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FINAL RULE ON OVERTIME PAY

HEARING

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

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FINAL RULE ON OVERTIME PAY

TUESDAY, MAY 4, 2004

U.S. SENATE,
SUBCOMMITTEE ON LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES,
COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 9:30 a.m., in room SD–192, Dirksen Senate Office Building, Hon. Arlen Specter (chairman) presiding.

Present: Senators Specter, Craig, Harkin, and Murray.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Good morning, ladies and gentlemen. The hour of 9:30 having arrived, we will now proceed with the hearing of the appropriations Subcommittee on Labor, Health, Human Services, and Education.

The subject of our hearing is the final rule on overtime pay. This subcommittee has held two hearings on the proposed regulation, on July 31 of last year and January 20 of this year, on the proposed regulation which was issued on March 31, 2003. There have been substantial revisions in the regulation, and my distinguished colleague and ranking member, Senator Harkin, who has just joined us, was on the floor yesterday discussing the new regulation in some detail. It is anticipated that there will be a vote on the amendment offered by the Senator from Iowa on this subject. We thought it would be useful to have this hearing to explore the applicability of the regulation in some detail.

The existing regulation has not been revised for a very long time, substantially unchanged since 1975, and is said to be subject to a great many vagaries. Our inquiry will focus on the contrast between the current regulation and the final proposed regulation to see what differences there are illustrative of administrative employees where the definition is "customarily and regularly exercises discretion and independent judgment," contrasted with the current final regulation on administrative employees, "primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." We are interested to know what effect that will have by way of clarification. On the surface, it looks like the definition is very similar, referring to the exercise of discretion and independent judgment.

Similarly illustrative on professional employees with the current regulation specifying "primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual

instruction and study," contrasted with the final regulation on professional employees, "primary duty of performing work and requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction." With the addendum, "customarily" can mean the employee has obtained the knowledge through a combination of work experience and intellectual instruction. Here again, the inquiry goes to what improvements will be on clarification to avoid the complexities of litigation, which is the primary objective of the new regulation.

That is a very brief opening on some matters of special concern, but I now want to yield to my distinguished colleague, Senator Harkin. We are operating under a time constraint, as usual, with other commitments beginning at about 10:45. So I think we will have adequate time for the panels, but we will ask people to observe the time limitations, leaving the maximum amount of time for dialogue, questions, and answers.

Senator Harkin.

OPENING STATEMENT OF SENATOR TOM HARKIN

Senator HARKIN. Thank you very much, Mr. Chairman, for holding this very important hearing regarding the final rules issued last week by the Department of Labor on overtime eligibility.

Again, make no mistake, the rule, while an improvement over the proposed rule, will still I think strip many workers of their right to fair overtime compensation. At the outset, it seems like we are now using as a yardstick of measurement on this new rule what the proposed rule was. So if this is a little bit better than the proposed rule, it must be okay. I submit, however, we should use as the yardstick of measurement who is getting overtime now and how much overtime they are getting now compared to what the final rule says. As I said last week, the proposed rule was profoundly terrible, and this rule is just plain terrible. So if that is an advancement, that is an advancement.

Since the passage of the Fair Labor Standards Act in 1938, the 40-hour work week has been pretty sacrosanct, supported by Presidents and Congresses of both parties. I would also point out that since 1938, the Fair Labor Standards Act has been amended many, many times, 12–14 times. I cannot get a correct count on it. It has been changed and amended. But in almost every circumstance that I can determine, it has been done through a congressional process where the Congress would hold hearings on the appropriate committees. We called in management, called in labor, called in all affected parties to see what needed to be done to upgrade and modify the rules and then act accordingly.

This, to my information, is the first time that any administration has promulgated rules in the fashion in which they did, in other words, just put them out there, no public hearings. You get all the comments back and then you issue a final rule without the Congress having had any real input whatsoever. I think this in itself is the wrong way to proceed.

If employers can more easily deny overtime pay, they are simply going to push their employees to work longer without compensation. Statistics show that without overtime rights people are twice

as likely to work more than 40 hours a week and three times as likely to work more than 50 hours a week.

The final rules issued last week I believe will deny time-and-a-half overtime pay to possibly millions of workers earning as little as $23,660. Now, part of my questioning to Ms. McCutchen will be on that line. The administration claims that no workers earning less than $100,000 will lose overtime under this final rule. That I wish to discuss with Ms. McCutchen to find out if that is so or not.

I do want to discuss also this concept of a team leader which is not in present rules or regulations, that a team leader who leads a team of other workers can be denied overtime pay even if they do not have any direct supervisory role. What is a team leader? It is not defined. We do not know. An employer decides whether you are a team leader or not, just whatever they want. So I believe this loophole alone—well, not me, but MIT Professor of Management Tom Kochen estimates that this one loophole alone could strip overtime rights from up to 2.3 million workers making $23,660 or more annually. So the stakes are very high.

I had one very poignant communication with a worker in Seattle who said that she depends on overtime for helping her out. She is a single mother. She said, remember, when I get home from work, my second shift starts. I have got kids to feed, clothes to wash, housework to do, et cetera. She put it I think very poignantly when she said my time with my family is premium time. It is the best part of my day or my week. If I am going to be asked to give up my premium time with my family, I ought to get premium pay for it, which is overtime. And I think that really succinctly captures it.

So, Mr. Chairman, I really want to hear Ms. McCutchen and I hope we will have a good exchange of questions so we can figure out just who is covered and who is not. Thank you very much, Mr. Chairman.

STATEMENT OF TAMMY D. MC CUTCHEN, ADMINISTRATOR, WAGE AND HOUR DIVISION, EMPLOYMENT STANDARDS ADMINISTRATION, DEPARTMENT OF LABOR

Senator SPECTER. Thank you very much, Senator Harkin.

We turn now to our lead witness, Ms. Tammy McCutchen, Administrator of the Wage and Hour Division of the Employment Standards Administration, bachelor's degree in English literature from Northwestern and a law degree from Northwestern University School of Law. Thank you very much for joining us, Ms. McCutchen, and we look forward to your testimony.

Ms. MCCUTCHEN. Thank you, Mr. Chairman and members of the subcommittee, for the opportunity to discuss the Department's final white collar regulations.

The final regulations published in the Federal Register on April 23 strengthen and restore the overtime protections of the Fair Labor Standards Act. The final rules guarantee overtime protection for every worker earning less than $23,660 per year where the current regulations only provide a guarantee for employees earning less than $8,060 a year. The final rules provide equal or greater protection to workers between $23,660 and $100,000 per year.

The final rules ensure that employees can better understand their rights, that employers can better understand their legal obli-

gations, and that Wage and Hour investigators have the tools they need to more vigorously enforce the law.

In addition, because the final rule provides clarity and certainty, employees will not have to wait through years of Federal court litigation to recover the overtime pay they have earned. Federal overtime class actions have tripled since 1997 and now outnumber Federal employment discrimination class actions.

The Department published draft rules in March 2003 and for the last 13 months, we have been carefully considering the public comments and public debate regarding the draft rules. We believe the final regulations are responsive to the public concerns, including concerns raised by members of this subcommittee.

First, blue collar workers. A new section provides that blue collar workers such as longshoremen, carpenters, electricians, and factory workers are entitled to overtime protection.

Second, first responders. A new section provides that police officers, fire fighters, EMT's, and other first responders are entitled to overtime protection.

Third, union members. A new section states that nothing in the final regulations relieves employers of their obligations under union contracts.

Fourth, nurses. For the first time in history, the regulations state that licensed practical nurses are entitled to overtime protection, while leaving unchanged the current rules regarding registered nurses.

Fifth, engineering technicians. The final preamble adopts the comments filed by the International Federation of Professional and Technical Engineers, which is the parent union of the Society of Professional Engineering Employees and Aerospace, that engineering technicians and similar technical employees are entitled to overtime protection.

Sixth, veterans. The final rule deletes the language in the draft rules regarding military training and states that the Department intends no change to the educational requirements for the professional exemption.

Some organizations have now raised new issues regarding new occupations and I look forward to answering your questions, particularly about the team leaders, and any other specific occupations discussed in the final regulations.

For now, let me just state that the changes made in the final rules merely adopt current Federal case law, Wage and Hour opinion letters, or longstanding enforcement policy from the Wage and Hour Division field operations handbook.

Before closing, I would like to spend a few minutes to discuss why the Department has opposed Senator Harkin's amendment. The Department shares your concern that the overtime protections for low-wage and middle class workers should be maintained or strengthened, but we believe the final regulations are the best way to achieve this result. The amendment raises many questions, and we believe will put overtime protections for millions of employees at risk.

For example, how would we determine which sections, paragraphs, or even sentences of the final rules would still be in effect should the amendment pass?

How would the amendment work for employees whose entitlement to overtime pay is unclear under the current regulations?

How would the amendment affect employees receiving overtime pay today not because it is required under the FLSA statute or the regulations, but because the employer is paying that overtime voluntarily?

How would the amendment affect the last 50 years of Federal case law, Wage and Hour opinion letters, and Wage and Hour field operations handbook sections which are not reflected in the current regulations but are in the final rule? Would all or some of these still have the force of law, and which ones?

What about new employees who are hired? Will they be subject to a different set of rules? And what rules would apply to an employee who changes employers but performs the same work? It appears that the amendment could result in different employees who perform the same work for the same employer being paid differently and that could raise a whole new set of legal issues.

In short, we have opposed the amendment because we do not know what the law would be for any employee if the amendment is passed. We do know that it would add confusion and double the litigation. The amendment would make our enforcement of the regulations more difficult because each case would require two determinations instead of one. First, was the employee exempt under the current regulations, and second whether the employee is exempt under the final regulations.

PREPARED STATEMENT

Mr. Chairman, for the last 20 years, both Republican and Democratic administrations have recognized the need to reform these regulations. These are constructive changes that will benefit millions of workers and they are long overdue.

Thank you for inviting me here today, Mr. Chairman, and I will be happy to answer questions.

[The statement of follows:]

PREPARED STATEMENT OF HON. TAMMY D. MCCUTCHEN

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

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

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

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

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

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

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

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

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

Suggested changes to the Part 541 regulations have been the subject of extensive public commentary for two decades. Significantly, in a 1999 report[2] to Congress and at a May 2000 hearing before a subcommittee of this Committee, the U.S. General Accounting Office (GAO) chronicled the background and history of the exemptions, estimated the number of workers who might be included within the scope of the exemptions, and identified the major concerns of workers and employers. The GAO concluded that "given the economic changes in the 60 years since the passage of the FLSA, it is increasingly important to readjust these tests to meet the needs of the

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

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

modern work place," and recommended that "the Secretary of Labor comprehensively review the regulations for the white-collar exemptions and make necessary changes to better meet the needs of both employers and employees in the modern work place. Some key areas of review are (1) the salary levels used to trigger the regulatory tests, and (2) the categories of employees covered by the exemptions."

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

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

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

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

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

The Department's final rule also includes a streamlined test for highly-compensated "white-collar" employees. To qualify for exemption under this section of the final rule, an employee must: (1) receive total annual compensation of at least $100,000, an increase of $35,000 over the proposed rule; (2) perform office or nonmanual 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

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

even this result is unlikely given the incentives for employers to retain high-skilled workers and minimize turnover costs.

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

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

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

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

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

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

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

requiring the employee to be "actively engaged" in the management of the enterprise.

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

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

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

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

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

Senator SPECTER. Thank you very much, Ms. McCutchen.

The Washington Post editorialize today on the regulation and notes that the 1938 law makes an exception for white collar workers, those in executive, administrative, and professional positions. Figuring out who falls into this category has become a particularly byzantine area of labor law and the regulations outlining the exceptions have not been updated for 50 years.

When Secretary of Labor Chao responded to questions for the record from our January 20 hearing this year, she noted the discretion and independent judgment standard was described as "one of the most confusing and difficult requirements in the regulations,"

and further noted that Federal courts have had difficulty interpreting and applying the standard.

When I look at the current regulation on administrative employees, it says, "customarily and regularly exercises discretion and independent judgment." When I look at your final regulation, it says, "primary duty includes the exercise of discretion and independent with respect to matters of significance."

Ms. McCutchen, where is the improvement from the current law to your proposed final regulation to avoid the vagaries of litigation?

Ms. MCCUTCHEN. First of all, of course, we made an attempt in our proposed rules to adopt a new test, which the commenters uniformly did not like. So we decided to go back to the discretion and independent judgment in the current standard.

The "includes" language is in the current short test, which is 541.2(e)(2), and it states that the exemption applies to employees whose primary duty consists of the performance of work described in paragraph (a) of this section which includes work requiring the exercise of discretion and independent judgment.

The "customarily" language comes from current long test, which of course applies only to employees earning between $8,000 and $13,000 a year and therefore has been replaced with a guarantee of overtime, which is an improvement.

We have also added the words in the regulatory text itself "with respect to matters of significance." Under the current rule, that is in the interpretive guidelines, which courts are free to ignore, and we put it up into the regulatory text at the suggestion of our career professionals at the Wage and Hour Division who felt it was very important to make the point that the primary duty must include exercise of discretion or judgment with respect to matters of significance, not with respect to matters such as deciding which pens to buy, that it has to be discretion and independent judgment on a major issue for the employer, not a minor one. And that is an improvement that will benefit employees.

Senator SPECTER. Well, Ms. McCutchen, where you have the core language saying "customarily and regularly exercises discretion and independent judgment" and then you add to it two layers of additional description, "primary duty," there you have a question of interpreting what is a primary duty, and then you have the subsequent language "with respect to matters of significance." Here again, there is no clear-cut delineation as to what may be significant or not.

In a context where you have had a lot of litigation, a lot of class actions—and I share the Department of Labor's interest in minimizing the litigation and class actions—and you have had many, many lawsuits with a lot of factual settings, it seems to me that you would have a basis for coming to closure with those vagaries. I have been involved in a lot of litigation matters, and you learn from the experience of the court cases. But to come right back with the same language, "customarily and regularly exercises discretion and independent judgment," and adds only "primary duty" and "matters of significance," which require a lot of interpretation themselves, I do not see that you have advanced the ball much.

Ms. MCCUTCHEN. What we did in the final regulation is we took a lot of the Federal court case law, some of the new language in

the definitional section, what is a matter of substantial importance, what is primary duty, what is discretion and independent judgment. There are new definitional sections which take language out of the current case law and out of the Wage and Hour enforcement policy and opinion letters and incorporates that into the regulation itself. So now it is clearer which cases and which language from which cases are the ones that are the law. Whereas before, employees would have to go and do their own legal research or file a FOIA request with the Department to get the information, the information is now in the regulatory text itself.

I will also say that most commenters believed that sticking with the current language would cause them less problems than the proposed position of responsibility test. They felt that the position of responsibility test was vague and that they would prefer to go back to the current language because that is what they are comfortable with. We would have liked to have clarified it even further, but we did not receive any comments with any better ideas. Obviously, our idea of position of responsibility was not working because the commenters felt that it was too vague and the definitions would not help.

So what we did instead is looked at the Federal case law, looked at the Wage and Hour opinion letters, and incorporated the key parts of that case law and opinion letters into the regulatory text itself, which we believe will be beneficial, especially to employees and HR managers because they will no longer have to hire a lawyer to find those cases that describe what is discretion and independent judgment. They will be able to go to the list of factors that is in the final regulation to make that determination.

Senator SPECTER. Well, my red light went on in the middle of your answer.

Senator HARKIN. Go ahead.

Senator SPECTER. No, no. I am going to adhere to the time limit.

I have grave reservations that notwithstanding the changes you have made, that they will not have to have legal interpretation. I have yet to see a regulation which does not require a lot of analysis and a lot of legal interpretation, but if we can avoid the lawyers, so much the better, speaking as a lawyer.

Senator Harkin.

Senator HARKIN. Ms. McCutchen, first, to clear up one point. If an employer in the past or today wanted to determine whether or not certain employees were exempt or not exempt, they could go to you for an advisory opinion, could they not?

Ms. MCCUTCHEN. They can.

Senator HARKIN. And so I was thinking about this case against the Farmers Insurance Exchange in California last year. A jury slapped them with a $90 million judgment because they had not been paying the claim adjustors overtime for years. The company said it believed it was correctly exempting its adjustors as professionals. But they could have gone to you to try to determine that. They could have gone for an advisory opinion. Right? Why would an employer not come to seek your advice on whether or not an employee is exempt or not?

Ms. MCCUTCHEN. First of all, the Farmers Insurance case was brought under California law and not Federal law.

Senator HARKIN. I understand that.

Ms. MCCUTCHEN. Since California law is different, I could not have opined on that.

But actually we did have a request for an opinion letter on insurance claims adjustors and we did issue that opinion letter, which has been adopted by two Federal courts since we issued it.

Senator HARKIN. Now. I am just talking about in the past. My point is any employer can come to DOL right now and ask for an advisory opinion.

Ms. MCCUTCHEN. Including an advisory opinion about the effect of the current rules, which we expect to get requests for.

Senator HARKIN. I understand. I just wanted to make that point.

Second, Ms. McCutchen, Secretary Chao said that under the new regulations issued last week, no workers earning between $23,660 and $100,000 a year would lose overtime protection and that the only provision in this regulation that would restrict overtime eligibility is new section 541.601 on highly compensated employees under which approximately 107,000 workers earning over $100,000 a year would lose overtime rights. Is that correct?

Ms. MCCUTCHEN. I believe that is correct for two reasons. One, the changes that we made to the duties test that apply between $23,660 and $100,000 are all adopting current Federal case law, current Wage and Hour opinion letters, or the current Wage and Hour field operations handbook. So although it is a change in the language of the regulation, it is not a change in the current law that is being applied in the courts today.

What you have to recall is since these regulations have not been changed in 50 years, there is 50 years of case law and Wage and Hour opinion letters that are not incorporated into the regulations.

Senator HARKIN. There is a new provision in the final rules about team leaders. Team leaders is not in the current regulations, nor is it defined in the final rule. The final rule—let me find the thing on team leaders—on the team leader issue, which I believe is a loophole big enough to drive any kind of a truck through, there is no real definition of what a team leader is and how a team leader would operate in the workforce here. I am just trying to find where this is right here.

Section 541.203. An employee who leads a team of other employees assigned to complete other projects for the employer meets the requirements for the exemption even if the employee does not have direct supervisory responsibility over the employees on the team. And you list a few white collar examples. But employers are given no clear guidance on what the rule contemplates by the term "major projects," and nowhere does the rule define what a team leader is or state that the team leader exemption is not to be applied to blue collar work.

How can you say that no one—you say you believe this. No one who makes between $23,660 and $100,000 a year under this new rule will lose overtime pay protection that they have under the current law. That is what you are saying.

Ms. MCCUTCHEN. I believe our economic analysis says few if any because I do not think anybody can speak in absolutes.

Senator HARKIN. Oh, few.

Ms. MCCUTCHEN. No one can speak in absolutes.

Senator HARKIN. She said none.

Ms. MCCUTCHEN. Well, we believe it is going to be none, but the economists say few if any.

Senator HARKIN. What about a team leader? What about all these team leaders that can now be exempt?

Ms. MCCUTCHEN. Well, this is a particularly puzzling issue to me because the language that you quoted—and I would like to quote the full language—is actually a pro-employee change from the current language. And I would like to read the current regulation and the final regulation.

The language in the current regulation, which is in 541.205(c), says that the administrative exemption applies "to a wide variety of persons who either carry out major assignments in conducting the operations of the business or whose work affects business operations to a substantial degree." So the current language says that the administrative exemption is available to a wide variety of employees who work on major projects.

We have limited that definition of an administrative exempt employee to limit it only to the person who leads the team who works on major projects. And we have defined what the major projects are, which is the key to the final rule. What the final rule says is "an employee who leads a team of other employees assigned to complete major projects for the employer, such as purchasing, selling, or closing all or part of a business, negotiating a real estate transaction or a collective bargaining agreement or designing and implementing productivity improvements."

That parenthetical is key to the section, and what it says is that the current language of a wide variety of persons who carry out major assignments is now limited only to a person who leads a team who conducts a major assignment like opening a new plant or being the lead in a collective bargaining negotiation on behalf of the company. We are not talking about union bargaining unit members, who are sometimes called team leaders, who might direct the work of other employees day by day but are not assigned to complete major corporate change type of functions.

So it is much more limited in the final than it is in the current. And I agree with you that we should be comparing the rule to the current law and the current regulation, and this is a pro-employee change from the current regulation.

Senator HARKIN. So that list of examples that you just gave me is exhaustive?

Ms. MCCUTCHEN. Our examples are not—in this one, I think we said "such as." We did not include the language "including or limited to," but I think the purpose of the parenthetical is to indicate that we are talking about major projects. We are talking about people who are leading a project to buy a new business, not to buy office supplies.

Senator HARKIN. An employer can decide what a major project is.

Ms. MCCUTCHEN. Well, ultimately the Department of Labor and the Federal courts are going to decide, and if anybody has questions about a particular team leader who does not complete major projects, they are free to send a request for an opinion letter from me.

Senator HARKIN. Well, I thought it is interesting that they put that thing in there, that they do not even have to have supervisory authority.

Let me get to one other thing.

Ms. MCCUTCHEN. Well, this is the administrative exemption. I am sorry for interrupting you. This is the administrative exemption, and the executive exemption is the exemption that is designed for managers and supervisors. The administrative exemption covers employees who do not have supervisory responsibility but still work on major issues for the employer.

Senator HARKIN. I think I see.

Two other things. Well, you want to get into the management. It has long been held that—the Wage and Hour field operations handbook defines those exempt employees—a rule of thumb is their primary duty must be more than 50 percent. Fifty percent of their time has to be in management or professional work. Is that not true?

Ms. MCCUTCHEN. It has been a guidance, a rule of thumb. It has never been an absolute rule.

Senator HARKIN. It is a rule of thumb in your operations handbook. That has been deleted from the final rule. Is that not true?

Ms. MCCUTCHEN. It is a guideline, yes.

Senator HARKIN. That 50 percent has been deleted.

Ms. MCCUTCHEN. It has been a guideline and it is still as a guideline under the final rule.

Senator HARKIN. No, it is not. Fifty percent is not a guideline under the final rule. No, it is not. It has been deleted. Is that not right?

Ms. MCCUTCHEN. In the final rule, 541.700(b) states the amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. The final rule adopts the Federal court decisions in a series of cases involving Dairy Queen and Burger King that state that the 50 percent rule is a guideline but supervisors who can both supervise and perform nonexempt work at the same time can still be executives. So what we did is we adopted the case law in the Burger King and the Dairy Queen cases.

Senator HARKIN. So you adopted that to take away the 50 percent rule of thumb.

Ms. MCCUTCHEN. No. It is a guideline. We call it a "useful guide." We replaced the word "rule of thumb," which seemed to us a very odd word to have in a regulatory text, and replaced it with the language "useful guide."

Senator HARKIN. Well, no. What you say is the amount of time spent on a primary duty can be a useful guide.

Ms. MCCUTCHEN. Is a useful guide.

Senator HARKIN. Well, but it is different than what it is now. It is not a 50 percent rule of thumb.

Let me get to the police. DOL's talking points on fair overtime security for the 21st century says that the final regulations "contain an ironclad guarantee of overtime protection for police offi-

cers." Does this mean all police sergeants are entitled to overtime protection? Yes or no.

Ms. MCCUTCHEN. It is very hard for me to speak in absolutes, but we believe that the vast, vast, vast, vast majority of sergeants would be entitled to overtime because generally they may direct the work of other employees but they do not have management as their primary duty and they do not have authority to hire or fire, which is the third requirement that we added to the executive exemption.

Senator HARKIN. So which police sergeants would be entitled to overtime protection and which would not?

Ms. MCCUTCHEN. Well, I actually just discussed this issue with our district director out of Kansas City who said that sometimes in a very, very small police department, the sergeant actually might be the top executive in the department, but they are called a sergeant.

In the regulation, what we did and particularly in the preamble is we discussed the many, many different cases that are out there regarding police officers. It is our view of the cases that the Federal courts generally view sergeants and below as entitled to overtime and that is what we tried to adopt in the final rule, and police captains and police commissioners as not entitled to overtime, with the battleground really being lieutenants. And the Federal courts have found some lieutenants to be exempt and some lieutenants to be nonexempt depending upon their particular job duties. So it all depends upon your job duties, but we believe that we have increased the protection substantially for sergeants in the final rule.

Senator HARKIN. Ms. McCutchen, I just will close on this. You went on about my amendment and all these problems and how you determine it. That is really reaching, Ms. McCutchen.

My amendment would work as follows. There are one or two steps, very simple. In each case you see if the employee is eligible for overtime under the old regs. If they are, they get overtime. Very simple. Then if no, if they are not eligible for overtime under the old regs, you look at the new regs. If they are eligible for overtime under the new regs, they get it. If not, they do not. Two steps. Very easy.

Last I would say that the amendment I offered invalidates the whole section of the new regulation, not just for a single litigant but for all future litigants. If someone is eligible for overtime now, they will continue to be eligible for it under my amendment. If they are not eligible under the present rule, they look at the new regulation, if they are eligible, they get overtime. If not, they do not. Because I thought the whole idea of this was to expand overtime pay protections.

That is what my amendment does. If you are eligible under the old, you continue to get it. If you are not eligible under the old, you look at the new regulation. If under the new regulation you are eligible for overtime, you get it. That expands overtime pay protection. If you are not eligible under the old and you are not eligible under the new, you do not get overtime. It is a very simple two-step process. It is not quite as convoluted as what you said.

Last I would just say that you were quoted last year—well, it is not a quote. It was in a story saying that you predicted a deluge

of lawsuits as employees and employers press for clarification once the new rules go into effect. John Bilhorn, whom I do not know, a Chicago attorney who represents employees in lawsuits said it is just going to create new areas of fog. And I would just close by saying that that is what I think is exactly what is going to happen here.

Thank you, Ms. McCutchen. Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Harkin.

Ms. McCutchen, would you please stay with us for the balance of the hearing? Because there may well be issues raised by the next panel which we would like to have your comment on.

Ms. MCCUTCHEN. I do have to step out for another event for probably a half an hour, but I will try to come back. I am sorry. I am just previously scheduled for another event, but I will try to come back so that I am here when the next panel is done. I apologize.

Senator SPECTER. Well, Ms. McCutchen, though, we need you to listen to what they have to say so that you are in a position to comment about them. When we schedule these hearings, we really expect witnesses to be able to stay. We had an experience with the Secretary last time which was difficult for the subcommittee. So we expect you to stay.

Let us proceed now to panel two. Questions will be submitted to the record.

Senator Craig, do you have questions of Ms. McCutchen?

Senator CRAIG. I do not. Thank you.

STATEMENT OF CRAIG BECKER, ASSOCIATE GENERAL COUNSEL, AFL–CIO

Senator SPECTER. Our first witness is Mr. Craig Becker, Associate General Counsel of AFL–CIO. He is also Associate General Counsel of the Service Employees International Union. Bachelor's degree from Yale and a law degree from the Yale Law School. Thank you for joining us, Mr. Becker, and we look forward to your testimony.

Mr. BECKER. Thank you for the opportunity to appear before you on this very important subject. I have litigated in this area and also taught the Fair Labor Standards Act at UCLA and University of Chicago Law Schools, published several articles on the subject.

In my view the new regulations in both obvious and subtle ways will expand the scope of the four primary exemptions to the basic protections of the Fair Labor Standards Act.

These regulations are obviously dense, long, and complex, 61 type script pages. So what I want to do in my very short time before you is illustrate how they depart from some fundamental principles which have guided the construction of the amendments in four ways.

First, the old regulations governing these exemptions contained a clear and explicit percentage limit on the amount of time employees could spend on nonexempt work. 20 percent of their time, 40 percent in the retail and service industries could be spent on nonexempt duties.

Now, outside the outside salesman exemption, that percentage limited fall into disuse because of the woefully inadequate salary

levels for the long test. The Department, however, has now increased those salary levels but discarded this very clear and explicit bright line rule and replaced it with a vague test of the primary duty which ultimately rests on a subjective analysis of what the "most important" duty of the employee is. We submit that if you want to avoid litigation, you retain the bright line rule and do not substitute a vague and subjective analysis.

This will have particular impact in two areas. One, low level managers and supervisors. The cases cited by the Administrator, Burger King cases, universally held that these low level assistant managers spent most of their time flipping burgers and serving customers, and therefore they did not meet this bright line rule and were nonexempt under the 20 percent tolerance level.

Second, in the area of outside sales, there was no salary requirement for the 20 percent limitation. So here is an absolutely clear area where the new regulations exempt employees who were not exempt under the old regulations; that is, outside salesmen who spend more than 20 percent of their time performing non-outside sales work. We substitute for that clear and explicit test a vague primary duties test.

The second area where the regulations clearly depart from longstanding principles is in regard to the salary basis test. It has long been held that people who qualify on the duties tests universally are paid a salary, not only a salary level, but they are paid on a salary basis; i.e., they do not punch a clock. So in return for not being paid overtime, they have certain compensatory privileges. They can leave for an hour during the day to take their kid to the doctor. The salary basis test has existed for over 50 years. The old regulations provided that you could not be paid on an hourly basis. The new regulations retain in name the salary basis test, but define salary basis away by saying explicitly you can be paid on a salary basis even though you are actually paid hourly. Even though you are actually paid hourly.

In other words, many employees who used to qualify under the duties test—and the most obvious example is registered nurses—in many cases—and I cite them in my written testimony—held that nurses do not qualify for exemption because they are not paid on a salary basis. I.e., in a hospital a nurse's time is strictly controlled. They do not have the kind of autonomy that Congress had in mind for exempt employees, and therefore they do not qualify on the salary basis test.

The Department has now defined away what it meant to be paid on a salary basis, and I quote from the Court of Appeals for the Third Circuit which said, "Paying an by the hour affords the employee little of the latitude that the salary requirement recognizes. A basic tension exists between the purpose behind a salary requirement and any form of hourly compensation."

The Department has now said, you can be paid hourly and still qualify on a salary basis test. Again, here is another area where clearly employees such as nurses—and that is a very important classification because of the high number of forced overtime hours which nurses work, given the nursing shortage—who were previously not exempt because they could not satisfy the salary basis

test will now be considered exempt because of the dilution of what it means to be paid on a salary basis.

Third—and let me just say in the 5 seconds I have left—the old regulations did not expressly exempt any named classifications. That is, the old legislative regulations had tests and then the interpretive regulations, which did not have the force of law, had certain examples of how the tests apply. The interpretations have been eliminated and in the legislative regulations, named classifications are now exempt. The rule has always been that titles did not matter. It mattered what you actually did. But now the Department is saying in the legislative regulations that certain named titles are exempt, and beyond titles, certain whole industries, financial services employees are exempt.

My fourth point was going to be team leaders, but team leaders have been extensively discussed.

So let me just say that I did a Federal court search for exemption cases involving team leaders to see if this new provision would be consistent——

Senator SPECTER. Mr. Becker, could you sum up?

PREPARED STATEMENT

Mr. BECKER. And all I wanted to say about team leaders, since it has already been discussed, is that a search of Federal court cases for cases holding team leaders to be exempt under the old regulations found no cases whatsoever. So this is a new provision in the regulations.

Thank you for your time.

[The statement follows:]

PREPARED STATEMENT OF CRAIG BECKER

Thank you for the opportunity to appear before you today to discuss this important subject. I have experience in this area both as a litigator and as an academic. I have represented employees in many industries in actions brought under the Fair Labor Standards Act (FLSA). In addition, I have taught labor and employment law, including the FLSA, at the University of California at Los Angeles and the University of Chicago Schools of Law and published several articles about the FLSA.

The new regulations, in both obvious and subtle ways, expand the scope of the four primary exemptions to the basic protections of the FLSA. They depart from several fundamental principles that have undergirded the construction of the statutory exemptions for decades. Time and space permit me to provide you with only a few illustrative examples.

ELIMINATION OF CLEAR TOLERANCE LEVELS

The old regulations governing the executive, administrative, professional and outside sales exemptions contained a clear and explicit percentage limit on the amount of time employees could spend on nonexempt work and still be classified as exempt executive, administrative, professional or outside sales employees. Exempt employees could not devote more than 20 percent of their time (or in the case or retail or service employees, 40 percent of their time) in any workweek to nonexempt duties. 29 C.F.R. § 541.1(e), 541.2(d), 541.3(d), 541.5(b), 541.5(b). Congress considered these limitations on the amount of time that exempt employees could devote to nonexempt duties when it extended the FLSA to retail and service establishments in 1961 and modified them only by setting the tolerance level for executive and administrative employees in those industries at 40 percent. 29 U.S.C. § 213(a)(1). While this clear rule had fallen into disuse, except as applied to outside salesmen, because for the other exemptions it was attached to the so-called long-test that was only applied to employees earning amounts that had become so low that the test was no longer widely used, the Department has now raised the salary level but also discarded the clear and sensible tolerance levels. In their place is a vague definition of "primary

duty," § 541.700, that requires application of a wide variety of factors and ultimately a subjective judgment about what the employee's "principal, main, major or most important duty" is. This vague and ultimately subjective test will lead many employers to misclassify employees as exempt based on the employers' own notion of what is "most important," thereby contracting coverage and increasing litigation.

DILUTION OF SALARY BASIS TEST

For over 50 years, the regulations have required employers to prove not only that employees perform the duties of an executive, administrative or professional employee, but also that the employees were paid above a minimum salary and paid that salary on a "salary basis." The salary basis requirement embodied the empirical finding that bona fide executive, administrative and professional employees did not punch a clock, but rather had a degree of control over their own working hours. This autonomy compensated for the loss of overtime pay because long hours were less oppressive to an employee who was free to take a break during the day to attend to personal business or for other purposes. The new regulations ostensibly retain the salary basis requirement but undermine the meaning of the term "salary basis."

The old regulations provided that additional compensation along with a salary was not inconsistent with payment on a salary basis. However, the examples given did not include additional compensation paid on an hourly basis. In addition, the regulations provided, "The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment 'on a salary basis'. For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted." 29 C.F.R. § 541.118(b).

The new regulations expressly provide that "[a]n exempt employee's salary may be computed on an hourly, a daily or a shift basis, consistent with the exemption and the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal workweek." § 541.604(b). The new regulations further provide an example of a reasonable relationship: "Thus, for example, an exempt employee guaranteed compensation of at least $500 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $150 per shift without violating the salary basis requirement." *Id.* If the employee in the example works only three shifts, she will be paid only $500 instead of the $750 she earns when she works five shifts but she may continue to be treated as exempt. Thus, a reasonable relationship is defined to allow at least a $250 per week variation based on hours worked, a permissible variation of at least 50 percent of the employee's minimum weekly compensation.

The old regulations provided that employees were not paid on a salary basis if they could be suspended for less than one day for disciplinary reasons other than "infractions of safety rules of major significance." 29 C.F.R. § 541.118(a)(5). The new regulations add to this limited exception deductions for "unpaid disciplinary suspension of a full day or more imposed in good faith for infractions of workplace conduct rules." § 541.602(b)(5).

In *Brock* v. *The Claridge Hotel and Casino,* 846 F.2d 180 (3d Cir. 1988), *cert. denied,* 488 U.S. 925 (1988), the Court of Appeals held that low-level casino managers who were paid on an hourly basis with a minimum salary guaranteed were not paid on a salary basis. The Court reasoned, "Paying an employee by the hour affords that employee little of the latitude the salary requirement recognizes. Thus, a basic tension exists between the purpose behind a salary requirement and any form of hourly compensation." *Id.* at 184. The Court also found, at the Secretary's urging, that such a method of compensation, in effect, allows for the docking of employees' pay for absences of less than one day which is inconsistent with salaried status. *Id.* at 185. To argue that an employee who is paid by the hour is paid on a salary basis "contravenes the common meaning of the term . . ., the purpose behind a salary requirement . . ., and the Labor Department's empirical findings on the attributes

of bona fide [exempt] status." *Id.* at 186. The Court found such a construction also "conflicts with the Secretary's interpretation of those regulations." *Id.*[1]

These two changes to the definition of what it means to be paid on a salary basis will thus permit employers to classify many employees as exempt who previously failed the salary basis test. One area where this will be true is nursing. While registered nurses meet the duties test for the professional exemption, they have until now consistently failed the salary test because their employers exercised close control over their time, not permitting them to come and go as they chose and docking them if they miss part of a day. *Klein* v. *Rush-Presbyterian-St. Luke's Medical Center,* 990 F.2d 279 (7th Cir. 1993), for example, involved a registered nurse who was held to be nonexempt because the employer did not pay her on a salary basis. The Court noted, "the regulations have determined that a salaried employee is paid the same regardless of the number of hours worked. . . . An exempt employee's pay cannot be reduced for absences of less than a day." *Id.* at 284. In Klein, the Court held the RN was not paid on a salary basis because she had her compensatory time docked if she missed part of a day and she was suspended for reasons other than major safety violations. This case would come out differently under the new regulations.

Another example is *Elwell* v. *University Hospitals Home Care Services,* 276 F.3d 832 (6th Cir. 2002), which also involved a nurse. The nurse was also held to be nonexempt on the grounds that she was not paid on a salary basis. "Because the undisputed facts show that Elwell's compensation arrangement was based at least in part on the number of hours she worked, we conclude that the district court correctly awarded summary judgment to the plaintiff as to University's claim that she was an exempt professional." *Id.* at 839. This case would also come out differently under the new regulations.

The new regulations will allow employers to pay employees such as these RNs for hours worked in excess of 40 in a workweek[2] at straight, as opposed to overtime, rates or to "pay" them in compensatory time off. This is expressly provided for in the new regulations which indicate that "the exemption is not lost if an exempt employee who is guaranteed at least $455 each week paid on a salary basis also receives additional compensation based on hours worked beyond the normal workweek" and that "[s]uch additional compensation may be paid on any basis . . . and many include paid time off." § 541.604(a).

Thus, under the new regulations employers will be able to both closely control employees' time, requiring them to punch a clock, and at the same time deny them overtime compensation. This will lead to the exemption of a large number of employees who previously failed the salary basis test.

WIDENING OF WINDOW OF CORRECTION

The old regulations allowed employers to correct only inadvertent deductions from pay in order to preserve the exempt status of employees. The old regulations provided, "where a deduction not permitted by these interpretations is inadvertent . . . 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." 29 C.F.R. § 541.118(a)(6).

The new regulations provide that the exemption is not lost unless the employer "did not intend to pay employees on a salary basis." § 541.603(a). It further provides, "An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis." § 541.603(a). Proving a practice of making deductions requires more than proving deductions were intentionally made. § 541.603(a). Intentional improper deductions will not cause a loss of exempt status if they are "isolated." § 541.603(c). Moreover, even if the employer has a practice of making improper deductions, the exemption is only lost during the time period of the deductions and for those employees in the same class, working for the same manager. § 541.603(b). Finally, a complete safe-harbor is created for employers who simply communicate a policy (which need not be in writing) forbidding improper deductions that includes a complaint mechanism, reimburse employees subject to improper deductions and promise to comply in the future. § 541.603(d). This will insulate the employer unless the employer "willfully violates the policy by con-

[1] The Department cites this decision and this decision alone after stating that "[c]ourts also have upheld the reasonable relationship requirement." Preamble at 245 (citations to the Preamble to the new regulations are to the typescript version submitted to the Federal Register. This version appears on the Department's web site at http://www.dol.gov/esa/regs/compliance/whd/fairpay/preamble.pdf.) In fact, the Court expressly did not do so. 846 F.2d at 185 n. 6.

[2] Or in excess of the alternative standard permitted in hospitals and similar institutions by 29 U.S.C. § 207(j).

tinuing to make improper deductions after receiving employee complaints." § 541.603(d).

The Department makes clear that the final rule is a departure from its prior position. Preamble at 233.

DEPARTURE FROM WORKWEEK ANALYSIS

Consistent with Congress' creation of a standard 40 hour workweek, the Department has long used the workweek as the unit of analysis under the Act. Thus, for example, the minimum salaries under the old short and long tests were established on a workweek basis. See, e.g., 29 U.S.C. § 541.1(f). The new regulations depart from this analysis in creating a highly paid employee category. They provide that an employees whose "total annual compensation is at least $100,000 is exempt if he or she "customarily and regularly performs any one or more of the exempt duties." § 541.601(a). Moreover, they permit employers to retroactively adjust employees' salary after the end of the year. Under the new rules, an employer that fails to pay an employee the required amount by the end of the year can make up the difference by the end of the next pay period. § 541.601(b)(2). Thus, an employer can wait until the end of the year, compare its potential overtime liability to the salary deficit and decide to avoid the former by paying the latter. The employee, meanwhile, cannot determine if he or she must be paid in accordance with the Act's requirements until the end of the first pay period of the new year.

EXEMPTION OF LOW LEVEL MANAGERS AND ASSISTANTS WHO SPEND LARGE AMOUNTS OF TIME PERFORMING RANK-AND-FILE DUTIES

The old regulations contained a section governing "working foremen," i.e., employees who have some management functions, but also perform rank-and-file work. 29 C.F.R. § 541.115. Its express intent was to "distinguish between the bona fide executive and the 'working' foreman or 'working' supervisor who regularly performs 'production' work or other work which is unrelated or only remotely related to this supervisory activities." 29 C.F.R. § 541.115(a). The old regulations provided that a working foreman who spent more than 20 percent of his time performing the same work as his subordinates or other nonmanagerial work was not exempt. 29 C.F.R. § 541.115(b).

The new regulations eliminate this provision. In fact, the new regulations expressly provide, "Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption." § 541.106(a). The new regulations add, "For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption." § 541.106(b). The new regulations thus permit the exemption of employees who spend most of their time, even all of their time, on ordinary work B cooking, stocking, cleaning—so long as they also have management functions that can be designated their "primary duty."

Prior decisions about such employees, such as assistant managers in fast food restaurants, consistently held that they failed the old long-test because they performed too much nonexempt work. *See Donovan* v. *Burger King Corp.*, 675 F.2d 516 (2d Cir. 1982); *Marshall* v. *Erin Food Services, Inc.*, 672 F.2d 229 (1st Cir. 1982); *Donovan* v. *Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982). By wholly eliminating the long test and the working supervisors provisions and providing that exempt employees can perform exempt and nonexempt duties at the same time, the new regulations strip low-level managers at the bottom of the salary range who perform substantial amounts of ordinary rank-and-file work of the Act's protection.

WIDENING OF EXEMPTION FOR 20 PERCENT OWNERS

The old regulations contained an exception to the tolerance limits on performance of nonexempt work for an employee who owns at least a 20 percent interest in the enterprise. 29 C.F.R. § 541.1(e). All of the other requirements for exemption still had to be met by such an employee. The new regulations simply define a 20 percent owner as exempt if he or she "is actively engaged in [the enterprise's] management." § 541.101.

NARROWING THE DEFINITION OF NOT "DIRECTLY RELATED TO MANAGEMENT"

Both the old and new regulations require that the work of administrative employees be "directly related to the management or general business operations of the employer or the employer's customers." New § 541.200. However, the old regulations' interpretations defined the term "directly related to management policies or general

business operations" not to include "'production' or, in a retail or service establishment, 'sales' work." 29 C.F.R. §541.205(a). The new regulations contain a narrow exclusion. They provide that the term "related to the management or general business operations" does not include "working on a manufacturing production line or selling a product." §541.201(a).

CREATION OF EXPRESSLY EXEMPT CLASSIFICATIONS

The old legislative regulations did not expressly exempt any named classifications of employees. The regulations were divided into legislative regulations having the force of law and interpretive regulations having only persuasive force. In the old interpretive regulations, the Department gave some examples of how the legislative regulations would apply to certain classifications, for example, registered nurses. 29 C.F.R §541.301(e)(1). But these examples did not have the force of law.

The new regulations eliminate the interpretive sections and include numerous express designations of specific classes of employees as exempt in the legislative sections. This departs from the long-established proposition that job titles alone are not determinative of exempt status. Indeed, the new regulations continue to state that "[a] job title alone is insufficient to establish the exempt status of an employee" and that "[t]he exempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations." §541.2. But the novel, express designation of a specified classification as exempt in the legislative regulations is a marked departure from this principle.

CREATION OF EXEMPTION FOR TEAM LEADERS

Under the heading, "Administrative exemption examples," the new regulations include, "[a]n employee who leads a team of other employees assigned to complete a major project for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) . . . even if the employee does not have direct supervisory responsibility over the other employees on the team." §541.203(c). This is a broad new category of exempt employees. Given the increasing organization of work into teams and the incentive this provision will give employers to so organize work, it potentially sweeps large numbers of employees in numerous industries outside the protections of the Act.

There was no parallel provision in the old regulations. The old regulations long test for administrative employees did include an employee "[w]ho executes under only general supervision special assignments and tasks." 29 U.S.C. §541.3(c)(3). But a "special project" is far different from a "major project" because a special project is a project outside the ordinary work of the employer while a major project is simply an important project. Thus, the small category of previously exempt special project employees were those who worked on extraordinary projects as staff (as opposed to line) employees (29 U.S.C. §541.201(a)(2)) outside the ordinary routine of the employer's business. The newly exempt team leaders can work on major project on a continuous basis as an integral part of the employer's business.

In addition, special project employees under the old regulations also had to have as his or her primary duty the "performance of office or non-manual work directly related to management policies or general business operations," had to "customarily and regularly exercise discretion and independent judgment," and could not devote more than 20 percent of his or her time to nonexempt work. 29 C.F.R. §541.2(a)–(d). The new regulation expressly eliminated the 20 percent tolerance level which is critically important because most project and team leaders also perform the ordinary duties of the other members of the team in substantial quantities. By stating that team leaders "generally meet the duties requirements," the new regulations encourage employers and courts to assume that all elements of the exemption are met for employees so designated.

CREATION OF CATEGORICAL EXEMPTION OF FINANCIAL SERVICES EMPLOYEES

New §541.203 provides that "[e]mployees in the financial services industry generally meet the duties requirements for the administrative exemption. This exempts a vast range of employees with the only exception being those "whose primary duty is selling financial products." The classification of all employees in an industry as exempt is a radical departure from prior practice under which it was universally held (as discussed above) that exemption depended on the actual duties performed by individual employees.

The Department justifies this blanket industry exemption by reference to a handful of cases, all but one arising out of insurance companies and with the one excep-

tion arising out of a management consulting firm and not the financial services industry. Preamble at 95–102.

Moreover, the case law is not as uniform as the Department suggests because in *Casas* v. *Conseco Finance Corp.*, 2002 U.S.Dist. LEXIS 5775 (D.Minn. 2002), the Court ruled that almost 3,000 "loan originators" employed by Conseco did not fall into the administrative exemption because they were line rather than staff employees. The Court found that the employees' primary duties were "to produce the very product that Conseco exists to produce: design, create and sell loans." *Id.* at *21. The Department is not correct when it suggests this decision was based solely on a finding that the employees' primary duty was sales. Preamble at 98. The new regulation would reverse this decision and all others based on similar reasoning unless the primary duty of the employees at issue is the selling of financial products.

CREATION OF EXEMPTION FOR INSURANCE CLAIMS ADJUSTORS

The new regulations expressly provide that insurance claims adjusters "generally meet the duties requirements for the administrative exemption." § 541.203(a). Prior case law has held some claims adjustors nonexempt. *See, e.g., Bell* v. *Farmers Ins. Exchange,* 115 Cal.App.4th 715, 9 Cal.Rptr.3d 544 (2004) (decided under state law but following federal precedent). As recently as February 26, 2004, multidistrict litigation involving claims representatives employed by Farmers Insurance Exchange resulted in a holding that several categories of such representatives are nonexempt. *In re Farmers Ins. Exchange Claims Representatives' Overtime Pay Litigation,* MDL Docket No. 33–1439 (D.Or. Feb. 16, 2004).

CREATION OF EXEMPTION FOR CHEFS

The new regulations provide that chefs with a four-year degree in culinary arts are exempt learned professionals. § 541.301(e)(6). This is a significant expansion of the types of employees who can be classified as learned professionals for several reasons. First, the old regulation defined as professionals only those who worked in a field requiring knowledge "in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study." 29 C.F.R. § 541.3(a)(1). Most chefs do not acquire their knowledge through such a prolonged course of study, yet the new regulation nevertheless exempts the minority of chefs who do. Second, cooking has never before been classified as a "field of science or learning." Third, cooking is manual labor. Thus, the new exemption of chefs is a significant expansion of the learned professional exemption. The new exemptions for athletic trainers and funeral directors, discussed below, share several of these novel characteristics.

CREATION OF EXEMPTION OF ATHLETIC TRAINERS

The new regulations provide for the first time that athletic trainers are exempt learned professionals. The Department acknowledges in its preamble to the final regulations that "[i]n the past, the Department has taken the position that athletic trainers are not exempt learned professionals." Preamble at 135.

CREATION OF EXEMPTION OF FUNERAL DIRECTORS

The new regulations also provide for the first time that funeral directors are exempt learned professionals. The Department also acknowledges that "[i]n the past, the Department has taken the position that licensed funeral directors and embalmers are not exempt learned professionals." Preamble at 138. In fact, as recently as 2000, the Department filed an amicus brief arguing this position. Preamble at 138.

LOOSENING OF STANDARDS FOR EXEMPTION OF TEACHERS

The old regulations short test required that teachers be paid on a salary basis and perform work requiring the consistent exercise of discretion. 29 U.S.C. § 541.3(e). The old regulations long test required that teachers be paid on a salary basis, perform work requiring the consistent exercise of discretion, and perform work that is predominantly intellectual and varied. 29 U.S.C. § 541.3(a) (3).

The final regulations eliminate all these requirements. § 541.303.

EXPANSION OF EXPRESSLY EXCLUDED CLASSES OF PROFESSIONALS

The old regulations interpretations listed a number of occupations as falling into the category of learned professions. The new legislative regulations expand the list of exempt occupations to include dental hygienists and physicians assistants as well as the specific classification discussed above. § 541.301(e).

REMOVAL OF PRESUMPTION AGAINST EXEMPTION OF JOURNALISTS

The Department contends in the preamble to the final regulations that the regulations were "intended to reflect current federal case law regarding the status of journalists as creative professionals. Preamble at 145. The Department quotes the conclusion in one such case that it is the Aminority of reporters 'whose work depends primarily on invention, imagination, or talent.'" 146 (quoting *Reich* v. *Newspapers of New England, Inc.,* 44 F.3d 1060, 1075 (1st Cir. 1995)).

The old regulations were consistent with this case law. They provided, "[o]bviously the majority of reporters do work which depends primarily on intelligence, diligence, and accuracy. It is the minority whose work depends primarily on invention, imagination, or talent." 29 C.F.R. §541.302(d). "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 . . . and must be considered as nonexempt work." 29 C.F.R. §541/302(f)(2). The new regulations, in contrast, to not contain any of this language. §541.302(d). They provide:

"Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy. Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reports 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. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator."

§541.302. The removal of the express presumption that journalists are non-exempt and other changes in the language of the regulation will obviously encourage employers improperly to treat journalists as exempt and argue that they satisfy the standard articulated in the new regulation.

WIDENING OF THE COMPUTER PROFESSIONAL EXEMPTION

The old regulations made clear that the exemption of computer professionals applied only to those at the highest levels of the profession. They applied only to employees performing "[w]ork that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering." 29 C.F.R. §541.3(a)(4). The old regulations interpreted this provision to apply "only to highly-skilled employees who have achieved a level of proficiency in [these areas]." 29 C.F.R. §541.303(c). The new regulations eliminate the prefatory language and its interpretation, thus exempting all employees working in these computer fields. §541.400(b).

WIDENING OF THE OUTSIDE SALES EXEMPTION

The old outside sales exemption contained a 20 percent limit on the amount of non-outside sales work an exempt employee could perform. 29 C.F.R. §541.5(b). The new regulation eliminates this tolerance level. §541.500. In light of this change, the Department's contention that the "primary duty test is relatively simple, understandable and eliminates much of the confusion and uncertainty that are present under the existing rule" is difficult to comprehend. Preamble at 160. The 20 percent tolerance level was a bright line rule. Elimination of the 20 percent tolerance level will both render more employees who perform some outside sales work exempt and create additional litigation concerning when employees have outside sales as their primary duty.

CONCLUSION

In each of these respects and in others too numerous to describe comprehensively here, the new regulations widen the exemptions and thereby make it more difficult to achieve Congress' objective of creating national wage and hour standards.

STATEMENT OF DAVID S. FORTNEY, PARTNER, FORTNEY & SCOTT, LLC

Senator SPECTER. Thank you very much, Mr. Becker.

We turn now to Mr. David Fortney, co-founder of Fortney and Scott, a Washington-based firm specializing in labor and employment issues. He had been with the Department of Labor in the capacity of acting solicitor and chief legal officer, a bachelor's degree from Penn State and a law degree from Duquesne. Thank you for joining us, Mr. Fortney, and we look forward to your testimony.

Mr. FORTNEY. Good morning, Mr. Chairman and members of the subcommittee. It is a privilege to be here again to discuss what we now have as the final regulations, whereas before, the committee was looking at the proposed regulations.

Without spending too much time on it, let us remember where we are coming from. We are coming from current regulations that I think everyone agrees, even those that perhaps are challenging these regulations, the current regulations do not work well. They create a morass. They create uncertainty.

My primary practice is working with employers to help them comply. I will tell you typically an employer will come and say, how are we supposed to compensate people? And as someone who has spent a great deal of time, both at the Labor Department trying to enforce and in the private sector trying to work with various employers, answering those questions is sometimes unnecessarily difficult and it results in giving less than satisfactory answers. Those are the so-called weasel answers that lawyers give that drive employers crazy. Well, I think it is probably this way.

These regulations in my view are a significant step forward in clarifying the rules. They do provide more certainty, and they do, I think, responsibly address the current environment, in which we have seen what are the current salary requirements, which are a technical morass and has resulted in the slightest error in how people are compensated, resulting in hundreds if not millions of dollars in liabilities and really creating a frenzied litigation lottery.

Moreover, the duties tests—the way they have been defined in the current regulations where the regulations are vague, you look at field operation handbooks and other guidance in court cases that I would suggest are not readily available to employers and certainly not to small business people, or to employees for that matter, are now at least codified within the rules in a much clearer, more concise fashion.

With respect to specifics, this is not all a pro-employer set of changes. In general, these rules codify the current requirements. There are several substantive changes, however.

With respect to executives, the requirements are more rigorous now than they have been under the current law. Now there is a requirement to have hire and fire authority to some degree. Under the current rule, there are many folks who are properly exempt from overtime who do not have such authority.

The administrative exemption, which has received I think the lion's share of the focus of the hearing and the criticism, I submit is codifying what rules we have there. Now, the rules may not be perfect, and as Ms. McCutchen indicated in her statement, a proposal was made to change those rules. I think generally everyone

said, wait a minute, do not give us a new test that is vague and uncertain. If those are our choices, we will take the existing test, clarify it, which I think is what the Department has done. We now have a test within the four corners of the reg that is supported by the court decisions that go behind it. So it is more than just the words, it is the whole fabric that goes with it, and I think that is very, very helpful.

Professional exemptions again have been clarified appropriately and in my view have not been expanded or changed. There is one new addition. It is certainly a new exempt category that has before not existed, the so-called highly compensated, and that focuses on $100,000. The Labor Department, though, has modified that some. So it is not just that you are paid $100,000. First of all, they have made clear no matter how much you are paid, if you are blue collar, that is, do primarily manual work, work with your hands, you get overtime. It does not matter whether we call you a team leader. It does not matter whether you are highly compensated earning more than $100,000. You get overtime. The rules are crystal clear on that. There is no room for doubt or wiggle on that.

PREPARED STATEMENT

With respect to the highly compensated, though, we are talking about folks who have to perform at least one duty and have to be paid in accordance with the salary requirements at the minimum of $455 per week.

With that, I will save my time for answering questions as they may come up. I know there are a lot of areas that I think the chair and others would like to discuss. Thank you.

[The statement follows:]

PREPARED STATEMENT OF DAVID S. FORTNEY

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

INTRODUCTION AND OVERVIEW OF THE FLSA WHITE-COLLAR EXEMPTION REGULATIONS

The white-collar exemption regulations are dramatically outdated and have imposed significant confusion and uncertainty in determining who is, and who is not, exempt from the FLSA's minimum wage and overtime requirements. The FLSA imposes minimum wage and overtime requirements on covered employers, but also, in 29 U.S.C. §213 (a), provides certain exemptions from these requirements. Section 213 (a) states that the minimum wage and overtime requirements shall not apply to any employee employed in a bona fide executive, administrative, or professional

capacity or in the capacity of outside salesperson. Section 213 also authorizes the Secretary of Labor to "define and delimit" these exemptions. As you know, the regulations for implementing these statutory exemptions—commonly referred to as the "white-collar" exemptions—are codified at 29 CFR Part 541. The white-collar exemption regulations impose two requirements for a job to be classified as exempt. First, the employee must be paid on a salary basis and at the required salary level. And, second, the job duties must involve managerial, administrative or professional skills and duties.

THE CURRENT WHITE-COLLAR EXEMPTION REGULATIONS ARE OUTDATED AND REQUIRE COMPREHENSIVE REFORM

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

The duties tests, however, have proven to be a vast "gray" area, because the current regulations are too vague. As a result, both employers and the Labor Department are faced with inconsistent results that often are no more certain than the next court decision. In particular, the administrative exemption's requirements, which require exempt employees to perform "staff" rather than production or sales work, and exercise "discretion and independent judgment" on important matters in managing the employer's general business operations, are particularly difficult to apply. For example, a court ruled that a project superintendent, who supervised three large construction projects for a construction management company, earning an annual salary of $90,000, was not an exempt administrative employee. The court reasoned that under the staff versus production dichotomy, the employee "produced" construction project management and thus was a nonexempt production employee. See *Carpenter* v. *R.M. Shoemaker Co.,* 2002 WL 987990, 7 Wage & Hour Cas. 2d (BNA) 1457 (E.D. Pa. May 6, 2002). Similarly, the professional exemption was found not to apply to network communications specialists who had advanced physics, mathematics and engineering degrees, and who trained mission control personnel, because, the court held, the employees failed to exercise discretion, because they used technical manuals and made group decisions. *Hashop* v. *Rockwell Space Operations,* 867 F. Supp. 1287 (S.D. Texas 1994).

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

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

Everyone—perhaps with the exception of a small cadre of plaintiffs' lawyers who are making huge fees filing these wage and hour class action lawsuits—agrees that the outdated regulations require revision, because the rules are not only vague and ambiguous but also difficult to apply to many positions in today's modern workplace.

The U.S. General Accounting Office ("GAO") review of regulations in 1999 recommended that the Secretary of Labor comprehensively review and make the necessary changes to the white-collar regulations to better meet the needs of both employers and employees in the modern workplace and to anticipate future workplace trends. The GAO's recommendations recognized the problems in achieving compliance. My personal experience has been that it often is difficult to advise employers because the rules are not clear. Additionally, the judicial interpretations vary and compound the problems in securing compliance. Moreover, it is my belief, based on my personal experience, that these same factors pose challenges to the Labor Department's ability to effectively and efficiently enforce these rules in a uniform and consistent manner.

OVERVIEW OF THE CHANGES IN THE FINAL OVERTIME REGULATIONS

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

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

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

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

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

THE FINAL REGULATIONS PROVIDE MUCH GREATER CLARITY TO THE OVERTIME REQUIREMENTS AND WILL RESULT IN GREATER COMPLIANCE AND OVERTIME PROTECTIONS

The Labor Department deserves significant credit for meeting the challenge of updating the long-ignored overtime rules. Under Secretary Chao's leadership, the Department successfully has completed a very complex rulemaking. Faced with such clearly outdated regulations and with recommendations by the General Accounting

Office and others urging an overhaul of the regulations, the current Secretary of Labor undertook the long-neglected task of providing regulations that are meaningful for the modern workforce. This was a task that earlier Administrations, both Democratic and Republican, had considered but shied away from, undoubtedly over concern that revising these regulations would be controversial.

1. The Rulemaking Process Resulting in the Final Overtime Regulations

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

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

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

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

2. The Salary Component Will Again Become a Meaningful Criterion

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

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

3. The Administrative Exemption is Clarified

Another improvement implemented by the Final Regulations is the clarification of the Administrative exemption. 29 CFR §§ 541.200–541.204. The Proposed Regulations set forth a new duties test for Administrative employees, requiring such employees to hold a "position of responsibility." Many feared that the introduction of a new standard would have the inevitable effect of triggering significant uncertainty and litigation regarding the scope of the exemption. In response, the Labor Department's Final Regulations rejected that new standard and, instead, essentially retain the current test for Administrative employees, with significant clarifications and better guidance. The result is that employers and employees now have the benefit of using long established criteria that is further clarified by the numerous examples

set forth in the Final Regulations. Thus, under the Final Regulations, a worker who is compensated on a salary or fee basis at a rate of not less than $455 per week must have as his/her primary duty "the performance of office or non-manual work directly related to the management of the general business operations of the employer or the employer's customers and whose primary duty must include the exercise of discretion and independent judgment with respect to matters of significance." The addition of the requirement of "matters of significance" to the former discretion and independent judgment requirement is in keeping with current law and is useful in understanding that the Administrative exemption takes into account the level of importance or consequences of the work performed. 29 CFR § 541.202.

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

—insurance claims adjusters;

—financial services industry employees whose duties include "collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products and marketing, servicing or promoting the employer's financial products" (NB: if the employee's primary duty is selling financial products, the exemption is not available);

—employee who leads a team of other employees assigned to complete major projects for the employer;

—executive assistant or administrative assistant to a business owner or senior executive of a large business;

—human resources managers who formulate, interpret or implement employment policies and management consultants who study the operation of a business and propose changes (NB: personnel clerks typically are non-exempt); and,

—purchasing agents with authority to bind the company on significant purchases.

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

—inspectors doing ordinary inspection work along standardized lines involving well-established techniques and procedures;

—examiners or graders;

—comparison shoppers who report a competitor's price, distinguished from the buyer who evaluates the reports on competitors prices; and,

—public sector inspectors or investigators of various types, such as fire prevention or safety, buildings or construction health or sanitation, environmental or soils specialists and similar employees.

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

4. The Learned and Creative Professional Exemptions Are Clarified

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

The *Learned Professional* test tracks the existing learned professional criteria, and streamlines and summarizes the current criteria without material changes. The Final Regulations focus on employees with the primary duty of performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. 29 CFR § 541.301. The proposed regulatory language that would have allowed equivalent knowledge "through a combination of work experience, training in the armed forces, attending a technical school, attending a community college of other intellectual instruction" has not been included in the Final Regulations. This proposed language had been criticized as allowing military training to suffice as training for a learned profession, sufficient to qualify for exemption. The Labor Department clarified in the Preamble to the Final Regulations that it "never intended to allow the professional exemption based on veterans' status." 69 Fed Reg 22123. Also see 69 Fed Reg 22150 ("Thus, a veteran who is not performing work in a recognized professional filed will not be exempt, regardless of any training received in the armed forces.").

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

—Registered or certified medical technologists who have four years of college and course work approved by the Council of Medical Education of the American Medical Association;

—Nurses—registered nurses who are registered by the appropriate State examining board continue to be exempt, as they are and have been under the current regulations. Licensed practical nurses generally do not qualify for the learned professional exemption;

—Dental hygienists who have completed four academic years of study approved by a designated credentialing body;

—Physician's assistants who have completed four academic years of study approved by a designated credentialing body;

—Accountants—certified public accountants generally are exempt, but clerks and bookkeepers are non-exempt;

—Chefs, including executive and sous chefs with specialized, four year degrees are exempt, but fast food cooks and cooks who perform predominantly routine mental, manual, mechanical or physical work are non-exempt;

—Athletic trainers who have four academic years of pre-professional and professional study in a curriculum accredited by the designated credentialing body;

—Funeral directors and embalmers who are licensed in states requiring four years of study and graduation from an accredited college of mortuary science.

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

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

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

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

5. The Executive Exemption is More Restrictive

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

ditional requirement of the hire/fire authority, employers at least have the benefit of reasonably clear requirements. Realistically, employers will need to assess whether currently exempt executive employees meet this new criterion.

The Final Regulations also modify the executive exemption for a business owner by adopting the new classification of exempt executive employee proposed in the Proposed Regulations; i.e., any employee who owns at least a bona fide 20 percent equity interest in the enterprise in which the employee is employed and who is actively engaged in its management. 29 CFR § 541.101. The Final Regulations, however, modify the Proposed Regulations in two material ways. First, the Final Regulations require that an owner/employee's 20 percent business interest be a "bona fide" one. This was designed to insure that the ownership in the business must be genuine, not illusory. Second, the Final Regulations require the owner/employee to be "actively engaged" in the business' management. Moreover, in the case of a 20 percent business owner, the salary threshold of $455 does not apply. The Final Regulations make additional changes to the executive exemption. The "sole charge" exemption is eliminated completely. Also, the Final Regulations make clear that performing exempt and nonexempt duties concurrently will not disqualify an employee from the executive exemption, if the employee meets the other requirements of the executive exemption. 29 CFR § 541.106. The determination of whether the employee meets the other requirement when he/she performs concurrent duties is made on a case-by-case basis.

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

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

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

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

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

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

The revisions to the salary deductions and the safe harbor for investigation and corrections of improper salary deductions are significant steps in enabling employers

to comply with the overtime rules, while avoiding disproportionate windfalls to unaffected employees. Similarly, the provisions empower employees, who can take steps to help ensure prompt compliance.

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

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

9. Conclusions About the Final Regulations

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

MISINFORMATION AND CONFUSION RELATING TO THE FINAL OVERTIME REGULATIONS

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

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

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

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

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

fessionals was amended to clarify that veteran status alone will not be sufficient, but that a combination of work and experience may allow the employee to qualify for the exemption, determined on a case-by-case basis.

CONCLUSION

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

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

STATEMENT OF ROSS E. EISENBREY, VICE PRESIDENT, ECONOMIC POLICY INSTITUTE

Senator SPECTER. Thank you very much, Mr. Fortney.

Our next witness is Mr. Ross Eisenbrey, vice president of the Economic Policy Institute, former Commissioner of U.S. Occupational Safety and Health Review Commission. An undergraduate degree from Middlebury, and a law degree from Michigan. Thank you for joining us, Mr. Eisenbrey, and the floor is yours.

Mr. EISENBREY. Thank you, Senator Specter and members of the committee. It is an honor to be here. Thank you for inviting me.

I have three things to say about this rule. The first is that the benefits that the Department claims for it are phony, that they have invented the number, that 1.3 million low-wage workers will benefit from this rule, and I will show you why that is so. The rule will increase litigation in a number of ways. I know that that has been a justification for the rule. It has been a particular concern of the chairman and there are just so many ways that this is going to increase litigation. Finally, the third point is that millions of workers I believe are going to lose overtime rights because of this rule. Let me start with the benefit calculations.

The Department of Labor admits in its economic analysis that it has inflated the estimate. Their data show that a minority of workers actually work overtime, and yet the Department assumes, for purpose of inflating the benefit estimate, that all of them, all 100 percent of the workers that are in the survey and that they identify worked overtime. So they have admitted that they have inflated this estimate.

More importantly perhaps, if you look at the estimate and their economic analysis and look at the kinds of workers that they have included, you can see that they have included workers who do not benefit. There is no way on this earth that they could benefit. They have said that cashiers, secretaries, typists, receptionists, bookkeepers, general office clerks, bank tellers, and data entry keyers are the kinds of employees, even though they are paid less than $23,660 a year, who are exempt executives under current law or exempt administrative employees. I submit that there is no circumstance under which a cashier is exempt under current law and this is just phony.

We have looked at these rules ourselves, at their economic estimate and the effects on low-wage workers. Our estimate is that it is closer to 240,000 or 250,000 workers who might benefit from this rule, a far cry from the 1.3 million they claim.

My second point is that this is going to increase litigation. A prime example is the professional exemption where going from a rule that is a bright line test that you have to have a specialized degree and then the interpretive guidelines that the administrator said courts are free to ignore say that in the rare case, an employee who does not have a degree could be a professional, they have now made that the rule and with language that says if they have substantially the same knowledge and do substantially the same work as a degreed professional employee. What in the world does that mean and is that not going to be the cause of endless litigation?

They have dumbed down the requirement for what it means to be a manager. You no longer have to manage a department or a subdivision. The preamble cites approvingly a district court case from Illinois that says you can be the manager of a team or a grouping and be an exempt executive. That is going to cause endless litigation.

This whole notion of doing away with the 20 percent limit on nonexempt work and saying working foremen now have concurrent duties and can be treated as exempt executives will cause needless litigation.

Then they create this notion of—they say they are clarifying the rule—that blue collar employees are nonexempt and entitled to overtime, but then they qualify it. They say non-management blue collar workers and non-management production line employees. Well, what is a management production line employee? Can you imagine the litigation over this issue?

Finally, I would say that the net result of all this is absurdity, that instead of changing these rules to do away with the notion that a Burger King assistant manager is an exempt executive, even though he spends 90 percent of his time frying fries and flipping burgers, they have made that the basis of their test and that will be the law from here forward if the Harkin amendment is not enacted.

Finally, millions of workers will lose their right to overtime pay. Some are inarguable, the highly compensated that they admit. Funeral directors and embalmers, except in the Sixth and Seventh Circuit, have always been held to be nonexempt. They are not professional employees. Nursery school teachers, chefs and cooks. They have created two new exemptions for chefs and cooks. Then there are others that are less obvious. All of these professional employees who in the proposed rule they admitted were losing their right to overtime—they admitted 350,000 of them who were being paid overtime now would lose their right to overtime. They just wave a wand and they have disappeared from the economic analysis, but they are still there.

PREPARED STATEMENT

The team leaders that you have identified.

Computer employees. Nothing has been mentioned about the changes there. They have removed language that protects computer employees as professionals.

So overall you have I think clearly millions of workers who will lose under this rule.

Thank you.

[The statement follows:]

PREPARED STATEMENT OF ROSS E. EISENBREY

INTRODUCTION

The U.S. Department of Labor has issued a final rule that changes the legal exemptions from the right to overtime pay for executives, professionals and administrative employees. Many in Congress, the press, and the public have asked EPI to estimate how many employees will lose overtime pay or the right to receive it as a result of this new rule. However, such an estimate will take time and it is too soon to give a complete answer to that question. The rule and its explanatory text and regulatory analysis are more than 500 pages long and differ in unexpected ways from the proposed rule the DOL issued last year. The final rule and its preamble are also rife with ambiguity. Many regulatory provisions have been changed without real explanation, even while the Department claims—contrary to the plain language of the rule—that it is not changing the law.

All in all, the rule means longer hours and less pay for millions of workers—and more litigation for our entire economy. A number of things about the rule are immediately clear:

First, the Department has created new exemptions that jeopardize the overtime rights of millions of employees who earn between $23,660 and $100,000 a year. The overtime rights of the nation's 367,000 nursery school and pre-school teachers are weakened. Low-level working supervisors all throughout American industry will be reclassified as "executives" and will lose overtime rights; just as fast food assistant managers already have in some jurisdictions, even though they spend 90 percent or more of their time doing routine, production-line work such as flipping burgers and taking customer orders.

Despite its claims to the contrary, the new rule's treatment of cooks, chefs, and sous chefs, for example, of whom 2.4 million are employed in the United States, will cause hundreds of thousands to lose their right to overtime pay. Funeral directors and embalmers will be treated as exempt learned professional employees by the Labor Department for the first time, and large numbers of employees in the financial services industry will be adversely affected by a new blanket exemption.

Second, the rule will lead to an explosion of litigation because the Department chose to adopt new definitions that are unclear and new tests for exemption that require a case-by-case analysis that will be almost impossible for Wage and Hour's enforcement staff. Most notably, the new rule encourages employers to treat non-degreed employees as professionals, as long as they have "substantially similar" knowledge and do substantially similar work. The best possible objective criterion is missing: there is no requirement that they receive substantially similar pay. How will the Department know whether a non-degreed sous chef has substantially the same knowledge as a college grad? By making him prepare a soufflé, or taste-testing his Caesar salad? The rule also reduces the requirement that an exempt executive manage "the enterprise in which he is employed or of a customarily recognized department or subdivision thereof," to a new and embarrassing level of absurdity. Rather than the enterprise or a department or subdivision, it will be enough to be in charge of a "grouping or team." Unhelpfully, the Department suggests that a "case-by-case analysis is required"—a guaranteed recipe for litigation. Department stores will argue that an employee "in charge of" the perfume counter is an exempt executive because she has the "authority" to suggest shift assignments for two other employees.

Third, contrary to the Bush Administration's claims, it is not the case that 1.3 million low-wage workers who are not getting overtime pay now will. The Administration is engaged in consumer fraud, selling this new regulation on the promise of benefits it knows full well will not materialize. Part of the problem is that the Department's estimate assumes that every employee among these 1.3 million low-wage workers actually worked overtime during the year, even though the evidence is that they did not, and even though only about one employee in seven generally works overtime. If the Department had made this same assumption with respect to the proposed rule, it would have found that almost 5 million employees would have lost overtime pay, rather than the 644,000 it claimed. Moreover, the number of employees who will be guaranteed coverage by the $23,660 threshold will diminish over time because it is not indexed for inflation. An administration that cared about low-wage workers would have raised the threshold to at least keep pace with inflation since 1975, in other words, to at least $28,075.

Fourth, by the Department's own estimates, more than 100,000 employees who earn $100,000 a year or more will lose their right to overtime pay. As inflation and

rising productivity increase the pay of American workers, the number of employees adversely affected by this new test will grow each year.

Fifth, a bizarre and poorly explained new exemption for "team leaders" creates the potential for hundreds of thousands of currently exempt non-supervisory workers to lose their overtime rights. The use of self-managed teams of non-managerial, non-supervisory, front-line employees is widespread in American industry, and millions of employees are routinely involved in them. The regulations provide no definition of "team leader," it has never been defined in FLSA case law, and the Department's assertion that it is clarifying current law is patently false.

Sixth, the Department's claims that it has clarified and expanded the overtime rights of police officers and other first responders are untrue. The ambiguities in the rule make their rights more uncertain than ever.

Seventh, despite the Department's claims in power point presentations to public officials that blue-collar workers are entitled to overtime, the rule limits overtime rights to "non-management blue-collar employees," begging the question of who gets classified as a management blue-collar worker, a seemingly new class of exempt workers that will grow significantly under these new rules.

Eighth, by reducing the penalties for employers who illegally dock the pay of salaried workers, the Department removes an important deterrent and makes it more likely that hourly employees will lose overtime pay.

ANALYSIS

1. Chefs and cooks

The treatment of cooks and chefs is a good example of the artful deception of the final rule and the magnitude of the rule's potential harm. Under current law, chefs, sous chefs, and other cooks can be found exempt and denied overtime pay only if they manage a kitchen, supervise, hire and fire other employees, and have executive duties as their primary duty. They are not, however, learned professionals, because cooking is not a learned profession (it is not "a field of science or learning" and does not involve "work that is primarily intellectual in nature"), and most chefs learn through on-the-job training and apprenticeship, not formal education at a college or school of culinary arts. Nevertheless, the final rule expands the exemption to treat "chefs and sous chefs" with a four-year degree as exempt learned professionals. In addition, the rule for the first time extends the exemption for creative professionals to chefs and sous chefs even though cooking has never been found by a court to meet the test of being "a recognized field of artistic or creative endeavor," as required by new 541.302(a) or the current law's test for artistic professionals—"a recognized field of artistic endeavor." 541.302(b).

The effect of these two new avenues of exemption for chefs and cooks will be a significant loss of overtime coverage. Now that the Department has created the "learned profession" of being a chef or cook[1] with a four-year culinary arts degree, 541.301(d) of the final rule permits employers to deny overtime pay to any of the hundreds of thousands of chefs or cooks who have "substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction." As the Department of Labor's Occupational Outlook Handbook points out, "many chefs are trained on the job," "others may receive formal training in independent cooking schools," and still others get two-year degrees or learn through apprenticeships sponsored by industry associations and trade unions. The new creative professional exemption legalizes the denial of overtime to non-degreed chefs who do not have executive duties, effectively catching any chef the other exemptions missed, since every chef creates unique new recipes—the criterion identified at a hearing before a House committee by Secretary Chao and Administrator McCutchen for distinguishing between a creative chef and a non-exempt chef or cook.

There are about 2.4 million cooks and chefs in the United States, about 60 percent of whom are fast food cooks, institution and cafeteria cooks, or short order cooks, and are unlikely to be exempted, whatever their skills might be. The other 850,000 chefs, head cooks, and restaurant cooks are fair game for the three exemptions, depending on their skills and creativity—and the creativity of their employers.

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[1] The American Heritage Dictionary defines chef as "A cook, especially the chief cook of a large kitchen staff." According to the Department of Labor's Occupational Outlook Handbook, "The terms chef and cook are often used interchangeably. . . ." "Chefs and cooks create recipes and prepare meals. . . ." "A sous chef, or sub chef, is the second-in command and runs the kitchen in the absence of the chef."

Nursery school teachers

According to the testimony of Karen Dulaney Smith, a management consultant on FLSA issues who for 12 years was a federal Wage Hour Division investigator, nursery school teachers who devoted most of their day to custodial care were always considered non-exempt employees, regardless of their educational attainment, because their work did not require the consistent exercise of discretion and independent judgment. A Wage Hour Division opinion letter written in 2000 is consistent with Ms. Smith's testimony that most pre-school teachers are non-exempt and entitled to overtime under current law.

"Based on the information provided, it is our opinion that while "childhood education settings" (for ages 0–5), commonly referred to as preschools may engage in some basic educational activities for the children attending, preschool employees whose primary duty is to protect and care for the needs of the children would not ordinarily meet the requirements for exemption as teachers."——2000 DOLWH Lexis 14 (September 20, 2000).

The final rule removes the discretion and judgment requirement from the current regulation's definition of a professional employee in current section 541.3(b) and places it in the definition of "work requiring advanced knowledge" at 541.301(b)—a provision that applies only to learned professionals. Thus, under the final rule, all nursery teachers will be exempt, and all of those who have been found to be entitled to overtime in the past will lose that entitlement.

Funeral directors and embalmers

With the exception of two federal judicial circuits, funeral directors and embalmers have never been held to be exempt learned professionals. As the Department admits in the preamble to the final rule, "In the past, the Department has taken the position that licensed funeral directors and embalmers are not exempt learned professionals." Moreover, for at least the past six years, Congress has considered legislation to exempt funeral directors and embalmers but has chosen not to do so. Nevertheless, the Department has chosen to create a new exemption requiring only four years of post-secondary education, including a year of mortuary science school (which includes courses in cosmetology, according to the court in *Rutlin* v. *Prime Succession, Inc.*). In most of the nation, the final rule takes away the overtime rights of funeral directors and embalmers, yet the Department's economic analysis does not account for any change in coverage.

Working foremen and working supervisors

The final rule turns current law on its head and eliminates the right to overtime pay for low-level supervisors who spend the vast majority of their time performing routine, manual, non-exempt production, as long as their most important duty is managerial. Relying on poorly reasoned cases interpreting the current regulations, most notably the Burger King cases from the First and Second Circuits, the final rule completely reverses those regulations, which set a limit of 20 percent on the amount of non-exempt work a supervisor can do and still be found an exempt executive.

Section 541.115(b) of current law provides:

"Clearly, the work of the same nature as that performed by the employee's subordinates must be counted as nonexempt work, and if the amount of such work performed is substantial the exemption does not apply."——("Substantial" as used in this section means more than 20 percent.)

Section 541.115(c) of current law applies the same rule to a supervisor whose work is different from his subordinates':

"Another type of working foreman or working supervisor who cannot be classed as a bona fide executive is one who spends a substantial amount of time in work which, although not performed by his subordinates, consists of ordinary production work or other routine, recurrent, repetitive tasks which are a regular part of his duties. Such an employee is in effect holding a dual job."

The current rule is simple common sense. An employee who spends 90 percent of his time frying French fries and flipping burgers is not a bona fide executive, even if he is simultaneously responsible for supervising the other two employees on his shift. An employee who works on a sewing machine six or seven hours a day is not a bona fide executive, even if he does supervise other employees.

Nevertheless, the final rule rejects common sense and adopts the position that an employee can spend 100 percent of his time performing ordinary, routine, repetitive, non-exempt production tasks and yet still be a bona fide executive by concurrently

or simultaneously performing "executive" duties such as supervision of two other employees. New section 541.106(b) provides:

"For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves, and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves."

The implications of this change in the law are far greater than the Department admits. While claiming to conform the regulations to current case law, in fact the Department is rejecting the better-reasoned cases and extending the worst case law beyond retail to the rest of American industry. Burger King and the other cases that have permitted employees to do unlimited amounts of menial work while still being held to be exempt executives are not the law in every judicial circuit, and they have not been extended outside of the fast food and retail industries. New section 541.106 applies the notion of concurrent duties to every industry, including construction, manufacturing, and other "blue collar" work. Employees who spend the vast majority of their time doing blue-collar, manual labor will now be subject to exemption as "bona fide executives" as long as the employer can establish that their most important duty is supervisory.

Because the Department treats this sweeping new rule as established law, its economic analysis does not account for any loss of overtime rights or pay. One can get a sense of how damaging this change will be, however, by examining the Department's estimate that 346,000 low-income "managers and administrators not elsewhere classified" and "supervisors and proprietors of sales occupations" will have their overtime rights restored by the new $23,660 salary test. In the Department's view, all of those low-income employees would otherwise qualify as "bona fide executives" or administrators, despite their abysmal pay.

Clarity and litigation

The new concurrent duties test in 541.106 is a good example of how the final rule increases confusion and makes increased litigation a certainty. The final rule abandons the bright line test that an employee who spends more than 80 percent of his time doing nonexempt work cannot be a bona fide executive and replaces it with language that forces the employer and employee to make a determination on a "case-by-case basis and based on the factors in section 541.700."

The learned professional exemption, which has required, except in rare instances, that any bona fide exempt professional must have a specialized academic degree (a clear, objective test), is expanded in the final rule to permit non-degreed employees to be exempted and denied overtime pay if they have "substantially the same knowledge and do substantially the same work" as the degreed professionals. This one provision will generate thousands of unnecessary cases and devour the resources of the Wage and Hour Division as it tries to weigh the knowledge of thousands of non-degreed employees working in dozens of different professional occupations. The Department failed to add any sensible objective measure of equivalence, such as a market test: is the non-degreed employee receiving substantially the same pay?

Even when the Department claims to be bringing clarity to difficult issues, it isn't. New 541.3 provides 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." Anyone doing any such work would seem to be exempt under the final rule, but the Department has thrown in a qualifier that destroys any illusion of clarity. Section 541.3 goes on to say that "non-management production-line employees and non-management employees in maintenance, construction and similar occupations . . . are not exempt under the regulations." This raises the question: What is a management blue-collar employee? What is a management production line worker? We have already seen the answer in 541.106: an employee can spend all day doing production work or construction work—manual, blue-collar work—and be exempt as a bona fide executive as long as he simultaneously supervises two other employees. Construction and utility crews all over America work without any manager higher than a working foreman to supervise them, a more senior employee charged with ensuring the safety and quality of the work, even as he works side-by-side with the other laborers. If his most important duty is managing the other employees, his employer will exempt him as a bona fide executive who concurrently does exempt and non-exempt work. As the preamble of the final rule makes clear, the Department now believes that an executive can be in charge of a unit no more substantial than "a grouping or a team."

Team leaders

There are many other examples of the Department changing the law to weaken overtime protection while simultaneously increasing the law's confusion and the likelihood of litigation. None is more glaring than the new exemption for "team leaders" in 541.203(c). Current law has no equivalent provision, and I have found no case that holds "team leaders" to be exempt even if they have no supervisory duties. The term "team leader" is widely used in American industry, and usually describes a non-management employee responsible for calling meetings and directing a group of front-line employees who have been given an important task of a kind that historically was reserved to management, such as improving efficiency and productivity, improving customer service, researching and implementing IT improvements, identifying safety problems and recommending solutions, or improving employee morale. According to an expert in the field, Professor Thomas Kochan of the MIT Sloan School of Management, there are somewhere between 750,000 and 2.3 million currently non-exempt team leaders who could lose their right to overtime because of this new exemption. It appears that the management of a team would transform a manual laborer or other blue-collar employee into a "management blue-collar employee," leading to exemption and loss of overtime pay.

The Department has opened an enormous loophole, but does almost nothing to explain it in the preamble of the final rule. Administrator McCutchen has suggested that current section 541.205(c) also allows the exemption of team leaders, but that language bears no resemblance to new 541.203(c):

"Employees whose work is 'directly related' to management policies or to general business operations include those whose work affects policy or whose responsibility it is to carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree."

New 541.203(c) has created a significant new exemption and a significant new source of confusion and litigation.

Police officers

New section 541.3 seems to deny the application of the exemptions to most law enforcement personnel, and the preamble specifically addresses the case of police sergeants, normally the lowest level of front-line supervision on a police force. The treatment of sergeants is instructive. The preamble explains that sergeants are entitled to overtime "because their primary duty is not management or directly related to management or general business operations; neither do they work in a field of science or learning where a specialized academic degree is a standard prerequisite for employment." This raises the question, what if a sergeant had so much management responsibility that it did constitute his primary duty? When asked in a public forum whether a sergeant is exempt regardless of his duties, just by virtue of his rank, Solicitor of Labor Howard Radzeley refused to respond. This is not surprising, since the Fair Labor Standards Act does not permit the DOL to exempt employees by title or rank: their duties must be examined to determine whether they are executive, administrative, or professional. Nor does the statute justify treating one kind of manager differently from another based on whether one is a first responder. Congress could change the statute to accomplish such distinctions, but it has not.

The bottom line is that the rights of police officers are still at risk. The final rule makes it easier to find that an employee's primary duty is an exempt duty, because it allows employees to spend unlimited amounts of their time doing non-exempt work (work such as investigating crime scenes, making arrests, etc.) and yet still be found exempt. Police officers could also be exempt if they are deemed "team leaders," whose primary duty is presumed by the final rule to be administrative.

Low-income workers

There is no basis in fact for the Department's estimate that 1.3 million low-income workers will receive overtime pay that they are not receiving now. There are only 1.2 million salaried white collar employees who work overtime and make less than $23,660 a year. Using the Department's own estimates of the likelihood of exemption for such low-paid employees, fewer than one-fifth—about 250,000—are likely to be exempt. As the Department admits, the lower paid an employee is, the less likely it is that she is exempt as a bona fide executive, professional or administrator. The Department actually admits that it has fabricated its estimate. Even though the BLS Current Population Survey data show that a minority of the employees the Department considers likely to be exempt actually reported working any overtime, the Department assumed for the purpose of its estimate that 100 percent of them did.

STATEMENT OF DR. RONALD BIRD, Ph.D., CHIEF ECONOMIST, EMPLOYMENT POLICY FOUNDATION

Senator SPECTER. Thank you, Mr. Eisenbrey.

Our next witness is Dr. Ronald Bird, Chief Economist at the Employment Policy Foundation. He had been chief economist at Dynacorp, holds a Ph.D. in economics from the University of North Carolina at Chapel Hill. Thank you for joining us, Dr. Bird, and the floor is yours.

Dr. BIRD. Thank you, Mr. Chairman and members of the subcommittee.

My name is Ronald Bird. I am an economist. Unlike the other members of the panel, I am not a lawyer, and I have spent much of the past 30 years studying the conditions and trends affecting the American workplace.

I think lost in the debate over the Labor Department's proposed revision of the rules concerning who is exempt and who is nonexempt under the Fair Labor Standards Act is the reason why amending the regulations is necessary in the first place. I think before considering the impact of any particular change or any particular change in wording, 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 under both Democratic and Republican administrations.

The FLSA was enacted in 1938 when America was still in the midst of the Great Depression. Nearly 1 in 5 Americans who wanted a job could not find one. Labor supply exceeded demand, and the bargaining position of the typical worker was weak. The Fair Labor Standards Act was envisioned in part as a way to redress the perceived imbalance between employers and employees in free market bargaining about wages, hours, and working conditions.

Today the fundamental competitive conditions of the labor market are very different. In March 2004, the unemployment rate was 5.7 percent, dramatically lower than the 19.1 percent in 1938. The peak unemployment rate following the 2001 recession was the lowest of any recession of the past 30 years and the second lowest in 50 years. An ironic indicator of the sweep of change in labor market conditions since the passage of the Fair Labor Standards Act in 1938 is the fact that most of us consider today's 5.7 percent unemployment rate to be too high, primarily because recently we have enjoyed the benefits of it being even lower.

As an employee, I like low unemployment rates that have become the norm over the past 20 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. 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, power to make demands about wages, hours, and working conditions that my grandfather in 1938 would have never dared make.

Before World War II, nearly 1 in 3 workers were employed in manufacturing. In contrast, today less than 1 in 7 works in manufacturing. Industries that have experienced relative job growth

have been characterized by workplace organizations in which job duties are just not as narrowly defined as they used to be.

Managerial and professional jobs, ones with a high probability of being exempt, given the right duties being satisfied, have increased more than any other category. In 1940, only about 1 in 6 workers were employed in managerial and professional occupations. Today nearly 1 in 3, 30 percent, are in such jobs.

I think it is also 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 contracting 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 reported hours, and I was paid an overtime premium when I worked over 40 hours. Needless to say, I wanted to work over 40 hours a lot more than I had the opportunity to do so.

The point is that I was an hourly worker and technically nonexempt because of the pay status, but my employer could have converted me based on my duties to salary and exempt status at any time. That did not happen because it was in both of our interests to keep things on an hourly basis. And if he had done so against my wishes, I would have quit because there were six other people willing to hire me.

PREPARED STATEMENT

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. Today's employers are more concerned about the high cost of turnover, the high cost of recruiting and hiring and training new workers, averaging over $17,000 per worker for the kind of workers we are talking about, than shaving a few cents off the payroll through compulsory reclassification.

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

Thank you, sir.

[The statement follows:]

PREPARED STATEMENT OF DR. RONALD BIRD

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

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

The Employment Policy Foundation is a non-profit, non-partisan educational and research institution. EPF supports research to develop facts—hard data—that are

relevant to the assessment of workplace conditions and policies. I am here today to share with you some of the facts that I have been able to find that may be relevant to your inquiries about the need for revision of FLSA rules revisions and the impact of revisions.

WHY REFORM OF THE EXEMPT-NON EXEMPT RULES ARE NEEDED

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

THE WORKPLACE HAS CHANGED DRAMATICALLY

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

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

LABOR DEMAND AND SUPPLY

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

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

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

INDUSTRIAL STRUCTURE

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

Even in manufacturing, technological and organizational advances that have raised productivity have also blurred the definitional lines of many job responsibilities, qualifications and duties. The result of these changes in industrial structure

and workplace organization has been to complicate significantly and increase the number of FLSA coverage/exemption status determination decisions that employers must make each year.

OCCUPATIONAL STRUCTURE

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 post-secondary (college-level) education. Over 38 percent of workers now have a college-level degree. Only 11.9 percent have less than a high school diploma. Between 1998 and 2001, the number of jobs held by college graduates has increased 5.8 million while employment of persons with no more than a high school diploma has declined by 1.7 million. (See Figure 4.)

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

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

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

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

WORKPLACE DYNAMICS

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

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

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

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

ACCELERATING WORKPLACE CHANGE AND INCREASED REGULATORY BURDEN

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

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

STATUS AND CHOICE

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

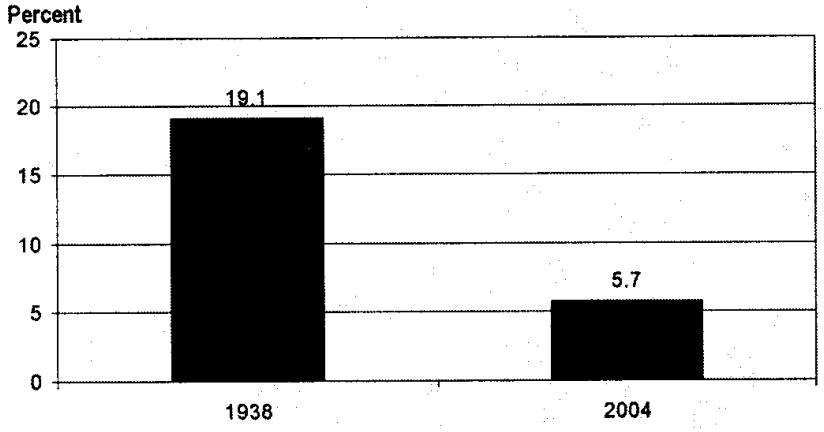
The point is that I was an hourly worker, and technically non-exempt because of the pay status, but my employer could have converted me to salary and exempt status based on duties. That did not happen because it was in both of our interests to keep things on the hourly basis. For me it meant occasional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

CONCLUSION

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

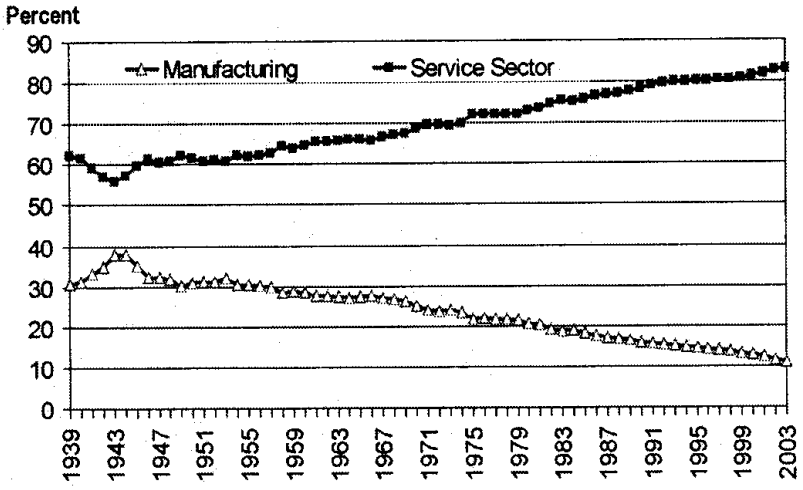
The new rule will ensure that everyone who earns less than $455 is classified as nonexempt. They would be guaranteed the protections of the FLSA, including having a basic hourly wage rate defined, having their working hours tracked and recorded, and being paid a fifty percent hourly wage rate premium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

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



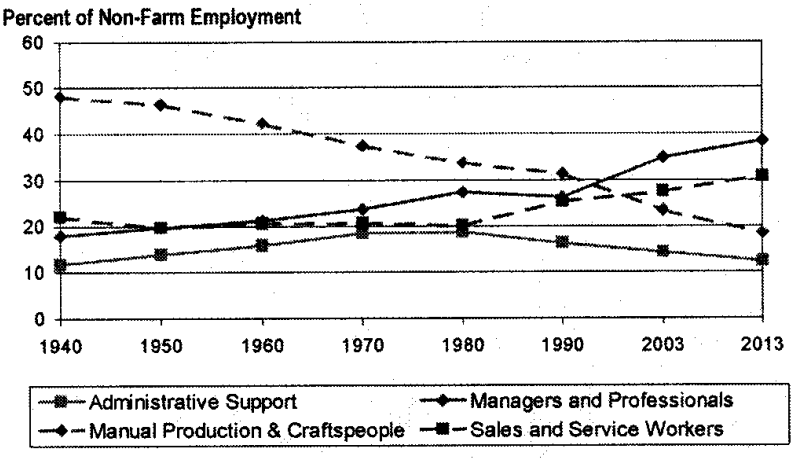
Source: Employment Policy Foundation analysis based on Bureau of Economic Analysis, National Income and Product Tables 6.6A-6.6D data.

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



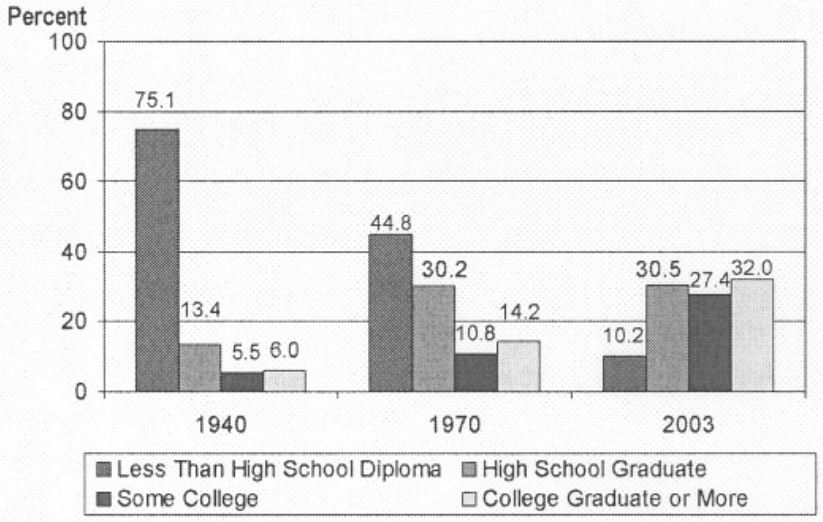
Source: Employment Policy Foundation tabulation of Bureau of Labor Statistics Current Employment Statistics data.

Figure 3
Employment by Occupation
1940 to 2003 and Forecast 2013



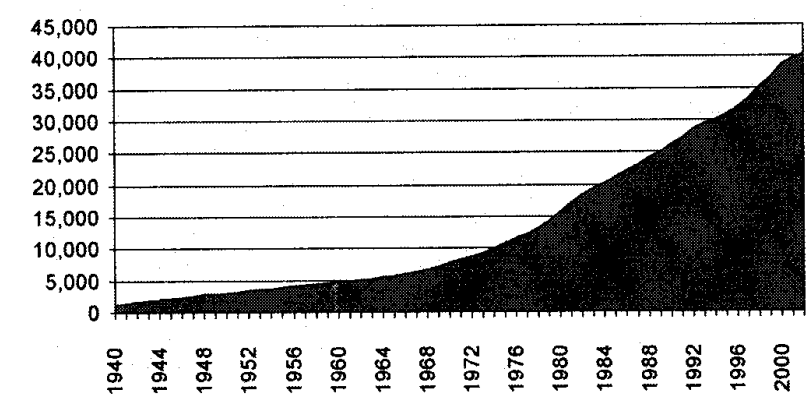
Source: Employment Policy Foundation tabulations of Decennial Census data and March Current Population Survey data. 2013 forecast is EPF projection based on linear trend model 1980-2003.

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



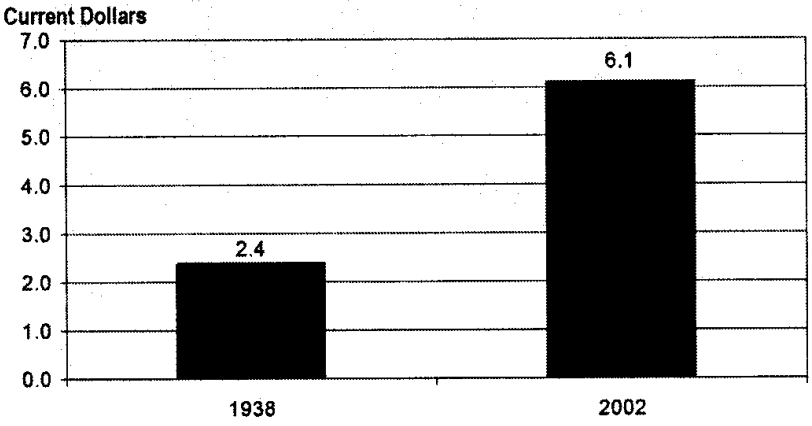
Source: Employment Policy Foundation tabulations of data from the U.S. Census Bureau and March Current Population Survey.

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



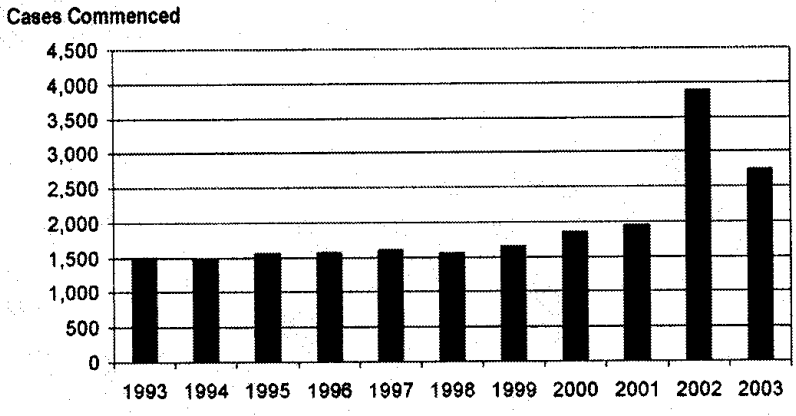
Source: Bureau of Economic Analysis, National Income and Product Tables6.6A-6.6D. Note that amounts reflect earnings of all workers, regardless of annual work experience category, normalized to full-time equivalent terms.

Figure 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.

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.

Senator SPECTER. We will now proceed with 5-minute rounds. We really have to conclude the hearing in advance of 11 o'clock.

Dr. Bird, is the thrust of your testimony that the improved status of the workers, as a matter of the marketplace, makes it a situation where it does not matter a whole lot what the technicalities are of the regulation in effect?

Dr. BIRD. Well, certainly we need the Fair Labor Standards Act and we need it to be able to protect the people it was designed to protect.

Senator SPECTER. I agree with you about that, but as I listened to your testimony—and I found it very illuminating—the comparison you make with 1938 is that the employee is in a lot better position.

Dr. BIRD. Yes.

Senator SPECTER. So it might not make a whole lot of difference what the definitions are if the employee can walk away from the job and find a new one if he is not being treated fairly. Maybe we are making a too much of a fuss about the semicolons. I am just trying to get the thrust of your testimony.

Dr. BIRD. Right, yes, sir. I appreciate that question because it really does illustrate I think the problem that we have encountered in the discussion about the old rule versus the final new rule. We see in that discussion a lot of jumping to conclusions I think.

Senator SPECTER. We are experts at that, Dr. Bird.

Dr. BIRD. I guess that is why we have got three lawyers and one economist on the panel.

Senator SPECTER. That is the second time you have made that observation.

Dr. BIRD. First of all, people are jumping to conclusions.

Senator CRAIG. As a non-lawyer, it is a good point, Mr. Chairman.

Senator SPECTER. But you are not an economist, Senator Craig.

Senator CRAIG. That does not make any difference.

Senator SPECTER. Let me move over to Mr. Fortney for just a minute. Just a thought when you talked about a job for your grandfather in 1938. My father would have loved to have any job regardless of what the regs had to say.

Mr. FORTNEY. And my grandfather knew he was lucky to have one.

Senator SPECTER. That is when he went to Lyons, Kansas to open up a junkyard with his bare knuckles.

Mr. Fortney, what about Mr. Eisenbrey's testimony that there is a vast overstatement, a vast inflation in the number of workers who will work overtime?

Mr. FORTNEY. Senator Specter, I am not sure I am the best witness to comment on the numbers, the economic impact of these regulations.

Senator SPECTER. You are the best one available, Mr. Fortney.

Mr. FORTNEY. Well, I can tell you that with respect to whether the classifications have changed—I listened to Mr. Eisenbrey's comments—those are examples that he listed there. They are not changes. They are examples. They are codifications of what otherwise today an employer or an employee has to pay a lawyer to go out and dredge through the cases and provide those examples. That is not new. It is there. They are listed specifically as examples. We are not, if you will, exempting or carving out specific occupations or classifications. They are listed as examples not by title, but describing job duties. I mean, if the law is not changing, the numbers should not change materially. So I would disagree I guess on that level with his comments.

Senator SPECTER. Well, you raise a good point and Ms. McCutchen raised a good point when she said that regs do make a selection of the cases and give the parties some detailed information as to which cases are to be followed. Implicitly in that, cases were rejected if they are not included.

I would like to ask both Mr. Becker and Mr. Eisenbrey whether that is not a significant improvement, to have the case law readily at hand so that people who are trying to figure out what these words mean—and as I noted before, they are very similar under the current reg or under the final proposed reg. But is it not true that incorporation of the case law into the regulations is a substantial help, Mr. Eisenbrey?

Mr. EISENBREY. I am not persuaded that it is a substantial help, but I think it is important to realize that the Department chose the cases to put in here very selectively. For example, they chose a case from several years ago on insurance claims adjustors that went against the employees. They did not include a case from February that they could have from the State of Oregon where it held that insurance claims adjustors were entitled to overtime.

Senator SPECTER. So they made a selective basis which you think undermines their credibility.

Mr. Becker, in the opening class with Professor Kessler in contracts, he had a Wisconsin case at Yale and a Minnesota case. They were about the sale of a cow, as I recollect. Maybe you can refresh my recollection. You have been there more recently. So it is hard to figure out from the case law what was what. That is how they confuse law students, Senator Craig.

Senator CRAIG. That is why I did not become one.

Senator SPECTER. How about it, Mr. Becker? Is this case law too selective to be valid or does it give some fair indication to the prospective parties as to what the law is?

Mr. BECKER. I think to say that what has happened here is a codification of case law which was well established under the old regulations is misleading, and let me give you two examples.

Take, for example, chefs. Now, chefs we may think are important or unimportant as a group of employees, but what is important is the principle. The cases cited by the Department relate to chefs who are actually executives, that is, chefs who are not exempt as professionals, but chefs who are exempt because they have the requisite managerial authority. The exemption of chefs is not unusual simply because for the first time it explicitly exempts this classification and tempts employers to say anybody called a chef is exempt, but it also alters the nature of the professional exemption in an important way.

The professional exemption has always said it applies to people in a profession, the vast majority of whom acquire their professional knowledge through a prolonged course of study, lawyers, doctors, et cetera. The difference here is they say even though it is the minority of chefs who have a prolonged course of study, those who do are now exempt. So it is not simply that the case law does not support what they are doing in that area, but they are also changing the nature of the exemption.

Take areas where they have not codified the case law, and I cite case law concerning nurses. They repeatedly say we are expressly saying that registered nurses are exempt under these regulations, but that is misleading because they are expressly saying that under the duties test and registered nurses have been held in case after case not to be exempt under the salary basis test. Do they codify that case law? No. In fact, they expressly change that case law. So it is misleading to think that what is happening here is the codification of the consensus view in the courts.

Senator SPECTER. Senator Harkin.

Senator HARKIN. Thank you, Mr. Chairman. I think the more we get into it, the more I am convinced that this should have gone through the normal legislative process with hearings and taken some time to figure all this out rather than the slam-dunk type of process that the Department used in issuing these rules last year, getting comments, and then coming back again with the final rule without really having a legislative hand in it from those of us who represent our constituents, both employees and employers. Again, it is just the wrong way to make these kinds of changes.

Just a couple of things. Dr. Bird, an economist, in 1975 the threshold level was around I think $8,060, if I am not mistaken.

Dr. BIRD. Yes.

Senator HARKIN. You mentioned in your testimony about the effects of inflation and what has happened on inflation. It is time to change these things because of inflation. Well, if you were to factor in inflation for the threshold test, the threshold would be $28,075 rather than $23,660. Do you know why the Department picked $23,660 instead of $28,075?

Dr. BIRD. I am not aware of why a particular number was picked. Certainly the fact is, though, the number that is in the final rule is significantly higher than what was in the old rule and therefore extends protection to a large number of people.

Senator HARKIN. I am not disputing that, but you rely on inflation. I am just saying, well, I am just taking your inflation figures and it really ought to be $28,075. I can find no justification anywhere why it is $23,660. There is a justification for $28,075 because that would factor in inflation from the last time it was changed in 1975.

Dr. BIRD. I think too I would need to look at whether you are inflating the $155 number per week or the $250 per week, the long test threshold or the short test threshold. The new number $455 per week is equivalent to the concept of the long test threshold under the old rule because there are added duties that have some parallel to the long test for people who make between $455 and $100,000 per year.

Senator HARKIN. Mr. Eisenbrey, you mentioned that in your testimony, the $28,075. That is where I got the figure.

Mr. EISENBREY. Yes. I can help you with that. $28,075 would be the lower figure, $155 increased for inflation. If you took the $250 figure for the short test that Mr. Bird referred to, it would be up around $44,000 a year. That would be significant protection for workers.

Dr. BIRD. And if I may interject, though, in setting the equivalent of the short test threshold, instead of merely setting it at $44,000, the Department has set that now at $100,000, much higher over inflation.

Mr. EISENBREY. It is a vastly different test. The highly compensated test admittedly does not apply the same duties test. It allows an employee who customarily and regularly, which means perhaps once a week does one of these executive duties, to be considered exempt. So it is very different from the old test.

Senator HARKIN. Mr. Fortney, you talked about employers not knowing how to operate here and all of these class action lawsuits and stuff. I will ask you again, as I asked Ms. McCutchen, if an employer has any question about whether or not an employee is exempt or not, they can, can they not, get an advisory opinion from the Department of Labor?

Mr. FORTNEY. That is an excellent question, and the answer is in theory yes. In the real world, that process typically takes years.

Senator HARKIN. How many?

Mr. FORTNEY. Years. How many years? 2 years, 3 years, sometimes more. There are a significant number of requests that the Department——

Senator HARKIN. Maybe that is what we ought to fix.

Mr. FORTNEY. Well, maybe so, but that is something that I personally have had clients that have been through significant efforts

to try because this is the next step. If the lawyer cannot give you a clear answer, let us go to the Department and see if we can get a clear answer. That is a process that in fact does not work well.

Senator HARKIN. I would just interrupt. My time is running out. It has been my information that many of the employers who are caught up in some of these suits have never sought an advisory opinion from the Department of Labor as to whether they should pay overtime or not.

Mr. FORTNEY. They may or may not. I will give the current administration credit. At least they have, as part of their compliance assistance focus, made that option much more widely known and available. It is still somewhat slow.

Can I follow up with a point that you raised earlier with respect to nurses? Would that be helpful or not?

Senator HARKIN. Fine. Yes, please, go ahead.

Mr. FORTNEY. Two things. I think there is some confusion. The nurse issue has not changed. The duties test is the same. And I do not think there is any disagreement on the panel. The salary requirements are the same, and that is that what this reg does, which codifies the wide range of methods that can be used to pay a salary, including paying people—this is not self-evident—in hourly components is permissible. The Department, in one these rare opinion letters, has issued opinion letters within the last couple of years clarifying this. And so I think that there has been a lot of confusion with respect to registered nurses who in theory can be exempt but in the marketplace, because of market factors, often are compensated in such a way that they are not treated as exempt.

Senator HARKIN. Well, I think if you look at the case of *Elwell* v. *University Hospitals Home Care Services*, a Sixth Circuit case in 2002, I think it is illustrative of what we are talking about here where a court held that Nurse Elwell was eligible for overtime on the grounds that even though she was otherwise a learned professional, she was not paid on a salary basis. Well, the new rule is going to be a punch in the gut to our registered nurses of this country, like Nurse Elwell. Under these new rules, a registered nurse who earns $25 an hour, works 50 hours a week, will lose $6,500 a year under these new rules. That is a registered nurse.

Mr. FORTNEY. With all due respect, I think I would reach a different conclusion on that point.

Senator HARKIN. Well, the new rule also allows employers to pay registered nurses at straight time over 40 hours rather than time-and-a-half, does it not? The new rule.

Mr. FORTNEY. For an exempt registered nurse, that is correct. You could put on additional payments beyond the base salary. Whether you call them straight time, holiday time, there are a variety of additional payments that can be made. That is correct.

Senator HARKIN. And then another loophole. What about a head nurse paid hourly who is a team leader? Another loophole.

Mr. FORTNEY. Well, "loophole" of course is a word designed to characterize it. I do not think it is a loophole.

The team leader area illustrates an area of confusion which is the term "team leader" as used on the shop floor is not what is codified in these regs. There are a lot of people who are referred to as team leaders in the workplace. These regs are very specific

about the subset of team leaders who are covered and possibly could be exempt under the administrative exemption as a team leader as the administrator discussed and it focuses on the major project responsibilities.

Senator HARKIN. My time is up. A team leader is not defined in the regulations. It is not defined.

Senator SPECTER. Thank you, Senator Harkin.

Senator Craig.

Senator CRAIG. Thank you, Mr. Chairman. Well, I am neither an attorney nor an economist, and it is an area of the law that I frankly know very little about, gentlemen. So let me ask some fairly basic questions.

I say that because I think the Fair Labor Standards Act's frustration today is that it is becoming a place to go litigate almost on a constant basis and the threat of litigation is a phenomenal tool to be used in the marketplace. Most people like to avoid it. It is expensive. Therefore, it is a leverage or a tool oftentimes used where it serves a variety of purposes.

I guess, Mr. Becker, I would ask you, is it your opinion that the rule as proposed brings greater certainty, less ambiguity, and therefore less potential for lawsuits?

Mr. BECKER. No. I do not think that is the case. I just return to my initial example. We obviously commend the Department for raising the salary levels, which has not been done since the 1970's and we all concede is long overdue. But the old rule attached a very clear standard to those who are most in doubt, that is, those at the lower end of the salary threshold. And that rule was that if you perform more than 20 percent of nonexempt duties, that is, a clear bright line rule, you are nonexempt. So that is ordinarily clear.

Senator CRAIG. Do you feel that will have to get litigated?

Mr. BECKER. I am saying the abolition of that clear percentage rule is going to cause more litigation. Take the outside sales area. Now it is a subjective question. What is the primary duty? And that is defined basically as what is the "most important" duty. How do we know what is the most important duty, and are we not going to tempt employers to say I think this is the most important duty as opposed to saying, does this person spend more than 20 percent of their time in the office not performing outside sales? That is obvious. That is clear.

Senator CRAIG. Thank you.

Mr. Fortney, same question.

Mr. FORTNEY. I think that the proposed regulations, in fact, do add clarity. This primary duty point——

Senator CRAIG. Can I follow the logic of clarity, meaning less risk of lawsuit?

Mr. FORTNEY. Well, let us start with——

Senator CRAIG. Or are we just a litigious society today where no matter how we write the rules, somebody is going to try to use them——

Mr. FORTNEY. I hope the answer is no. So I think that clarity will ultimately produce less litigation, but let us talk about the steps that you get there.

If you are running a small- or medium-sized business, the fundamental question is how do I properly pay people. I would suggest to anyone if they would go look at the current regulations now, it is not terribly helpful.

Now, are the final regulations that have come out perfect in that regard? No. I am not suggesting that. I do not think anyone is. But they are significantly better than what we have, and the listing of examples and explanation of duties, the types of duties, make it so that I think it is realistic that we can expect a small- or medium-sized employer or an employee—because it is just as important that they know what the rules are——

Senator CRAIG. I would hope so.

Mr. FORTNEY [continuing]. Can read that and get a sense, okay, here is how I am to be treated under this law. I should get overtime; I should not get overtime.

I think it is a significant step forward, and I think then if we get people classified properly, that then will resolve the litigation and the threat of litigation that often results in the current environment. So I do think it will improve and I think that would be the steps whereby it would occur.

Senator SPECTER. Mr. Eisenbrey, I recall you saying you thought this would bring more litigation, would not bring less. There is greater ambiguity. Did I hear you correctly?

Mr. EISENBREY. You did and let me just give you two examples. This team leader provision—the Department says we are not changing the law. This is the same as the major assignment language. If it were the same, why not keep the major assignment language? They have changed the law. They have changed the law. They have changed that language. It will be subject to litigation just because it is changed. But they have not defined team leader. They have put in this language about it being a major assignment, but they give an example of productivity teams which are widespread all throughout American industry. Every team leader on one of those productivity teams now is going to subject to exemption and that will be litigated.

The chairman had a good example——

Senator CRAIG. Let me move to Dr. Bird before my time is up on the same question, Dr. Bird.

Dr. BIRD. Yes, sir. I think when you look at that question, there are really two pieces to the litigation issue. One is what will happen to litigation next year or the next 2 years, and what will happen to litigation on average over the much longer time. Even with a clearer rule, a rule that rolls into the surface that is obvious to everybody, all of the footnotes and decisions from the past so that everything is up front, certainly in the initial phase, you may well have a lot of issues to settle and there may be a——

Senator CRAIG. A testing for clarification as much as anything.

Dr. BIRD. Testing it, but then I think that it is reasonable to expect the new rule will lower the rate of litigation in the longer run. When you look at litigation costs, there are two aspects, not only the number of suits filed, but also the intensity of resource use in prosecuting a suit. I think that even where the number of suits filed might not go down, the cost of defending and prosecuting a

case may be less because the applicable rules are clearer and more on the surface.

Third, I think you also have to look at a related compliance cost issue which is the administrative burden. That is the cost of making the day-to-day declassification decisions and hoping that you make it accurately enough and well enough to avoid getting sued, to avoid making a mistake.

I think this rule is clearer. When you listen to what Ms. McCutchen said about how they rolled all of the footnotes and the residual from 50 years of case law into the rule, you have got an essentially clearer item that should lower both the administrative costs and the direct litigation costs.

Senator CRAIG. Thank you, Mr. Bird. Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Craig.

Senator Murray.

Senator MURRAY. Thank you, Mr. Chairman. I appreciate the opportunity to make a statement at this hearing. I ask unanimous consent that my full statement be in the record.

Senator SPECTER. Without objection, it will be.

[The statement follows:]

PREPARED STATEMENT OF SENATOR PATTY MURRAY

Mr. Chairman, thank you for calling this hearing to examine the Department of Labor's ongoing efforts to deny overtime protections to American workers.

I've been concerned about the Administration's plans for a long time.

I was hoping that this final rule would ease the concerns of working families, but instead it has made them worse.

There is a lot we still need to explore in this 400-page rule, but from what I've seen so far, it is bad news for working families.

This rule opens the door for workers to lose their overtime protections. Specifically, it cuts the rights and incomes of hundreds of thousands of pre-school school teachers, veterans, nurses, and law enforcement personnel. Let me share a few examples.

As a former pre-school teacher, I know that many pre-school and nursery school teachers work more than 40 hours a week and deserve overtime pay.

Today, they are protected. Under this final rule, up to 360,000 pre-school and nursery school teachers will lose their overtime pay.

This rule is also bad news for veterans. Some people claim that the Administration made changes to protect veterans, but here's the bottom line:

—Veterans who acquire training outside of the military could still be denied their overtime pay.

—Our veterans deserve better.

This rule will also hurt many nurses. It will make it easier for employers to reclassify RN's as salaried professionals—making them ineligible for overtime protections.

Finally, this rule is a slap in the face to law enforcement officers. For example, this rule does not protect sergeants from losing their overtime protections.

Overall, the Labor Department's final rule will make things worse for many hardworking Americans.

We should be strengthening the rights and opportunities of working Americans, but this rule undermines them.

Today, long-term unemployment is at an all-time high, and families continue to struggle in this tough economy. I don't see how this Administration can continue to cut the pay of hardworking Americans who rely on overtime to make ends meet.

I'm left to ask—Haven't working families been punished enough by this President's economic policies?

Let me just add that this rule doesn't even do what the Administration said it wanted to do—to clarify and simplify existing protections. This 400-page rule will undoubtedly lead to new rounds of litigation as both sides seek clarifications.

I look forward to the testimony of our witnesses, and I hope we will have time to discuss the many problems with this rule in greater detail during our question and answer period.

Senator MURRAY. I know I just have a couple minutes, because members need to leave for a vote. But I just have to say if the purpose of this hearing was to clarify and simplify the existing rules, just listening to the last 45 minutes of this hearing, I am not certain that that objective was achieved. But I know I just have a couple of minutes, so just let me ask a few questions.

I am really concerned that workers with a little more than a high school diploma or little or no on-the-job discretionary authority or responsibility may be really impacted by this proposal. Under this new rule, those workers can be reclassified as executive or administrative employees who no longer would be able to claim extra pay for hours worked above 40 hours a week. I am really concerned about the lessening of this education requirement.

Mr. Becker, let me start with you. What do you see as the direct result of weakening the education requirement for determining overtime?

Mr. BECKER. Well, let me answer in two ways. And we share your concern about those at the bottom end of the spectrum. I think you see them affected importantly in two ways.

One is that the type of employees who now are expressly classified as professional are a wholly new type; that is, funeral directors, athletic trainers, chefs. They are not in what any of us, I think, would considered learned professions, that is, professions where the norm, the vast majority of people have a prolonged course of study. Doctors, lawyers, are the classic examples. Athletic trainers I just do not think any of us would consider to fall into that classification.

Senator MURRAY. Preschool teachers would fall into that?

Mr. BECKER. Excuse me?

Senator MURRAY. Preschool teachers perhaps would fall into that?

Mr. BECKER. So that is one area where a—because a minority of people now have some kind of training or education, they are classified as professional even though the majority in their field do not.

The other area where you have people with very little education who are classified exempt is obviously in this low level manager and supervisor working foremen category where case law under the old rule, even under the old long test because these employees are paid so little, found that they spent more than 20 percent of their time, in fact, in some cases 90 to 100 percent of their time, performing ordinary duties, selling products, flipping hamburgers, stocking shelves, that those employees can now be classified under this concurrent duties test and with the elimination of the working foreman provision and the elimination of the 20 percent tolerance level as exempt even though they perform ordinary rank and file duties.

Senator MURRAY. Mr. Fortney, would you disagree with that?

Mr. FORTNEY. I do disagree with that. As discussed, let us go in reverse order. The folks with low levels of education that you initially said you were focused on, those are not folks who today would be classified as being exempt under the professional exemption possibly, meaning that they presumably should be getting overtime, because the professional exemption today clearly requires advanced education and learned training. So with respect to those

folks, it seems to me the only way they possibly could be exempt, meaning not getting overtime today, would be if they are executives or administrative.

These regulations now clarify, for example, that executives, a working supervisor whose primary duty is performing nonexempt work on the production line, those people do not lose their overtime. The regs specifically provide that. Indeed, the regs have gone a step further in clarifying that you have to have supervisory hire/fire authority, not just supervisory, hire/fire authority in order to qualify as an executive. This was a point that I tried to address in my opening statement that I think that many folks who may have limited education and be exempt today are going to gain over time that are in these lower level manager supervisory positions, number one.

Number two, with respect to chefs and some of these other issues——

Senator MURRAY. Real quickly because I do want to get to Mr. Eisenbrey.

Mr. FORTNEY. Chefs and other issues. The focus is not on what their job is. It deals with advanced accreditation and training by universities and in most cases State licensing such as for embalmers.

And finally, kindergarten teachers who you referenced——

Senator MURRAY. I said preschool teachers.

Mr. FORTNEY. I am sorry. Preschool. But the regulations do represent teachers of kindergarten or nursery school pupils will continue to be exempt, and the regulations provide that.

Senator MURRAY. Mr. Eisenbrey, you get my last 20 seconds.

Mr. EISENBREY. On the professional exemption, Mr. Fortney said it clearly requires advanced education and learned training. That is no longer true. The rule says you can get to be a professional and exempt with work experience. So that is a major change.

The hire/fire authority that Mr. Fortney mentioned is not hire/fire authority. If you even have the ability to suggest that somebody have a shift change or that they be considered for a promotion, that is all the authority. You do not have to have hire/fire authority.

And nursery school teachers. This is important. They are losing their right to overtime that they have now. There is a Wage/Hour opinion letter that says that most nursery teachers, preschool teachers do not exercise independent judgment and discretion. They are not instructing students. They are watching over them, 2-and 3-year-olds. And they are entitled to overtime now. Under this rule, they lose their right to overtime. As a class they are exempt.

Senator MURRAY. Mr. Chairman, I am out of time. I thank all of our witnesses.

Senator SPECTER. Thank you very much, Senator Murray.

Beyond any question, this hearing could go on and on and on on a very, very complicated subject. But we very much appreciate your coming, gentlemen, and I think it better prepares not only the panelists but those who will following the transcripts. We have to make a judgment on this very important subject.

ADDITIONAL PREPARED STATEMENT

We have received the prepared statement of the American Nurses Association that will be included in the record at this point.

[The statement follows:]

PREPARED STATEMENT OF THE AMERICAN NURSES ASSOCIATION

In regards to the Senate Appropriations Subcommittee on Labor, HHS hearing on May 4, 2004, the American Nurses Association appreciates the opportunity to provide a written statement on the U.S. Department of Labor final revisions to the Federal Labor Standards Act (FLSA) regulations as published in the Federal Register on April 28, 2004.

The American Nurses Association (ANA) represents the nation's registered nurses through its 53 state and territorial state nurses associations. Our members represent the interests of registered nurses practicing in hospitals and nursing homes and a wide range of other health care settings. The implementation of these proposed revisions to the FLSA will have implications for their practice, their work environment and the quality of patient care they provide.

ANA has reviewed the final rule and while the final rule includes some improvements over the proposed rule it still remains controversial for registered nurses. Part 541 of the rule redefines which workers are salaried professionals, administrative managers and executives, and, therefore, exempt from federal overtime protections. A worker can be exempted from overtime protections under one of these categories if he or she meets a two-pronged test: her/his qualifications and duties must meet the standards outlined in the regulations; and s/he must be paid on a salary basis an amount more than $455 per week.

Registered nurses have long met the "duties test" to be considered learned professionals; however, because most registered nurses are paid on an hourly basis, they do not meet the second prong of the existing rules, i.e., the salary component, and therefore are entitled to overtime compensation. The Department of Labor is correct in their claim that the status of salaried registered nurses remains unchanged under the new rule, but it has overlooked the impact on the large percentage of registered nurses who are paid on an hourly basis. The rule is further complicated by changes in the definition of a salaried employee by now allowing salaried compensation to be calculated on a hourly or a shift basis. The new regulations create a degree of legal ambiguity that employers may try to exploit. For example, ANA is concerned that employers may try to claim that more RNs are salaried. Creating doubt about registered nurses' right to overtime pay threatens ongoing efforts to retain and recruit nurses—particularly in a time when mandatory overtime is a common practice and RNs are in short supply.

As stated by Patti Heffner, RN, in her testimony on January 20, 2004, nurses are paid for overtime, whether voluntary or mandatory. Under the proposed changes, nurses will be working the same long hours they currently work, but without the guarantee for overtime compensation. Expanding the number of professional workers, such as registered nurses, who are exempt from overtime protections, will lower the marginal cost of overtime work for the employers. In health care institutions, this will encourage the use of mandatory overtime as a staffing strategy. ANA strongly opposes mandatory overtime as it has been widely recognized as one of the major factors contributing to nurses' job dissatisfaction and the nursing shortage. Mandatory overtime also increases the risk of medical errors and concerns for patient safety.

The Institute of Medicine (IOM) released a report in November, 2003 which shows a clear link between patient safety and the nursing work environment. The study, *Keeping Patients Safe: Transforming the Work Environment of Nurses* recommends limiting the number of hours a nurse can work to 12 hours in any 24-hour period and 60 hours in any seven day period.

The overtime regulations are set to go into effect in August, 2004 barring Congressional action to change them. ANA has joined with other organizations representing nurses to send a letter to the U.S. Senate asking Senators to support an amendment introduced by Sen. Harkin (D-IA) to roll back any portion of the regulations that restricts eligibility for overtime pay. While ANA appreciates the need for clarification of some the regulatory provisions of the FLSA, ANA is concerned these revisions in the final rule will not accomplish that goal. In fact, the net effect of the final rule will add to the uncertainty by substituting one confusing set of definitions for another. ANA urges you to continue to oppose these changes to the overtime rule.

Once again, thank you for allowing the American Nurses Association to comment on the issues facing nursing.

CONCLUSION OF HEARING

Senator SPECTER. Thank you all very much for being here. That concludes our hearing.

[Whereupon, at 11:02 a.m., Tuesday, May 4, the hearing was concluded, and the subcommittee was recessed, to reconvene subject to the call of the Chair.]

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