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Overtime Pay: The Department of Labor Initiative and Congressional Response (2003-2004)

William G. Whittaker
Specialist in Labor Economics
Domestic Social Policy Division

Summary

On August 23, 2004, the Department of Labor (DOL) placed in effect a new regulation for implementation of Section 13(a)(1) of the Fair Labor Standards Act (FLSA): an exemption from the Act's overtime pay requirements for employers of *bona fide* executive, administrative, and professional workers, outside salespersons, and certain others. This report sketches the evolution of that initiative and suggests where additional information about it might be found. It will not be updated unless there are significant new administrative or legislative actions in this area.

The Fair Labor Standards Act of 1938 (29 U.S.C. §§ 201-219), as amended, is the primary federal law governing minimum wages, overtime pay, and closely related labor standards. Section 6 provides for a minimum wage; Section 7, a workweek of 40 hours after which overtime pay (1½ times a worker's regular rate of pay) is due. Section 13 sets out exemptions from the act's wage and hour standards. Section 13(a)(1) of the act provides that Section 6 and Section 7 will not apply to "... any employee employed in a *bona fide* executive, administrative or professional capacity" or in the capacity of outside salesman. To it was subsequently added language exempting certain "academic administrative personnel" and teachers "in elementary or secondary schools...."

Congress did not define the several terms but, rather, left them to be "defined and delimited from time to time" by the Department of Labor. In October 1938, the first federal Wage and Hour Administrator, Elmer F. Andrews, provided the original regulation governing the Section 13(a)(1) exemption and, in it, defined the concept of "bona fide executive, administrative or professional" workers. The "Andrews Rule" took up *two-thirds of one page* in the *Federal Register*.[1] Through the years, Andrews' successors have modified that original rule by administrative action, adding qualifying standards and tests for exemption and defining applicable concepts. As the regulation has

[1] *Federal Register*, Oct. 20, 1938, p. 2518.

evolved, two general tests for exemption have emerged: *First*. An exempt worker had to be paid at a rate befitting an executive, administrator, or professional. *Second*. The worker had to perform the duties of an executive, administrator, or professional. Several standards were developed for outside sales workers and for those in educational fields.

With the passage of time, the threshold of the salary or earnings test eroded until it closely approximated the federal minimum wage. The duties test very slowly expanded, taking into account new types of work that had developed since the 1930s. Some argued that each of the tests had become, by the end of the 20th century, considerably out-of-date.

On March 31, 2003, Wage and Hour Administrator Tammy McCutchen published a new proposed rule governing Section 13(a)(1).[2] During a three-month comment period on the proposed rule, DOL received about 80,000 pieces of testimony. On April 23, 2004, the Department published a final rule that would take effect on August 23, 2004.[3] The new/final rule, which is now operational, provides for an increase in the salary level to qualify for exemption: a provision generally acceptable to labor. Persons earning less that $23,660 would automatically be protected by FLSA minimum wage and overtime pay requirements. Those earning more than $100,000 and performing any executive, administrative or professional function, *may* be exempt. Between $23,660 and $100,000, however, coverage or exemption would be determined by the *duties test* — substantially redefined and, some argue, broadened significantly to expand exemption under Section 13(a)(1). Labor has objected strongly to this redefinition; employers, generally, appear to be more supportive of the initiative.[4]

In its current printed form in the *Federal Register*, the final rule is of two parts: a regulatory analysis and statement of intent, followed by the precise language of the rule *per se*. What its impact will be is not clear. Labor Secretary Elaine Chao declared that the rule "strengthens and clarifies" overtime protection.[5] Administrator McCutchen affirmed that the final rule is "clear, straightforward and fair."[6] But, not everyone is so sanguine.

Ross Eisenbrey of the labor-oriented Economic Policy Institute argued that the Department has chosen "to adopt new definitions that are unclear and new tests for exemption that require a case-by-case analysis that will be almost impossible for Wage

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[2] *Federal Register*, Mar. 31, 2003, pp. 15560-15597. See also CRS Report RL32088, *The Fair Labor Standards Act: Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, by William G. Whittaker.

[3] *Federal Register*, Apr. 23, 2004, pp. 22122-22274.

[4] For organized labor's perspective, see the AFL-CIO website at [http://www.aflcio.org]. For industry-oriented views, see the Labor Policy Association (HR Policy Association) website at [http://www.hrpolicy.org].

[5] Statement of Secretary Chao before a hearing of the House Committee on Education and the Workforce, Apr. 28, 2004. See [http://www.dol.gov].

[6] Statement of Administrator McCutchen before a hearing of the Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services, and Education, May 4, 2004.

and Hour's enforcement staff" — a "guaranteed recipe for litigation."[7] Senator Arlen Specter (R-PA), who presided over several hearings on the final rule, reportedly stated that the rule will spawn "lots of litigation, lots of class actions." Senator Tom Harkin (D-IA), a critic of the final rule, branded it as "anti-employee" and an "attack on the 40-hour workweek."[8] Still, Representative John Boehner (R-OH), Chair of the House Committee on Education and the Workforce, was up-beat: "Is it [the final rule] going to be perfect? No. Is it a lot better than it was? Absolutely."[9]

The Section 13(a)(1) exemption is potentially the broadest under the FLSA. The Government Accountability Office (GAO) has estimated that between 19 and 26 million workers, in 1998 (under the old rule), fell into the category of executive, administrative or professional employees.[10] Not all of these workers would necessarily be affected by the new rule — but many could be. Deputy Wage and Hour Administrator Alfred Robinson, addressing the potential impact of the final rule, projected that some 107,000 employees earning over $100,000 a year, satisfying other requirements of the rule, "*could* be classified as exempt" — but added that DOL believed even that was "*unlikely*." (Italics in the original.) Robinson added: "... few if any workers earning between $23,660 and $100,000 are likely to lose the right to overtime pay."[11] Eisenbrey suggested that the rule "could strip away the right to overtime pay for over six million workers."[12]

Methodologies differ — and so do underlying economic assumptions. How many workers will be affected — and which groups of workers they may be — is unclear at this point. Much depends upon how the Department of Labor defines the various terms and concepts imbedded within the rule, what actions employers may take to accommodate their operations to the rule, and the general economics of the marketplace. But it may not be unreasonable to expect the impact to be — at least potentially — substantial.

Release of the proposed rule, March 31, 2003, sparked an immediate public and congressional reaction. The chart that follows tracks the sequence of agency actions, hearings by committees of the Congress, legislative proposals, and related developments.

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[7] Eisenbrey testimony, Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services, and Education, May 4, 2004.

[8] Senators Specter and Harkin are quoted in the Bureau of National Affairs, *Daily Labor Report*, May 5, 2004, p. AA3.

[9] Rep. Boehner, comments before the House Committee on Education and the Workforce, Apr. 28, 2004, FDCH Transcripts, p. 69.

[10] U.S. General Accounting Office (now Government Accountability Office), *Fair Labor Standards Act White-Collar Exemptions in the Modern Work Place*, report to the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, GAO/HEHS-99-164, Sept. 1999, p. 2.

[11] Testimony by Robinson, House Small Business Subcommittee on Workforce, Empowerment and Government Programs, May 20, 2004.

[12] Ross Eisenbrey, *Longer Hours, Less Pay: Labor Department's New Rules Could Strip Overtime Protection from Millions of Workers* (Washington: Economic Policy Institute, July 14, 2004), p. 1. See [http://www.epinet.org/content.cfm/briefingpapers_bp152].

Table 1. Issue Chronology: The Department of Labor's Section 13(a)(1) Overtime Pay Initiative and Congressional Response

Date	Action or consideration[a]
Mar. 31, 2003	DOL issues notice of proposed rulemaking with respect to Section 13(a)(1) of the Fair Labor Standards Act (FLSA) and seeks comment.
June 30, 2003	Comment period on the proposed rule closes (ca. 80,000 comments received).
July 8, 2003	H.R. 2665, a bill to restrict DOL from moving forward with its proposed rule, was introduced by Rep. Peter King (R-NY).
July 10, 2003	House votes (210 ayes to 213 nays) to reject an amendment proposed by Rep. David Obey (D-WI) to Labor, Health and Human Services, Education, and Related Agencies Appropriations Bill (H.R. 2660: FY2004), to prevent DOL from moving forward with the proposed rule. (Hereafter cited as L-HHS-ED, and by fiscal year.)
July 29, 2003	S. 1485, a bill to restrict DOL from moving forward with its proposed rule, was introduced by Sen. Edward Kennedy (D-MA).
July 31, 2003	Senate Appropriations Subcommittee on Labor, Health and Human Services, and Education, chaired by Senator Arlen Specter (R-PA) conducts oversight hearing on the proposed Section 13(a)(1) rule.
Sept. 9, 2003	S. 1611, a bill to create a *blue ribbon* commission to review the overtime requirements of the FLSA, was introduced by Sen. Specter. Were it adopted, the Specter proposal would hold the proposed rule in abeyance pending a report from the commission.
Sept. 10, 2003	Senate approves (54 yeas to 45 nays) a floor amendment to H.R. 2660 (L-HHS-ED, FY2004), proposed by Senator Tom Harkin (D-IA), to restrict DOL from moving forward with its proposed Section 13(a)(1) rule.
Oct. 2, 2003	During appointment of House conferees on H.R. 2660 (L-HHS-ED, FY2004), the House voted (221 yeas to 203 nays) to instruct its conferees to support the Harkin amendment on the Section 13(a)(1) issue.
Nov. 25, 2003	Setting aside H.R. 2660 (still pending in conference), an omnibus appropriations bill (H.R. 2673) was filed which omitted the Harkin amendment. See H.Rept. 108-401.
Dec. 8, 2003	The House approved H.R. 2673 (242 yeas to 176 nays) without dealing with the Section 13(a)(1) overtime pay issue.
Jan. 20, 2004	Senate Appropriations Subcommittee on Labor, Health and Human Services, and Education, chaired by Sen. Specter, conducts a second oversight hearing on the proposed rule dealing with Section 13(a)(1).
Jan. 20, 2004	Senate commenced consideration of the conference report on the L-HHS-ED, FY2004 appropriations bill (now, the omnibus appropriations bill, H.R. 2673). Confronted with a Harkin amendment to restrain DOL from moving forward with its Section 13(a)(1) initiative, Sen. William Frist (R-TN) moved for cloture. The cloture vote failed, 48 yeas to 45 nays.[b]
Jan. 22, 2004	Senate concurred in a second Frist motion for cloture: 61 yeas to 32 nays (7 not voting).[b] Thereafter, the Senate approved the conference report on H.R. 2673 (65 yeas, 28 nays, 7 not voting). The Section 13(a)(1) provision (Harkin amendment) was not included.
Jan. 23, 2004	President Bush signed H.R. 2673 (P.L. 108-199).

Date	Action or consideration[a]
Mar. 3, 2004	S. 1637 ("Jumpstart Our Business Strength (JOBS) Act"), a tax and trade measure, was called up in the Senate. Sen. Harkin announced that he would offer an amendment to restrain DOL from moving forward with the Section 13(a)(1) initiative. (Debate continued on Mar. 4, 2004, after which the Senate moved temporarily to other matters.)
Mar. 22, 2004	Debate on S. 1637 resumed. The Harkin amendment dealing with the Section 13(a)(1) issue was called up. With the Harkin amendment pending, Sen. Mitch McConnell (R-KY) moved for cloture.
Mar. 24, 2004	Senate vote on cloture (S. 1637) was defeated (51 yeas to 47 nays).[b] The Senate moved on to other business.
Apr. 5, 2004	Sen. Frist submitted a second motion for cloture on S. 1637.
Apr. 7, 2004	Senate voted on the Frist cloture motion on S. 1637, the motion being defeated by a vote of 50 yeas to 47 nays.[b] Again, the Senate moved on to other business.
Apr. 23, 2004	The Department of Labor published in the *Federal Register* its final rule dealing with overtime pay under Section 13(a)(1).
Apr. 28, 2004	The full Committee on Education and the Workforce, chaired by Rep. John Boehner (R-OH), conducted an oversight hearing on the Department's final rule on Section 13(a)(1).
May 4, 2004	Senate Appropriations Subcommittee on Labor, Health and Human Services, and Education, chaired by Sen. Specter, conducted a third oversight hearing on the Section 13(a)(1) overtime pay issue, focusing here upon the Department's final rule.
May 4, 2004	Senate resumed consideration of S. 1637 and adopted two amendments dealing with the Section 13(a)(1) overtime pay issue: (a) an amendment by Sen. Judd Gregg (R-NH) listing types of work that would be exempted from any putative adverse impact of DOL's final rule, and (b) the Harkin amendment restraining DOL from moving forward with implementation of its final rule. The Gregg amendment was approved by 99 yeas (1 Senator not voting); the Harkin amendment, by 52 yeas to 47 nays.
May 12, 2004	Rep. George Miller (D-CA) moved the instruct the conferees on H.R. 2660 (L-HHS-ED, FY2004 appropriations bill, still technically in conference) to support the Senate (Harkin) amendment to restrict implementation of the Section 13(a)(1) overtime pay rule. Rep. Tom DeLay (R-TX) moved to table the Miller motion — the DeLay motion to table carrying by 222 yeas to 205 nays.
May 18, 2004	Rep. George Miller again moved to instruct the conferees on H.R. 2660 (L-HHS-ED, FY2004 appropriations bill) to support the Senate (Harkin) amendment to restrict implementation of the Section 13(a)(1) overtime pay rule. Rep. DeLay moved to table the Miller motion; the DeLay motion carried, 216 yeas to 199 nays.
May 20, 2004	House Small Business Subcommittee on Workforce, Empowerment and Government Programs, chaired by Rep. W. Todd Akin (R-MO), conducted an oversight hearing on DOL's final rule dealing with the overtime pay provisions of Section 13(a)(1).
June 4, 2004	Rep. William Thomas (R-CA) introduced H.R. 4520, roughly the House counterpart to S. 1637.
June 17, 2004	H.R. 4520 was called up in the House and passed (251 yeas to 178 nays). As passed by the House, H.R. 4520 was silent on the Section 13(a)(1) issue, including neither the Harkin nor Gregg language.

Date	Action or consideration[a]
July 14, 2004	During House Appropriations Committee consideration of the DOL appropriations bill (L-HHS-ED, FY2005), later introduced as H.R. 5006, Rep. Obey proposed language restricting DOL from implementing the final rule governing the overtime pay provisions of Section 13(a)(1). The Obey amendment was defeated in the full Committee by a vote of 31 nays to 29 yeas.
July 15, 2004	H.R. 4520 was called up in the Senate. The Senate struck all after the enacting clause, substituted the language of S. 1637, as amended, and thereafter passed H.R. 4520 by a voice vote. As passed by the Senate, H.R. 4520 now contained both the Harkin and Gregg amendments. The Senate immediately appointed conferees for the measure.
Aug. 23, 2004	The Department of Labor's final rule governing Section 13(a)(1), overtime pay, went into effect.
Sept. 8, 2004	Office of Management and Budget issued a statement affirming that it "would strongly oppose" and recommend that the President "veto the final version of the bill [H.R. 5006] if it contained any provision prohibiting or altering the Labor Department's enforcement of the final overtime security rule."[c]
Sept. 9, 2004	During House floor consideration of H.R. 5006, the L-HHS-ED, FY2005 appropriations bill, the House concurred in an amendment proposed by Rep. Obey that would, in effect, turn back implementation of DOL's final rule governing Section 13(a)(1) and restore the administrative status quo as of July 14, 2004 (i.e., to return to the Section 13(a)(1) regulation as it stood prior to implementation of the new final rule on Aug. 23, 2004). The House vote was 223 yeas to 193 nays.
Sept. 15, 2004	Senate Appropriations Committee, by a vote of 16 yeas to 13 nays, approved an amendment to S. 2810, the L-HHS-ED, FY2005 appropriations bill, that would prevent DOL from using any funds provided under that Act "to implement or administer any changes to regulations regarding overtime compensation in effect on July 14, 2004, except those changes ... specifying the amount of the salary required to qualify as an exempt" executive, administrative or professional employee. Further: "This provision requires the immediate re-instatement and enforcement of the old overtime regulations in effect on July 14, 2004, except for the new section" specifying new salary tests for exemption.[d]
Oct. 7, 2004	Through several days, the Senate wrestled with an amendment to the House-passed H.R. 4520 (the "Jobs Bill"), eventually acknowledging defeat of overtime pay.
Oct. 15, 2004	DOL Solicitor Radzely observed that negative predictions "were not accurate" and explained: "Almost without exception, the reports indicate people are gaining overtime protection." (e)

a. Actions and/or considerations indicated on the table, here, are described briefly. One should consult the actual wording of the bill, amendment, et al., for a more complete understanding of what was proposed in each instance.
b. To invoke cloture requires three-fifths of the Members duly chosen and sworn.
c. See [http://www.whitehouse.gov/omb/legislative/sap/108-2/hr5006sap-h.pdf], Executive Office of the President, Office of Management and Budget, "Statement of Administrative Policy," Sept. 8, 2004.
d. See U.S. Congress, Senate Committee on Appropriations, *Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2005*, report to accompany S. 2810, 108th Cong, 2nd sess., S.Rept. 108-345, Sept. 15, 2004, p. 24.
e. See *Daily Labor Report*, Oct. 18, 2004, p. A7.