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THE DEPARTMENT OF LABOR'S OVERTIME REGULATIONS EFFECT ON SMALL BUSINESS

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT & GOVERNMENT PROGRAMS

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

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THURSDAY, MAY 20, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT AND GOVERNMENT PROGRAMS
COMMITTEE ON SMALL BUSINESS
Washington, D.C.

The Subcommittee met, pursuant to call, at 2:18 p.m. in Room 311, Cannon House Office Building, Hon. W. Todd Akin, presiding.

Present: Representatives Akin, Udall, and Sanchez.

Chairman AKIN. The meeting of the Subcommittee will come to order. Forgive me for begin a little late. Too many meetings and too little time here, but I appreciate your interest in this issue, and we will go ahead and proceed. I believe we will be able to get things done in a timely manner.

I would like thank you all for joining us here today as we examine the proposed changes in the Department of Labor's overtime regulations and their effect on small businesses and their employees. I would especially like to thank our witnesses who have agreed to testify before this Committee.

On April 23, 2004, the Department of Labor issued final regulations under the Fair Labor Standards Act implementing the exemption from overtime pay for executive, administrative, professional, outside sales, and computer employees. These exemptions are often referred to as the "white collar" exemptions.

To be considered exempt, employees must meet certain minimum tests related to their primary job duties, and in most cases must be paid on a salary basis at not less than minimum amounts as specified in the applicable sections of these regulations. These regulations will become final on August 23, 2004.

As many of you know, this is the first significant update of the rules governing the white collar exemption to the Fair Labor Standards Act in nearly 50 years. Given these rules are among the most convoluted and ambiguous federal regulations, this long overdue update is welcome news for business owners and for their employees.

The current regulations have caused a great deal of confusion for both employers and their workforce. Employers today are more likely to be sued for alleged violations of the Fair Labor Standards Act than any other labor statute. In fact, the number of class action lawsuits under the Fair Labor Standards Act has more than dou-

bled since 1997. Costly litigation is counterproductive, takes valuable time and drains resources away from businesses, resources that should be used to improve employee benefits, make American companies more competitive, and create new jobs.

During the 108th Congress this Committee has held hearings on a diverse field of topics, including health savings accounts, union salting abuse, assistance programs offered by the Small Business Administration most recently, the federal minimum wage.

Despite the diversity, each is focused on answering a central question: What can we do to lower the cost of doing business in the United States?

Answering this question with good policy is fundamental to maintaining a healthy, vibrant economy where businesses can flourish and produce jobs for the American people. We must continue to make it easier to do business in America in order to facilitate stronger and longer term growth. The revised overtime regulations do just that by cutting bureaucratic red tape, reducing the need for costly litigation.

I look forward to hearing the testimony presented today, but before we get to testimony I would like to turn to our distinguished ranking member, Mr. Udall, for any opening statement he would like to offer.

[Chairman Akin's statement may be found in the appendix.]

Mr. UDALL. Thank you, Chairman Akin. It is a pleasure to be here with you today.

Today's hearing will look at the Department of Labor overtime regulations and the impact it will have on our nation's working families and small business owners. This proposal will raise the threshold for earnings and will revise the types of jobs that enable individuals to qualify for overtime.

I am very concerned about the effect that this regulation will have on many hard working individuals and on our nation's small businesses. By the department's own admission, this regulation would strip overtime pay from hundreds of thousands of hard working Americans. These regulations will also create a pay cut for middle class families, most of whom already feel a pinch from the economic policies of this administration.

Middle class workers are finding themselves facing shrinking wages and climbing health care costs. These new overtime regulations are only going to worsen their economic situation and strip them of their right to overtime pay.

The administration may claim that these overtime regulations are flexible and will help with payroll costs, but in reality these new rules will only add to the exploding volume of paperwork that already create problems for small businesses.

This new rule will ultimately create much confusion for our nation's small firms. The overtime regulations are lengthy and very complicated. Because much of the terminology used in the new rule has changed, it will create confusion for small businesses which do not have the time or manpower to weed through all 530 pages. The complex regulation will dramatically increase the amount of paperwork and create litigation problems for small enterprises for failing to comply with the rule they may not even understand.

Further exacerbating this issue is the fact that the new overtime regulations could go into effect as early as August 23rd. This is not nearly enough time to make an accurate analysis of what type of impact this will have on our economy and our nation's small businesses.

What is clear at this point is that these regulations will deprive a significant number of hard working employees of their overtime pay and will create confusion for small businesses who may find themselves faced with new litigation problems due to the complexity of the rule.

Mr. Chairman, although I made my concerns known, I nevertheless very much look forward to hearing the testimony of the distinguished witnesses on the panel and thank them for coming today. I yield back.

Chairman AKIN. Thank you. Because of the fact we have got some votes coming up, I am going to go ahead. We also have two panels of witnesses, which is a little unusual for our Committee, I am going to go ahead to try to move things along and hear from our panel.

Our first panelist is Alfred Robinson who is the Deputy Administrator of the Wage and Hour Division of the United States Department of Labor. And Alfred, we just appreciate your coming in. You have got five minutes, and with no objection you can submit any other additional written comments for the record.

Proceed. Thank you.

STATEMENT OF ALFRED B. ROBINSON, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR

Mr. ROBINSON. Thank you, Mr. Chairman, and distinguished members of the Subcommittee.

I appreciate this opportunity to discuss with you the department's final Part 541 or white collar regulations, and to emphasize the new rules' positive impact upon small businesses and employees.

As you know, the department published its final rule last month. The department is very proud of the final rule for a number of reasons. Under the new regulations workers earning less than $23,660 per year or $455 per week are guaranteed overtime protection. This new minimum salary level for exemption almost triples the current minimum salary of only $8,060 per year, and strengthens overtime rights for 6.7 million American workers.

Of these 6.7 million workers, 1.3 million are low wage salaried, white collar workers who are not entitled to overtime pay under the old regulation, and they will gain up to $375 million in additional earnings every year. Other provisions strengthen overtime protection for licensed practical nurses, police officers, fire fighters, paramedics, and similar public safety employees, and blue collar workers, such as construction workers, manual laborers, and employees on factory lines. Such employees will not be affected by the new regulation.

As for workers earning between $23,660 and $100,000 per year, the final rule provides equal or greater overtime protection and ensures that employees can better understand their rights, employers

better understand their legal obligation, and wage and hour investigators have the necessary tools to vigorously enforce the law.

The old regulations are very difficult for employment lawyers and human resource professionals to understand, and much more so for average workers or small business owners. They have created so much confusion over these exemptions that it has resulted in an explosion of class action litigation and has failed sufficiently to protect worker rights.

The department issued a final rule that is responsible and responsive to the public. For the past year, we listened to thousands of comments from employees, labor organizations, business associations, and employers, and designed new regulations that are clear, straightforward, and fair. We worked hard to get it right. The importance of small businesses to our economy made it critical that the department get it right.

These entities are the engine of job creation in this country. The department estimates that there are 39 million employees working at some 5.2 million small business establishments that are covered by the FLSA.

During the rulemaking process the department carefully weighed the concerns expressed by the many commenters. Because of their size, small businesses noted that they are disproportionately impacted by unclear overtime rules and concomitant risks of possible litigation. The department's final rule is sensitive to the unique challenges of small businesses.

Also, we have already embarked upon an aggressive compliance assistance program to help small enterprises understand and comply with the new rule. The department's website is dedicated to promoting compliance with the new white collar regulations. Small businesses, as well as employees, may obtain a wide array of compliance assistance materials such as facts sheets, video, and other helpful aides. Also, the department distributes printed versions of the material for employers and employees who do not have access to the internet.

The department is working with the Small Business Administration to educate small business owners and employees about Part 541 as part of our ongoing participation in the SBA Expo Reg Fair hearings. We have other programs in Texas, New Jersey, and in California where we do compliance assistance with small businesses.

Small businesses expressed concern during the comment period that because of regional differences in salary and industry characteristics they might face disproportionate burden from the increased salary level. Accordingly, the department's methodology specifically considered salary levels actually being paid by small businesses, and in low wage regions. The department's approach was designed specifically to achieve a careful and delicate balance, mitigating the adverse impacts of raising the salary threshold on small businesses covered by the law by staying consistent with the objective and the statute to clearly define and to delimit which workers qualify for the exemptions. Our overriding goal has been to prevent the misclassification of exempt employees.

Mr. Chairman, my time is about to expire, and I want to thank you and members of the Subcommittee, and I would be happy to answer any questions that you may have.

[Mr. Robinson's statement may be found in the appendix.]

Chairman AKIN. Thank you, Administrator. Let me just—what was kind of interesting from our opening statements it seems like a couple of ships passing in the night, and so I want to see if I can't go over a few things.

What I think I heard you say, first of all, that many additional new people qualify for overtime; is that correct?

Mr. ROBINSON. That is correct, Mr. Chairman. 6.7 million employees' overtime rights will be strengthened.

Chairman AKIN. But let us talk about the new ones that do not quality that will qualify under this.

Mr. ROBINSON. And of those there are 1.3 million who will qualify, and they will share in approximately $375 million in additional———.

Chairman AKIN. Okay, now, it is possible that what both of us said at the same time is true, because you are saying 1.3 million additional people will qualify for overtime that do not qualify currently; is that correct?

Mr. ROBINSON. That is correct.

Chairman AKIN. Now, it is also possible that you may have some people who currently qualify who in the future will not. So I guess the question I have is how many of those are there, and when you put the two together which one is more?

Mr. ROBINSON. Okay. Of that 6.7, you are correct, 1.3 will. 5.4, there will be no question because of the new salary level that they will qualify.

Chairman AKIN. So there were 5 point something that were questionable are sort of in the gray zone.

Mr. ROBINSON. That is right because they were subject to the duties test. But with raising the salary level from $155 to $455, they are guaranteed overtime protection so there will not be any question for those 5.4.

Our estimates as to people who could lose overtime is that there are approximately 107,000 employees or workers who could be converted to exempt salary status as a result of when we test for highly compensated employees.

Chairman AKIN. So if you did not like what you were doing, what you could say is there is over 100,000 people who are going to lose their ability to get overtime, but on the other hand if you liked it you could say there are 1.3 million who do not qualify who will qualify, so the net total is there is still a huge amount more that do not qualify for overtime that with the new regulations will qualify; is that correct?

Mr. ROBINSON. That is correct and——

Chairman AKIN. So the net total is pretty close to 1.2 million in total and will qualify, more than what will not.

Mr. ROBINSON [CONTINUING] That is correct, and I would also caution that about 107,000, based on our economic analysis, they could lose. Some of them may already not be receiving overtime, but it is because of the economic models, and the thinness, if you

will, of data it is very hard to predict at that level of exactly how many of 107,000———.

Chairman AKIN. You are saying 107,000 is——

Mr. ROBINSON. It is a max.

Chairman AKIN [CONTINUING] It is a maximum and it is an estimate?

Mr. ROBINSON. Yes, sir.

Chairman AKIN. Okay. So first of all, we are raising the earning ceiling also significantly.

Mr. ROBINSON. That is correct.

Chairman AKIN. And that is part of the reason why you are getting so many more people who qualify for overtime.

Mr. ROBINSON. That is correct.

Chairman AKIN. So the net result is that a whole lot more people are going to qualify for overtime with the change in the rules and regs than currently do?

Mr. ROBINSON. That is correct.

Chairman AKIN. Okay.

Mr. ROBINSON. Yes.

Chairman AKIN. The second point is, is that I think there was criticism that there was a haziness or fuzziness or hard to follow the new regulations. Now, my understanding is that the only reason we are doing this is because we have 50-year-old rules and regs, and nobody really—I mean, it is a big struggle and that is why we have this huge increase in litigation. Obviously your objective was to make it more straightforward and simple; is that not right?

Mr. ROBINSON. That is correct.

Chairman AKIN. And to make sure that both employees and employers know exactly where they stand?

Mr. ROBINSON. That is correct, Mr. Chairman.

Chairman AKIN. So you would disagree with the fact that we have made it more complicated, but you would say we have simplified it?

Mr. ROBINSON. I would say that we clarified the rule.

Chairman AKIN. Yes.

Mr. ROBINSON. We simplified, it, yes, Mr. Chairman, and if I may give you an example. We have reduced the regulatory burden. The current regulation has over 33,000 words in it. The final regulation that we propose has a little over 15,000 words in it, so we have been able to clarify, streamline, simplify at the same time without compromising employee overtime protection, and in fact strengthening employee overtime protection.

Chairman AKIN. One of the other questions might be that the economic rule that accompanies the final rule, it states in the rule that it will eventually cost businesses a significant amount of money. I am just wondering, why are businesses and trade associations so supportive of the rule if it is going to end up costing them money? Is it simply the red tape reduction and the fact that the new rule is easier to understand, and therefore reduces the chances of cost of litigation?

Mr. ROBINSON. Mr. Chairman, I think that you have accurately explained part of that. We are updating the rules, clearer, simpler, easier for employees to know their rights, easier for the—excuse

me—for employees to know their rights, employers to know their obligations, and easier for Wage and Hour, Department of Labor to enforce.

And so yes, bringing these rules into the twenty-first century brings clarity and clearer rules that———.

Chairman AKIN. Administrator, my nickel has run out here, and I need to now recognize the minority.

Mr. UDALL. Thank you, Mr. Chairman.

First, on this issue of the numbers and the disagreement. I think what the real issue is here, and we could probably go on and on about it, but I just want to state this for the record is that your regulation has so many vague terms in it that could be used to reclassify, and you can make an argument that the number is small, and others, I think, can make the argument that the numbers are very large, but clearly the terms are very vague. They can be interpreted very, very differently. So I think the numbers comparison really is not a fair one.

But the thing that I am interested in in terms of small business people is this whole litigation issue. I mean, these are massive in terms of the numbers of pages. I mean, we are talking about 530 pages of regulations.

You are creating whole new terms, and as all of us know that it followed this kind of litigation. When you put out a new regulation, when you create new terms, it takes years and years to define the terms in the regulation through the court system, and we have had the Fair Labor Standards Act on the books since the 1930s, I think 1938. Many of the key phrases have been interpreted by the courts. As soon as you get these interpretations over the years what happens is you have a lot less litigation, and lawyers working with small business people can give them good, solid advice.

What we are talking about doing here is something sweeping. I mean, in 50 years you are sweeping aside and creating a whole new set of terms which are going to require litigation, which are going to require small business people to consult attorneys to figure out what these terms mean, and they are not going to be able to figure out what they mean.

The attorneys are going to say, well, this is what I think it means, but we do not know what a court is going to say, and then you are going to go into court. And so I do not see how you can walk in here, sir, and say that this is not going to create litigation problems.

I mean, I guess my question to you is, is it not a fact that whenever you get a new regulation or a new statute it takes a long time before you really sort out a lot of the problems that come from not having clear court rulings on the new phrases and key issues that are in the regulation?

Mr. ROBINSON. Congressman, if I can reply. What we have done here is condensed, if you will, the regulations that are currently on the books. We have streamlined and reorganized them. As I have mentioned, we have reduced just the word count itself, and we have relied on case precedent to explain in this preamble to the rule the rationale for the test as articulated in the regulation.

The test for duties component of the exemptions is based very closely on the existing short duties test of the rule that currently

exists. For example, the executive test, it is the short test with a new component from a long test in the current regulation for hiring and firing or authority of hiring and firing.

So we think we have been consistent with trying to use terminology that is in the current rule without opening up this rule to the charge that it will result in litigation by using concepts that are in the current regulation, defining them, relying on case law. Discretion and independent judgment is currently in the regulation. Today, you will find that concept in the proposed final regulation that we issued last month.

So we have tried to be consistent and take into account the precedent that you have mentioned so that there will be consistency, and there will be certainty, and this would consequently reduce litigation.

Mr. UDALL. Well, I do not see how when you move from one set of clear tests, I mean, the old rules have very clear tests that are there and the tests use specific phrases and they have been litigated over the years, and really in this new rule you substitute case-by-case determinations.

I mean, the recurring theme to me looking at these regulation is over and over again you have this case-by-case determinations. I mean, let us take an example here.

The department suggests that it will no longer require that executives actually manage the enterprise or a department or a subdivision thereof, it may be enough to be in charge of a team or grouping, but a case-by-case analysis is required.

I mean, as soon as you start throwing this out of a clear test, which has been defined in the courts, to a case-by-case analysis, I think you are just inviting litigation. I think you are inviting a significant amount of litigation. And just to give one final example, I know I have run out of my times, but I think this is very important, Mr. Chairman, is here we have a new creative professional exemption for chefs. And what we say about it, it is so vague that it "must be applied," this is quoting from the rule, it is on chefs. "It must be applied on a case-by-case basis with particular focus on the creative duties and abilities of the particular chef at issue." That is the end of the quote right there.

So here we are talking about case-by-case particular duties. I mean, I just think you are opening yourself wide open to litigation.

I appreciate the courtesy, Mr. Chairman, and I yield.

Chairman AKIN. I thank the gentleman. And next questioning we go to Ms. Sanchez, and five minutes.

Ms. SANCHEZ. Thank you, Mr. Chairman.

America's businesses need clear, concise laws to provide their workers with decent jobs that provide fair pay and benefits, and in my view that is not asking a lot. If I am a small business owner, and I will state for the record my husband is actually a small business owner, what they want is a clear rule with a clear answer, and what I am hearing is that the rules do little to clarify the overtime regulations, and to avoid litigation, which is the primary objective in the first place of amending the rules.

I have to add that I am not alone in the belief that it creates more confusion than it clarifies. Senator Spector said last week, and I quote, "There is no indication that this new regulation is

going to clarify anything at all. On the current state of the record I am opposed to the regulation.''

I want to thank you, Mr. Robinson, for being here. I am hoping you might be able to help me shed some light to these new and what I consider complex rules. I have a limited amount of time, so I am going to run through my questions quickly, and I will allow you to address them one on one at your leisure, and I will remind you of them if you should have questions.

But I want to pose some scenarios to you. Let us say that I am a small business owner and I have quality teams. I need to know whether I can stop paying overtime to my team leaders, and whether I will be sued if I do.

The new Section 541.203 provides, and I am quoting, that ''an employee who leads a team of other employees assigned to complete major projects for the employer generally meets the duties requirement for the administrative exemption.''

The term ''team leader'' is a very familiar one in American industry. I want to know what is the definition of team leader, and will that not have to be litigated? What is the definition of major project, and will that not have to be litigated? And can I stop paying overtime to team leaders on major projects if most of their work is production work, but they perform some minimal office or nonmanual work in their capacity as team leaders?

Scenario number two: Let us say I am an owner of a medium-sized business with a unionized workforce. Will my employees be affected by this regulation? The new Section 541.4 says that nothing in the regulation ''relieves employers from their contractual obligations under collective bargaining agreements.''

But what if my contract with my workers simply refers to applicable law for overtime eligibility, and would not this regulation change the applicable law on overtime eligibility?

I am wondering if you can tell us what percentage of union contracts have their own eligibility terms as opposed to referencing applicable law, and I want you to consider the union contracts that do not have their own eligibility terms. Is it not true that to the extent this regulation has any effect on workers' overtime eligibility union members would still have to negotiate at the bargaining table for what is now currently guaranteed by law?

Last question: There are potentially millions of workers who perform supervisory work or other management work or administrative work related to management or professional work less than 50 percent of the time. Without a 50 percent rule of thumb is not overtime eligibility of these workers in jeopardy? Without a 50 percent rule of thumb is it not true that workers are more likely to consider these kinds of duties to be their employees' primary duty even though the employee spends a small amount of each time on them?

And if you need me to repeat, I will be more than happy to, Mr. Robinson.

Mr. ROBINSON. Let me try to address your first set of questions dealing with quality teams. The regulation as you noted has a provision in there that is more protective of overtime pay for individuals who perform work as you used the term ''team leaders'' than in the current regulations. They must lead a team of other employees assigned to complete major projects.

We define major projects in the regulation as purchasing or selling all or part of a business, negotiating a real estate transaction, negotiating a collective bargaining agreement. Those are major projects, and that is some guidance provided in the regulation as well.

So we are talking about buying, selling, closing part of factories, not buying or selling office supplies, so we have tried to give guidance as to what qualifies as major projects.

Ms. SANCHEZ. But that term would be subject to interpretation, and potentially litigation, would it not?

Mr. ROBINSON. Well, we think it is more restrictive than what is in the current regulation which uses the terms "a wide variety of persons carrying out major assignments," and it has a broad list of what is considered to be major assignments. So we feel like this rule that we have promulgated is more protective and gives better guidance than the current regulation.

Ms. SANCHEZ. But would not case law from the old regulation provide the type of guidance needed to assess the old regulation?

Mr. ROBINSON. Yes, ma'am, and I would have to check. I would be glad to get back with you on this. What we have also tried to do is rely on existing case law to justify our regulation that you have before you.

So to the extent there is some precedent in this area, and I do not have it here, I can look it up after we are through if you would like, but we have tried to rely wherever there is precedent out there to justify the rationale and the explanation of our rules.

Chairman AKIN. Mr. Administrator.

Mr. ROBINSON. Yes.

Chairman AKIN. We are out of time, and so I would recommend perhaps for Ms. Sanchez, you might be able to respond——

Ms. SANCHEZ. In writing.

Chairman AKIN [CONTINUING] Independently or in writing.

Mr. ROBINSON. We can do it either way, yes.

Chairman AKIN. Whichever you would prefer.

Ms. SANCHEZ. I thank you and I thank the Chairman. that would be wonderful.

Chairman AKIN. All right. One quick thing that you did bring up which raises a question before we move to the next panel. My understanding was that these regulations really do not apply to people who are in unions, because I thought they had their own separate agreements; is that not correct?

Chairman AKIN. So all of what we are talking about deals with non-union people.

Mr. ROBINSON. Union employees will be protected by their collective bargaining agreement.

Chairman AKIN. Whatever that agreement is that they negotiate.

Ms. SANCHEZ. Excuse me, Mr. Chairman, if I could clarify. Many of the new contracts reference applicable law or applicable regulations in determining whether employees are eligible for overtime law. So to the extent that you are changing the regulation or the definition, you are also changing then the collective bargaining agreements; is that correct?

Chairman AKIN. I will go ahead and ask that question for you. Is it true that there are some agreements that go back to the new set of standards?

Mr. ROBINSON. That go back to the current standards?

Chairman AKIN. Yes, or I guess they really could not go back to the current because they do not exist, but is it true that in some cases agreements between employees and employers reference applicable law?

Mr. ROBINSON. I am sure that there are agreements out there that reference applicable law, yes, sir. This provision, though, does not deny union members who are currently receiving overtime under the provisions of collective bargaining agreements, it does not change their eligibility.

Chairman AKIN. I know what you are saying. So in other words, it does not change anybody that is getting overtime, but if in certain particular agreements that was not specified then they would fall back.

Mr. ROBINSON. And some people that are not making $455 per week, they might be making $300, will be guaranteed overtime protection because———.

Chairman AKIN. It cuts both ways.

Mr. ROBINSON. Yes.

Chairman AKIN. Yes. Thank you for clarifying.

I think it is time now for us to go to our second set of panelists, so if they could come forward as quickly as possible. I do have the sense of an impending vote here. So thank you.

Thank you again for joining us today, and our first panelist is Mr. Neill Fendly. He is a certified mortgage consultant, President/CEO of Mortgage Defense, Incorporated in Scottsdale, Arizona, and so that says to me you have come a long way, and I want to just thank you for making the trip and appearing before us today. You have five minutes to give an oral presentation, and then without objection if you would like to submit anything else for the record, you will be free to do that.

Proceed. Thank you.

STATEMENT OF NEILL E. FENDLY, MORTGAGE DEFENSE, INC.

Mr. FENDLY. Mr. Chairman, Congresswoman Sanchez, I am Neill Fendly, government affairs chair, and past president of the National Association of Mortgage Brokers. I appreciate the opportunity to discuss issues of vital importance to the small business community, and specifically, mortgage brokers.

The AMB is the nation's largest organization exclusively representing the interests of the mortgage brokerage industry and has more than 24,000 members and 48 state affiliates nationwide. Mortgage brokers are typically small businesses who operate in the communities in which they live and consist of one office and several employees.

The AMB 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 towards recognizing the vast changes that have occurred in the American economy over the years. The final changes will help to clarify the Fair Labor

Standards Act, and to make it more workable in the modern economy, and hopefully reduce litigation for small business.

Wage and hour litigation has become the leading source of costly employment litigation for small business, particularly for mortgage brokers and lenders regarding the status of loan officers and overtime pay. We believe the Department of Labor revisions will change this trend for small business owners.

For the mortgage industry, the new rules help clarify the status of loan officers and make the rules regarding overtime pay more consistent with actual industry practice.

A loan officer or a mortgage broker must make certain judgments when assisting consumers in financing the most important purchase of their lives. The mortgage loan officer positions require a high degree of skill and judgment. The old regulations did not take these facts into account.

In the financial services industry employees will be included in the administrative exemption if their duties include: collecting and analyzing information regarding the customers' income, assets, investments or debts; determining which financial products best meets the customer needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing service or promoting the employer's financial products.

These duties are highly analogous to other financial services occupations such as stockbrokers that have always been exempt under the previous Department of Labor overtime rules.

The new rules ensure that similarly situated occupations are treated the same, a fairness objective that should be part of any administrative rule taking. The proposed regulations recognize that business practices and employment relations today are vastly different than those that existed at the time the original regulations were implemented.

In just the past 15 years, there has been a rapid radical evolution of the home mortgage market. An entire new industry, mortgage brokers, has evolved to serve as the intermediaries between the lenders and the consumer. The number and complexity of mortgage loan products as expanded dramatically. The advent of risk-based pricing, the development of sub prime mortgage market has added a vast array of new products and underwriting considerations that must be evaluated by loan officers.

As a consequence of these changes and others, the role of the loan officer today, whether at a bank, savings and loan association, mortgage company, or mortgage broker, is radically different from the role of the loan officer even 20 years ago. Thus there is no standard template mortgage that applies to all customers. This role requires a high degree of skill and judgment, bringing together the needs of the consumer with the products offered by the lenders.

In closing AMB applauds the substantial effort of the Department of Labor in overhauling these regulations. Thank you again for providing me the opportunity to testify on the Department of Labor final overtime rule, and I would be happy to answer any questions that any of the members may have.

[Mr. Fendly's statement may be found in the appendix.]

Chairman AKIN. Thank you very much and bringing it in on time, Neill. I have been informed that we have got a vote coming up pretty quickly so I am just going to go ahead and run down, let everyone get your five minutes out, and then if we have time we will do some questioning. Thank you.

Our next panelist is going to be Mr. John Fitch. He is the Senior Vice President for Advocacy, National Funeral Directors Association.

And John, whereabouts do you hail from?

Mr. FITCH. I was born and raised here in Washington, D.C., sir.

Chairman AKIN. Okay, good. Well, we do not have you from Scottsdale, Arizona anyway John, please proceed. You have five minutes.

STATEMENT OF JOHN H. FITCH, NATIONAL FUNERAL DIRECTORS ASSOCIATION

Mr. FITCH. Thank you, Mr. Chairman. It is a pleasure to be here representing the National Funeral Directors Association.

The NFDA represents more than 13,000 funeral homes and over 20,000 licensed funeral directors and embalmers in all 50 states. The average NFDA member is independently owned and operated with fewer than 10 employees, and has been in the same family for over 60 years. The NFDA is the leading funeral service organization in the United States, providing a national voice for the profession.

We have a strong interest in the Fair Labor Standards Act, and we have a particular interest in the professional employee exemption and its application to funeral directors and embalmers.

Based on their licensing requirements and primary duties, NFDA has long believed that licensed funeral directors and embalmers should be exempt from the minimum wage and overtime requirements of FLSA. The NFDA's position is based on the belief that licensed funeral directors and embalmers comply with the duties test of the current FLSA implementing regulations for professionals. The Department of Labor has historically disagreed with NFDA on this issue.

As a result, we have come to Congress on several occasions and introduced legislation to exempt licensed funeral directors from the Fair Labor Standards Act.

However, subsequently the Department of Labor took note of the professional requirements and duties of licensed funeral directors and embalmers, and the federal court decisions related thereto in the final rule published on April 23, 2004.

With regard to litigation involving funeral directors, there have been two landmark court cases, one in the 6th Circuit and one in the 7th Circuit Federal District Court cases that address the question of whether or not a licensed funeral director under the current rules are exempt under the professional exemption, and in both circuits the district courts and the circuit courts have agreed that licensed funeral directors in fact met the current test, and that creates a disparity throughout the country because you have other jurisdictions that do not have that litigation, so the new overtime rules address the litigation problem for funeral service.

The NFDA believes that the duties and responsibilities of funeral directors meet the current test for the Fair Labor Standards Act, and we have said so in our comments on the proposed rules. While the final rule was changed slightly, it is the first time the Department of Labor has recognized licensed funeral directors and embalmers as professionals, and we definitely support that whole area.

Mr. Chairman, NFDA strongly believes that the changes in the overtime rule that was promulgated by the Department of Labor are an accurate reflection of the duties and responsibilities of today's licensed funeral directors and embalmers. We believe that both employers and their valued staff benefit tremendously.

Moreover, it will have a positive competitive advantage in that it will hopefully encourage new entrants into the profession, and make salaries more competitive. By recognizing the professional status of licensed funeral directors and embalmers, the Department of Labor has improved the economic and family lives of each practitioners whose daily professional life is console and attend the needs of families in their communities who have lost loved ones. They are highly competent, compassionate, and caring individuals who deserve to be considered professionals.

I would be happy to answer any questions.

[Mr. Fitch's statement may be found in the appendix.]

Chairman AKIN. Thank you again. That was a call for a vote. We probably have time to fit in the two more testifies if you can kind of keep on the same pattern, and I think you are running about four minutes or so if I can get everybody done. I am not too sure how many votes there are in a row and I doubt we will be able to come back, so we may be able to just take your testimony.

Our next witness would be Ronald Bird, Ph.D., Chief Economist for the Employment Policy Foundation. Ronald.

STATEMENT OF RONALD BIRD, EMPLOYMENT POLICY FOUNDATION

Mr. BIRD. Thank you, Mr. Chairman.

Lost in the debate over the Labor Department's proposed revision of the Fair Standards white collar exemption is why amending the regulations and revising the regulations is necessary in the first place.

The FLSA was enacted in 1938, and the regulatory structure and definitions and categories of duties implementing its pay classifications have remained essentially unchanged since 1954.

In 1938, America was in the midst of a great depression. Nearly one in five Americans who wanted a job could not find one. Labor supply exceeded demand, and the bargaining position of a typical worker was weak.

Today, the fundamental competitive conditions of the labor market are very different. In March 2004, the unemployment rates was 5.6 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 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 5.6 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 20 years, and will likely remain the norm in the future as an aging population presses the economy to produce more goods and services with a relatively smaller proportion of the population active in the labor force.

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 never would have dared.

The occupational structure of work has changed as we have moved into an increasing knowledge-based economy. Today, nearly one in three employee work in managerial and professional category jobs, far different from 50 years ago.

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 status more complex and time consuming than is desirable. Changes in occupational structure mean that many more jobs today than in the past may qualify for exemptions based on the exemptions defined in the act. The increase in the number of potentially exempt jobs makes it more important today that the regulations implementing the exemption concept in the act are clearer and easier to apply.

It is important to recognize that everyone who is eligible by duties for exempt status is not automatically paid on a salary basis. Qualifying for exemption does not mean that pay status or pay amount will change.

For example, I used to work for a government contractor firm. My duties and education qualified me for exemption as a professional, and my weekly earnings were in excess of the minimums. Nevertheless, my employer and I agreed to an hourly pay arrangement.

In 2001, 7.6 million managerial and professional workers who were entitled to overtime because they were paid on an hourly basis even though their duties would have allowed them to be made exempt, they were not made exempt not because even though they could have been, because it was not in their interest or their employer's interest to make it otherwise.

Instead of shaving a few cents off of payroll by trying to reclassify an employee, today's employer is much more concerned with the tremendous cost of trying to replace an employee who might leave to go to work for another employee if he is not treated right.

The complexity and ambiguity of the old rule is also enhanced by the disagreement and litigation that it generates. Revision of these regulations has been on the agenda for 25 years, and the revision is long overdue.

[Mr. Bird's statement may be found in the appendix.]

Chairman AKIN. Thank you very much for your testimony, Ronald, and our last witness would be Mr. Ross Eisenbrey, and you are the Vice President and Policy Director of the Economic Policy Institute; is that correct, Ross?

Mr. EISENBREY. That is correct.

Chairman AKIN. Good. We have got probably enough time if you can do the same as everybody else, and I think we are just going to call an end to the hearing because we have probably got about an hour break and I do not want to keep everybody.

STATEMENT OF ROSS EISENBREY, ECONOMIC POLICY INSTITUTE

Mr. EISENBREY. I will be quick, Mr. Chairman, and I would like to request that I get a letter of invitation. Could I get that from the Committee? I got an oral invitation that we need something———.

Chairman AKIN. A letter, I think we can arrange that. Yes, thank you.

Mr. EISENBREY. I would like to start off by seconding what Mr. Udall said, and pointing out that some of the testimony that you have heard makes it clear exactly what he said; that by changing current law the department cannot possibly be keeping current law, which is what they say.

If you want to keep the law the same, do not change it. If you change the language, you are going to change peoples' rights. Mortgage brokers say on page 3 of their testimony, "The industry understands that this language in the new rule was intended to ensure that boiler room employees with little skill or knowledge and who offer no meaningful advice to consumers should not be exempt administrative employees."

Well, that is not the current law. The current law is that loan officers, mortgage loan officers are generally non-exempt, entitled to overtime because they do not consistently use enough independent judgment and discretion in their work to be considered exempt administrators.

The law has changed a little bit thanks to what the Department has done, and they are no pushing to change the law from where it is now, and this is going to happen across the board. Every employer faced with this new language, the team leader language that Ms. Sanchez pointed to, will read it and say, well, this is new and different, and this is going to apply to people, there is nothing like this in current law. The team leaders is a great example.

The provision that the department cites disingenuously has nothing to do with deeming employees to have met all the duties, which is what the team leader provision does. It is a provision that illustrates that it needs to be directly related to management.

Well, that is one prong of the test. This new provision says if you are a team leader, you are presumptively—you have met the duties test, and you do not get overtime.

There are 2.3 million team leaders. The question about what is a major project is exactly right on. An employer would say improving productivity, which is one of the illustrations, is a major thing to me, to any employer. Well, there are millions of productivity teams, and if they are not in every business, there could be after this passes and they will all be exempt.

I guess finally, I think it is important to realize that the department's numbers, three times in their testimony they say 1.3 million employees will gain overtime rights. We have looked at that. We

have taken the current population survey data that they use, and the number is really 380,000, 384,000 people who are currently receiving overtime who make less than $455 a week who will gain rights. The numbers, you should ask for a National Science Foundation peer review or a GAO look at this. Their numbers are wrong, and they are provably wrong.

[Mr. Eisenbrey's statement may be found in the appendix.]

Chairman AKIN. Thank you all of the panelists for keeping your comments right in line. We are just about within walking distance of getting to the board, so I am going to call an end to the hearing, but thank you all for participating, and for your perspective.

The hearing is now adjourned.

[Whereupon, at 3:10 p.m., the Subcommittee was adjourned.]

OPENING STATEMENT
20 MAY 2004

SUBCOMMITTEE CHAIRMAN W. TODD AKIN
SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT &
GOVERNMENT PROGRAMS

The Department of Labor's Overtime Regulations' Effect on Small Business

Good afternoon. I'd like to thank you all for joining us here today as we examine the proposed changes in the Department of Labor's overtime regulations and their effect on small businesses and their employees. I would especially like to thank our witnesses who have agreed to testify before this committee.

On April 23, 2004, the Department of Labor issued final regulations under the Fair Labor Standards Act implementing the exemption from overtime pay of executive, administrative, professional, outside sales and computer employees. These exemptions are often referred to as the "white collar" exemptions. To be considered exempt, employees must meet certain minimum tests related to their primary job duties and, in most cases, must be paid on a salary basis at not less than minimum amounts as specified in applicable sections of these regulations. These regulations will become final on August 23, 2004.

As many of you know, this is the first significant update of the rules governing the white-collar exemption to the Fair Labor Standards Act in nearly 50 years. Given

these rules are among the most convoluted and ambiguous federal regulations, this long overdue update is welcome news for business owners and their employees.

The current regulations have caused a great deal of confusion for both employers and their workforce. Employers today are more likely to be sued for alleged violations of the Fair Labor Standards act than any other labor statute. In fact, the number of class action lawsuits under the Fair Labor Standards Act has more than doubled since 1997.

Costly litigation is counterproductive, takes valuable time and drains resources away from businesses – resources that should be used to improve employee benefits, make American companies more competitive and create new jobs.

During the 108th Congress, this Committee has held hearings on a diverse field of topics including: Health Savings Accounts, union salting abuse, assistance programs offered by the Small Business Administration and, most recently, the federal minimum wage. Despite the diversity, each has focused on answering a central question: "What can we do to lower the cost of doing business in the United States."

Answering this question with good policy is fundamental to maintaining a healthy, vibrant economy where businesses can flourish and produce jobs for the American people. We must continue to make it easier to do business in America in order to facilitate stronger and longer-term growth. The revised overtime regulations do just that by cutting bureaucratic red tape and reducing the need for costly litigation.

I look forward to hearing the testimony presented today. But before we get to the testimony, I would like to turn to our distinguished Ranking Member, Mr. Udall, for any opening statement he would likes to offer.

STATEMENT OF ALFRED B. ROBINSON, JR.
DEPUTY ADMINISTRATOR FOR POLICY
WAGE AND HOUR DIVISION
EMPLOYMENT STANDARDS ADMINISTRATION
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT AND
GOVERNMENT PROGRAMS OF THE
HOUSE COMMITTEE ON SMALL BUSINESS

May 20, 2004

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today to discuss the positive impact upon small business owners and workers of 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 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 month. 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, or employees on a factory line, 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 old regulations were very difficult for employment lawyers and human resources professionals to understand, and much more so for the average worker or small business owner. 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. The importance of small businesses to our economy made it critical that the Department get it right. The Department estimates that there are nearly 39 million employees working at some 5.2 million small business establishments that are covered by the FLSA.[1] 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. During the rulemaking process, the

[1] The Department estimates that 5,216,843 establishments employing 38,721,918 employees are covered by both the Fair Labor Standards Act and the Small Business Regulatory Enforcement Fairness Act (SBREFA). Such establishments have estimated annual payrolls of $939.7 billion and annual sales revenues of $5.7 trillion. See Table 5-2 of the Final Rule, 69 FR at 22221 (April 23, 2004).

Department carefully weighed the concerns expressed by small businesses, which, because of their size, are disproportionately impacted by unclear overtime rules and the concomitant risks of costly litigation. The Department has published a final rule sensitive to the unique challenges of the small business environment and has planned an aggressive compliance assistance program to help small enterprises understand and comply with the new rule, including revising all pertinent compliance assistance materials for small entities' use, and distributing printed versions of the materials for employers that do not have access to the Internet. The Department also intends to work with the Small Business Administration to educate small business owners and employees.

We also listened closely to the Congress, whose comments have been a tremendous benefit to the Department. The Department extends its gratitude to the 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. It is a significant improvement over the old, confusing regulations that had not been updated for decades.

Unfortunately, much of the 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. Updating the law is especially important

for small enterprises, as small business owners can ill afford large and potentially devastating legal fees to decipher and litigate the old rule's maze of vague and complicated overtime standards. Clarifying the rule is a catalyst for compliance and will reduce the human resource and legal costs of properly classifying workers.

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 economy that has long since changed.[2] 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."

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[2] 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 was employed in manufacturing; in 1940, only one-in-six (17.9 percent) was 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 stay 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) works in managerial or professional occupations; less than one-in-three (28.5 percent) works in an occupation 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.

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[3] to Congress and at a May 2000 hearing before a subcommittee of the House Education and the Workforce 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 workplace," 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 workplace. 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."

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.

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

From the beginning of this rulemaking, the Department has been consistent in what it wanted to achieve with this update. The primary goal was 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 have found it difficult to determine who is entitled to overtime pay under the old rules, and very few employees understood 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 workplace 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 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 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 because of potential confusion over how their job duties fit the old tests will now be guaranteed overtime protection; and 1.3 million salaried workers who are likely to work extra hours but are not entitled to overtime today will gain up to $375 million per year in additional earnings. Small business interests expressed concern during the comment period that because of regional differences in salaries and industry characteristics, they might face disproportionate burdens from the increased salary level. Accordingly, the Department's methodology specifically considered salary levels actually being paid by small business industries (such as retail stores and restaurants), and in lower-wage regions (such as the South). The Department's approach was designed specifically to achieve a careful and delicate balance – mitigating the adverse impacts of raising the

salary threshold on smaller businesses covered by the law while staying consistent with the objectives of the statute to clearly define and delimit which workers qualify for exemption as Congress intended, while at the same time helping to prevent the misclassification of obviously nonexempt employees.

Pursuant to the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. § 601 et seq., the Department assessed the impact of the Part 541 regulations on small entities as defined by the applicable Small Business Administration size standards. The Department has determined that the final rule is not likely to have a substantial economic impact on small businesses.

Further pursuant to the Regulatory Flexibility Act of 1980, the Department considered a number of alternatives. The first – not changing the existing regulations – was rejected because the existing salary tests had become ineffective in distinguishing between bona fide exempt and nonexempt employees, and the duties tests, last modified in 1949, were too complicated, confusing and outdated for the modern workplace. Two other alternatives – raising the salary levels and leaving the duties tests unchanged, and, conversely, updating the duties tests but leaving the salary levels unchanged – were similarly rejected given the critical need to raise the salary levels from their outdated 1975 levels, and the necessity of better meeting the needs of both employees and employers by updating the duties tests for the first time in more than 50 years.

The Department is pleased to report that estimated first-year costs of the final rule – which decrease significantly in subsequent years – are not likely to have a substantial impact on small businesses.

The Department examined the ratios of the final rule's first-year costs to payrolls, revenue and profits of small businesses in each of nine major industry divisions. The ratio of first-year costs to payrolls averaged just 0.07 percent for private sector small businesses nationwide, with first-year costs to revenue averaging approximately 0.01 percent, and first-year costs to pre-tax profit averaging 0.37 percent. First-year costs of this magnitude should not result in significant disruptions to small businesses in any of the major industry sectors. There are costs involved, but they are minimal and worth the increase in clarity and voluntary compliance and the reduction in unnecessary litigation. Furthermore, reducing regulatory red tape and litigation costs will free-up resources and stimulate economic growth.

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 tests 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.

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 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: First, the employee must perform work requiring advanced knowledge. Second, the advanced knowledge must be in a field of science or learning. Third, the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. All three conditions must exist for an employee to qualify for the exemption. 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.

Mr. Chairman, with these new regulations, workers will clearly know their rights and employers will know their responsibilities. Publication of this new rule is an important catalyst for compliance, and will bring about an increased understanding of overtime rights and obligations. This is all the more important for small business employers and workers, as resources in this important segment of our economy can be better used to create more jobs rather than to defend needless and costly litigation. The new rule also enables the Department of Labor to enforce vigorously our nation's overtime laws and regulations. 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 Subcommittee. I would be happy to answer any questions you may have.

Prepared Testimony of Neill Fendly, Government Affairs Chair & Past President

National Association of Mortgage Brokers

on

The Department of Labor's Overtime Regulations' Effect on Small Business

before the

Subcommittee on Workforce, Empowerment, and Government Programs

of the Committee on Small Business

U.S. House of Representatives

Thursday May 20, 2004

Chairman Akin, Ranking Member Udall, I am Neill Fendly, Government Affairs Committee Chair and Past President of the National Association of Mortgage Brokers (NAMB). I appreciate the opportunity to discuss issues of vital importance to the small business community and specifically, mortgage brokers. NAMB is the nation's largest organization exclusively representing the interests of the mortgage brokerage industry and has more than 24,000 members and 48 state affiliates nationwide. NAMB provides education, certification, industry representation, and publications for the mortgage broker industry. NAMB members subscribe to a strict code of ethics and a set of best business practices that promote integrity, confidentiality, and above all, the highest levels of professional service to the consumer.

Today, mortgage brokers originate more than two out of three of all residential mortgages. There are many reasons for this large market share. Mortgage brokers are typically small businesses who operate in the communities in which they live, often in areas where traditional mortgage lenders may not have branch offices. Many mortgage broker firms consist of one office and five employees, including the owner. Mortgage

brokers provide lenders a nationwide product distribution channel that is much less expensive than traditional lender branch operations.

I. NAMB Applauds the Department of Labor Regulations

NAMB commends the U.S. Department of Labor (DOL) 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. 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 (FLSA), 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.

Significant changes have been made throughout the final rule to address concerns raised by both labor unions and employers alike. NAMB is pleased that the DOL responded to the comments relating to clarifying the overtime exemption rules, particularly with reference to employees in the financial services industry. A loan officer for a mortgage broker must make certain judgments when assisting consumers in financing the most important purchase of their lives. Mortgage loan officer positions requires a high degree of skill and judgment, the old regulations did not take these facts into account.

The mortgage industry has long held that loan officers are exempt from the government's overtime pay requirements. According to the DOL, the final rule was designed to be consistent with existing law. It includes a new section that specifically addresses the distinction between exempt and nonexempt financial services employees based on the primary duty they perform.

The rule includes several broad exemptions from overtime pay for various kinds of employees, including one for qualifying "administrative" staff. In the financial services industries, employees will be included in the administrative exemption if their 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." These duties are highly analogous to other financially services occupations such as stockbrokers that have always been exempt under the 541 Rules. The new rules ensure that similarly situated occupations are treated the same – a fairness objective that should be a part of any administrative rulemaking.

Most mortgage loan officers conduct such work and should therefore be classified under the administrative exemption from overtime pay. The rule cautions that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." The mortgage industry understands that this language was intended to ensure that "boiler room" employees with little skill or knowledge and who offer no meaningful advice to consumers should not be exempt administrative employees. This is a far cry from the advice provided by mortgage brokers today. As discussed below in some detail, mortgage brokers consult with and advise consumers on every aspect of what is often the largest purchase the consumer will make. For this reason, even though their position normally involves sales of mortgage products, under the rule they should be considered to be exempt administrative employees. Although the final rule does not include specific language regarding loan officers, we believe the department's decision to frame the rule in the context of existing case law is positive for the industry and a significant benefit to small business mortgage brokers with little or no access to expensive labor attorneys.

II. THE MORTGAGE BROKER PROVIDES A VITAL AND SOPHISTICATED SERVICE TO HOMEOWNERS AND HOMEBUYERS

A. Changes in the home mortgage industry

The proposed regulations recognize that business practices and employment relationships today are vastly different from those that existed at the time the original Section 541 regulations were implemented. The mortgage brokerage industry is a good example of a business model that simply did not exist at the time the current wage and hour regulations were written. At that time, consumers obtained their home mortgages directly from banks (and, later, savings and loan associations). In general, banks and savings and loan associations did almost no marketing of mortgage products; rather, they depended on consumers to contact them when they were in the market for a new home. While consumers occasionally refinanced their existing mortgages, the practice was nowhere near as prevalent as it is today. Moreover, typically each bank or savings and loan association offered only a handful of mortgage loan products, so the consumer had few options to consider. The consumer filled out the loan application and the bank lending committee either approved the loan or not. Either way, the transaction was relatively simple.

The typical loan officer from fifty years, when these rules were last comprehensively revised, ago would not even recognize the loan products or procedures that dominate the market today. In just the past fifteen years, there has been a rapid, radical evolution of the home mortgage market in many different respects, including the following:

(1) The home mortgage market has become extremely competitive. In addition to banks and savings and loan associations, a new group of mortgage companies offer mortgage loan products. An entire new

industry, mortgage brokers, has evolved to serve as the intermediaries between the lenders (banks, savings and loan associations and mortgage companies) and the consumers. Because all of these entities compete with one another for home mortgage business, marketing and outreach has become an important function in any mortgage-related business;

(2) The number and complexity of mortgage loan products has expanded dramatically. Now a consumer must choose from an array of loan types, including fixed and variable rate loans, FHA and other government backed loans, debt consolidation loans, interest only loans, and a host of others. Loan officers must have an intimate knowledge of these products and be prepared to explain advantages and disadvantages of each;

(3) The advent of risk-based pricing and development of the subprime mortgage market has added a vast array of new products and underwriting considerations that must be evaluated by loan officers. In the past, access to credit was limited to those with the best credit histories. With the development of the subprime market, each consumer must be evaluated by a loan officer to determine where they fit in the vastly expanded credit spectrum.

As a consequence of these changes and others,[1] the role of the loan officer today (whether at a bank, savings and loan association, mortgage company or mortgage broker) is radically different from the role of the loan officer even twenty years ago. Typically, loan officers today utilize skill and judgment to gain an understanding of the needs and financial status of the consumer as no two consumers are alike. They then review the loan products available to aid the consumer in choosing loan programs, features, and terms for the consumers unique desires and financial situation. While at all times loan officers work for their employers and not as agents of the consumer (except where required by state law), nevertheless, they must assist the consumers in understanding the complexities of the loan programs and assessing how particular products fit with their needs and abilities. This work requires a high degree of skill and knowledge of both the various loan products and the consumers.

B. The role of the mortgage broker

While mortgage broker firms vary greatly in size, typically they are small, independent businesses, employing five people including the owner. Mortgage brokers often work with low- to moderate-income consumers and consumers with less-than-perfect credit to help them realize the dream of homeownership. They take the time necessary to

[1] One change in the mortgage industry over the past decade is the development of a secondary market for home mortgages that have been converted into securities. This development has required major changes in the way applications are evaluated, how loans are underwritten and sold.

help less sophisticated consumers cope with the various of home mortgage products. Many mortgage brokers work with their clients to understand and correct any credit deficiencies. Some consumers have unique credit situations, such as seasonal income or a bankruptcy in their credit history. Without the assistance of mortgage brokers, many of these consumers would find it impossible to find loans and work their way through the application process.

Mortgage brokers have relationships with numerous lenders. Mortgage brokers must understand the subtle differences between the products offered by the different lenders with whom they deal. A mortgage broker may have literally hundreds of different loan products available, each of which has unique properties. The mortgage broker acts as an intermediary between the lenders and the consumers. As each consumer is different, a loan officer of a mortgage broker must make certain judgments, analyzing information unique to each consumer and placing them in the product they choose. Thus, there is no standard template mortgage that applies to all consumers. This role requires a high degree of skill and judgment, bringing together the needs of the consumer with the products offered by the lenders. As such, mortgage brokers provide consumers the most efficient and cost-effective method of obtaining a mortgage that fits the consumer's financial goals and circumstances as well as provide savings to wholesale lenders.

III. Conclusion

As discussed above, NAMB applauds the substantial effort of the DOL in overhauling these regulations. The final regulations go a long way toward recognizing the vast changes that have occurred in the American economy since the Section 541 regulations were originally written. The final changes will help to clarify the FLSA and to make it more workable in the modern economy. Wage and hour litigation has become the leading source of costly employment litigation for small business. We believe the DOL revisions will change this trend for small business owners.

Thank you again for providing the opportunity to testify on the DOL's final overtime rule. I would be happy to answer any questions the committee may have.

National Funeral Directors Association

STATEMENT OF THE NATIONAL FUNERAL DIRECTORS ASSOCIATION

ON THE DOL CHANGES TO THE FEDERAL OVERTIME RULES

BEFORE THE COMMITTEE ON SMALL BUSINESS SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT AND GOVERNMENT PROGRAMS

UNITED STATE HOUSE OF REPRESENTATIVES

MAY 20, 2004

National Funeral Directors Association

Mr. Chairman, Members of the Subcommittee, thank you for the opportunity to present the views of the National Funeral Directors Association (NFDA) on the new overtime rules as promulgated by the Department of Labor. I am John H. Fitch, Jr., Senior Vice-President for Advocacy.

The National Funeral Directors Association represents more than 13,000 funeral homes and over 20,000 licensed funeral directors and embalmers in all 50 states. The average NFDA member is an independently owned and operated business with fewer than 10 employees and has been in the same family for over 60 years. NFDA is the leading funeral service organization in the United States, providing a national voice for the profession. .

The NFDA has a great interest in the Fair Labor Standards Act and the implementing regulations that define the occupational classifications that are exempt from the Act's minimum wage and overtime requirements and strongly supports the final rules as promulgated by the Department of Labor. The NFDA has a particular interest in the professional employee exemption and its application to licensed funeral directors and embalmers.

Background

Based on their licensing requirements and primary duties, NFDA has long believed that licensed funeral directors and embalmers should be exempt from the overtime requirements of the FLSA. The NFDA position is based on the belief that licensed funeral directors and embalmers comply with the duties test of the current FLSA implementing regulations for professionals. However, the Department historically has disagreed with the NFDA on this issue. The Department concluded in the early 1970's that licensed funeral directors and embalmers do not satisfy the current duties test for learned professionals. Rather, they are a trade not a profession.

As a result of the Department's historic opposition, NFDA went to Congress to seek legislative relief in the form of H.R. 2065 and S.292. Subsequently, The Department of Labor took note of the professional requirements and duties of licensed funeral directors and embalmers and the federal court decisions related thereto in the final rules published on April 23, 2004.

As the Department notes in the preamble to the current rule changes, this (the current exemption) has led to "confusion and litigation" about the exempt status of funeral directors as well as other occupations and invited "more information about the particular job duties and responsibilities generally found in such occupations."

Funeral Directors and the Professional Exemption Litigation

The U.S. Court of Appeals for the Sixth Circuit directly addressed the question of the exempt professional status of licensed funeral directors and embalmers in *Rutlin v. Prime Succession, Inc.*, 220 F.3d 737 (6th Cir., 2000). Prime Succession employed David Rutlin from 1968 to 1997 in Michigan. From 1985 to 1997 he was paid under five different salary arrangements, receiving from $1540 to $1750 every two weeks. From mid-April 1997 to October 1997 he was paid on an hourly basis and received overtime pay for hours worked over forty per week. Rutlin sued Prime Succession in 1997 contending that he was denied overtime pay and on-call compensation in violation of the FLSA.

The district court concluded that Rutlin was an exempt professional employee during the time he was paid a salary. The circuit court agreed. Rutlin's salary of over $250 per week satisfied the "short test" of 29 C.F.R. 541.3. Likewise, Rutlin's work responsibilities satisfied the duties test of the regulation. According to the court, his responsibilities required "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes." Lastly, the court concluded that Rutlin's job duties also required him to customarily and regularly exercise discretion and independent judgment. In reaching its decision the court examined the credentials and responsibilities required by Rutlin's position, finding that:

> As a funeral director and embalmer, plaintiff had to be licensed by the state. In order to become licensed, plaintiff had to complete a year of mortuary science school and two years of college, including classes such as chemistry and psychology, take national board tests covering embalming, pathology, anatomy, and cosmetology, practice as an apprentice for one year, and pass an examination given by the state.
>
> We agree with the district court. Rutlin completed a specialized course of instruction directly relating to his primary duty of embalming human remains. The fact that Rutlin was not required to obtain a bachelor's degree fails to persuade us otherwise. The FLSA regulations do not require that an exempt professional hold a bachelor's degree; rather, the regulations require that the duties of a professional entail advanced, specialized knowledge. We conclude that a licensed funeral director and embalmer must have advanced specialized knowledge in order to perform his duties.

The court also examined the independent judgement and discretion required by Rutlin's duties. The court held that these too met the regulatory requirements. According to the court:

> This claim is supported by the nature of plaintiff's duties, including counseling grieving families, and removing, embalming and cosmetizing bodies, and by the fact that plaintiff was often unsupervised in those duties. While plaintiff gained expertise in his work over the course of his employment, such expertise does not

> change the professional nature of plaintiff's work, or eliminate the discretion and judgment plaintiff exercised in performing his duties.

The court rejected the argument that Rutlin's duties were "routine and contained within well-defined parameters." On the contrary:

> Rutlin was responsible for supervising and coordinating the removal of bodies from residences, hospitals and nursing homes; organizing, directing, and supervising funerals; performing embalming procedures, adjusting those procedures to the condition of the deceased; and counseling families.

The *Rutlin* decision followed an unreported 1998 decision of the U.S. Court of Appeals for the Seventh Circuit in *Szarnych v. Theis-Gorski Funeral Home, Inc.*, Case No. 97-3069 (7th Cir., 1998) on the same issue. Again, a licensed funeral director and embalmer sued his employer alleging that he did not receive overtime compensation in compliance with the FLSA. And again, the Seventh Circuit dismissed the lawsuit concluding that he was a *bona fide* professional employee under 29 C.F.R. 541.3. The circuit court agreed with the lower court assessment that:

> [P]laintiff was an exempt professional employee because his work required consistent exercise of discretion and judgment and specialized knowledge in his field.

Licensed Funeral Director and Embalmer Duties and Responsibilities

The NFDA believes that the description of the credentials, duties and responsibilities of licensed funeral directors and embalmers in the *Rutlin* and *Szarnych* decisions is a generally accurate characterization of those required and experienced by all licensed funeral directors and embalmers.

Funeral directors are engaged in the care and disposition of the human dead, and in preparing the remains for the funeral and burial, or cremation. A major part of their responsibilities includes helping to meet the emotional needs of the loved ones and survivors of the deceased. Death is a major crisis to those left behind, and each person and family is different.

This requires a funeral director to continually exercise discretion and judgment in responding to and accommodating their needs. This begins with the removal and transportation of the body. It continues through counseling and advising the family on ceremony and disposition options that respect and fulfill their needs and those of the deceased, implementing these decisions and coordinating with the other entities necessary for the final disposition. A funeral director does not, and cannot, follow a standard operating procedure to prepare a funeral ceremony or address the emotional and other needs of a family. Neither can a funeral director adhere to a rigid schedule. Death is obviously unpredictable and the funeral director must be prepared to act when needed.

Embalmers are engaged in the practice of disinfecting and preparing the remains for final disposition. Preparation of the body should start as soon as possible after the remains are made

available to the funeral home. Restoration of the body is sometimes necessary, particularly in cases of trauma or wasting illness. This preparation and restoration demands the exercise of considerable skill and judgment. The conditions that must be diagnosed and analyzed and the selection of the appropriate treatment vary a great deal from one death to another. This is compounded in instances where restorative work is necessary.

The end result of an embalming procedure depends primarily upon the knowledge, skill, judgment and experience of the embalmer. The procedure itself can take several hours. The specific procedures required for optimal results depend entirely on the skill and judgment of the embalmer. Like funeral directors, embalmers cannot apply standard operating procedures to every case, or follow a predictable schedule.

Funeral service is a unique profession. It requires advanced knowledge and skills specific to its unique needs. A prolonged course of specialized instruction is required in order to acquire the knowledge and skills necessary to become a licensed funeral director or embalmer. This instruction is not limited to strict technical skills or abilities. It also includes a broad intellectual education is such disciplines as chemistry, sociology, psychology, history and communication gained by attending an accredited mortuary science school. In addition, a mandatory apprenticeship of one to two years is common for both licensed funeral directors and embalmers as is passage of a state or national examination.

Mr. Chairman, I would add here that both employers and licensed funeral director and embalmer employees urged NFDA to continue its efforts to gain this exemption. Because funeral service is dictated by forces outside the control of funeral directors, work hours are unpredictable. As a result of being classified as nonexempt hourly workers, the pay of licensed funeral home employees varies greatly from week to week. In addition, to reserve against overtime, hourly pay rates are lower than they could be. Licensed employees want higher and more predictable wages, and to equalize their income over time. They also want the opportunity to receive compensatory time so that they can spend more time with their families. Employers want to stabilize their payroll and pay their licensed employees appropriately. They also want to eliminate the costly record keeping and reporting burden. REMEMBER, these are mostly small, family-owned businesses.

NFDA comments on Proposed Rules

In its comments to DOL on their March 31, 2003 proposed changes to the overtime rules, NFDA contended that licensed funeral directors and embalmers met the salary and standard duties test. The proposed rule required:

> A minimum salary of $425 per week. Primary duty of performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.

NFDA stated, "The proposed definition of professional employees is consistent with the education, experience and duties of licensed funeral directors and embalmers as described in the *Rutlin* and *Szarnych* decisions. It eliminates the consistent exercise of discretion and judgment requirement and clarifies "that, so long as such an employee's level of advanced knowledge is equivalent to the knowledge possessed by an employee with the typical academic degree generally required by the profession, the employee may qualify as an exempt professional."

NFDA noted that "All states, except Colorado, license individuals practicing as funeral directors and/or embalmers. Nearly all require post high school study and/or specialized study in a mortuary college, or in mortuary science. Thirteen states and the District of Columbia require licensed funeral directors and embalmers to pass a national and/or state examination. Forty-nine states and the District of Columbia require licensees to serve an apprenticeship as well. Apprenticeships range from 1,000 hours to two years. Thirty-one states and the District of Columbia impose a yearly continuing education requirement in order to maintain a funeral director or embalmer's license.

NFDA concluded that "…. funeral directors and embalmers who have successfully completed a course of study at an accredited mortuary college and serve an apprenticeship, and are licensed by the state in which they practice, are professional employees as defined in the Department's proposal. The NFDA believes that the Department should include licensed funeral directors and embalmers in the final rule with guidance that clarifies that these occupations are professional employees and exempt from the minimum wage and overtime requirements of the FLSA."

Final Rule

While the language of the final rules governing the Learned Professional exemption was modified, the DOL guidance recognized, for the first time, licensed funeral directors and embalmers as professionals and relied on the decisions in the federal court cases outlined above as the basis for its decision. However, the guidance needs clarification, as it would appear that the Department's interpretation of the *Rutlin* decision does not accurately reflect the credentials and responsibilities the court concluded exempt licensed funeral directors and embalmers from the FLSA overtime requirements.

The Department of Labor estimates that 42,694 funeral directors are subject to the Part 541 white- collar salary level test (69 FR 22244). According to DOL, 29,867 earn more than $155 a week and 21,843 are exempt from the current overtime rules (69 FR 22248). Lastly, DOL estimates that 912 funeral directors earn more than $155 a week but less than $455 and will "most likely gain compensation under the final rule" published April 23, 2004 (69 FR 22252).

Conclusion

Mr. Chairman, NFDA strongly believes that the changes in the overtime rules as promulgated by the Department of Labor are a significant improvement in recognizing the duties and responsibilities of today's licensed funeral directors and embalmers. We believe that both employers and their valued staff benefit tremendously. Moreover, they will have a positive

competitive advantage in that it should encourage new entrants into the profession and make salaries more competitive. By recognizing the professional status of licensed funeral directors and embalmers, the Department of Labor has improved the economic and family lives of these practitioners whose daily professional life is dedicated to consoling and attending to the needs of families in their communities who have lost a loved one. They are highly competent, compassionate and caring individuals who deserve to be considered professionals.

Thank you again for this opportunity. I would be happy to answer any questions you or the Subcommittee members may have.

STATEMENT OF RONALD BIRD

Before the Subcommittee
on
Workforce, Empowerment and Government Programs
of the
Committee on Small Business

U.S. House of Representatives

May 20, 2004

The final revisions to the white-collar regulations are long overdue because of profound changes in the structure of the American workplace, which is substantially different than the workplace of 1938. These demographic and environmental shifts have occurred in key areas—the industrial and occupational makeup of the workforce, the educational attainment and earnings of workers, labor demand and supply, and workplace dynamics. These changes are ongoing and accelerating forces within the American workplace and have greatly increased the difficulty of accurately classifying employees as exempt or non-exempt under regulations that were last substantively revised 50 years ago.

Since the Department of Labor (DOL) first wrote the regulations in 1938, the workforce has undergone dramatic shifts. Before World War II, just over one-in-three workers worked in the manufacturing sector; today, fewer than one-in-seven do. Similarly, far more workers today are engaged in management and professional occupations than were in 1940. The proportion of workers in such occupations has nearly doubled from just over one-in-six to nearly one-in-three.

In 1940, it was not uncommon for the typical worker to be a high school dropout—over three-quarters of all adult workers had never finished high school. Today, over 58 percent of the population age 16 and older has at least some college-level education. These changes have blurred the definition of professional work, as currently defined in the regulations, and have made the classification of employees under the regulations more complex. Given the dramatic changes in work and the workforce, the Department of Labor was justified in following a process to revise the white-collar regulations.

STATEMENT OF RONALD BIRD

Before the Subcommittee on
Workforce, Empowerment and Government Programs
of the Committee on Small Business
U.S. House of Representatives
May 20, 2004

Thank you, Mr. Chairman and members of the committee. 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. 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). At your request, I have included in my testimony information regarding the administrative and litigation burden imposed on employers – especially small businesses – by the prior old FLSA regulations and the expected benefits of simpler new regulations.

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.

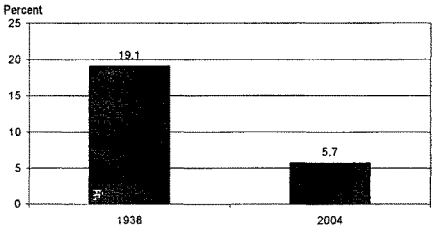
Today's American workplace is different in structure and more complex in its organization than the workplace of 1938. The workplace transformation of the past 65 years reflects at least six dimensions of change that affect relevance and applicability of current FLSA regulations.

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 6.6A-6.6D data.

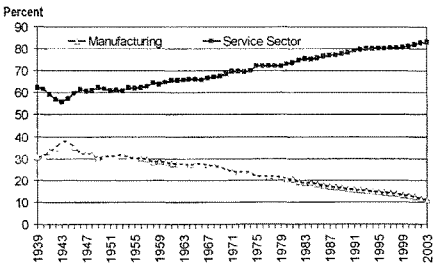
Today the fundamental competitive conditions of the labor market are very different. Figure 1 shows unemployment in March 2004 at 5.7 percent, dramatically lower than the condition in 1938. The peak unemployment rate following the 2001 recession was the lowest of any recession of the past 30 years and 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.

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

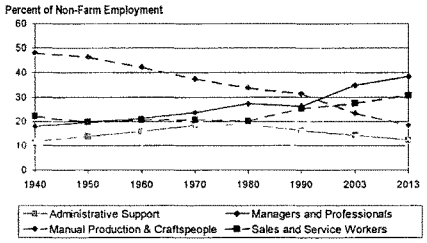


Source: Employment Policy Foundation tabulation of Bureau of Labor Statistics Current Employment Statistics data.

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.

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 1980-2003.

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.

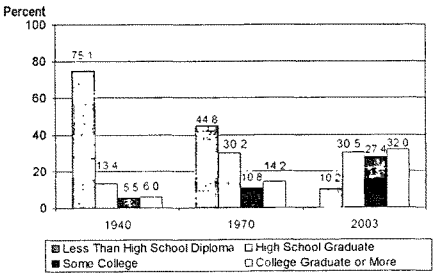
These changes in occupational structure mean that many more jobs today than in the past may quality for exemptions defined in the Fair Labor Standards Act. The increase in the number of potentially exempt jobs makes it much more important today that the regulations implementing the exemption concepts 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

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.

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.)

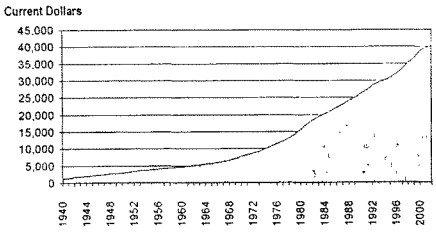
The increase in employment of college graduates reflects the changing structure of the workplace and increasing need for workers who can think critically and analytically, and who can manage and coordinate their work activities through complex automated information, process control and communication 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.

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 Tables6.6A-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).

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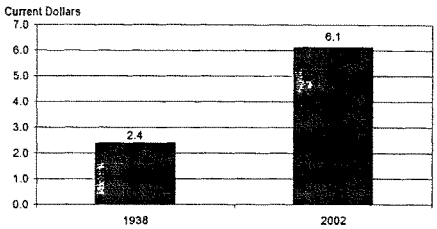
Higher earnings have made it more important that status determinations under Part 541 be accurate. The confusion and complexity associated with the current rules mean that both employees and employers have more at stake, and both will benefit by revised rules that make the status determination process 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 6.6A-6.6D 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.

6

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.

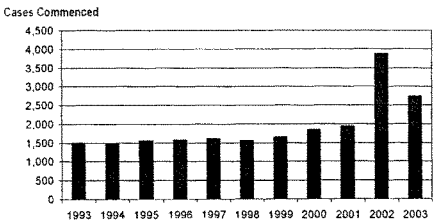
The complexity and ambiguity of the existing rule is evidenced by the amount of disagreement and litigation it generates. For the past three years, FLSA issues–most related to the exempt-nonexempt status of workers–have been the leading employment-related civil action in federal courts. For the 12 months 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.

Fortunately, not every employment classification decision results in a lawsuit. With 43.6 million classification decisions being made every year in America's dynamic workplaces, the court system would be overwhelmed. However, each of these decisions take time and cost money – wages of managers and human resource specialists to analyze jobs in comparison to complex regulations, fees for consultants and lawyers to advise on difficult decisions. For small businesses the burden of classification decision making is especially onerous. It takes precious time of small business owners away from the critical work of building the business. It takes money to pay consultants and lawyers away from the cash flow needed to expand the business and to create new jobs. EPF estimated that the administrative classification decisions under the old rule cost up to $1.3 billion per year. The simpler presentation of the new rules could cut that cost by $648 million or more based on estimates of decision making time from a panel of human resource professionals.

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.

In 2001, 7.6 million white-collar managerial and professional workers in occupations that wage and hour enforcement experts judged in 1998 to have 90 percent or higher likelihood of meeting exemption duties tests were paid hourly. These 7.6 million hourly workers are entitled to overtime because they are paid on an hourly rather than salary basis, but their duties are such at they could very likely be reclassified as exempt it the employer wanted to change their status. These 7.6 million workers comprise 29.4 percent of the total 25.7 million workers in the white-collar occupations most likely to qualify for exemption by duties under either the old or new rules. They could be classified as exempt and be denied overtime premium pay. It has not happened because these workers and their employers find the hourly pay with overtime premium to be in their mutual best interests. The possibility of exempt classification does not translate into reality of exempt classification. In today's labor market where skilled workers are scarce and turnover costs high, workers are most likely to be paid in the method and the amount that they want. The employer is not in total control.

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. Altogether 23.5 million workers who earn under $455 per week enjoy new or stronger protections of their overtime rights under the new FLSA rule. Under the old rule, the status of many was subject to interpretations of duties. Those who gain added protection under the new rules include:

- 1.3 million previously exempt (salaried) employees who work full time and earn less than $455 per week including 203,000 managers, 143,000 sales workers with supervisory duties, 52,000 accountants, 49,000 registered nurses and 48,000 teachers.
- 5.4 million salaried white-collar workers (full- and part-time) who earn between $155 and $455 per week for whom the new rule automatically and absolutely guarantees the right to overtime.
- 3.4 million white-collar employees in occupations with a high probability of having exempt duties who are currently paid on an hourly basis and who are protected from future reclassification to salaried exempt status.
- 10.6 million employees in white-collar occupations who are paid hourly wages and whose occupations have a low to moderate likelihood of having exempt duties who would be protected from some risk of future reclassification to salaried exempt status.
- 2.8 million salaried workers in presumably non-exempt blue-collar occupations who earn less than $455 per week who gain absolute protection of overtime rights under the new rule's higher earnings threshold.

The new rule will ensure that everyone who earns less than $455 is classified as nonexempt. They are 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.

Economic Policy Institute

Testimony of Ross E. Eisenbrey
Vice President and Director of Policy
ECONOMIC POLICY INSTITUTE

On the Department of Labor's Final Overtime Regulations

Before the Workforce, Empowerment and Government Programs Committee

May 20, 2004

The Department of Labor's (DOL) final rule on overtime will hurt millions of American workers. If the final rule takes effect, millions of employees will lose the right to overtime pay and will find themselves working longer hours with less in their paychecks to show for it. I have attached a copy of my testimony before the Senate Subcommittee of Labor, Health and Human Services, and Education (May 4, 2004) on the overtime rule, which explains some of ways the specific ways this rule harms workers.

The main justification for the new overtime rule advanced by the Department and by some business representatives who have aligned with the Department is that it is a cure for a litigation "explosion" under the Fair Labor Standards Act (FLSA). There are two problems with this argument: there has not been a litigation explosion, and the rule is far more likely to *provoke* additional litigation than to prevent it. You have heard about a tripling in the number of federal FLSA class action suits. This is true; in 1997 there were 31 such cases, and in 2003 there were 102. But that is only an average of two suits for each state and the District of Columbia, hardly a crisis in a nation with more than 7 million employers. Moreover, I believe the rule is so ambiguous and internally inconsistent that businesses will find themselves unable to understand or explain it, and workers will be much more likely to sue when employers take advantage of the rule to reclassify their employees and cut costs.

The rule both eliminates key objective tests that provide clarity in the current regulations and introduces a host of ambiguous new terms and provisions that will be the source of litigation for many years to come. Far from clarifying the law, the Department has removed many of the existing bright line tests and replaced them with terms that literally require a case-by-case analysis--that is to say, a lawsuit-by-lawsuit analysis. The remainder of my testimony addresses a handful of these problem areas.

Primary Duty – 50% rule of thumb

For half a century, employers and employees have relied on a simple, common sense rule to guide the determination of the fundamental question: what is the employee's primary duty. The task that the employee spends most of her time performing is her primary duty. This "50% rule of thumb" is not iron-clad, but it provides easily understood guidance that makes sense to almost everyone. The final rule leaves half of the 50% rule of thumb: an employee who spends more than 50% of her time doing management duties is presumed to be exempt, but if she spends less than 50% of her time on exempt duties, no presumption is made. There is no minimum amount of exempt work that an employee might do and still be found to be exempt.

Blue collar workers

The Department claims that it has strengthened overtime protection for blue-collar workers by adding a new, clear statement of their entitlement to overtime. This is untrue. Section 541.3(a) starts promisingly, by stating that the exemptions do not apply to "manual laborers or other 'blue-collar' workers who perform work involving repetitive operations with their hands, physical skill, and energy." While this is already confusing – why aren't sous chefs, who spend all but a few minutes of the day working with their hands, "blue collar"? – the rule further confuses things by distinguishing non-exempt blue-collar workers from **exempt**

employees by the source of their training: apprenticeships and on-the-job training. But that is precisely how most chefs get their training; only a relative handful learn their trade in formal cooking schools. By this definition, chefs and sous chefs are blue collar, but the rest of the rule treats them as subject to exemption.

The most serious problem with the treatment of blue-collar workers is the clarification in the third sentence: it is only "**non-management** production line employees and **non-management** employees in maintenance, construction, and similar occupations" who are entitled to overtime premium pay.

The rule gives no clue about how to distinguish a **management** production line employee from a **non-management** production line employee, or a **management** maintenance employee from a **non-management** maintenance employee. No one in the Department of Labor, including the deputy wage and hour administrator who is testifying today, can tell you at what point a non-management blue-collar worker is transformed into a management blue-collar worker. How much administration or supervision is required to become exempt? If a supervisor spends eight hours of his nine-hour workday alongside a crew of carpenters, sawing wood and pounding nails with them, is he blue collar? Is he exempt or non-exempt?

Team leaders

Section 541.203(c) exempts "an employee who leads a team of other employees assigned to complete major projects for the employer" even if the employee does not have direct supervisory authority over the other employees on the team. This is a broad new exemption that could apply to as many as 2.3 million currently non-exempt team leaders throughout American industry. The only limitation on this exemption is that the team's project must be "major." No definition of "major" is provided in the rule, though the rule's examples, which are not exclusive, include "designing and implementing productivity improvements." Productivity teams are among the most common teams in use today. If finding productivity improvements meets the definition of "major," what else does the classification include? Safety is a major issue for any employer: will every safety team leader in American now be exempt? What about employee morale, diversity issues, and customer service improvement? Teams addressing these issues would arguably all be involved in major projects, and their team leaders would all be exempt.

Will this be a "major" source of litigation? You bet it will!

Highly compensated employees – "customarily and regularly"

Highly compensated employees lose their right to overtime according to section 541.601 if they "customarily and regularly perform any one or more of the exempt duties of an executive, administrative, or professional employee." Thus, whether something is customary and regular is a key issue. Take as an example a blue-collar employee on an oil rig in Alaska who makes suggestions about the promotion of fellow employees once a year, thus performing a duty of an exempt executive employee. Is once a year "customarily and regularly"?

The answer is supposed to be found in section 541.701, which, unfortunately, defines "customarily and regularly" as "a frequency that must be greater than occasional but which, of course, may be less than constant." My **American Heritage** dictionary defines

"occasional" as "occurring from time to time." Section 541.701 goes on to give an example of "customarily and regularly" that raises more questions than it answers: "Tasks or work performed 'customarily and regularly' includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks."

Clearly, this definition is unclear, unhelpful, and will be a source of constant litigation. While something done once a workweek, such as a weekly safety talk given by a construction worker, obviously fits the illustrative example, the definition permits much less frequent tasks. But how much less frequent? A regular, once-a-year review where the oil rig employees make promotion suggestions would be more than occasional; it would not be an "isolated or one-time task" because it would happen every year. The solicitor of labor told an audience at the National Conference of State Legislatures that a task would have to be performed at last twice a year to be customary and regular, so a twice-a-year suggestion about promotion or shift assignments would be enough to meet the test.

If the DOL had wanted to provide clarity and avoid litigation, it could have required that a task be performed at least once a day, or at least once a week, to be customary and regular. Instead it left us with an inept and unhelpful definition certain to lead to more lawsuits.

Professional employees – substantially the same knowledge and work

The single change from current law that will create the most confusion and spark the most litigation is probably the new test for exemption as a learned professional. This new "learned professional" exemption allows employers to deny overtime pay to employees who do not have advanced degrees or college degrees, as long as they "have substantially the same knowledge level and perform substantially the same work as the degreed employees." What does "substantially the same" mean? It doesn't mean equal knowledge; could it mean less? How much less could a non-degreed employee know and still be considered a professional? How will employees and employers, let alone Wage and Hour inspectors, know whether an employee has "substantially the same knowledge" as the degreed employees? The employer has the burden of proving that an employee satisfies the tests for exemption. Will employers have to start giving tests to their employees? Will Wage and Hour have to test the cooking skills of learned professional chefs to determine whether they have substantially the same knowledge? Under current law, the test is a reasonably bright line: does the employee have a professional degree?[1]

The DOL could have provided absolute clarity for employers and employees alike by making a four-year specialized college degree an absolute prerequisite for the learned professional exemption. That would be a clear and objective basis for determining the employee's status as a professional. Under the final rule, poorly-paid, non-degreed employees will be labeled professionals and denied overtime, and many of them will likely sue their employers over it.

Learned professional exemption--veterans

The final rule's learned professional exemption creates a new problem for employers and employees by allowing knowledge gained from work experience and other sources to

[1] In one case, an engineer with 30 years of work experience and three years of college was found to be a professional, but this rare exception is just that – a rare exception. The final rule makes the substitution of work experience for a degree an easy route to exemption and loss of overtime pay.

substitute for a professional degree. The DOL has gone to great lengths to deny that knowledge employees gain from service in the armed forces can be used to establish this exemption. But how will employers (who have the burden of proof in establishing that an employee is exempt) prove that none of the knowledge a veteran has that gives him "substantially the same knowledge" as degreed professionals, was gained in the armed services?

Financial services employees

Section 541.203(b) creates a broad new exemption for "employees in the financial services industry…if their duties include work 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. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption."

This raises many questions. What is the financial services industry? Does it include insurance? Table A-5 in DOL's Federal Register notice classifies certain jobs as "securities and financial services sales occupations." Are securities firms excluded from the financial services industry for purposes of section 541.203(b)?

Does an employee have to perform all of the listed duties to qualify for the exemption, or just some of them? Could an employee do no more than collect customer income information and still qualify for the exemption? What is the difference between marketing or promoting the employer's financial products, advising the customer regarding the advantages and disadvantages of different financial products, and selling financial products? How will an employee know whether his primary duty is selling or marketing?

Proof of the confusion this new exemption will cause can be found in Table A-3 in the Federal Register notice. Despite the rule's statement that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption," the DOL estimates that 295,175 out of 389,000 employees (76%) in "securities and financial services occupations" will be exempt. This is the same proportion that will be exempt in insurance sales occupations and real estate sales occupations. These figures do not include supervisors in these occupations, who fall into a separate occupational classification.

Creative professionals – journalists

Under current law, editors and reporters are presumed to be non-exempt, because "the reporting of news, the rewriting of stories received from various sources, or the routine editorial work of a newspaper is not predominantly original and creative in character." The final rule eliminates this language and replaces it with language that implies that all but a few reporters who "only collect, organize, and record information that is routine and already public" will be exempt as creative professionals. The rule furthers this implication by offering the following example: "newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals." Are reporters who do more than merely rewrite press releases, etc. exempt? If the Department doesn't intend to change the law, which currently exempts only 30% of editors and reporters, why has it changed the text of

the regulation? Why has the presumption of entitlement to overtime for journalists been removed? I talked to a reporter this week whose boss had read the rule and determined that somewhere between one and 20 of the 20 reporters in the newsroom would be exempt as creative professionals under the final rule. That is not clarity.

Working supervisors/outside sales

Current law has several clear, bright line tests that determine exempt status, including the 20% limit on non-exempt work by working foremen and a 20% limit on non-outside sales work by exempt outside salespeople. The final rule eliminates both of these tests and replaces them with a "primary duty" test, a test so slippery and uncertain that it will spawn endless litigation.

Under the new rule, how will a route sales driver who spends half or less of his time on the road know whether he is entitled to overtime? Under current law, it would be simple. He knows he is entitled to overtime because more than 20% of his hours are non-outside sales. Under the final rule, the question becomes, which is his primary (i.e., most important) duty--outside sales or his other work? The amount of, however, time is not dispositive; even spending most of his time doing inside sales work would not guarantee him the right to overtime pay. The DOL has chosen to make the rules murkier, not clearer, and the result will be new litigation.

Similarly, by eliminating the 20% tolerance test for non-exempt work by supervisors, factory foremen who spend virtually their entire day doing manual work on the line next to the employees they supervise will lose their right to overtime pay, as long as the employer can claim that their primary duty was executive, i.e., supervisory. Instead of an easy test based on time spent doing non-exempt duties, the test will be completely subjective, left to determination "on a case-by-case basis," according to section 541.106(a).

Conclusion

The Department's abandonment of clear tests and the substitution of "case-by-case" determinations is a recurring theme of the final rule. The Department suggests that it will no longer require that executives actually manage the enterprise or a department or subdivision thereof; it may be enough to be in charge of a team or grouping, "but a case-by-case basis analysis is required" (69 Fed. Reg. at 22,134). Similarly, the Department admits that the new creative professional exemption for chefs is so vague that, of course, it "must be applied on a case-by-case basis with particular focus on the creative duties and abilities of the particular chef at issue" (69 Fed. Reg at 22,154). Obviously, this approach is a recipe for more litigation, not less.

O.T. Coalition

Working for fairness and clarity in overtime laws

May 20, 2004

Chairman Todd Akin
House Committee on Small Business
Workforce, Empowerment, and Government Programs Subcommittee
2361 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Akin:

We are writing to let you know of our support for the final "FairPay" Overtime rules that were issued by the Department of Labor last month.

As you know, the federal regulations governing overtime pay have not been comprehensively updated since the early 1950's, and have not kept pace with the substantial changes in the American workplace, workers, and their jobs. What should be a simple test—determining an employee's exempt status—is often an extremely complex task with very little certainty. Employers face significant challenges in trying to classify today's jobs into categories that were created in a different era.

The antiquated nature of these workplace regulations has proven to be a bonanza for the plaintiffs' bar. While employers have been struggling with how to comply with the severely outdated regulations, trial lawyers have seized upon this as a new lucrative area to exploit for their own financial gain. In fact, since 1997, lawsuits under the Fair Labor Standards Act have tripled, and for the past three consecutive years, more FLSA class action lawsuits have been filed than employment discrimination class actions. The final rules issued by DOL should lead to greater clarity in application of the rules in the workplace and, as a result, should help curb the dramatic escalation of wage and hour lawsuits.

Both Democratic and Republican administrations have recognized the need to revise the "white collar" regulations. Even the nonpartisan GAO recommended in a 1999 report that "the Secretary of Labor comprehensively review current regulations and restructure white-collar exemptions to better accommodate today's workplace and to anticipate future workplace trends."

Throughout the entire rulemaking process, opponents have engaged in a campaign of blatant misinformation about the proposed regulation. Allegations have been made that whole classes of individuals – from firefighters and nurses to our nation's military veterans – would be denied overtime. While these assertions were never factual, the final regulation explicitly states that first responders, licensed practical nurses, blue collar workers, and veterans are entitled to overtime pay.

Again, we commend the Department of Labor for their leadership in issuing the final "FairPay" overtime regulations, and look forward to working with you to ensure that our workplace laws are brought into the 21st Century.

Chairman Todd Akin
May 20, 2004

Sincerely yours,

American Bakers Association
American Bankers Association
American Council of Engineering Companies
American Hotel & Lodging Association
American Insurance Association
American International Automobile Dealers Association
American Shareholders Association
American Wholesale Marketers Association
Americans for Tax Reform
Associated Builders and Contractors
College and University Professional Association for Human Resources
Colorado/Wyoming Petroleum Marketers and Convenience Store Association
The Financial Services Roundtable
Food Marketing Institute
Hispanic Alliance for Progress
HR Policy Association
Independent Electrical Contractors
International Foodservice Distributors Association
International Franchise Association
Louisiana Oil Marketers and Convenience Store Association
Mortgage Bankers Association
Missouri Grocers Association
National Association of Chain Drug Stores
National Association of Convenience Stores
National Association of Manufacturers
National Association of Mortgage Brokers
National Council of Chain Restaurants
National Federation of Independent Business
National Funeral Directors Association
National Newspaper Association
National Restaurant Association
National Retail Federation
Nebraska Petroleum Marketers & Convenience Store Association
New England Convenience Store Association
New Hampshire Grocers Association
Ohio Association of Convenience Stores
Ohio Grocers Association
Pennsylvania Food Merchants Association/ Pennsylvania Convenience Store Council
Petroleum & Convenience Marketers of Alabama
Petroleum Marketers & Convenience Stores of Iowa
Printing Industries of America
Property Casualty Insurers Association of America

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May 20, 2004

Retail Industry Leaders Association
Society for Human Resource Management
Society of American Florists
Society of Independent Gasoline Marketers of America
Tennessee Grocers Association
Texas Petroleum Marketers and Convenience Store Association
U.S. Chamber of Commerce
Utah Food Industry Association
Utah Petroleum Marketers
West Virginia Oil Marketers and Grocers Association