing more than 75,000 public comments on its draft proposal, both positive and negative, the Department published its final rule last week and I'm pleased Secretary Chao is here to testify. It's important we come into this hearing with an open mind ready to listen. It's troubling that some seemed to have reached conclusions about the final rule even before it was issued last week. It appears the Labor Department has worked very hard to address legitimate concerns raised by both workers and employers, but I want to hear directly from Secretary Chao and other witnesses, and this is why we are holding this hearing.

Numerous changes were made to the final rule issued last week. For example, the final regulation ensures any worker making less than $23,660 annually will automatically become entitled to overtime pay. It is unacceptable that today's outdated regulations would allow someone earning as little as $8,060 to qualify as a 'white collar' employee and therefore prevent them from receiving overtime pay.

According to the Department's analysis, the final regulation will extend new overtime rights to an estimated 1.3 million workers, and strengthen existing overtime protections for 5.4 million working Americans.

The Department's economic analysis of its final overtime rule indicates few, if any, workers making less than $100,000 per year will be adversely affected by the final regulation. The Department estimates the only workers who will likely be affected are those making more than $100,000 annually, whose white-collar job responsibilities qualify them as exempt from overtime. According to the Department, no more than 107,000 workers nationwide fall into this highly-compensated category.

Finally, and I think most importantly, the Department's final rule protects the overtime rights of blue-collar workers, union workers, nurses, veterans, firefighters, policemen and similar public safety workers, and responds to concerns raised with earlier draft regulations during the comment period by ensuring the overtime rights of these workers are not affected under the final rule.

Our focus here should be putting more money in the pockets of working Americans, not trial lawyers. Because of confusion over these outdated rules, class action overtime lawsuits are now the fastest growing category of employment litigation. Doing nothing would be a victory for trial lawyers who have lined their own pockets with "gotcha" class action lawsuits. Clearer rules will reduce the cost of litigation, encourage employers to hire more workers, and strengthen current law overtime protections for American workers. This is especially important for the millions of low-wage workers who will receive new overtime pay protections under the final rule.

I'd like to commend the Department for its willingness to make adjustments to the final regulation, and I urge everyone to listen to the facts and put election-year politics aside. I look forward to hearing more details from our witnesses.

STATEMENT OF HON. GEORGE MILLER, RANKING MEMBER, COMMITTEE ON EDUCATION AND THE WORKFORCE

Mr. MILLER. Thank you, Mr. Chairman. Thank you for holding this hearing, and Madam Secretary, thank you for being here.

History very often is in the eye of the beholder. I would tell a different history of these regulations. I would tell a history of regulations that were published and said that they were going to strengthen overtime protections for workers and extend them to millions of low income workers, and then upon analysis of those regulations by many, many parties, it became very clear that not only would these regulations extend overtime protections to millions of low income workers, it would threaten the overtime protections to millions of other workers.

That history is validated by the fact that on a bipartisan basis, both the House and the Senate rejected the idea of these regulations, and the most dramatic retreat from those original regula-

tions by the Department of Labor as they submit these final regulations for our consideration.

I would suggest to you that in the time available to read and analyze the 530 pages of these artfully crafted new regulations, it's clear to me and I think to many others who have undertaken the beginnings of the analysis that the policy continues, and that is to cut the overtime protection for millions of workers, in this instance those workers between the base salary of $23,660 and the ceiling of $100,000.

That when you look at the number of workers who can be adversely affected in these new regulations, you start to see the potential of millions of employees who are in that situation; employees working in financial services, chefs, computer programmers, route drivers, assistant retail managers, preschool teachers, team leaders, working foremen and many other categories that are created in these regulations either in reactions to lawsuits or the interests of specific industries within the country that have been seeking these changes for a number of years.

And I think that we'll see that your dinner guest will find himself well compensated by continuing to go to court by the flood of litigation that will be created by the definitions within these new regulations. So he will continue to do very well.

Later today we will hear from a witness, Karen Smith, who served as a Department of Labor Wage and Hour investigator in the Reagan, Bush and Clinton administrations and a management consultant for employers for the last several years, and will explain some of the nuances and the definitional context of these regulations that threaten the overtime protection of millions of workers, as have other analysts who have had a chance to look at these regulations.

What I don't understand is why we continue to see this assault on middle class working Americans by the Bush Administration. We all applauded the effort to raise the income ceiling on those who would be eligible for overtime protections. There was no disagreement on either side of the aisle about that effort. What we don't understand why then that good deed has to be extracted by putting other people who have overtime rights today at risk.

Middle class Americans face so many problems today—shrinking real pay, higher cost of basic benefits, greater competition for employment, downsizing, outsourcing, higher costs of higher education and all that goes on with maintaining your economic status in this country and the ability to provide for your family. But one problem they don't have is too much money from overtime.

And to suggest now that these regulations are going to start curtailing the access to overtime for millions of America's families who need that. We all understand the overtime in the workplace is a love-hate relationship. We love it at the end of the year when it's in our W–2 form, but we had it on a Friday night when we're asked to work it, and we hate it when we're asked to work overtime when we know we now have to adjust the time of our daycare arrangements, the time of dinner for our family, whether we're going to have a vacation, whether we're going to be able to go to the movies or we're going to be able to take care of other needs of the family. But we work it, and we get a premium pay for that reason.

Under these regulations for millions of workers in the categories that I have named, and we'll go into detail later, they're going to find out that they're going to work the overtime; they're just not going to get the pay. But that's what these regulations were designed to do in a whole range of industries.

So, again, I would go back to the original plea that many of us made when the initial regulations were put forth, those that have now been withdrawn. I would hope that we would go back to holding harmless those individuals that currently have overtime. Why are we taking away the overtime of these individuals when for so many of them, it means whether or not they qualify for the mortgage on their house, whether or not they're going to be able to afford their car or finance their kids' education. That's what overtime means to millions of Americans.

We wouldn't understand that in the Congress of the United States, because we only work a 3-day week or a 2-day week, so we never get up against those 40-hour weeks here in Washington. But for millions of Americans, they bump up against that 40 hours all the time, and they then have to restructure their life in order to keep their job, and they should be compensated for that activity.

So I look forward to a discussion of these regulations, but I must say, I must say that I am deeply disturbed that millions of Americans will have the threat to what they now have the right to, and that is overtime compensation for overtime worked put at risk because of these regulations.

Thank you, Mr. Chairman.

Chairman BOEHNER. It's now my pleasure to introduce our first panel today. The Honorable Elaine Chao is the nation's 24th Secretary of Labor, nominated by President Bush and confirmed by the U.S. Senate in January of 2002. Secretary Chao's previous government career included serving as Deputy Secretary of the U.S. Department of Transportation, Chairman of the Federal Maritime Commission, and Deputy Maritime Administrator in the U.S. Department of Transportation.

She brings a wealth of business experience to the post of labor secretary, having worked as vice president of syndications at Bank of America Capital Markets Group, and as a banker with Citigroup. Secretary Chao has also served as director of the Peace Corps and as president and CEO of the United Way of America.

She has received her MBA from the Harvard Business School and her undergraduate degree in economics from Mount Holyoke College.

Secretary Chao is accompanied this morning by Ms. Tammy McCutchen, the Administrator of the Wage and Hour Division of the Department of Labor, which has principal oversight over the nation's Federal wage and hour laws.

And with that, Madam Secretary, we're glad that you're here and we're anxious to hear from you.

STATEMENT OF THE HONORABLE ELAINE L. CHAO, SECRETARY, U.S. DEPARTMENT OF LABOR, ACCOMPANIED BY TAMMY D. McCUTCHEN, ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR, WASHINGTON, DC

Secretary CHAO. Thank you, Mr. Chairman, and Members of this Committee, for the opportunity to discuss the Department of Labor's new overtime security rules, which are a tremendous step forward for America's workers.

The new rules published in the Federal Register as of April 23rd strengthen and guarantee overtime pay protection for an unprecedented 6.7 million additional workers. They modernize and clarify what's often called white collar regulations that have not been substantially updated since 1949. As the world of work changes, these regulations remain frozen in time. They're difficult and sometimes nearly impossible to interpret or enforce in the modern workplace. They list positions which no longer exist like leg man, gang leader, straw boss, keypunch operators.

This rule has been on the regulatory reform agenda of the Department of Labor since 1977 when President Jimmy Carter was in office. Because of the ambiguity and the outdated nature of these rules, a lot of workers are forced to resort to lengthy court battles and hire—spend money and hire lawyers to find out whether they're eligible for overtime. In fact, overtime complaints now generate more Federal class action lawsuits than employment discrimination class action lawsuits.

There has to be a better way for workers to get the overtime that they've earned, and that's why the Department has developed stronger, clearer overtime rules to help working families.

The final rules dramatically increase the number of workers who will be guaranteed overtime because the salary threshold has nearly tripled. Under the current regulations, workers earning more than $8,060 annually can be classified as executives and denied overtime protection. Under the new rules, workers earning up to $23,660 annually are guaranteed overtime regardless of their job title or responsibilities.

Changing the salary threshold alone ensures overall protection—overtime protection for 6.7 million workers. That's 1.3 million workers who had no right to overtime at all, and another 5.4 million workers whose overtime rights were ambiguous at best.

The first draft of this rule did generate a great deal of interest and discussion. Members of Congress expressed their views, and we received about 75,000 comments from the public. I want to say that we have listened very carefully to all these comments and concerns, and we have produced a final rule that puts workers' overtime protections first and it strengthens and clarifies their overtime protection. That's why, for example, we took the extra step of spelling out in the new white collar rules who is not impacted by them. For the first time in history, the overtime rights of police, firefighters, paramedics, emergency medical technicians, other public safety employees, licensed practical nurses, are explicitly protected in the Department's white collar overtime rules. And for the first time ever, the overtime rights of blue collar workers such as construction workers, longshoremen, factory workers, are spelled out plainly in these rules.

The final regulations preserve overtime protections for veterans, cooks. They were never, never taken away. But again, to clarify that these overtime rules strengthen overtime protection, we have put in those occupations and those categories as well.

We have also included union members and made sure that the final regulations preserve overtime protections for union members whose overtime pay is secured under a collective bargaining agreement.

The new rules are very clear.

One. Everyone who is paid by the hour is entitled to overtime.

Two. All blue collar and manual laborers are entitled to overtime.

All salaried workers earning less than $23,660 a year are entitled to overtime, period, regardless of job title or duties.

Salaried workers. Salaried workers earning more than $23,660 annually must be paid overtime unless they perform executive, administrative or professional duties.

Now, unfortunately, a great deal of misinformation and distortions harmful to workers have been spread about the impact of these rules.

These rules have been attacked for taking away overtime rights when the exact opposite is true. The new rules either preserve existing definitions of executive, professional and administrative duties or make them stronger and clearer to protect workers based on current Federal case law or statutes passed by the Congress.

With these new rules, workers will clearly know their rights to overtime pay, employers will know what their legal obligations are, and this Administration, which has set new records for aggressive wage and hour enforcement, will have updated and strengthened new standards with which to vigorously enforce the rules to protect workers' pay.

In fact, just yesterday I announced a new wage and hour overtime security enforcement task force to ensure that workers' expanded overtime rights are secured. I met with our wage and hour district directors and charged them to help workers and employers know the facts about these new rules and not be misled by misinformation that is being spread.

The final rule gives our Department investigators the tools with which to ensure overtime security for millions of workers.

I have to say this to the Committee. I am deeply concerned about the campaign of misinformation about these new rules. The confusion it is designed to create will only harm workers by denying them good information about their overtime pay rights.

To prevent that from happening, we have put a tremendous amount of effort into compliance assistance and maximizing our enforcement presence. Our goal is to ensure that workers get the overtime pay that they've earned, and that's why the Department has issued updated overtime rules that will strengthen and guarantee overtime protections for more workers than ever before.

Mr. Chairman, thank you for inviting me to be here today, and I'll be more than happy to answer any questions that the Committee may have.

[The prepared statement of Secretary Chao follows:]

Statement of Hon. Elaine L. Chao, Secretary, U.S. Department of Labor, Washington, DC

Chairman Boehner and Members of the Committee:

I am pleased to appear before you today to discuss the Department of Labor's final rule addressing the Fair Labor Standards Act's "white-collar" exemptions. This rule sets forth the criteria for determining who is exempted from the Act's minimum wage and overtime requirements as an executive, administrative, or professional employee. The new regulations appear in Title 29 of the Code of Federal Regulations, at Part 541.

As you know, the Department's proposed rule was published in March 2003, and the final rule was published last week. The Department is very proud of the final rule. Overtime pay is important to American workers and their families, and this updated rule represents a great benefit to them. Under the new regulations, workers earning less than $23,660 per year – or $455 per week – are guaranteed overtime protection. This will strengthen overtime rights for 6.7 million American workers, including 1.3 million low-wage, salaried "white-collar" workers who were not entitled to overtime pay under the old regulations, and who will gain up to $375 million in additional earnings every year under this final rule. We have also strengthened overtime protections for licensed practical nurses, police officers, fire fighters, paramedics, and similar public safety employees.

The new rule exempts only "white-collar" jobs from overtime protection. The Department has updated the rule to clarify that "blue-collar" workers – such as construction workers, cashiers, manual laborers, employees on a factory line or workers compensated under a collective bargaining agreement, will not be affected by the new regulation.

Under section 13(a)(1) of the Fair Labor Standards Act (FLSA), certain executive, administrative and professional employees are exempt from the overtime requirements. The new rules will end much of the confusion about these exemptions that has led to an explosion of class action litigation and failed sufficiently to protect workers' rights.

The Department has issued a final rule that is responsible and responsive to the public. We worked hard to get it right. Let me emphasize Mr. Chairman, that this final rule is significantly different from the proposed rule. For the past year, we listened to thousands of comments – from workers and employers – and have designed new regulations that are clear, straightforward and fair. We also listened closely to Congress, whose comments have been a tremendous benefit to the Department. The Department extends its gratitude to Congress for identifying issues in the proposed rule that needed more explicit clarification. The final rule successfully addresses the concerns that have been raised and is much stronger as a result. Under the rulemaking process, we have made significant changes from the proposal and we believe the final product is better in every way, and a significant improvement over the old, confusing regulations that have not been updated for decades.

Unfortunately, much of the recent press coverage and public debate over this rule has been misleading and inaccurate. I thank you, Mr. Chairman for the opportunity to discuss precisely what this new rule means for American workers. By returning clarity and common sense to the regulations, we help workers better understand their overtime rights, make it easier for employers to comply with the law, and strengthen the Labor Department's enforcement of overtime protections. With this update, more workers will receive overtime pay, and they will get it in real time – when they earn it – not years later after enduring lengthy battles in federal court.

The framework of the old rule was based upon the American workplace of a half-century ago. The old rule, therefore, reflected the structure of the workplace, the type of jobs, the education level of the workforce, and the workplace dynamics of an industrial economy that has long since changed.[1] With each passing decade of inattention, the overtime regulations became increasingly out of step with the realities of the workplace and provided less and less guidance to workers and employers.

When Congress passed the Fair Labor Standards Act in 1938, it chose not to provide definitions for many of the terms used, including who is an "executive, administrative or professional" employee. Rather, in Section 13(a)(1) of the Act, Congress expressly granted to the Secretary of Labor the authority and responsibility to "define and delimit" these terms "from time to time by regulations."

The Department, therefore, has the duty to update these regulations. Unfortunately, despite every administration since President Carter placing Part 541 reform on its regulatory agenda, until now, the DOL has been unable to meet its charge from Congress.

Suggested changes to the Part 541 regulations have been the subject of extensive public commentary for two decades. Significantly, in a 1999 report[2] to Congress and at a May 2000 hearing before a subcommittee of this Committee, the U.S. General Accounting Office (GAO) chronicled the background and history of the exemptions, estimated the number of workers who might be included within the scope of the exemptions, and identified the major concerns of workers and employers. The GAO concluded that "given the economic changes in the 60 years since the passage of the FLSA, it is increasingly important to readjust these tests to meet the needs of the modern work place," and recommended that "the Secretary of Labor comprehensively review the regulations for the white-collar exemptions and make necessary changes to better meet the needs of both employers and employees in the modern work place. Some key areas of review are (1) the salary levels used to trigger the regulatory tests, and (2) the categories of employees covered by the exemptions."

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[1] During the course of public debate on the Department's proposed rule, an excellent summary of the changes in the structure of the American workplace and implications for Part 541 reform was submitted to a January 20, 2004 Senate subcommittee hearing at which the Secretary of Labor and Wage and Hour Administrator testified. *See Hearing on Proposed Rule on Overtime Pay: Before the Subcomm. On Labor, Health and Human Services, Education of the Senate Appropriations Comm.*, 108th Cong., 2nd Sess. (2004) (written statement of Ronald Bird, Chief Economist for the Employment Policy Foundation). Among other insights, the Bird testimony notes that: before World War II, nearly one-in-three (33.6 percent) workers were employed in manufacturing; in 1940, only one-in-six (17.9 percent) were employed in managerial or professional occupations; nearly one-half (48.2 percent) of all employees worked in occupations related directly to manufacturing and production; more than three-quarters (75.1 percent) of all adult workers had never finished high school; and most workers expected to say with a single employer during the course of their working life. In contrast, today less than one-in-seven (13.6 percent) works in the manufacturing sector; nearly one-in-three (30.1 percent) work in managerial or professional occupations; less than one-in-three (28.5 percent) work in occupations related directly to manufacturing and production; more than 58 percent of the population age 16 and older have at least some post-secondary (college-level) education, while 38 percent have a college-level degree and only 11.9 percent have less than a high school diploma; and average job tenure is under five years and declining.

[2] *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place* (GAO/HEHS-99-164, September 30, 1999).

There is no question this rule needed to be updated. The minimum salary level was last increased in 1975, almost 30 years ago, and was only $155 per week. The job duty requirements in the regulations had not been updated since 1949 – almost 55 years ago. The salary basis test was set in 1954 – a half century ago.

From the beginning of this rulemaking, the Department has been consistent in what it wanted to achieve with this update. The primary goal remains to protect low-wage workers. Under the old rule, only employees earning less than $8,060 per year were guaranteed overtime pay – that is equivalent to less than minimum wage earnings. The regulations also needed to be reformed to ensure that all workers receive overtime pay without having to wait years for federal court litigation to play out. Even lawyers find it difficult to determine who is entitled to overtime pay under the old rules, and very few employees understand their rights. Reforming the "white-collar" regulations is also a catalyst for compliance with the law, because employers are more likely to comply with clearer rules that reflect the work place of the 21st Century. Finally, this update benefits both employees and employers by reducing wasteful litigation. Federal class actions for overtime pay have tripled since 1997, and now outnumber discrimination class action lawsuits. Often in these protracted lawsuits, workers receive only a few thousand dollars each, while the lawyers may walk away with millions of dollars. We simply cannot allow this legal morass to continue unabated.

Under section 13(a)(1) of the FLSA and its implementing regulations, employees cannot be classified as exempt from the minimum wage and overtime requirements unless they are guaranteed a minimum salary and perform certain required job duties. The old rule required three basic tests for each exemption: (1) a minimum salary level, set at $155 per week per week for executive and administrative employees and $170 per week for professionals under the basic "long" duties test for exemption, whereas a higher salary level of $250 per week triggered a shorter duties test in each category; (2) a salary basis test, requiring payment of a fixed, predetermined salary amount per week that is not subject to reduction because of variations in the quality or quantity of work performed; and (3) a duties test, specifying the particular types of job duties that qualify for each exemption.

The new regulations expand the number of workers guaranteed overtime protection by nearly tripling the $155 per week, or $8,060 per year, salary threshold. The final rule increases the minimum salary level required for exemption as a "white-collar" employee to $455 per week. This is a $300 per week increase from the old rule, and the largest increase since Congress passed the Fair Labor Standards Act in 1938. This is also a $30 per week increase from the proposed rule, and means that overtime protection is guaranteed for all workers earning less than $23,660 per year.

This dramatic increase in the salary level also means that the final rule strengthens overtime protections for 6.7 million salaried workers earning from $155 to $455 per week. 5.4 million salaried workers, who today are at risk of being denied overtime, are now guaranteed overtime protection. 1.3 million salaried workers, who are not entitled to overtime today, will gain up to $375 million per year in additional earnings. The final rule identifies the occupations these 1.3 million workers are in and the estimated number of currently exempt workers who will likely gain compensation under the final rule.[3] They are predominately married women with less than a college degree and live in the South.

The Department's final rule also includes a streamlined test for highly-compensated "white-collar" employees. To qualify for exemption under this section of the final rule, an employee must: (1) receive total annual compensation of at least $100,000, an increase of $35,000 over the proposed rule; (2) perform office or non-manual work as part of their primary duty; and (3) customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee. The final rule also strengthens this exemption by clarifying that employees must receive a portion (at least $455 per week) of their compensation on a salary basis. Given the final rule's significant increase in this test's salary level, only 107,000 employees who earn at least $100,000 per year, *and* perform office or nonmanual work, *and* "customarily and regularly" perform exempt duties *could be* classified as exempt. However, the Department believes even this result is unlikely given the incentives for employers to retain high-skilled workers and minimize turnover costs.

The final rule simplifies and clarifies the duties tests for each of the exemptions so that the regulations are easy for employees and employers to understand and for the Department to enforce. The old rule provided two sets of duties test for each of the exemption categories. There was both a "short" duties test and a "long" duties test for each of the executive, administrative and professional exemptions. The long tests applied to employees earning between $8,060 and $13,000 per year. Given these low levels, the long tests essentially have been inoperative for many years. Accordingly, the final rule replaces the long duties tests with guaranteed overtime protection for workers earning less than $23,660 per year and retains the short test requirements for workers earning above that level, especially emphasizing the existing "primary duty" approach found in the current short tests. Significantly, as discussed below, the final rule has retained the "discretion" and "judgment" concepts from the current short tests, ensuring that the final rule's standard duties test are now equally or more protective than the current short duties tests. As a result, few if any workers earning between $23,660 and $100,000 are likely to lose the right to overtime pay.

In recent months, there has been a tremendous amount of misinformation about the likely impact of the Department's new rule on employees such as blue-collar workers, police officers, nurses and veterans. The Department never had any intention of taking overtime rights away from such employees, and the final rule makes this clear beyond a shadow of a doubt. Section 541.3(a) of the final rule provides that manual laborers or other "blue-collar" workers are not exempt under the regulations and are entitled to overtime pay no matter how highly paid they might be. This includes, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers.

Similarly, to make certain the intentions of the Department are clear, Section 541.3(b) of the final rule provides that police officers, fire fighters, paramedics, emergency medical technicians and similar public safety employees who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; and similar work are entitled to overtime pay.

Section 541.301(e)(2) states that licensed practical nurses and other similar health care employees are generally entitled to overtime pay, since possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations. The current law regarding registered nurses is unchanged. Further, the Department never intended to allow the professional exemption for any employee based on veteran status. The final rule has been modified to avoid any such misinterpretation.

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[3] See Final Rule, Table A-4 of Appendix A.

In response to the public commentary evidencing further confusion, the Department has also emphasized the right to overtime protection for technicians and other skilled employees, as Section 541.301 clarifies that there is no change to the educational requirements for the professional exemption. As a result, employees in occupations that customarily may be performed with a "general" academic degree, or through an apprenticeship, or with training in routine mental or manual processes, such as cooks, are entitled to overtime pay. As was the case under the previous rule, those working under union contracts are protected. Section 541.4 provides that neither the FLSA nor the final regulations relieves employers from their obligations under union collective bargaining agreements.

Under the final rule, the executive exemption adds a third requirement to the current short test that makes it more difficult to qualify as an exempt executive. In other words, fewer workers qualify as exempt executives than qualify under the old regulations. Under the final rule, an exempt executive must (1) have the primary duty of managing the entire enterprise or a customarily recognized department or subdivision thereof, (2) customarily and regularly direct the work of two or more other workers, and (3) have authority to hire or fire other employees or have recommendations as to the hiring and firing or other change of status be given particular weight. This third requirement is from the old long duties test, and its addition makes the exemption more difficult to meet.

The final rule also deletes the special exemption in the proposed rule for "sole charge" executives, and strengthens the business owner exemption by requiring the 20-percent equity interest in the enterprise to be a "bona fide" interest, as well as requiring the employee to be "actively engaged" in the management of the enterprise.

In response to numerous comments, the final rule's administrative exemption has been significantly modified from the proposed rule. The revised test in the final rule requires that (1) the employee have the primary duty of 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 (2) the primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. The proposal's language regarding "position of responsibility" and "high level of skill or training" was dropped as potentially ambiguous, resulting in a final test that is easy to apply and is as protective as the current short test. Moreover, the final rule is more protective because it strengthens the "discretion and independent judgment" standard by adding the requirement, currently in the interpretive section of the old regulation, that the discretion be exercised "with respect to matters of significance."

Similarly, the "discretion and judgment" concept has been retained in the final rule's test for exemption as a learned professional. The final rule in this area requires an employee to have the primary duty of "the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." To emphasize that the educational requirements of this exemption have not been changed from the old rule, the final regulation breaks down the three elements of this test: (1) the employee must perform work requiring advanced knowledge; (2) the advanced knowledge must be in a field of science or learning; and (3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. The phrase "work requiring advanced knowledge" is explicitly defined as "work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work." Similarly, the final rule's test for a creative professional exemption remains as protective as it was under the old rule.

Mr. Chairman, workers win under this final rule. We have guaranteed and strengthened overtime protection for more American workers than ever before. We have strengthened overtime rights for 6.7 million workers, including 1.3 million low-wage, white-collar workers who likely will see an increase in their paychecks. In the course of issuing these regulations, a great deal of misinformation has surrounded their impact. They have been unfairly characterized as taking away overtime pay from millions of Americans when the exact opposite is true. That is why we took the extra step of spelling out in the regulations who is not affected by the new rules. We want police officers, fire fighters, paramedics, emergency medical technicians, public safety employees and licensed practical nurses to know that the new regulations will better protect their overtime rights, not harm them. In fact, the new rule strengthens their claim to overtime. In addition, blue-collar workers, technicians, cooks and veterans who currently receive overtime pay will continue to receive overtime pay. The final rule will not affect union workers covered by collective bargaining agreements.

With these new regulations, workers will clearly know their rights and employers will know their responsibilities. The new rule also enables the Department of Labor to enforce vigorously our nation's overtime laws and regulations, and will reduce needless and costly litigation. We at the Department of Labor are very proud of the updated rule, Mr. Chairman. America's workers deserved action. They now have a strengthened overtime standard that will serve them well for the 21st Century.

Thank you, Mr. Chairman and Members of the Committee. I would be happy to answer any questions you may have.

Chairman BOEHNER. Madam Secretary, we appreciate the fact that you're here and again say how proud I am of you and your team at the Department for the job that you're doing in the face of what else happens in this town.

Now we all know there's two things that happen in Washington. We do public policy, and unfortunately, we do it in a political setting. And the political battle on this issue has already begun, and I for one am disappointed that right out of the box, opponents of the Department's effort and the administration have sought to sling political mud rather than to discuss the substance of the new regulations themselves.

For an example, the AFL-CIO has already mischaracterized these regulations as a "pay cut" quote/unquote. In fact, I believe that you would estimate that these rules will result in more overtime pay going into employees' pockets. And I'd like for you to expand on that. And as a follow-up, I think many of us would be in-

terested to know that if this is really going to cost employers more money, why are so many employers wholeheartedly embracing these reforms?

Secretary CHAO. I would say that there's bipartisan support for reform of these rules. As I mentioned, these reforms have been on the regulatory agenda for well over 25 years. It's been there since 1977 when President Jimmy Carter was in office.

I think what most people want is clarity. We need clarity in these much outdated rules so that workers know their overtime rights and so that employers can know what their legal obligations are and so the Department can again more fully vigorously enforce the law as well.

So clarity is a very important part of why this updated rule is so much needed.

Chairman BOEHNER. Somebody was whispering in my ear the other day that the AFL-CIO a week and a half before this regulation was issued were filming commercials attacking the proposed rule that they hadn't even seen yet. Do you know anything about this?

Secretary CHAO. The overtime rules were released on—they were announced on April 22nd. They were posted in the Federal Register on April 23rd, and the rules were not released in advance.

Chairman BOEHNER. A number of us over the period between the draft regulation and the final regulation heard from nurses, both registered nurses and licensed practical nurses, about threats to their overtime. Can you explain to the Committee exactly how the final regulations treat registered nurses and licensed practical nurses, and about nurses whose overtime is guaranteed under a collective bargaining agreement?

Secretary CHAO. The new overtime rules actually strengthen overtime for licensed practical nurses. For the very first time, LPNs are specifically listed as being guaranteed overtime.

Registered nurses' status remains unchanged. It is what the current rule says. Furthermore, registered nurses who are receiving overtime under collective bargaining agreements will continue to receive overtime, and if registered nurses are continuing to receive, they will continue to receive overtime. So these rules will be clarified. And, again, they are strengthened for LPNs, and the current rule on registered nurses will still remain the same.

Chairman BOEHNER. Well, Madam Secretary, it's an honor for us to have you here once again before our Committee. You've been here many times. You have a distinguished career in public service. And I can't say it often enough how impressed I am that the Department would do something that needed to be done. Fifty-four years since any substantive changes to this law took place, and the confusion that exists in many workplaces is undeniable, both by employees and employers.

And by bringing clarity to this and by doing your duty to look at the 75,000 comments that were made on the draft regulations, I think what we have before us is a set of regulations that are fair, that are understandable and will guarantee the overtime rights for millions and millions of American works.

With that, I'll yield to Mr. Miller.

Mr. MILLER. Thank you. I'm not sure about your campaign of disinformation. I'm still not clear what you're talking about, but let's go to the specifics.

First of all, in the previous proposed regulations, obviously various organizations across the country, myself included and many Members of the House and the Senate, talked about people who were going to lose their overtime under those regulations. Many of those people now have been explicitly exempted. So obviously there was some ambiguity. There was some concern about that, and those were changed. I don't think that was about misinformation. That was about the facts of people who under those regulations their right to overtime was placed at risk. Those have now been changed. The Secretary enumerated those. So let's just stick with that part of it.

My concern is that under these regulations, there's still significant job classifications, Madam Secretary, that are in that zone between $23,660 and $100,000 that with the new regulations will find themselves certainly open to question as to whether or not they have a right to overtime.

The suggestion has been that registered nurses' rights are absolutely protected. And yet the regulation has changed and the regulation appears to read that as long as they are given—before you start shaking your head, let me finish reading it—as long as they're guarantee the $455 per week that as long as that guarantee is there, then they're not necessarily guaranteed overtime as long as that base salary is guaranteed, and even with the insertion of the hourly wage in the discussion of that base salary.

Journalists, you may have seen a number of commentaries in the paper, the question of whether they're included or not included is a determination of whether or not they're creative or not. If they're just gathering facts and information, if they're doing it on a big fire, they're out working long hours on whatever it is, they may or may not be exempt under that discussion.

Chefs, we say that those chefs that have 4-year degrees are exempt, and we describe the duties that will make the exempt. And yet we know there are hundreds of thousands of chefs in this country that have 2-year degrees that do those exact same—those exact same duties in terms of creativity and the production of food for restaurants.

Working supervisors. A concern has been raised there by a number of employee organizations. The question if you're designated a supervisor, and another time the separation had to be that you had to spend a lot of time supervising and not doing your regular work. You're working in a cannery, you're dumping tomatoes in the cannery, you're in the dumping bay, you have three or four other bays, and you're the supervisor, but all night long in your night shift you're still dumping tomatoes off of the truck, are you exempt or aren't you exempt? You're now a working supervisor. In the old days, because most of your duties was dumping tomatoes and supervising the bay to make sure that they got to the conveyor belt, that they got to the sorting belt, then they got—but now you're a working supervisor.

Assistant retail managers I think provides the mechanism by which many retail employees will find themselves designated in

managerial task. Again, they don't have to perform any great supervisory talents, and they can certainly perform the same work as those that they are supervising. A distinction that used to provide for your right to overtime or not has now been stripped from those regulations.

I think it continues to go on, and you can make this argument even with respect to nursery school teachers under the new definitions because of the changes that have been made there.

Computer employees. As you know, there were exemptions and distinctions were drawn among computer employees for those who were—in the previous regulation, those who achieved a level of proficiency in theoretical and practical applications that really set them apart from other employees. But now we see that really entry level computer employees also is open to question in these regulations, serious question I believe, as to whether or not they in fact will be protected for overtime as they are today because those distinctions are stripped from the regulations as they currently exist.

And so what I think you're seeing here is that these regulations were written with a purpose, and they're written with an understanding of those distinctions that protected people's rights to overtime within those industries, because obviously, as you and the Chairman have stated, these regulations have not changed for a number of years, and so there's a body of law that has been built up. There's interpretations of your wage and hours inspections, and those people have their rights protected. Those now are thrown into jeopardy.

Finally, on another one in the name of modernizing these rules in the new multi-task world, if you did inside sales at a previous time, you were provided overtime. But as I read the definition of employees in financial services generally meet their duty requirements for the administrative exemption if their duties include work such as collecting, analyzing information regarding the customer's income, assets, investments or debts, determining which financial products are best to meet the customer's needs, the financial circumstances, advising the customer regarding the advantages and disadvantages of different financial products, marketing, servicing and promoting the employer's financial products. Individuals who do all those and which you find out now in the modern world if you call a Citicorp or you call a Wells Fargo, you find out that there's one person on the other end of the line that does all of those things.

They help you determine whether your mortgage payments are in line or not, but they also then start asking you if you want additional products, would you like a home equity loan, would you like a credit card, can they help you with a student loan.

But the regulation says in a little however, if the employee whose primary duty is selling financial products, he does not qualify for this administrative exemption. But the multi-task employee who is selling the financial products would be exempt from overtime. So there's a little flag at the end that says make sure you don't designate these people as primarily selling the products.

So there's a whole class of people who had rights to overtime before who now under that definition in the new multi-task world will find out that they in fact do not have the availability of that overtime to them. And the classifications, job classifications, there

are numerous other ones where these situations continue to exist in terms of mobile technicians, in terms of route drivers, all of which are brought into question by these regulations.

I do not think that's misinformation. I think those are very legitimate questions given the language used in the new regulations, the body of law that existed, both administrative law and judicial law that existed prior to the changes to these regulations and those people who are impacted by them.

Thank you, Mr. Chairman.

Secretary CHAO. Is there a question?

Chairman BOEHNER. The Secretary may respond if she chooses. [Laughter.]

Secretary CHAO. Well, I'm very glad, Mr. Miller, that you brought these concerns up. Because once again, the extent of your litany of occupations reflect the tremendous confusion that surrounds the current rule.

Our new rules are built upon the current rule and also current case law. And rather than have people have to do a great deal of research, we have clarified these rules, encompassing once again current rule and case law.

Some of the jobs that you've mentioned didn't exist 40 years ago, which is why it is very important that this rule be updated to reflect the occupations and the positions which currently exist.

Overtime rights are expressly guaranteed, for example, for manual and blue collar workers in what are white collar regulations. Because there has been disinformation going on and a lot of workers have been scared, we went the extra length of including in the final rule expressly overtime protection rights for workers who would not have normally been affected by this rule. We wanted to ensure that they get overtime, which is why in order to fight the misinformation, we made sure that their overtime guarantee rights were explicitly included.

As I've said in my testimony, the new rules do not expand the category of workers who do not receive overtime. They are as equal or more protective than current law. And if I can, I would like to ask Tammy McCutchen, Administrator of Wage and Hour, to address your particular occupations.

Ms. MCCUTCHEN. My notes, I think you mentioned eight—nine occupations, and I'd like to start with the last ones first.

First, on technicians, in particular engineering technicians. In the preamble we cited to and agreed with the comments that were filed by the engineering technicians who work at Boeing, and we agreed with them in our preamble that they are entitled to overtime pay.

On financial services, the section on financial services reflects the current sections at 201(a)(2), 205(c)(5), 205(d) and also adopts the current case law, Reich v. John Alden in '97 in the First Circuit, Hogan v. Allstate from the 11th Circuit in 2004, and Wilson v. Allstate decided by the Middle District of Georgia in 2002.

What we did was we took that current case law, we read what it said and we adopted it and put it in the regulations so that employees and employers don't have to hire a lawyer to go find the case law that's not reflected in the current regulations, because, as

the Secretary said, 50 years of Federal court case law is not reflected in the current litigation.

On computer employees, what we did on the computer employees is adopt virtually word for word the 1990 and 1996 statutory amendments passed by Congress regarding computer employees. It also reflects the current sections at 205(c)(7) and 207(c)(7).

On nursery school teachers, this is one I'm particularly puzzled about, and I want to read to you the current regulations at 541.301(g)(2), which regards the exemption for teachers. And what section says is that teaching—exempt teachers include, quote, "teachers of kindergarten or nursery school pupils." That is in current Section 541.301(g)(2). And we took the language from the exiting regulation and repeated it in the final. So since it's the exact same words as the current regulation, it cannot be a change in the law or less protective than the current regulations.

On assistant managers and working supervisors, we adopted a series of case law, Burger King and Dairy Queen cases. There are about six Federal cases cited in our preamble which discusses when an assistant manager is exempt and when he is not exempt. And in particular, we retained in the final regulation language that specifically states—and this is from—excuse me. This is from existing—it's in the final regulation at 106(c), which specifically states that working supervisors and relief supervisors are entitled to overtime pay. We used two examples: a relief supervisor working on a production line, and an electrician who is directing the work at a constructionsite.

On chefs, the rule that we adopted says that only chefs who have advanced 4-year college degrees in the culinary arts can be denied overtime pay, and we clarified that ordinary cooks and any other type of cook or chef who does not have a 4-year post-high school degree cannot be denied overtime pay.

On journalists, our preamble discusses a series of about six cases that have been decided over the last 10 years defining who—which journalists are entitled to overtime pay and which are exempt. And again, what we did in our final rule is discuss the cases in the preamble, read the cases, determine what the Federal courts said and write that into the regulation.

Finally, the section that you referred to on nurses about minimum guarantee plus extra, that section has been in our field operations handbook for decades. And what we did is we took a section that has been a long-standing position of the Department of Labor available to employees and employers only by filing a FOIA request and getting a copy of the field operations handbook, and we put that in the final regulation instead so that employers and employees can have easy access to a policy that's been in place at the Department for years.

I think I covered it all.

Mr. MILLER. I appreciate that. And that's your story, and stick to it. But again, I think if you read the language on the primary duties of chefs, you will see that you create a definition there of people who don't have a 4-year degree who carry out those duties. And the same is true on financial services.

Chairman BOEHNER. The gentleman's time has expired. The Chair recognizes the gentleman from North Carolina, Mr. Ballenger.

Mr. BALLENGER. As a member of this Committee for 20 years, and I'd like to say right to start with that I've employed people in my business back home since 1948, 25 at that time and 300 now, and if they think the rules are so simple right now, they've got to have their heads examined because supervisors have always been exempt as long as somebody can make up a story about what a supervisor is. And you all have firmly come out with an answer of what supervisor responsibilities are.

But I'd like to—he mentioned in his opening thing about computers. And as I remember, we were here I think, the senior member and myself were both here at the time that we passed a regulation.

Let me just ask the question. The regulations include slightly different exemption rules for computer employees, and those rules were mandated by us here in Congress back in 1990. Can you tell us briefly what those rules are and how the final regulation before us today affects computer employees?

Secretary CHAO. I'd be more than glad to. As I mentioned, on the issue of computer technicians, we basically followed the will of Congress. And so there was a legislative act in 1996, and we basically incorporated what that legislative rule, or what that legislation basically said. If I can, I'll ask Tammy to cite it in greater detail.

Ms. MCCUTCHEN. The regulation that was passed in 1996 exempted only certain high level computer employees who were involved in design and programming. And our rule adopts that almost word for word.

One of the things that was in the regulations before Congress acted and which I have heard people talk about incorrectly is that the Congressional action did not include a requirement that computer employees who are exempt need to exercise discretion and independent judgment. Our regulation prior to 1996 had included that additional requirement, but the Congress took it out in 1996, and therefore we had to take it out, we believe, in order to follow the will of Congress, that additional requirement.

Everything in the computer exemption is the same as the Congressional action in 1996.

Mr. BALLENGER. Thank you, ma'am. And, Madam Secretary, during the debate on the proposed regulation, we heard a lot of numbers thrown around, in particular a study done by an organization called the Employee Policy Institute, or EPI, which garnered a lot of media attention. And I think it's important to note for the record that while EPI may call itself an objective think tank, its board of directors reads like a Who's Who of organized labor, including as chairman of the EPI board the president of AFSCME, and as a board member, the secretary and treasurer of the AFL-CIO and current presidents in half a dozen of the country's largest unions.

Now these may be good and honorable people, but I wouldn't exactly call them objective or nonpartisan. And the fact that all of these unions and more are listed prominently as financial donors and supporters of the EPI gives me some pause in accepting EPI's analysis as fair and unbiased.

But putting that aside, Madam Secretary, and addressing the EPI study on its merits, did the Department examine EPI's report and the conclusions reached in its study? Which is—what is the Department's response to EPI's claims?

Secretary CHAO. I think you also did not mention that they're housed at the AFL-CIO as well. Nevertheless, the claims are false. Their assertions demonstrate that they do not understand the current rule. And I would like again Tammy, who has analyzed this study, to elaborate a bit more on that.

Ms. MCCUTCHEN. There's actually a very thorough response to the EPI study that is included in the economic report that was published with the final rule, and it's available on the Department's web page.

In general, their report included broad classifications of employees who are entitled to overtime and will not see any change under this rule. For example, they included in their figures every cook in America. And I think that we have clarified in the final rule that ordinary cooks are not exempt.

They also included a large number of employees who work only part time and thus by definition do not—you know, work 20 or 30 hours a week and never get close to 40 hours a week. And so these types of mistakes that they've made about the current law continue to add up and makes their number far larger than it could possibly be when you look at the current case law.

A good example is the computer employee example we discussed. How can employees be losing overtime when all we've done is adopted the will of Congress in the 1996 enactment?

Mr. BALLENGER. Well, I'd like to thank you, Madam Secretary. Having been on this Committee for almost 20 years, attempting to correct this law is a wonderful effort on your part. And the fact is, it's somewhat considered like we used to in politics used to talk about Social Security, touching the third rail and being electrocuted by the effort. I think you're doing an excellent job, and I'd just like to thank you profusely as an employer who has been trying for 40 years to figure out how we can work out overtime, how you do figure overtime, how you don't figure overtime, and it's very difficult. It really is. I mean, it's so nebulous that the description that we have a law that everybody can understand is making a lot of trial lawyers very wealthy in efforts to prove that point.

Secretary CHAO. Thank you. Our intent as always is to strengthen and guarantee overtime protection to millions more Americans.

Mr. BALLENGER. Thank you.

Secretary CHAO. Thank you.

Chairman BOEHNER. Mr. Kildee.

Mr. KILDEE. Thank you, Mr. Chairman, Madam Secretary. I go home every weekend and generally after mass I go to a few union halls and talk to union people and they certainly were very alarmed when your first proposed regulations and had a $60,000 figure, and then it was changed—well, proposed, and then changed to $100,000. But they're still very skeptical.

What assurances can I give them that the $100,000 figure will not be unilaterally rolled back, since this is within the purview of the executive branch of government, unilaterally rolled back to

$60,000 or some lesser figure, or that the classifications that you have moved around a bit will not be changed?

Secretary CHAO. First of all, union members covered by collective bargaining agreements are not impacted at all by this rule. Because of the misinformation that was being circulated, we went out of our way to put in the final rule express overtime guarantees for union members who have overtime protection under the collective bargaining agreement. So that's the first point, if I could.

Secondly, we have gone beyond what was expected, because we wanted to combat some of this misinformation, we expressly put overtime guarantees for union members who are under collective bargaining agreements. Because union members under collective bargaining agreements will abide by the collective bargaining agreement, and when they get overtime, that will of course remain the same.

The salary level. This is a regulation. Once it goes final, it cannot be unilaterally rolled back. It's not like an executive order. So the $100,000, first of all—I want to clarify several things, but the $100,000 salary threshold, that will be there because it's part of the regulation. It will not be rolled back.

And let me also clarify, this $100,000 does not apply to hourly workers. It does not apply to blue collar workers. It's only for white collar workers who are in supervisory or managerial positions.

Mr. KILDEE. First of all, I want to make it clear that labor unions, their interest goes beyond their own membership. They are concerned beyond just their own members.

But let me ask you this question also. New Section 541(4) says that nothing in the regulation relieves employers from their contractual obligations under collective bargaining agreements. If the union contracts simply refers to applicable law for overtime eligibility, a union worker will be directly and immediately affected by these regulations when they take effect. Isn't that true?

Secretary CHAO. I'm sorry. I didn't hear the question. If you could repeat that, please.

Mr. KILDEE. If union contracts simply refers to applicable law for overtime eligibility, a union worker will be directly and immediately affected by the applicable law then? In other words, if the—

Secretary CHAO. No. If a worker is under a collective bargaining agreement, they're covered by the collective bargaining agreement, and it is not impacted by these white collar regulations.

Mr. KILDEE. But if the contract refers only to the Wage and Hour Act, it says the overtime shall be in accordance with the Wage and Hour Act, then they would be affected by your changes in the Wage and Hour Act.

Secretary CHAO. Well, I don't think so. And I will give you another example. Just because—

Mr. KILDEE. Well, they would be.

Secretary CHAO. A collective bargaining agreement when it expires, for example, wages don't go back to minimum wage. They're $5.15. So there's no impact for union members under collective bargaining agreements.

Mr. KILDEE. All right.

Secretary CHAO. And if I can ask Tammy perhaps she can clarify that a little bit further.

Mr. KILDEE. Let me say, if the contract were to say that the overtime would be in conformity with the Wage and Hour Act, then that would affect the results of the contract.

Now, if they say they have to get their own language in rather than the Wage and Hour Act, that puts more things on the negotiating table and creates a greater onus for the bargaining unit then if that's part of the collective bargaining; whereas if they could refer to a reasonable Wage and Hour Act, they could feel better protected.

But if they have to go beyond the Wage and Hour Act because they feel it no longer is protective enough, then that becomes part of the negotiations, which puts a greater onus. There's only so much you can put on that table for negotiating.

Secretary CHAO. As I mentioned, union members under collective bargaining agreements are not impacted. But let me ask Tammy McCutchen perhaps to clarify it even further.

Ms. MCCUTCHEN. Thank you, Madam Secretary. First of all, a union member, if you're paid by the hour you're entitled to overtime. It doesn't matter what's in—that's what these rules say. And so if you're a union member who is paid by the hour, you're entitled to overtime.

If you perform blue collar or manual labor, 541.3 clearly states you're entitled to overtime. So these rules strengthen protections for union workers no matter what's in their collective bargaining agreements.

Mr. KILDEE. You still haven't answered my question. If—

Mr. HOEKSTRA. [presiding] The gentleman's time has expired. We're going to keep moving. I think the Secretary has limited time, and we obviously have a lot of member interest, so we're going to try to stick to the clock a little closer. Mr. McKeon?

Mr. MCKEON. Thank you, Mr. Chairman. Madam Secretary, I too want to thank you and your staff for the courage and the leadership that you're showing in trying to protect the workforce of America.

In the public debate on the proposed rules issued last March, we all heard significant concern that the proposed regulations would have taken overtime pay away from policemen, firefighters, EMTs and other first responders. In that light, I was especially pleased to see that the final rule issued by the Department was endorsed by the Fraternal Order of Police, who noted, and I quote, "These final regulations show that this Administration and the Department of Labor are responsive to the concerns of rank and file first responders." End quote.

I would first ask that the statement of the Fraternal Order of Police be inserted in the record of today's hearing. I would also ask that the record include a letter from the President of the Fraternal Order of Police to the Committee setting forth the FOP's views on these final regulations.

Mr. HOEKSTRA. Without objection, so ordered.

[The provided material follows:]

Fraternal Order of Police, Letter and Press Release, "Final DOL Regulations Protect and Expand Overtime for America's First Responders", April 20, 2004

April 20, 2004

Final DOL Regulations Protect and Expand Overtime for America's First Responders

F.O.P.'s Efforts Crucial to Protection of Overtime for Public Safety

Today National President Chuck Canterbury hailed the release of the Department of Labor's (DOL) final regulations on the exemptions from overtime under the Fair Labor Standards Act (FLSA) as an "unprecedented victory" for America's first responders. The regulations, which were first proposed in March 2003, highlight the F.O.P.'s singular and significant contribution to protecting the future of overtime compensation for State and local police officers, firefighters and EMTs.

"The Fraternal Order of Police is extremely grateful for the work of Secretary of Labor Elaine L. Chao and Wage & Hour Administrator Tammy McCutchen to take into consideration and incorporate the views of the F.O.P. in developing their final regulations," Canterbury said. "Since the beginning, the F.O.P. was alone in its confidence in this Administration's commitment to our nation's first responders, and their intention to resolve this issue to the benefit of these vital public servants."

On the preamble to the final regulations, the Department of Labor acknowledged that it was responding specifically to the views of the Fraternal Order of Police "about the impact of the proposed regulations on police officers, firefighters, paramedics, emergency medical technicians (EMTs) and other first responders." DOL went on to note that the current regulations do not explicitly address the exempt status of these employees, and "this silence...has resulted in significant federal court litigation to determine whether such employees meet the requirements for exemption."

The final Part 541 regulations make several important changes for public safety employees. For the first time ever, the regulations clarify that neither the regulations contained in 29 CFR nor the Section 13(a)(1) exemptions apply to police officers, firefighters, EMTs and other first responders who perform public safety work. The regulations go on to clarify why these employees, regardless of their rank or pay level, cannot be classified as executive, administrative or professional employees, and thus be exempted from receiving overtime pay. In addition, the Department acknowledges that the right to overtime compensation may be extended to some public safety employees who are currently classified as exempt because of changes to the regulations.

"Where others were content to ask the Department to say in its final rule only that 'no expansion of law enforcement exemptions is included in or intended by the new rules,' the Fraternal Order of Police said 'today's public safety work is more unique than ever before, and the final regulations must account for the challenges faced by our nation's first responders in the post-9/11 environment,'" Canterbury said. "The final regulations achieve that goal."

On 31 March 2003, the Department of Labor published a Notice of Proposed Rulemaking in the Federal Register to revise and update the exemptions from overtime under the FLSA for executive, administrative, and professional employees; also known as the Part 541 or "white collar" exemptions. Immediately, the clarion call spread across the nation that the Department was trying to take away the right to overtime pay for hundreds of thousands of police officers, firefighters and EMTs.

During the public comment period, the F.O.P. worked with the International Association of Firefighters (AFL-CIO) to seek clarification of the Department's intent with respect to the overtime eligibility of public safety employees--an issue which was not explicitly addressed in the proposed rule. In late June, the F.O.P. submitted its formal written comments to the Department. It was the first organization to weigh in on behalf of America's law enforcement community regarding the proposed changes, and advised DOL about the potential impact of the proposal on public safety employees.

"We were never concerned that DOL was trying to destroy the ability of police officers and others to earn overtime compensation, despite the rhetoric employed by other groups and some legislators to vilify and demonize Secretary Chao," Canterbury said. "Rather, we believed it was important to point out that the regulations as proposed did not sufficiently recognize the increased workloads and hazards faced by public safety employees since the heinous terrorist attacks of September 11, 2001, and to use that as the basis for our efforts."

Canterbury explained that while the F.O.P. faced strident and often vitriolic opposition from other organizations who viewed this as a fight to maintain the status quo, the F.O.P. never considered this to be a viable solution because of the number of public safety officers currently classified as exempt under the existing regulations. Instead, the F.O.P. viewed the proposal as a unique opportunity to correct the application of the overtime provisions of the FLSA to public safety officers.

"These final regulations show that this Administration and this Department of Labor are responsive to the concerns of rank and file first responders," Canterbury said. "There has been too much posturing and rumor mongering on this issue by the leadership of other police organizations, who have seemed intent on sacrificing their members' paychecks on the altar of partisan politics. I hope that those who have been so employed over the course of the past year can see the folly of their ways, and that we can all recognize this for what it truly is: an unprecedented victory for police officers and their families."

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April 27, 2004

Via Facsimile (202-547-8190) and First Class Mail

Mr. Chuck Canterbury
National President
Fraternal Order of Police
309 Massachusetts Avenue, NE
Washington, DC 20002

Dear Mr. Canterbury:

On April 23, 2004, the Department of Labor (DOL) published in the *Federal Register* their final regulations defining and delimiting exemptions from overtime pay requirements under the Fair Labor Standards Act for executive, administrative, and professional employees. As you may know, the Committee on Education and the Workforce is scheduled to hear testimony on this rulemaking at a hearing on April 28, 2004.

Since DOL's proposed regulations were first published in March 2003, much has been said about public safety officers losing their rights to overtime pay. In the final regulatory text, however, DOL has incorporated an exclusion for public safety employees, one which appears to protect their right to overtime and may expand overtime eligibility to others who are at present denied this benefit. This appears to be a major victory for police officers, firefighters, paramedics, and other first responders and appears to alleviate the concern expressed by some that DOL sought to weaken overtime protections for public safety employees.

In light of these facts, I am writing to request your organization's views regarding the impact of these final regulations on the continued ability of police officers and other public safety employees to receive overtime compensation. Given that the Committee is scheduled to examine these regulations at our hearing tomorrow, the favor of your immediate reply would be appreciated.

I thank you in advance for your assistance with this request. You may fax your response to the attention of Jim Paretti of the Committee's staff at 202-225-3899 (fax). Should you have any questions, Mr. Paretti may be reached at 202-225-7101.

Sincerely yours,

JOHN BOEHNER
CHAIRMAN

GRAND LODGE
FRATERNAL ORDER OF POLICE®
309 Massachusetts Ave., N. E.
Washington, DC 20002
Phone 202-547-8189 • FAX 202-547-8190

CHUCK CANTERBURY
NATIONAL PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

28 April 2004

The Honorable John Boehner
Chairman, Committee on Education & the Workforce
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I am writing in response to your letter regarding the F.O.P.'s position on the Department of Labor's (DOL) final regulations governing the exemptions from overtime for executive, administrative, and professional employees—also known as the Part 541 regulations. We appreciate this opportunity to express our views on the final rule.

In essence, the final Part 541 regulations provide a clear and historic victory for America's police officers, fire fighters and EMTs. Throughout the history of the FLSA, there has never been any clear guidance to State and local governments concerning the overtime rights of public safety employees under Section 13(a)(1) of the Act or under the Part 541 regulations. As DOL noted in the preamble to the final rule, "this silence in the current regulations has resulted in significant federal court litigation to determine whether such employees meet the requirements for exemption as executive, administrative, or professional employees." Now, for the first time, the Department has guaranteed that overtime compensation will be available to an expanded majority of those public safety employees whose continued performance of overtime work is vital to the security of our nation.

Specifically, Section 541.3(b) of the final rule provides that neither the exemptions contained in the Act nor the regulations apply to police officers, firefighters, EMTs and others—regardless of their rank or pay level—who perform public safety work. Despite the continued mischaracterization of some, the final rule does not require that these employees have a "primary duty" of performing work such as fighting fires, rescuing accident victims, or preventing or detecting crime; nor is the "public safety exclusion" limited to only rank-and-file officers. The regulations go on to clarify why these employees cannot be classified as executive, administrative or professional employees, and thus be exempted from receiving overtime pay.

In addition, DOL acknowledges that the right to overtime compensation may be *extended* to some public safety employees who are currently classified as exempt because of other changes to the regulations. One group in particular that will likely benefit from the final regulations are the thousands of police sergeants who serve in cities across the nation. In the preamble, the Department addressed their eligibility by noting that "police sergeants, for example, are entitled to overtime pay even if they direct the work of other police officers because their primary duty is not management or directly related to management...; neither do they work in a field of science or learning where a specialized academic degree is a standard prerequisite for employment."

The F.O.P. is extremely grateful for the work of Secretary of Labor Elaine L. Chao and Wage & Hour Administrator Tammy McCutchen to take into consideration and incorporate the views of our organization in developing their final regulations. Throughout this process, it has been the Secretary's "stated intention to strengthen and expand overtime for America's police, fire fighters and other first responders." The F.O.P. was alone in its confidence in this Administration's commitment to our nation's first responders, and their intention to resolve this issue to the benefit of these vital public servants. Likewise, we are also confident that this Department of Labor will vigorously enforce the overtime rights of public safety employees when the regulations take effect later this year, particularly given the creation of an enforcement task force comprised of experienced Wage & Hour officials to ensure that employers live up to their new obligations under the final rule.

On behalf of the more than 312,000 members of the Fraternal Order of Police, thank you again for soliciting our views on the Department of Labor's final overtime regulations. Please do not hesitate to contact me, or Executive Director Jim Pasco, if we can provide you with any additional information.

Sincerely,

Chuck Canterbury
National President

Mr. MCKEON. Thank you, Mr. Chairman. That done, Madam Secretary, perhaps you could explain to us exactly how the final rule treats policemen, firefighters, EMTs and other first responders.

Secretary CHAO. The final rule strengthens overtime protection for these workers. And the Fraternal Order of Police supported the rule because it provides clearer, stronger overtime protection than ever before. As I mentioned, the final rule includes—expressly states the overtime protection for police, firefighters, first responders and other public health safety workers as well. And maybe, Tammy, you can elaborate on that as well.

Ms. MCCUTCHEN. We inserted a brand new section, which appears at 541.3(b), and what that does is it first of all states that, you know, police officers and firefighters who are doing the day by day work of the public agency, who are investigating crimes and who are fighting fires, who are interviewing witnesses and collecting evidence are entitled to overtime pay.

And in fact, we go further. In final regulation 541.3(b)(2), (3) and (4), we set forth why police officers generally do not qualify as exempt executive, administrative and professional employees.

Secretary CHAO. Thereby strengthening their overtime.

Mr. MCKEON. Thank you, Madam Secretary. I think in your testimony you explained clearly that any worker, no matter what his job or her job or job title, who makes $23,660 or less is automatically entitled to overtime. And I understand that there's a slightly different test for salaried employees who make more than $100,000 a year. It seems to me that there are a lot of workers right in the middle of that range, people making between $23,660 and $100,000. What is the Department's estimate of the impact of these final regulations on these workers?

Secretary CHAO. These final rules will help to strengthen overtime for these workers as well, because the erosion in our rule—the erosion in overtime protection comes about through the ambiguity of our rules.

The best way we have to protect workers is to ensure that these outdated rules are brought up to date, that they no longer include positions which no longer exist, and that they fit a modern workplace. And so for the Department's estimates of these final impacts, again, we're going to get about—we're going to increase overtime protection for about 6.7 million workers because of the increase in salary thresholds. And then of the workers above that, we expect, again, strengthened overtime protection as well.

Tammy, anything?

[No response.]

Mr. MCKEON. Thank you very much.

Secretary CHAO. Thank you.

Mr. HOEKSTRA. Mr. Owens?

Mr. OWENS. Thank you, Mr. Chairman. I'd like unanimous consent to submit a statement for the record.

Mr. HOEKSTRA. Without objection. Which statement is that? Oh, your statement?

Mr. OWENS. To submit a statement in addition to what I'm going to say orally.

Mr. HOEKSTRA. Without objection, so ordered.

[The prepared statement of Mr. Owens follows:]

Statement of Hon. Major R. Owens, a Representative in Congress from the State of New York

This morning, the full Education and the Workforce Committee is holding a hearing on a critical issue for millions of hard-working Americans: namely, the content of the Labor Department's final rule on overtime pay. For far too many of America's middle class workers, overtime pay can mean the difference between paying the electricity bill and failing to do so. It can mean the difference between meeting the monthly mortgage payment and having to default on it. Likewise, it can mean the difference between paying for an essential doctor's appointment and having to skip it. Or, it can mean the difference between covering school expenses for one's daughter or son and having to tell them they can't take that school trip. If one's children are older it can mean the difference between covering the community college tuition bill and being forced to tell them they have to sit out a semester. To American workers and American families, these bread and butter issues mean a great deal. So, it behooves all of us here today to be crystal clear and absolutely forthright on all this. And according to the standard of forthrightness, the Labor Department's final rule comes up far too short. The final rule continues to deny countless American workers the legitimate right to overtime pay – a right established under the Fair Labor Standards Act more than six decades ago.

Let's review the Bush Administration's track record on overtime pay. In issuing the proposed regulations eight months ago, the Department of Labor set up more than a credibility gap – it was a credibility chasm. The proposed rule would have made egregious cuts in overtime pay for such critical front-line responders as firefighters, police officers, veterans, nurses and others. Secretary Chao's written testimony today maintains that all these proposed pay cuts have been reversed. Yet cleverly constructed loopholes throughout the 536 pages of the final rule may mean that some of these workers – police sergeants and registered nurses in particular – may fall under the overtime budget ax.

The final rule also jeopardizes entirely new categories of low wage and middle class workers. The nursery school teacher exemption provides a stunning example of this. Embedded in the final rule is the assertion that "Exempt teachers include, but are not limited to: … teachers of kindergarten or nursery school pupils…" (Section 541.303 (b)). From my district in Brooklyn to Berkeley, California there are thousands upon thousands of nursery school teachers – many earning less than $23,660 a year – who will lose their rights to overtime pay. Let me go down the list of workers in a typical YMCA Headstart program. There are 2 teaching assistants, one of whom may have a college degree. Last year, these assistants earned $15,000 and $20,000 a year, respectively. Then there may be 2 teachers, one with a bachelor's degree and one with a master's degree. They earn about $21,000 and $32,000 a year, respectively. According to one YMCA Headstart program director, under current law and IRS regulations all these workers are entitled to and receive overtime pay. Under current law, in fact, the majority of nursery school, Headstart and pre-school teachers qualify for and receive overtime pay. Yet the final rule before us puts these workers on the chopping block. And this comes after the Bush White House pushed very hard to emphasize reading instruction in all early childhood programs, including Headstart. Will Headstart workers and other pre-school teachers have to pay the price for enhanced early childhood education by forgoing any hard-earned overtime pay?

Now, let us turn to blue collar workers. With respect to them, the Secretary states on the eighth page of her written testimony that: "The Department never had any intention of taking overtime rights away from such employees and the final rule makes this clear beyond a shadow of a doubt." Furthermore, the written testimony underscores that the final rule ensures that:

> "… manual laborers or other 'blue-collar" workers are not exempt under the regulations and are entitled to overtime pay no matter how highly paid they might be. This includes… non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers." (Section 541.3(a))

But at what point does a blue collar worker do enough supervisory work to be categorized as an "executive employee" who is automatically exempted from overtime? What about a blue collar worker with administrative tasks? To what degree might they be considered an "administrative employee" and thus lose any legitimate rights to overtime pay?

Let me close with what might be termed the "real deal" here. The credibility gap continues. On the first page of her testimony, Secretary Chao asserts that "Under the new regulations, workers earning less than $23,660 per year – or $455 per week – are guaranteed overtime protection." But this will not be the case for thousands of nursery school teachers. The Department of Labor says the final rule is focused on helping low-wage workers. But the reality is that the Labor Department could have easily ensured such protection by simply adjusting the minimum salary threshold for inflation. Such an inflation adjustment – last made in 1975 – would reach the mark of $31,720 today. Instead, Secretary Chao has set the mark far lower, at $23,660. Also, what will happen to some of the chefs, outside sales workers, computer employees, financial services workers and others who fall under the final rule's overtime budget ax? Last but not least, Secretary Chao insists on page 12 of the written testimony that "The final rule will not affect union workers covered by collective bargaining agreements. But in reality, the rule sets forth a new national norm that workers will have to deal with in all future negotiations with management. Make no mistake about it. American workers will lose overtime rights and pay a very heavy price indeed for the significant loopholes contained in the final rule's 536 pages.

Mr. OWENS. I also would like to make a correction of the Secretary's testimony. There are 2.4 million cooks employed in America. You stated that the EPI study said all 2.4 million would be exempt. EPI did not say that. EPI said about 400,000 would be exempt, and I think the record ought to be corrected in that respect.

Secretary CHAO. I didn't criticize EPI on that point.

Mr. OWENS. The question of compensatory time versus cash for overtime has been on the agenda for the last four or 5 years. As the Ranking Democrat on the Workforce Protection Committee, I've had to deal with that repeatedly. You did not deal with that in these regulations.

Secretary CHAO. Right.

Mr. OWENS. Compensatory time versus cash. Can we assume that's off the table and that's no longer going to be a matter of concern to the Labor Department, that we won't have to deal with that? These regulations will make it clear that we're talking about cash now and forever?

Secretary CHAO. This regulation has nothing to do with comp time.

Mr. OWENS. Yeah, but you're rewriting the rules. So since you left that out, we can assume that—

Secretary CHAO. No. These rules have never had anything to do with the comp time.

Mr. OWENS. Well, an amendment, we proposed to amend the rules.

Secretary CHAO. No.

Mr. OWENS. We proposed to amend the rules to make compensatory time—

Secretary CHAO. These are two separate issues. We never—we never anticipated including—

Mr. OWENS. What law would we be amending if we dealt with compensatory time versus cash for overtime? Overtime is only one law.

Ms. MCCUTCHEN. In order for there to be comp time, it has to be a statutory amendment. It is the Fair Labor Standards Act, and that talks about when you're entitled—

Mr. OWENS. It has to be an amendment, right, to the Wage and Hour Act?

Secretary CHAO. But it is not part 541 of this rule. It's something completely different.

Ms. MCCUTCHEN. It has not been amended, and the Department has never suggested that it be amended. Comp time has to do—it only applies to employees who are entitled to overtime. These are about white collar workers, and so it's a totally separate issue. We don't have any authority at the Department of Labor to make the statutory changes that would be necessary for anything like comp time.

Mr. OWENS. I'm talking about broader policy question. The Secretary is involved with policymaking.

Chairman BOEHNER. [Presiding] If the gentleman will yield. No employee in the private sector is entitled to comp time in lieu of overtime pay. Only Federal workers, state workers and local government employees are entitled to comp time.

Mr. OWENS. Yes. Let's—and I was asking, Mr. Chairman—

Chairman BOEHNER. And that's under the law, not under regulations. It's under the law.

Mr. OWENS. Mr. Chairman, do we have your word that this is off the table and we won't have any discussion of it in the future?

Chairman BOEHNER. Well, there's going to be a lot of discussion about it, because if it's good enough for Federal workers, state workers and local government workers, it ought to be good enough for our constituents who'd like to have compensatory time off in lieu of overtime pay.

Mr. OWENS. Thank you. I have one last point I want to clarify. The $100,000 ceiling. Do we have a ceiling right now of any kind?

Secretary CHAO. Yes. It's about $13,000.

Mr. OWENS. That's the ceiling now?

Secretary CHAO. Yes. That's why it needs to be—this rule needs to be updated. The ceiling is currently $13,000 for highly compensated executives. This is another example why this rule needs to be updated.

Mr. OWENS. A hundred thousand dollar ceiling means that that's a little less than $53 an hour if you are working an hourly rate. If an electrician working by himself, and there may be other people on the job, but he basically is not supervising anybody, and he works in a situation where the work is seasonal or there are gaps between one job and another so that during the course of the year he makes only $50,000 or $60,000, is his hourly pay such that he will not be eligible for overtime because he makes $53 an hour, $60 an hour?

Secretary CHAO. An electrician is not what's called under the terms a white collar worker. So, therefore, he would not be impacted at all by that $100,000 rule anyway. The $100,000—

Mr. OWENS. Section 541.601(a)(3) says that seasonal and project workers who are paid pro rata at a rate that would push them higher than the $100,000 ceiling, even though they won't reach that mark because they only work eight or 9 months, will lose their rights to overtime pay.

Maybe you can get that clarified and let us know in writing what—

Secretary CHAO. I think it's pretty clear. The $100,000 is not definitive. It is only an upper salary threshold. It does not apply to blue collar workers. It does not apply to hourly workers. And it possibly may apply to a worker who is making $100,000 with job responsibilities that are more of a managerial or supervisory nature.

Chairman BOEHNER. The gentleman's time has expired. The Chair recognizes the gentleman from Texas, the Chairman of the Employee-Employer Relations Subcommittee, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. Madam Secretary, you've already stated that you're authorized to make these changes, and I think the law does say that by regulation as the Secretary of Labor you can change these rules, and you've already stated that Republicans and Democrats alike over the years have attempted to make these changes.

And one of the changes that you made in your proposal was removing the phrase "training in the armed forces." That's so that anybody with military background, like mine, can obtain overtime pay under your regulations.

As a matter of fact, Mr. Chairman, I've got three letters here from the American Legion, the Veterans of Foreign Wars, and the Disabled American Veterans all supporting this regulation. I would ask permission to put these into the record.

Chairman BOEHNER. Without objection, so ordered.

[The provided material follows:]

The American Legion, Letter to Secretary Chao, April 26, 2004

★ WASHINGTON OFFICE ★ 1608 "K" STREET, N.W. ★ WASHINGTON, D.C. 20008 ★
(202) 263-2986 ★

April 26, 2004

Honorable Elaine L. Chao, Secretary
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Madam Secretary:

I am writing in support of the recently released regulatory changes to the Fair Labor Standards Act (FLSA). The American Legion has a long history of advocating in support of veterans employment and training entitlements and we are pleased with the Department of Labor's (DoL) Part 541 final regulations that seek to clarify overtime pay eligibility rules.

Recent assertions that the proposed regulatory changes target veterans who rely on overtime pay caused undue concern for those proud veterans who have successfully transitioned into the civilian workforce. The removal of language referencing "training in the armed forces" will ensure that no worker will be unjustly penalized for their veteran status as a result of these regulatory changes.

At a time in our history when America's servicemembers are answering the nation's call to arms in more than 130 countries worldwide, this country must ensure that all military and veterans entitlements are preserved rather than stripped away. The American Legion supports DoL's efforts to clarify eligibility for overtime pay and we applaud you, Madame Secretary, for ensuring that the employment rights of America's veterans are protected.

Sincerely,

John A. Brieden, III

JOHN A. BRIEDEN, III
National Commander

Disabled American Veterans, Letter to Secretary Chao, April 26, 2004

April 26, 2004

Honorable Elaine L. Chao
Secretary of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Secretary Chao:

On behalf of the 1.2 million members of the Disabled American Veterans, I would like to express our gratitude for keeping us, and other veterans' service organizations, informed throughout the revision of rules governing overtime eligibility for workers under the Fair Labor Standards Act.

We also commend your efforts to protect veterans by ensuring that a worker's status as a veteran cannot be used as a basis for exemption from overtime pay.

I look forward to working with you on future efforts to assist our nation's disabled veterans.

Sincerely,

JOSEPH A. VIOLANTE
National Legislative Director

JAV:bel

NATIONAL SERVICE AND LEGISLATIVE HEADQUARTERS * 807 MAINE AVENUE, S.W. * WASHINGTON, D.C. 20024-2410 * PHONE (202) 554-3501 * FAX (202) 554-3581

Veterans of Foreign Wars of the United States, Letter to Secretary Chao, April 22, 2004

VETERANS OF FOREIGN WARS

OF THE UNITED STATES

April 22, 2004

Honorable Elaine L. Chao
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Dear Secretary Chao:

The Veterans of Foreign Wars of the United States appreciates your soliciting our comments and recommendations on the revision of the Fair Labor Standards Act to strengthen and clarify the overtime protection provisions; particularly the provision addressing veterans and the training they received while serving in the armed forces.

Much confusion and erroneous misinformation was disseminated with respect to how the proposed regulations could adversely affect veterans. You and the staff of the Veterans Employment and Training Service and the Wage and Hour Division's willingness to engage the VFW and other Veterans Service Organizations in constructive dialogue resulted in the removal of language pertaining to "training in the armed forces," thus ensuring veterans will not be denied overtime as a result of such training.

Again, the VFW appreciates your recognition of those who serve our nation in peace and war.

Sincerely,

James Magill

JAMES N. MAGILL, Director
National Employment Service

cc: Frederico Juarbe, Assistant Secretary
Veterans Employment & Training Service

VFW MEMORIAL BUILDING • 200 MARYLAND AVENUE, N.E. • WASHINGTON, D.C. 20002-5799
AREA CODE 202-543-2239 • FAX 202-543-6719

Mr. JOHNSON. Thank you, sir. These are prominent veterans groups, and each one is thanking the Department for its work on the final rule, and each is appalled at the assertions that the proposed changes target veterans.

Having fought in two wars myself, I was particularly angered over the undue anxiety that was placed on those proud veterans who have successfully transitioned into the civilian workforce. It's obvious to me that certain opponents of these regulations had scripted their opposition before even seeing the final regulation, as you indicated, Mr. Chairman. And I would ask that these letters be considered.

And, Madam Secretary, do you care to explain what changes or clarifications were made with regards to overtime eligibility for our veterans?

Secretary CHAO. I do. And let me first of all say that the statute does say that the Secretary has the responsibility from time to time to define and delimit these overtime regulations.

In fact, in the preamble it says allowing more time to pass without updating the regulations contravenes the Department's statutory duty to define and delimit the Sections 13(a)(1) from time to time.

So in fact, we have a responsibility to keep these regulations up to date.

Secondly, on the point of veterans—

Mr. JOHNSON. Well, you're doing a good job of that too, let me say.

Secretary CHAO. Thank you. Second, on the point of veterans, I was particularly concerned of the misinformation that's been spread about the veterans' status. So in the final rule, as I've mentioned, we've listened. We wanted to make sure that we got everything right. We went the extra step of making sure that this particular issue is addressed as well. And if I can ask Tammy to elaborate.

Ms. MCCUTCHEN. The concern about veterans was raised under the professional exemption with questions about our intent on the educational requirements that are necessary in order to be exempt professionals.

We state very clearly in the preamble, and we've restructured the professional exemption to clarify that we do not intend any changes to the education requirements to the professional exemption, and that's where we took out that language regarding training in the armed forces, attending a technical school and attending a community college from the final 541.301(d).

We also addressed veteran status, particularly in two places in the preamble, making it very clear that veteran status has nothing to do with whether or not you're entitled to overtime. And I'd like to give you those pages. It's at 69 Federal Register 22149 and 69 Federal Register 22150.

Mr. JOHNSON. Thank you, ma'am. I appreciate you taking care of our great veterans.

Secretary CHAO. Thank you.

Mr. JOHNSON. And I know you do consider them in every place. Let me ask you another, or make a statement. I understand that more than 340,000 workers received a record of $212.5 million in

back wages as a result of the Wage and Hour Division investigations last year, up from roughly 263,000 workers. That's another 100,000 plus who received $175 million in back pay in 2002.

And I just want to congratulate you on a significant improvement, something I think we would all agree is an excellent result and ask you what is the Department's intent going forward with respect to enforcement of the new regulations.

Secretary CHAO. Thank you for asking that. As mentioned, I met with the Department's Wage and Hour district directors who are in charge of the investigators within the Department.

We indeed have a very good record in terms of enforcement. We have recovered more back pay for workers than any other year or administration. And in fact, it's an 11-year high. So it is an enforcement record that we are justly proud of.

I met with the Wage and Hour district directors yesterday to charge them with helping to inform employers and workers of the new overtime security rules. As I mentioned, there's been a great deal of misinformation and confusion about the current rule and about what is needed—about the final rule as well.

So I spoke with them, and I asked that they make clarification, communication and enforcement of these new rules a top priority.

These new rules are part of our enforcement effort, because the ambiguity in these rules are eroding workers' rights to overtime security.

Mr. JOHNSON. Thank you for your concern. Thank you, Mr. Chairman.

Chairman BOEHNER. The gentleman's time has expired. And if it weren't for the great Wage and Hour Division at the Department of Labor, I wouldn't have gotten the back pay, overtime pay that I was entitled to 32 years ago.

With that, the Chair recognizes the gentleman from New Jersey, Mr. Payne.

Mr. PAYNE. Thank you, Mr. Chairman. I just wondered if you might be able to give me the definition of team leader.

Secretary CHAO. Sure.

Mr. PAYNE. It's a new category. I'm interested in what a team leader is.

Secretary CHAO. Sure. Mr. Payne, I think she—

Mr. JOHNSON. Can he turn his mic on, Mr. Chairman?

Secretary CHAO. Turn your microphone on. Anyway, I'll be more than glad to answer the issue about team leaders, because that is also an area of confusion.

In fact our final rule strengthens overtime protection for workers, because we tighten up on the language and we clarify the language and narrowed its scope. And, Tammy, can I ask you to answer that?

Ms. MCCUTCHEN. Certainly. What I'd like to do is read you the current law on this section. The current law appears at 541.205(c), and it states that employees who can be classified as administrative exempt employees who aren't entitled to overtime includes a, quote, "wide variety of persons who carry out major assignments." So the current regulation says "a wide variety of persons who carry out major assignments."

What we've done in the final rule, which is 541.203(c), is we've stated that 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 a business, negotiating a real estate transaction or collective bargaining agreement, or designing and implementing productivity improvements.

That language strengthens overtime protections for employees in two ways. First, we say that only the leaders of these major project teams can be exempt rather than the current regulation, which says "a wide variety of employees" who work on major projects can be exempt.

Secondly, we've defined what it means to carry out a major assignment and limited it to only those very significant assignments that happen in a corporation. We're not talking about people who lead teams to buy office supplies. We're talking about an employee who leads the team to purchase a business. So it's very much tightened and more protective than the current regulatory language.

Thank you.

Mr. PAYNE. Well, let me just say that, you know, there seems to be subjectivity. When you use terms—first of all, we create this new category, but then when we take terms like and we say this is clarifying 50 years of legislation that needs changing, but we use things like "significantly" or "significantly change" something, you know, what is significant to one person may not be significant to someone else. And so you're, you know, I think now we're getting into subjectivity.

And the more that we tend to make new categories which tend to not be very clearly, you could have five typists and someone's got to maybe answer the phone and type and so that could be a team leader and therefore exempt. So I just think that although I looked at the web site and it's called the fair pay overtime initiative, sounds great, I've listened to titles for the last three or 4 years, and anytime—the better the title, the worse it was for the worker—before your time, Ms. Secretary. I mean, you know, flexible family friendly something what's meant, well, you don't get overtime. You can work 40, 50, 60 hours without overtime, and then when it gets slow, the employer can say you have tomorrow off, not when you want it, but when they want it.

And so we just get concerned that this tremendous new thrust to assist workers when we've been attempting to increase the minimum wage from $5.15 it's so—gets you a little skeptical when we find that all of a sudden the Department of Labor is so friendly to workers that we want to enhance and improve them when we can't even get an increase in the $5.15 minimum wage.

And so it tends to make some of us I guess who have been for a while a little skeptical and leery. And so when we see new terms and this sort of making it better, it just seems to me to be contrary to just a simple basic thing as why can't we increase the minimum wage in America from $5.15 an hour. So I'll yield back. Thank you.

Chairman BOEHNER. The Chair recognizes the gentleman from Georgia, Mr. Norwood, the Chairman of the Workforce Protection Subcommittee.

Mr. NORWOOD. Thank you very much, Mr. Chairman. And, Madam Secretary, we are all delighted you're here. I want to state

for the record that I'm very grateful for what you're doing in these regulations, and I'd like to thank you for the 98 percent of the workers in my district in Georgia that aren't union members.

I'd like to thank you for the employers in our district who hopefully will spend less time in court. And at the end of the day when the truth comes out and the facts are really known, I think probably I can come back and say I'm very grateful on behalf of the 2 percent of the union membership in my district.

Now you've pointed out a number of things to me that I find interesting. The collective bargaining agreement, as you said, overrules these regulations. So in effect, this rule doesn't affect the 10 percent of the members in this country that are unionized. It affects the 90 percent that aren't, because they can fix their problems with a collective bargaining agreement. Isn't that what you said to me, or said to us?

Secretary CHAO. Yes.

Mr. NORWOOD. I thought I heard it that way. There is, unhappily, during an election year, a campaign of distortion going on. My friend, Mr. Miller, doesn't believe it, but it is. And my concern about that is that when you put out misinformation, you scare people.

I don't know if anybody's trying to scare people or not, but the workers of the country and in fact our colleagues have a reason to be concerned when they look to just one think tank to get their information. I am absolutely amazed—and everybody knows how it happens in this town—that when in doubt, hire a think tank, pay them, put them in your own office building and tell them how to think and ask them to do an analysis that suits you.

And I think EPI, Economic Policy Institute, has done just that. Their board, as you pointed out, is made up mostly of AFL-CIO members. They're housed in that building. I don't understand how anybody can use that as analysis, because it is going to distort the information during an election year.

Further, I am amazed that the solicitation and the storyboards in the AFL-CIO commercial claiming that these regulations would take away overtime for millions of Americans. Well, of course that would scare people if it were true. And what amazes me is all of this was prepared a week or two before the final, final, final regulations was made public to anyone.

Did the Labor Department send these folks an updated or advanced copy of these new rules? How did they know to go out and start having a commercial to oppose regulations if you didn't send them an advance copy of the regulations?

Secretary CHAO. No. The Department did not send an advance copy.

Mr. NORWOOD. Well, why would anybody want to have a negative commercial airing to scare people about regulations that they didn't know what the final regulation was? What is the point to that?

Secretary CHAO. One can only ask.

Mr. NORWOOD. Well, the political battle is on. This is what this is all about. You've done a great job helping workers. But the problem is, we're in an election year. I'm very disappointed that right out of the box, opponents of your efforts and the Department's efforts and the Administration have sought to sling political mud

rather than discuss the substance of these regulations themselves, for which I hope we're having a good conversation today.

The AFL-CIO has already mischaracterized these regulations as a pay cut. Now my understanding is—maybe my think tank is telling me what I want to hear, too—but my understanding is that's not the case. In fact, I believe you estimated that these rules will result in more—underline "more," please, ma'am—overtime pay going into the pockets of the employees.

I want you to expand on that just a little bit for me. And as a follow-up, I think many of us would be very interested, Madam Secretary, to hear why if this really will cost more money, why in the world have so many employers wholeheartedly embraced these reforms? What are they thinking about? It's going to cost the employers of America a lot of money for you, Madam Secretary, to put these regs into place. Why are they supporting you on this?

Secretary CHAO. Well, workers are going to see an increase of approximately $375 million in overtime pay. That's what these new rules will accomplish. It will mean real money for workers.

Mr. NORWOOD. You estimate that employers are going to pay $375 million more dollars than they pay today—

Secretary CHAO. Every year. Every year.

Mr. NORWOOD.—to employees. Why in the world are they for that?

Chairman BOEHNER. The gentleman's time—

Mr. NORWOOD. Can the Secretary finish answering, Mr. Chairman?

Chairman BOEHNER. The Secretary may respond.

Secretary CHAO. I think part of it, you will have to ask—part of the answer, as we have seen submitted in some of the comments, which again, we have reviewed very carefully, is the desire for certainty and for predictability.

And also, when the rules are unclear, workers are not protected either.

[The prepared statement of Mr. Norwood follows:]

Statement of Hon. Charlie Norwood, a Representative in Congress from the State of Georgia

Mr. Chairman, I thank you for holding today's very important hearing to discuss the Department of Labor's final regulations that will revise and update Section 541 of the Fair Labor Standards Act (FLSA). We all recognize that the workforce of the 21St Century has changed a great deal since this regulation was last reformed in 1975, and I commend the Committee for holding this hearing to examine the Department's proposal.

I also want to thank the witnesses for their time and expertise in shedding light on this critical issue, particularly my good friend Secretary Chao, who has provided exemplary leadership since first taking on the challenge to update Section 541 more than three years ago. We are honored to have you hear today Madame Secretary.

Mr. Chairman, I congratulate the Department of Labor for once again proposing commonsense rule changes to the FLSA that will provide new overtime protection to 1.3 million low-income workers; workers that did not have overtime protection before. The final rule pays heed to extensive commentary filed after the Department s initial proposal last year, and protects overtime coverage for those 5.4 million Americans already eligible to receive it. In addition, the final rule updates and makes clear the wage-and-hour language in the regulation that in some cases is 55 years old; language that prevents employers from clearly and fairly interpreting overtime rules for their employees.

This much needed regulatory change GUARANTEES overtime protection for over 6.7 million employees, including every worker making less than $23,600 dollars per year. The final rule also strengthens overtime protection for every police officer, fire fighter, paramedic, EMT operator and first responder that you can think of.
Mr. Chairman, under the Department of Labor's Final Rule overtime protection for licensed practical nurses is guaranteed.

Overtime protection for veterans is guaranteed. In fact, virtually every white or blue-collar worker who currently is eligible for overtime protection will not be impacted by these regulatory changes. None of these folks have anything to fear.

However, Mr. Chairman, I can tell you with certainty that trial lawyers do have something to fear. Thanks to the fact that 541 regulations have been allowed to fester unchanged for as many as 55 years, outdated and confusing language has led to an explosion of litigation that lines the pockets of trial lawyers while punitively damaging small businesses throughout the nation.

Mr. Chairman, the overwhelming majority of American businesses want to do right by their employees, but confusing and obtuse language under current law leaves too many employers scratching their head without knowing who is truly eligible for overtime. DOL's final rule will solve that problem by clearing up the language, thereby saving employers millions of dollars that they can use to invest in their workforce instead of fending off frivolous class-action lawsuits.

But opponents of these regulations have no interest in protecting small businesses and their employees from the threat of a costly, unwarranted lawsuit. No sir ... there are too many political points to be won. In a blatant election year ploy to scorch the earth and distort the facts, organized labor and their friends on the other side of the aisle have launched an unprecedented guerilla campaign to discredit and undermine these important regulatory changes; a campaign that begin before the final rule had even been released on April 20th!

Despite the fact that the final rule represents a major compromise from the initial proposal first introduced last year, and our nation's most influential journals have endorsed and fully support these important reforms (including the Washington Post and the Atlanta Journal Constitution,) the opponents of overtime reform will simply not give in to common-sense policy that benefits millions of American workers. Prizing political expediency at the expense of legitimate reform, union bosses and their allies on the left are simply hanging workers out to dry.

Well Mr. Chairman I can tell you this where I'm from in Northeast GA we have a little saying. If it walks like a duck and it talks like a duck, it's probably a duck. Though opponents of the Department's final 541 regulations may claim to represent workers' interests by misrepresenting these important reforms, you can bet that the folks back home will know a duck when they see one.

Mr. Chairman, I look forward to hearing from our distinguished panel of experts to further explore the Department of Labor's final rule on Section 541 of the FLSA, especially my good friend Secretary Chao, and respectfully yield back the remainder of my time.

Chairman BOEHNER. As everyone—all the members know—the bells have rung. There are two votes on the House floor. We will proceed quickly, I hope, with Mr. Andrews and Ms. Biggert, because by the time we get back, the Secretary will have run out of time. And so when we resume at approximately 12:30, we will resume with our second panel. Mr. Andrews.

Mr. ANDREWS. Thank you, Mr. Chairman. I'd like to thank the Secretary and welcome her back to the Committee. It's always a pleasure to have her here. The good news is that I fixed the microphone.

[Laughter.]

Mr. ANDREWS. The bad news is that that makes me a learned professional so I can't get overtime anymore and I'm very upset about that.

[Laughter.]

Chairman BOEHNER. The gentleman was not entitled to overtime before he learned how to turn on his microphone.

[Laughter.]

Mr. ANDREWS. That's because I was presumptively creative, Mr. Chairman. The first question I have, Madam Secretary, is about nursery school teachers. Assume that we have a nursery school teacher who makes $25,000 a year, who presently receives overtime if she has to teach before eight o'clock in the morning or after four o'clock in the afternoon and she has a bachelor's degree in elementary and preschool education.

Under this new rule, could her overtime be taken away?

Secretary CHAO. Tammy, can I ask you to answer that?

Ms. MCCUTCHEN. Sure. The current rules list nursery school teachers. The current regulations list nursery school teachers as exempt teachers under current Section 541.205(c). But I think that's partly because nursery school teachers—nursery school doesn't mean today what it meant back in 1949.

Long-standing wage and hour policy which we've adopted in the preamble in the final rule states that you're an exempt teacher if you're actually teaching. The key distinction is, are you involved in child care or are you actually imparting knowledge?

Mr. ANDREWS. Let's say that what happens is the parents drop the children off at 7:30, and for that half hour, she's responsible for starting the day, telling the children what day it is, whether it's raining or sunny, and between three and four o'clock she reviews the lessons that were done during the day. I assume that's teaching. So that means she's now exempt and she would lose her overtime?

Ms. MCCUTCHEN. It's hard to give a clear answer without more facts, but I think on the facts—

Mr. ANDREWS. What more facts would you like?

Ms. MCCUTCHEN.—she would be entitled to overtime because her primary duty would not be teaching. Her primary duty would be child care.

Mr. ANDREWS. So the difference between eight o'clock and three o'clock is child care and not teaching? Who's going to make that determination?

Ms. MCCUTCHEN. Wage and Hour investigators with years and years of experience.

Mr. ANDREWS. If she files a complaint. If she files a complaint. But if she just says—

Secretary CHAO. That's why these rules are very important.

Mr. ANDREWS. Right.

Secretary CHAO. Because we want workers to know their rights. Because when they know their rights, they can file these complaints.

Mr. ANDREWS. One thing I do want to make clear, though, she doesn't make anything near $100,000 a year, but she may lose her overtime if the facts go the wrong way, right? This $100,000 a year—

Secretary CHAO. Well, right now, right now it is so confusing that we can't even help her. She has to go to the courts and to hire a lawyer and wait a very long time before—

Mr. ANDREWS. But the fact of the matter is, if there's a determination that she's teaching between 7:30 and 8 and between 3 and 4 in the afternoon, then she loses her overtime, right?

Secretary CHAO. No. I'm sorry. No. I think under those facts, she would be entitled to overtime under existing long-standing wage and hour enforcement policy, and I want to emphasize again—

Mr. ANDREWS. But doesn't this rule—this rule changes that policy, doesn't it?

Secretary CHAO. No. It is not a change. That policy has been in the field operations handbook for decades. It is a long-standing policy. We are not changing the current law. I guess I'd like—

Mr. ANDREWS. Well, let me ask a question, then. Senator Harkin has a piece of legislation that says that people who presently are protected by the overtime law will be grandfathered, or grandmothered in this case, and still protected. I assume that you would support that legislation since it simply reiterates what you just told me?

Secretary CHAO. No, I do not, because Senator Harkin's amendment will add even more confusion to an already very confused area. And let me give you a reason.

Mr. ANDREWS. Well, now—

Secretary CHAO. Let me explain why.

Mr. ANDREWS. Yeah, but, if I may, Madam Secretary, I want to come back to the point that your colleague made. She said that under my facts, the person right now is entitled to overtime and this doesn't change that. Well, if that's the case, why don't we just reiterate that in the statute and say that she's protected and it can't lose it under these new rules?

Secretary CHAO. Because the Harkin amendment would attach overtime guarantees to a person. So let's use Dick Grasso as an example. Dick Grasso started out at the New York Stock Exchange as a stock boy. He received overtime. Under the Harkin amendment, he would be guaranteed overtime for the duration of his career, even as he receives $148 million in additional pay.

Mr. ANDREWS. I assume you're concerned about his other compensation he's been guaranteed as well. Let me ask you about chefs, because you made a comment about chefs. If you have a chef that's in the learned—excuse me, that's in the creative professional category, and the chef has less than this 5 years of education, can the chef lose his or her overtime?

Ms. MCCUTCHEN. What we did is we adopted in—we discussed in the preamble an existing wage and hour opinion letter from some years back about florists and when florists are creative.

Mr. ANDREWS. Right.

Ms. MCCUTCHEN. And we applied that to creative professional exemption in discussing the creative professional exemption for chefs.

Mr. ANDREWS. But there are chefs that have less than this minimum academic standard who could lose their overtime under the new rule, correct?

Ms. MCCUTCHEN. Only if they're creating unique new dishes, like they're creating recipes themselves.

Mr. ANDREWS. Every chef claims that he or she does that, right?

Chairman BOEHNER. The gentleman's time—

Mr. ANDREWS. Thank you very much.

Chairman BOEHNER. The gentleman's time has expired. The Chair recognizes the gentlelady from Illinois, Ms. Biggert.

Mrs. BIGGERT. Thank you, Mr. Chairman. And first of all, let me associate my remarks with the Chairman's remarks on compensatory time. That is a statutory issue which is very near and dear to my heart.

Madam Secretary, thank you very much for being here. As you know, we've heard in detail about a lot of misinformation spread around about these regulations. One concern that I've heard from my constituents is that these regulations somehow remove the concept of the 40-hour work week or that workers who are eligible for overtime in a week where they work more than 40 hours will now have their work schedule spread over 2 weeks or 80 hours before they are eligible for overtime. Is that true?

Secretary CHAO. These news rules will strengthen the 40-hour work week. The erosions in these rules in terms of accountability and relevance is hurting workers. So we need to have these—as we have seen already in today's meeting, there seems to be a great deal of ambiguity and confusion about the current rule.

These rules are very prescriptive, and therefore, it is necessary from time to time that they be updated. So in fact these rules by being updated will help workers with the 40-hour work week. It will strengthen the 40-hour work week.

Mrs. BIGGERT. Thank you for that clarity. And one other quick question. Although these regulations are broadly written and cover employees in a wide range of industries, I know the final regulations addressed with specificity a number of industries and occupations, including the financial services industry.

And again, opponents claim that all these workers will lose overtime pay. Can you specifically tell me how the final rules apply to workers in the financial services industry? I think the insurance adjusters and funeral directors.

Secretary CHAO. I want to make sure that we have the exact answers, so let me ask Tammy McCutchen to address those as well.

Ms. MCCUTCHEN. What we did in all of these categories—financial services, insurance claims adjusters and funeral directors—is to adopt the existing Federal court case law. And we did not just list their title. We took the case law and we said, for example, financial services employees who collect and analyze financial information, who provide advice and consulting to a customer about which financial products are appropriate, are entitled to overtime consistent with the Federal regulation.

For funeral directors, there are two Federal court cases that addressed funeral directors. And what they found is that a funeral director who has 4 years, three or 4 years of education beyond high school are exempt professionals, and we adopt those two cases. One of those cases was a 7th Circuit case, and another one is a 6th Circuit case.

And what our rule says is not all funeral directors are exempt, but only those who have 4 years of college-level courses and are licensed by a state that requires that. The same is true for insurance claims adjusters. We adopted four Federal cases that address the exempt status of insurance claims adjusters.

Mrs. BIGGERT. And then, quickly, why did the Department specify these segments in particular?

Ms. MCCUTCHEN. Because these were segments in particular that in recent years have generated a lot of confusion and a lot of litigation. And in order to find out if you're in these industries, you can't go to the regulations and find out whether you're entitled to overtime or not. You have to basically get a lawyer who can do legal research for you.

And we felt it was important because there's been so much confusion, so much litigation, that we put it in the rule itself so that an employee can read the rule and find out whether they're entitled to overtime pay.

Mrs. BIGGERT. Thank you very much. I yield back.

Chairman BOEHNER. I want to thank you, Madam Secretary, and thank you, Ms. McCutchen, for your excellent testimony. As I said earlier, just the facts. And I think both of you have presented an awful lot of facts to help clarify what the new rules and regulations regarding overtime are.

Ms. WOOLSEY. Mr. Chairman?

Chairman BOEHNER. The Committee—

Ms. WOOLSEY. Is there any chance being that so many members still want to ask questions that we could have another hearing with the Secretary so we could follow up—

Chairman BOEHNER. We could consider that. But under the Secretary's agreement—

Ms. WOOLSEY. No, I understand today, but maybe even in the very near future?

Chairman BOEHNER. Well, we can work with the Secretary to see if that's possible.

Ms. WOOLSEY. Thank you.

Chairman BOEHNER. The Committee will stand in recess for approximately 30 minutes, and when we resume, we will resume with the second panel.

Secretary CHAO. Thank you.

[Recess.]

Chairman BOEHNER. The Committee will come to order. We've completed the testimony from the Secretary, and we will now turn to the second panel. It's my pleasure to introduce them and thank them for coming today.

The first witness in the second panel will be Dr. Bird, who is the Chief Economist for the Employment Policy Foundation. Dr. Bird has extensive experience in labor economics research, forecasting survey design, data management and public policy analysis. He's the author of more than 70 papers, peer-reviewed articles and reports on topics such as public policy economics, economic theory and analysis, the economics of education, energy economics and regional economic issues.

Prior to joining the Employment Policy Foundation, Mr. Bird served as the department chair and professor of Wesleyan College's Department of Economics and Finance and was an associate professor at North Carolina State University and the University of Alabama. Dr. Bird earned his PhD in economics from the University of North Carolina.

We will then hear from Ms. Karen Dulaney Smith, a Wage and Hour Consultant. Ms. Smith offers consultation on wage and hour pay issues to employers, employees, attorneys and associations. Prior to entering private practice, Ms. Dulaney was an investigator with the Wage and Hour Division of the United States Department of Labor for more than 12 years, and she's a frequent lecturer on these topics.

And then last, we will hear from Mr. David Fortney, a partner of the firm Fortney & Scott, LLC. Mr. Fortney has practiced law for 23 years, and his practice focuses on workplace-related matters. Mr. Fortney provides broad-based experience and expertise in labor and employment, government relations and litigation matters.

Mr. Fortney served as the acting solicitor of labor and has held other senior policy positions in the U.S. Department of Labor during the first Bush administration. And more recently, Mr. Fortney served as a member of the Presidential Task Force on 21st Century Workplace.

And with that, I'd like to ask Mr. Bird to begin.

STATEMENT OF RONALD E. BIRD, CHIEF ECONOMIST, EMPLOYMENT POLICY FOUNDATION, WASHINGTON, DC

Mr. BIRD. Thank you, Mr. Chairman and Members of the Committee. My name is Ronald Bird. I am an economist, and I have spent much of the last 30 years studying the conditions and trends affecting the American workplace.

I think lost in the debate over the Department of Labor's proposed revision of the rules concerning who is exempt and not exempt under the Fair Labor Standards Act is the question of why amending the regulations is necessary in the first place.

I think before considering the impact of any particular change, it is important to consider why reform of FLSA white collar regulations has been on the Department of Labor's regulatory calendar for over 25 years in both Democratic and Republican administrations.

The Fair Labor Standards Act was engaged in 1938, and the regulatory structure of definitions and categories of duties implementing its pay classifications have remained essentially unchanged since 1954. The minimum salary thresholds for possible exempt status were last changed in 1975. The law has changed little, while the workplace it governs has changed enormously.

The FLSA was enacted when America was still in the midst of the Great Depression. Nearly one in five Americans who wanted a job could not find one. The labor supply exceeded demand, and the bargaining position of the typical worker was weak. The Fair Labor Standards Act was envisioned in part as a way to redress the perceived imbalance between employers and employees in free market bargaining about wages, hours and working conditions.

Today the fundamental competitive conditions of the labor market are very different. In March 2004, the unemployment rate was 5.7 percent, dramatically lower than the 19.1 percent in 1938. The peak unemployment rate following the 2001 recession was the lowest of any recession of the past 30 years and second lowest in 50 years.

An ironic indicator—an ironic indicator of the sweep of change in labor market conditions since the passage of FLSA in 1938 is the fact that many of us consider today's 5.7 percent unemployment rate too high because recently we have enjoyed the benefits of it being even lower.

As an employee, I like low unemployment rates. These low unemployment rates have become the norm over the past 20 years and will likely remain the norm in the future as an aging population pressures the economy to produce more goods and services with a relatively smaller proportion of the population active in the workforce.

As an employee, I like the trend of lower unemployment rates not just because I am less likely to be unemployed, but because the relative scarcity of potential replacements gives me power to make demands about wages, hours and working conditions that my grandfather in 1938 would never have dared.

Before World War II, nearly one in three workers were employed in manufacturing. In contrast today, one in seven works in the manufacturing sector. The industries that have experienced relative job growth are characterized by workplace organizations in which job duties are not as narrowly defined as they were in manufacturing in the 1940's. The number of jobs where duties do not clearly fit the categories defined by the old FLSA rules has increased considerably.

Managerial and professional jobs have increased more than any other category. In 1940, only about one in six workers were employed in managerial or professional occupations. Today, nearly one in three employees work in such jobs.

The 50-year-old regulations make the process of determining FLSA status for workers in management and professional jobs the most complex and time consuming.

It is important, too, to recognize that everyone who is eligible by duties for exempt status is not automatically paid on a salaried basis. Qualifying for exemption does mean that pay status or pay amount will change. For example, I used to work for a government contractor firm. My job duties and education qualified me for exemption as a professional, and my weekly earnings were in excess of the minimum thresholds. Nevertheless, my employer and I agreed to an hourly pay arrangement. My earnings fluctuated from week to week, and I was paid an overtime premium when I worked over 40 hours.

Needless to say, I frequently wanted to work over 40 hours a week, but the boss was less frequently willing to let me work that many hours as I would have liked. The point is that I was an hourly worker and technically nonexempt because of the pay status only. My employer could have converted me to salary and exempt status based on my duties. That did not happen because it was in both of our interests to keep things on an hourly basis.

The complexity and ambiguity of the existing rule is also evidenced by the amount of disagreement and litigation that it generates. For the past 3 years, FLSA issues, mostly related to the exempt/not exempt status question, have been the leading employment related civil action in Federal courts.

Revision of FLSA regulations has been on the regulatory agenda for 25 years. This revision is long overdue.

Thank you.

[The prepared statement of Mr. Bird follows:]

Statement of Ronald E. Bird, Chief Economist, Employment Policy Foundation, Washington, DC

Thank you, Mr. Chairman and members of the committee. I am honored by your invitation to come here today to share the findings of my economic research regarding trends of labor market change that may be relevant for understanding the need for revision of regulations implementing the white collar exemptions under the Fair Labor Standards Act (FLSA). My name is Ronald Bird, and I am an economist who has spent much of the past thirty years studying the conditions and trends affecting the American workplace, employment, unemployment, earnings and the role of education and training to ensure American competitiveness in the global economy.

My research career has taken me from graduate study at the University of North Carolina at Chapel Hill to faculty positions at North Carolina State University and the University of Alabama. For the past five years, the Employment Policy Foundation has enabled me to pursue a broad agenda of research regarding the condition of the American workplace and the forces of change that are rapidly reshaping it. My work relevant to the issue of FLSA reform is one aspect of those efforts.

The Employment Policy Foundation is a non-profit, non-partisan educational and research institution. EPF supports research to develop facts–hard data–that are relevant to the assessment of workplace conditions and policies. I am here today to share with you some of the facts that I have been able to find that may be relevant to your inquiries about the need for revision of FLSA rules revisions and the impact of revisions.

Why Reform of the Exempt-Non Exempt Rules are Needed

Lost in the debate over the Department of Labor's proposed revision of the rules concerning who is exempt and non-exempt under the Fair Labor Standards Act (FLSA) is why amending the regulations is necessary in the first place. Before considering the impact of any particular change, it is important to consider why reform of the FLSA white collar regulations has been on the Department of Labor's regulatory calendar for over 25 years in both Democratic and Republican administrations.

The Workplace Has Changed Dramatically

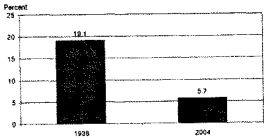
The FLSA was enacted in 1938, and the regulatory structure of definitions and categories of duties implementing its pay classifications have remained essentially unchanged since 1954. The minimum salary thresholds for possible exempt status were last changed in 1975. The law has changed little, while the workplace it governs has changed enormously.

Today's American workplace is different in structure and more complex in its organization than the workplace of 1938. The workplace transformation of the past 65 years reflects at least six dimensions of change that affect relevance and applicability of current FLSA regulations.

Labor Demand and Supply

The FLSA was enacted in 1938 when America was still in the midst of the Great Depression. Figure 1 shows the unemployment rate in 1938–19.1 percent. Nearly one in five Americans who wanted a job could not find one. Labor supply exceeded demand, and the bargaining position of the typical worker was weak. The FLSA was envisioned, in part, as a way to redress the perceived imbalance between employers and employees in free market bargaining about wages, hours and working conditions. The FLSA was also envisioned as a way to encourage sharing of work among those seeking it. In 1938, the average workweek was only 44 hours, and typical hours of work for factory workers had been falling steadily since 1900, even during pre-depression boom times. The overtime premium concept was seen in 1938 by many of its proponents as a way to reduce hours (and pay) of employed workers and open new jobs and shift pay to unemployed people.

Figure 1
Unemployment Rate Then and Now
Annual Average Unemployment Rates 1938 and 2004



Source: Employment Policy Foundation analysis based on Bureau of Economic Analysis, National Income and Product Tables 6.9A-6.9D data.

Today the fundamental competitive conditions of the labor market are very different. Figure 1 shows unemployment in March 2004 at 5.7 percent, dramatically lower than the condition in 1938. The peak unemployment rate following the 2001 recession was the lowest of any recession of the past 30 years and the second lowest in 50 years. An ironic indicator of the sweep of change in labor market conditions since the passage of the FLSA in 1938 is the fact that most of us consider today's 5.7 percent unemployment rate to be too high, because recently we have enjoyed the benefits of it being even lower.

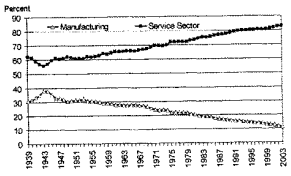
As an employee, I like the low unemployment rates that have become the norm over the past twenty years and that will likely remain the norm in the future as an aging population pressures the economy to produce more goods and services with a relatively smaller proportion of the population active in the labor force. I like the trend of lower unemployment rates not just because I am less likely to be unemployed, but because the relative scarcity of potential replacements gives me power to make demands about wages, hours and working conditions that my grandfather in 1938 would have never attempted.

Industrial Structure

Before World War II, nearly one-in-three (33.6 percent) workers were employed in manufacturing. In contrast, today less than one-in-seven (13.6 percent) works in the manufacturing sector. (See Figure 2.) The industries that have experienced relative job growth are characterized by workplace organizations in which job duties are not as narrowly defined as they were in manufacturing in the 1940s. The number of jobs where duties do not clearly fit the categories defined by the current FLSA rules has increased considerably.

Even in manufacturing, technological and organizational advances that have raised productivity have also blurred the definitional lines of many job responsibilities, qualifications and duties. The result of these changes in industrial structure and workplace organization has been to complicate significantly and increase the number of FLSA coverage/exemption status determination decisions that employers must make each year.

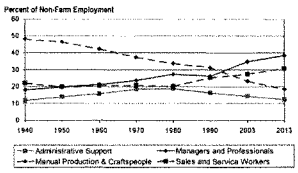
Figure 2
Manufacturing and Service Sector Employment
Proportion of total non-farm employment, 1939–2003



Source: Employment Policy Foundation tabulation of Bureau of Labor Statistics Current Employment Statistics data

Occupational Structure

Figure 3
Employment by Occupation
1940 to 2003 and Forecast 2013



Source: Employment Policy Foundation tabulations of Decennial Census data and March Current Population Survey data. 2013 forecast is EPF projection based on linear trend model 1960-2003

Managerial and professional jobs have increased more than any other category. In 1940, only about one-in-six workers (17.9 percent) were employed in managerial or professional occupations. Today, nearly one-in-three employees (30.1 percent) work in such a position. Under the FLSA, job title alone is not sufficient to determine coverage or exemption status. The 50-year old regulations make the process of determining FLSA status for workers in management and professional jobs the most complex and time consuming. (See Figure 3.)

In 1940, nearly one-half (48.2 percent) of all employees worked in occupations related directly to manufacturing and production, including: laborers, craftspeople, construction workers, assembly-line workers and machine operators. Jobs related to manufacturing and manual production are now less than one-in-three of all occupations (28.5 percent). In 1938, determination of coverage status for workers in these types of occupations was fairly straightforward–the job title and the job duties were closely aligned and readily associated with decision criteria of the FLSA rules. Today, there are fewer numbers of "easy-to-classify" jobs. Even among production occupations, technological and organizational changes have often blurred the lines of distinction on which the current duties tests rely.

These changes in occupational structure mean that many more jobs today than in the past may quality for exemptions defined in the Fair Labor Standards Act. The increase in the number of potentially exempt jobs makes it much more important today that the regulations implementing the exemption concepts be clearer, and easier to apply. The larger number of decisions about exemption status that must be made in today's workplace magnifies the cost burden of rules that are complex and cumbersome.

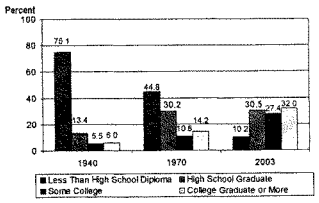
Education

Just as occupational and industrial structures have changed, educational attainment of the workforce has also changed dramatically. In 1940, it was not uncommon for the typical worker to be a high school dropout–over three-quarters (75.1 percent) of all adult workers had never finished high school.

Today, over 58 percent of the population age 16 and older has at least some postsecondary (college-level) education. Over 38 percent of workers now have a college-level degree. Only 11.9 percent have less than a high school diploma. Between 1998 and 2001, the number of jobs held by college graduates has increased 5.8 million while employment of persons with no more than a high school diploma has declined by 1.7 million. (See Figure 4.)

The increase in employment of college graduates reflects the changing structure of the workplace and increasing need for workers who can think critically and analytically, and who can manage and coordinate their work activities through complex automated information, process control and communication systems. Increased educational attainment is also associated with increased diversity of job duties and the breakdown of traditional organizational hierarchies in the workplace. These education-related changes have blurred the definition of professional work as currently defined in the FLSA regulations and made the process of determining status of employees under the regulations more complex.

Figure 4
Educational Attainment of the U.S. Workforce
Age 25 and older



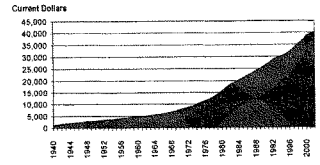
Source: Employment Policy Foundation tabulations of data from the U.S. Census Bureau and March Current Population Survey.

Earnings

Changing occupational structure and rising educational attainment have resulted in a workforce that is significantly better paid than 65 years ago. In 1938, the average full-time equivalent worker earned $1,249 (equivalent to $15,800 in 2003 dollars). Today, the average full-time, year-round worker earns $44,579, 15.7 percent of full-time, year-round workers earn over $65,000 and 4.2 percent earn over $100,000.

The trend is towards greater numbers of high earning workers. Since 1992, the number of full-time, year-round workers earning over $65,000 in real 2002 dollar equivalent doubled from 7.4 million to 14.9 million, and the number earning over $100,000 increased 41 percent from 2.5 million to 4.2 million. Growth of number of employees earning over $100,000 per year accounted for 8.7 percent of total employment growth for full-time, year-round workers over the past decade. The number of full-time, year-round workers earning less than $65,000 increased 18.7 percent. Growth of jobs paying $65,000 or more accounted for 37.5 percent of total employment growth for full-time, year-round workers over the past decade.

Figure 5
Earnings Growth
Annual Earnings Per Full-time Equivalent Worker, 1940–2002



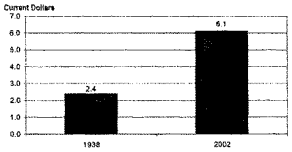
Source: Bureau of Economic Analysis, National Income and Product Tables 6.5A-6.6D. Note that amounts reflect earnings of all workers, regardless of annual work experience category, normalized to full-time equivalent terms.

Figure 5 shows the change in annual earnings per full-time equivalent workers from 1940 to 2002. In current dollars, annual earnings have increased by a factor of 30. After adjusting for inflation, real earnings have increased by a factor of 2.5.

Higher earnings and the strong growth of numbers of highly skilled workers at the highest end of the earnings spectrum are factors that also indicate the shift in bargaining power in favor of employees. Figure 6 compares the average hourly earnings per full-time equivalent worker in 1938 to the 25 cents per hour minimum wage that was set in 1938. The average worker in 1938 earned only 2.4 times the minimum–60 cents per hour. In 2003, the average hourly earnings per full-time equivalent worker was 6.1 times greater than the 2003 real dollar equivalent of that original minimum wage ($3.17).

Higher earnings have made it more important that status determinations under Part 541 be accurate. The confusion and complexity associated with the current rules mean that both employees and employers have more at stake, and both will benefit by revised rules that make the status determination process simpler, easier to understand, and less prone to error or disagreement. The possible loss of overtime pay to employees who are wrongly classified as exempt has been a stated concern, despite statistical evidence that classification has little or no impact of average weekly earnings.

Figure 6
Average Earnings Relative to Minimum Wage
Real Hourly Earnings Ratio to 1938 Minimum Wage



Source: Employment Policy Foundation analysis based on Bureau of Economic Analysis, National Income and Product Tables 6.5A & 6D data

Workplace Dynamics

Beyond the changes in workplace structure, education and earnings, the American workplace has become more dynamic in terms of employment growth and turnover. Technological change, global competition and changing social norms have resulted in a workplace in which new jobs are created and old jobs eliminated at a faster rate than ever before. In 1938, most workers expected to stay with a single employer for his or her working life. Today, average job tenure is under five years and declining.

The typical worker entering the workforce today can expect to change jobs seven times over a working life. Both new jobs created by economic growth and replacement job openings created by job-shift turnover and retirement result in decisions that employers must make about FLSA coverage/exemption status.

According to data from the Bureau of Labor Statistic's Job Openings and Turnover Survey, private sector employers made 45.6 million hiring decisions in 2002, despite a total employment level that was essentially unchanged. The 45.6 million hiring actions reflects replacement of employees who lost jobs, changed jobs or retired. This 42.2 percent turnover rate indicates the flux of job creation, *i.e.*, the job elimination and job switching that constantly characterizes our dynamic labor market.

Each of these hiring actions involves some degree of decision-making regarding FLSA coverage/exemption status of the job. For replacement positions, the decision may be limited to a review of the existing determination to confirm whether it is still appropriate. For newly created positions, the decision making process to determine FLSA coverage/exemption status is more lengthy. Net job growth (1.6 million annually) is a minimal estimate of new job positions created. Because of changing job duties, expansion and contraction of employment within industries, and offsetting job eliminations and creations, the number of new positions that require more intensive effort for determination of coverage/exemption status may include a sizable number of the 45.6 million hiring actions per year previously identified as "replacement" hires.

Accelerating Workplace Change and Increased Regulatory Burden

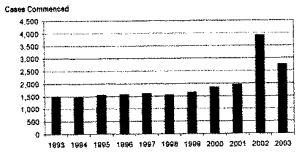
Each of the categories of change discussed above reflects on-going and accelerating forces affecting the American workplace. These changes have already increased the regulatory burden under the existing Part 541 rules to a significant degree. However, the need for revisions to Part 541 does not rest solely on the history of workplace change and increased burden.

The complexity and ambiguity of the existing rule is evidenced by the amount of disagreement and litigation it generates. For the past three years, FLSA issues–most related to the exempt-nonexempt status of workers–have been the leading employment-related civil action in federal courts. For the 12 months ending September 30, 2003, a total of 2,251 FLSA cases were filed, including 102 large class action cases. The number of class action FLSA cases has tripled since 1997. Figure 7 (on the next page) shows the significant increase in the number of FLSA cases filed from 1993 to 2003.

Status and Choice

It is important to recognize that everyone who is eligible by duties for exempt status is not automatically paid on a salary basis. For example, I used to work for a government contractor firm. My job duties and education qualified me for exemption as a professional, and my weekly earnings were in excess of the minimum thresholds. Nevertheless, my employer and I agreed to an hourly pay arrangement. My earnings fluctuated from week to week depending on my recorded hours, and I was paid an overtime premium when I worked over 40 hours. Needless to say, I frequently wanted to work over 40 hours a week but the boss was less frequently willing to let me work as many extra hours as I would have liked.

Figure 7
FLSA Federal Court Cases
1993–2003



Source: Employment Policy Foundation tabulations of data from the Administrative Office of U.S. Courts.

Note: Commenced during each fiscal year, October 1 through September 30.

The point is that I was an hourly worker, and technically non-exempt because of the pay status, but my employer could have converted me to salary and exempt status based on duties. That did not happen because it was in both of our interests to keep things on the hourly basis. For me it meant occasional extra income, and for my employer it meant less risk of losing me to a competitor because I was happy with the arrangement. In today's labor market, many employees have more bargaining power than was typical 50 years ago. An employer who would change an employee's status to shave a few cents off the payroll would do so at his peril and likely lose a valuable worker to a competitor.

Conclusion

The revision of FLSA regulations has been long overdue. It has been on the regulatory agenda for 25 years. Inflation, along with rising real wages, has rendered the long-test for exemption–applicable to employees making between $155 and $250 per week–virtually moot. In 2003, 75.9 percent of employees who earned between the current minimum threshold of $155 per week and the proposed new salary test threshold of $455 also earned over $250 per week. For those 6.0 million full-time and part-time employees, determination of their exemption status was based on an attenuated list of duties under the "short test."

The new rule will ensure that everyone who earns less than $455 is classified as nonexempt. They would be guaranteed the protections of the FLSA, including having a basic hourly wage rate defined, having their working hours tracked and recorded, and being paid a fifty percent hourly wage rate premium in the event that they work over 40 hours during a given week.

Chairman BOEHNER. Thank you.
Ms. Smith.

STATEMENT OF KAREN DULANEY SMITH, WAGE AND HOUR CONSULTANT, AUSTIN, TEXAS

Ms. SMITH. Mr. Chairman and distinguished Members of the Committee, my name is Karen Dulaney Smith. I'm a former United States Department of Labor Wage and Hour Investigator. I began my career in 1987 during the Reagan Administration, continued through the Bush Administration and into the Clinton Administration and left shortly before the birth of my second child in 1999.

What I want you to know is that most of the flaws in this regulation are going to negatively affect workers who earn between $23,660 and $100,000 a year. Many of these employees work in businesses that the Department has identified as low-wage industries, such as the restaurant industry and the child care industry. Some of them are nursery school teachers, nurses, chefs, team leaders, outside salespeople and financial service employees.

Ladies and gentlemen, this regulation is going to decrease the rights of workers and very little if anything to decrease the litigation that employers are currently experiencing. I cannot give you an estimate of the overall impact of this regulation, nor can I speak to every issue. Even if I were prepared to do so, you would find this extremely tedious.

Some of the wording in the final rule, I am disappointed to say, artfully weakens the current regulation in very subtle but significant ways that will surprise employers and employees when businesses begin the implementation process.

When I worked for the Labor Department, I represented the Secretary. I did not represent employees or employers. I realize the importance of having learned that. Public servants have a difficult obligation to balance public interest when making policy. I served proudly for over 12 years investigating businesses of all types under the laws enforced by the Division and performing other assignments, even working in Wage and Hour's National Office for a short time. I was recognized on many occasions for outstanding performance. I maintain friendly working relationships with the Department, and I am sad that I feel obligated to challenge a document that I know required many hours of hard work on the part of intelligent and dedicated people.

I have to do that, though. Since leaving the Wage and Hour Division, I have worked as a consultant, primarily for employers and their attorneys, though I have taken plaintiff's work as well. My clients are corporate America, small businesses and public agencies. Their business concerns are varied: manufacturing, retail, technology and others. I serve as a consulting expert and expert witness for attorneys who are labor law specialists. They hire me to help them understand the regulations and Wage and Hour's enforcement policies and procedures, and to assist their clients in achieving compliant business practices.

I have chosen a variety of occupations to elucidate some of the more technical points of the current rule and the juxtaposition of the final rule. Last year I spent the entire comment period looking at this regulation. Obviously, I haven't had that kind of time.

I would like to talk about nursery school teachers. I saw in the testimony that raised significant questions. That will take me more than the time allotted right now. If a member would like to ask a question, I would be more than happy to go into that, and it may take me longer than 5 minutes to explain it. It is extremely complicated, but I think it's very important, because it is going to affect mostly women who are working in a low-wage industry.

There is some conversation in my testimony on registered nurses. Those employees were exempt under the old law as far as their duties were concerned. They are exempt now as far as their duties are concerned. Under a specific provision section in this newly promulgated rule that will go into effect right before Labor Day, there is an addition of the word "hourly" to a provision, and it has not been there before.

Employers in the past could pay on a daily or shift basis to their salaried employees as long as they guaranteed a salary. Now they will be able to pay on an hourly basis. That has some very strong and frightening implications for employees who are accustomed to being paid hourly, or even who have been paid salary. Their pay levels may change.

I'd like to discuss the matter of chefs. I'm very concerned about that. The restaurant industry is one of those industries that the Department of Labor has identified as a low-wage industry. I believe that there are people who are cooks, who may very well be creative, they may have a couple of years experience. But I believe they're going to lose their overtime wages, and it's very common in this industry to work 50 and 60 hours a week. I know, because I participated in targeted industry investigations. I have investigated hundreds of restaurants of every conceivable description.

I want to make clear to you with regard to team leaders. That word is not in the current regulation. We don't know what that's going to mean. Team leaders would have been non-exempt when I was an investigator unless they had supervisory duties and management responsibilities. The examples that the Secretary has given are not exhaustive, and they are not conclusive. Those are not the only people who could be exempt by the addition of these new words.

Also, I'd like to talk about working foremen, assistant managers and working supervisors. The way that this regulation is constructed makes it less obvious to me that those employees will be exempt employees.

Outside sales employees. You know, I initially thought that removing that 20 percent tolerance test for outside sales employees might not be so harmful to outside sales employees. The Secretary said that she wanted to align the primary duty test as it is for executive, administrative and professional folks. The salary test is not aligned. We don't have to pay outside sales folks anything.

I want to talk about computer employees. There is a significant deletion in there that I think will make an impact in the computer industry. That's the new production industry of the 21st century.

And finally, I would like to discuss financial service employees. I believe that this and other provisions like it are loopholed for inside sales. Congress specifically said outside sales. The Secretary and the Administrator said that they couldn't change that, but I

believe that there is a loophole where the employers can take advantage of that if they choose to do so.

And I believe my time is out. I'll be glad to answer questions you have. Thank you so much.

[The prepared statement of Ms. Smith follows:]

Statement of Karen Dulaney Smith, Wage and Hour Consultant, Austin, TX

Mr. Chairman and distinguished Members of the Committee, my name is Karen Dulaney Smith. I am a former United States Department of Labor Wage and Hour Investigator. I began my career in 1987, during the Reagan Administration, continued through the Bush Administration and into the Clinton Administration, and left shortly before the birth of my second child in 1999.

What I want you to know is that most of the flaws in this regulation are going to negatively affect workers earning between $23,660 and $100,000 per year. Many of these employees work in businesses that the Department has identified as low-wage industries. Some of them are: nursery school teachers, nurses, chefs, team leaders, outside sales people, and financial service employees.

Ladies and gentlemen, this regulation is going to decrease the rights of workers and do very little if anything to decrease the litigation that employers are experiencing. I cannot give you an estimate of the overall impact of this regulation nor can I speak to every issue in the regulations. Even if I were prepared to do so, you would find the discussion extremely tedious! This is an enormously complicated regulation that most people just don't find as interesting as I do. Some of the wording in the final rule, again, I am disappointed to say, *artfully* weakens the current regulation in very subtle, but significant ways that will surprise employers and employees when businesses begin the implementation process and that would take more time to explain to you than I have.

As a young investigator, I sat with my boss before a particularly irate employer who had just heard from me how much he owed in back wages. The employer pronounced loudly that we were taking the employee's side. My boss calmly informed him that I did not represent the employee nor did I represent the employer. We represent the
Secretary, he said. It was our job to look objectively at the facts during an investigation. This was what I had done. Even now, I think of those words and realize their extreme importance. Public servants have a difficult obligation to balance public interests when making policy.

I served proudly for over 12 years, investigating businesses of all types under the laws enforced by the Division and performing other assignments, even working in Wage and Hour's National Office for a short time. I was recognized on many occasions for outstanding performance. I still maintain friendly working and personal relationships with the Department and am sad that I feel obligated to challenge a document that I know required many hours of hard work on the part of some very intelligent and dedicated people.

Since leaving the Wage and Hour Division, I have worked as a consultant, primarily for employers and their attorneys, though I have taken plaintiff's work as well. My clients are corporate America, small businesses, and public agencies. Their business concerns are varied: manufacturing, retail, technology, and others. I serve as a consulting expert and expert witness for attorneys who are labor law specialists. They hire me to help them understand the Regulations, and Wage and Hour's enforcement policies and procedures, and to assist their client's in achieving compliant business practices.

I have chosen a variety of occupations to elucidate some of the more technical points of the current rule in juxtaposition of the final rule. Last year, I spent the entire comment period analyzing the proposed rule and preparing my own remarks for submission. Obviously, I have not had nearly so much time to study the final rule.

Because the final rule has not yet become effective, I will refer to it as the final rule rather than as the Regulation. I will refer to the Regulation now in effect as the current rule. If it becomes necessary, I will refer to the rule issued for public comment last year as the proposed rule.

Nursery School Teachers

Nursery School Teachers have been non-exempt and entitled to overtime because their job does not require the use of independent discretion and judgment. The final rule removes this requirement, so nursery school teachers will lose their right to overtime pay.

Neither the current rule nor the final rule requires that a teacher be paid anything at all—no minimum salary guarantee, nothing. In my past investigative experience many nursery school teachers in the two-year old room spent their days changing diapers, giving snacks, holding and corralling small children from 7 a.m. until 6 p.m. Though most of the Fair Labor Standards Act violations I cited in my years with the Department were for failure to count all hours of work or pay overtime, preschools are one of the places where I clearly remember finding minimum wage violations. There were teachers working long days, paid on a salary so low that it didn't equal the minimum wage for their hours of work. When I was working at the Department, we didn't exempt these employees; most often they had no degree and exercised little discretion and judgment.

There are actually MA degrees in early childhood education and there are preschools that hire these professionals to teach. Let me tell you some relevant points about the make-up of teaching staff at my own child's preschool. All teachers are required to have a general degree; at various times some of the teachers employed have early childhood degrees. We may have at any given time a Master Teacher with an MA in Early Childhood, who would teach the pre-K class. Others who perform the same work have degrees in education and are certified on the elementary or secondary level, one has a degree from a culinary arts school, others have had such varied degrees as a master's in geology, a theatre degree, etc. All those teachers can perform the same job and do; they all follow curriculums and teach numbers, letters, social skills, etc. Our school is licensed by the state, but the state does not have a requirement that these preschool teachers have a degree, nor does the national association by whom the school is also accredited. Therefore, I would say that a degree is not required in that field, nor is a specialized degree required by our school. It 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.

Please understand that there was and is a specific salary exception for teachers. There is no requirement that they receive any particular type of payment whatsoever. Moreover, the term "teacher" as used in the final rule does not require that the employee have as a primary duty work in a field of science or learning or that her primary duty be in an artistic or creative endeavor. Nor does it require that she perform work requiring the consistent exercise of discretion and judgment.

Under the final rule, teachers are exempt regardless of what they teach. One does not have to teach in a field of science or learning or in an artistic/creative field. Though in the definition of learned profession "teaching" is included, that definition goes to define a primary duty which the teacher need not meet. What a circuitous construction! If the argument is lost on you, let me assure you that the argument for paying overtime to those wonderful care providers in the toddler room is also lost.

Registered Nurses

There is a significant change to the salary basis that undermines the overtime provisions of the Fair Labor Standards Act. It is under the heading "Minimum Guarantee plus Extras".

I would like to show the members how an expanded construction of the salary basis will affect nurses and many other employees. It is a common practice to pay employees in this field on an hourly basis. A basic requirement in the current rule is that employees receive a guaranteed salary; if they don't that means that their employers are required to pay these hourly workers time and one-half for overtime work.

This will no longer be the case. In the final rule, Section 541.604(b) adds the term "hourly" to indicate a new possibility for employers to pay a portion or even all of an employee's guaranteed salary on an hourly basis. Furthermore, the final rule eliminates a caveat found at 541.118(b) in the current rule that would prohibit the employer from deducting a portion of that wage for impermissible reasons. Certainly, under 541.602 of the final rule, payment on a "salary basis" is defined to show that an employer may not deduct for quality or quantity of work or absences occasioned by the employer, but it absolutely does not have the same effect as the current rule, when coupled with this new possible pay construction.

It is philosophically noteworthy that this addition of "hourly" to the section on "minimum guarantee plus extras" belies the idea that exempt employees have discretion to manage their own time and are not answerable for the number of hours they work. In discussions of this subject it has often been said that the employee who is salaried is paid for the value of the services they perform rather than by hour or task. Payment of a salary on an hour basis is not reflective of these ideas and is a dramatic department of long-held FLSA principles.

There are scenarios wherein an employer could pay an employee based on an hourly wage, or a shift or day rate and not have violated the "salary basis" requirement. This would be a tremendous cost savings to the employer and force the employee to work for straight time wages in the same way that an employee with no wage guarantee works.

Chefs

The proposed regulation was breath-taking in its potential effect on chefs and sous chefs.
A bit of rework on that issue has somewhat improved their lot; however, there are still some issues that I find very, very disturbing when contemplating the regulation in light of this specific exemption. This is not a white-collar job; it is manual; much of it is repetitive; it is not in a field of science or learning. When my clients read this regulation they are most definitely going to say, in fact some have already said, "Well, if chefs are considered exempt professionals, why can't I exempt so and so in the such and such department." It is fascinating to me that paramedics are specifically named as non-exempt employees whereas chefs with four-year degrees are specifically named as exempt employees.

The Regulation makes clear that chefs who have a four year degree are exempt. To the extent that chefs have creative ability, they can be exempt professionals. That means potentially every chef can be exempt. This, to me, is a farcical construction of a law that will affect many employees in what the Department has defined as a low-wage industry.

Furthermore, having declared the culinary arts a learned profession, the Department creates the possibility of attaining professional status not just through a four-year college degree, but also through work experience. How will the Department determine that a non-degreed employee has "substantially the same knowledge" as a degreed sous-chef? How will the Department even tell a cook from a sous chef? After all, the dictionary definition of "chef" is "cook," and unlike the current law exemption for executive chefs, the final rule has no requirement that an exempt chef or sous chef supervise any other employees.

Team Leaders

I want to make clear that the term "team leaders" is not in the current regulation. A Wage and Hour investigator interviewing employees to consider their exempt status would have found "team leaders" non-exempt, unless they had supervisory duties and management responsibilities. I would be interested to hear how the department expects to make its decisions about the compliance status of employers who put into practice this new concept. I believe that the addition of team leaders as potentially exempt employees is a matter that will result in increased litigation for employers and diminished rights for employees. I have seen estimates that as many as 2.3 million currently non-exempt employees could be made exempt under this single provision.

Working Foreman/Assistant Managers/Working Supervisors

Under the current rule, working foreman are always non-exempt employees, and thus they are entitled to overtime pay. The current regulation eliminates this discussion. The removal of this extensive discussion calls into question whether people like head tellers or warehouse managers would lose their exemption.

Regulation 541.115(b) states: "Clearly, the work of the same nature as that performed by the employee's subordinates must be counted as non-exempt work and if the amount of such work performed is substantial, the exemption does not apply." Similarly, subsection 541.115(c) says "Another type of working foreman who cannot be classified as a bona fide executive is one who spends a substantial amount of time in work which although not performed by his own subordinates consists of ordinary production work or other routine, recurring, repetitive tasks, tasks which are a regular part of his duties, such an employee is in effect holding a dual job."

There is no such section in the final rule. Contrast, instead, the current provisions with the final rule at 541.106, titled "Concurrent Duties". Concurrent performance of exempt and non-exempt work does not disqualify an employee from the executive exemption if the requirements of 541.100 are met. That is to say, if the employee has management as a primary duty.

Just who's in charge – The Department of Labor thinks that that could be a lot of people. Whether an employee is a team leader, a working foreman, or one of several assistant managers of a subdivision or working supervisors; those people may be either executively or administratively exempt.

Outside Sales Employees

Remember, that I said that much of this final rule is an artful weakening of employee rights? Well, here is a simple and artless example that should give you a good idea of who the Administration is trying to please. The Department removes the 20% tolerance rule – and admittedly unwieldy construction – in order to, among other stated reasons, align this exemption with the other white color

exemptions in terms of primary duty examples. Why didn't the Department see fit to also align this section by requiring that the employer meet the salary test as well?

The department has not retained the current rules 20% tolerance limit on outside sales work. This limitation prevented employers from assigning duties to outside sales persons that were not related to their outside sales work. Initially, when I reviewed the proposed regulation, it seemed to me that this would helpful to employers and probably not harmful to employees. However, I am questioning whether or not, in practice, this won't be one of two loopholes for employers to exempt employees who perform a great deal of inside sales work, lower level promotion and marketing work or other work unrelated to outside sales. When you apply the definition of primary duty to salespeople, there isn't any reason that an employer couldn't have employees spending much of their time making inside sales, as long as those employees also make outside sales. As a result, inside sales people could lose their overtime protections.

Computer Employees

The final rule deletes the requirement in the current rule that a computer "professional" have a high degree of skill and expertise, usually acquired by a prolonged period of specialized work experience. The computer field is huge and growing. Employees in this category are the production workers of the 21st Century. The Department has not crafted this regulation with today's employees in mind, much less those of tomorrow.

Current law provides: "The exemption provided by section 541.303(a)(4) applies only to highly skilled employees who have achieved a level of proficiency in the theoretical and practical application of a body of highly-specialized knowledge in computer systems analysis, programming and soft-ware engineering and does not include trainees or employees in entry level positions learning to become proficient in such areas or to employees in these computer-related occupations who have not attained a level of skill and expertise which allows them to work independently and generally without close supervision..."

I know the Department has said that what has been removed from this exemption section is really contained already under the Administrative exemption. This is actually not the case. The Administrative exemption contemplates that exempt employees will be using computers to provide business solutions for their employers—"to develop systems to solve complex business, science or engineering problems."

An employee who is exempt as a computer professional does not have to be involved with the general business operations of the employer, making or implementing policies or any of the other responsibilities normally expected of an administrative employee. By removing the language from the "computer professionals" section, the Department is opening the way for employers to exempt lower level employees and employees performing repetitive processes utilizing low-level computer knowledge.

Financial Service Employees

Speaking of loopholes for inside sales, I'm going to approach another loop hole for exemption in a different manner. Turn, please, to the page in the final rules that describes financial services employees. I'm going to talk with you about that section so that you can see what I have previously described as artful language. The Administrator says that marketing, promoting an employer's product or services, advising, and consulting with a customer are exempt activities.

Let's say, as happened recently in our family, that I call a bank wanting to borrow money to remodel our home. I call the toll-free number and speak with Ms. Jones that I would like to apply for some type of loan. She asks some questions about my purpose and my financial situation such as why I am seeking the loan, how much I currently owe on my mortgage, what other outstanding debt I have, what savings I may have, etc.

After completing the application, she tells me what products their company can offer and helps me decide such questions as whether I want to take a short term loan, or a long term loan, perhaps convincing me that I should borrow more if the interest rate is favorable in order to pay off the car or student loan I mentioned in the initial questioning, and asks me if I would like to open a direct deposit account or credit card with the bank, which could lower my percentage points.

I have just described to you each aspect of what the Administrator has said is exempt. Mr. Chairman and Members, I submit to you that I have just described the process of selling the company's product as well! This sales employee used to be entitled to overtime, but that is no longer the case.

Mr. Chairman and Members, I would be happy to answer any questions you may have.

Chairman BOEHNER. Thank you, Ms. Smith.
Mr. Fortney.

STATEMENT OF DAVID S. FORTNEY, ESQ., PARTNER, FORTNEY & SCOTT, LLC, WASHINGTON, DC

Mr. FORTNEY. Good afternoon, Mr. Chairman and Members of the Committee. I would like to offer my comments that reflect both my current practice, which is representing predominately employers on compliance matters with the FLSA, and also takes into account my prior service as one that was charged with responsibilities for enforcing the FLSA when I was the Acting Solicitor of Labor.

In a nutshell, the problem that all stakeholders face today under the current regulations, including employers, employees, and candidly, the Labor Department, is trying to apply these outdated reg-

ulations to the workplace. As a result, the outdated regulations create uncertainty and frustration.

The salary requirements, of which there are significant improvements in the final regulations, currently frankly are a technical morass, resulting in hundreds if not millions of dollars in liability in what is nothing short of a frenzied litigation lottery to enforce the FLSA. That is not a good way to run these regulations or determine these very fundamental issues.

The second area which deals with duties also is unfortunately under the current regs very gray. The result is that there are a host of typically unintended liabilities. In order to avoid that, employers are faced with the prospect of having to pay counsel, which respectfully to myself and others in the practice, isn't cheap, but I think should be an unnecessary cost of doing business.

I would challenge any business person to read the current regulations and understand what he or she is supposed to do. And it shouldn't be that way, and it doesn't need to be that way. And frankly, when you talk to the Labor Department, some of the folks there aren't clear on what the current regulations are either.

So I think this exercise is going to be extremely helpful in pulling that together and developing some clarification and focus.

Now in large part—and it sounds like Ms. Smith and I may have some respectful disagreements over and maybe with other Members of the Committee what the effect of these changes are. But in large part, the predominant—the story of these new regulations is, they are clarifying and codifying the law that's on the books. The problem is, it's buried in Labor Department manuals, it's buried in court cases, it's buried in a lot of different places. And unless you're a real expert, it's very hard to find.

There are several areas, though, where the regulations actually further narrow the grounds on which people can be exempt, meaning not get paid overtime. And probably the easiest example to look at is with respect to executives. The new executive exemption adds an additional requirement of hiring and firing authority. Today there are many individuals who do not get overtime. They're salaried. They do not get overtime who do not have hire/fire authority. Starting August 23 when these regulations go into effect, those folks stand to lose that exempt status, and they will have to be paid overtime.

Now with respect to other issues, as far as the administrative exemption, where I think there's been a lot of focus and discussion, the fact is that although the Department proposed a different standard, that I think many people criticized, and the Department in fairness responded to that, that is what is supposed to happen in a rulemaking. It is an interactive process.

The story line on the administrative is the Department responded and has retained the same standard that governs today. And "administrative" is the term that encompasses these financial advisors and a whole host of the occupations that are being discussed in the hearing today.

Also, as Administrator McCutchen referenced in her earlier testimony, the regulation does a very good job of codifying or writing down in the four corners of the regulations the rules that are out

there in the court decisions, again saving people having to pay lawyers to go look that up and understand what the rules are.

There are similar changes with respect to the professional categories and so forth.

Another point that I think is very important that these regs change is with respect to salary, and what happens if you don't meet these technical requirements on paying people the correct salary. Today the answer is, you potentially stand to lose the ability to pay people on a salary for a whole wide range of employees. This is why these cases result in sometimes tens of millions of dollars in damages to people who are paid who got their salary, who were paid correctly. Now they're just receiving this windfall.

What the Department does is create a system now where the employers are encouraged to publish policies, to put complaint procedures in place so that people know about it, and then to take corrective action. It's very similar to what has worked very successfully to deal with workplace harassment and the rules that changed there. In large part, that model has now been extended. It doesn't benefit anyone to have to wait 5 years down the road, go through litigation to find out whether people were paid correctly or not. This is a very positive step forward in that regard.

I know there are lots of specific questions on areas, and I think during the question and answer period I'd be happy to answer those.

Thank you.

[The prepared statement of Mr. Fortney follows:]

Statement of David S. Fortney, Esq., Partner, Fortney & Scott, LLC, Washington, DC

Mr. Chairman, Members of the Committee. My name is David Fortney, and I am a co-founder of the law firm, Fortney & Scott, LLC in Washington, DC. I am testifying today to provide the Committee with my assessment of the U.S. Department of Labor's newly promulgated Final Regulations governing overtime in the workplace. My testimony reflects my experience as a practicing labor and employment attorney for twenty four years, as well as my previous experience at the U.S. Department of Labor, where I served as the Deputy Solicitor and Acting Solicitor during the first Bush Administration, under Secretaries of Labor Elizabeth Dole and Lynn Martin. In my positions at the Labor Department, my responsibilities included the interpretation and enforcement of the Fair Labor Standards Act of 1938 ("FLSA"), as amended, and the regulations implementing the FLSA, including the "white-collar" exemption regulations that are the focus of today's hearing and that provide exemptions from overtime and minimum wage for "white-collar" jobs, including executive, administrative and professional positions. In addition to my government experience, I have extensive experience and expertise in counseling and advising employers to comply with the white-collar regulations and to respond to the growing number of class action claims being filed against employers. I will discuss my experience and views on these matters in the context of the newly promulgated white-collar exemption regulations.

Introduction and Overview of the FLSA White-Collar Exemption Regulations

The white-collar exemption regulations are dramatically outdated and have imposed significant confusion and uncertainty in determining who is, and who is not, exempt from the FLSA's minimum wage and overtime requirements. The FLSA imposes minimum wage and overtime requirements on covered employers, but also, in 29 U.S.C. § 213 (a), provides certain exemptions from these requirements. Section 213 (a) states that the minimum wage and overtime requirements shall not apply to any employee employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson. Section 213 also authorizes the Secretary of Labor to "define and delimit" these exemptions. As you know, the regulations for implementing these statutory exemptions – commonly referred to as the "white-collar" exemptions – are codified at 29 CFR Part 541. The white-collar exemption regulations impose two requirements for a job to be classified as exempt. First, the employee must be paid on a salary basis and at the required salary level. And, second, the job duties must involve managerial, administrative or professional skills and duties.

The Current White-Collar Exemption Regulations Are Outdated and Require Comprehensive Reform

The problem that all stakeholders face under the current regulations, including employers, employees and the Labor Department, is in trying to apply the outdated regulations to today's workplace. The duties tests were last modified in 1949 – over 50 years ago – and have remained essentially unchanged since that time. The salary basis was added to the regulations in 1954 and was last updated in 1975 – over 25 years ago. As a result, the long-outdated requirements create uncertainty and frustrate compliance efforts. For example, the "long test" for determining whether an employee is exempt from the overtime provisions of the statute is currently triggered by a weekly salary of only $155, a figure so out-of-date that it renders the long test meaningless. Virtually every salaried employee earns more than $155 per week and is therefore potentially outside the overtime protections of the law. Indeed, if an employee is paid the minimum wage of $5.15 per hour, which equals $206 for a 40-hour workweek, the long test is met. Moreover, the alternative salary test of $250 for "highly compensated" exempt employees (the "short test") is nearly met with the minimum wage and, as a practical matter, is not a useful tool. Therefore, as a practical matter, because of the general obsolescence of the salary test, and assuming that the technical salary requirements are satisfied, typically the evaluation of whether jobs properly are classified as exempt primarily turns on the duties requirements.

The duties tests, however, have proven to be a vast "gray" area, because the current regulations are too vague. As a result, both employers and the Labor Department are faced with inconsistent results that often are no more certain than the next court decision. In particular, the administrative exemption's requirements, which require exempt employees to perform "staff" rather than production or sales work, and exercise "discretion and independent judgment" on important matters in managing the employer's general business operations, are particularly difficult to apply. For example, a court ruled that a project superintendent, who supervised three large construction projects for a construction management company, earning an annual salary of $90,000, was not an exempt administrative employee. The court reasoned that under the staff versus production dichotomy, the employee "produced" construction project management and thus was a nonexempt production employee. See *Carpenter v. R.M. Shoemaker Co.*, 2002 WL 987990, 7 Wage & Hour Cas. 2d (BNA) 1457 (E.D. Pa. May 6, 2002). Similarly, the professional exemption was found not to apply to network communications specialists who

had advanced physics, mathematics and engineering degrees, and who trained mission control personnel, because, the court held, the employees failed to exercise discretion, because they used technical manuals and made group decisions. *Hashop v. Rockwell Space Operations*, 867 F. Supp. 1287 (S.D. Texas 1994).

The result is that the current vague regulations result in unintentional noncompliance and resulting liabilities. The significant increase in employment claims is a clear indication that the current rules are not working – why should we have escalating claims when the rules have not changed? Wage and hour class actions now are the *most frequently filed class action claims* employers face, and individual wage and hour lawsuits doubled in 2002.

In my experience, the explanation for these unacceptable developments is simple – plaintiffs' lawyers have discovered that the outdated regulations provide an excellent basis for filing "gotcha" claims that primarily benefit the attorneys. Moreover, under the current outdated rules, employers often are required to secure expensive legal guidance on what is required to secure compliance, and even then the best that typically can be provided is somewhat guarded advice. As one of our clients once asked me, why should extensive good faith compliance efforts have the same feel as spinning a roulette wheel?

Everyone – perhaps with the exception of a small cadre of plaintiffs' lawyers who are making huge fees filing these wage and hour class action lawsuits – agrees that the outdated regulations require revision, because the rules are not only vague and ambiguous but also difficult to apply to many positions in today's modern workplace. The U.S. General Accounting Office ("GAO") review of regulations in 1999 recommended that the Secretary of Labor comprehensively review and make the necessary changes to the white-collar regulations to better meet the needs of both employers and employees in the modern workplace and to anticipate future workplace trends. The GAO's recommendations recognized the problems in achieving compliance. My personal experience has been that it often is difficult to advise employers because the rules are not clear. Additionally, the judicial interpretations vary and compound the problems in securing compliance. Moreover, it is my belief, based on my personal experience, that these same factors pose challenges to the Labor Department's ability to effectively and efficiently enforce these rules in a uniform and consistent manner.

Overview of the Changes in the Final Overtime Regulations

The Final Regulations, to be codified at 29 CFR Part 541, provide clarified tests for the executive, administrative and professional exemptions. See 69 Fed Reg 22122 – 22274 (April 23, 2004). These new regulations should make compliance easier and provide greater certainty. This result directly benefits all stakeholders – employers, employees and the Labor Department. Greater compliance should directly result in lower litigation claims and resulting exposures.

Although the higher standard salary test of $455 per week ($23,660 per year), which is nearly a 300 percent increase from the current long test, may impose a hardship on some sectors, this material change is a return to the original exemption criteria that required a salary of sufficient magnitude in order for an employee to be classified as exempt. Thus, the only employees who will be affected by the new higher minimum salary levels are those who will start to receive overtime. The estimates by the Labor Department are that *1.3 million workers now exempt would gain overtime protection* by the new $455 per week ($23,660 per year) requirement. These are employees who today are performing jobs with exempt duties but who are being paid below the $455 per week salary requirement.

The Final Regulations also retain and clarify the two long-standing requirements for classifying employees as exempt – the duties and salary tests. The Final Regulations, however, also impose new duties test for some white-collar exemptions, and some of the changes result in more demanding requirements. For example, under the executive duties test of the Final Regulations, employees are required to (1) have a primary duty of managing the entire enterprise or a department or subdivision, (2) direct the work of two or more other workers *and* (3) have hiring/firing authority or substantial influence over these decisions. This is a more restrictive test, and some executives who currently are exempt will no longer be exempt. The Final Regulations also provide clarification of existing criteria, many of which are retained. Thus, for example, while the Administrative exemption's criteria remain essentially unchanged, the Final Regulations provide extensive, helpful examples of which administrative job duties are exempt and non-exempt. Similarly, under the Professional Exemption of the Final Regulations, the duties

test is generally retained (the "discretion" requirement of the long test under the Current Regulations is eliminated), but the Final Regulations clarify when education and experience qualify an employee as a professional.

The Final Regulations retain the salary basis requirement that employees be paid a fixed, predetermined salary for each week in which the employee performs work, but allows employers greater latitude in making pay deductions for, for example, employee misconduct and violations of safety and workplace conduct rules. The liability for improper deductions or "dockings" is reasonably limited to the employees who are directly affected.

Finally, the proposed regulations add new eligibility for exempting highly compensated workers with an annual salary of at least $100,000, if they perform office or non-manual work, are paid on a salary basis at the rate of at least $455 per week, *and* customarily and regularly meet one of the duties of either an exempt executive, administrative or professional employee. The payment of a salary of $100,000 or more does not meet the requirements for the highly compensated exemption unless the duties and salary requirements also are satisfied.

The Final Regulations Provide Much Greater Clarity to the Overtime Requirements and Will Result in Greater Compliance and Overtime Protections

The Labor Department deserves significant credit for meeting the challenge of updating the long-ignored overtime rules. Under Secretary Chao's leadership, the Department successfully has completed a very complex rulemaking. Faced with such clearly outdated regulations and with recommendations by the General Accounting Office and others urging an overhaul of the regulations, the current Secretary of Labor undertook the long-neglected task of providing regulations that are meaningful for the modern workforce. This was a task that earlier Administrations, both Democratic and Republican, had considered but shied away from, undoubtedly over concern that revising these regulations would be controversial.

1. The Rulemaking Process Resulting in the Final Overtime Regulations

In the FLSA, Congress quite consciously left undefined those broad terms describing which jobs were exempt ("any employee employed in a bona fide executive, administrative, or professional capacity") and explicitly placed on the Secretary of Labor the duty to "define and delimit" the terms used in the exemptions. Congress also explicitly provided that the Secretary's actions in defining and delimiting the exemptions are subject to the provisions of the Administrative Procedure Act.

During 2002, the Department initially met with over 40 interest groups, representing employers and employees, to learn of their suggestions and concerns. On March 31, 2003, the Department of Labor published proposed regulations (the "Proposed Regulations") in the Federal Register, and requested comments on the proposal. See 68 Fed Reg 15560 – 15597 (March 31, 2003). In the preamble to the Proposed Regulations, the Department explained the existing regulations and the changes proposed, and provided comparisons between the two. In accordance with Executive Order 12866, the proposal included a Preliminary Regulatory Impact Analysis, and a regulatory flexibility analysis assessing the impact of the proposed regulations on small businesses, as required by the Regulatory Flexibility Act. The public had an opportunity to comment on these economic analyses, as well as on the substantive provisions of the proposed regulations.

The rulemaking record remained open for 90 days. When it closed on June 30, 2003, the Department of Labor had received more than 75,000 comments from a wide variety of interests, including employees, employers, trade and professional associations, labor unions, small business owners, Members of Congress and others. The proposal also prompted vigorous public policy debate in Congress and the media.

Against this backdrop, the Department issued the Final Regulations, to be codified at 29 CFR Part 541 that provide the much-needed update of the overtime requirements. See 69 Fed Reg 22122 – 22274 (April 23, 2004). The Final Regulations clearly evidence that the Labor Department fully reviewed the comments received in the rulemaking record and carefully determined what changes it should make to the regulations, based on the comments received.

2. The Salary Component Will Again Become a Meaningful Criterion

Among the major improvements achieved by the Final Regulations is the updating of the salary requirements, resulting in a restoration of the salary component as a meaningful criterion in the determination of whether employees receive overtime. The Final Regulations nearly triple the current $155 per week minimum salary level required for exempt employees to $455 per week, or $23,660 per year. 29 CFR §541.600. As a result, any employee earning less than $455 per week will receive overtime – regardless of their duties or how they are paid. The Labor Department estimates that this change alone results in 1.3 million currently exempt white-collar workers gaining overtime protection. At the same time, employers clearly benefit from having an unambiguous rule that helps facilitate compliance.

The Final Regulations also introduce clarity and common sense to the highly compensated white-collar employees who earn at least $100,000 per year. 29 CFR §541.601. These highly compensated employees properly can be classified as exempt if they "customarily and regularly" perform any one or more of the exempt duties, and receive at least $455 per week on a salary basis. These salary changes are consistent with the underlying purposes of the FLSA, which are to protect overtime for those workers who earn the least, and presumably are least able to negotiate adequate compensation arrangements.

3. The Administrative Exemption is Clarified

Another improvement implemented by the Final Regulations is the clarification of the Administrative exemption. 29 CFR §§ 541.200 – 541.204. The Proposed Regulations set forth a new duties test for Administrative employees, requiring such employees to hold a "position of responsibility." Many feared that the introduction of a new standard would have the inevitable effect of triggering significant uncertainty and litigation regarding the scope of the exemption. In response, the Labor Department's Final Regulations rejected that new standard and, instead, essentially retain the current test for Administrative employees, with significant clarifications and better guidance. The result is that employers and employees now have the benefit of using long established criteria that is further clarified by the numerous examples set forth in the Final Regulations. Thus, under the Final Regulations, a worker who is compensated on a salary or fee basis at a rate of not less than $455 per week must have as his/her primary duty "the performance of office or non-manual work directly related to the management of the general business operations of the employer or the employer's customers and whose primary duty must include the exercise of discretion and independent judgment with respect to matters of significance." The addition of the requirement of "matters of significance" to the former discretion and independent judgment requirement is in keeping with current law and is useful in understanding that the Administrative exemption takes into account the level of importance or consequences of the work performed. 29 CFR §541.202.

Moreover, the listing of examples of the job duties that typically are either exempt or non-exempt under the Administrative exemption is particularly useful. 29 CFR §541.203. The examples essentially codify the major court rulings, and provide much needed clarity and certainty in determining whether employees properly can be classified under the Administrative exemption. The examples of employees who often are exempt include:

- insurance claims adjusters;
- financial services industry employees whose duties include "collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products and marketing, servicing or promoting the employer's financial products" (*NB*: if the employee's primary duty is selling financial products, the exemption is not available);
- employee who leads a team of other employees assigned to complete major projects for the employer;
- executive assistant or administrative assistant to a business owner or senior executive of a large business;
- human resources managers who formulate, interpret or implement employment policies and management consultants who study the operation of a business and propose changes (*NB*: personnel clerks typically are non-exempt); and,
- purchasing agents with authority to bind the company on significant purchases.

On the other hand, examples of workers who typically are *not* exempt include:

- inspectors doing ordinary inspection work along standardized lines involving well-established techniques and procedures;
- examiners or graders;
- comparison shoppers who report a competitor's price, distinguished from the buyer who evaluates the reports on competitors prices; and,
- public sector inspectors or investigators of various types, such as fire prevention or safety, buildings or construction health or sanitation, environmental or soils specialists and similar employees.

These changes to the Administrative exemption in the Final Regulations add much needed clarity and make it much easier for employees to be properly classified as exempt or non-exempt. The result should be greater compliance with the overtime requirements, which is in the interest of employers and employees alike.

4. The Learned and Creative Professional Exemptions Are Clarified

The Final Regulations for the Professional exemption provide much clearer guidance for today and the future, similar in approach to the changes in the Administrative exemption. 29 CFR §§ 541.300 – 541.304. The Professional exemption continues to be divided into the Learned Professional and Creative Professional categories.

The *Learned Professional* test tracks the existing learned professional criteria, and streamlines and summarizes the current criteria without material changes. The Final Regulations focus on employees with the primary duty of 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. 29 CFR § 541.301. The proposed regulatory language that would have allowed equivalent knowledge "through a combination of work experience, training in the armed forces, attending a technical school, attending a community college of other intellectual instruction" has not been included in the Final Regulations. This proposed language had been criticized as allowing military training to suffice as training for a learned profession, sufficient to qualify for exemption.

The Labor Department clarified in the Preamble to the Final Regulations that it "... never intended to allow the professional exemption based on veterans' status." 69 Fed Reg 22123. Also see 69 Fed Reg 22150 ("Thus, a veteran who is not performing work in a recognized professional filed will not be exempt, regardless of any training received in the armed forces.").

The Learned Professional regulation includes examples and explanations illustrating the application of the exemption, including occupations that properly are classified as *exempt*, such as:

- Registered or certified medical technologists who have four years of college and course work approved by the Council of Medical Education of the American Medical Association;
- Nurses – registered nurses who are registered by the appropriate State examining board continue to be exempt, as they are and have been under the current regulations. Licensed practical nurses generally do not qualify for the learned professional exemption;
- Dental hygienists who have completed four academic years of study approved by a designated credentialing body;
- Physician's assistants who have completed four academic years of study approved by a designated credentialing body;
- Accountants – certified public accountants generally are exempt, but clerks and bookkeepers are non-exempt;
- Chefs, including executive and sous chefs with specialized, four year degrees are exempt, but fast food cooks and cooks who perform predominantly routine mental, manual, mechanical or physical work are non-exempt;
- Athletic trainers who have four academic years of pre-professional and professional study in a curriculum accredited by the designated credentialing body;
- Funeral directors and embalmers who are licensed in states requiring four years of study and graduation from an accredited college of mortuary science.

The new regulations also provide that paralegals generally do *not* meet the learned professional exemption.

Another significant clarification is that Learned Professionals now can use manuals that provide guidance involving highly complex information pertinent to difficult or novel circumstances. *See* 29 CFR § 541.704. The preamble explains that this new section is intended to avoid the absurd result reached by a court, ruling that instructors who trained Space Shuttle ground control personnel were non-exempt because they relied on manuals to assist in their training. 69 Fed Reg 22188 – 22189. This welcome change means that scientists and other learned professionals do not become non-exempt technicians if they

use manuals that provide general guidance on addressing open-ended questions or novel circumstances, as distinguished from directions on routine and recurring circumstances.

Finally, in what will clearly be valuable future guidance, the Final Regulations recognize that the areas in which the professional exemption may be available are expanding. The Final Regulations provide that when specialized curriculum and courses of study are developed by accrediting and certifying organizations similar to those listed in the examples, additional Learned Professional exemptions will be recognized. 29 CFR § 541.301(f). These provisions will help ensure that the Final Regulations continue to be viable and provide guidance for the Learned Professional exemption as our workforce continues to develop and change in the 21st Century.

The *Creative Professional* exemption under the Final Regulations has been modified primarily with respect to journalists. *See* 29 CFR § 541.302. The Final Regulations specifically recognize that some journalists may qualify for the exemption, while others will not. While the Labor Department did not intend to create an across-the-board exemption for journalists, the Final Regulations reflects the status of case law, which recognizes that "... the duties of journalists vary along a spectrum from the exempt to the nonexempt .... The determination of whether a journalist is exempt must be made on a case-by-case basis." 69 Fed Reg 22158.

5. The Executive Exemption is More Restrictive

The most significant changes to any exempt classification are those relating to the Executive exemption. 29 CFR §§ 541.100 – 541.106. While the Final Regulations maintain many of the same requirements and definitions of the current regulations, the Final Regulations do make significant changes to the exemption qualification criteria. Most notably, the Final Regulations impose a requirement that executives must have either the authority to hire or fire other employees or that such executives' suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status" be given "particular weight" (the "Hire/Fire Requirement"). 29 CFR § 541.100(a)(4). While this requirement exists under the long test of the current regulations, it is rarely invoked because most executives qualify under the short test that contains no such requirement. Thus, for many employers, this new, more restrictive criterion may limit the number of employees who can qualify as exempt under the Executive exemption. In fact, many executives who currently are exempt may lose their exempt status. Although most employers and their representatives did not favor the restriction of the Executive exemption with the additional requirement of the hire/fire authority, employers at least have the benefit of reasonably clear requirements. Realistically, employers will need to assess whether currently exempt executive employees meet this new criterion.

The Final Regulations also modify the executive exemption for a business owner by adopting the new classification of exempt executive employee proposed in the Proposed Regulations; i.e., any employee who owns at least a bona fide 20 percent equity interest in the enterprise in which the employee is employed and who is actively engaged in its management. 29 CFR § 541.101. The Final Regulations, however, modify the Proposed Regulations in two material ways. First, the Final Regulations require that an owner/employee's 20 percent business interest be a "bona fide" one. This was designed to insure that the ownership in the business must be genuine, not illusory. Second, the Final Regulations require the owner/employee to be "actively engaged" in the business' management. Moreover, in the case of a 20 percent business owner, the salary threshold of $455 does not apply.

The Final Regulations make additional changes to the executive exemption. The "sole charge" exemption is eliminated completely. Also, the Final Regulations make clear that performing exempt and nonexempt duties concurrently will not disqualify an employee from the executive exemption, if the employee meets the other requirements of the executive exemption. 29 CFR § 541.106. The determination of whether the employee meets the other requirement when he/she performs concurrent duties is made on a case-by-case basis.

6. The New Regulations Require that the "Primary Duty" be the Performance of Exempt Duties

The Final Regulations adopt the requirement that the "primary duty" constitute exempt duties. 29 CFR § 541.701. The primary duty requirement replaces the current regulations that limited the percentage of time to activities that were not directly and closely related to exempt work, as in the Outside Sales exemption discussed below. Under the current regulations, often there were drawn out disputes requiring expensive time-motion studies or similar efforts in order to determine whether the employee was properly engaged in exempt work. The adoption of the primary duty standard will avoid the need for such expensive and time consuming analyses and promotes greater compliance.

7. Salary Deductions – The Salary Requirements Are Clarified so that Deductions from Pay Now can be Made Due to Suspensions for Infractions of Workplace Conduct Rules, and There is a "Safe Harbor" for Employers to Address Improper Pay Deductions

The salary requirements under the Final Regulations continue to prohibit partial day deductions or "dockings" from exempt employees' pay. The Final Regulations add an exception to the salary basis requirement for deductions from pay due to suspensions for infractions of workplace conduct rules. 29 CFR § 541.602(b)(5). This added exception reflects recognition of the growing trend to place increased responsibility and risk of liability on employers for their employees' (exempt and non-exempt) conduct. 69 Fed Reg 22177.

The effect of improper deductions also is clarified. 29 CFR § 541.603. A practice of making improper deductions demonstrates that the employer did not intend to pay on a salary basis, as is the case under the current regulations. If there is an improper practice of deductions, then the exemption is lost during the time period in which the improper deductions were made for the employees in the same job classification working for the same managers responsible for the actual improper deductions. 29 CFR § 541.603(b). This new provision is a significant improvement in the current rules. This currently results in a windfall of overtime payments to exempt employees who were properly paid on a salary basis, simply because, for example, a manager mispaid a small subset or one of the employees. These changes close a loophole that resulted in undeserved windfalls to many properly salaried employees.

Finally, the "safe harbor" provision, codified in 29 CFR § 541.603(d), is a modification of the existing window of correction whereby employers can address improper deductions in salary payments. This provision provides that employers with clearly communicated policies that include a complaint procedure will not lose the exemption for any employees unless the employer violates the policy by continuing to make improper deductions after receiving employee complaints. This provision creates helpful incentives for employers to promulgate clear policies about how employees should be paid, thereby enabling employees to help police compliance. The provision also provides a mechanism for employers to be promptly advised if salary payment discrepancies occur and allows employers to take necessary remedial action.

The revisions to the salary deductions and the safe harbor for investigation and corrections of improper salary deductions are significant steps in enabling employers to comply with the overtime rules, while avoiding disproportionate windfalls to unaffected employees. Similarly, the provisions empower employees, who can take steps to help ensure prompt compliance.

8. There are Limited Changes to the Computer and Outside Sales Exemptions

The Final Regulations make limited changes to the Computer and Outside Sales exemptions, codified at 29 CFR §§ 541.400 – .402 and 541.500 – .504, respectively. The Computer exemption regulation consolidates all of the regulatory guidance on computer occupations into a new regulatory subpart. The consolidation of the Computer regulations will help ensure that the exemption is applied properly. The Outside Sales exemption's primary change is the imposition of the primary duties discussed above, and the elimination of the 20 percent limit on duties in the current regulations.

9. Conclusions About the Final Regulations

The Final Regulations are a significant improvement over the current regulations and will result in improved compliance in administering the exempt classifications. The Final Regulations are more concise, easier to understand, clearer in scope, and drafted in a manner that will make them easier to apply in the changing workplaces we face in the 21st Century. The elimination of exemptions for persons making less than $23,660 ($455 per week) means that all such employees will be eligible for overtime. The Final Regulations also eliminate many of the technical requirements and are much easier for a human resources representative or business owner to understand and follow. The changes in the salary rules will promote greater compliance and limit overtime payments to those employees who were affected by the practices that violate the salary requirements. The safe harbor changes will encourage employers to have clear compensation practices and complaint procedures to ensure that employees are properly compensated without the delay, costs and uncertainty of litigation.

Misinformation and Confusion Relating to
The Final Overtime Regulations

There also has been a significant amount of confusion resulting from inaccurate information and news stories relating to the Final Regulations, and I would like to briefly address some of those matters. One common misconception is that the Final Regulations result in a "take away" of overtime on a widespread basis. This is not the case. Although we can allow economists to project the impact of the Final Regulations, the only changes that are guaranteed are that 1.3 million workers *gain* overtime protection because of the new $455 per week requirement.

Many employees' representatives have raised false alarms, claiming that their exempt/non-exempt status will be changed by the Final Regulations. Take nurses, for example. Registered Nurses currently are exempt, even though the overwhelming majority receives shift premiums or similar additional payment as a result of market factors, and that classification remains unchanged. Generally, Licensed Practicing Nurses currently are not exempt, and their status also has not changed. The Final Regulations provide that RNs are exempt, 29 CFRR § 541.301(e)(2), and the Preamble provides that the Labor Department "... did not and does not have any intention of changing the current law regarding RNs, LPNs or other similar health care employees...." 69 Fed Reg 22153. Thus, claims by nurses that the Final Regulations have, in some way, negatively affected nurses' status, are simply not true.

The Final Regulations also include similar provisions specifying that police officers, firefighters paramedics, emergency medical technicians and similar public safety employees are non-exempt. 29 CFRR § 541.3(b). Again, this continues the same status that these occupations have under the current regulations.

Unionized employees will continue to receive overtime as provided by their collective bargaining agreements, and a specific provision has been added to the regulations specifying that "blue collar" workers are not exempt from overtime. 29 CFR § 541.3(a). Again, there is no change from the current regulations. These are, and have always been, the "white-collar" exemption regulations.

Finally, the claim that the Proposed Regulations would have allowed military experience to be used as a course of study sufficient to justify a Learned Professional exempt status has been refuted by the Labor Department. In the Preamble to the Final Regulations, the Labor Department notes that it was "... never intended to allow the professional exemption based on veterans' status." 69 Fed Reg 22123. Also see 69 Fed Reg 22150 ("Thus, a veteran who is not performing work in a recognized professional field will not be exempt, regardless of any training received in the armed forces."). Thus, in order to avoid any confusion on the matter, the language in Section 541.301(d) of the Final Regulations defining the criteria for Learned Professionals was amended to clarify that veteran status alone will not be sufficient, but that a combination of work and experience may allow the employee to qualify for the exemption, determined on a case-by-case basis.

Conclusion

Where do we stand today? The Department of Labor has completed a protracted and long overdue rulemaking process. The current regulations are not serving anyone's interests except those of class action lawyers. The employment community – employers, employees and government enforcement agencies alike – should embrace the Final Regulations as a great step forward in creating working guidelines that all can understand and implement as we move headfirst into the 21st Century workplace.

Thank you for your time. I will be happy to answer any questions you may have.

Chairman BOEHNER. I want to thank all of our witnesses for your excellent testimony. And some of our members didn't have an opportunity to question the Secretary on the first panel, and so what I'd like to do is begin with those members who didn't have a chance. And so the Chair would recognize the gentleman from Florida, Mr. Keller.

Mr. KELLER. Thank you, Mr. Chairman. I have sat patiently this morning listening to the examination of Secretary Chao by those colleagues of mine on the other side of the aisle. And after doing that, I am now in a position to get the bottom line on this. I can now sum up the Democrats' entire platform in one word: Boo.

They want to scare workers into thinking that they are going to get a pay cut with overtime regs. They're trying to scare seniors about prescription drugs and Medicare. They're trying to scare young people by pretending that we're going to bring back the draft. All of these things are simply untrue. All of these things are shameless, bogus scare tactics that are specifically—

Chairman BOEHNER. If the gentleman could suspend, we've had a practice in the Committee of allowing members to disagree, but not being disagreeable. So I would just caution my good friend from Florida, we don't want to be disagreeable in our Committee.

Mr. KELLER. Well, I respect that comment, but I would like to be very specific, Mr. Chairman. I think it's my job to represent my constituents as well as it's your job to represent yours.

On April 13th, the AFL-CIO sent out this e-mail to Working Families e-Activists. It says in this e-mail to click onto a link onto their web site. If you click onto the link on their web site, it shows a TV ad, and at the top of this page, it shows a police officer with a police car saying this comes down to protecting the 40-hour work week. The Bush Administration has proposed to take away overtime pay for millions of Americans who work more than 40 hours a week.

This is 10 days before the regulations were even issued. Ten days later, on April 23, the regulations come out, and they specifically provide that police officers and firefighters shall be entitled to overtime pay; a specific misrepresentation.

Now 5 days later, here we are at this hearing. And a few minutes ago, I go check the web site, and it's still there, still the claim, that police officers are going to have their overtime pay taken away. Now why? Why would someone say that? Well, we don't have to guess. The goal, according to the e-mail, is we need to raise money. We need to spread the word. We need to stop the overtime pay. We need to stop Bush overtime pay take away to raise awareness, even if it means making stuff up.

So let's talk about what the regs really do, and let me start with you, Mr. Fortney. Let's take the example of an assistant manager at the local Foot Locker retail store who makes $18,000 a year in salary. Under these new regs, would he be entitled to get overtime pay?

Mr. FORTNEY. No he would not, because he makes less than the floor amount of $23,660. He will get overtime pay.

Mr. KELLER. That's what I'm saying. He will be entitled—

Mr. FORTNEY. He will receive overtime pay.

Mr. KELLER. OK. And before these regs came out, there's a possibility he would not get overtime pay.

Mr. FORTNEY. I would suggest to you a distinct possibility he would not get overtime pay.

Mr. KELLER. OK. So he would be one of the 6.7 working Americans who would actually get strengthened under this reg?

Mr. FORTNEY. That would be my understanding, yes.

Mr. KELLER. Let me ask you about litigation here. My question goes to the need for these regulations, particularly because of the issue of wage and hour class action litigation.

I understand that class action lawsuits under the Fair Labor Standards Act have more than tripled since 1997, and since 2001, they have outnumbered employment discrimination lawsuits. Tell us, if you would, how you believe these regs will clarify the situation to hopefully minimize these class action lawsuits. Do you have any examples?

Mr. FORTNEY. Sure. I'd be happy to. One of the areas in which there has been a tremendous amount of litigation involves—in the financial industry—involves the application of what is called the administrative exemption, so it deals with people that are involved in marketing that support, provide response to customers, whether they be in banking, the securities industry. And there's been extensive litigation in those fields, as well as in the insurance industry.

The regulations have listed as examples under the administrative exemption those occupations, not just by title, but describing what the job duties are. And what that does effectively and very succinctly is, it puts down within the four corners of the regulation what people are now spending tens of millions of dollars to litigate about in the courts.

And it effectively has what I'd call codify or written down the court rulings within the four corners. What that means is, when someone comes and first of all looks at the regulations, they can understand who is and is not exempt. That clarification is very, very important. If they want to secure an opinion from counsel, frankly, counsel can give an opinion with a high level of certainty, which does not happen today.

Mr. KELLER. Thank you. And let me ask you to follow up on something Ms. Smith was talking about in terms of chefs. She testified that chefs will lose overtime. It's my understanding that under current law, chefs who have a 4-year specialized academic degree from a culinary arts program are already exempt as learned professionals. And furthermore, that the new rule explicitly states that cooks who perform predominately routine mental, manual, mechanical or physical work are entitled to overtime, does it not?

Mr. FORTNEY. That's exactly right.

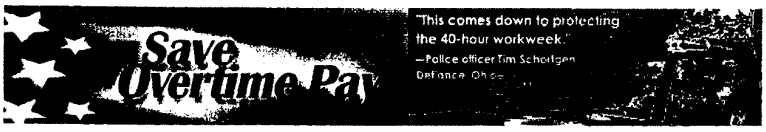
Mr. KELLER. Doesn't that seem to be actually more protective of these employees?

Mr. FORTNEY. I think it certainly at a minimum doesn't change it. It doesn't make it so that more people are going to lose overtime. And the Department has said that it intends to codify what the current rules are, and it appears that it has done just that.

Mr. KELLER. OK. Thank you, Mr. Chairman. I yield back the balance of my time.

[The provided material follows:]

AFL-CIO, Working Families e-Activist Network, TV Ad and e-mail, "Help Stop Bush's Overtime Pay Take-Away with Ads", April 13, 2004



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TV Ads to Save Overtime Pay

View the ad:

Real Player

QuickTime

Script

Alan Rice: "This means a direct 10 percent pay cut from what I'm accustomed to bringing home."

VO: The Bush administration has proposed a new rule allowing corporations to take away the right to overtime pay from millions of Americans who work more than 40 hours a week.

Bush's plan is a victory for the big corporations.

And a pay cut for American workers.

Alan Rice: "The whole effect of it is to give more money to business...

"...by taking it out of the pockets of workers.

"That doesn't help our economy and it certainly doesn't help me or my family."

-----Original Message-----
From: Working Families e-Activist Network [mailto:peoplepower@aflcio.org]
Sent: Tuesday, April 13, 2004 9:29 AM
Subject: Help stop Bush's overtime pay take-away with ads

Dear Working Families e-Activist:

The Bush Labor Department has sent the final paper work to take away overtime pay from millions of working Americans to President Bush's top accountant at the Office of Management and Budget in Washington, D.C. This action means that the overtime pay take-away is imminent--the exact date is up to President Bush.

We know the best way to stop the Bush overtime pay take-away is to raise awareness about this outrageous pay cut. We've won votes in the U.S. Senate and House when people have spoken out, but it hasn't been enough to stop the Bush administration yet. Millions of families are about to see their paychecks cut. What sort of family-budget choices will they have to make?

The stakes are so high that it is important to deliver a message to millions more through TV advertisements. To put these advertisements on the air, we need to raise money this week before Bush finalizes the overtime pay take-away. Please take one minute right now to make a donation to support the TV ads by clicking on the link below.

https://secure.ga3.org/08/otpayads/n4p1PeLK1U7GE

Your contribution of $25, $50, $75, $100 or more could make
a big difference.

The AFL-CIO already has put together a television advertisement about the overtime pay issue. If you have RealPlayer or QuickTime player, you can view it at the link below or read an illustrated script.

https://secure.ga3.org/08/otpayads/n4p1PeLK1U7GE

This ad clearly explains what President Bush's overtime pay take-away would do to millions of people. Our goal is to force President Bush to withdraw his overtime pay take-away.

Please donate any amount: https://secure.ga3.org/08/otpayads/n4p1PeLK1U7GE

If you aren't able to donate today, you can help make a difference by spreading the word about this important effort or continuing to get the word out about the Petition to Save Overtime Pay. Everybody can make a difference in this campaign!

Thanks for all you do.

In Solidarity,

Working Families e-Activist Network, AFL-CIO
April 13, 2004

If you would like to unsubscribe from the e-Activist Network, visit your subscription management page at:
http://www.unionvoice.org/wfean/smp.tcl?nkey=8k8w3544i368t

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Click on the link below for more information
from your union, online activism and benefits.
http://www.unionvoice.org/wfn/join.html
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Chairman BOEHNER. The Chair recognizes the gentlelady from California, Ms. Woolsey.

Ms. WOOLSEY. Thank you, Mr. Chairman. I believe that what the Republicans, what the Department of Labor is taking credit for is rules that were already in place that have not been supported over the last few years. So that's codifying—they're taking credit for the goodness of making what should have been happening already, making it happen.

Now I want to say something about misinformation and about scare tactics. Anybody in this chambers that watched Harry and Louise during the health care debate knows what misinformation and scare tactics is about.

I was a human resources professional for 20 years in manufacturing, and then 10 years I had my own company, and I advised high tech companies on their human resources policies and practices. So I'm going to tell you what a team leader is.

First of all, a team leader is not a professional that's negotiating, has a whole group of realtors working under a team negotiating for some grand project in some community, because that person is a professional, period, not a person paid on an hourly rate or a nonexempt person. All right.

A team leader is a senior employee who has the background and the experience to probably earn the top of their pay rate. Right then, they've earned it. They've been around. They've got experience, and they're at the top of their pay scale. And because they've been around, because they know something, they've been asked to show more junior workers how to do the work, and to give them confidence and to give them guidance.

But they're doing the work right alongside of them. This person today earns overtime. Without that overtime, that leader is probably going to earn less than the person that they're working and guiding, because the person they will be guiding will be getting overtime for the same hours.

So what are we talking about? We're talking about people at the top of their pay grade getting less because they happen to be at a high pay grade. And I just don't see how anybody here in this room can expect any of us to believe that any new rules that impact workers like these do, rules such as the publishers standing up and cheering Secretary Chao—newspaper publishers—when she announced how this would affect reporters. Because they knew they were going to save money, tons of money.

Well, a rule that works for a handful of people and against most of the newspaper writers and reporters can't be the rule that works for the people of this country. And we know that. So another rule, the rule—and Ms. Smith, I'm going to ask you to respond to this one. You brought up nursery school teachers.

We have here at this dais talked about Head Start teachers having a 4-year degree and how important that is, how important these little kids are. So now under these rules, we're going to—have encouraged Head Start teachers to get a 4-year degree, that under these rules we're going to take away their overtime. Now what in the world are we doing here? This is not the way we're going to help the workers that need the help the most. And those are not earning $100,000 a year. Somebody earning $23,660 is not

earning a living that they can raise a family on. They should have overtime.

So would you, Ms. Smith, talk to me about what your views are about how these new rules have affected nursery school teachers?

Ms. SMITH. Perhaps the Department of Labor didn't intend in its construction to handle this the way they did, but here's what the result is. A teacher who, for example, has an elementary or secondary certificate and is teaching in a public school, as Head Start teachers are, has been in the past considered exempt and will be in the future considered exempt.

The real effect of this nursery school, the inclusion of a nursery school teacher in the way that it's included now—the words were there before—it's where they are in the regulation that is different. And in the interest of time, and I'll be as detailed as you'd like me to be, but in the interest of time, let me point you to 303 in the final rule, what's proposed here that would be passed, not the current law as it is today. It says exempt teachers include but are not limited to regular academic teachers, teachers of kindergarten or nursery school pupils. Specifically includes them in that section. That's like the law that we have now. That's not different.

What's different is in Part D it says the requirements of 541.300 and subpart (g), the salary requirements of this part, do not apply to the teaching professions described in this section. So then you have—talk about a conundrum and a complication—then you need to go back to Section 300 and read what that is.

And what Section 300 says, that does not apply nursery school teachers, they don't have to receive a salary. That's not different. They never had any salary guarantee. There was a salary exception for teachers, always has been. But they also—they do not have to have primary duty requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

What this means is they can teach anything. And when I was an investigator, and I had a lot of experience with this, because preschools are automatically all covered under the Fair Labor Standards Act. Every employer has to comply with that unless they can exempt an employee. The only employees who were ever exempt when I made these investigations were executive directors and perhaps the teacher who had an early childhood, a masters in early childhood education, and they might have been teaching the pre-K or some schools do, some preschools do have kindergarten. Those teachers might be exempt.

The others were considered to be lacking in independent discretion and judgment, or sufficient discretion and judgment, and a lot of times they didn't have degrees.

Mr. NORWOOD. [presiding] The gentlelady's time has expired. Thank you, Ms. Smith. Mr. Kline, you're now recognized for 5 minutes.

Mr. KLINE. Thank you, Mr. Chairman, and thank all members of the panel for being here today. I guess I'd have to admit I'm getting a little confused with the testimony today. We seem to be hearing conflicting reports from the two panels and the different witnesses.

And I just heard a definition of team leaders from one of my colleagues, and I was wondering if Mr. Fortney would like to comment on that.

Mr. FORTNEY. I'd be happy to. I think the example that was given would not qualify as a team leader under the current reg. Let's start with what the team leader is defined as.

A team leader requires that it be involved in major—an employee who leads a team of other employees assigned to complete major projects for the employer—major projects. So that working side-by-side, showing someone how to do something, that is not what team leader envisions in this reg. And with all due respect, I don't think that's what it means today under the current regs.

Additionally, under the definition of concurrent duties, which is 541.106, it makes clear that although an exempt person may perform nonexempt work, but it parses out how you're to balance that. The example that was given is an example of people that may be loosely called team leaders in the nomenclature of the workplace but who would not be eligible to be salaried and not receive overtime.

So I hope that answers. But it's a—it codifies what is the rule today. It is narrow. It's based on the duties, and it has to be a major project in order to be ineligible for overtime.

Mr. KLINE. Thank you. My wife spent over 30 years as a registered nurse, and so the issue of nurses has come up again and again. And I think it's important that we revisit that one more time.

So let me go back again to you, Mr. Fortney, because Ms. Smith has expressed a concern about the effect of the new regulation on nurses. But it's been my understanding that the final rulemakes no change to regulation governing registered nurses, who have always generally been exempt as professionals, even though they are often paid overtime because of their collective bargaining agreements, which many are members, or because of the fact that we have a nursing shortage.

And my family takes some blame for that, because my wife has now retired as a nurse, but my niece is entering the field. So we're trying to keep it even.

And it's my understanding also that licensed practical nurses are explicitly exempt in this new regulations, and I read Ms. Smith's testimony and listened to what she had to say about hourly pay, and, quote, "the minimum guarantee plus extras." And could you, Mr. Fortney, explain to us exactly what this means from your perspective, and is it a change from current regulations?

Mr. FORTNEY. Sure. I'd be happy to address that. Nurses. We now have an explicit provision within the four corners of the regulations dealing with nurses. It's very short. Registered nurses who are registered by the appropriate state examining board generally meet the duties and requirements for the learned professional exemption. Licensed practical nurses, LPNs and other similar health care employees, however, generally do not qualify as exempt. In plain speaking, LPNs and others get overtime; RNs are not—can properly be salaried and not receive overtime.

With respect to what does it mean to pay on salary, it means a number of things under the regulations. Again, it does today and

it has for a long time. The regulations going back to the—the Labor Department has a series of manuals that are called field operation handbook, and it defines in great detail how people can be paid a salary.

And salary—it can be computed on an hourly basis. It can be paid on an hourly basis. The rule in the current regulation defines salary. So even if people are paid hourly, as long as you meet the minimums and it's expressed ultimately in terms of a fixed amount, it is permissible.

So I think that is the reason why there may be some confusion on this. And in the reality, I think many RNs, as you indicate in your question, although they can be exempt—that means salaried, not receive overtime—in the real world, many of them do receive a whole variety of additional premiums—shift premiums, overtime, et cetera. So that's a marketplace factor as distinguished from what the law requirements.

Mr. KLINE. And there's not a change?

Mr. FORTNEY. It is not a change. It is absolutely more—continues what is there. Makes it clear, puts it within the four corners of the reg.

Ms. SMITH. Would the Chair recognize me to respond as well?

Mr. KLINE. I'd be happy to have you respond, Ms. Smith.

Ms. SMITH. Thank you. In this section—

Mr. NORWOOD. Ms. Smith, his time is almost up. Be as brief as you can.

Ms. SMITH. OK. The minimum guarantee plus extras adds the new word "hourly." Registered nurses who are paid hourly, as long as they are guaranteed a minimum amount, which is supposed to bear a reasonable relationship to the salary for their usual hours—those are new words. We don't know exactly what that's going to mean yet—there is a possibility that registered nurses can be paid hourly and not receive overtime. And that's my concern.

Mr. NORWOOD. As long as we have lawyers and write new laws and write new regulations, anything's a possibility. That's understood and a given. But sometimes you have to move forward hoping you understand what it means until some smart lawyer comes and tells you you don't understand what it means.

And in fact, speaking of smart lawyers, Mr. Tierney, you have 5 minutes.

Mr. TIERNEY. Thank you very much, Mr. Chairman. Mr. Chairman, I think it's a little bit unfortunate that this hearing has actually happened before most people have had an opportunity to really digest the complications that are in the new rule. And I hope that the Secretary will come back after people have had a chance to analyze that.

But in the meantime, it's ambiguous to some of us and a little higher burden to ask about some of the detail. So I hope people will bear with us. And I regret some of the defensiveness that the Administration and the Secretary are going through, but they I hope understand that this is not an Administration that's been highly credible to working families and the American worker on a number of issues, whether it be the Secretary's statement at an earlier hearing where she said that the Administration wouldn't extend the unemployment benefits for people because she thought that

would encourage them not to seek work, or whether it's because of their failure to fund No Child Left Behind, or attacks on worker safety, workers right to organize, or sleight of hand with the Medicare prescription drug bill and the history of this rule right on down the line.

So there's reason for skepticism, and people don't mean to be attacking the witnesses. We mean to just fulfill our responsibility to try to find out exactly what this says.

Ms. Smith, let me ask you a question about one particular section on this. It's now called concurrent duties. It's Section 541.106, and I think it used to be called the working foreman. It refers to the situation where employees have rank-and-file duties but also some level of managerial duties, usually supervisory or managerial in nature.

The regulation essentially says an employee can be exempt as a supervisor even if the person also performs substantial nonexempt work, such as for a manager in a retail store, perhaps like the one Mr. Keller mentioned, or as a fast food establishment. The supervisor doesn't lose the exempt status even if he or she performs work stocking shelves or running the cash register. Am I right on that interpretation, Ms. Smith?

Ms. SMITH. That what? I didn't hear the last part.

Mr. TIERNEY. That he or she would not lose their exempt status even if they perform some work stocking shelves or running the cash register or normal duties.

Ms. SMITH. Correct.

Mr. TIERNEY. OK. Now the concurrent duties regulation isn't limited to any particular industry as I read it. Do you read it the same way?

Ms. SMITH. That it's not specific to particular industries?

Mr. TIERNEY. Right.

Ms. SMITH. Right. They do give a couple of examples. But it will apply to all industries.

Mr. TIERNEY. It used to be, as understand it, under the long duties test, that if a so-called manager spent more than 20 percent of time performing rank-and-file work, then that person would lose the exemption. But it appears that that's no longer true, because they've eliminated the long duties test, right?

Ms. SMITH. This is meant to mirror more or less the primary duties. They've added some. They've drawn some things from the long duties test into the primary duty, but not the specific criterion you're looking for. That's correct.

Mr. TIERNEY. So it now it looks like the determination of whether it's a primary duty is going to be made on a case-by-case basis. There's no more bright line rule. And I guess it's just going to be whether it's a primary or a more important duty and somebody's subjective analysis. Would that be your interpretation?

Ms. SMITH. Primary duty is a subjective analysis, yes, because it doesn't have to be a specific amount of time.

Mr. TIERNEY. So it seems to me at least that that goes against the claim that the previous law was ambiguous and this one is going to be so much better. But if one person or an employee spends 75 percent of the time performing routine functions and 25

percent of the time managing, then they must be nonexempt. But another person might conclude the other way.

Ms. SMITH. Because it depends on their primary duty.

Mr. TIERNEY. So smart employer, as opposed to a smart lawyer, may just decide this is the way they're going to get around the law and then we're going to be in all sorts of litigation. It seems not only subjective but a bit ambiguous.

If we get back to that and we take it out of the Foot Locker business that Mr. Keller was talking about, what if we're talking about a fire or police sergeant who performs regular police work but also does some supervisory work? He might be exempt despite the rank or the pay level. Am I right?

Ms. SMITH. I think that those examples are—those are blue collar examples, and I think the focus of the Administration right now is on exempting white collar workers from overtime. I don't think their focus is on exempting blue collar workers. I'm not saying it couldn't have that effect. I think that's possible. But I don't think that's where the Administration's focus is right now.

White collar workers are, as Mr. Bird has testified, and he knows more than I do about this, but white collar workers are expanding tremendously, and there are less blue collar workers today. And so I think what the Administration is saying is, we need to figure out a way where not all—this huge amount of white collar workers, they're not all receiving overtime.

Mr. TIERNEY. OK. I do think that whether this concurrent duty thing goes in, it's so subjective that it could apply to this particular area as well as to a retail area.

Ms. SMITH. Yes sir. Absolutely. They have removed the definition of working foreman.

Mr. TIERNEY. And I guess my question is, if what the Secretary says is accurate, that they really did want to protect people who are now getting unemployment between $23,660 and $100,000, I don't know what the resistance would be of just having a provision that says that all of those people for that job responsibilities would be exempt, would continue to be exempt, grandfathered in. And this wouldn't make them for life no matter what they change for their job, but it would be their job as currently engaged in.

Ms. SMITH. Concurrent duties is a very vague and subjective thing that's going to be hard to deal with. The working foreman definition was much easier to deal with. We had much more examples, and it gave a 20 percent limitation which had nothing to do with long or short duties. That's not there any more.

Mr. TIERNEY. So, Mr. Norwood's—

Mr. NORWOOD. Thank you very much.

Mr. TIERNEY. Mr. Norwood's smart lawyers will be busier yet. Thank you.

Mr. NORWOOD. Thank you, Mr. Tierney. I recognize myself for 5 minutes. Just a couple of thoughts. We've had enough time surely to look at this regulation. The AFL-CIO understood what was in it a week before it was issued, so surely we ought to know.

Another thing, while my friend, Mr. Miller is here, and I wanted you to be here, I know you may work two or 3 days a week, and I congratulate you, but we should put in the record that most

Members of Congress work six and 7 days a week, and I'm sorry that—

Mr. MILLER. Not in Washington, D.C. they don't.

Mr. NORWOOD. I'm sorry that the labor union wasn't here who enjoyed your comment. But the fact is, most Members of Congress—I don't know how you can get away with two or 3 days. But most Members of Congress work all week pretty hard.

Mr. MILLER. Through Tuesday night at 6:30—

Mr. NORWOOD. Now let me—

Mr. MILLER.—3 o'clock in the afternoon—

Mr. NORWOOD. Mr. Miller, come on.

Mr. MILLER.—6:30.

Mr. NORWOOD. You are really out of line.

Mr. MILLER. Well, you're out of line with the comment. We go in to work at 2:30 on a Tuesday—

Mr. NORWOOD. I congratulate you on working two to 3 days a week. That's what you said.

Mr. MILLER. I know what I said.

Mr. NORWOOD. Mr. Fortney, would you care to comment on primary duty?

Mr. FORTNEY. Sure. Primary duty—

Mr. NORWOOD. And I wish Mr. Tierney were here to hear the other side.

Mr. FORTNEY. Be pleased to. Primary duty is a part that exists under what we call the long test, and those of us that have suffered through these proceedings long enough have recognized that those are a set of tests or standards that in large part are not followed today. That is this percentage requirement, point one. So the reference to 20 percent I think suggest something that respectfully isn't there, isn't being followed.

No. 2, the determination of 20 percent or any percent suggests that you're to keep time records and do a host of other things that are directly inconsistent with having someone being exempt. And indeed, when there is a dispute, under the old rules, if I can call them that, the 20 percent, that's exactly how that gets resolved. You have people come in with time motion and clipboards and they're following what people are doing, following around. It's very burdensome, very expensive.

With all due respect, Ms. Smith, I do not think it provides a level of certainty. It creates a false illusion of certainty that simply doesn't exist, and it doesn't work well.

The primary duty codifies the rules that are there. It does so in a way that it creates a standard that is more easily applicable to the wide range of jobs and well understood in the wide range of jobs that we have in the workplace today.

Mr. NORWOOD. The Economic Policy Institute, they put out a briefing paper, and it was their belief that eight million workers would lose overtime pay. Mr. Bird, do you agree with that?

Mr. BIRD. No.

Mr. NORWOOD. Mr. Fortney, do you agree with that?

Mr. FORTNEY. No.

Mr. NORWOOD. Mr. Fortney, do you agree with that? Eight million workers?

Mr. FORTNEY. That seemed very ambitious, and it's a little outside. I'm not going to go into the numbers in detail, but that seemed—I was frankly stunned by that number. I read the report, and I couldn't get the numbers to add up.

Mr. NORWOOD. Ms. Smith, do you agree with that?

Ms. SMITH. I'm not an economist. I don't feel qualified to answer on economic questions about that kind of impact.

Mr. NORWOOD. You were a footnote in that briefing paper as I recall.

Ms. SMITH. Yes sir.

Mr. NORWOOD. So you had input into that?

Ms. SMITH. Yes. My part of that was to go through and look at the different job descriptions that were listed and say whether those job descriptions would have been exempt or nonexempt under the Fair Labor Standards Act at the time.

Mr. NORWOOD. So you don't agree or you don't know if eight million workers—you don't know whether eight million workers would lose overtime pay, according to this briefing paper put out by EPI?

Ms. SMITH. Right. I did not do the economic analysis. That was not my part of that.

Mr. NORWOOD. But you worked for EPI?

Ms. SMITH. No, I do not work for the EPI.

Mr. NORWOOD. Are you a consultant to EPI?

Ms. SMITH. No. I was not a consultant.

Mr. NORWOOD. They just called you up. Mr. Bird, you wanted to make further comment?

Mr. BIRD. Yes. Thank you, sir. I am an economist, and I'm not a lawyer. I'm used to dealing with data and dealing with empirical facts. And I too was shocked by that analysis. I looked at it very carefully.

That analysis was—that number of eight million and some odd was put forth in the context of the proposed regulation a year ago, not this final regulation, and it's important to keep that in mind. It was wrong then. It is even more wrong now. It was based on jumping to conclusions about things for which there was no hard empirical fact.

Mr. NORWOOD. Well, Mr. Bird, many people are using that briefing report as the Holy Bible.

Mr. BIRD. And I found that to be a very frustrating aspect of much of the debate and discussion about this issue. The reality is that, you know, first of all, there are three sorts of jumping to conclusions going on here, all of which come out with very misleading results.

First of all, I hear jumping to conclusions about how changes of a word here or there will change the decision of whether or not numbers of people are exempt or nonexempt. And the fact of the matter is, we do not have sufficient hard data, actual descriptions of the texture of people's work, to be able to accurately and empirically say how a change in a phrase here or there will move millions of people one side or the other side of the line.

Secondly, there's being—we're jumping to conclusions about whether or not becoming potentially qualified for an exemption will actually lead to a change in one's pay basis or not. As I said in my opening statement and talk about more in the written testimony,

there are millions of people who are clearly qualified for exemption who are working on a salaried basis and therefore earning overtime, not because their employer has neglected to take something from them, but because they and their employer have arrived at a mutual decision.

And then finally, there is the jumping to the conclusion that even if a person's status is changed from hourly to salaried, for whatever reason, that they will lose pay, when in fact the studies that we've seen looking carefully comparing people who do the same job and work the same hours, we find that regardless of whether you're paid on a salaried basis or an hourly basis, you wind up making the same amount per week and per year for doing the same job from the same qualifications and the same basis.

Mr. NORWOOD. Thank you, Mr. Bird. My time is well expired. Mr. Miller, you're now recognized.

Mr. MILLER. Thank you, Mr. Chairman. I appreciate you were all amazed and alarmed and whatever with the figure by EPI. But I think when you look at what's transpired in the year since that came out, they're closer to the mark than the Secretary's 600,000 impacted because you look at the dramatic rewrite of these regulations, it would suggest that they had included far more people to lose their overtime in the previous regulations than they were willing to tell the public at that time, or the regulations were simply that sloppily drawn that you could draw that number that's a lot closer to EPI than it was to what the Secretary said.

And as to the changing of a word, Mr. Bird, we all fight over the changing of a word because we know what it means to your clients and we know what it means to my constituents, and that's what legislation is about. And it's amazing. We pay people hundreds of thousands and millions of dollars in organizations to change a word here and change a word there. That's the legislative process, because we know exactly very often what that impact is.

Ms. Smith, let me ask you a question, if you might expand on page 493 for the rest of you. I'm looking at the question of the financial services industry and those people who will meet the administrative exemption.

And the question there, one of the questions being raised by a number of organizations is the impact on people today as I understand who would be—would not be exempt because they're engaged in sales, with this definition which picks up sales among other activities would, as it says there, provide for the administrative exemption.

Ms. SMITH. Yes sir. Let's say, as happened recently in our family, that I call a bank wanting to borrow money to remodel our home. I call the toll free number and speak with Ms. Jones and say I would like to apply for some type of loan. She asks some questions about my purpose and my financial situation, such as why I'm seeking the loan, how much I currently owe on my mortgage, what other outstanding debt I have, what savings I may have, et cetera.

After completing the application, she tells me what products their company can offer and helps me decide such questions as whether I want to take a short-term loan or a long-term loan, perhaps convincing me that I should borrow more if the interest rate is favorable in order to pay off the car or student loan I mentioned

in the initial questioning, and asked me if I would like to open a direct deposit account or credit card with the bank which could lower my percentage points.

I have just described to you each aspect of what the Administrator has said is exempt. It says that work such as collecting and analyzing information regarding customer's income, assets, investments or debts. That would be what she did when she asked me about my financial situation.

Determining what financial products meet my needs. Do I want a short term or a long term? Do I want a home equity or an unsecured loan?

Advising the customer regarding the advantages and disadvantages. Well, if you do this, you know, it's a shorter term loan, but it's a higher interest.

And marketing service and you're promoting, asking me if I want a credit card or to open a direct deposit account.

I submit to you, Mr. Chairman and members, that what I've just described is the process of selling the company's product, and that's going to be exempt.

In the very next sentence, it reads: However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption. What is the process that I just described that the administrator would be exempt? It's a selling process.

And at the very least, I think that those who oppose the idea that this is a bad thing for employees could agree with me that this would at least be of confusion to employers and could encourage more litigation.

Mr. MILLER. Well, I think again, earlier this morning I raised the point that when you now engage people in many aspects of the financial service industries, however you engage them, because of home mortgages or because of automobile loans or what have you, you very often now are engaging somebody who then has a series of questions for you.

You can talk about whether or not your payment was received on time, and then they want to know, is there anything else can they do for you. Can they talk to you about, as I said, a home equity loan or this, that or the other thing.

So the argument is that in the modern world, people are multitasking. These are the new jobs of the future. These are—somebody here said it. I think maybe it was you—said these are the production jobs of the future. In my district, huge numbers of people are engaged in this activity. Their primary worry right at the moment is that those jobs are going to be outsourced. But let's assume that they hold onto those jobs for the moment.

Your argument is that you're marrying those tasks into a definition here that provides for the administrative exemption. Is that?

Ms. SMITH. Yes.

Mr. MILLER. I don't want to put words in your mouth, but, I mean.

Ms. SMITH. I think at least it would be accurate to say that we're going to have to that—well, investigators. I was one of those.

Mr. MILLER. I understand this is a gray area.

Ms. SMITH. Right.

Mr. MILLER. It's not a question whether I'm all right or you're all right or you're all wrong or what have you.

Ms. SMITH. Sure.

Mr. MILLER. But the question is, I'm just trying to figure out what, you know, people are asking what this means to them. It seems to me that one of the things that's happened here is you have aligned people within a definition. Some of those people weren't there before. The job was more segregated than previously.

If you wanted to take advantage of this exemption, you obviously would train people to multi-task both sales products, services, what have you, whether they're on the road, off the road or, you know, because that's in theory that the new world of work requires that people be able to do this, but it also feeds into the administrative exemption. I don't know. I think Mr. Fortney would like to comment on that.

Mr. FORTNEY. Could I just have maybe 20 seconds?

Mr. MILLER. Sure.

Mr. FORTNEY. I think perhaps—

Mr. MILLER. This isn't a black or white game.

Mr. FORTNEY. OK. Thank you. I think perhaps there's some confusion as to, these points, the exchange that you've just had here I think is an interesting policy discussion. But going back to what the regs do and whether the regs are changing something. The answer is no, they are not.

The regs—there are several court decisions that deal explicitly with where you draw this line, and those court decisions—I recognize you're a lawyer, a practicing lawyer, the John Alden case, the Allstate Insurance case, that's First Circuit, 11th Circuit, and a District Court case out of Georgia again involving Allstate Insurance.

In those cases, the courts have recognized that employees can have a wide range of activities, exactly what Ms. Smith has described in her scenario, that properly can be deemed to be exempt. And the Labor Department has said, this is what we intend to do. We don't—we're not creating a new standard, we're trying to write down what's out there.

Now there may be a different issue as to whether a different standard should be created, but I think the distinction is one that's important. It's not a take-away, it's not a change.

There is a court decision that I think does a good job of illustrating what is out there. When is inside sales really inside sales? That's a case called Conseco, where it talks about your primary duty day to day being selling. But the courts have recognized, because they've had to struggle with these fairly vague rules the way they are, in these modern workplaces that you're describing, where people are doing different functions. There is a certain level of, if you will, bleeding over into sales function that does not prevent the people from being properly classified as exempt. So with that, I hope that's helpful.

Mr. MILLER. And if you'll be kind enough to give me 20 seconds, I would just say that as you're bleeding over, you probably would not want to create a position of primary duties of selling financial—you'd create a person that does more than that duty, who used to be recognized as inside sales. Ms. Smith?

Ms. SMITH. I do not believe, as Mr. Fortney has suggested, that this is an interesting policy discussion. I believe that a wage and hour investigator will have to look at this regulation and decide exemption and nonexemption, and I believe that they would have decided that employees were nonexempt when they were conducting inside sales activities, and now they're going to decide that those employees are exempt.

I believe here we have a large group of employees who will lose exempt status. They will lose their overtime. This is not just an interesting policy discussion.

And I do also think we're talking about clarity here. The Administration said repeatedly that they'd like to have a clearer law, one that lets employers know what their obligations are. This is not it.

Chairman BOEHNER. [Presiding] The Chair recognizes the gentlelady from Illinois, Ms. Biggert.

Mrs. BIGGERT. Thank you, Mr. Chairman. Mr. Fortney, following up on this, that Ms. Smith just claimed that an employee who calls, solicits information about a customer's financial status and sells a customer a loan product she thinks would be exempt. But doesn't the rule explicitly provide that an employee whose primary duty is sales is entitled to overtime? Or do you share Ms. Smith's—

Mr. FORTNEY. No, no, no. And this goes back. If the primary duty is sales, and we've talked earlier about you can do additional duty. If your primary duty is sales, you get overtime. That's the rule today. That's the rule under the final regulations that will be implemented.

Mrs. BIGGERT. So do you agree that this is going to be something that is not clear now at the time, for somebody like inside sales?

Mr. FORTNEY. No. Frankly, with all due respect, I think this is something that's much clearer now because in two or three fairly succinct sentences, I think the Labor Department has done a very fair job of summarizing the case law that's out there today. And as I mentioned earlier, that allows a business owner and an employee to go read the regulation, a couple or three sentences, get a sense as to what the rule is, as well as the Labor Department when it comes to enforcing it.

Mrs. BIGGERT. OK. Thank you. Then your testimony suggests that changes to regulations governing computer employees and outside sales employees are largely administrative and do not make any substantive changes to the current law. I believe that Ms. Smith seems to suggest otherwise.

Can you expand on your testimony on these points, and do you share Ms. Smith's assessment of these regulations?

Mr. FORTNEY. Yes. With regard to computer employees, there's been some discussion of that. What the regulations do is codify in the regulations the language that was used in the 1996 amendment enacted by Congress. And I think that frankly, had the Labor Department steered away from that, I think that Congress would rightfully be upset and probably be all over them.

So I'm not sure they had a whole lot of running room on that, and I think if you uphold the law, the statue enacted by Congress and you look at the reg, it's the same thing. So I don't think there is a change. I think that's what it's now in the reg clearly.

With respect to the outside sales, there was a 20 percent rule. The Labor Department has adopted, and there's been some earlier discussion about the primary duty. And that's still the case. The Labor Department also has helped us understand what happens in the real world today with outside sales; that they're not just selling. They're doing a variety of other functions. And I do believe, although—is there room for improvement? I suppose, but it's a lot better than what we have, and the line is much easier to understand than the rather mechanical 20 percent. That suggests an artificial level of precision, and in the world, it just doesn't work like that.

Mrs. BIGGERT. Thank you. And one last question. How do the final regulations affect employees who may actually own some share or hold an investment in their company?

Mr. FORTNEY. Yes. I'm sorry. There is a specific provision that deals with the 20 percent ownership. And there was criticism in the proposal as to whether the standards were too loose.

Essentially, what the final regs do, they tighten it and say that the person can be exempt; that is, not get overtime. But they still have to perform, you know, have a bona fide job there, be performing duties, exempt duties in a fashion. So it does permit that.

Mrs. BIGGERT. So that means that let's say a telephone operator at IBM owns 50 shares of stock in the corporation, that she's not exempt from overtime?

Mr. FORTNEY. We're not talking about, with all due respect to the operator that owns 50 shares of IBM, no. Because they would not meet the requirement, the ownership requirement. It's very high.

What we're really talking about are typically fairly small businesses, often family run businesses, closely held businesses where people have that type of ownership.

Mrs. BIGGERT. OK. And then what—how does that compare to current law? What's the current law right now on that? Is there a change?

Mr. FORTNEY. There's not. Again, there is not—I sound perhaps like a broken record, but there is not a change. It's concise, it's precise, but it's not substantively different.

Mrs. BIGGERT. Thank you. Thank you, Mr. Chairman. I yield back.

Chairman BOEHNER. Let me thank our witnesses for your valuable time and your testimony. And for the benefit of our members, it should be obvious that, as this hearing comes to a close, that trying to determine exempt or nonexempt status is not an exact science. And having run a business, having traveled the country, there are every imaginable kind of business, every imaginable type of job, and the new rules I think will bring more clarity to the workplace for both employers and employees than what we've been working under over the last several decades.

But the reason that we have investigators, such as Ms. Smith used to be, to go out and try to make these determinations and to have enough clarity in the regulation to give them the kind of background and basis for making a determination about a particular job. Is it going to be perfect? No. Is it a lot better than it was? Absolutely. And I think that both employers and employees

will be very happy having more certainty about what to expect in these regulations.

And with that, the hearing is adjourned.

[Whereupon, at 1:45 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows:]

U.S. Department of Labor, Fair Pay Facts, Overtime Security for the 21st Century Workforce, "AFL–CIO Distortions Harm Workers"

AFL-CIO Distortions Harm Workers

On April 13th, the AFL-CIO released and began soliciting contributions for a political TV ad attacking the Department of Labor's final overtime security rule – a week before the final rule was finalized and publicly available! These tactics reflect a greater interest in playing politics than in protecting workers.

The AFL-CIO's subsequent releases on the Department's final overtime security rule are so full of distortions and misrepresentations that they create a serious credibility gap and compromise efforts to protect workers' pay rights.

The Department of Labor is initiating unprecedented compliance assistance and law enforcement efforts to ensure that workers fully benefit from the strengthened overtime rights guaranteed by the new rule, and that employers fully comply with their new legal obligations. However, the dissemination of false and misleading information compromises these worker protection efforts by confusing and scaring workers and encouraging unscrupulous employers to twist the rules.

The AFL-CIO characterizes the new protections provided in the final rule for police officers, fire fighters, paramedics, emergency medical technicians, licensed practical nurses, cooks and "blue collar" workers as solving "a public relations problem." The Department of Labor categorically rejects the AFL-CIO's viewpoint that protecting the overtime pay of workers – especially front-line first responders – is just about public relations or politics. Workers are real people who need real pay – not political pawns.

AFL-CIO Distortion #1: "It's a pay cut"
The final regulation "will hurt many workers" by "taking much-needed extra cash out of their pockets."

> **The Facts: Workers Gain $375 million every year**
> Under the final rules, 1.3 million salaried "white collar" workers will get a pay increase of $375 million in additional earnings every year. Another 5.4 million workers – 6.7 million workers in all – will enjoy guaranteed overtime protection without having to pay a lawyer.

AFL-CIO Distortion #2: "It's a job killer"
Because millions of employees will lose overtime protection, employers will not hire new workers.

> **The Facts: Employers will pay more overtime and create more jobs**
> The current overtime rules do not adequately protect workers' overtime rights and sap money out of the economy – which could be used to create jobs – through wasteful litigation. Under the new rules, overtime protection is strengthened for 6.7 millions workers, and only 107,000 employees who all earn over $100,000 *could* be reclassified as exempt. By clarifying and updating 50-year old regulations, the final rules ensure that more workers are guaranteed overtime, and hundreds of millions of dollars that are currently spent every year on wasteful litigation can be invested in creating more jobs and paying more overtime.

AFL-CIO Distortion #3: Blue collar workers will lose overtime pay
The Department's final regulation will "negatively affect" blue collar workers.

> **The Facts: For the first time, blue collar workers' overtime is guaranteed in print**
> For the first time in the history of the Fair Labor Standards Act, the "white collar" exemptions explicitly spell out that "blue collar" workers are not subject to the overtime exemptions. New § 541.3(a) of the Department's final rules guarantee the overtime rights of "blue collar" workers – including carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers.

AFL-CIO Distortion #4: Team leaders will lose overtime pay
The Department's final regulation will take away overtime pay of "team leaders."

> **The Facts: Overtime protection is strengthened for team leaders**
> The final rules ensure overtime protection for "blue collar" team leaders and are *more protective* of overtime pay for "white collar" team leaders than the current regulations. Final § 541.203(c) provides that the administrative exemption applies only to 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 implementing productivity improvements."
>
> By contrast, current § 541.205(c) applies the overtime exemption "to a wide variety of persons" who "carry out major assignments," and current §541.205(b) exempts those whose work includes "advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control." In other words, ***if the Department adopted the AFL-CIO's position, workers would lose overtime, not gain it.***

AFL-CIO Distortion #5: Working supervisors will lose overtime pay
The Department's final regulation will "strip overtime rights" from working supervisors. The final regulation will make it "much easier for employers to exempt workers by naming then 'department managers.'"

The Facts: Overtime protection is strengthened for working supervisors
The final regulation makes it more difficult to deny overtime protection to employees based on a job title as new section 541.2 states that job titles are irrelevant. The final rule ***adds a new requirement*** to the executive exemption – making it ***harder*** for employers to deny overtime protection to working supervisors and low-level managers. Moreover, final § 541.106(c) specifically protects the overtime pay of "relief supervisors" and "working supervisors" such as those who work "on a production line in a manufacturing plant." The final rules are at least as protective as current § 541.103, which denies overtime to any worker in a department or subdivision who "spends more than 50 percent of his time in production or sales work" but also "has broad responsibilities similar to those of the owner or manager of the establishment," and who "supervises other employees, directs the work of warehouse and delivery men, approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require." Once again, ***if the Department adopted the AFL-CIO's position, workers would lose overtime, not gain it.***

AFL-CIO Distortion #6: Computer employees will lose overtime pay
The Department's final regulation removes existing overtime protections from computer employees.

The Facts: No change to current law regarding computer employees
The final rules make no change to current law regarding computer employees' overtime status. In fact, the rules adopt provisions on computer employees ***as passed by Congress*** in 1990 and 1996. The final rules on the administrative exemption mirror current §§ 541.205(c)(7) and 541.207(c)(7), which classify systems analysts and computer programmers engaged in the planning, scheduling, and coordination of activities necessary to develop systems for processing data to obtain solutions to complex problems as exempt "white collar" workers. The final rules also mirror existing federal case law, including Lutz v. Ameritech Corp. (6th Cir. 2000).

AFL-CIO Distortion #7: Financial services industry employees will lose overtime pay
Under the Department's final rules, "most workers in the financial services industry" will be exempt.

The Facts: No change to current law regarding financial services
The final rules make no change to current law regarding financial services employees. Current §§ 541.201(a)(2), 541.205(c)(5) and 541.205(d) provide that financial consultants, insurance experts, and tax experts are generally exempt from overtime under the administrative duties test. Several federal court decisions, including Reich v. John Alden Insurance (1st Cir. 1997), Hogan v. Allstate Insurance (11th Cir. 2004), and Wilshin v. Allstate Insurance (M.D. Ga. 2002), have upheld and further defined this exemption. Final § 541.203(b) is fully consistent with current regulations and case law by exempting only financial services employees who are engaged in tasks such as "collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products." Final § 541.203(b) states that employees' whose primary duty is sales ***are entitled to overtime.***

AFL-CIO Distortion #8: Journalists will lose overtime pay
The Department's final regulations will deprive journalists of overtime pay.

The Facts: No change to the law regarding journalists
The final rules make no change that diminishes journalists' overtime rights under existing law. Current § 541.301(d) provides that "many employees in these quasi-professions," including "journalism," "may qualify for [the creative professional] exemption." The new rules actually enhance journalists' overtime rights by incorporating federal court case law, including Reich v. Gateway Press (3rd Cir. 1994), Reich v. Newspapers of New England (1st Cir. 1995), Freeman v. NBC (2nd Cir. 1996), and Sherwood v. Washington Post (D.D.C. 1994).

AFL-CIO Distortion #9: Insurance claims adjusters will lose overtime pay
The Department's final regulations will deprive insurance claims adjusters of overtime pay.

The Facts: No change to the law regarding claims adjusters
The final rules make no change to current law regarding insurance claims adjusters as set forth in existing § 541.205(c)(5) and applied in several federal court decisions, including Jastremski v. Safeco Insurance (N.D. Ohio 2003) and Palacio v. Progressive Insurance (C.D. Cal. 2002).

AFL-CIO Distortion #10: Funeral directors will lose overtime pay
The Department's final regulations will deprive funeral directors and embalmers of overtime pay.

The Facts: Overtime protection is strengthened for funeral directors
The final rules are ***more protective*** of funeral directors than current law, which allows employers to deny overtime to funeral directors and embalmers who have only one year of mortuary science and two years of college. *See* Rutlin v. Prime Succession, Inc. (6th Cir. 2000); *see also* Szarnych v. Theis-Gorski Funeral Home (7th Cir. 1998). The final rules provide that funeral directors and embalmers may be exempt only if they are licensed and work in a state that requires completion of ***four years*** of post-secondary education, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education.

AFL-CIO Distortion #11: Athletic trainers will lose overtime pay
The Department's final regulations will deprive athletic trainers of overtime pay.

The Facts: No change to current law regarding athletic trainers
The final rules make no change to current law regarding athletic trainers' overtime status. In fact, they mirror the federal court decision in Owsley v. San Antonio Independent School District (5th Cir. 1999) and the final rules limit the ability of employers to deny overtime only to those workers who are certified by the National Athletic Trainers Association.

AFL-CIO Distortion #12: "50% rule of thumb" is eliminated
The Department's final regulation "eliminates" the "50% rule of thumb."

The Facts: No change to current law regarding 50% guideline
The final rules make no change to current law regarding the 50% "rule of thumb." Because the phrase "rule of thumb" was unclear and could generate confusion, final § 541.700(b) substitutes the term "useful guide:" "The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is a primary duty of an employee." This language is at least as protective as current § 541.103, which states that in "situations where the employee does not spend over 50 percent of his time on management duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion." The final rules are also at least as protective as longstanding Section 22c02 of the Wage and Hour Field Operations Handbook, which notes that "the 50% test is not a hard-and-fast rule but rather a ***flexible*** rule of thumb. In many cases, an exempt employee may spend less than 50% of his time in managerial duties but still have management as his primary duty." Numerous federal courts have also upheld this standard, including: Jones v. Virginia Oil Co. (4th Cir. 2003), Murray v. Stuckey's, Inc. (8th Cir. 1991), Glefke v. K.F.C. Take Home Food Co., (E.D. Mich. 1993), and Stein v. J.C. Penney Co., (W.D. Tenn. 1983).

AFL-CIO Distortion #13: "Discretion and independent judgment" standard weakened
The Department's final rules weaken the current "discretion and independent judgment" requirement for the administrative exemption by using the word "includes."

The Facts: The final rules strengthen the "discretion and independent judgment" requirement
Current § 541.2(e)(2) requires that a worker's primary duty must be activity that "includes" the exercise of discretion and independent judgment, in order to be classified under the "short test" for the administrative exemption. However, the final rules are ***more protective*** of workers' overtime rights, because they strengthen the "discretion and independent judgment" standard by adding the requirement that the discretion be exercised "with respect to matters of significance." The current "long test" language requires the "customary and regular" exercise of discretion, but that test applies only to employees earning between $8,060 and $13,000 per year – all of whom are now guaranteed overtime under the final rule, regardless of their job duties.

AFL-CIO Distortion #14: List of management functions
The Department's final regulation takes overtime pay away from employees in tax, finance, accounting, budgeting, auditing, management, human resources, employee benefits, labor relations, public relations, government relations, and legal and regulatory compliance.

The Facts: No change to current law
Final § 541.201(b) lists the functional areas which are generally considered "management or general business operations." This list is consistent with current §§ 541.201(a)(2), 541.205(b), and 541.205(d) which provide that workers in an employer's "staff" or "functional" areas such as tax, insurance, finance, employee benefits, safety and health, labor relations, and purchasing may be administratively exempt, if all of the other tests are satisfied. The final rules ***strengthen*** overtime protection for workers by making clear that employees working in these areas may be exempt only if they also exercise discretion and independent judgment with respect to matters of significance. For example, final § 541.203(e) provides that human resources managers may be exempt, but personnel clerks are entitled to overtime.

AFL-CIO Distortion #15: Work experience
The Department's final regulation will "strip overtime rights" of workers who have the same knowledge and perform the same work as degreed professionals.

The Facts: No change to educational requirements for the professional exemption
The final rules make no change to the current requirement that, in order to be an exempt learned professional, an employee must, among other things, perform work in a profession in which specialized, advanced academic training is a standard prerequisite for entrance.

Compare current § 541.301(d) ("The word 'customarily' implies that in the vast majority of cases specific academic training is a prerequisite for entrance into the profession.") with new § 541.301(d) ("The phrase 'customarily acquired by a prolonged course of specialized instruction' restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession."). Under both the final and the current rules, a lawyer or engineer may be classified as exempt if that employee has attained the advanced knowledge required for the profession through a combination of work experience and intellectual instruction. However, the final rule deletes language in the original proposal stating that equivalent knowledge could be attained "through a combination of work experience, training in the armed forces, attending a technical school, [or] attending a community college."

AFL-CIO Distortion #16: Business owners will lose overtime pay
The Department's final regulation eliminates the duty and salary requirements for 20% business owners.

The Facts: The Department made changes requested by the AFL-CIO
The final rule tightens the original proposal – in response to comments from the AFL-CIO – by requiring that an employee's 20% ownership interest in the company must be "bona fide," and that the business owner must be "actively engaged in its management." These modifications assure that this provision, which would be rarely invoked in practice, will not be subject to abuse.

AFL-CIO Distortion #17: Sales employees
The Department's final regulation will "strip overtime rights" from inside sales employees, route drivers and mobile technicians who sell.

The Facts: Overtime protections strengthened for inside sales workers
The final rules strengthen overtime rights for inside sales employees. First, in the final rule's preamble, the Department expressly states that it "does not have statutory authority to exempt inside sales employees from the FLSA minimum wage and overtime requirements under the outside sales exemption." Second, under the administrative exemption, the final rules include an example protecting the overtime rights of inside sales employees: "[A]n employee whose primary duty is selling financial products does not qualify for the administrative exemption." § 541.203(b). Regarding route drivers and mobile technicians who sell, the Department noted in the preamble to the final rule that the Department made no substantive changes from the current rule.

AFL-CIO Distortion #18: Nursery school teachers will lose overtime pay
The Department of Labor's final rules will strip overtime protection from nursery school teachers.

The Facts: No change to overtime status of nursery school teachers
The final rules make no change to the current *statutory* law regarding the exempt status of nursery school teachers whose primary duty is teaching. The FLSA expressly exempts teachers in elementary and secondary schools, which the current rule (at § 541.3(a)(3)) defines as those whose duties involve "teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge." Current § 541.301(g)(2) states that teachers who are exempt from overtime include "teachers of kindergarten or nursery school pupils." The AFL-CIO did not comment on this exemption during the rulemaking process, and the final rule retains the current language in new § 541.303(a) and (b).

At the same time, the new rules protect the overtime rights of day care center employees, who are primarily responsible for the physical safety and custodial care of children, and are therefore not considered exempt "teachers" for purposes of determining eligibility for overtime. This reflects the past interpretation of the Department, *see* Administrator opinion letter of May 4, 1982 (1982 WL 213489); Field Operations Handbook, § 22d22.

AFL-CIO Distortion #19: Chefs will lose overtime pay
The Department of Labor's final rules will strip overtime rights from chefs and cooks.

The Facts: No change to overtime status of chefs; cooks explicitly protected
The final rules make no change to current law regarding the status of executive chefs and sous chefs who have obtained a four-year specialized academic degree from a culinary arts program and thus meet the requirements of a "learned professional." Cooks, on the other hand, are explicitly protected under the new rules: final rule § 541.301(e)(6) states that "cooks who perform predominantly routine mental, manual, mechanical or physical work" are entitled to overtime.

AFL-CIO Distortion #20: Executive secretaries will lose overtime pay
The Department of Labor's final rules will make it easier for executive secretaries to lose their overtime pay.

The Facts: Stronger overtime protection for executive secretaries
The final rules actually strengthen overtime protection for executive secretaries. Final rule § 541.203(d) restricts the administrative exemption for executive secretaries only to an "executive assistant to a business owner or senior executive of a large business." *See* Preamble to the final rule, 69 Fed. Reg. at 22146. Final rule § 541.203(d) states that the administrative exemption should not be expanded "to include secretaries or other clerical employees," and final rule § 541.202(e) makes clear that the exercise of discretion and independent judgment "does not include clerical or secretarial work." By comparison, current § 541.201(a)(1) denies overtime rights to any secretary who "is the assistant to a proprietor or to an executive or administrative employee." ***If the Department adopted the AFL-CIO's position, workers would lose overtime, not gain it.***

AFL-CIO Distortion #21: Staff vs. production dichotomy
The Department's final regulations broaden the definition of administrative work by eliminating language requiring that such work be related to "administrative" vs. "production" operations of a business.

The Facts: No change from current law
Section 541.201(a) specifically provides that "an employee must perform 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." The Preamble to the final rule, 69 Fed. Reg. at 22141, also states that "The Department believes that the dichotomy is still a relevant and useful tool in appropriate cases to identify employees who should be excluded from the exemption."

AFL-CIO Distortion #22: Registered Nurses will lose overtime pay
The Department's final rules will exempt hourly registered nurses from overtime coverage.

The Facts: No change from current law on scope of RN overtime protection
The final rules make no change to current law regarding overtime protection for RNs. RNs paid on an hourly basis are entitled to overtime pay under the final rules. RNs who receive overtime pursuant to a collective bargaining agreement are expressly protected under the final rules. In general, RNs have been viewed as learned professionals exempt from overtime ***since 1971*** – a position reflected in existing rule § 541.301(e)(1). New § 541.301(e)(2) reiterates the longstanding view that RNs satisfy the duties test for learned professional employees while licensed practical nurses and other similar health workers generally do not, regardless of work experience and training – because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

The final rule also preserves the requirement that RNs be paid on a salary basis to be treated as exempt from overtime. Under final rule § 541.604, an employer may pay an exempt employee additional amounts beyond the required salary, but there must be a "reasonable relationship" between the guaranteed amount and what is actually received. This "reasonable relationship" requirement codifies the Wage and Hour Division's long-standing interpretation of the existing salary basis test (*see* Field Operations Handbook sec. 22b03), which has been upheld in leading federal court decisions. *See, e.g.* Brock v. Claridge Hotel & Casino, 846 F.2d 180 (3rd Cir.) cert. denied, 488 U.S. 925 (1988). The preamble to the final rule points out how the reasonable relationship standard would protect nurses who might be paid on an hourly or shift basis; *see* 69 Fed. Reg. at 22184.

AFL-CIO Distortion #23: Veterans will lose overtime pay
Under the Department's final rules, veterans will lose overtime protection because of changes to the education requirement.

The Facts: Stronger overtime protection for veterans, by making clear that no amount of military training can turn a technical field into a "profession"
The final rules strengthen overtime protection for veterans and make clear that there was never any intention to disallow overtime for a worker based on overtime status. The final rule makes no change to the existing educational requirement for the professional exemption and removes references contained in the proposed rule to training in the armed forces, attending a technical school and attending a community college; *see* final § 541.301(d).

The preamble to the final rule, 69 Fed. Reg. at 22149, adds further protection to veterans by stating that "only occupations that customarily require an advanced specialized degree are considered professional fields under the final rule.... [N]o amount of military training can turn a technical field into a profession. Similarly, a veteran who received substantial training in the armed forces but is working on a manufacturing production line or as an engineering technician cannot be considered a learned professional because the employee is not performing professional duties." The preamble to the final rule, 69 Fed. Reg. at 22150, also makes clear that "a veteran who is not performing work in a recognized professional field will not be exempt, regardless of any training received in the armed forces." The preamble also explicitly guarantees that technical workers with military training are "entitled to overtime under the existing and final regulations because their work does not require advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." *See also* 69 Fed. Reg. at 22149 ("The Department did not and does not intend to change the long-standing requirements for the learned professional exemption."); and AFL-CIO Distortion #15.

AFL-CIO Distortion #24: Union members will be negatively impacted
The Department's final rules will negatively impact the overtime rights of union members.

The Facts: Union members' overtime rights are explicitly protected
For the first time ever, the final Part 541 rules explicitly protect union members covered by collective bargaining agreements. Final § 541.4 states that "nothing in the Act or the regulations in this part relieves employers from their contractual obligations under collective bargaining agreements." Moreover, since the final rules guarantee overtime protection for more workers, and since the final rules also explicitly recognize overtime rights for the first time ever for police, fire fighters, other first responders and licensed practical nurses, union members who work under collective bargaining agreements that incorporate FLSA eligibility by reference also stand to benefit.

AFL-CIO Distortion #25: First responders are insufficiently protected
Under the Department's final rules, the overtime rights of police, firefighters and other first responders are not guaranteed.

The Facts: Overtime rights of first responders are explicitly guaranteed
For the first time ever, the Department's final rules describe the various duties performed by police, fire fighters and other first responders to ensure that workers performing such duties are entitled to overtime. The silence of the existing regulations regarding this vital group of workers has resulted in significant litigation. These Americans' pay rights have been further damaged by false information spread about the Department's rules – such as the distortion that police sergeants will lose overtime protection. To protect police and other first responders from such harmful misrepresentations, the preamble to the final rule, 69 Fed. Reg. at 22129, clarifies that police sergeants "are entitled to overtime pay even if they direct the work of other police officers because their primary duty is not management or directly related to management or general business operations; neither do they work in a field of science or learning where a specialized academic degree is a standard prerequisite for employment." Relying on existing case law, the Department included section 541.3(b) in the final regulations to clarify that police, fire fighters and first responders are non-exempt and fully entitled to overtime.

AFL-CIO Distortion #26: Income Cap
The Department of Labor's final "highly compensated test" strips overtime rights from virtually all workers earning more than $100,000.

The Facts: The "highly compensated test" is consistent with current law and practice, and will affect few workers earning more than $100,000
Few workers will be affected by the final "highly compensated test" since most workers earning over $100,000 are already classified as exempt. At the most, 107,000 workers who earn $100,000 or more *and* perform exempt duties *could* be reclassified as exempt under the final rules. The "white collar" regulations have contained special provisions for "highly salaried" employees since 1949. *See* 69 Fed. Reg. at 22173-22174. Consistent with the rationale used in 1949 for establishing such a test, the final rule provides a "'short-cut test' that combines 'high salary requirements with certain qualitative requirements relating to the work performed by bona fide executive, administrative, or professional employees,' while excluding 'craftsmen and others of the type not intended to come within the exemption.'" *See* 69 Fed. Reg. at 22174.

At the same time, the final rules strengthen overtime pay safeguards under the highly compensated test by requiring that: 1) workers must have a guaranteed salary of at least $455 a week; 2) the workers' primary duty must include performing office or non-manual work; and 3) workers must "customarily and regularly" perform one or more exempt duties or responsibilities of an executive, administrative, or professional employee.

AFL-CIO Distortion #27: Workers would fare better under the Harkin amendment

The Facts: The Harkin amendment would make things worse for workers
For the first time in the history of the Fair Labor Standards Act, the Harkin amendment would create an entitlement to overtime that is attached in perpetuity to a *person,* rather than to a set of duties or even a particular job title. If the Harkin amendment prevailed, it would create a bifurcated caste system of overtime eligibility that is anathema to the spirit of the Fair Labor Standards Act. Under the Harkin amendment, workers performing the same duties for the same employer could receive different treatment under the overtime laws – exponentially increasing confusion, non-compliance and litigation. The Harkin amendment would also freeze the currently outdated duties tests forever in time – denying workers the added clarity. Litigation will further explode, meaning that workers will have to spend years in court to get the overtime they deserve – and hundreds of millions if not billions of dollars will be wasted on lawsuits instead of paying more overtime and creating more jobs.

U.S. Chamber of Commerce, Letter to Chairman John Boehner, April 28, 2004

U.S. Chamber of Commerce

www.uschamber.com

1615 H Street, NW
Washington, DC 20062

April 28, 2004

The Honorable John A. Boehner, Chairman
Committee on Education and the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515

RE: Committee Hearing Assessing the Impact of the Labor Department's Final Overtime Regulations on Workers & Employers

Dear Chairman Boehner and Members of the Committee:

On behalf of the U. S. Chamber of Commerce, we are pleased to submit these comments for the record in response to the Committee's hearing on the Labor Department's final regulations defining and delimiting the exemptions for executive, administrative, professional, outside sales, and computer employees (commonly referred to as the white collar regulations).[1] The Chamber submitted extensive comments during the rulemaking process and we encourage the committee to engage in an open debate about the need for this important regulatory reform and the substance of the regulations. While we are still studying the Department's regulations, it is clear that they make important clarifications that will help employers classify employees, while addressing the many criticisms levied against the regulations proposed by the Department last year.

The U.S. Chamber of Commerce (Chamber) is the world's largest business federation, representing more than three million businesses of every size, sector, and region, with substantial membership in all 50 states. The overwhelming majority of our members are covered by the Fair Labor Standards Act of 1938 and are required to apply the Department's regulations governing overtime eligibility of their white collar employees on a regular basis.

Our comments focus on the need for reform of these long-outdated regulations, emphasize that the Department's final rule, while not addressing all of our concerns, takes important steps toward providing needed clarity, and address some of the early criticisms of the final rule.

[1] 69 Fed. Reg. 22,122-274 (Apr. 23, 2004).

Need for Reform

Today, even the most well intentioned employer, amply staffed with consultants and legal counsel, will often be unsure as to whether it has classified its employees correctly. This is because the regulations governing classification of white collar employees have not been comprehensively modified since 1949 and are simply out of step with the modern workplace. Outdated regulations are bad for employers who must spend significant resources in trying to classify employees and face significant legal exposure for even inadvertent misclassifications. Outdated regulations are likewise bad for employees, who deserve to know what their rights are. Outdated regulations also place an unnecessary drain on enforcement resources at the Labor Department and in the judicial system.

There can be no doubt that the white collar regulations are in dire need of reform. For the past 25 years, every administration, both Republican and Democrat, has made reform of these regulations a priority, though none have succeeded in bring the regulations in line with the modern workplace until now. In 1999, the non-partisan General Accounting Office called on the Labor Department to "comprehensively review the regulations for the white collar exemptions and make necessary changes to better meet the needs of both employers and employees in the modern workplace." Indeed, in comments received by the Department in response to its 2003 proposed rule, virtually all substantive commenters favored some change to the white collar regulations.[2]

The consequences of the Department's failure to update the regulations have been significant. According to the Administrative Office of the U.S. Courts, collective actions under the FLSA have increased by 230 percent since 1997 alone. This is directly attributable to the failure to keep the white collar regulations in line with the modern workplace. Trial lawyers have simply found it too easy to exploit employer difficulties in shoehorning new jobs into old categories.

The failure to update these regulations has also been criticized by courts who are too often called on to try to interpret the regulations. For example, in one case where a top television producer at a major network claimed overtime eligibility, the Second Circuit said "Although the 1949 [regulation] with its 1943 origins may still apply to small-town reporters whose responsibilities do not differ much from those of 1949-era journalists, it is anachronistic, even irrational to continue to impose those guidelines on many journalists in major news organizations."[3]

Labor Department's Final Rule

We are still analyzing the Labor Department's final rule to fully assess its impact on employers and employees. However, from our initial review of the rule it appears that the rule clarifies many important areas of the regulations and will help reduce unnecessary litigation.

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[2] *See* 69 Fed. Reg. 22,125.
[3] *Freeman v. National Broadcasting Co., Inc.*, 80 F.3d 78, 85 (2nd Cir. 1996)

For example, the regulation effectively overturns the absurd Texas case that held that highly educated employees responsible for training NASA space shuttle ground control personnel were not exempt professionals since they failed to exercise enough discretion.[4] In making its ruling, the court relied, in part, on the regulation's "discretion" requirement, finding it inconsistent with the use of sophisticated manuals. The Department's new regulations reverse this result by stating that "the use of manuals, guidelines, or other established procedures containing or relating to highly technical, scientific, legal, financial, or other similarly complex matters that can be understood or interpreted only by those with advanced of specialized knowledge does not preclude exemption ...."[5] In other words, the use of highly technical manuals by those with advanced knowledge is not inherently inconsistent with acting as a professional. This is a positive change that will help reduce litigation and help employers classify employees in highly technical fields.

As another example, the Department's regulations will reduce the number of massive workplace reclassifications based on minor and infrequent violations of the salary basis test. As an illustration, consider the case of *Klem v. County of Santa Clara*[6] in which an employer of 14,000 employees made improper payroll deductions from 53 employees over a six-year time period. The result of the employer's violations was that the employer was forced to reclassify all 5300 of its exempt employees to overtime eligible for the period in question, resulting in difficult calculations of backpay considering the fact that employers do not typically keep detailed, hour-by-hour, time records for employees they classify as exempt. The Department's new regulation would limit reclassification of employees who have never actually been subjected to improper pay practices to those employees working in the same job classification working for the same manager as those improperly paid.[7] The Department's rule does not go as far as the Chamber and other business groups had asked. It is our view that no exempt employee should be reclassified unless they have been subjected to an improper pay practice. Nevertheless, although the Department did not adopt our recommendation, its final rule represents a significant improvement over the old regulations and will help reduce unnecessary litigation.

We are also pleased the Department took steps to add additional clarifications in the final rule dispelling common criticisms of its 2003 proposal. For example, the Department added sections stating clearly that the rule does not remove the legal rights to overtime from police officers, fire fighters and other first responders, blue collar workers, or licensed practical nurses.[8]

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[4] *Hashop v. Rockwell Space Operations*, 867 F. Supp. 1287 (S.D. Tx. 1994).
[5] Section 704.
[6] 246 F.3d 776 (6th Cir. 2001).
[7] Section 603(b).
[8] *See* §§ 3, 301(e)(2).

On the other hand, there are several areas of the final regulation with which we have significant concerns. For example, we do not support raising the salary level for highly compensated employees to $100,000 per year. We believe this is an overly cautious approach. Indeed, in preparing our comments on the Department's proposed regulations, we undertook an examination of job duties for employees earning between $55,000 and $65,000 per year. According to our review, the Department could have lowered the compensation level to a more reasonable level without defeating the FLSA's protective purpose.

Likewise, we are disappointed that the Department did not eliminate the production dichotomy as part of the administrative exemption. The dichotomy, which was initially adopted as an illustration of the types of work that were not covered by the administrative exemption, is a relic of the manufacturing age and has led to illogical interpretations where courts have examined the duties of loan officers and others in the financial sector based on manufacturing constructs. While we believe the Department's modest changes to the production dichotomy will help reduce this type of litigation, we are concerned that it did not go far enough.

In addition, we do not support the Department's continued emphasis, as part of the professional exemption, on the method by which advanced knowledge is acquired. Indeed, education is much more sophisticated than it was six decades ago. As employers have a greater need for specialized knowledge, nontraditional educational programs have flourished. We had hoped the Department would recognize these advances in education and abandon its focus on the method by which knowledge is acquired.

Some have argued that the new regulations will generate some additional litigation as courts struggle with new terms or concepts as some questions of interpretation are resolved. However, the new regulations are will still be a marked improvement over the confusing status quo which was plainly unacceptable and ultimately, after some "growing pains" are sorted out, the regulatory playing field will be clearer to all.

We continue to hope that all concerned will engage in an honest debate over the provisions of the Department's regulations. However, we are disappointed that already opponents of the rule have begun to mischaracterize the Department's final rules. Based on our review thus far, these allegations are without merit. A more detailed response to these criticisms follows.

Early Mischaracterizations of the Final Rule

Simplified Test for Highly Compensated Employees

Allegation: The simplified test for highly compensated employees is unprecedented. There is no legal authority for such a provision because the FLSA says nothing about it.

Response: The regulations have contained simpler tests for highly compensated employees since 1949. The 1949 regulations included three "special provisos for high salaried" employees, codified at sections 119, 214, and 315. These provisions explicitly provide more streamlined tests for highly compensated employees and more complex tests for lower paid employees.[9]

Allegation: Employees earning over $100,000 per year are automatically exempt from overtime requirements.

Response: No matter how highly paid an employee is, there is no automatic exemption from overtime. In fact, the Department specifically asserts that it does not have the legal authority to adopt such a bright line test.[10] In addition to receiving compensation of at least $100,000 per year, the employee must also perform office or non-manual work and customarily and regularly perform one or more exempt duties of an executive, administrative, or professional employee.[11] In addition, the employee's compensation must include at least $455 per week that is paid on a salary basis, rather than as bonuses or commission.[12]

Team Leaders

Allegation: The proposal denies overtime to employees who lead a team of other employees even if they do not have supervisory responsibility over the other employees on the team.

Response: One of the new examples the Department has added to the administrative exemption describes team leaders; however, this is not a change in law. First of all, the allegation that the status of team leaders has been changed confuses the executive and administrative requirements. Supervision of other employees has always been an element of the executive exemption—it has never been an element of the administrative exemption. A team leader's status under the executive exemption will still depend on whether the employee's primary duty is management (in addition to other elements of the test), consequently working supervisors will still be non-exempt.[13] Classification of a team leader under the administrative exemption hinges on whether the employee's primary duty is performance of office or non-manual work directly related to management or general business operations, in addition to meeting a discretion test. The old regulations described exempt administrative duties as including "persons who either carry out major assignments in conducting the operations of the business ... even though their tasks are related to a particular segment of the business.[14] The new regulation revises this language to describe an employee who leads a team of other employees assigned to complete major projects for the employer.[15] By way of explanation, the

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[9] *See* Weiss Report, pages 22-24.
[10] 69 Fed.Reg. 22,173.
[11] §§ 601(a), (d).
[12] § 601(b).
[13] §§ 100, 106.
[14] 29 C.F.R. § 205(c).
[15] § 203(c).

preamble to the new regulations states that the revision "merely updates this concept with a more modern example."[16]

Funeral Directors

Allegation: The new regulations strip overtime protections from funeral directors, something Republicans in Congress have tried to do unsuccessfully.

Response: The new regulations do not exempt all licensed funeral directors (in comparison to pending legislation, *see, e.g.,* S. 292, 108th Cong.). Instead they codify a position adopted by the Clinton Administration and by at least two circuit courts that the professional exemption includes funeral directors from those 16 states that require licensed funeral directors to complete two years of college plus graduation from an accredited college of mortuary science, an additional two-year course of study.[17] While the Department's regulations codify this position, they do not affect the status of funeral directors in states with less rigorous educational standards.[18]

Computer Employees

Allegation: The new rule changes deny overtime to workers employed in computer network, Internet and database administration.

Response: The regulations do not exempt any position based on job titles. An analysis of job duties is required.[19] The administrative exemption does contain a list of job functions that illustrate the type of work that the department considers as "directly related to management or business operations" including computer network, internet and database administration.[20] This list has not been updated since 1949 and it is not surprising that the Labor Department has included jobs that did not exist when the regulations were last substantively revised. The added job functions, however, do not automatically exempt employees who perform them. To qualify as an exempt administrator, the exempt duties must be the employee's primary duty and the employee's primary duty must also include the exercise of discretion and independent judgment with respect to matters of significance.[21] The preamble emphasizes this point by stating that even for the illustrative job duties, "it is still necessary to analyze the level or nature of the work … in order to assess whether the administrative exemption applies."[22]

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[16] 69 Fed. Reg. 22,146.
[17] *See* 69 Fed. Reg. 22,155; *Rutlin v. Prime Succession, Inc.*, 220 F.3d 737 (6th Cir. 2000).
[18] 69 Fed. Reg. 22,156.
[19] § 541.2.
[20] § 201(b).
[21] § 200(2), (3).
[22] 69 Fed. Reg. 22,142.

Salary Levels

Allegation: The minimum salary level of $23,660 is too low and doesn't even keep up with inflation from the last increase.

Response: The AFL-CIO proposed increasing the salary level to $980 per week, or about $50,960 per year, and the United Food and Commercial Workers suggestion increasing the salary level to $855 per week, or about $44,460 per year.[23] The Department's proposal nearly triples the annual salary below which employees are automatically exempt, an increase that is likely to impose significant additional labor costs in some parts of the country. Moreover, the Department's salary level is based on an analysis of salaries actually paid in the workforce setting the standard for automatic eligibility at the wage level earned by the lowest 20 percent of salaried employees, as opposed to the approach used in the past that set the wage level at the lower 10 percent of exempt salaried employees.[24] The Department's new salary levels, while perhaps not as high as some advocates would like, certainly represent a significant change from the current salary threshold of about $8,060 per year.

Allegation: The salary level should be indexed to inflation.

Response: Since at least 1949, the Department has believed that it does not have the legal authority to index the salary levels to inflation. The FLSA gives the Department the authority to identify executive, administrative, and professional workers, but it does not give the Department the authority to set their wages.[25] In addition, even if the Department had the authority to impose an automatically increasing salary level test, doing so would create an unknown impact on low wage regions and industries.[26] Furthermore, indexing the salary level would only address one component of the regulations and would ignore the duties tests and other components of the regulations that the Fair Labor Standards Act obligates the Department to update periodically.[27]

Veterans

Allegation: Veterans could be denied overtime since the rule allows workers to be denied overtime based on a combination of specialized training and work experience.

Response: Opponents of reform asserted that the Department's proposed changes to the learned professional exemption could have adversely affected the status of those with military training since the proposal included language that would have recognized that the requisite "advanced knowledge" necessary for the exemption could be attained though alternative means, "such as an equivalent combination of intellectual instruction

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[23] 69 Fed. Reg. 22,165.
[24] 69 Fed. Reg. 22,167-68.
[25] Weiss Report at 11; 69 Fed. Reg. 22,171.
[26] 69 Fed. Reg. 22,171-72.
[27] 29 U.S.C. § 213(a)(1).

and work experience."[28] While this allegation was untrue, the Labor Department went out of its way in its final rule to clarify that the final regulations have no adverse affect on veterans. Specifically, the final regulations eliminate the new "equivalent combination" language.[29] In addition, the preamble stresses the fact that the learned professional exemption, in addition to a discretion requirement, has three separate tests, all of which must be met in order for the exemption to apply: (1) that the employee perform work of advanced knowledge; (2) that the advanced knowledge be in a field of science or learning; and (3) that the advanced knowledge be customarily acquired through a prolonged course of intellectual instruction.[30] The preamble further notes that no amount of military training can turn a technical field into a profession[31] and that a veteran who receives substantial training in the armed forces but works in a manufacturing line or as an engineering technician cannot be considered a learned professional because the employee is not performing professional duties.[32] In addition, the allegation that "specialized training and work experience" could satisfy the requirements to be a learned professional simply ignores the fact that the hallmark of the learned professional is intellectual instruction.[33]

Nurses

Allegation: Nurses could lose overtime under the final regulation.

Response: If anything, more nurses will be legally entitled to overtime under the final regulation. The confusion surrounding the status of nurses is largely due to the fact that there are many different types of nurses who are treated differently under the old regulations. The principal issue in classifying nurses deals with whether they have obtained the requisite intellectual instruction to qualify as a learned professional. Registered nurses typically must obtain 2 to 4 years of specialized intellectual instruction before obtaining a BSN or ADN degree. By contrast licensed practical nurses typically receive only one year of vocational or technical training. The old regulations listed "nursing" among those fields generally exempt,[34] and added that registered nurses are traditionally recognized as exempt.[35] Through opinion letters, the Department has consistently held that registered nurses satisfy the duties test for learned professionals, while licensed practical nurses do not.[36]

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[28] Proposed § 301(a).
[29] §§ 300(a), (d).
[30] 69 Fed. Reg. 22,148-51.
[31] 69 Fed. Reg. 22,149.
[32] *Id.*
[33] *See* § 300(d).
[34] § 301(e)(1).
[35] *Id.*
[36] 69 Fed. Reg. 22,153 (referencing specific opinion letters).

In spite of the fact that registered nurses typically perform the duties of exempt professionals, most nurses are paid on an hourly basis and as such are entitled to overtime. In other words, while employers are under no legal compulsion to pay registered nurses hourly, they typically do so because of the demands of the market. The final regulations make no change to the status of registered nurses.[37] However, the final regulations contain additional language clarifying that nurses without the intellectual instruction of registered nurses, including licensed practical nurses and similar health care employees, do not qualify as exempt since "possession of a specialized academic degree is not a standard prerequisite for entry into such occupations."[38] In addition, the final rule deletes the language listing "nursing" as one of the fields that typically meet the requirements of the learned profession.[39]

Collective Bargaining

Allegation: The final regulations will make it harder for union workers to get overtime.

Response: The Fair Labor Standards Act sets minimum requirements for employees entitled to the minimum wage and overtime premium pay. Just as employees are free to negotiate higher wages or eligibility for overtime premium pay over and above what the FLSA requires, unions are also free to make such negotiations on behalf of their members. This is not changed by the final regulation, which includes a provision expressly stating that the regulation does not relieve employers of their responsibilities under collective bargaining agreements.[40] However, some argue that any reclassification of union workers from nonexempt to exempt would weaken a union's position at the bargaining table. Of course, most union members are not affected by the white collar regulations (since most do not perform executive, administrative, or professional job duties) and very few employees are likely to lose overtime protections under the regulations. However, assuming for the sake of argument that a class of union workers did become converted from nonexempt to exempt, it is hard to see how they would be disadvantaged at the bargaining table. Wage rates, overtime premium pay eligibility and overtime premium rates are all mandatory subjects of bargaining under the National Labor Relations Act. As such, in a unionized setting, employers are *required* to negotiate over the overtime of any employees who become exempt as a result of the final regulations.

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[37] § 301(e)(2).
[38] *Id.*
[39] § 301.
[40] § 541.4.

Conclusion

We appreciate the opportunity to share these concerns regarding the Department's final regulations. The Chamber commends the Labor Department for undertaking this much needed initiative. While we recognize that the Department's final rule does not go as far as we had hoped, our initial review indicates that it creates clearer rules that will be helpful for both employers and employees. Improved clarity will also help reduce the number of unnecessary litigation and permit employers to shift resources from consultants and attorneys to growing their business and creating jobs. Finally, we urge the committee to carefully examine the Department's final regulations and to dismiss early allegations raised by those opposed to reform.

Thank you for your consideration of these important matters. Please do not hesitate to contact us if the Chamber can be of further assistance.

Sincerely yours,

Randel K. Johnson
Vice President
Labor, Immigration and Employee Benefits

Michael J. Eastman
Director
Labor Law Policy

U.S. Chamber of Commerce, Press Release, "Chamber Welcomes White-Collar Overtime Reform", April 20, 2004

U.S. Chamber of Commerce
www.uschamber.com

CONTACTS: Linda Rozett/Eric Wohlschlegel
(202) 463-5682 / 888-249-NEWS

Tuesday, April 20, 2004

Chamber Welcomes White-Collar Overtime Reform
Changes Make Work Rules Clearer for Employers and Employees

WASHINGTON, D.C. - The United States Chamber of Commerce commended the Department of Labor for completing a long-overdue reform of the nation's white-collar overtime regulations.

"Although we are disappointed in some of the provisions, these reforms provide clearer guidance to both employers and workers on their rights and responsibilities under wage and labor laws," said Randel K. Johnson, Chamber vice president for labor, immigration and employee benefits. "They also address many of the fundamental problems in the previous, outdated regulations that led to numerous compliance questions and needless lawsuits."

Since 1954, America's overtime regulations have not significantly changed, making the regulations obsolete and the source of much, costly litigation. According to the Administrative Office of the US Courts, class action litigation on wage and hour laws has grown by 230 percent since 1997 alone.

In describing the Labor Department's action, the Chamber pointed to a September 1999 recommendation from the nonpartisan General Accounting Office that the Labor Department launch a comprehensive review of antiquated overtime regulations with a goal of reforming them to better address the realities of the modern workplace.

"For 25 years, every administration has made reform of these regulations a priority, but none has been successful until now," Johnson said. "Secretary Chao and the Labor Department are to be commended for completing these important reforms."

The U.S. Chamber of Commerce is the world's largest business federation representing more than three million businesses and organizations of every size, sector and region.

National Council of Chain Restaurants, of the National Retail Federation, News Release, "NCCR Welcomes Updated Overtime Rules", April 20, 2004

National Council of Chain Restaurants of the National Retail Federation

NEWS RELEASE

Liberty Place, 325 7th Street, NW, Suite 1100, Washington, DC 20004 202.626.8183 Fax

For Immediate Release
Contact: Scott Vinson, 202.661.3059
vinsons@nrf.com

NCCR Welcomes Updated Overtime Rules

Washington, DC, 20 April 2004 – The National Council of Chain Restaurants (NCCR) today welcomed the release of the Department of Labor's long-awaited update to the regulations that govern the payment of overtime to white collar workers. The regulations, which haven't been comprehensively revised in nearly fifty years, implement the overtime pay provisions of the Fair Labor Standards Act (FLSA).

"We applaud the Department of Labor for undertaking this difficult and challenging task," said Terrie Dort, NCCR President. "These regulations were embarrassingly outdated, and employers have struggled for years trying to comply with rules that no longer made sense in today's modern workplace," she continued. "The new rules are sure to be a vast improvement over the old, and will bring much needed clarity to an area of the law that has created serious legal headaches for employers and employees alike."

Dort noted that NCCR had not yet had time to thoroughly review the new regulations, but that the changes were likely to eliminate much of the confusion regarding which employees are eligible for overtime pay, and which are not. Confusion in this area has led to an explosion of wage and hour class action lawsuits in recent years. "Although these new regulations will undoubtedly result in more employers paying overtime to more employees, the changes are worth it given the savings to employers that will result from a reduction in lawsuits. Employers would much rather pay overtime to employees than spend millions of dollars on lawyers to defend themselves in court."

"The Department and this Administration are to be commended for having the courage to bring these regulations into the 21st century, especially given the tremendous opposition to change from organized labor," said Dort. "Undertaking such a controversial update during a political year is nothing short of remarkable, and this Administration deserves credit for forging ahead despite immense pressure to do nothing."

The National Council of Chain Restaurants (NCCR), a division of the National Retail Federation (NRF), is a national trade association representing forty of the nation's largest multi-unit, multi-state chain restaurant companies. These forty companies own and operate more than 50,000 restaurant facilities. Additionally, through franchise and licensing agreements, another 70,000 facilities are operated under their trademarks. In the aggregate, NCCR's member companies and their franchisees employ more than 2.8 million Americans. For more information about NCCR, visit www.nccr.net. For more information about NRF, visit their web site at www.nrf.com

National Association of Mortgage Brokers, Press Release, "Mortgage Brokers Applaud DOL Overtime Regulations", April 22, 2004

8201 Greensboro Drive, Suite 300, McLean, VA 22102 (703) 610-9009 www.namb.org

For Immediate Release

Contact: Karen Tyson
(703) 610-0260

Mortgage Brokers Applaud DOL Overtime Regulations

April 22, 2004 – The National Association of Mortgage Brokers (NAMB) commends the U.S. Department of Labor for updating and clarifying its regulations regarding overtime pay for American workers.

"The new regulations go a long way toward recognizing the vast changes that have occurred in the American economy over the years," said NAMB President A.W. Pickel, III, CMC. "For the mortgage industry, they help clarify the status of loan officers and make the rules regarding overtime pay more consistent with actual industry practice."

THE NEW REGULATIONS UPDATE THE FAIR LABOR STANDARDS ACT, ONE OF AMERICA'S FIRST EMPLOYMENT LAWS. THE FLSA ESTABLISHED MINIMUM WAGE, OVERTIME PAY, RECORD-KEEPING AND OTHER EMPLOYMENT REQUIREMENTS AFFECTING FULL- AND PART-TIME WORKERS, BUT HADN'T BEEN UPDATED IN 50 YEARS. THE NEW REGULATIONS SPECIFY A NUMBER OF WHITE-COLLAR JOBS THAT WILL BE EXEMPT FROM OVERTIME PAY ELIGIBILITY. THESE RULES GO INTO EFFECT 120 DAYS AFTER PUBLICATION, WHICH IS LIKELY FRIDAY, APRIL 23.

NAMB is pleased that the DOL listened to its constituents in reworking the regulations, especially as they regard employees in the financial services industry. "A loan officer of a mortgage broker must make certain judgments when assisting consumers in financing the most important purchase of their lives," said Pickel. "It's a job that requires a high degree of skill and judgment. The old regulations didn't take this into account, the new regulations do."

The National Association of Mortgage Brokers is the voice of the mortgage broker industry with more than 21,000 members in all 50 states and the District of Columbia. NAMB provides education, certification and governmental affairs representation for the mortgage broker industry, which originates two of every three residential loans in the United States.

American Bankers Association (ABA), News Release, "ABA Statement on Labor Department Final Overtime Rule", April 20, 2004

NEWS RELEASE 2004
ABA Media Contact: Tracey Mills
(202) 663-5471
E-mail: tmills@aba.com

April 20, 2004

ABA STATEMENT ON LABOR DEPARTMENT'S FINAL OVERTIME RULE

By Edward L. Yingling, ABA executive vice president

"The ABA applauds Secretary Chao and the Department of Labor on the release of a final rule updating — for the first time in 50 years — the 'white collar' exemption from the overtime requirements of the Fair Labor Standards Act.

"ABA is continuing to review this lengthy rule. However, we believe changes that provide greater certainty to employers about which employees are eligible for overtime pay will help stem the proliferation of lawsuits surrounding this complex rule, and that would be welcome relief."

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The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership -- which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks -- makes the ABA the largest banking trade association in the country. ABA can be found on the World Wide Web at www.aba.com.

Retail Industry Leaders Association (RILA), RILA News, "Retail Industry Leaders Association Applauds Release of New Overtime Regulations", April 20, 2004

RILA News

News from the Retail Industry Leaders Association

The world's leading alliance of retailers and suppliers

www.retail-leaders.org

Sandra L. Kennedy, President

Contact: Suzie Squier, 703-600-2020, suzie.squier@retail-leaders.org

RETAIL INDUSTRY LEADERS ASSOCIATION APPLAUDS RELEASE OF NEW OVERTIME REGULATIONS

Arlington, VA (April 20, 2004) – The Retail Industry Leaders Association (RILA) expressed its support for the Department of Labor's initiative in issuing long-awaited final regulations governing overtime eligibility.

"Bringing these regulations into the 21st century will help reduce overwhelming litigation costs that have plagued retailers and other employers," said Paul Kelly, RILA's senior vice president of federal and state government affairs. "The Department of Labor should be applauded for its leadership in facing a very complex issue in a very difficult political environment," he added.

RILA is currently reviewing in detail the final regulations and will hold a telephone briefing on their impact on the retail industry on April 29 at 1 p.m. Eastern time zone.

For more information, contact Mary Walker at 703-600-2041.

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Associated Builders and Contractors, Inc., (ABC), News Release, "ABC Applauds Labor Department Effort to Revise Outdated Rules Under Fair Labor Standards Act", April 20, 2004

News Release

ABC APPLAUDS LABOR DEPARTMENT EFFORT TO REVISE OUTDATED RULES UNDER FAIR LABOR STANDARDS ACT

Contact: Pete Mason, 703-812-2069
Gail Raiman, 703-812-2073

For Immediate Release
April 20, 2004

WASHINGTON, DC -- Associated Builders and Contractors (ABC) today praised U.S. Secretary of Labor Elaine L. Chao for introducing final regulations that will provide the first significant changes to the Fair Labor Standards Act (FLSA) in more than 50 years. The new regulations, known as the "FairPay" rule, will help alleviate confusion for workers and employers, reduce wasteful class action litigation and effectively protect workers' pay rights.

"ABC applauds the Labor Department for accomplishing something that has eluded previous administrations — modernizing the antiquated and outdated regulations of the FLSA," said Kirk Pickerel, ABC president and CEO. "The demographics of the workforce and the societal pressures influencing it have changed dramatically since 1938; yet the FLSA has not kept pace with these changes."

According to the Labor Department, the new rules greatly expand the number of workers eligible for overtime by nearly tripling the salary threshold. Under the previous rules, only workers earning less than $8,060 ($155 per week) annually were guaranteed overtime. The new FairPay rule stipulates that workers earning $23,660 ($455 per week) or less are guaranteed overtime, strengthening overtime protections for 6.7 million low-wage salaried workers, as well as 1.3 million salaried "white collar" workers who were not entitled to overtime pay under the existing regulations.

"Under the current regulations, it is difficult for employers to determine which employees are exempt from overtime restrictions and which employees are not exempt," said Pickerel. "The Labor Department's new FairPay initiative will clarify this process and update language in the FLSA that presently includes position descriptions that have been out of date for many years."

Litigation involving overtime pay is one of the fastest growing areas of employment litigation today. According to the Labor Department, federal FLSA cases have grown from approximately 1,500 per year in the 1990s to approximately 3,000 per year by 2003, while FLSA class action lawsuits have more than tripled since 1997.

"Although the new FairPay regulations will have a limited impact on the construction industry, as the vast majority of construction employees are non-exempt and qualify for overtime pay, these changes are vital to helping eliminate the outrageous lawsuits currently facing employers trying to comply with these arcane regulations," said Pickerel.

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Editors Note: Associated Builders and Contractors (ABC) is a national association representing 23,000 merit shop construction and construction-related firms in 80 chapters across the United States. For more news and information, visit ABC's website, www.abc.org.

Society for Human Resource Management (SHRM), PR Newswire, "New White–Collar Exemption Rules Expected to Bring Clarity to Workplace", April 20, 2004

New White-Collar Exemption Rules Expected to Bring Clarity to Workplace

PR Newswire
04/20/04, 12:15p
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SHRM Applauds DOL Efforts to Update 50-Year-Old Regulations

ALEXANDRIA, Va., Apr 20, 2004 /PRNewswire via COMTEX/ -- The Society for Human Resource Management (SHRM) commends the **Department of Labor's** (DOL) efforts to update and clarify the overtime status of employees with the release of its new finalized white-collar exemption rules.

The DOL's final rules update part 541 of the Fair Labor Standards Act (FLSA) and are commonly referred to as the white-collar exemption regulations. The regulations pertain only to those employees who carry out office, or non- manual work, and do not apply to employees who perform work that is considered blue collar. The regulations were originally meant to provide human resource professionals direction in classifying employees as exempt or non-exempt for purposes of coverage under the FLSA overtime protections.

"SHRM is currently studying the details of the new rules to determine their implications on the workplace. But, I believe the DOL must be commended for their efforts to update and clarify the 50 year old regulations," said SHRM President and CEO Susan R. Meisinger, SPHR. "It's my hope that SHRM's analysis will find that the new regulations will bring clarity, simplification and more objectivity in determining who is and is not eligible for overtime compensation."

SHRM strongly advocated an update to the old rules stating that HR professionals had little guidance in determining exempt status for job positions because the rules were often vague, inapplicable to today's workforce and inconsistent. The overall confusion of the rules has resulted in a 229 percent increase in the number of FLSA class action lawsuits since 1997. SHRM believes that if the rules are clarified, it may help to reduce the number of class-action lawsuits and open the door for more Americans to receive overtime compensation. The Bureau of Labor Statistics estimates nearly 73 million workers are now eligible for overtime.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 180,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 500 affiliated chapters within the United States and members in more than 100 countries. Visit SHRM Online at www.shrm.org

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Secretary Chao Issues Final FLSA White Collar Regulations

HR Policy to Hold Compliance Conference Featuring Wage-Hour Administrator McCutchen on May 11

Demonstrating steadfast resolve despite relentless attacks, today Labor Secretary Elaine Chao issued final regulations to modernize the 50-year-old FLSA white collar regulations. Secretary Chao emphasized "When workers know their rights and employers know how to pay workers, everybody wins." HR Policy has been urging reform of the regulations for over a decade, as the existing regulations do not easily apply to today's jobs, and the lack of certainty has produced an easy target for plaintiff's lawyers. The Secretary's achievement is monumental because the revision has been on the agenda of every administration since President Carter was in office.

Summary of the Final Regulations The final regulations would provide more clarity to several areas under the existing regulations, including the "salary basis test," which generates a substantial share of the litigation. It was this specific area that drove HR Policy Association to launch a reform effort in the early 1990s. The new regulations would also provide greater clarity to the executive, administrative, and professional exemptions, set a lower salary threshold of $23,660, and create a highly compensated employee exemption for certain individuals earning over $100,000 annually.

Employers will be required to comply with the regulations 120 days after they are published in print form in the *Federal Register* soon. A more comprehensive summary, as well as additional briefing materials prepared by the Department of Labor, are available at the DOL's FairPay website.

HR Policy to Work Closely With Our Members in Devising Compliance Strategies HR Policy will engage its members to help analyze the effects of the new regulations, as well as develop compliance recommendations. The FLSA/FMLA Advisory Board will meet on May 5 to conduct an in-depth review of the regulations. Their comments will form the basis for our comprehensive analysis, which will be issued shortly

Contact:
Tim Bartl
tbartl@hrpolicy.org
(202) 789-8670

Links:
541 Regulations

541 Preamble

DOL News Release

DOL FairPay Website

HR Policy Association Press Release

Register for the May 11 Compliance Conference

Vagaries of the White Collar Exemptions

Register for the May 13 Seattle Training Course

HR Policy Association/Fortney & Scott Compliance Assistance

www.hrpolicy.org

thereafter.

HR Policy to Host Compliance Conference on May 11 In order to help our members prepare for the changes that they will have to make to comply with the new regulations, HR Policy Association will hold an all-day compliance conference in Washington, DC, on May 11. Wage-Hour Administrator Tammy McCutchen will join us during the morning portion of the session to discuss the content of the final regulations and DOL's likely enforcement approach. The remainder of the day will be devoted to discussions led by FLSA/FMLA Advisory Board Members, HR Policy Assistant General Counsel Tim Bartl and former DOL Acting Solicitor David Fortney. The discussions will focus on the effects of the final regulations and steps employers should take to identify and make any changes to affected employees while minimizing legal complications and workforce disruptions. To register, click here or e-mail Allison Morris of the HR Policy Staff at amorris@hrpolicy.org.

Special Session of White Collar Training Course in Seattle on May 13 For members on the west coast, we will hold a special session of the *Vagaries of the White Collar Exemptions* in Seattle, Washington on May 13. The course will focus on the new regulations, as well as practical implementation tips. To register, click here or e-mail Denise Giles at dgiles@hrpolicy.org.

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Heritage Foundation, WebMemo 485,"The New Overtime Regulations: Clearer Rules, Fewer Conflicts", April 20, 2004

www.heritage.org

[back to web version]

The New Overtime Regulations: Clearer Rules, Fewer Conflicts
by Paul Kersey
WebMemo #485
April 20, 2004 | printer-friendly format

This morning, the Department of Labor released new regulations governing overtime pay that will make it easier for employers to figure out which employees must receive it. While the full impact of the regulations has yet to be determined, they appear to provide several much-needed updates and clarifications to exemptions from the Fair Labor Standards Act. These improvements will limit costly lawsuits and should make it easier for businesses to expand their payrolls.

Outdated Standards
The Fair Labor Standards Act (FLSA) establishes a standard workweek of forty hours and requires that employees who work more than that in a given week receive one-and-a-half times their regular pay ("time-and-a-half") for the extra hours. There are exceptions to this rule, though, such as the "white-collar" exemptions for executive, professional, and administrative employees.

Determining which workers qualify under these exceptions is the responsibility of the Department of Labor (DOL), but DOL has made only minor changes to its rules since 1954. In 1954, computers had vacuum tubes and industrial robots were far in the future. Much has changed in the workplace since then, and the FLSA became increasingly outdated.

The old overtime rules left employers in a bind. Which employees were exempt was not always clear, and court rulings on overtime have been inconsistent difficult to predict. For instance, one appeals court found that assistant managers at fast-food restaurants were white-collar workers, even though they spent half of their time preparing food. However, a federal court in Texas concluded that engineers and scientists who ran simulations of missions for the space program and critiqued the performance of astronauts and mission control specialists did not qualify as white-collar employees and were entitled to overtime pay. In this environment, predatory lawyering has thrived; class-action judgments on the FLSA have reached as high as $90 million dollars.

Newfound Clarity
The regulations that were released today do not represent a major shift in policy; workers in occupations that customarily receive overtime pay are not likely to lose it. But the new regulations do provide clarity to the numerous grey areas that have developed over the last fifty years.

- The new regulations clear up the question of "discretion and independent judgment," a hallmark of white-collar occupations and a source of considerable confusion in the past. The old regulations did not describe how to measure this critical variable. The new regulations, however, provide explicit guidance, incorporating case law and the experience of DOL's own investigators to give employers a better indicator of which occupations involve sufficient discretion to qualify as exempt.
- The new regulations provide more up-to-date descriptions of specific occupational categories and workplace situations. Obsolete references to "legmen" and "straw bosses" have been replaced by detailed rules covering medical technologists, paralegals, and other less-dated occupations. Employers who look to the rules for clear instructions are more likely than before to find guidance that they can easily put into practice.
- The largest substantive change in the new regulations expands overtime coverage for low-level supervisors, such as assistant managers in retail stores and restaurants. Until now, workers making as little as $8,060 per year—below minimum wage—could be considered "white collar." The new regulations raise that minimum standard to $23,660. This change will be a boon to low-level supervisors, and many will now receive overtime pay automatically.

Clearer rules will allow both employees and employers to be more certain about their workplace rights, preventing conflicts that lead to expensive lawsuits. That there is now less legal uncertainty regarding overtime—due to the replacement of outdated and unclear regulations—should make employers more willing to hire. While many details still have to be explored and worked out in the workplace, the new regulations have the potential to provide a significant benefit to the nation's economy.
Paul Kersey is Bradley Visiting Fellow in Labor Policy at The Heritage Foundation

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Food Marketing Institute (FMI), Press Release, "Food Retailers and Wholesalers Applaud DOL for Rewriting Overtime Rules for the 21st Century Economy" April 20, 2004

655 15th Street, N.W. Washington, DC 20005-5701 Telephone: (202) 452-8444 Fax: (202) 429-8272

FOR IMMEDIATE RELEASE

Contact: Bill Greer
202-220-0667
wgreer@fmi.org

Food Retailers and Wholesalers Applaud DOL for Rewriting Overtime Rules for the 21st Century Economy

WASHINGTON, DC — April 20, 2004 — "Food retailers and wholesalers today applaud the U.S. Department of Labor (DOL) for working to modernize, clarify and simplify the rules governing who qualifies for overtime pay," said Tim Hammonds, president and CEO of the Food Marketing Institute, commenting broadly on today's release of the final white collar rules under the Fair Labor Standards Act (FLSA).

"This day is historic," he added, "because these rules have not been changed significantly for over half a century. The old regulations were designed for a 1950s workforce populated by straw bosses and keypunch operators — not the network engineers and Webmasters of the 21st century economy."

The rules determine whether employees are "nonexempt" and must be paid overtime for working more than 40 hours a week or "exempt" and earn a salary with no overtime pay. "These rules have been some of the most convoluted and ambiguous federal regulations on the books," Hammonds said. "They have led to tremendous confusion for both workers and employers in the food distribution industry.

"As a result of this confusion, trial lawyers have discovered a gold mine of class-action lawsuits against employers over how they implement these regulations. FLSA class-action litigation is up by 230 percent since 1997 — legal actions that drain nearly $2 billion a year from our economy, according to Labor Secretary Elaine Chao, costing jobs and better pay for our workers.

"We look forward to reviewing the final regulations in detail to make sure they reflect the realities of the modern workplace."

# # #

Food Marketing Institute (FMI) conducts programs in research, education, industry relations and public affairs on behalf of its 2,300 member companies — food retailers and wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores with a combined annual sales volume of $340 billion — three-quarters of all food retail store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from 60 countries.

National Federation of Independent Business (NFIB), News, "NFIB: DOL Overtime Rule Offers Clarity for Small Business", April 20, 2004

NFIB. SMALL-BUSINESS NEWS

National Federation of Independent Business • 1201 F Street, N.W., Suite 200 • Washington, DC 20004
• 202-554-9000 • Fax 202-554-0496

FOR IMMEDIATE RELEASE
April 20, 2004

Contact: Michelle N. Dimarob or
Angela Jones (202) 554-9000

NFIB: DOL Overtime Rule Offers Clarity for Small Business

In response to the final rule regarding overtime released today by the U.S. Department of Labor (DOL), NFIB Senior Vice President Dan Danner made the following statement:

"We welcome today's action by DOL to update and reform obsolete, unclear and antiquated language so that 21st century small-business owners can succeed in a 21st century business environment. Modernizing overtime regulations is critical to reducing regulatory red tape and simplifying business practices for small business. But it is also about reducing litigation costs so that our small-business owners have the financial resources necessary to stimulate economic growth. Since 1997, the number of class action lawsuits under the Fair Labor Standards Act (FLSA) has more than doubled."

"NFIB is hopeful today's final rule will help reduce lawsuits filed by trial lawyers who are eager to capitalize on the confusion caused by outdated regulations. We will be reviewing the rule to understand better how it will impact our members."

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The National Federation of Independent Business (NFIB) is the nation's largest small-business advocacy group. A nonprofit, nonpartisan organization founded in 1943, NFIB represents the consensus views of its 600,000 members in Washington and all 50 state capitals. For more information on NFIB visit www.NFIB.com. NFIB's 2004 National Small Business Summit will be held June 16-18 in Washington, D.C. More information is available on-line at www.NFIB.com/summit.

American Insurance Association (AIA), Press Release, "AIA Praises New Labor Regulations", April 20, 2004

American Insurance Association

1130 Connecticut Avenue, NW, Suite 1000 · Washington, DC 20036 ·Phone: 202/828-7100 ·Fax: 202/293-1219 · www.aiadc.org

FOR IMMEDIATE RELEASE

Contact: Gary Karr
(202) 828-7494

AIA PRAISES NEW LABOR REGULATIONS

WASHINGTON, D.C., April 20, 2004 – The U.S. Labor Department's update of overtime regulations will help end needless litigation, as well as reduce conflict and confusion amongst employers and employees, the American Insurance Association (AIA) said today.

"These revisions are long overdue, and the changes will allow for a more sensible, clearer application of the Fair Labor Standards Act," said Ken Stoller, AIA counsel.

The 'white-collar' regulations in the Fair Labor Standards Act (FLSA) have not been substantially updated since 1954, Stoller noted, even though the workplace has changed drastically since then.

"Old, outdated rules hurt both employers and employees," Stoller said. "Trying to figure out whether an employee with independence and leadership responsibilities is an 'exempt' executive, for example, has led to unnecessary litigation and sometimes conflicting judicial rulings. We commend the Labor Department and the Bush Administration for bringing clarity to a confusing situation."

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The American Insurance Association represents over 400 major insurance companies that provide all lines of property and casualty insurance and write more than $110 billion annually in premiums. The association is headquartered in Washington, D.C., and has representatives in every state. All AIA press releases are available at www.aiadc.org.

Mortgage Bankers Association (MBA), Statement by Kurt Pfotenhauer, Senior Vice President of Government Affairs, "MBA Applauds Department of Labor for Modernizing the Fair Labor Standards Act", April 20, 2004

MBA Applauds Department of Labor for Modernizing the Fair Labor Standards Act
- A Statement by Kurt Pfotenhauer, Senior Vice President of Government Affairs -

Source: Mortgage Bankers Association

Date: April 20, 2004

Contacts

Laura Armstrong
(202) 557-2730
larmstrong@mortgagebankers.org

Matthew Royse
(202) 557-2727
mroyse@mortgagebankers.org

WASHINGTON, D.C. (April 20, 2004) - - "We are pleased that the Department of Labor has modernized the Fair Labor Standards Act [FLSA] which has not been updated in 50 years. The new rule better clarifies and defines who is - and who isn't - eligible for overtime for both employers and employees. It is an important and welcome step forward."

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The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 400,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership prospects through increased affordability; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters excellence and technical know-how among real estate finance professionals through a wide range of educational programs and technical publications. Its membership of approximately 2,700 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

National Restaurant Association, Press Release, "National Restaurant Association Recognizes Labor Department's Modernization of Overtime Regulations", April 20, 2004

FOR IMMEDIATE RELEASE
April 20, 2004
202-331-5902
Katharine Kim
202-331-5939

CONTACT: Brad Dayspring

NATIONAL RESTAURANT ASSOCIATION RECOGNIZES LABORDEPARTMENT'S MODERNIZATION OF OVERTIME REGULATIONS

(Washington, DC) The National Restaurant Association today acknowledged the U.S. Department of Labor (DOL) for issuing a final rule modernizing the 50-year old overtime regulations under the Fair Labor Standards Act (FLSA) which determine overtime eligibility for executive, administrative and professional "white-collar" employees.

"This far-reaching final rule -- while not perfect -- is long overdue and will ultimately help restaurant owners to operate a 21st century business and employ a 21st century workforce without the threat of expensive litigation," said Robert Green, vice president of federal relations for the National Restaurant Association. "We commend Secretary of Labor Elaine L. Chao for her vision in recognizing the need to update these regulations which will help ensure that employers know which employees should be paid overtime, and that employees receive the compensation to which they are entitled."

Written in 1949, the old labor regulations became severely outdated and included job classifications that no longer existed. The new regulations redefine the job duties required to qualify for the overtime exemption. Under the modernized exemption, chefs are now granted "professional" status and restaurant managers and assistant managers are more clearly classified as "executives." The new DOL overtime regulations also raise the salary threshold--the salary level below which workers would automatically qualify for overtime--from $155 a week to $455 a week ($8060 in comparison to $23,660 annually).

The National Restaurant Association, a strong supporter of DOL efforts to update overtime regulations, concentrated its advocacy efforts on the proper classification of restaurant employees, including the unique duties of restaurant managers, assistant managers and chefs which are prevalent within the industry. The Association also contended in its public comments that the substantial salary threshold increase proposed by DOL would have an impact on certain employers in the restaurant industry, and suggested that DOL review and reconsider the methodology used to establish the proposed minimum salary threshold.

"By streamlining labor laws written during the Truman Administration and reducing the regulatory red tape for small business operators," added Green, "restaurateurs are now better equipped to operate their businesses with a modern workforce without the threat of increased exposure to overtime class-action lawsuits. The Bush Administration should be commended for following through on its promise to update the antiquated regulations."

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The National Restaurant Association, founded in 1919, is the leading business association for the restaurant industry, which is comprised of 878,000 restaurant and foodservice outlets and a work force of 12 million employees - making it the cornerstone of the economy, career opportunities and community involvement. Along with the National Restaurant Association Educational Foundation, the Association works to represent, educate and promote the rapidly growing industry. For more information, visit our Web site at www.restaurant.org.

National Association of Manufacturers (NAM), Press Release, "NAM Welcomes Labor Dept. Announcement of Update of Nation's Antiquated Overtime Regulations", April 20, 2004

NEWS ALERT

NAM National Association of Manufacturers

04-93

FOR IMMEDIATE RELEASE

NEWS CONTACTS:
Scot Montrey (202) 637-3099
Sandra Boyd (202) 637-3133

NAM WELCOMES LABOR DEPT. ANNOUNCEMENT OF UPDATE OF NATION'S ANTIQUATED OVERTIME REGULATIONS

Washington, D.C., April 20, 2004 – The National Association of Manufacturers today congratulated the U.S. Department of Labor for being the first in decades to tackle the challenge of revising the nation's 50-year-old regulations governing white collar exemptions from overtime pay.

"There have obviously been major changes since the proposed rule was issued last year. Everyone on all sides of this issue would do well to carefully digest all 500-plus pages and keep their powder dry before playing election-year politics," said NAM Human Resources Policy Vice President Sandy Boyd.

Employers today are more likely to be sued for alleged violations of the Fair Labor Standards Act – enacted in 1938 and laden with anachronisms like the term "straw boss" – than any other labor statute. "An aggressive trial bar combined with vague, outdated regulations makes for bad policy that benefits neither employers nor their employees," Boyd recently wrote in a letter to Congress. "What employers want ...in the final regulation is clarity and protection from senseless litigation."

THE NATIONAL ASSOCIATION OF MANUFACTURERS IS THE NATION'S LARGEST INDUSTRIAL TRADE ASSOCIATION. THE NAM REPRESENTS 14,000 MEMBERS (INCLUDING 10,000 SMALL AND MID-SIZED COMPANIES) AND 350 MEMBER ASSOCIATIONS SERVING MANUFACTURERS AND EMPLOYEES IN EVERY INDUSTRIAL SECTOR AND ALL 50 STATES. HEADQUARTERED IN WASHINGTON, D.C., THE NAM HAS 10 ADDITIONAL OFFICES ACROSS THE COUNTRY.

The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media and the general public about the importance of manufacturing to America's economic strength.

-NAM-

Americans for Tax Reform (ATR), News, "Labor Department Announces New Rule to Clarify 50–Year Old Regulations and Increase Overtime Pay for Millions of Workers", April 20, 2004

AMERICANS FOR TAX REFORM

NEWS

1920 L Street, NW • Suite 200 • Washington, DC 20036
202.785.0266 • Fax 202.785.0261

WWW.ATR.ORG

FOR IMMEDIATE RELEASE

CONTACT: Jonathan Collegio
Chris Butler
202-785-0266

20 April, 2004

Labor Department Announces New Rule to Clarify 50-Year Old Regulations and Increase Overtime Pay for Millions of Workers

New rule modernizes 50-year-old Fair Labor Standards Act (FLSA) regulations regarding "white collar" workers and provides overtime pay for 6.7 million new workers.

WASHINGTON — Today the U.S. Department of Labor announced the final rule to modernize the 50-year old regulations defining exemptions from the Fair Labor Standards Act (FLSA) for "white-collar" employees.

"Secretary Elaine L. Chao and the DoL have continued to bring the department's rules into the 21st century while clarifying outdated regulatory language," said Grover Norquist, President of ATR. **"These changes will stop trial lawyers from bankrupting small business with frivolous lawsuits while getting rich on outdated and confusing regulations."**

Under the old rules, employees earning only $155 a week qualify as a white collar employee, not entitled to overtime pay. **Trial lawyers have used the ambiguity of the old regulations to increase litigation against small businesses for unpaid overtime.** In fact, in 2001, for the first time, class action lawsuits filed under the FLSA (79) outnumbered Equal Employment Opportunity (EEO) class action cases (77).

The increased litigation has forced small businesses and entrepreneurs to settle out of court for outrageous fees. Consider the following:

- Starbucks paid $18 million to settle lawsuits alleging managers and assistant managers were misclassified as exempt from overtime.
- Radio Shack paid $30 million to settle a class action lawsuit involving store managers.
- Pacific Bell paid $35 million to settle a lawsuit alleging engineers were misclassified as professionals exempt from overtime.

"These changes will save the United States economy between $870 million to $1.5 billion by reducing regulatory red tape and litigation costs for business," said Norquist. **"These reforms are necessary and long over due."**

Americans for Tax Reform is a non-partisan coalition of taxpayers and taxpayer groups who oppose all federal and state tax increases. For more information or to arrange an interview please contact Jonathan Collegio at (202) 785-0266 or by email at jcollegio@atr.org

National Association of Convenience Stores (NACS), Press Release, "Convenience Store Industry Commends Labor Department's Efforts on 'Fair Pay' Overtime Initiative Under FLSA", April 20, 2004

FOR IMMEDIATE RELEASE
April 20, 2004

Contact: Jeff Lenard
(703) 518-4272
jlenard@nacsonline.com

Convenience Store Industry Commends Labor Department's Efforts on 'FairPay' Overtime Initiative Under FLSA

ALEXANDRIA, VA – The National Association of Convenience Stores (NACS) on Tuesday thanked the U.S. Department of Labor (DOL) for taking on the difficult task of modernizing the overtime exemption regulation in its "FairPay" Overtime Initiative under the Fair Labor Standards Act (FLSA).

"The workplace has changed dramatically since overtime regulations first hit the books in 1938," said Allison Shulman, NACS director of government relations. "No other administration had the courage to touch this polarizing issue, and NACS commends Secretary Chao for modernizing this outdated regulation," she added.

Shulman noted that NACS still needs time to analyze exactly how this new rule will impact the convenience store and petroleum marketing industry. "The one thing we know for certain, without going into an extensive analysis of the rule, is that there are 130,659 convenience stores in the United States who employ nearly 1.4 million Americans, and this rule will affect nearly every single one of them," Shulman said

Between 1997 and 2002, class action lawsuits under FLSA increased by almost 200 percent, costing the economy more than $2 billion annually. NACS joined other employer groups in arguing that updating the overtime rule was long overdue to bring clarification to the overtime exemption regulation.

DOL's summary of the final rule said the changes could give up to 1.3 million low-wage "white-collar" workers an additional $375 million in compensation each year. Under the current rules, workers who earn less than $8,060 are automatically eligible for overtime -- a level set in the 1970s. The proposed rule had called for raising the cap to $22,100. Under the final rule, however, workers who earn up to $23,660, or about $455 a week, will be automatically eligible for overtime.

"NACS will continue to analyze the exact impact this new rule has on the convenience store and petroleum marketing industry," noted Shulman.

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THE NATIONAL ASSOCIATION OF CONVENIENCE STORES (NACS) IS AN INTERNATIONAL TRADE ASSOCIATION REPRESENTING 1,900 RETAIL AND 1,800 SUPPLIER MEMBERS. THE U.S. CONVENIENCE STORE INDUSTRY POSTED MORE THAN $290 BILLION IN TOTAL SALES FOR 2002, WITH $181 BILLION IN MOTOR FUELS SALES.

National Retail Federation (NRF), News Release, "Retailers Welcome New Overtime Regulations", April 20, 2004

NATIONAL RETAIL FEDERATION

NEWS RELEASE

THE WORLD'S LARGEST RETAIL TRADE ASSOCIATION
Liberty Place, 325 7th Street, NW, Suite 1100, Washington, DC 20004 202.783.7971 Fax: 202.737.2849

For Immediate Release
Contact: J. Craig Shearman, (202) 626-8134
shearmanc@nrf.com

Retailers Welcome New Overtime Regulations

Washington, D.C., April 20, 2004 — The National Retail Federation today welcomed the Department of Labor's release of new federal white collar overtime regulations, saying the long-sought update would help put an end to costly litigation from disputed overtime decisions.

"The Department of Labor has given us the first comprehensive update of overtime regulations in half a century," NRF Vice President for Legislative and Political Affairs Katherine Lugar said. "That is a victory unto itself, regardless of the details. Employers have spent too many years trying to shoehorn modern jobs into regulations that haven't been updated since Elvis was a teenager. We've finally got regulations that will mean something in the 21st century workplace."

Lugar cautioned that NRF has not had time to fully review the just-released regulations but that the update was certain to be an improvement over existing rules. DOL, which released a draft of updated Fair Labor Standards Act regulations in March 2003, unveiled the final version of the regulations at a news media briefing in Washington this morning.

"The problem that employers have had is that the old overtime rules were vague, outdated and confusing," Lugar said. "The lack of clarity has made it difficult to know that you're making the correct decision about who gets overtime and who doesn't. That created a gold mine for trial lawyers trolling for clients they could convince to sue their bosses. This update should give us the clarity to know for certain who should get overtime and put an end to that explosion of lawsuits."

"We know this isn't the end of the political battle," Lugar said. "Businesses have been trying to get these rules updated since the Carter Administration but the Bush Administration has been the first to get this far. That's taken political courage and stamina and we're going to back up President Bush on any congressional challenges. We will work with Congress to ensure that lawmakers understand that updating these regulations benefits both businesses and workers and see to it that nothing is done to sidetrack that victory."

"The idea that this is an attempt to take overtime away from anyone it was intended to cover in the first place is just plain fiction," Lugar said. "Just the change in dollar levels alone means that employers are going to have to pay overtime to more workers. This will cost businesses money but most would rather spend money on wages that benefit their employees than spend millions of dollars defending themselves in court time and time again."

The National Retail Federation is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet and independent stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.4 million U.S. retail establishments, more than 23 million employees - about one in five American workers - and 2003 sales of $3.8 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations. www.nrf.com.

Statement of Cheryl Johnson, RN, President, United American Nurses, AFL–CIO (UAN), April 28, 2004

600 Maryland Ave., SW
Suite 100 West
Washington, D.C. 20024
202-651-7118/fax 202-651-7347

Statement for the Record of Cheryl Johnson, RN
President, United American Nurses
House Education and Workforce Committee
Hearing on Assessing the Impact of the Labor Department's Final Overtime Regulations on Workers and Employers
April 28, 2004

I would like to thank the chairman, ranking Democratic member, and members of the committee for the opportunity to provide testimony for the hearing on "Assessing the Impact of the Labor Department's Final Overtime Regulations on Workers and Employers." My name is Cheryl Johnson and I have been a registered nurse for 30 years. I am currently a critical care nurse at the University of Michigan Health Systems in Ann Arbor, Mich. I am testifying today as the President of the United American Nurses (UAN), a union representing 100,000 registered nurses.

On April 23, 2004, the Labor Department released final regulations that will significantly change the criteria for determining which employees are eligible for overtime pay. The UAN is concerned that these new regulations fail to protect overtime rights for RNs, as well as thousands of other American workers. The UAN and its legal counsel are still reviewing these complex regulations, but have the following concerns:

- The new rules provide immunity from overtime cuts to certain high-profile groups of first responders, such as police officers, firefighters, paramedics and LPNs. However, the regulations conspicuously fail to include RNs in this protected group. These new regulations will exacerbate the registered nurse staffing crisis in America. Because of deteriorating working conditions and a lack of respect, registered nurses are leaving the bedside. A 2002 report by the Health Resources and Services Administration states that by 2020, hospitals will be short 808,416 RNs. In a 2002 survey by the United American Nurses, three out of every ten nurses said it was unlikely they would be a hospital staff nurse in five years. By failing to protect RNs' right to overtime, the Department of Labor has missed an opportunity to address the nurse staffing crisis in America.

- The new regulations may make it easier for employers to classify RNs as "salaried professionals" making them ineligible for overtime protection. Section 541.604 of the new rules states that an "exempt employee's earning may be calculated on an hourly, daily or a shift basis, without losing the exemption or violating the salary basis requirement." This new exemption means that hospitals may try to claim that their RNs are salaried, and therefore exempt from overtime,

even though they are being paid according the number of hours or shifts that they work. In essence it may allow employers to disguise hourly wages as a salary in order to avoid paying overtime.

- A new section of the regulations creates a new type of employee called a "Team Leader" that can be denied overtime. A team leader is "an employee who leads a team of other employees assigned to complete major projects for the employer," and can be classified as exempt, "even if the employee does not have direct supervisory responsibility." Employers may be encouraged by this section to argue that RNs are team leaders, and therefore exempt from protection as administrative employees.

- Under the new rules, a cap of $100,000 is placed on the amount of income a worker can earn and still be eligible for overtime pay. This may not seem like a direct threat to nurses, because very few RNs are compensated above $100,000. However, it will eventually erode protections for all workers, because the cap will not increase with inflation or with wage increases. According to the most recently available numbers from the Bureau of Labor Statistics (BLS), the national mean annual pay of an RN in 2002 was $49,840 (Source: BLS, Occupational Employment and Wage Estimates). If RN wages were to grow at only 5% per year (this is a reasonable assumption given past experience with inflation and wages), the average nurse would be ineligible for overtime pay within 15 years because of hitting the $100,000 cap. Even if wages only grew at 3% per year (which would probably not even keep pace with inflation) within 25 years, the average RN would not be covered by overtime protections. This cap is unprecedented. Congress and the Supreme Court have always prevented overtime opponents from applying a cap before now. By instituting this fixed cap, the Bush Administration clearly intends, gradually but inevitably, to eliminate overtime protection for all workers. Furthermore, if this cap goes unchallenged, there will be nothing to prevent DOL from issuing new rules in the future to lower the cap.

- The new regulations send the wrong message at a time when there is a nurse-staffing crisis and mandatory overtime is widespread. By creating the potential to make overtime work less expensive, the regulation runs the risk of chasing nurses from the profession and encouraging employers to expand mandatory overtime.

- The new regulations fail to provide any clarification on overtime rights and will likely spur endless litigation. Many of the sections and definitions in the new regulations are ambiguous at best and it will likely take the courts to determine their true impact on American workers.

In conclusion, the UAN is concerned that these new regulations threaten the right of registered nurses to continue to receive overtime compensation, as well as eliminate any incentive for hospitals to address inadequate staffing resulting from the national shortage in this field. UAN believes that it is essential to preserve the right to overtime pay for

Thank you again for opportunity to provide testimony regarding this important issue. The UAN looks forward to working with the committee to protect registered nurses' right to receive overtime pay.

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