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Garrett Reid Krueger

STRAIGHT-TIME OVERTIME AND SALARY BASIS: REFORM OF THE FAIR LABOR STANDARDS ACT

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Abstract: The Fair Labor Standards Act (FLSA) was passed in 1938 in response to oppressive working conditions and a depressed economy. While FLSA's overtime provisions may have been responsive to the workplace of the 1930s, they are now outdated in the flexible, service-oriented economy of the 1990s and in need of revision. FLSA's salary basis test and corresponding inconsistent treatment of straight-time overtime payments are examples of excessively wooden provisions. Originally adopted to separate well-compensated white-collar employees from blue-collar line workers in need of statutory protection, the salary basis test no longer effectively serves as a gatekeeper for FLSA's overtime provisions. The DOL should promulgate regulations that allow the payment of straight-time overtime to well-paid workers and in doing so follow the lead of the Washington State Legislature.

Suppose that *X* is the human resource manager of a successful medium-sized accounting firm. The junior members of the firm are certified public accountants who are compensated in the following manner: They are paid a salary of $750 per week ($39,000/yr) plus straight-time overtime ($18.75/hr) for any hours worked over forty. Historically, junior accountants also have been given a Christmas bonus of $1000. Due to the long hours demanded of accountants primarily during tax season, junior accountants earn approximately $55,000 per year.

Recently, *X* has heard complaints concerning the manner in which overtime compensation is paid. Several junior accountants contend that they are covered under the Fair Labor Standards Act (FLSA or "the Act") and are entitled to time and a half for hours worked over forty because they are not paid on a salary basis. Based on prior experience, *X* knows that workers who are classified as professionals and paid on a salary basis are exempt from the provisions of FLSA. Hence, *X* previously has assumed that junior accountants are exempt and are not entitled to coverage. However, the junior accountants claim that because they are paid straight-time overtime, they are not paid on a salary basis and instead are hourly workers subject to the provisions of the Act. The junior accountants also bring to *X*'s attention decisions from the Court of Appeals for the Third and Ninth Circuits which appear to support their position. Further, *X* knows that if their claim is successful in court, the firm would be liable for at least two years of back overtime with the possibility of a third year of liability and double damages on all three years. Estimates of bottom-line liability approach $400,000.

Human resource managers across the nation are faced with this and other similar problems when interpreting FLSA provisions. This Comment contends that FLSA should not be interpreted to extend coverage to employees such as the junior accountants in the example above. Moreover, to eliminate any uncertainty, the Department of Labor (DOL) should issue regulations that specifically allow the payment of straight-time overtime to employees without nullifying their salaried status. Part I of this Comment examines the scope, coverage, legislative history, and purpose of FLSA. Part II discusses the white-collar exemptions to FLSA and details the subject of this Comment, the salary basis test. This section also explains the consequences faced by employers who fail to compensate employees on a salary basis. Part III summarizes the split in federal case law regarding the payment of straight-time overtime to previously exempt employees. This section also argues that treating straight-time overtime as inconsistent with salary status is against the clear intent of FLSA and DOL regulations. Part IV introduces a proposed amendment to FLSA based primarily on the recent statutory amendment to the Minimum Wage Act of Washington.

I. FEDERAL OVERTIME LAW

FLSA was enacted in 1938 during the Great Depression in response to abusive working conditions and high unemployment.[1] The Act's stated purpose is to protect workers from "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for [the] health, efficiency and general well-being of workers. . . ."[2] President Franklin D. Roosevelt urged passage of the Act because he believed governmental regulation was needed to prevent employers from overworking and underpaying employees.[3] President Roosevelt also was concerned with the exploitation of unorganized labor and child labor.[4] However, until the passage of FLSA, comprehensive wage-and-hour legislation had been an elusive goal. President Roosevelt's previous attempt at creating a wage-and-hour standard (the National Industrial Recovery Act) was deemed unconstitutional by the

1. *See, e.g.*, Mechmet v. Four Seasons Hotels, 825 F.2d 1173, 1176 (7th Cir. 1987); *Statutory History of the United States: Labor Organization* 396 (Robert F. Koretz ed., 1970); John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 Law & Contemp. Probs. 464, 465–66 (1939); 1940 Wage & Hour Manual (BNA), at 21–22 (Oct. 24, 1939).

2. 29 U.S.C. § 202(a) (1988).

3. Forsythe, *supra* note 1, at 464–66.

4. *Id.* at 465–66.

U.S. Supreme Court.[5] Undeterred, President Roosevelt introduced a precursor to FLSA in 1937 and stated that only goods meeting minimum labor standards should be admitted to interstate commerce. Further, President Roosevelt urged that goods produced in a work environment that was abusive and did not meet basic standards of decency should be restricted from the channels of interstate trade.[6]

FLSA is an inclusive piece of legislation, which is generally applicable to all employers engaged in interstate commerce, subject to specific exemptions. The Act is structured to provide workers with certain minimum protections against substandard wages and excessive hours.[7] Further, the overtime provisions of FLSA are designed to stimulate the employment market and protect workers' physical and economic well-being.[8] Congress believed that an overtime provision would spread work among a greater number of workers, thereby reducing unemployment.[9] Prevailing theory during debates on the measure held that an employer would seek to avoid the overtime penalty by hiring more workers, thereby stimulating the employment market.[10]

Public sector employees initially were excluded in the scope of the Act, but an amendment to FLSA in 1974 brought public employees under its regulatory umbrella.[11] The legislative history of the amendments confirms Congress's intent to provide coverage for public employees.[12] Two years later, however, the U.S. Supreme Court struck down the amendment and held that extending FLSA coverage to state and city governmental employees was inconsistent with state sovereignty.[13] In 1985, the Court reversed itself and upheld the constitutionality of including public sector employees within the scope of

5. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

6. Roland Elec. Co. v. Walling, 326 U.S. 657, 668 (1946) (citing 81 Cong. Rec. 4960, 4961 (1937) (message of President Roosevelt)).

7. *See* Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942) (citing 81 Cong. Rec. 4960, 4983 (1937) (message of President Roosevelt)).

8. Freeman v. NBC, Inc., 846 F. Supp. 1109, 1112 (S.D.N.Y. 1993).

9. Mechmet v. Four Seasons Hotels, 825 F.2d 1173, 1176 (7th Cir. 1987).

10. Robert Lipman et al., *A Call for Bright Lines To Fix the Fair Labor Standards Act*, 11 Hofstra Lab. L.J. 357, 359-60 (1994).

11. Fair Labor Standard Amendments of 1974, Pub L. No. 93–259, 88 Stat. 58, 60, § 6(a)(1), (a)(6), 29 U.S.C. § 203(d), (x) (1988).

12. H.R. Rep. No. 913, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837 ("[T]he bill extends minimum wage and overtime coverage to about 5 million non-supervisory employees in the public sector.").

13. National League of Cities v. Usery, 426 U.S. 833 (1976).

the Act.[14] Thus, FLSA currently provides coverage to public employees and private employees working for firms engaged in interstate commerce.[15] Correspondingly, private employers engaged only in intrastate commerce are not governed by the Act and need only answer to state legislation. Due in part to the indecisiveness of the U.S. Supreme Court, much of the litigation on this issue involves the public sector.[16]

Courts have interpreted the scope of FLSA liberally. Due to the legislative history and remedial nature of the Act, courts have determined that FLSA must be viewed broadly to achieve its purpose[17] and therefore have read a presumption of coverage into the Act.[18] Consistent with the congressional goal of providing broad federal regulation for workers, exceptions to the Act are to be narrowly construed.[19] Moreover, the employer bears the burden of proving that an employee is exempted from the Act.[20] The employer must prove by "clear and affirmative evidence" that an exemption applies to a specified group of workers.[21]

II. WHITE-COLLAR EXEMPTIONS TO FLSA OVERTIME PROVISIONS

The overtime provision of FLSA states: "No employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."[22] However, an employer does not have to pay overtime to an "employee employed in a bona fide executive, administrative, or professional capacity . . . as such terms are defined and delimited from time to time by regulations of the

14. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Until *Garcia*, FLSA was not applied to the public sector and state wage and hour law generally governed public employees.

15. Fair Labor Standard Amendments of 1974, *supra* note 11.

16. *See generally* Thomas v. County of Fairfax, 758 F. Supp. 353, 357–58 (E.D. Va. 1991).

17. *See, e.g.*, Powell v. United States Cartridge Co., 339 U.S. 497, 510–11 (1950).

18. *See, e.g.*, Schultz v. W.R. Hartin & Son, Inc., 428 F.2d 186, 189 (4th Cir. 1970).

19. *See* Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960); Mitchell v. Lubin, McGaughy & Assocs., 358 U.S. 207, 211 (1959); Guthrie v. Lady Jane Collieries, Inc., 722 F.2d 1141, 1143 (3d Cir. 1983).

20. Corning Glass Works v. Brennan, 417 U.S. 188, 196–97 (1974). *See also* Walling v. General Indus. Co., 330 U.S. 545, 547–49 (1947); Clark v. J.M. Benson Co., 789 F.2d 282, 286 (4th Cir. 1986).

21. Donovan v. United Video, Inc., 725 F.2d 577, 581 (10th Cir. 1984).

22. 29 U.S.C. § 207(a)(1) (1988).

Secretary . . . ."[23] The executive, administrative, and professional exemptions are not specifically defined in FLSA. Rather, the DOL is responsible for determining the operative definitions of these terms through interpretive regulations.[24] Generally, DOL regulations are entitled to judicial deference[25] and are the primary source of guidance, apart from case law, that determines the scope and extent of exemptions to FLSA.[26]

Pursuant to this duty, the DOL has established "long" and "short" tests to determine whether an employee is exempt from the overtime provisions of FLSA.[27] Each test focuses on two issues: (1) the duties, responsibilities, and degree of independence from supervision ("duties test"), and (2) the method and amount of payment ("salary basis test").[28] Both the duties and salary basis tests must be satisfied before an employer can claim an exemption.[29] To establish an exemption under the long test, employees must be "compensated for [their] services on a salary basis at a rate of not less than $155 per week." Under the short test, the employee must be paid at least $250 per week.[30] Because the vast majority of workers governed by this section earn more than $250 per week, an employee's pay generally is a non-issue.[31] Rather, overtime cases generally turn on the defined duties of an employee and whether the employer's method of compensation is consistent with payment on a salary basis.

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23. 29 U.S.C. § 213(a)(1) (1988).

24. 29 U.S.C. § 203 (1988).

25. Udall v. Tallman, 380 U.S. 1, 16 (1965).

26. 29 U.S.C. § 203.

27. 29 C.F.R. § 541.1 (1994). Under the "long" test, an executive employee must meet the requirements of subsections (a) through (f) of § 541.1, whereas under the "short" test proviso of subsection (f), an employee "shall be deemed to meet all the requirements of this section" if

> compensated on a salary basis at a rate of not less than $250 per week . . . and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein . . . .

29 C.F.R. § 541.1(f).

Presumably, the "short" test is meant to impose fewer requirements on an employer because an employee earning at least $250 per week needs less statutory protection, and is more likely to perform the duties of an exempt employee, than an employee earning $155 per week.

28. 29 C.F.R. §§ 541.1, 541.2 (1994).

29. Abshire v. County of Kern, 908 F.2d 483, 484 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

30. 29 C.F.R. § 541.1(f).

31. Lipman et al., *supra* note 10, at 364.

A. Duties Test

The DOL regulations define the duties and responsibilities necessary to meet each exemption. For example, employees are considered executives if: (1) their primary duty is managing the enterprise in which the employee is employed, and (2) they customarily and regularly direct the work of two or more other employees.[32] An administrator's primary duties must be "[t]he performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers . . . which includes work requiring the exercise of discretion and independent judgment."[33] A professional must primarily perform "[w]ork requiring knowledge of an advance type . . . acquired by a prolonged course of specialized intellectual instruction and study," or work "original and creative in character in a recognized field of artistic endeavor."[34] Each test is subjective in nature and dependent on fact-sensitive determinations of what constitutes supervision, responsibility, judgment, and knowledge—terms of art that are malleable and difficult to define with precision. Once an employee is over the duties hurdle, analysis shifts to the salary basis test.

B. Salary Basis Test

A central purpose of the salary basis test is to differentiate white-collar decisionmakers from hourly production workers.[35] Congress sought to distinguish between supervisors and employees in need of statutory protection—generally unskilled workers paid by the hour. The legislative history of the 1974 amendments illustrates Congress's intent to protect "non-supervisory employees."[36] However, when FLSA was drafted, a clear dichotomy existed between line-workers and corporate supervisors or bookkeepers—an individual paid on a salary basis ordinarily had attained a level of managerial status and compensation beyond the scope of FLSA's coverage. Correspondingly, white-collar supervisors were paid salaries and blue-collar clerical or line workers were paid by the

32. 29 C.F.R. § 541.1.

33. 29 C.F.R. § 541.2.

34. 29 C.F.R. § 541.3 (1994).

35. *Selected Statements Before House Economic and Educational Opportunities Subcomm. on Work Force Protections, March 30, 1995: Statement of William J. Kilberg*, BNA Daily Lab. Rep. (BNA), No. 62 at *2 (Mar. 31, 1995), *available in* LEXIS, Daily Lab. Rep. Library [hereinafter *Statement of William J. Kilberg*].

36. H.R. Rep. No. 913, *supra* note 12, at 27.

hour.[37] Thus, when the DOL issued salary basis regulations, it stated that payment on a salary basis was one way to screen exempted employees and was the method of payment that most accurately reflected the status of an executive or professional.[38] However, because the DOL regulations primarily focus on method of payment instead of total compensation earned, application of the salary basis test to the workplace of the 1990s can produce absurd and distorted results given the original purpose of the test.

The regulations state that an employee is paid on a salary basis if,

> under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. . . . [T]he employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.[39]

Courts look to several factors which are deemed inconsistent with salary status. They are: 1) method of tracking hours; 2) deductions from salary for part day absences;[40] 3) deductions for disciplinary violations;[41] and 4) straight-time payment of overtime.[42]

Payment on a salary basis generally requires payment on a weekly or less frequent basis of a predetermined amount without regard to number of hours worked or quality of work performed.[43] Typically, salaried employees do not "punch a clock," are not paid by the hour, and are not docked pay if they do not work forty hours in a given week. One court has stated that a salaried employee is compensated for the general value of services provided instead of for the sheer number of hours worked.[44] Correspondingly, salary may not be reduced when an employer

37. Lipman et al., *supra* note 10, at 366.

38. *Id.*

39. 29 C.F.R. § 541.118(a) (1994).

40. Abshire v. County of Kern, 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

41. Klein v. Rush-Presbyterian-St. Luke's Med. Ctr., 990 F.2d 279, 285–86 (7th Cir. 1993).

42. Brock v. Claridge Hotel & Casino, 846 F.2d 180, 184–85 (3d Cir.), *cert. denied*, 488 U.S. 925 (1988).

43. *Abshire*, 908 F.2d at 486.

44. *Id.*

schedules an employee to work fewer hours when there is not enough work to keep her busy.[45] Further, although the regulations are silent as to partial day absences, the majority of courts agree an employee is not exempt from FLSA if an employer has a policy of reducing the employee's compensation for absences of less than a day.[46] However, the Fourth and Ninth Circuits have stated that only cash or salary deductions endanger salaried status—deductions from accrued paid leave are allowed for absences of less than one day.[47]

Salary deductions can be made if a worker misses more than a day for personal reasons or because of sickness or disability "if the deduction is made in accordance with a bona fide plan" under which compensation is provided for such absences and the worker has not yet qualified for the plan or has used up benefits under the plan.[48] Thus, if a worker is allowed two weeks of sick leave per year and misses three weeks due to sickness, the employer may dock the employee's pay for the extra week and maintain the FLSA exemption. The regulations also expressly permit salary deductions if the employee violates safety rules of major significance.[49] Violations of general workplace policies are not considered major, and deductions because of minor violations can preclude exempt status.[50]

An issue generating substantial litigation is whether employees who are subject to deductions, as opposed to employees actually docked because of disciplinary violations, are non-salaried employees under 29 C.F.R. § 541.118(a).[51] Congress received a firestorm of complaints from the corporate community[52] after the Ninth Circuit in *Abshire v. County of Kern*[53] held that as long as the employer had "an express policy of deducting for part-day absences," the fact that no deduction had actually been made was of no consequence.[54] The *Abshire* court found an entire class of previously overtime-exempt employees to be hourly employees

45. 29 C.F.R § 541.118(a)(1) (1994).

46. Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 617 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992).

47. International Ass'n of Fire Fighters v. City of Alexandria, 720 F. Supp. 1230, 1232 (E.D. Va. 1989). *See also* Barner v. City of Novato, 17 F.3d 1256, 1261–62 (9th Cir. 1994).

48. 29 C.F.R. § 541.118(a)(3) (1994).

49. 29 C.F.R. § 541.118(a)(5) (1994).

50. Klein v. Rush-Presbyterian-St. Luke's Med. Ctr., 990 F.2d 279, 285–86 (7th Cir. 1993).

51. McGrath v. City of Philadelphia, 864 F. Supp. 466, 486 (E.D. Pa. 1994).

52. *See generally Statement of William J. Kilberg*, *supra* note 35, at *3.

53. 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

54. *Id.* at 486.

entitled to overtime because they were subject to pay docking.[55] The federal circuits are currently split on this issue.[56]

C. *Payment of Overtime and Exemptions to FLSA*

The circuits also disagree about whether the payment of straight-time overtime is inconsistent with payment on a salary basis. In *Brock v. Claridge Hotel & Casino*,[57] the Third Circuit held that casino employees who otherwise satisfied the FLSA duties test were paid on an hourly basis instead of a salary basis and therefore were not exempt. The employees were paid a guaranteed amount equivalent to the statutory minimum ($250 per week) and an hourly rate for hours worked after the guarantee was reached.[58] Thus, if an employee made $25 an hour, the guarantee would be reached after ten hours and the employee would be compensated at a straight-time $25-per-hour rate beginning with the eleventh hour. The court invalidated this payment scheme, stating that "a basic tension exists between the purpose behind a salary requirement and any form of hourly compensation."[59] The court also emphasized that payment on a salary basis should not vary with the amount of hours worked.[60] Similarly, the Ninth Circuit has stated in dicta that additional compensation for hours worked beyond forty is inconsistent with salaried status.[61]

Other circuits have taken the opposite view. The Fifth Circuit in *York v. City of Wichita Falls*[62] held that an executive exemption is not precluded by paying an hourly rate for each hour worked beyond those regularly scheduled.[63] District courts also are split on this issue.[64] Thus,

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55. *Id.*

56. *Compare id. with* McDonnell v. City of Omaha, 999 F.2d 293, 296 (8th Cir. 1993).

57. 846 F.2d 180, 184–85 (3d Cir.), *cert. denied*, 488 U.S. 925 (1988).

58. *Id.* at 182.

59. *Id.* at 184.

60. *Id.*

61. Abshire v. County of Kern, 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

62. 944 F.2d 236, 242 (5th Cir. 1991).

63. *See also* Hilbert v. District of Columbia, 23 F.3d 429, 436 (D.C. Cir. 1994) (Henderson, J., concurring) ("[O]vertime compensation calculated on an hourly basis should not preclude the exemption's applicability."); Michigan Ass'n of Governmental Employees v. Michigan Dep't of Corrections, 992 F.2d 82, 84 (6th Cir. 1993) ("Increases in compensation because of variations in quantity of work are not prohibited. . . . [A]dditional pay at an hourly rate for each hour worked beyond an employee's regular schedule is expressly permitted. . . ."); Hartman v. Arlington County, 720 F. Supp. 1227, 1229 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990).

the willingness of some courts to deny exemptions based on seemingly technical payment practices has sparked controversy and a recent torrent of litigation.

D. Damages

Overtime issues frequently are litigated because the consequences are severe if an employer fails to qualify a class of employees under one of the exemptions. If a court finds that an employee has not been paid on a salary basis and is therefore an hourly employee entitled to overtime compensation under 29 U.S.C. § 207, then the employee can file a claim seeking two years of unpaid overtime, interest, and legal fees.[65] An employer who willfully commits a violation is exposed to three years of overtime liability.[66] According to the U.S. Supreme Court, a violation is willful if the employer either knew or showed reckless disregard for whether its conduct was prohibited by FLSA.[67] The burden is on the plaintiff to prove that an employer willfully violated the Act.[68] Consistent with that burden, the statute favors the two-year rather than a three-year limitations period.[69]

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64. *Compare* Aaron v. City of Wichita, 797 F. Supp. 898, 907 (D. Kan. 1992) ("[A]dditional compensation for extra hours worked is not generally consistent with salaried status."); Thomas v. County of Fairfax, 758 F. Supp. 353, 364–65 (E.D. Va. 1991) ("[O]vertime pay is inconsistent with salaried status in two respects. First, the concept of 'overtime' pay is inherently inconsistent with the common-sense understanding of salaried executive status. Second, the measure of overtime pay by an hourly rate supports the inference that plaintiffs are hourly employees.") *and* Banks v. City of N. Little Rock, 708 F. Supp. 1023, 1024 (E.D. Ark. 1988) ("Payment of a fixed amount plus additional hourly wages for extra hours worked is not consistent with salaried status.") *with* McGrath v. City of Philadelphia, 864 F. Supp. 466, 488 (E.D. Pa. 1994) ("[S]everal courts . . . have properly concluded that an employer does not lose the executive exemption merely because it provides compensatory time to its employee in addition to a fixed salary."); Masters v. City of Huntington, 800 F. Supp. 363, 368 (S.D. W. Va. 1992) ("Receipt of additional pay at an hourly rate for hours worked beyond their regular schedule does not defeat the executive exemption. . . ."); Paulitz v. Naperville, 781 F. Supp. 1368, 1371 (N.D. Ill., 1992) ("The better position [is] to consider this additional remuneration to be a bonus scheme [consistent with salary status].") *and* Keller v. City of Columbus, 778 F. Supp. 1480, 1488 (S.D. Ind., 1991) ("[A]dditional money given as an incentive . . . does not extinguish an officer's salaried status.").

65. 29 U.S.C. § 255(a) (1988) (statute of limitations section that establishes applicable claim period).

66. *Id. See* Service Employees Int'l Union v. County of San Diego, 784 F. Supp. 1503, 1505–6 (S.D. Cal. 1992).

67. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988).

68. *Id.*

69. Walton v. United Consumers Club, Inc., 786 F.2d 303, 310 (7th Cir. 1986) ("A two-year period is the norm, a three-year period the exception.").

Moreover, FLSA states that an employer violating the Act's overtime provisions "shall be liable . . . in the amount of [workers'] unpaid . . . wages . . . and in an additional equal amount as liquidated damages."[70] To avoid liquidated or double damages, the employer has the onerous burden of proving that it compensated workers "in good faith and that [it] had reasonable grounds for believing that [its] act or omission was not a violation" of FLSA.[71] Hence, an award of liquidated damages is commonplace in FLSA damage award rulings.[72] This presumption for liquidated damages can be traced to the fact that double damages were mandatory before FLSA was amended in 1947.[73] To clarify "good faith," courts have held that an employer must make an effort to determine the requirements of FLSA and to comply with those findings.[74] Moreover, damage awards must be monetary in nature—employers may not award employees compensatory time off equal to damages due.[75] Thus, the effect of straight-time payment of overtime on an employee's status as an exempted worker is critically important because of backpay liability facing employers.

The regulations provide for a window of correction in which an employer may escape liability for inadvertent errors.[76] On its face, the regulation allows an employer to avoid damages and the loss of employee-exempt status by compensating improperly paid employees and bringing policies in line with department regulations.[77] However, a majority of the circuits have interpreted the provision narrowly, stating that its purpose is to determine whether inadvertence or a general company policy of deducting for absences of less than a day is responsible for the impermissible deduction.[78] Under this reading, the

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70. 29 U.S.C. § 216(b) (1988).

71. 29 U.S.C. § 260 (1988).

72. *Walton*, 786 F.2d at 310 ("Double damages are the norm, single damages the exception.").

73. *Id.* (citing Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 581 (1942)).

74. *See, e.g.*, Kinney v. District of Columbia, 994 F.2d 6, 12 (D.C. Cir. 1993). *See generally* Matthew M. Smith, *Overtime Pay Liability: The Unexpected Peril of Disciplinary Suspension Policies*, 20 Emp. Rel. L. J. 503, 518 (1995).

75. Service Employees Int'l Union v. County of San Diego, 784 F. Supp. 1503, 1507–08 (S.D. Cal. 1992).

76. 29 C.F.R. § 541.118(a)(6) (1994).

77. *Id.* (stating that "a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.").

78. *See, e.g.*, Klein v. Rush-Presbyterian-St. Luke's Med. Ctr., 990 F.2d 279, 287 (7th Cir. 1993) ("[Defendant] is not entitled to use the window of correction because the deductions were not inadvertent."); Abshire v. County of Kern, 908 F.2d 483, 489 (9th Cir. 1990), *cert. denied*, 498 U.S.

window of correction is available only for a single inadvertent deduction and not policy-driven salary decisions.

III. THE DEPARTMENT OF LABOR SHOULD ALLOW STRAIGHT-TIME OVERTIME FOR SALARIED EMPLOYEES

The current split in the circuits, combined with inaction by the DOL, has produced uncertainty in important employment decisions. Due to this uncertainty, human resource directors across the nation cannot be confident about the decisions they are making with regard to which employees are to be paid overtime at one and one-half their regular rate of pay. These decisions essentially amount to educated guesses about how to structure employees' hours. When combined with the damage provisions of FLSA, educated guesses can turn into multimillion dollar judgments.

The DOL should not allow this uncertainty to continue. At a minimum, the DOL should promulgate regulations that specifically allow the payment of straight-time overtime to highly compensated salaried employees. Several considerations support such a regulation. First, FLSA was not drafted to regulate the compensation of well-paid executives, administrators, and professionals. The legislative history of the Act clearly supports the proposition that Congress meant to regulate the employment of industrial workers earning low wages and working long hours.[79] Second, the current DOL regulations should be interpreted to allow straight-time overtime. Straight-time overtime is consistent with the DOL regulations' general allowance of additional compensation besides salary[80] and with the regulations' specific examples of permissible types of additional compensation.[81]

Third, the decisions in the Third Circuit[82] and Ninth Circuit[83] that have created the uncertainty on this issue are not supported by either the legislative history of FLSA or the DOL regulations. The decisions inaccurately interpret the regulations by concluding that the payment of straight-time overtime is a characteristic of an hourly employee entitled

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1068 (1991). *See also* Paulitz v. Naperville, 781 F. Supp. 1368, 1373 (N.D. Ill. 1992) ("The deductions that Naperville made were not simply one-time slip-ups but routine matters.").

79. S. Rep. No. 884, 75th Cong., 1st Sess. 34 (1937).

80. 29 C.F.R. § 541.118(b) (1994).

81. *Id.*

82. Brock v. Claridge Hotel & Casino, 846 F.2d 180 (3d Cir.), *cert. denied*, 488 U.S. 925 (1988).

83. Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

to recourse under FLSA. These decisions should be limited to illusory salaries that bear no reasonable relation to actual compensation, thereby preserving a general rule allowing straight-time compensation to salaried workers. Fourth, the "salary basis" test is outdated and was written to regulate the workplace of the 1950s. The DOL should therefore promulgate new regulations that respond to flexible compensation schemes and work schedules.

A. The Legislative History of FLSA Does Not Support Coverage of Highly Paid Workers

The stated purpose of FLSA is to eliminate "conditions detrimental to the maintenance of the minimum standard of living . . . without substantially curtailing employment or earning power."[84] The Act attempts to provide a federal wage standard for workers subjected to increasingly long workdays for relatively little compensation and is directed at unorganized and otherwise unprotected workers who lack legitimate bargaining power in the workplace.[85] President Roosevelt also viewed FLSA's primary purpose as protecting wage earners at the bottom of the pay scale—generally children and unorganized labor.[86] Moreover, the wage floor and workweek limitations of FLSA were intended to provide additional compensation to Depression-era workers and stimulate the creation of more jobs during a time of high unemployment and low wages.[87]

The courts in *Abshire v. County of Kern*,[88] and *Brock v. Claridge Hotel & Casino*,[89] however, have significantly expanded the coverage of FLSA beyond its intended purpose. Executive workers generally have supervisory or managerial responsibilities and are usually paid a salary that reflects their status. These employees are rarely subjected to abusive working conditions and poverty level wages. Applying a law aimed at

84. 29 U.S.C. § 202 (1988).

85. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706 n.18 (1945) (stating that the Act was directed at "those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage").

86. Forsythe, *supra* note 1, at 465–66 (citing S. Rep. No. 884, 75th Cong., 1st Sess. 34 (1937)).

87. White v. Witwer Grocer Co., 132 F.2d 108, 110 (8th Cir. 1942). *See* H.R. Rep. No. 1452, 75th Cong., 1st Sess. 34 (1937); Noel Sargent, *Economic Hazards in the Fair Labor Standards Act*, 6 Law & Contemp. Probs., 422, 428 (1939) ("The theory of the Fair Labor Standards Act seems to be that employee welfare can be increased by compulsory sharing of existing work, and that this will be promoted by heavy penalties on overtime employment.").

88. 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

89. 846 F.2d 180 (3d Cir.), *cert. denied*, 488 U.S. 925 (1988).

the "lowest paid" and "unprotected" workers to executives earning $5000 a month was clearly not envisioned by the drafters of the Act. Because FLSA was intended to enhance workers' compensation, employers that pay straight-time overtime to well paid employees should not be penalized for making these additional payments.

Consider the following hypothetical: An executive earning a salary of $40,000 per year is asked to work seventy hours per week during the months of April through June. Typically that employee works fifty hours per week. Due to the increased workload, the employer offers to pay the employee straight-time overtime for hours worked over forty. Assuming that the employee qualifies under the duties test and is exempt from FLSA, the employer does not have to pay this employee any overtime regardless of whether the employee works fifty, seventy, or ninety hours in a given week. Correspondingly, it is illogical for an employer to then lose an exemption if it decides to pay straight-time overtime. FLSA is, in effect, giving an employer a choice between paying no overtime and time-and-a-half overtime. For most employers this choice is simple. By penalizing employers for making payments that are not required by statute, the interpretation of FLSA suggested by *Abshire* and *Brock* may effectively eliminate, rather than enhance, compensation opportunities for workers. This result is not consistent with the spirit and intent of FLSA.

Similarly, well-compensated professionals also should be exempt per se from FLSA because the legislative history of the Act does not support coverage for these employees. Professional service firms such as accounting and engineering firms or companies that have engineering or accounting departments, regularly pay workers straight-time overtime for hours worked over forty.[90] Recently, The Boeing Company (Boeing) faced multimillion dollar backpay overtime liability after the Washington Court of Appeals ruled straight-time overtime to be inconsistent with payment on a salary basis.[91] The court ruled that because a staffing coordinator of a nursing services company was paid straight-time overtime, she was essentially an hourly employee.[92] In contrast, Boeing

90. *See generally Statement of William J. Kilberg*, *supra* note 35, at *1.

91. Tift v. Professional Nursing Serv., 76 Wash. App. 577, 886 P.2d 1158 (1995).

92. *Id.* at 585, 886 P.2d at 1163. In *Tift*, the plaintiff was a telephone operator entitled to salary payments of $762.62 every two weeks. The issue of whether Tift's position as a staffing coordinator qualified under the administrative duties test was not litigated in the court of appeals as the sole issue was the hourly overtime component in Tift's compensation. Assuming, for argument's sake, that Tift qualified under the duties test, Professional Nursing Services (PNS), like the employer in the aforementioned hypothetical, probably would have avoided legal liability had it limited Tift's

consistently has paid overtime to FLSA-exempt workers over the past twenty years, and it is estimated that 35,000 workers, including 14,000 unionized engineers, are currently eligible for overtime pay.[93] The median salary of these employees is $54,000 per year.[94] Clearly, these employees are not who President Roosevelt envisioned when he spoke of correcting abuses associated with unorganized labor and child labor.

In part because of a powerful lobbying effort, Boeing and other professional service firms[95] were successful in legislatively overruling the Court of Appeals decision.[96] State law, however, only controls businesses operating within state lines, while the federal government's commerce power regulates businesses engaged in interstate operations. Hence, although the state law was overturned, Boeing faces almost identical questions under FLSA. To remedy this situation, the DOL should reshape the exemptions to conform with a law intended to benefit workers working long weeks for low pay.[97] To accomplish this objective, the DOL should redraw the lines that identify workers who are eligible for overtime and exempt from the provisions of FLSA. The current definitions under the salary basis and duties tests have expanded coverage of FLSA to workers who should be beyond the scope of the Act.

B. *A Plain Reading of the Department of Labor Regulations Supports Straight-Time Overtime*

A section of the DOL regulations labeled "Minimum guarantee plus extras" speaks directly to the issue of additional compensation beyond payment of a salary.[98] This section states that a "salary may consist of a predetermined amount *constituting all or part* of the employee's compensation. . . . [A]dditional compensation besides the salary is not

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compensation to $762.62 every two weeks regardless of the number of hours worked. Hence, compliance with the court's interpretation of the FLSA may go farther toward creating sweatshop conditions than PNS's "violative" pay structure.

93. *Overtime: Washington Legislature Considers Bills Clarifying Exemptions from Overtime Law*, 1995 Daily Lab. Rep. (BNA), No. 42 at *2 (Mar. 3, 1995), *available in* LEXIS, Daily Lab. Rep. Library [hereinafter *Overtime*]. Note that FLSA governs union contracts. A union cannot "contract away" statutory overtime privileges. See 29 U.S.C. § 203(e)(1) (1988) ("[T]he term 'employee' means any individual employed by an employer.").

94. *Id.*

95. *Id.* at *1.

96. *See* Wash. Rev. Code § 49.46.130(2)(a) (1995).

97. *Statement of William J. Kilberg*, *supra* note 35, at *2.

98. 29 C.F.R. § 541.118(b) (1994).

inconsistent with the salary basis of payment."[99] A plain reading of this section seemingly allows payment of straight-time overtime without nullifying an exemption as long as an employee is guaranteed a predetermined amount for each workweek. The court in *Brock*, however, adopted a strained interpretation premised on a meaningless distinction between payment on a shift basis and payment on an hourly basis.[100]

This section gives three examples of additional compensation consistent with the salary basis of payment.[101] The first two examples allow a commission based on sales and a profit-based bonus.[102] The third example "is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work."[103] Hence, an employee can be paid additional compensation per shift or per day over and above a predetermined base wage. In concrete terms, the court in *Hilbert v. District of Columbia* stated: "[A]n employee who earns $100 per shift and is guaranteed $250 each week is salaried even though he receives extra money on top of his minimum guarantee whenever he works three or more shifts in a week."[104]

The section does not state that the examples listed are exclusive. Rather, because the section speaks of examples and "another type of situation,"[105] it is clear that the section is meant to provide helpful illustrations of the general type of additional compensation that is consistent with the salary basis of payment. The DOL intended that many other forms of additional compensation also would be compatible with payment on a salary basis.

Although the examples do not specifically cover the payment of straight-time hourly overtime, this form of additional compensation is consistent with the third example. Courts have attempted to distinguish hourly and shift-based payment of overtime because "a shift typically lasts longer than an hour."[106] This argument assumes that the DOL was

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99. *Id.* (emphasis added).

100. 846 F.2d 180, 185–86 (3d Cir. 1988).

101. 29 C.F.R. § 541.118(b).

102. *Id.*

103. *Id.*

104. 23 F.3d 429, 432 (D.C. Cir. 1994).

105. 29 C.F.R. § 541.118(b).

106. *Hilbert*, 23 F.3d at 432. *See also* Brock v. Claridge Hotel & Casino, 846 F.2d 180, 185 (3d Cir.) ("Defendant has not argued that the agency can make no distinction between shift and hourly payment."), *cert. denied*, 488 U.S. 925 (1988); Thomas v. County of Fairfax, 758 F. Supp. 353, 365

trying to differentiate between hourly and non-hourly additional compensation and used examples that purposefully avoided straight-time hourly overtime. It is illogical, however, to read the regulations as permitting payment of additional compensation if an employee works an extra shift or day, but precluding exempt status if the same employee only works an extra hour. To read such a technical distinction into the regulations would mean that additional compensation is allowed only if the extra hours are worked consecutively, thereby forming a shift, instead of separately on a day-to-day basis.

This distinction is unreasonable and is not supported by the purposes of the Act. Consider the following example: *A* is paid $160 per shift and works six eight-hour shifts for a total of forty-eight hours. *A* is guaranteed $800 per week. *B*, who also is guaranteed $800 per week, is paid $20 per hour and works a five-day week including twelve hours on Monday and twelve hours on Friday for an identical total of forty-eight hours. Under the third example in the DOL regulations and the hypothetical in *Hilbert*, *A* is considered a salaried employee even though *A* earned additional compensation of $160 for a total of $960. *B* also will earn $960 if compensated on an hourly straight-time basis. In short, there is no discernible difference between the guaranteed salary, additional compensation, and total compensation of *A* and *B*. If, however, the distinction between hourly and shift-based overtime controls, *B*'s exemption would be nullified and *B* would be entitled to time-and-a-half overtime for hours worked over forty. With such an interpretation, the regulations effectively allow an exempt employee to work eight overtime hours on a Saturday (a shift), while disallowing a schedule calling for four overtime hours on Monday and Friday. Such a distinction accomplishes no known purpose of the Act and simply adds confusion and frustration to employment decisions.

Conversely, allowing straight-time compensation is consistent with the general spirit of FLSA and the regulations' express statement that "additional compensation . . . is not inconsistent with the salary basis of payment."[107] By providing for administrative, professional, and executive exemptions, Congress determined which workers needed wage and hour protection.[108] The exemptions were simply an attempt to separate "shop

(E.D. Va. 1991) ("In addition, § 541.118(b) does not approve additional compensation computed by means of an hourly rate; in fact, none of the examples cited in the regulation is explained in terms of hourly rates.").

107. 29 C.F.R. § 541.118(b).

108. *Statement of William J. Kilberg*, *supra* note 35, at *2.

floor workers and exempt white-collar thinkers."[109] Once a worker has progressed to the point of being responsible for certain "duties" and is paid on "a salary basis" for the work performed, the worker has exceeded the intended statutory minimum and no longer needs the protection of the Act. Congress intended the minimum guarantee (now $250 per week) as a floor upon which workers could earn more money and a dividing line which signaled that a worker earning more than this amount no longer needed FLSA's protection. Indeed, in *McReynolds v. Pocahontas,*[110] the Fourth Circuit held that any formula that results in a guarantee above the statutory minimum satisfies the salary basis test.

It is nonsensical to say that after a worker has advanced from non-exempt to exempt status, the worker somehow needs further protection because she receives straight-time overtime. Rather, the regulations should be read to mandate minimum guaranteed salaries and to further allow additional payments beyond the guarantee without regard to form.[111] A more consistent interpretation of the regulations and the Act as a whole is to view straight-time overtime as a permissible form of "additional compensation"[112] and a means for workers to earn extra compensation over and above a statutorily sufficient predetermined salary. Thus, the DOL should act to eliminate the uncertainty caused by *Brock* and *Abshire* and promulgate a regulation that allows employers to pay salaried employees straight-time overtime without nullifying the applicability of the exemption.

C. Brock *and* Abshire *Should Be Confined to Illusory Payment Schemes*

Brock is the primary source of disagreement on the straight-time overtime issue because it is the only clear circuit court ruling that holds payment of straight-time overtime to be inconsistent with salaried status.[113] As a consequence, *Brock* is cited consistently for the proposition that straight-time overtime is inconsistent with payment on a

109. *Id.*

110. 192 F.2d 301, 303 (4th Cir. 1951) ("In our opinion, what the Regulations mean by a 'salary basis' test is a guaranteed wage whether the Company operates or not.").

111. *See* Hilbert v. District of Columbia, 23 F.3d 429, 440 (D.C. Cir. 1994) (Mikva, C.J., concurring in part and dissenting in part).

112. 29 C.F.R. 541.118(b).

113. 846 F.2d 180 (3d Cir.), *cert. denied*, 488 U.S. 925 (1988).

salary basis.[114] The Ninth Circuit decision in *Abshire* is the only other Court of Appeals case that rejects straight-time overtime as inconsistent with the salary basis of payment.[115] In *Abshire*, however, the court's statement on the issue is clearly dictum because the holding concerns impermissible salary deductions.[116] *Abshire* provides no analysis on the straight-time overtime issue and instead offers a one-sentence conclusory statement.[117]

In *Brock*, the court was presented with a transparent scheme designed to avoid the payment of overtime under FLSA. Workers were guaranteed a minimum salary of $250 per week and received additional compensation for hours worked once the minimum had been reached.[118] The majority of the employees were paid much more than the guaranteed "salary" and, correspondingly, their take-home pay had no relation to this minimum figure.[119] The court upheld the district court's objection to the lack of correlation between the employees' salary and take-home pay and declared the guarantee "nothing more than an illusion" because workers were paid the guarantee in only twelve out of approximately 70,000 paychecks.[120]

The *Abshire* court's subsequent reliance on *Brock* to support the general conclusion that straight-time overtime is inconsistent with payment on a salary basis is misplaced. The analysis in *Brock* was based on facts distinguishable from the majority of salary basis litigation—well-paid employees were "guaranteed" a salary of $250 per week. In addition to the absence of a reasonable relationship between the stated salaries and take-home compensation, the employer in *Brock* clearly adopted the payment scheme at issue to circumvent the provisions of FLSA.[121]

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114. *See, e.g.*, Hilbert v. District of Columbia, 23 F.3d 429, 432 (D.C. Cir. 1994) (describing this portion of *Brock* as dicta and declining to follow); Abshire v. County of Kern, 908 F.2d 483, 486–87 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991); Thomas v. County of Fairfax, 758 F. Supp. 353, 360 (E.D. Va. 1991); Banks v. City of N. Little Rock, 708 F. Supp. 1023, 1024 (E.D. Ark. 1988).

115. 908 F.2d at 486–87.

116. *Id.* at 486.

117. *Id.* ("Such additional compensation for extra hours worked is also not generally consistent with salaried status.").

118. Brock v. Claridge Hotel & Casino, 846 F.2d 180, 182 (3d Cir.), *cert. denied*, 488 U.S. 925 (1988).

119. *Id.* at 185.

120. *Id.* at 182–83.

121. *Id.* at 183. The *Brock* court did not directly rule that the payment scheme was enacted to avoid paying overtime, but called the system "illusory" and stated, "'[j]ust as dressing a mannequin up in a skirt and blouse does not transform it into a woman, so too masquerading an hourly

Boeing's payment method is more typical of straight-time overtime payment systems. Boeing pays its workers a guaranteed salary for the first forty hours of work and straight-time overtime plus $6.50 for all additional hours.[122] For example, a worker with a weekly salary of $1000 earns another $315 in a fifty-hour week ($25/hr plus $6.50 = $31.50 x 10 hrs). This method, unlike the pay structure in *Brock*, is not an illusory vehicle fashioned to avoid FLSA provisions. Correspondingly, the rationale of *Brock* should not be expanded to cover legitimate pay structures such as Boeing's in which salary bears a reasonable relationship to actual compensation.

Thus, the analysis in *Brock* is consistent with FLSA regulations only if confined to cases where the salary in question bears no reasonable relationship to total compensation. Two courts have already taken this view.[123] In *Michigan Ass'n of Governmental Employees v. Michigan Department of Corrections*, the court interpreted *Brock* as a limitation on the general rule that additional compensation is consistent with a salary basis of payment.[124] The court approved of additional pay at an hourly rate for hours worked beyond forty but noted that the salary basis test is not met if the predetermined salary bears no reasonable relationship to actual compensation.[125] Hence, the court confined the *Brock* analysis to extreme situations where the "salary" paid is a sham and an employer is trying to circumvent the Act.

Similarly, in *McGrath v. City of Philadelphia*, the court distinguished *Brock* as applying only to illusory salaries.[126] The *McGrath* court ruled that if the salary paid to an employee bears a reasonable relationship to actual compensation, *Brock* should not control.[127] Hence, *Brock* should be utilized only to differentiate between legitimately salaried employees who are earning overtime and an illusory scheme erected to avoid the mandates of FLSA. Viewed in this way, *Brock* is consistent with the

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employee's compensation as a guaranteed salary plus hour-based bonuses does not transform the compensation scheme into a salary-based plan.'" *Id.* (quoting Brock v. Claridge Hotel & Casino, 664 F. Supp. 899, 904 (D.N.J. 1986)).

122. *Overtime*, *supra* note 93, at *2.

123. Michigan Ass'n of Governmental Employees v. Michigan Dep't of Corrections, 992 F.2d 82 (6th Cir. 1993); McGrath v. City of Philadelphia, 864 F. Supp. 466 (E.D. Pa. 1994).

124. 992 F.2d at 84.

125. *Id.*

126. 864 F. Supp. at 488–89.

127. *Id.* at 489 ("All of the evidence in the instant case indicates that Commanders receive a set salary predicated on their rank and tenure, not a highly variable amount predicated on the number of hours worked during the week. Thus, *Brock* is not controlling.").

regulatory intent of 29 C.F.R. § 541.118(b) which states that payment of extras can defeat salaried status if used to avoid the regulatory requirements.[128] The DOL should incorporate the *Brock* analysis as a limitation to a general rule specifically allowing straight-time overtime for salaried employees. Such a result would protect employees from employer abuse and allow legitimate salaried employees to supplement their compensation with straight-time overtime.

D. FLSA Cannot Effectively Govern the Pay Structures of the Modern Workplace

The administrative, executive, and professional exemptions in FLSA were intended to differentiate industrial line workers in need of federal wage protection from white-collar employees earning much more than a "minimum" wage.[129] However, exemptions that were effective line-drawing tools in the manufacturing-oriented economy of the 1940s and 1950s are now outdated in an economy in which three out of every five jobs are in service industries.[130] Although the workplace has changed since the adoption of FLSA, the method of determining exempt employees has remained static. Current employment norms such as flextime, alternative work schedules, and compensatory time off were unheard of when the regulations were drafted. Moreover, hierarchical corporate structures have since flattened, producing a workforce where responsibilities are spread among many employees.[131] Top-down management is giving way to work groups and quality management circles geared toward efficiently using diverse worker expertise and input. These changes have introduced confusion into an act predicated on a clear demarcation of worker responsibility and compensation levels.

The salary basis test is a good example of an artificially rigid construct that is in need of retooling. Administrative and executive employees must pass both the duties and salary basis tests to be exempt from

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128. 29 C.F.R. § 541.118(b) (1994).

129. *See supra* part III.A.

130. *Selected Statements Before House Economic and Educational Opportunities Subcomm. on Work Force Protections, March 30, 1995: Statement of Maggi Coil*, 1995 Daily Lab. Rep. (BNA), No. 62, *1–2 (Mar. 31, 1995), *available in* LEXIS, Daily Lab. Rep. Library ("Every aspect of the FLSA made perfect sense in the context of 1938 but makes little sense and is becoming increasingly counterproductive in the 1990s. . . .").

131. *Id.* at *3. *See, e.g., Statement of William J. Kilberg, supra* note 35, at *2–3; Lipman et al., *supra* note 10, at 365.

FLSA.[132] As management structures have evolved to give workers more responsibility, an increasing number of workers can pass the duties test. Thus, the administrative duties test can be manipulated to include an assistant earning $1200 per month in charge of the administration for a small retail outlet and a director of administration earning $5000 per month. Similarly, a wide range of executive and professional workers are subject to the salary basis test. As a result, a central strategy of corporate employment legal counsel is to structure job descriptions to give the maximum number of employees sufficient duties to qualify under the duties test.

FLSA's focus on method of compensation rather than amount of compensation is a primary culprit for this troublesome situation. Beyond setting a minimum wage basis, FLSA contains no provisions that effectively separate low- to mid-level earners from highly compensated employees. The salary basis, which once held this role, is no longer an effective indicator of different classes of employees.[133] By simply concentrating on method of payment, workers earning $1200 and $5000 per month can be considered exempt while identical workers each earning $3000 per month are entitled to different rights because one receives straight-time overtime.[134] Workers at different ends of the pay scale should not be governed by the same rules because FLSA is intended to protect workers who lack the bargaining power to effectively protect themselves. It may be the case that an "exempt" worker earning $1200 per month should get paid time-and-a-half for additional hours—the worker is relatively unskilled and there is a potential for employer abuse because it is cost effective to schedule the employee for sixty-five hour weeks and pay straight-time overtime. The same cannot be said for a skilled director of administration who can pick and choose where she works and may want to work additional hours to advance her career.[135]

Furthermore, FLSA was not drafted to effectively regulate flexible pay and work schedules. Consider the situation where an employee works twelve-hour shifts and enjoys the flexibility of working four days on with the following four days off. This schedule is difficult to administer under the current salary basis test because the employee may

132. Abshire v. County of Kern, 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

133. Lipman et al., *supra* note 10, at 358 ("The salary basis test has proven to be unworkable. Its rigidity does not take into account the increasing flexibility used in establishing methods of compensation. . . .").

134. *Id.* at 361.

135. *Id.* at 382.

work forty-eight hours one week and thirty-six the next.[136] The employer may not allow such a schedule if forced to pay time-and-a-half overtime during the first week. Also, it is common practice for employers to grant compensatory time off for hours worked over forty that a worker can use at a later date for family events or for extending a vacation. The court in *Abshire* ruled that compensatory time off was equivalent to the straight-time payment of overtime and inconsistent with a salary basis of payment.[137] Both of the work schedules above may be desirable for a worker who wishes to spend more time with her family. However, the administrative problems posed by each type of schedule discourage employers from adopting such schedules because they may run afoul of the salary basis test.

Finally, the current judicial split on straight-time overtime is symptomatic of an outmoded salary basis test. In *Tift v. Professional Nursing Services*, the Washington Court of Appeals had to determine the status of a "staffing coordinator" earning $634.62 every two weeks.[138] The employee essentially was a telephone dispatcher whose job responsibilities were dressed up to technically qualify her for an administrative exemption.[139] In this factual situation, there is a definite possibility for employer abuse because by paying the plaintiff a minimal "salary" an employer can push an employee to work sixty hours a week and avoid paying time-and-a-half for the additional hours worked. It seems clear that this exact type of situation should be subject to the purview of the salary basis test. In contrast, consider the plaintiff police commanders of *McGrath v. City of Philadelphia*.[140] Captains, the bottom rung of commander status, earned between $48,042 and $52,424 per year[141]—a far cry from the sham salaries targeted in *Brock*. To avoid *Brock*, the court divided salaries into "sham" and "consistent" categories in an attempt to differentiate between employees on opposite ends of the pay scale.[142] Hence, the method-oriented salary basis test should be revised to include quantitative provisions which identify workers in need of statutory protection.

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136. *Id.* at 380.

137. 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

138. 76 Wash. App. 577, 886 P.2d 1158 (1995).

139. *Id.* at 579, 886 P.2d at 1160.

140. 864 F. Supp. 466 (E.D. Pa. 1994).

141. *Id.* at 484.

142. *Id.*

IV. AMENDING FLSA REGULATIONS

The DOL should issue a clear regulation regarding straight-time overtime that is patterned after a recent amendment to the Washington Minimum Wage Act.[143] Moreover, the DOL should overhaul the determination of exempt and non-exempt employees because a narrow amendment that specifically permits straight-time overtime does nothing to change the outdated and inefficient duties and salary basis tests. One solution would be to rewrite the administrative, executive, and professional duties tests to reflect the workplace changes that have taken place since FLSA was passed in 1938. A second solution would be to keep the existing definitions but rework the salary basis test to account for disparate factual situations. Creating a per se exempt status for employees earning over a congressionally determined amount per year would codify distinctions already developing in case law and make it easier for courts to distinguish between true executives and administrative employees subject to employer abuse.

A. The Washington Minimum Wage Act (MWA) Amendment Should Be Applied to FLSA Regulations

The Washington Legislature recently amended the state minimum wage law in direct response to *Tift v. Professional Nursing Services*.[144] The Washington legislative solution is direct and narrowly constructed to solve questions regarding straight-time overtime and should serve as a model for DOL regulations on this issue. The legislation provides that "[t]he payment of compensation or provision of compensatory time off in addition to a salary shall not be a factor in determining whether a person is exempted" from MWA's provisions.[145] The provision expressly allows flexible scheduling that utilizes straight-time overtime and compensatory time off and would fit within the existing regulatory framework of 29 C.F.R. § 541.118(b).

A national standard similar to the Washington legislative solution is needed because the current uncertainty and confusion regarding the salary basis test creates administrative nightmares for companies doing business in several states.[146] Although the issue is settled for Washington

143. Wash. Rev. Code § 49.46.130(2)(a) (1995). *See supra* notes 91–96 and accompanying text.

144. *Overtime*, *supra* note 93, at 1.

145. Wash. Rev. Code § 49.46.130(2)(a).

146. Lipman et al., *supra* note 10, at 370.

employers that conduct only intrastate business, Washington employers that do business across state lines are swept under the FLSA umbrella and associated federal case law and differing state laws. Hence, a Washington-based employer that has recently expanded to Portland, Oregon, and Boise, Idaho, may be subjected to Oregon and Idaho wage-and-hour laws that do not allow straight-time overtime.[147] An employer subject to multiple jurisdictional interpretations will have a difficult time administering divergent pay structures. Furthermore, because the business has moved into "interstate commerce," it is subject to the Ninth Circuit's *Abshire* decision which implies that the payment of straight-time overtime is inconsistent with payment on a salary basis.

B. The Department of Labor Should Redraw the Lines Between Exempt and Non-Exempt Employees

Much of the difficulty surrounding the salary basis test is a direct result of using a single method-oriented test to determine exempt status for a diverse group of workers. Overtime provisions are a necessary component of federal regulation and consistent with the fundamental goals of FLSA. Workers making at or near the minimum wage must be protected from overwork because they often lack the skills and corresponding bargaining power to avoid oppressively long workweeks. It can be economically beneficial for an employer to schedule such a worker for sixty-five hour workweeks to avoid hiring an additional employee. The same cannot be said for skilled, well-compensated workers. One commentator has noted that:

> higher paid workers may be voluntarily willing to work long hours to further their careers or to earn more money, or both. Many professionals must work long hours at the start of their careers as a right of passage. Other workers may be willing to work long hours because they value extra compensation over more non worktime.[148]

Thus, the DOL must issue regulations that create a different set of rules for each class of worker.

One relatively straightforward solution is to abandon the salary basis test in favor of a regulation which separates workers based on annual earnings.[149] Such a regulation could start by creating a per se exemption

147. *Id.*

148. *Id.* at 382.

149. *Statement of William J. Kilberg, supra* note 35, at *5.

for workers earning over six and one-half times the hourly minimum wage.[150] This solution is consistent with an exemption drafted for computer-related occupations.[151] The regulation states, "payment 'on a salary basis' is not a requirement for exemption in the case of those employees in computer-related occupations . . . who are paid on an hourly basis if their hourly rate of pay exceeds 6½ times the minimum wage provided by section 6 of the Act."[152] Thus, computer programmers paid six and one-half times the minimum wage are considered exempt from the salary basis test. The legislative history of the provision illustrates why an exemption for highly paid professionals and executives is needed. Senator Bob Kerry stated that workers in computer-related occupations are often "highly educated, highly skilled and highly paid. They are the backbone of the high technology industries that fuel our growing economy. It is imperative that they be exempted from these provisions so that they are able to provide services as efficiently and productively as possible."[153]

Senator Kerry's statement is equally applicable to workers outside of the computer industry. Workers who are "highly skilled and highly paid" should be allowed to schedule their workweeks as efficiently as possible. Schedules that utilize compensatory time off, straight-time overtime, four days on and four days off, rotating schedules, and flexible leave policies should not be eliminated because they violate the excessively wooden and technical salary basis test. Rather, such schedules should be encouraged for employees beyond the scope of FLSA. By allowing employees earning more than six and one half times the minimum wage to be per se exempt from the overtime provisions of FLSA, workers in need of regulatory protection are correspondingly identified. Restricting judicial analysis to workers at the lower end of the pay scale is consistent with the intent of FLSA and avoids the illogical result of forcing an employer to pay millions in back overtime to executives earning $50,000 or more per year.

150. Lipman et al., *supra* note 10, at 387–88.

151. 29 C.F.R. § 541.312 (1994).

152. *Id.*

153. Lipman et al., *supra* note 10, at 388 (quoting 135 Cong. Rec. S3742 (daily ed. Apr. 12, 1989)).

V. CONCLUSION

The DOL needs to revise the salary basis test to include a provision that allows compensatory time off credit and payment of straight-time overtime for hours worked over forty in a given week. Regulations must be promulgated to establish clear straightforward rules concerning exemptions from the provisions of FLSA. The confusion and uncertainty caused by the current regulations and case law are creating potentially enormous liability traps for employers relating to issues far removed from the original purpose of FLSA. Further, the current legal framework provides an outdated and inaccurate method of protecting workers in need of wage and hour protection. The DOL must respond to the fundamental changes that have taken place in the American workplace over the past fifty years by adopting regulations that allow for flexible and efficient compensation structures.