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Computer Services Personnel: Overtime Pay Under the Fair Labor Standards Act

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Summary

The Fair Labor Standards Act of 1938 (FLSA), as amended, is the primary federal statute in the area of minimum wages and overtime pay. Section 13(a)(1) provides, *inter alia*, that the Act's wage and hour (overtime pay) requirements will not apply to "any employee employed in a bona fide executive, administrative, or professional capacity ...." Through administrative rulemaking, the Secretary of Labor has established two tests through which to define eligibility under the Section 13(a)(1) exemption: a duties test and an earnings test.

The Department of Labor (DOL) has defined a *professional* as one who has undergone "a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship." After a review of then-current practice in the field, the Department (in a series of decisions beginning in the 1960s) decided that it was not able to determine that computer services workers were "professional" for Section 13(a)(1) purposes. Thus, such workers remained under the protection of the minimum wage and overtime pay provisions of the Act.

In 1990, Congress adopted free-standing legislation directing DOL to promulgate regulations defining the status of computer services workers and to include in that definition an earnings test: not less than 6½ times the federal minimum wage. Although DOL proceeded as directed, Congress revisited the issue in 1996. It moved the computer services exemption from Section 13(a)(1), creating a new categorical exemption in Section 13(a)(17). Here, unburdened by the issue of defining *professional*, Congress set its own standard. It also froze the earnings test at $27.63 per hour. With the increase in the general wage floor, part of the 1996 amendments, that came to equal 5.4 times the minimum wage.

Some might argue that the rationale for exemption of computer services personnel, in the absence of a significant hearings record, may not be entirely clear. Given the broad definition of a computer services professional in the legislation, for example, some may question which workers in the industry *would not be covered* by the exemption.

In the 106th Congress, legislation was introduced by Representatives Andrews and Lazio that would have increased the scope of the exemption: first, by expanding the range of exempt job titles, and then, through a relative reduction in the value of the earnings threshold or test. For example, were the minimum wage increased to $6.15 per hour, as pending proposals would do, the value of the computer services exemption threshold would be 4.5 times the federal minimum wage. Ultimately, neither bill was enacted, but the issue re-emerged in the 107th Congress: H.R. 1545 (Andrews) and H.R. 546 (Quinn). The new proposals died at the close of the 107th Congress.

Contents

Computer Services Personnel: Overtime Pay Under the Fair Labor Standards Act

Most Recent Developments

Early in the first session of the 107th Congress, Representative Quinn introduced legislation (**H.R. 546**) that would have exempted from the minimum wage and overtime pay protections of the Fair Labor Standards Act (FLSA), *where qualifying standards are met*, certain workers in the computer services industry. Subsequently, **H.R. 1545**, a bill of similar focus, was introduced by Representative Andrews. The bills were referred to the Committee on Education and the Workforce, Subcommittee on Workforce Protections.[1] No other action was taken on these proposals.

Introduction

The Fair Labor Standards Act of 1938, as amended, is the basic federal statute dealing with minimum wages, overtime pay, and related standards. Three sections are of immediate relevance for this report. ***Section 6*** is the Act's basic minimum wage provision. ***Section 7*** requires that one and one-half times one's regular rate of pay ("time-and-a-half") be paid to workers for hours worked in excess of 40 per week. ***Section 13*** is devoted to exemptions. In the 1938 statute (and still a part of the Act as Section 13(a)(1)), Congress exempted both from minimum wage and overtime pay protections "any employee employed in a bona fide executive, administrative, [or] professional" capacity (the EAP exemption), adding that such terms were to be "defined and delimited by regulations of the Administrator" — i.e., now, the Secretary of Labor.

Initially limited, largely, to industrial workers associated with interstate commerce, wage/hour coverage under the FLSA has gradually been expanded to include a larger portion of the workforce. Speaking generally, employers have urged a broadening of exemptions while workers have urged expanded coverage. In some cases, precise exemptions have been written into the Act; at other times, exemption has been flexible, leaving discretion to the Secretary of Labor. The result after 60 years, some have argued, is a statute that is inordinately complex and difficult to interpret — though others would argue that it is necessarily precise.[2]

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[1] The bulk of H.R. 546 deals with non-labor issues. That bill was also referred to the Committee on Ways and Means.

[2] See, for example, Saddler, Jeanne, and Albert Karr. Minimum-Wage Exemptions Baffle Many, *The Wall Street Journal*. March 23, 1989. p. B2. Although it is now dated in some

(continued...)

In 1990, Congress directed the Department of Labor (DOL) to redraft the Section 13(a)(1) regulations to allow certain computer services personnel to qualify as exempt. In 1996, Congress revisited the wage/hour coverage of computer services personnel and created a new categorical exemption: Section 13(a)(17). Under legislation pending in the 107th Congress, Congress would revisit Section 13(a)(17) to redefine coverage criteria. However, since the 1990 and 1996 actions were effected through floor amendment without the benefit of significant hearings, some may find the rationale for this exemption not entirely clear.

Section 13(a)(1)

Under the Fair Labor Standards Act of 1938 (FLSA), special minimum wage and overtime pay treatment (an exemption) was allowed for certain persons who qualify as *bona fide* executive, administrative or professional employees (Section 13(a)(1)). Definition of a *bona fide* executive, administrative or professional employee was left to the discretion of the Secretary of Labor who, through the years, has developed qualifying criteria. To be exempt under Section 13(a)(1), three criteria must normally be met. *First*, the worker must be paid a salary above a threshold established by the Secretary: **the salary test**. *Second*, the worker must be engaged in duties that would meet, in this instance, the standard of a professional (**the duties test**) as specified by the Secretary. *Third*, the worker may devote not more than 20% of his or her time to duties that are not professional (**the duties time test**). Requirements, set by the Secretary, may differ slightly for each type of work; academic requirements for the job are taken into consideration.[3] Through the years, the validity of the tests, however, has been impacted by changes in educational practice and by changes in the economy.

Definition of executive, administrative and professional and establishment of the elements necessary to qualify as *bona fide* have proved contentious: in part because persons so defined and, thus, falling within the Section 13(a)(1) exemption are stripped of minimum wage and overtime pay protection under the Act. Further, in rapidly evolving fields, it has not always been clear who actually is a *bona fide* professional and who is simply a technically skilled worker. In computer sciences, for example, job descriptions, academic requirements, and work patterns varied widely and were, early, in near constant flux. Thus, the Department, after lengthy consideration, determined that it was not practical to render a clear definition of *professional* in the computer services field, delaying a finding till the discipline had stabilized.

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[2] (...continued)
places, the best overview of exemption patterns under the FLSA is Volume IV of the Report of the Minimum Wage Study Commission, *Exemptions from the Fair Labor Standards Act*, Washington, U.S. Govt. Print. Off., 1981. 492 p.

[3] While there are different qualifying factors, established by the Secretary for each classification (executive, administrative, or professional), the computer services issue revolved around the concept of *professional.*

In the absence of any change in the DOL position established in the mid-1960s, Congress took action. In 1990, with P.L. 101-583, the 101st Congress directed the Secretary to promulgate regulations that would permit certain computer services workers to qualify as exempt under Section 13(a)(1). It specified certain job titles (or sub-disciplines) that would be included in the exemption and set the wage level necessary for such workers to qualify.[4] DOL published rules implementing the legislation in 1991; but, the matter was not entirely resolved.[5] In 1996, with P.L. 104-188, Congress restructured the provision. It moved the exemption for computer services personnel from Section 13(a)(1) — where it was predicated upon the concept of *bona fide* executive, administrative or professional status (with qualifying tests) — to a new Section 13(a)(17), a categorical exemption which rests upon conditions specified by Congress. Thereafter, the extent to which computer industry workers met DOL's tests for professional status would be a moot issue.

In the 106th Congress, legislation was introduced that would have rewritten the Section 13(a)(17) exemption to refine the types of computer-related work covered by the exemption and to restructure the exemption. The proposals died at the close of the 106th Congress, but the issue has re-emerged with new legislation in the 107th Congress.

General Definition of "Professional"

The eligibility criteria developed by the Secretary for the EAP exemption are precise. *Bona fide* professionals are to be paid in excess of the minimum wage required under the FLSA — and their work is to be substantively different from that of factory, clerical or other workers categorized as non-professional. The Department's regulatory structure is intended to assure that workers are not given a *pro forma* title so that they can be paid a rate lower than that intended by Congress.

Various Tests and Standards

In Section 29, Part 541.3, of the Code of Federal Regulations (CFR), the *duties test* and *time duties test* for a "professional" are set forth in detail. An "employee employed in a bona fide ... professional capacity" is a worker:

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

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[4] No hearings were conducted on the measure. It was adopted by voice vote after relatively modest debate. See *Congressional Record* (hereafter cited as CR), October 18, 1990, p. H10563-H10564, and October 27, 1990, p. S17679. The issue had been raised briefly during consideration of the FLSA Amendments of 1989. See CR, April 12, 1989, p. S3741-S3742; May 17, 1989, p. S5477; and November 1, 1989, p. H7855. The enactment seems to have sparked a mixed reaction within the industry. See: *The New York Times*, January 28, 1991, p. D3; *The Washington Post*, January 25, 1991, p. F1-F4; and Bureau of National Affairs, *Daily Labor Report* (hereafter cited as DLR), May 13, 1991, p. A1.

[5] *Federal Register*, February 27, 1991, p. 8250-8251. The rules took effect on March 29, 1991.

> (1) Work requiring knowledge of an advance[d] type in a field of science or learning *customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes* [italics added], or
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> (2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or
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> (3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed; and
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> (b) Whose work requires the consistent exercise of discretion and judgment in its performance; and
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> (c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
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> (d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; ...[6]

In addition, there are qualifying earnings tests which, normally, would be updated periodically through the rulemaking process. However, the current salary tests have remained in place since established *on an interim basis* in 1975. By the mid-1990s, DOL estimated that slightly in excess of 30 million employed wage and salary workers were minimum wage/overtime pay exempt under Section 13(a)(1) in the three categories of executive, administrative, or professional.[7]

Refining the Concept of "Professional"

DOL has been precise in setting standards for professionals exempt under Section 13(a)(1). Over time, it has applied the definition within specific work situations through opinion letters issued by the Wage and Hour Division; but, until the legislation of the 1990s, its treatment of computer services personnel was rooted in 1960s experience.

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[6] See 29 CFR 541.3(a) forward. These standards applied with respect to computer services workers for whom a Section 13(a)(1) professional exemption was sought prior to enactment of P.L. 101-583 in 1990.

[7] U.S. Department of Labor. Employment Standards Administration. *Minimum Wage and Overtime Hours Under the Fair Labor Standards Act, 1998 Report to the Congress*. Washington, U.S. Govt. Print. Off., June 1998. Table C1a95. Calculated on an hourly basis, the qualifying wage would range from $4.25 per hour to $6.25 per hour. See also *Federal Register*, February 19, 1975. p. 7091-7094.

Responding to a request that certain computer services workers be designated as professionals, the Wage-Hour Administrator (spring 1966) stressed "discretion and independent judgment."[8] Even were a portion of a worker's time devoted to activities that were within the concept of "professional," there would still remain the *duties time test* to be satisfied: i.e., that *a major portion* of his or her work must be professional in character.

An inquiry of a year later drew a similar reply. DOL affirmed that while a computer operator's work was "highly technical and mechanical" and "based on skill," it did not require advanced learning of a scholarly character. It is "reasonably clear that he is not performing work involving the regular and continuing use of knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study ...."[9]

By the early 1970s, computer technology was rapidly developing as a specialized discipline; and, in that context, DOL commenced a reevaluation of its treatment of workers in the data processing field. These employees, the Department noted, "are identified by a multitude of titles, including program operator, programmer, systems analyst, and many others. They have varied experience and training, and perform a variety of tasks which are difficult to measure in terms of their significance and importance to management."[10]

Reviewing its application of the Section 13(a)(1) exemption in the computer technology field, DOL solicited outside input with diverse results. Employer representatives "contended that computer programmers and systems analysts should be considered professional employees" and, thus, be minimum wage and overtime pay exempt. Some urged that a "junior programmer" should also be exempt. Employee spokespersons, pointed out that data processing was still a "relatively new occupational area," still "in a state of flux," and that "job titles and duties are not regularized and overlap and intermix in a confusing manner." They contended "that to expand the exemption was an invitation for employers to work such employees longer hours with no additional compensation." Both employers and employees concurred that a college degree was not "a requirement for entry into the data processing field."[11]

Ultimately, the Department concluded that "there is no need to change the definition of professional employee" in the regulations as it would affect computer services personnel. Instead, it would authorize exemptions based upon specific circumstances and work situations.[12]

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[8] Opinion letter, signed by Clarence T. Lundquist, United States Wage-Hour Administrator, April 14, 1966.

[9] *Ibid.*, May 22, 1967.

[10] *Federal Register,* September 10, 1970, p. 14268-14269.

[11] *Federal Register,* December 2, 1971, p. 22976-22979.

[12] *Ibid.*

Through the early 1970s, DOL maintained its *ad hoc* approach,[13] emphasizing that the professional exemption under Section 13(a)(1) required knowledge "of an 'advanced type' which is customarily acquired by a prolonged course of specialized intellectual instruction and study."[14] It maintained that a bachelor's degree was a standard prerequisite for a professional, defining its concept of "a prolonged course of specialized instruction and study" as "four academic years of preprofessional and professional study in an accredited university or college."[15] It affirmed that it could not "give a blanket determination as to the exempt status of any group or class of employees since the problem is a factual one dependent upon the particular situation with respect to each individual employee."[16] It viewed itself as "constrained by judicial decisions to interpret exemptions from the Act's provisions narrowly [and] ... limited to those who come plainly and unmistakably within their terms and spirit."[17]

Various Departmental initiatives for revision of the regulations governing Section 13(a)(1) would be considered during the Ford and Carter Administrations. With the advent of the Reagan Administration, general reform would be suspended; the Department would continue to follow its policies of the 1960s and 1970s.

Seeking Legislative Solutions

When the Department of Labor did not adopt regulations more broadly exempting computer services personnel, Congress took up the issue. There has now been a decade of legislative activity in this area.

Congress Addresses the Issue

In the 101st Congress (1989-1990), Senator David Durenberger, with others, proposed an amendment to general FLSA legislation that directed the Secretary of Labor to interpret the wage/hour "professional exemption" of Section 13(a)(1) in a manner "that permits computer systems analysts, software engineers, *and other similarly skilled professional workers* to qualify ... for such exemption." Under the Durenberger amendment, the exemption would seem to have applied to salaried workers and to hourly paid workers if their hourly wage was "at least 6½ times

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[13] *Federal Register*, May 7, 1973, p. 11390 and 11404.

[14] Opinion letter, signed by Warren D. Landis, Acting Wage-Hour Administrator, June 9, 1974.

[15] Opinion letter, signed by Warren D. Landis, Deputy Wage-Hour Administrator, March 5, 1976.

[16] Opinion letter, signed by Warren D. Landis, Acting Wage-Hour Administrator, November 10, 1975.

[17] Opinion letter, signed by Warren D. Landis, Deputy Wage-Hour Administrator, March 5, 1976. It has been the tradition of the Department to view exemptions narrowly. As Landis stated here: "This is so because an application of an exemption deprives an employee of the monetary benefits which the Act otherwise provides."

greater than the applicable minimum wage" under the FLSA.[18] No hearings had been conducted with respect to the issue. The amendment, offered on the floor, was adopted in the Senate without a roll call vote.[19] However, the legislation was vetoed by President Bush. An attempt by the House to override the President's veto failed.[20] Subsequently, a revised version of the FLSA/minimum wage legislation was adopted and signed by the President late in 1989; but, in the process, the computer services exemption had been dropped.[21]

During the summer of 1990, legislation had been adopted in the Senate to deal with FLSA wage rates for American Samoa. When it was called up in the House, an amendment was offered by Representative Austin Murphy, reintroducing the computer services issue.[22] On a voice vote, the House adopted the consolidated bill.[23] The Senate concurred in the House (Murphy) amendment, again by voice vote,[24] and on November 15, 1990, the measure was signed by President Bush (P.L. 101-583).

As it related to the computer industry, P.L. 101-583 provided, in part, for the following:

> Not later than 90 days after the date of enactment of this Act, the Secretary of Labor shall promulgate regulations that permit computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers as defined in such regulations to qualify as exempt executive, administrative, or professional employees under section 13(a)(1) ... Such regulations shall provide that if such employees are paid on an hourly basis they shall be exempt only if their hourly rate of pay is at least 6½ times greater than the applicable minimum wage ...

Thus, Congress took three steps. **First**. It mandated development of regulations that would "permit" the designated computer services personnel to be exempt from FLSA wage/hour requirements under Section 13(a)(1) if the requisite salary test were met: as *bona fide* "executive, administrative, or professional"employees. But, it did so without amending Section 13(a)(1) directly. **Second**. It mandated that DOL, within 90 days following enactment, promulgate the Section 13(a)(1) regulations applicable to the computer industry. **Third**. It established, by statute, the qualifying salary test for a Section 13(a)(1) exemption for the computer industry. It did not direct that the Secretary regard the computer services salary test as a guide for other industries; but, it did provide a precedent that the Department could hardly have missed.

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[18] *CR*, April 12, 1989, p. S3741.

[19] *CR*, April 12, 1989, p. S3741-S3742.

[20] The Durenberger language does not appear to have been a factor in the veto decision.

[21] *CR* (permanent set), November 1, 1989, p. 26805.

[22] *CR*, October 18, 1990, p. H10563.

[23] *CR*, October 18, 1990, p. H10565.

[24] *CR*, October 27, 1990, p. S17679.

Regulations Issued by the Department of Labor

Responding to its mandate, DOL issued an interim final rule on February 22, 1991. It noted that there had been"[i]nsufficient time" allowed "for the Department to issue a proposal for comments, review the comments, and promulgate a final rule to be effective 90 days after the law was enacted." But, it invited a submission of comments through a 60-day period preliminary to publication of a final rule. Since no hearings had been conducted on the issue and the legislative history was sparse, DOL may have been uncertain about the precise intent of Congress.[25]

The final rule made a number of technical and definitional changes in 29 CFR 541, the broader regulation applying the Section 13(a)(1) exemption. For example, it amended the definition of *professional* (541.3(a)) by adding the following:

> (4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field, as provided in 541.303; and ...

In 541.303, it presented an inventory of job titles indicative that an overtime pay exemption might be in order, other criteria having been met, but added: "... because of the wide variety of job titles applied to computer systems analysis and programming work, job titles alone are not determinative of the applicability of this exemption." In 541.3(b), DOL stated that consideration for an exemption would also rest upon "an employee's primary duty" — i.e., one or more of the following:

> (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
>
> (2) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
>
> (3) The design, documentation, testing, or modification of computer programs related to machine operating systems, or
>
> (4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

It explained that "employees engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment," as with persons whose work is "highly dependent upon, or facilitated by, the use of computers and computer software programs," would *not* be included as eligible for the overtime pay exemption.[26]

At least since the 1970s, the Department had argued that the concept of *professional* for Section 13(a)(1) purposes involved, as a prerequisite, a substantial

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[25] *Federal Register*, February 27, 1991, p. 8250-8251.

[26] See 29 CFR 541, paragraphs as indicated in the text.

academic education. Here, in response to P.L. 101-583, DOL modified its stance. In 541.303(c), the final rule stated with respect to computer *professionals*:

> (c) The exemption ... applies only to highly-skilled employees who have achieved a level of proficiency in the theoretical and practical application of a body of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and does not include trainees or employees in entry level positions learning to become proficient in such areas or to employees in these computer-related occupations who have not attained a level of skill and expertise which allows them to work independently and generally without close supervision. The level of expertise and skill required to qualify for this exemption is generally attained through combinations of education and experience in the field.

However, DOL added: "While such employees commonly have a bachelor's or higher degree, no particular academic degree is required for this exemption, nor licensure or certification, as is required for the exemption for the learned professions." Of course, employees who may not qualify for exemption as a *professional* could potentially qualify under another component of Section 13(a)(1) because of their managerial and administrative duties.

Congress Restructures the Exemption, 1996

Under P.L. 101-583, Congress directed DOL to promulgate new regulations concerning the Section 13(a)(1) computer services personnel exemption. The result had been regulatory, not statutory — except with respect to the earnings threshold. Five years later, Congress would adopt a different approach to the issue.

During the 104th Congress (1995-1996), several hearings were conducted on the concept of the minimum wage but not upon specific legislation. None of them focused upon the computer personnel exemption — nor was that a major issue during consideration of the proposal. In August 1996, new FLSA legislation was adopted and signed by President Clinton (P.L. 104-188).

New Statutory Language

Under the 1996 FLSA amendments, a new categorical exemption was created as Section 13(a)(17). Congress, thus, by-passed entirely the sub-paragraph Section 13(a)(1) reference to "executive, administrative, or professional." In doing so, it **first** decreed that certain computer services personnel would be exempt from the minimum wage and overtime pay protections of the FLSA and, **second**, specified the conditions that would permit that exemption to have effect. The new statutory language read:

> (17) any employee who is a computer systems analyst, computer programmer, software engineer, *or other similarly skilled worker*, whose primary duty is—

> (A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
>
> (B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
>
> (C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
>
> (D) a combination of duties described in subparagraphs (A), (B), or (C) the performance of which requires the same level of skills, and
>
> who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

In effect, Congress took discretionary initiative away from DOL, in the case of computer services personnel, and acted directly. With the targeted workers positioned under Section (13)(a)(17), there was no longer any need for the Wage and Hour Division to define "bona fide" or "professional." The exemption was now categorical with a statutory salary test for workers "compensated on a hourly basis."[27]

Declining Value of the Salary Test

In a floor statement explaining the earnings test incorporated within Section 13(a)(17), Representative William Goodling affirmed his understanding that it was "merely restating the law indicating that if they are making 6.5 times the minimum wage," the targeted computer services workers would not qualify for overtime pay under the FLSA. "The amendment simply maintains the current exemption level for 6.5 times $4.25, or $27.63 per hour."[28] Representative Steve Gunderson, however, stated the view that: "The amendment freezes the rate at which certain computer professionals are exempt from the minimum wage at $27.63 per hour. The current exemption amount is at 6.5 times the minimum wage ...." If the threshold ("6½ times") "was allowed to float with the minimum wage," Representative Gunderson observed, the dollar volume threshold would continue to increase. Under P.L. 104-188 it wouldn't do so; but, he explained, the FLSA "was intended to protect those who were underpaid, not highly paid professionals."[29]

Under P.L. 104-188 (the 1996 amendments), the threshold was, indeed, 6½ times the minimum wage at the time the new amendments were adopted ($4.25 x 6½ = $27.63). However, P.L. 104-188 also raised the minimum wage to $5.15 per hour. Because the $27.63 figure was now *frozen* in the statute, the "6½ times" formula was

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[27] How the specific job descriptions within the new exemption would be defined, the percentage of time spent in covered work, etc., was still, presumably, left to the Secretary to determine. Italics added.

[28] *CR*, May 23, 1996, p. 12309.

[29] *CR*, May 23, 1996, p. 12278.

reduced. Had the threshold been allowed to float (i.e., 6½ times the new minimum wage), the new earnings test would have been $33.48 per hour. As a result of moving from a floating threshold to a fixed (frozen) figure, the new ratio became 5.4 times the minimum wage.[30]

Legislative Proposals of the 106th Congress

In 1989, the issue of a wage/hour exemption for certain computer services personnel quietly emerged as a legislative issue, with a change in the statute being approved in 1990. In 1996, Congress revisited the issue and altered the structure of wage/hour regulation for computer services workers. But, the industry continues to be marked by evolution both of systems and work patterns. Thus, the statutory language of 1990 and 1996 may be perceived as needing further alteration.

In the 106th Congress, Representative Robert Andrews, with others, introduced legislation (H.R. 3038) that would have rewritten Section 13(a)(17). The bill had basically three provisions. ***First***. The proposal, in effect, would have repealed the existing Section 13(A)(17) and would then have started over. ***Second***. Although its language generally paralleled that of the existing code, H.R. 3038 would have redefined and broadened the types of computer-related work that could qualify one as overtime pay and minimum wage exempt under a reconstructed paragraph (17) — basically keeping abreast of a developing and rapidly changing field. It read:

> (17) any employee who is a computer systems, network, or database analyst, designer, developer, programmer, software engineer, or other similarly skilled worker—
>
> (A) whose primary duty is—
>
> (i) the application of systems or network or database analysis techniques and procedures, including consulting with users, to determine hardware, software, systems, network, or database specifications (including functional specifications);
>
> (ii) the design, configuration, development, integration, documentation, analysis, creation, testing, securing, or modification of, or problem resolution for, computer systems, networks, databases, or programs, including prototypes, based on and related to user, system, network, or database specifications, including design specifications and machine operating systems;

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[30] If the minimum wage is increased to $6.15 per hour as has been proposed in legislation of the 106th Congress and if the $27.63 figure is not altered, then the ratio will be 4.5 times the minimum wage.

> (iii) the management or training of employees performing duties described in clause (i) or (ii); or
>
> (iv) a combination of duties described in clauses (i), (ii), or (iii) the performance of which requires the same level of skills; and ...

The term "network" was intended to include "the Internet and intranet networks and the world wide web." ***Third***. H.R. 3038 would have set the earnings test for the exemption at $27.63 per hour as in the 1996 amendments.[31]

Introduced on October 7, 1999, H.R. 3038 was referred to the Committee on Education and the Workforce. No further action on the Andrews bill occurred during the 106th Congress.

As the 106th Congress advanced, momentum developed for enactment of new minimum wage legislation. H.R. 3081, introduced by Representative Rick Lazio, with others, called for an increase in the minimum wage to $6.15 per hour. Further, it would have altered wage/hour coverage for certain sales personnel, and would have exempted persons employed as a "licensed funeral director or licensed embalmer" from wage/hour coverage under the FLSA. In language largely identical to H.R. 3038 (Andrews), the Lazio bill would have redefined wage/hour treatment of certain computer services personnel, similarly setting the earnings test at "not less than $27.63 an hour" but stating that amount, directly, in monetary terms.[32]

While the Lazio bill would have increased the minimum wage to $6.15 per hour, it made no change in the threshold of earnings that would permit minimum wage and overtime pay exemption. Thus, it altered the ratio of the threshold to the minimum wage — establishing a new threshold formula, by indirection, at the equivalent of 4½ times the minimum wage.

H.R. 3081 was referred to the Committee on Ways and Means and to the Committee on Education and the Workforce for consideration of the provisions falling under the jurisdiction of the two committees. On November 9, 1999, the tax provisions of the measure were marked-up in Ways and Means which reported the bill on November 11 (H.Rept. 106-467, Part I). The Committee on Education and the Workforce did not act immediately. On January 28, 2000, the Committee on

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[31] H.R. 3038 did not directly specify a dollar amount. Rather, it provided:

> (B) who, in the case of an employee who is compensated on an hourly basis, is compensated at the rate set by the amendment enacting this paragraph made by section 2105(a) of the Employee Commuting Flexibility Act of 1996.

This, of course, is the language freezing the threshold at $27.63 and abandoning the original formula of "6½ times" the statutory minimum wage under Section 6.

[32] The labor-related provisions constitute a relatively small proportion of H.R. 3081, the bulk of the package dealing with issues not related to the FLSA or labor standards.

Education and the Workforce *was discharged* from further consideration of the legislation: no hearings were held and no report was filed.

On March 9, 2000, H.R. 3081 was passed by the House of Representatives. The Senate had earlier adopted different and separate minimum wage language: an amendment to S. 625, the Bankruptcy Reform Act of 1999 — but the latter did not deal with the exemption for computer services personnel. Ultimately, as the 106th Congress drew to a close, the computer services legislation was laid aside, and it died as the Congress adjourned.

Legislative Proposals of the 107th Congress

On February 8, 2001, Representative Quinn introduced **H.R. 546**, an umbrella proposal dealing mostly with non-labor issues. Added at the end, however, were provisions to raise the minimum wage to $6.15 an hour after April 1, 2002, and, among other changes in the FLSA, to broaden the wage/hour exemption with respect to computer services personnel. The computer services personnel provisions were later introduced as a free-standing bill by Representative Andrews: **H.R. 1545**. The bills were essentially identical — and similar to the proposals of the 106th Congress. The same pattern of referral was followed: H.R. 1545 to Education and the Workforce; H.R. 546 to Ways and Means and to Education and the Workforce.

Various other FLSA-related proposals were introduced during the 107th Congress, some as part of composite legislation and others free standing.[33] The primary focus, however, appeared to be upon an increase in the minimum wage — which, in turn, some argued, would need to be linked to tax benefits for business. While hearings were conducted on certain of the FLSA-related bills, the computer services personnel legislation did not receive immediate attention. Neither bill was acted upon during the 107th Congress.

Comment and Policy Considerations

Wage/hour treatment of computer services personnel has been intermittently an issue before the Department of Labor and the Congress through the past 25 years. Although it does not appear to have attracted great attention, it has raised a number of considerations of policy. These focus both upon specific legislation and upon the broader implications of the issue.

The issue of exempting certain computer services personnel from the minimum wage and overtime pay protections of the FLSA undoubtedly reflects the continuing change in the field. Some may argue, however, that the rationale for such action is not wholly clear. Who are the workers who would actually be affected by this exemption? How many of them are there? In which sub-categories of computer

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[33] See CRS Report RL30993, *The Fair Labor Standards Act: Wage/Hour and Related Issues before the 107th Congress*, by William G. Whittaker.

services personnel are they most numerous? What types of employers (firms) are/would be affected by the exemption? Precisely, how would the changes proposed in the 106th Congress affect the earnings and work patterns of specific computer services workers?[34]

Prior to 1990, the Department of Labor encountered difficulties in determining the "professional" status of categories of computer services workers. The legislation of 1990 and 1996 mandated that the regulations be written in such a manner that certain of these workers would qualify for exempt status. The proposals of the 106th Congress follow in that pattern. While specifying a series of computer-related job titles with inclusion of "other similarly skilled worker[s]," problems of definition may persist since the field is still evolving with some rapidity. Given the broad definition incorporated within the pending bills, some parties may ask what types of computer-related work *would not be covered* by the exemption.

There may also be questions of process. In practical terms, is it more useful for Congress to fine-tune the Section 13(a)(1) coverage criteria, determining who is and is not a "bona fide" executive, administrative or professional employee, than to provide general guidance and leave specific definitions to DOL? If Congress does continue to act in areas where professional standards and skill requirements are rapidly changing, will it find itself drawn inevitably, year after year, into revisiting these issues? On the other hand, how much discretion ought properly to be left to the Department of Labor? If the Department does not deal with these issues, will Congress need to act?

The FLSA is, inherently, a complex statute. It is also 6 decades old, modified by eight separate rounds of general amendments and by numerous *ad hoc* changes. Each change in the statute has necessitated new implementing regulations, supplemented by "opinion letters" from the Department that apply the statute to individual work situations. In terms of enforcement, compliance and the protection of workers, do new complexities serve well the various stakeholders? Crafting a wage/hour structure that protects workers without negatively impacting employers and that can be applied, equitably, to the entire national economy may not be a simple undertaking.

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[34] With respect to the personnel structure of the computer services industry, it may be useful to consult CRS Report RL30140, *An Information Technology Labor Shortage? Legislation in the 106th Congress*, by Linda Levine.