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The Fair Labor Standards Act: Exemption of "Executive, Administrative and Professional" Employees Under Section 13(a)(1)

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Summary

The Fair Labor Standards Act of 1938 (FLSA), as amended, is the primary federal statute dealing with minimum wages, overtime pay, child labor, and related subjects. Although the statute is comprehensive, there are many workers who have been exempted from its provisions. Of the exemptions included within the Act, perhaps the most far reaching is Section 13(a)(1) which exempts from all minimum wage and overtime pay protections "any employee employed in a bona fide executive, administrative, or professional capacity."

Having written Section 13(a)(1) into the statute (it was part of the original enactment), Congress left to the Secretary of Labor the authority, at his or her discretion, to define the terms *executive, administrative,* or *professional* — which the Secretaries have done through the rulemaking process. The result has been development, essentially, of two tests: an earnings threshold and non-monetary duties standards. Thus, when an employer has sought to exempt his or her employees from the minimum wage and overtime pay protections of the FLSA, two general questions have been asked. *First*. Is the worker compensated sufficiently well to be regarded as an executive, administrator or professional? *Second*. Does the worker perform the duties of an executive, administrative or professional employee and has he or she the responsibilities associated with such a designation?

While those initial questions may seem somewhat elementary, they are actually complex. As the issue has evolved, the criteria have become more detailed, more explicit — and, some assert, more confusing. Since the earnings thresholds for exemption have always been relatively low, the duties/responsibilities tests have been critical. By adjusting, even marginally, the criteria in those tests, the Section 13(a)(1) exemption can be significantly altered: to broaden or to narrow coverage and wage/hour protection. Such changes in the regulation can also impact the burden which is imposed upon employers in complying with the statute. Beyond the concerns of workers and their employers (which involve both economics and policy), there is the issue of administrative efficiency: the ease or difficulty that the Department of Labor experiences in giving effect to the statute through the administrative regulations.

On March 31, 2003, the Department of Labor published in the *Federal Register* a major revision of the Section 13(a)(1) regulations and called for public comment through June 30, 2003. Thereafter, the Department can be expected to evaluate the comments received to determine if and when a final rule should be published.

Working from the proposed rule, this report reviews the structure of the FLSA, the rationale for workhours restriction, and the nature of the proposed revision of the existing rule governing implementation of the Section 13(a)(1) exemption. This report will be updated if developments warrant.

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The Fair Labor Standards Act: Exemption of "Executive, Administrative and Professional" Employees Under Section 13(a)(1)

On March 31, 2003, the United States Department of Labor (DOL) published in the *Federal Register*[1] a notice of *proposed rulemaking*, together with a request for public comment. At issue is revision of the administrative regulation implementing Section 13(a)(1) of the Fair Labor Standards Act (FLSA). Section 13(a)(1) exempts from the minimum wage and overtime pay protections of the statute "any employee employed in a bona fide executive, administrative, or professional capacity," along with several additional categories of workers.[2]

Most changes in the regulations governing FLSA wage and hour requirements can be expected to be controversial. Those projected with respect to Section 13(a)(1) appear to be especially so. By June 30, when the public comment period closed, in excess of 75,000 statements had reportedly been received by the Department.[3] This report reviews the structure of the FLSA and its requirements, describes what the DOL has proposed, and points to some of the issues that appear to be in contention. The report is an interpretive overview, suggestive of general issues and policy. It focuses upon exemption of the three categories of workers: executive, administrative, and professional.

Introduction

Efforts to establish minimum working and compensation standards for American workers emerged actively during the 19th century and continued, intermittently, through the early decades of the 20th century — in part at the state and local governmental levels and, in part, at the federal level. Through the years, the several initiatives have complemented each other; and, where overlapping standards

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[1] *Federal Register*, Mar. 31, 2003, pp. 15560-15597. The entry in the *Register* includes both the proposed rule and the Department of Labor's explanation of it.

[2] 29 U.S.C. 213(a)(1), commonly referred to simply as Section 13(a)(1).

[3] Kirstin Downey, "Overtime Pay Proposal Stirs Storm of Debate," *Washington Post*, July 1, 2003, p. A11.

have been developed, the higher standard — that most protective of the worker — has normally prevailed.[4]

Enactment of Federal Wage/Hour Standards

Both at the state and federal levels, efforts to enact labor standards protections — including minimum wage and overtime pay requirements — encountered hostile courts that viewed such protections as an unconstitutional infringement upon the prerogatives of employers and upon the right of individual workers to enter into whatever employment relationship they might be able to negotiate with prospective employers. Reform efforts were enhanced during the World War I era and, later, with the Great Depression of 1929 and its aftermath.

Early in the New Deal era, Congress adopted the National Industrial Recovery Act (NIRA, 1933) which included, *inter alia*, provisions through which basic worker protections would be developed on an industry-by-industry basis. The resulting codes (which also dealt with general business practices not directly related to worker concerns) were, very largely, the work of industry with minimum input from organized labor or other worker groups. Although they provided for minimum wages and overtime pay (with other labor standards), there were many variations from the general requirements under the codes.[5] In 1935, the NIRA was declared unconstitutional: the body of worker protections, it appears, was largely set aside.[6]

With the demise of the NIRA, Congress began to experiment with alternative strategies through which to provide basic workplace protections. During the same period, the perspectives of the U.S. Supreme Court began to shift, allowing the federal government to play a more active role in the private sector economy.[7] As a result, Congress, working from recent experience (notably, that with the NIRA), began to fashion general and comprehensive labor standards legislation. Introduced in the spring of 1937 and subjected to intense scrutiny and debate, the new federal wage/hour law emerged in mid-1938 as the Fair Labor Standards Act.[8] The Act, initially narrow in scope, has been broadened through the years as Congress has extended wage/hour and related protections to an ever-expanding body of workers: modifying its provisions to respond to changes in the workplace, while retaining its essential shape and thrust. The FLSA remains the primary federal law in the area of

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[4] A summary of the movement for worker protections can be found in Landon R. Y. Storrs, *Civilizing Capitalism: The National Consumers' League, Women's Activism, and Labor Standards in the New Deal Era* (Chapel Hill: University of North Carolina Press, 2000).

[5] See Margaret H. Schoenfeld, "Analysis of the Labor Provisions of the N.R.A. Codes," *Monthly Labor Review*, Mar. 1935, pp. 574-603.

[6] See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[7] John W. Chambers, "The Big Switch: Justice Roberts and the Minimum Wage Cases," *Labor History*, vol. 10 (1969), pp. 44-73.

[8] P.L. 75-718. See Frances Perkins, *The Roosevelt I Knew* (New York: Viking Press, 1946), pp. 246-267; and Elizabeth Brandeis, "Organized Labor and Protective Labor Legislation," in Milton Derber and Edwin Young (eds.), *Labor and the New Deal* (Madison: The University of Wisconsin Press, 1961), pp. 193-237.

labor standards: wages, hours of work, child labor, industrial homework, and related concerns. It has undergone general revision on eight separate occasions: in 1949, 1955, 1961, 1966, 1974, 1977, 1989, and 1996. There have been numerous more focused amendments to the Act.

The Structure and Shaping of the FLSA

Both the hearings and floor debates of 1937 and 1938 suggest the very close relationship between the NIRA and the emerging FLSA.[9] In its current form, the latter is somewhat compartmentalized. Here, three of its components are of special concern. ***Section 206*** establishes the rate and basic coverage for the federal minimum wage. ***Section 207*** defines what the normal workweek will be (usually, 40 hours) and mandates that, for hours worked in excess of 40 in a single workweek, the employer must compensate his workers at not less than 1½ times the employee's regular rate of pay. Then, ***Section 213*** provides for certain exemptions from the general minimum wage and overtime pay provisions of the statute. Beyond this basic structure, implementation of the statute quickly becomes more complex.

Section 13(a)(1) of the FLSA provides that the minimum wage provisions of Section 206 and Section 207 (overtime pay) will not apply with respect to "any employee employed in a bona fide executive, administrative, or professional capacity." But, Congress did not define "bona fide executive, administrative, or professional," instead leaving that to the discretion of the Secretary of Labor and offering the Department little guidance.

The Department, while noting that the Section 13(a)(1) exemption was adapted from similar usage under the NIRA, has observed that specific references to the history of the exemption "are scant."[10] Thus, the Secretary of Labor, confronted with responsibility for enforcing the law, defined the terms *executive, administrative*, and *professional* by administrative action (29 CFR. 541).

Although the regulations governing implementation of the Section 13(a)(1) exemptions are extensive, they do not cover every possible variation that might appear in the world of work. Over the years, additional clarification has been necessary. On the one hand, the Secretary (or Administrator of the Wage and Hour Division within DOL) has expanded upon the regulations through *opinion letters* which examine more precisely the applicability of the statute (and the regulation) to individual workplaces. At the same time, where dispute has persisted, there has been resort to the courts. The record of litigation in this area is extensive.

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[9] On NIRA issues, see Hugh S. Johnson, *The Blue Eagle from Egg to Earth* (New York: Greenwood Press, 1968); and Donald R. Richberg, *The Rainbow* (New York: Doubleday, Doran & Company, Inc., 1936).

[10] *Federal Register*, Mar. 31, 2003, p. 15561. In 1996, Congress added Section 13(a)(17) to the Act, exempting from the minimum wage and overtime pay provisions of the statute certain computer services personnel. Section 13(a)(17), however, is beyond the scope of this report. See CRS Report RL30537, *Computer Services Personnel: Overtime Pay Under the Fair Labor Standards Act*, by William G. Whittaker.

It may be useful to keep in mind that the Section 13(a)(1), however it may be interpreted, is statutory: only Congress can alter it. The regulations of the Secretary governing administration of Section 13(a)(1), on the other hand, are *regulatory*, an administrative creation of the Secretary. They are flexible and can be altered by the Secretary, through the rulemaking process, at his or her discretion.[11] Routinely, the regulations have been interpreted and applied by the Secretary through *opinion letters*. Judicial decisions, critical for interpretation both of the Act and of the regulations, address specific factual situations and, absent a compelling finding to the contrary, are supportive of Secretarial interpretation. Thus, if the Secretary changes the regulations in a significant manner (and *significance* may be itself disputable), the impact could be felt throughout the structure.

To Exempt or Not To Exempt?

The Fair Labor Standards Act, as noted above, was enacted following decades of urging by various reform groups. The issues that it addressed had been the focus of a substantial body of academic literature; and, when legislation finally neared enactment, it was the subject of a year of intense and heated debate.[12]

Providing for Overtime Pay. The rationale for workhours limitation, as it has evolved through time, falls into at least three distinct categories. First were ***humane concerns***: to protect the health and well-being of workers, to allow time for the proper rearing of children, for skill development and further education, and for participation in the democratic process. Second were ***issues of safety***: that tired or exhausted workers may be accident-prone, thereby endangering themselves, their fellow workers, and the public. Third were ***economic concerns***: work-sharing during times of high unemployment (i.e., spreading the work available during an economic downturn by reducing the hours one individual might be employed by a single employer).[13]

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[11] The discretion of the Secretary, however, may not be unlimited. Some have suggested that "while courts will allow an agency to change its mind about how a law should be interpreted, the courts want to be convinced of the agency's reasoning." See perspective of Monica Gallagher, former Associate Solicitor of Labor, summarized in the Bureau of National Affairs, *Daily Labor Report*, May 8, 2003, p. C1.

[12] See Lawrence B. Glickman, *A Living Wage: American Workers and the Making of Consumer Society* (Ithaca: Cornell University Press, 1997); George E. Paulsen, *A Living Wage for the Forgotten Man: The Quest for Fair Labor Standards, 1933-1941* (Selinsgrove: Susquehanna University Press, 1996); and Willis J. Norlund, *The Quest for a Living Wage: The History of the Federal Minimum Wage Program* (Westport: Greenwood Press, 1997).

[13] Although some argue that workers rely upon overtime pay to sustain themselves and their families (and, indeed, some do), enrichment of workers does not appear to have been a purpose of the authors of the FLSA where the overtime pay requirement was concerned — nor does it appear to have been a focus of the academic scholarship of the period. See CRS Report 89-568, *The Fair Labor Standards Act: Analysis of Economic Issues in the Debates of 1937-1938*, by William G. Whittaker.

Congress chose not to set absolute restrictions upon hours of work but, rather, established **an economic penalty** (a premium pay requirement of 1½ times a worker's regular rate of pay for hours worked in excess of a fixed number per week) to be imposed upon employers whose workers were engaged for hours beyond a specified limit.

If the concerns of Congress were valid in 1938 (humane issues and questions of safety and economics), supporters of continuing workhours regulation would argue, there is little to suggest that the problems that workhours regulation and the overtime pay penalty were meant to address have lessened: the workplace is still fraught with hazards and exhausted workers may still be hazardous to themselves and others; workers still need time to devote to education, skill development, citizenship duties, and family care; and, given the technical complexity of the world of work and the shift in family structure (with more women employed outside the home even where there are small children in the family), restraints upon the number of hours of employment each week may have become increasingly important to many employees.

In Support of Exemption. Even during the 1930s, there were many from industry who were, at least, dubious about the federal regulation of workhours. Through the years, in some quarters, those concerns have persisted.

The overtime pay penalty, whatever the merit of workhours reduction, is clearly a burden to some employers. Many view it as an infringement upon the employer's right to manage: to schedule workhours at his or her convenience, to meet the requirements of his or her production and/or sales processes. It imposes a financial cost — requiring that employers pay their workers on a time-and-a-half basis when they are called upon to work more than 40 hours per week. The decision to impose a penalty in order to reduce the hours worked each week to not more than 40 was made by Congress over 60 years ago and, for good or ill, it continues to be public policy.

Critics of the overtime pay requirement suggest a range of considerations when urging that the penalty be eased or eliminated. There have been shifts in the world of work through the past 60 years. Work processes have changed, some suggest, with work becoming less physically strenuous. There has been increased emphasis, in many industries, upon health and safety — encouraged by the Occupational Safety and Health Act. And, at least in some sectors, the workplace has become increasingly worker friendly. There are also economic concerns that confront industry (and, indirectly, workers). Whatever may raise the cost of domestic American production may also reduce the ability of American firms to compete in the global marketplace — and, in turn, reduce employment opportunities for American workers.

Still others view the Section 13(a)(1) regulations (29 CFR 541) as unduly complex, detailed, often confusing and difficult to administer. As they stand, some suggest, both workers and employers (especially small employers) may find little certainty about either their rights or their obligations under the FLSA — and,

particularly, under Section 13(a)(1). Even if valid in theory, some argue, the existing regulations governing Section 13(a)(1) are out of date and in need of change.[14]

Speaking Generally. *Whether* to exempt executive, administrative, and professional workers is not really the question. The exemption (Section 13(a)(1)) is part of the statute. It is the regulatory question that is at issue. How should the concepts of *executive* and *administrative* and *professional* be defined?

For workers (and for employers), payment of not less than the minimum wage and payment of time-and-a-half for overtime hours worked is of considerable significance. That protection may be viewed as especially important where workers are not unionized and are not employed under a collective bargaining agreement. If they are exempted from federal minimum wage and overtime pay protection, they might be expected by their employers to work additional hours without extra pay in fulfillment of their duties as *executives, administrators*, or *professionals*.[15] The extra uncompensated hours arguably provide the employer with an incentive to secure exemption for his or her employees.[16]

Exemption under Section 13(a)(1) might impact a worker's income, employment and general well-being. Therefore, the DOL has observed (more generally with respect to wage/hour exemptions): "Exemptions provided in the Act 'are to be narrowly construed against the employer seeking to assert them' and their application limited to those who come 'plainly and unmistakably within their terms and spirit.'"[17]

Some Considerations in the Debate

The exemptions written into the statute are numerous and complex (Section 13(a)(1) is only one among many), and the regulations developed by the Secretary to interpret the statute are voluminous and detailed. When reviewing the proposed rule on Section 13(a)(1), it may be useful to keep in mind several considerations.

- Exemptions, under the FLSA are, for the most part *employer exemptions*, not worker exemptions. Although they are stated often

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[14] See Timothy J. Bartl, *Work and Pay in the New Century: Upgrading Our Wage and Hour Laws To Meet the Needs of Today's Employees* (Washington: Labor Policy Association, 2002).

[15] See U.S. General Accounting Office, *Fair Labor Standards Act: White-Collar Exemptions Need Adjustments for Today's Work Place*, Testimony of Cynthia M. Fagnoni before the Subcommittee on Workforce Protections, House Committee on Education and the Workforce, GAO/T-HEHS-00-105, May 3, 2000, p. 2.

[16] Ross Eisenbrey and Jared Bernstein argue in this regard: "The millions of employees who will see their pay reduced will, in all likelihood, see their hours of work increase at the same time. Once employers are not required to pay for overtime work, they will schedule more of it." See Eisenbrey and Bernstein, *Eliminating the Right to Overtime Pay* (Washington: Economic Policy Institute), undated briefing paper, p. 13.

[17] 29 CFR 780.2. Here, the Department refers to a series of judicial opinions by way of justification.

in terms of whether an employee qualifies for an exemption (implying a benefit for the worker), it is the employer who benefits from the exemption. The exemption allows the employer to avoid the costs of paying minimum wages or overtime pay to the worker. And, normally, it is the employer who seeks an exemption.

- In presenting the proposed rule governing Section 13(a)(1), DOL has analyzed what the costs of the revision may be for employers — and the extent to which employers may be inconvenienced by the projected changes. On the other hand, it did not explore in a similar manner what costs (or inconvenience) the altered regulation might impose upon workers. These may include a reduction of earnings for some employees and more scheduled overtime for other workers, among other impacts.[18]
- When one speaks of an *executive*, an *administrator* or a *professional*, one may imagine a top executive or manager, a physician or attorney, an affluent actor or musician: i.e., persons who are successful, relatively well off financially, and without the need for federal wage/hour protections. The floor for exemption under the proposed rule is a salary of $425 per week: $22,100 annually. Below that level, the worker would not qualify for exempt status. Between $22,100 and $65,000, a worker could be overtime pay and minimum wage exempt. Over an earnings threshold of $65,000 annually, he or she would likely be exempt — as he or she may be under the existing regulation.

Of the various FLSA exemptions, Section 13(a)(1) is one of the most far reaching. Defining the terms under which the Section 13(a)(1) exemption is applied is a difficult task equitably to achieve. Perhaps not surprisingly, the duties tests have not undergone major revision since the 1940s; the salary thresholds, since 1975.[19]

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[18] Following extensive discussion of the potential costs and benefits for various categories of employers, for example, the Department (Wage and Hour Division Administrator Tammy D. McCutchen) states: "This rule has been assessed ... for its effect on family well-being and the undersigned hereby certifies that the rule will not adversely affect the well-being of families." See *Federal Register*, Mar. 31, 2003, p. 15584.

[19] Ibid., p. 15560.

Looking at the Proposed Rule

The proposed rule, published in the *Federal Register* of March 31, 2003, together with an explanation (or justification) by DOL, would make a number of changes from the current practice that Labor Secretary Elaine Chao has termed "absurdly complex."[20] The proposed rule is shorter than the existing regulation — which it would also restructure. The result may be more logical and orderly but the structural changes also make it difficult to compare the existing regulation and the proposed rule. To complicate matters further, the exemptions are not mutually exclusive. One can combine the categories (duties) for purposes of exemption.

At the same time, a comparison between the existing regulation and the proposed rule may be only marginally useful. Although the language may be similar, slight changes can alter the overall interpretation of the various standards for exemption. If the proposed rule is implemented, it may over shadow some existing *opinion letters* and judicial decisions — since the regulation that was interpreted or litigated will have changed.[21] Here we examine the proposed rule as though it were a new requirement: freed from the constraints of current language but also subject to the ambiguities of a new regulatory structure.

Dealing with the proposed rule may raise issues for small businesses that do not maintain a human resources staff and for non-union workers lacking trade union support. Small operators may continue to pay overtime rates and standard wages (even where they need not do so) rather than risk violating the law.[22] Conversely, since most of the workers eligible for overtime pay protection will likely be in the lower economic range, they may be less knowledgeable about their rights and less able to insist upon them. Finally, given the complexity of the regulatory language and of the various tests to be satisfied, there may be a spate of violations — many, perhaps, inadvertent.

DOL states that the purpose of the proposed rule "is to clarify, consolidate, simplify, and update the existing criteria for compliance with the exemption."[23] Supporters believe change is warranted and that the proposed rule will bring clarity

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[20] Bureau of National Affairs, *Daily Labor Report*, Mar. 27, 2003, p. AA1. In a DOL press release, Mar. 27, 2003, the Secretary stated: "Our proposal will strengthen overtime for the most vulnerable low-wage workers and allow for stronger Department of Labor enforcement of this important worker protection." As noted below, not all would agree with that assessment.

[21] Although past practice may not be entirely relevant, it is still important to review both the existing regulation and the proposed rule for a clear understanding of what the Department has in mind and of the issues in the debate.

[22] In a Policy Backgrounder, *An Economic Primer to White Collar Reform*, May 21, 2003, from the Employment Policy Foundation, p. 2, for example, it is stated: "In many cases, however, unless the exemption determination is litigated, the employer can never be certain [under current regulations] that a worker is exempt." Again, p. 5, it is stated: "Because most classifications are never determined until they are litigated, employers need clear guidelines, which can be easily interpreted."

[23] *Federal Register*, Mar. 31, 2003, p. 15581.

to the process, enhance the likelihood that workers will enjoy the protections offered under the FLSA, and ultimately reduce legal or administrative costs (to employees, employers and to DOL).[24] Critics, however, strongly argue that the stated objectives of the proposed rule will be neither automatic nor assured.

Interpreting Provisions of the Rule

The qualifying criteria for the Section 13(a)(1) exemption are different for each category of worker: executive, administrator, and professional. These tests/standards are retained in the proposed rule (though with some modification of terminology and concept) and can be divided roughly into two general categories: (a) *an earnings test*, and (b) *a series of non-monetary tests*.

The Salary/Earnings Threshold Test. For Section 13(a)(1) purposes, under the proposed rule, the targeted workforce is divided into three general segments by earnings — *paid in the form of salary and not as hourly wages*.

First. Those workers earning *less than* the threshold of $425 per week would *not* be exempt under Section 13(a)(1).

Second. Those workers earning $65,000 annually (or more — and qualifying through a simplified duties test) would be exempt under a high earnings test.

Third. Those workers earning *at least* $425 per week ($22,100 on an annual basis) but less than the high earnings test, could be exempt or non-exempt depending upon their specific employment situation: the type of work performed, the amount of time devoted to specific types of work, their relationship to other workers, their level of training and of responsibility.[25]

The primary area of dispute could be expected to involve workers in this third category: earning more than $425 per week but less than $65,000 per year.

These earnings thresholds are considerably higher than those under the current regulation. This may not be surprising since the thresholds in the current regulations date from 1975 and, through the years, their value has eroded through inflation.[26] However, critics may argue that the thresholds projected under the proposed rule are still relatively low if one seeks to identify *bona fide* executive, administrative or

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[24] The current regulation, state Representatives Charlie Norwood (R-Ga.) and Cass Ballenger (R-NC) in a Dear Colleague letter of June 26, 2003, are "complex, confusing, and make it next to impossible for workers to know whether they are entitled to overtime, for employers to know how to pay their employees, and for DOL to enforce these important workplace protections." The proposed rule, they argue, will "make it easier for workers to know their rights, for employers to understand their obligations, and for DOL to enforce the FLSA."

[25] Currently, the earnings test for executives or administrators is $155 per week ($8,060 annually); for a professional, $170 a week ($8,840 annually). There is also a higher wage *short test* for qualification under the existing regulation.

[26] *Federal Register*, Mar. 31, 2003, p. 15560.

professional employees. Further, these thresholds can be expected to decline further in value with inflationary change in the general economy. *Neither under the current regulations nor the proposed rule is the earnings threshold indexed*.

An Issue of Clarity? Once the earnings test has been satisfied, there are a series of duties-related tests that must be complied with. "Job titles, nomenclature, or job descriptions," DOL explains of the proposed rule, "do not determine the exemptions, nor does paying a 'salary' rather than an hourly wage." Rather, the exemption depends "on *the specific duties and responsibilities of each employee's job*" and the amount and manner of payment: for example, "... whether the salary is guaranteed without regard to the quality or quantity of work performed ...."[27]

The exemption, clearly, is individual rather than for an entire class of workers: i.e., based upon "the specific duties and responsibilities of each employee's job."[28] To assess whether the standards have been met, one might first examine a worker's job description. But, in addition, a desk audit may be necessary, an interview, or both. Duties and responsibilities would likely vary from one firm to another — and be perceived differently by each employer, worker and compliance officer.[29] Individual workers may spend portions of their workhours engaged in executive duties, as a professional, or in non-exempt work. An employee who performs "a combination of exempt duties" (and whose work may include certain non-exempt duties as well) can be exempt.[30]

To understand, with assurance, the various tests for exemption and, possibly, to craft job descriptions and to design work patterns suited to meet the requirements of those tests, would seem to suggest the need for a human resources staff. This may be beyond the resources of small firms — unless aided by trade associations or other similar bodies.[31] Since an exemption has economic value for employers (it can reduce manpower costs — or, negatively, it can result in fines and the costs of litigation), one might expect that firms would avail themselves of such assistance.

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[27] Ibid., p. 15561. Throughout the report, italics have been added by the author for clarity of reference.

[28] *Federal Register*, Mar. 31, 2003, p. 15561.

[29] GAO, for example, is a discussion of application of the current test for *independent judgment and discretion*, reports: "To assess this requirement, an investigator must review both the general duties of the position and the specific duties of the employee. Further, the determination may hinge upon how an individual employee views his or her own duties." U.S. General Accounting Office, *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place*, GAO/HEHS-99-164, Sept. 1999, pp. 23-24.

[30] See 29 CFR 541.707 of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15596. See also, 29 CRF 541.600 of the existing regulation.

[31] One of the issues sometimes alleged with respect to the industry codes produced under the aegis of the NIRA was that they were written without sufficient input from small businesses that were primarily intent upon economic survival.

But, such help may not be readily available to small employers and is unlikely to be available to individual (non-union) workers.[32]

Another issue is that some states have labor standards that may differ from those under Section 13(a)(1). In such instances, the higher standard prevails; but, it means that employers and workers must keep in mind not only the FLSA and its regulations but, also, a range of different state statutes and attendant regulations.[33]

Overall, management of the exemption may turn out to be quite labor intensive. And, the process may lend itself to a certain subjectivity as the several parties interpret and apply the tests and standards.[34]

Defining Terms and Concepts

After more than 60 years, the Section 13(a)(1) regulations have become somewhat esoteric. Many phrases in the regulations have been litigated and now have a specialized meaning. The definitions provided in the current regulation and in the proposed rule may be as precise as could be written. But, they may leave the non-technician with little certitude about what can or cannot be done within the law.

The *Salaried* Worker. Both under the existing regulation and in the proposed rule, an exempt employee must be *salaried* (or, in some instances, compensated on a *fee basis*).[35] The terms are not set forth in statute but, rather, are regulatory, developed by the Secretary as a means through which to define the statutory language — executive, administrative and professional.

Setting an Exempt Earnings Threshold. Both *salary basis* and *fee basis* are explained in detail as are permissible and prohibited deductions from a salaried worker's compensation — deductions which if taken when impermissible could void

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[32] DOL notes, summarizing GAO findings with respect to Section 13(a)(1), that "the interests of employers to expand the white collar exemptions have competed with those of employees to limit use of the exemptions." *Federal Register*, Mar. 31, 2003, p. 15563. During floor consideration of the issue, Representative Norwood affirmed: "Nothing in these regulations affects[s] unions, period." See *Congressional Record*, July 10, 2003, p. H6570.

[33] *Federal Register*, Mar. 31, 2003, p. 15562. *The Nation's Restaurant News* observes editorially, Apr. 21, 2003, p. 27: "... the proposed changes would have no effect on more stringent state rules." See also: "Overtime Sits Secure in State Despite Federal Bill," *The Olympian*, July 12, 2003, p. A1.

[34] Deron Zeppelin, director of governmental affairs for the Society for Human Resource Management, was optimistic. "We're looking at a potential win for employers because they will know what their obligations are more clearly," he was quoted in *Government Executive Magazine*, Mar. 28, 2003. "Because of simplicity, the employees are going to know what their rights are and the Labor Department can enforce the regulations on a more even basis." See [http://www.govexec.com/dailyfed/0303/032803b1.htm].

[35] See 29 CFR 541.1(f), 541.2(e)(1), and 541.3(e). See also *Federal Register*, Mar. 31, 2003, p. 15585.

the exemption both with respect to the worker directly involved and, under certain conditions, for other workers in the same classification.

In its essential part, the concept of *salary basis* holds: "... the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed."[36] A fee is defined as payment of "an agreed sum for a single job regardless of the time required for its completion." The proposed regulations explain:

> ... generally a "fee" is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

To determine whether a fee meets the criteria for Section 13(a)(1) exemption status, "the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least $425 per week if the employee worked 40 hours."[37] Other qualifying restrictions deal with provision of board, lodging or other facilities and how their value should be counted against the salary or fee.

Indexing the Earnings Test. The earnings tests for the Section 13(a)(1) exemption were always relatively low. With attrition (through inflationary pressures), they shrank further through the years to become virtually without meaning.[38] Therefore, at least where the earnings threshold was concerned, the overtime pay penalty could often be avoided with respect to many lower mid-level executive and administrative employees.

In developing the proposed rule, the Department considered the possibility that the earnings tests be indexed. In rejecting that approach, DOL argued, *inter alia*: "... although adjusting the existing rates for inflation might provide the simplest, mechanical approach, the Department is concerned about the impact such adjusted salary levels would have on certain segments of industry and geographical areas of the country, particularly in the retail industry and in rural areas in the South, which tend to pay lower salaries."[39] DOL cited a "prescient analysis" from a 1958 Department of Labor study that argued: "... the same salary cannot operate with

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[36] Ibid., see pp. 15592-15595, for definitions.

[37] Ibid., pp. 15594-15595.

[38] In the *Federal Register*, Mar. 31, 2003, p. 15570, DOL explains, given the declining value of the existing salary thresholds: "Salary level was once viewed as being the best indicator of exempt status. Today, the existing salary level tests are of no help in distinguishing exempt employees from non-exempt workers." Currently, the test for executives and administrators is $3.88 per hour; for professionals, $4.25 per hour. The current federal minimum wage is $5.15 per hour.

[39] *Federal Register*, Mar. 31, 2003, p. 15570.

equal effect as a test in high-wage and low-wage industries and regions, and in metropolitan and rural areas, in an economy as complex and diversified as that of the United States."[40]

If experience is an appropriate indicator, any increase in the earnings threshold for the Section 13(a)(1) exemption, if approved, is unlikely to be revisited very soon, thus allowing the threshold to erode again. Indexation could prevent such erosion. However, were indexation accepted in this context, it might also be called for with respect to other aspects of the FLSA: for example, the statutory sub-minimum wage for youth, the small business exemption, aspects of the tip credit provision, and the minimum wage rate itself.[41]

Alternatives and Options? Since the structure of earnings tests results from administrative discretion, the Secretary might have moved to a wholly different — and far less complicated — approach. The proposed rule might have set a flat earnings threshold for the three categories of workers (for example, earnings of $25,000 or $50,000 or $100,000 a year) as the sole test, whether a worker was paid on an hourly basis or salaried.[42] At the same time, the duties tests in their various forms might have been eliminated, leaving the employer with a single question. Is the employee paid at the appropriate rate? If so, he or she would be exempt. This would seem, however, to suggest a variety of issues. As a practical matter, are the current and proposed thresholds and tests either necessary or useful? Do they enhance or deter enforcement and compliance? If exemption is justified, would a single indexed earnings threshold, set at a reasonable level, be more effective than the current/proposed structure?[43]

But, within the proposed structure, there are options. When explaining the proposed rule, the Department suggests several alternatives that might be explored by employers. *First*. Employers, DOL posits, could establish a 40-hour workweek (and pay their workers straight time and at least the minimum wage). Presumably, that would satisfy the intent of Congress when enacting the FLSA. *Second*. Employers could schedule whatever combination of hours was deemed necessary and pay their workers time-and-a-half for hours worked in excess of 40 per week. While such an arrangement would not have been the first choice of the authors of the FLSA (who instituted the overtime pay *penalty* to dissuade employers from adopting such a course), it would nevertheless be consistent with the statute. *Third*. Employers

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[40] Ibid.

[41] For a discussion of automatic adjustment of value under the FLSA, see CRS Report RL30927, *The Federal Minimum Wage: The Issue of Indexation*, by Gerald Mayer. The issue is also raised in the statement of Gregory Junemann of the International Federation of Professional and Technical Engineers, submitted to DOL on June 30, 2003, pp. 33-36.

[42] Any proposal to establish a single earnings threshold, however, could be expected to spark debate as to an appropriate dollar level. See, for example, Bureau of National Affairs, *Daily Labor Report*, Apr. 17, 2003, p. C2, and July 1, 2003, p. AA2.

[43] See discussion in U.S. General Accounting Office, *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place*, GAO/HEHS-99-164, Sept. 1999, pp. 33-34. The report provides a broad overview of the Section 13(a)(1) exemption issue.

could raise the wages of potentially exempt workers so that they would meet test requirements.[44]

There are other options. Employers could restructure the duties and earnings of their workers — perhaps converting some employees from hourly to salaried. Some might systematically develop job descriptions and compensation patterns so that workers would qualify for Section 13(a)(1) exemption — altering assignments and managerial/supervisory responsibilities and adding at least minimal analytical content in order to remove additional groups of workers from the wage/hour protections of the FLSA. Nothing in the FLSA would seem to preclude such practice.[45]

The Non-Monetary Tests. With the earnings thresholds rendered largely ineffective as the result of inflationary pressures, determination of whether the Section 13(a)(1) exemption applies to workers rests largely with the *duties tests*. Simplification of those tests *could* significantly broaden the scope of the exemption and remove large numbers of workers from minimum wage and overtime pay protection.[46] Thus, given the relatively modest proposed increases in the earnings thresholds, the manner in which the non-monetary tests are redefined becomes critical.

Some may dispute whether the proposed rule provides increased clarity. The specific provisions — the definitions, the exemptions, the application of various standards to types of work that may not be immediately distinguishable one from another (and all cross-referenced to other sections and definitions) — may leave some confused. As noted above, past practice ("opinion letters," judicial decisions) may not be especially helpful. It appears that interpretation of the proposed rule would be left to the Department, in large part.

The duties tests are presented separately for each category of worker — executives, administrators and professionals — though, in practice, workers may fall into more than one category and may be involved in non-exempt as well as potentially exempt work. Some examples, drawn from the proposed rule, will

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[44] *Federal Register*, Mar. 31, 2003, p. 15576.

[45] In its explanation of the proposed rule, the Department speculates: "Most employers affected by the proposed rule would be expected to choose the most cost-effective compensation adjustment method that maintains the stability of their work force, pay structure, and output levels." See *Federal Register*, Mar. 31, 2003, p. 15576.

[46] Impact estimates vary. "It's a net positive for employers — probably in a big way ...," states Washington attorney Daniel Abrahams. "The proposal loosens up the exemptions and makes it easier to classify borderline employees as exempt." Similarly, through from a different perspective, Chris Owens of the AFL-CIO voices concern that a "loosening up of the duties test will sweep a lot more workers into the [Section 13(a)(1)] exemption" who will, then, lose overtime pay protection. See Bureau of National Affairs, *Daily Labor Report*, Apr. 17, 2003, p. C1.

suggest its complex character. Again, the reader may find it useful to consult the full text in the *Federal Register*.[47]

The Executive Exemption

- An *executive* is characterized as one who "*customarily and regularly directs the work* of two or more other employees."[48] Later, DOL notes: "The phrase 'customarily and regularly' means a frequency that must be *greater than occasional* but which, of course, may be *less than constant*. Tasks or work performed 'customarily and regularly' includes work normally and recurrently performed every work week; it does not included (sic.) isolated or one-time tasks."[49]

Issues in the debate may include the following. What does the phrase "directs the work" mean in terms of a particular workplace? How much direction must be given? In a fast food outlet? In a garment factory? On a construction site? Does the phrasing lend itself to manipulation of job descriptions and work assignments?

- Under the proposal, an *executive* "has the authority to hire or fire other employees *or whose suggestions and recommendations* as to the hiring, firing, advancement, promotion or any other change of status of other employees *will be given particular weight*."[50]

Thus, to be an executive in this context, a person would not have to possess the "authority to hire or fire." Making "suggestions and recommendations" concerning the work status of others would seem to be sufficient. Interpretation of what constitutes "suggestions and recommendations," however, may well be problematic. How would a DOL compliance officer measure either the value of "suggestions and recommendations" or the concept of "particular weight"?

- The *executive* must have "a *primary duty* of the management of the enterprise in which the employee is employed or of a *customarily recognized department or subdivision thereof*."[51]

The concept of "primary duty" is explained in the proposed rule as "the principal, main, major or most important duty that the employee performs."

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[47] A side-by-side comparison of current requirements under Section 13(a)(1) and those of the proposed rule is presented in the *Federal Register*, Mar. 31, 2003, pp. 15573-15576. However, the side-by-side is a general summary. Reference should also be made to the actual language of the proposed rule.

[48] 29 CFR 541.100(a)(3) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15585.

[49] 29 CFR, 541.701 of the proposed rule, *Federal Register* Mar. 31, 2003, p. 15595.

[50] 29 CRS 541.100(a)(4) of the proposed rule, *Federal Register* Mar. 31, 2003, p. 15585.

[51] 29 CFR 541.100(a)(2) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15585. Although not dealt with here, the phrase "customarily recognized department or subdivision thereof" is parsed in detail in the proposed rule.

Further: "Determination of an employee's primary duty must be based on all the facts *in a particular case*."[52]

Such determinations would ultimately be specific to the individual worker: not a general rule. Short of a desk audit (or other close review) to verify that an exemption is justified, it is not clear how a DOL compliance officer could make this determination.

"The term 'primary duty' does not require that employees spend over fifty percent of their time performing exempt work." The proposed rule further states: "... the amount of time spent performing *exempt work* can be a useful guide, and employees who spend over fifty percent of the time performing *exempt work* will be considered to have a primary duty of performing *exempt work*."[53]

That standard is not absolute. The proposed rule directs that "the relative importance of the exempt duties as compared with other types of duties" be taken into account.[54] Thus, it would appear, an employee who briefly performs a really important exempt duty (but devotes the remainder of his or her workhours to relatively routine work) could still be exempt. The relative importance of the work performed would, in the last analysis, be left to determination by a compliance officer — a task that may be neither quick or simple.

To comply with the proposed rule, the work of the "executive" would need to be monitored and be documentable. What level of documentation can one expect the Department to require? This would seem to suggest an increased paperwork burden for employers — perhaps especially onerous for small businesses. Another issue is what is meant by *exempt work*. The proposed rule states:

> The term 'exempt work' means all work described in [paragraphs] 541.100, 541.101, 541.102, 541.200, 541.206, 541.300, 541.301, 541.302, 541.303, 541.304, 541.400 and 541.500, and the activities *directly and closely related* to such work. All other work is considered 'nonexempt.'[55]

Another issue is what is meant by "directly and closely related" to such exempt work. The proposed rule offers guidance:

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[52] 29 CFR 541.700 of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15595.

[53] Ibid. Under the current rule (29 CFR 541.103), it was stated as "a rule of thumb" that the concept of *primary duty* means "... over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty." Although the formal time/duties test may largely disappear under the proposed rule, it would seem not to disappear entirely in practice.

[54] 29 CFR 541.700 of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15595.

[55] 29 CFR 541.702 of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15595.

> Work that is 'directly and closely related' to the performance of exempt work is also considered exempt work. The phrase 'directly and closely related' means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. Thus, 'directly and closely related' work may include physical tasks that arise out of exempt duties, and the routine work without which the exempt employee's more important work cannot be performed properly. Work 'directly and closely related' to the performance of exempt duties may also include recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine. Work is not 'directly and closely related' if the work is *remotely related* or *completely unrelated* to exempt duties.[56]

The proposed rule goes on to discuss, through examples, a number of types of work that may be *directly and closely related* — or that may not be.

- Some aspects of the proposed rule are discussed in detail. As noted above, an *executive* must customarily and regularly direct the work "of two or more other employees." That may seem clear — but it may also raise questions. The proposed rule explains:

> The phrase 'two or more other employees' means two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent.[57]

Where the firm is small and the *executive* regularly and customarily directs the work of only one subordinate, then he (or she) would presumably be ineligible for exemption as an *executive*. (Depending upon the circumstances, he (or she) might qualify as an *administrative* or *professional* employee — though there is a similarly complex body of regulations governing those categories of work as well.) What happens, again in a small firm, if one of two subordinate employees retires and is not immediately replaced — for example, for 6 months? Does an otherwise exempt executive cease to be exempt through the 6-month period?

The Administrative Exemption

- An *administrative* employee is one with "*a primary duty* of the performance of office *or* non-manual work *related to* the management *or* general business operations of the employer *or* the employer's customers ...."[58] From the discussion above, it is clear that substantial definitional questions may be raised — and they *are* raised in the proposed rule.

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[56] 29 CFR 541.703(a) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15595.

[57] 29 CFR 541.105(a) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15586.

[58] 29 CFR 541.200(a)(2) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15587.

- The *administrative* employee, according to the proposed rule, is expected to hold "a position of responsibility." It is explained:

> The phrase 'position of responsibility' refers to the importance to the employer of the work performed *or* the high level of competence required by the work performed. To meet this requirement, an employee must either customarily and regularly perform work *of substantial importance* or perform work requiring *a high level of skill or training*.[59]

The proposed rule goes on to explain that "'work of substantial importance' means work that, by its nature or consequence, affects the employer's general business operations or finances *to a significant degree*."[60] It continues:

> Work of substantial importance includes activities such as formulating, interpreting or implementing management policies; providing consultation or expert advice to management; making or recommending decisions that have a significant impact on general business operations or finances; analyzing and recommending changes to operating practices, planning long or short-term business objectives; analyzing data, drawing conclusions and recommending changes; ... and work of similar impact on general business operations or finances.

But, then, the proposed rule adds caveats that seem to diminish the general importance of the work qualification.

> Work of substantial importance thus *is not limited to employees who participate in formulation of management policies or in the operation of the business as a whole*. It includes the work of employees who carry out *major assignments* in conducting the operations of the business, or whose work affects general business operations to a significant degree, even though their assignments are tasks related to the operation of a particular segment of the business.[61]

The proposed rule notes that "a buyer" for an industrial plant "or an assistant buyer for a retail or service establishment may have a significant impact on the business, even though the work may be limited to purchasing for a particular department." But these distinctions seem to become both technical and fungible. For example:

> ... although comparison shopping by an employee who merely reports findings on a competitor's prices is not work of substantial

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[59] 29 CFR 541.202 of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15587.

[60] 29 CFR 541.203(a) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15587.

[61] 29 CFR 541.203(b) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15587.

> importance, the buyer who evaluates such reports to set the employer's prices does perform work of substantial importance.[62]

Another example:

> An employee who leads a team of other employees assigned to complete a major project for the employer ... performs work of substantial importance, *even if the employee does not have direct supervisory responsibility* over the other employees on the team.[63]

Workers under the proposed rule may be considered to be engaged in "work of substantial importance, even if their decisions or recommendations are reviewed for possible modification or rejection at a higher level."[64]

- The administrative employee can be expected to have a "high level of skill or training" but what does this include in reference to a specific workplace? The proposed rule notes:

> ... 'work requiring a high level of skill or training' means administrative work requiring *specialized knowledge or abilities*, or *advanced training*. The specialized knowledge or abilities *need not be acquired through any particular course of academic training or study*. Also, the high level of training required *may involve advanced academic instruction or advanced on-the-job training*, or a combination of both.[65]

Though such details with respect to abilities, advanced training, and specialized knowledge, are admittedly difficult to define for generic application of the Section 13(a)(1) exemption, having defined them in the way that they have, critics may argue, permits an employer seeking exemption to create a job description to fit the exemption desired. The concepts such as "specialized knowledge or abilities," it would appear, could be adapted to a wide range of circumstances.

The Professional Employee

A *professional* employee, under the proposed rule, is one with "knowledge of an advanced type in a field of science or learning *customarily acquired* by a prolonged course of specialized intellectual instruction, *but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience ...*"[66]

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[62] 29 CFR 541.203(b)(1) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15587.

[63] 29 CFR 541.203(b)(3) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15587.

[64] 29 CFR 541.203(b)(4) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15587.

[65] 29 CFR 541.204(a) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15588.

[66] 29 CFR 541.300(a)(2)(i) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15589.

This working definition of a *professional* employee may be viewed as a marked departure from current practice. Under current regulations, a *professional* "includes those professions which have a recognized status and which are based on the acquirement of professional knowledge through prolonged study."[67] The current regulations offer the interpretation:

> ... knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes.[68]

The current regulations are relatively clear: such fields as law, medicine, architecture and "various types of physical, chemical, and biological sciences, including pharmacy" among others.[69] Again, these are *the learned professions* and not technical crafts. The current regulations state further:

> A college education would perhaps give an executive or administrator a more cultured and polished approach but the necessary know-how for doing the executive job would depend upon the person's own inherent talent. The professional person, on the other hand, attains his status after a prolonged course of specialized intellectual instruction and study.[70]

The requirement has often been applied by DOL to mean advanced academic study in a professional field, beyond a college degree — though exceptions have been made in some fields.

Under the proposed rule, the concept of a *learned profession* could be broadened to include not only the *traditional* learned professions but fields with requirements that can be satisfied "by alternative means such as an equivalent combination of intellectual instruction and work experience."[71] The proposed rule would not deem a normal high school education as "knowledge of an advanced type."[72] As described by the Department, the proposed rule interprets the phrase "customarily acquired" to mean:

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[67] 29 CFR 541.300.

[68] 29 CFR 541.301(a).

[69] 29 CFR 541.301(e)(1).

[70] 29 CFR 541.301(e)(2). In several fields, the definition of a *professional* for Section 13(a)(1) purposes has been of some controversy. Concerning industry's quest for wage/hour exemption of funeral directors and embalmers, see CRS Report RL30697, *Funeral Services: The Industry, Its Workforce, and Labor Standards*; concerning a similar effort to secure exemption for certain computer workers, see CRS Report RL30537, *Computer Services Personnel: Overtime Pay under the Fair Labor Standards Act*, both by William G. Whittaker.

[71] 29 CFR 541.301(a) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15589.

[72] 29 CFR 541.301(b) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15589.

> The phrase 'customarily acquired by a prolonged course of specialized intellectual instruction' *generally restricts* the exemption to professions where specialized academic training is a standard prerequisite ... However, the word 'customarily' means that the exemption is also available to employees in such professions who have *substantially the same* knowledge level as the degreed employees, but who attained such knowledge through a combination of *work experience*, *training in the armed forces*, attending *a technical school*, attending *a community college or other intellectual instruction*.[73]

Under the proposed rule, it appears that DOL, with the passage of time, may grant exemptions with a wider measure of flexibility. The proposed rule later states:

> The areas in which professional exemptions may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science and learning. *When a specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession*.[74]

Together with the various qualifying and conditioning elements ("work experience" or study at "a technical school" or "community college" or "other intellectual instruction"), critics may argue that there would be a wide range of exemptions DOL could approve.

The proposed rule speaks of work requiring "invention, imagination, originality or talent" — concepts that are defined largely in terms of examples.[75] But the phrasing of some of the examples may provoke further questions. A broadcaster, for example, who conducts interviews, reports or analyzes public events or acts as "a narrator, announcer or commentator" would likely be exempt. However: "Positions that primarily require the employee to collect and record routine facts or data *without analysis, interpretation, synthesis, or creative or original writing* would not qualify for the creative professional exemption."[76]

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[73] 29 CFR 541.301(d) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15589. Gregory Junemann of the International Federation of Professional and Technical Engineers, in a June 30, 2003, submission to DOL, p. 25, argues that by redefining the requirements for a *professional* employee to include "on-the-job training" would mean that "any job at all could be considered to be a profession." Daniel V. Yager, in a June 30, 2003, submission to DOL on behalf of the Labor Policy Association, p. 41, states: "... DOL has failed to articulate any clear line as to when nondegreed employees qualify as professionals."

[74] 29 CFR 541.301(g) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15589.

[75] 29 CFR 541.302(a) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15589.

[76] 29 CFR 541.302(d) of the proposed rule, *Federal Register*, Mar. 31, 2003, p. 15590.

Assuming that such workers were not otherwise protected, this may raise further issues.[77] For example, how does one define *analysis* or *interpretation*? And, how does one identify writing that is *creative or original* and distinguish it from writing that is merely reportorial? Again, are DOL compliance officers prepared to make such definitional determinations (to define *analysis,* to assess what is *creative* or *original*, etc.) for each of the hundreds of types of occupations they may encounter — either in terms of their own knowledge and understanding or in terms of the time they are allowed to devote to such exploration and assessment in the ordinary course of their work? Finally, do such distinctions matter in the context of the original intent of the minimum wage and overtime pay provisions of the FLSA?

In Summary

When placing the Section 13(a)(1) exemption in the FLSA, Congress left definition of the concepts *executive*, *administrative* and/or *professional* to the discretion of the Secretary of Labor, providing little in the way of guidance.

Whether there *ought* to be an exemption from the minimum wage and overtime pay requirements of the Act for executive, administrative and/or professional employees is not at issue. How such exemptions ought to be interpreted — narrowly or broadly — is left to the judgment of the Secretary, absent further action by Congress.[78]

The tests for implementation of Section 13(a)(1) are a construct of the Secretary. These tests and standards are regulatory and not statutory. Nothing in the statute requires them. They could be dispensed with were the Secretary able to develop an equitable alternative strategy.

In presenting the proposed rule, the Department has stated the need for updating the regulations governing the Section 13(a)(1) exemptions. By increasing the earnings threshold, it suggests, workers — especially those who are less highly paid (earning less than $22,100 per year) — would be afforded certainty with respect to their standing under the minimum wage and overtime pay requirements of the FLSA. Equally, employers, the Department avers, would be given a clearer understanding of which of their workers are covered by the full force of the FLSA requirements and which are exempt — thus, preventing inadvertent misclassification of workers and, for employers, litigation and potential fines. Similarly dated, the Department states, are the duties tests of the current regulations which, it suggests, are often based upon

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[77] In the news and related broadcast fields, many workers may have overtime pay protections as part of a collective bargaining agreement.

[78] Some, however, question the extent of regulatory discretion. "It is not the Department's job to expand the exemptions at the demand of employer groups which wish to lower payroll costs by avoiding the need to pay overtime to production workers," affirmed a draft statement to DOL from the National Employment Lawyers Association. And the United Food and Commercial Workers union, in its submission, seemed to concur. "The proposed regulations far exceed DOL's statutory power to 'define and delimit' the white-collar exemptions." See Bureau of National Affairs, *Daily Labor Report*, July 1, 2003, p. AA2.

job descriptions and workplace conditions that no longer exist — or, at least are not comparable to those of 60 years ago.

A primary question for the parties concerned with the issue would seem to be: Does the proposed rule "clarify, consolidate, simplify, and update the existing criteria for compliance" with the Section 13(a)(1) exemption?[79] The proposed rule is significantly shorter than the current regulation. Much of the language remains the same — but a great deal has also been changed. The changes may mean that past practice, administrative determinations, and case law would offer little interpretive guidance were the proposed rule to be implemented. This, in turn, might suggest a new era of revised *opinion letters* and litigation. Whether this occurs may ultimately turn on whether the proposed rule renders the basis for the exemption significantly more clear and understandable and easier to deal with for the small employer and the non-union worker.

The interpretive and discretionary character of the proposed rule, some might suggest, is its most distinctive element. It appears to allow broad authority for DOL and employers to define the concepts — *executive, administrative,* and *professional.* As proposed (and, in some measure, in the current regulation as well), the language of the rule seems sufficiently broad to be permissive of almost any interpretation.

For these reasons, impact projections associated with the proposed rule cannot be precise. How many workers would be affected may largely depend upon how the proposed rule, if approved, is implemented.[80]

Rather than establish a single national standard for exemption from the minimum wage and overtime pay protections of the FLSA, the Department has proposed a standard that could, in practice, be different for each individual worker in each individual workplace and for each of the categories of workers covered by the exemption. How that may be applied in practice, of course, would depend upon the will and intent of the Department.

In this debate, some major issues are foreseeable. Is the exemption, with its thresholds and duties tests and the great body of definitions and distinctions, too complicated for effective administration? Is the proposed rule sufficiently clear to be easily understood by employers, large and small alike, and by workers? How significant would be the paperwork burden that employers would have in order to

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[79] Representative Ralph Regula (R-Ohio), for example, affirms: "I think the rules would make management of the enterprise more effective and more efficient...." *Congressional Record*, July 10, 2003, p. H6568. However, Washington-based labor attorney Gregory McGillivary is more dubious, pointing to the "weak justification" for a number of the changes in the new regulations that "will subject them to attack" through the courts. See Bureau of National Affairs, *Daily Labor Report*, May 8, 2003, p. C1.

[80] The Department observes: "... data limitations prevent the Department from identifying exactly which workers are exempt and nonexempt based on the current and proposed duties tests." *Federal Register*, Mar. 31, 2003, p. 15577. See also: Bureau of National Affairs, *Daily Labor Report*, Mar. 28, 2003, p. AA2; and "Policy Backgrounder, An Economic Primer to White Collar Reform," May 21, 2003, from the Employment Policy foundations, p. 5.

assure that each individual workers, claimed to be exempt, actually is exempt under the regulation? Will the individual worker be clear as to his or her rights (minimum wage and overtime pay protection) as the proposed rule has been written? What does the new structure mean for the compliance staff of the Department of Labor: now sent out to determine, for example, the level of *originality* or *creativity* in the work of one employee or the quality of *work experience* acquired by another?