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TRYING TO GIVE PRIVATE SECTOR EMPLOYEES A BREAK: CONGRESS'S EFFORTS TO AMEND THE FAIR LABOR STANDARDS ACT

Shawn D. Vance*

I. INTRODUCTION

The Fair Labor Standards Act of 1938 (FLSA)\(^1\) is the basic federal wage and hour law governing the American workplace. The FLSA sets guidelines for most American employees' minimum wage and overtime pay.\(^2\) The FLSA was one of several post-Depression pieces of legislation that attempted to balance the field between employees and employers by creating basic fairness in the compensation of employees and standardizing their workweek hours. The FLSA was passed to combat oppressive working conditions and a depressed economy.\(^3\) Many writers have commented on the need for modification of the FLSA. One writer stated that "[a]fter enjoying decades of benign indifference from employers and politicians, the [FLSA] is now on the front burner for legislative 'reform.'"\(^4\) Continuing to echo the theme that change was needed, another writer penned, "[i]n the archives of federal labor laws, the FLSA holds a position nearly comparable to that of the Dead Sea Scrolls—there are other items that are more ancient, but not many."\(^5\)

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* Assistant Professor of Law, Southern Illinois University School of Law. I would like to thank my research assistant, Candace Bennett, for her research work and her general enthusiasm. I would also like to thank Professors Alice Noble-Allgire and Shari Rhode for their helpful comments on the draft of this article.

2. Id. §§ 206-207.
3. Id. § 202(a), (b).
While there have been several amendments to the FLSA over its long-standing history, few have involved the relationship between private employers and their employees. According to an article by William Bridges, jobs are consistently evolving; therefore, the law that governs these jobs must either evolve or become extinct. There are very few pieces of legislation enacted by Congress that have withstood the test of time as well as the FLSA. However, as with most things, with the passage of time comes the need for change.

Recently, Congress has attempted to address the cry for help coming from many employers and some employees. Beginning in 1995, there were a number of amendments proposed to the FLSA, which would grant certain rights, already available to public employees, to private employees. This article outlines, reviews, and discusses some of the proposed amendments. The Working Families Flexibility Act, proposed in 1997, is one of the amendments that has the most promise of becoming law. Therefore, a good portion of this article focuses on the impact of this proposed legislation. In addition, this article addresses some of the other amendments, which do not appear destined to become law, with an explanation of their deficiencies. Finally, this article discusses in detail the additional steps that Congress should take to better balance the rights of employers and employees.

II. BACKGROUND

During this country's attempt to climb from the depths of the Depression, President Franklin Delano Roosevelt recognized the incredible disadvantage at which the average American workers found themselves. As the United States attempted to pump life into a stagnant economy, there was a scarcity of jobs which paid wages sufficient to maintain a modicum of civility. Despite the dire fiscal status of the period, employers had thousands of individuals who were very eager to work, earn money, and feed their families. However, in light of the economic conditions, many workers placed a higher value on earning a salary to feed their families as opposed to the physical and emotional consequences of earning their pay. As a result, employers took the opportunity to maximize their profits by granting employees very few, if any, rights in the workplace.
Recognizing the incredible travesty facing the American worker, President Roosevelt urged Congress to enact laws to protect blue-collar workers. During the seventy-fifth session of Congress, President Roosevelt beseeched lawmakers to help the factory and farm workers of this country to earn “a fair day’s pay for a fair day’s work.” In response to this exhortation, Congress adopted the FLSA to maintain “minimum standards of living” for the American worker. Many in Congress believed that the labor conditions of the time were detrimental to the ability of an individual worker to maintain a basic living standard. In fact, this sentiment is reflected in 29 U.S.C. § 202, where Congress indicated its belief that the FLSA’s purpose is to maintain a standard of living that is necessary for the health and well-being of the American worker. However, Congress made clear that its goal was not to protect all employees. Congress took great steps to ensure that the protections of the FLSA were designed to protect employees who were subject to the harsh hand of an oppressive employer.

President Roosevelt’s term in office came on the heels of great instability in the American economy. After the crash of the stock market in 1929, the unemployment rate climbed to nearly twenty-five percent. While a twenty-five percent unemployment rate is astonishing, what is more amazing is the brevity in which unemployment rose during this period. In 1929, the unemployment rate was approximately three percent; however, four years later the rate had increased by a factor of eight. The country historically provided great support for those who faced economic difficulties. Whether it was family members or friends,
an individual down on his or her luck could always depend on the local community to provide some assistance. However, during the Depression, the local communities were unable to provide assistance to such a large number of persons faced with the economic hardship of the era.21

Ordinarily, American families placed monies aside for a “rainy day.” This practice is etched into the conscience of our culture. Even today, many states have developed “rainy day” funds within their fiscal budgets.22 Yet, many Americans who lost their jobs during this turbulent period in our history had no access to their “rainy day” funds. Thousands of banks closed across the country prior to 1933, leaving many unemployed Americans with absolutely no means of financial support.23

In addition, many business owners were forced into bankruptcy and the country’s overall economic state was extremely fragile.24 As a result of the economic conditions of the day, employers attempted to maximize their profits by reducing the overhead cost of operation.25 Poor working environments became the norm in the manufacturing industries—which dominated the economic period.26 By enacting the FLSA, President Roosevelt hoped to remove the deplorable working conditions for blue-collar workers and reverse the trend of unemployment.27

The primary impact of the FLSA was the establishment of a minimum wage and a forty-hour workweek.28 The FLSA’s stated goals were to reduce unemployment and improve working conditions.29 These goals were to be manifested in different ways. Congress felt that in order to reduce unemployment, employers would have to be encouraged to


22. Many state legislatures created “rainy day” funds to offset downturns in their economy. During the late 1990s, many states (as well as the federal government) enjoyed record fiscal surpluses. “Rainy day” funds were created in an attempt to limit spending and to provide fiscal security.


24. Id.

25. Id. at 255. One way of reducing company overhead was to limit the benefits available to employees. In addition, upgrading the work environment was no longer a viable choice for employers. As a result of the economic conditions and the gratefulness of the employees (to be employed), employers did not have to fear complaints from employees. Even when employees did complain, there was very little motivation to address their concerns. Prior to the Depression, there were few organized employee movements. In fact, Congress had yet to address the labor movement (the National Labor Relations Act was not yet law).

26. Id.

27. Id. at 253, 255, 256.


29. Id.
"hire more workers rather than demand that employees work excessive hours."\textsuperscript{30} Congress also recognized that in order to ensure that unemployment was reduced, employers had to suffer a penalty for overworking employees.\textsuperscript{31} Congress determined that the FLSA would create a higher rate of employment by establishing a minimum wage and standard hours of work for a given week.\textsuperscript{32} Under the law, a standard workweek consisted of forty hours.\textsuperscript{33} If an employee was required to work in excess of the standard workweek hours, the employer was to pay the employee at a rate of one and one-half times his hourly pay rate.\textsuperscript{34} Congress concluded that this penalty would be prohibitive and cause an employer to hire additional employees.\textsuperscript{35} It was believed the hiring of additional workers would stimulate the labor market and reduce unemployment.\textsuperscript{36}

When the FLSA was enacted, "the economy was still primarily centered around the production of goods rather than services."\textsuperscript{37} In such an economy, the lines of demarcation between blue-collar workers and white-collar workers were clearly visible. White-collar workers were well-paid and worked in offices, while blue-collar workers received poor wages and generally toiled in the factories or fields of America.\textsuperscript{38} Because the efforts of Congress were geared toward blue-collar workers, several exemptions were written into the FLSA's implementing regulations. Employees who are considered white-collar employees are exempt from the overtime provisions of the FLSA.\textsuperscript{39} However, in today's economy, blue-collar workers and white-collar workers are not always

\begin{itemize}
  \item \textsuperscript{30} Michael A. Faillace, \textit{Automatic Exemption of Highly-Paid Employees and Other Proposed Amendments to the White-Collar Exemptions: Bringing the Fair Labor Standards Act into the 21st Century}, 15 LAB. LAW. 357, 360 (2000).
  \item \textsuperscript{31} 135 CONG. REC. 3745 (1989).
  \item \textsuperscript{33} The FLSA originally set the standard workweek at forty-three hours. By 1941 this number was reduced to forty hours.
  \item \textsuperscript{34} 29 U.S.C. § 207(a)(1) (2000).
  \item \textsuperscript{37} Faillace, supra note 30, at 361.
  \item \textsuperscript{38} White-collar workers were paid much more money and were likely to receive non-monetary benefits. Blue-collar workers were not afforded similar options.
  \item \textsuperscript{39} Faillace, supra note 30, at 361, 364.
\end{itemize}
easily distinguishable.40 As a consequence, a law that was once clear has become much more difficult to apply. While there have been several amendments to the FLSA since its enactment, the efforts to apply the original ideals of the FLSA in an ever-changing workplace have not been very successful. The American work market is currently as competitive as it has ever been in our history. Employers are faced with the difficult task of attempting to attract, hire, and retain highly-skilled employees in today's work market.41 Employers have developed creative employment packages that would adequately compensate skillful employees, thereby allowing the employer to compete with his or her competitors. However, based on recent court opinions determining the applicability of the overtime provisions of the FLSA, these employers have faced incredible liability. The courts have instructed some employers that despite the high salaries of some of their employees, overtime pay was nonetheless required for hours worked in excess of forty hours per week.42

III. THE WORKING FAMILIES FLEXIBILITY ACT

In 1995, Congress set out to amend the FLSA in an attempt to grant employees in the private sector particular rights already available to employees in the public sector. While various employee and employer groups were discussing a number of issues, two particular issues gained momentum in Congress. Since 1985, public sector employees have been able to earn leave from work in the form of compensatory time off, in lieu of overtime pay.43 While this option has been seemingly well-received by public sector employees,44 private employers have wondered out loud why they could not offer the same option to their employees.45 In addition, private employers have petitioned Congress to grant them

40. In today's economy, white-collar workers are more likely to be engaged in work similar to, if not the same as, blue-collar workers. This distinction varies from industry to industry. See id. at 361-62.
41. Id. at 362.
42. See Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 613, 617 (2d Cir. 1991); Abshire v. County of Kern, 908 F.2d 483, 490 (9th Cir. 1990); Brock v. Claridge Hotel & Casino, 846 F.2d 180, 185, 189 (3d Cir. 1988).
45. Id. at 84-89.
greater flexibility in generating the work schedules of their employees.\textsuperscript{46} Specifically, employers requested that the forty-hour workweek concept of the FLSA be modified to allow an employee to average his or her hours over a monthly period.\textsuperscript{47}

A. Compensatory Time in Lieu of Overtime

In Congress, much debate has taken place over whether the option of paid time off, generally called compensatory time, in lieu of overtime pay, should be extended to employees in the private sector. In the fall of 1995, advocates of various employer groups proposed legislation that would have allowed private sector employers to compensate their employees for overtime hours worked with time-and-one-half compensatory time off.\textsuperscript{48} Prior to 1985, compensatory time was not available to employees as a substitute for monetary compensation.\textsuperscript{49} In 1985, the FLSA was amended to allow for compensatory time instead of monetary compensation.\textsuperscript{50} However, this option was only made available to public sector employees.\textsuperscript{51} Currently, state and local governments are permitted, under certain conditions, to substitute paid time off in lieu of overtime pay.\textsuperscript{52} The conditions under which compensatory time is allowed in the public sector are generally:

1) The compensatory time must accrue at one and one-half hours for each hour of overtime worked;
2) The amount of compensatory time an employee may accrue is limited (480 hours for fire protection and law enforcement employees; 240 elsewhere);


\textsuperscript{47} Walsh, supra note 44, at 83.


\textsuperscript{49} Walsh, supra note 44, at 111.

\textsuperscript{50} Id.

\textsuperscript{51} Id.

\textsuperscript{52} Id. at 78-79.
3) Prior to the work being performed, the employer and the employee must reach an agreement or understanding of how the compensatory time will be used;

4) The employee must be allowed to use the accumulated compensatory time within a reasonable period after requesting it, if taking it would not unduly disrupt the employer's operations; and

5) Upon termination, an employee must be paid any unused compensatory time at the average regular rate over the last three years or the final regular rate, whichever is higher.\(^{53}\)

The legislative history concerning the 1985 amendments indicate that Congress was responding to concerns of state and local governments over the financial impact of the FLSA's overtime provisions.\(^{54}\) Therefore, Congress attempted to accommodate existing pay practices that had been "worked out" voluntarily between many state and local governments and their employees. As proposed, H.R. 2391 allows private employees the same rights as their public sector counterparts to compensatory time in lieu of overtime.\(^{55}\) In addition, H.R. 2391 is patterned after the provision which applies to state and local governments.\(^{56}\) In fact, H.R. 2391 provides that:

1) An employee may receive compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required;

2) Compensatory time can be provided only if there is a collective bargaining agreement or other agreement between the employee and the employer before any work is performed;

3) Private sector employees can earn up to 240 hours of compensatory time each year and any compensatory time not used at the end of that year must be paid out at time and one-half the employee's regular rate;

4) Certain public sector employees (police, firefighter, emergency response, and those engaged in seasonal activities) can earn up to 480 hours, all other public sector employees can earn up to 240 hours, and there is no requirement for paying out unused compensatory time for public sector workers;

53. Id.


56. See supra note 53 and accompanying text.
5) When an employee leaves the job, he or she must be paid any unused compensatory time at a rate that is not less than the average regular rate of the last three years or his or her final regular rate, whichever is higher; and

6) Employees may use their compensatory time within a reasonable time after making a request to the employer, if the time away does not unduly disrupt the employer’s operations.  

Many groups that lobbied for H.R. 2391 argued that its passage would allow for an increase in flexibility with regard to the work schedules in the private sector. Moreover, during testimony before the House Subcommittee on Workforce Protection of the Committee on Economic and Educational Opportunities (Subcommittee), many speakers urged passage of the bill.

The comments by the Subcommittee’s Chairman, The Honorable Cass Ballenger, set the tone for the Subcommittee meeting, held on November 1, 1995. Mr. Ballenger stated that “as the percentage of employees who must balance work and family issues grows rapidly, there is more and more pressure from employees for increased control over their work schedule.” He acknowledged that opponents to the legislation were concerned that providing more flexibility to employees would lessen their protections. However, while he recognized the need for protections in the law against coercion, Mr. Ballenger believed that employees and employers should be allowed to develop flexible work schedules among themselves. Proponents of the legislation further pointed out their belief that the FLSA is out of touch with the modern workforce. One advocate in particular indicated that today’s employees, both men and women, juggle full-time work schedules with the responsibility of caring for children and elderly parents. Simply stated, “[t]hese increased, and sometimes conflicting, responsibilities often require employees to be in two places at once.” For these reasons,
many proponents of this legislation pushed Congress to ease the burdens placed on employees.\footnote{See generally Statements, Nov. 1, 1995, supra note 46, at E1 to E-7.} Some employers, including Timken Company and Hewlett-Packard, actually utilized employees to present their argument to the Subcommittee. Two employees from the Timken Company, a manufacturer of bearings and steel, spoke before the Subcommittee.\footnote{H.R. REP. NO. 105-21.} One, Sandie Moneypenny, was a twenty-year employee of the company.\footnote{Id. (statement of Sandie Moneypenny).} She was a mother of two boys and worked as a process technician.\footnote{Id.} For the two and one-half years preceding her testimony, she had served as a member of a “self-directed” work team.\footnote{Hearing Before the Subcomm. on Workforce Protections of the House Comm. on Econ. and Educ. Opportunities, 104th Cong. 186 (1995) (statement of Sandie Moneypenny).} Moneypenny indicated that having the option of compensatory time in lieu of overtime would be very helpful to a working mother.\footnote{Id.} According to her testimony, the legislation would provide her with flexibility if she “had to leave work because of a sick child, wanted to attend a teachers conference, needed to take [her] child to the dentist or just wanted time off to be with [her] family; [she] would have the option without it affecting [her] pay.”\footnote{Id.} Another longstanding employee of Timken, Kathleen Fairall, a senior human resource representative, provided a historical context for her belief that the passage of the legislation was necessary.\footnote{Id.} She discussed the sweeping changes in the workforce and the way industries within the United States conducted business.\footnote{Id.} Based on her experience, “many employees would prefer to have time off with pay, rather than receiving [an] overtime check.”\footnote{Statements, June 8, 1995, supra note 46, at d29 (statement of Kathleen Fairall).} Fairall also felt that employees would be more interested in “banking” their overtime.\footnote{Id.} Banked overtime could be used by managers to help their businesses through the low points in the business cycle. In summarizing the benefits of enacting the legislation, she stated the following reasons:

- It would be mutually beneficial to businesses and their associates because it would provide more flexibility to both;
It would provide private sector employees with the same rights as public sector employees; and, finally;

It would allow businesses in cyclical industries to better adjust to those cycles, thereby allowing employees increased financial security during low business cycles. 78

Other employers utilized employees to present testimony before the Subcommittee as well. Hewlett-Packard sent its Senior Vice-President of Personnel, Pete Peterson, to testify before the Subcommittee. 79 Peterson stated that he was also appearing on behalf of the Flexible Employment Compensation and Scheduling (FLECS) Coalition. 80 FLECS is a group of organizations representing a wide variety of industries that are, according to Peterson, seeking to bring the FLSA “into the [present] and beyond.” 81 Peterson cited a poll conducted by Penn & Schoen Associations, Inc., for the Employment Policy Foundation, as proof of the overwhelming support that the legislation had received from the public. 82 According to Peterson’s testimony, approximately seventy-five percent of the persons polled by Penn & Schoen “favor[ed] a proposal that allows hourly employees to choose to take their time-and-a-half overtime compensation in the form of paid time off.” 83 He also applauded the flexibility that the proposed legislation would provide to employees. 84

Notwithstanding the gracious reviews provided H.R. 2391, some individuals were still wary of the impact the legislation would have on the private sector workforce. According to Michael T. Leibig, a partner in the law firm of Zwerdling, Paul, Leibig, Kahn, Thompson & Wolly, P.C., the proposed legislation has several problems. 85 While noting the admirable goals of H.R. 2391, Leibig pointed out the need to be careful that the legislation not erode the clear desire of the FLSA. 86 He stated that American workers and their families clearly cannot afford further erosion of the forty-hour workweek. 87 Leibig’s position is supported by a

78. Id.
80. Id.
81. Id.
82. Id.
83. Id.
84. Id.
85. Id. at E-2, E-3 (testimony of Michael T. Leibig, Attorney at Law, Professor, Georgetown University).
86. Id.
87. Id.
poll conducted by Edith Rasell of the Economic Policy Institute. The result of Rasell's poll contradicts the poll cited by Peterson. Rasell's poll shows that an overwhelming sixty-four percent of Americans oppose a proposal to ease overtime pay requirements by allowing employers, at their discretion, to schedule workers for compensatory time off instead of overtime pay for working more than forty hours per week.

Without understanding the context in which the poll questions were answered, no one can truly obtain a sense of how the persons polled actually feel about the subject. Therefore, a review of the two poll questions results in a startling revelation. In the poll cited by Peterson, respondents were asked whether they would favor the ability to choose taking time and one-half overtime pay in the form of paid time off. The results of this poll should have surprised absolutely no one. Most employees, as the poll indicated, would desire more control over when they can use paid leave. On the other hand, in the poll cited by Rasell, respondents were asked whether they would favor allowing their employer to choose when they could take time off instead of receiving overtime pay. Both of these polls, in essence, asked the same question. The only difference between the two questions was who had control over the choice. It appears that when reading the two polls together, the polls indicate that employees would prefer to have the ability to choose compensatory time in lieu of overtime, as long as they have control over when to exercise the choice.

Many proponents cited the fact that public sector employees have enjoyed the option proposed in H.R. 2391 as just cause for extending the option to the private sector. However, others have warned against this sort of "what's good for the goose" approach to legislative reform. Some have argued that whatever changes are made to the FLSA have to be made in light of the changes (and more importantly, the circumstances created by those changes) made to the FLSA previously. Leibig, in his testimony before the Subcommittee, stated that the "administration of [compensatory] time within the public sector has highlighted a number

89. Id.
91. Id.
92. Statements, June 8, 1995, supra note 46, at d29 tbl.2 (testimony of M. Edith Rasell).
93. See id. at d29 (statement of Kathleen Fairall); Statements, Nov. 1, 1995, supra note 46, at E-1 (statement of Pete Peterson).
of problems not foreseen in 1985[,] [a]ny revision of the provisions applicable to compensatory time should remedy these problems."  

Some of the points highlighted by Leibig include a protection of the forty-hour workweek, distinction of termination and cessation of employment, voluntary use of the compensatory time option, and the banking problem. More specifically, he stated that a limitation should be added to ensure that employers did not generate standard employee schedules, which involved very high (above fifty) average weekly hours. He also expressed to the Subcommittee that the legislation should clearly specify that "its reference to the termination of employment does not apply solely to discharged employees but to all employees at the cessation of their employment."  

In addition, Leibig pointed out that the legislation should be clear in stating that "employees may not be required to use up their comp[ensatory] time banks except on a voluntary basis." As stated earlier, the employee does not have an absolute right to use the compensatory time at his or her pleasure. If the employee’s use of his or her leave will unduly disrupt the employer’s operation, then the employee cannot use the compensatory leave that he or she has accumulated. When an employer is understaffed, requests to use compensatory time are often denied and the stated reason is that the employer’s operation will be unduly disturbed. Conversely, when an employer is enduring a slow cycle and no longer needs as many employees at the workplace, the employer attempts to encourage employees to use their compensatory time. In addition, many employers develop procedures which dictate to employees that compensatory time must be used prior to the use of any other form of leave, such as annual leave. Based on the preceding discussion, some in the public sector would argue that they are not enjoying any advantages concerning the choice of compensatory time in lieu of overtime.

95. Id. at E-3.  
96. Id. at E3 to E4.  
97. Id. at E-3.  
98. Id. (emphasis omitted).  
100. See supra text accompanying note 53.  
101. Id.
B. One Step Closer to Becoming Law

On March 5, 1997, the House Committee on Education and the Workforce approved the Working Families Flexibility Act (WFFA). On March 19, 1997, the full House amended and passed the WFFA. This legislation would give employers the option of offering their employees the choice of paid time off in lieu of cash wages for overtime hours worked. The WFFA does not affect the forty-hour workweek or change the manner in which overtime is calculated. It retains all of the employee protections in current overtime laws. In order to ensure that the choice and use of compensatory time by the employee was voluntary, the House added the following new protections:

1) Employees cannot select compensatory time as an option to overtime pay until they have worked one thousand consecutive hours for the same employer;
2) Employees may use accrued compensatory time within a reasonable time after making the request, so long as its use would not unduly disrupt the operations of the business, and employers are prohibited from requiring, solely for their convenience, employees to use accrued compensatory time;
3) Employees may withdraw from a compensatory time agreement with an employer at any time;
4) Employers must provide employees with notice at least thirty days prior to cashing out any accrued compensatory time; however, employers may only cash out accrued time in excess of eighty hours;
5) Employees may request, in writing, at any time, to be paid cash wages for accrued, unused compensatory time, and employers must provide cash wages within thirty days of the request;
6) Employers must provide employees with notice at least thirty days prior to discontinuing a policy of offering compensatory time;
7) All enforcement remedies (including action by the Department of Labor and individual lawsuits) under current law apply if employers fail to pay wages to employees for accrued compensatory time or refuse to allow employees to use accrued

compensatory time in a manner not consistent with the legislation; and
8) Employers who coerce employees into choosing compensatory time instead of overtime wages or using accrued compensatory time are liable to the employees for double damages.\textsuperscript{105}

The Senate still has work to do on this legislation before the WFFA’s enactment into law. At a minimum, the Senate must:
1) Clearly define what is meant by the phrase “unduly disrupt the operations of the [business]”\textsuperscript{106};
2) Indicate what happens if employers fail to meet the time frames set forth in the WFFA; and
3) Provide public sector employees with similar rights and privileges.

C. Averaging Work Hours on a Monthly Basis

One of the more courageous amendments proposed by various employer groups is a bill that would allow the averaging of work hours over a period greater than one week.\textsuperscript{107} This bill has yet to come out of committee. Employers contended that employees desired a more flexible work schedule to accommodate family needs and personal wishes.\textsuperscript{108} Employers also have alleged that the FLSA limits their ability to manage their workforce.\textsuperscript{109} Supporters of the legislation state that “[b]usinesses are being forced to streamline operations and lay off employees in order to cut costs and remain competitive[,] [t]he lack of flexibility imposed by the FLSA . . . adds to the employe[rs’] burden[s].”\textsuperscript{110} These supporters claim that compensating employees for overtime places an undue burden on employers.\textsuperscript{111} Furthermore, given the fluctuation of work demands and the desire of employees for non-penalized time away from work, flexible work schedules are a necessity.\textsuperscript{112}

These arguments were quite convincing when first presented. However, as one delves into the substantive effect of the arguments, a different picture emerges. It is true that most, if not all, employees in America would prefer an option that would allow them to work a shorter

\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} H.R. 2723, 104th Cong. § 13A(c) (1995).
\textsuperscript{108} Clark, supra note 4, at 347.
\textsuperscript{109} Yager & Boyd, supra note 5, at 325.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
workweek. However, it is equally true that employees in America would dislike the consequences of working a shorter week. Those consequences include working an even longer week (during the same pay period) than average to make up for the shorter week or suffering a reduction in pay.

Recent polls indicate that Americans are spending more time at work and less time with their families. Juliet Schor's *The Overworked American: The Unexpected Decline of Leisure,* clearly establishes a disturbing trend in the work schedule of Americans. The work hours of the average American have increased by the equivalent of one month per year. As a consequence, individuals are spending less time sleeping, calling in sick more often, experiencing higher levels of stress, and are being less productive than ever before in this nation's history. In effect, the American workforce has increasingly become less like we desire it to be. It is more fatigued and therefore less productive. Working a shorter week under this amendment would only mean that employees would ultimately work a longer week to make up the average time. In other words, if employees work only thirty-two hours in week one, then over the next three weeks, employees must work in excess of forty hours. Employees are not given the shorter week to take care of personal affairs. This amendment would only serve the need of employers and would violate the intent of the forty-hour workweek principle. This principle stands for the premise that employees are to be paid time and one-half for any hour worked in excess of forty during a given week. Furthermore, Congress passed bills allowing individuals to take time off without penalty in certain circumstances, such as the Family and Medical Leave Act.

Employers painted a facade when arguing for the amendment. They claimed that the true purpose of the legislation would be to

114. See id.
115. While true, this statistic is somewhat misleading because it does not acknowledge the fact that more Americans are working. Many statisticians would argue that because the average work hours of Americans are being used, the total number of Americans working does not matter. However, the total number of workers does matter when one considers the possibility that the statistics may include persons working more than one job, but counted as only one worker in the poll. In addition, there are a number of employees who work part-time. This fact would also lead to inaccurate statistics.
116. See generally SCHOR, supra note 113.
118. Employers are in favor of this proposal because it creates more options for the employer with regard to employee work schedules.
accommodate the needs and desires of their employees when, in fact, the legislation would have only accommodated employers. For example, during the holidays, the need of the employers to have flexibility with scheduling is far greater than the desire of the employee for the same. In fact, the desires are directly in conflict with one another. Whether in preparing family meals, purchasing gifts, or taking vacations, most families generate more expenses during the holiday season than at any other time during the year. Consequently, the family requires more income during the holiday season. On the other hand, most employers have more customers to service during this period. In addition, employers have an assortment of cheap labor as a result of the scores of individuals seeking employment at this time. Therefore, the flexibility that employees desire is the ability to work more hours, which may lead to overtime pay, whereas the employers are attempting to infuse additional employees into the same number of work hours during the week, thereby absolving themselves of overtime obligations. The supporters of this legislation were actually lobbying against overtime compensation and not for flexible work schedules.

IV. EXEMPTION TO THE OVERTIME PROVISIONS OF THE FLSA

A. White-Collar Exemptions

Congressional action on the previously discussed amendments will not be sufficient to “right the ship” upon which the FLSA travels. Another aspect that Congress and the Department of Labor (DOL) must address is the “white-collar” exemptions. One writer has indicated that “[f]ew, if any, areas of employment law have proven themselves less adaptable to an evolving work force than the... white-collar exemption.” FLSA’s overtime provision states, in part, that: “No employer shall employ any of his employees... for a workweek longer than forty hours... unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.” However, the white-collar exemptions allow certain employees to be

119. This labor pool is dominated by students working between semesters or persons who want only a part-time job during the holidays.
120. 29 C.F.R. §§ 541.2, 541.3, 541.5 (2000).
121. Yager & Boyd, supra note 5, at 331.
excluded from the overtime requirement of the FLSA. The exemption results from the fact that FLSA was never intended to cover all employees." Many writers have commented that the FLSA was intended for the base-line workers in the employment environment. The Act had its motivation based on a desire to "insure an adequate standard of living for all working citizens . . . [and] that the output of the developing industrial economy was equitably distributed to the workers who made its success possible."

In addition, during legislative discussions concerning the enactment of the FLSA, the House Committee on Labor stated that the intent of the FLSA was to positively affect the most poorly paid and overworked employees. The exemption applies to employees "employed in . . . bona fide executive, administrative, or professional capacities." Nevertheless, the FLSA does not specifically define the terms executive, administrative, or professional. Instead, the DOL has the responsibility of "determining the operative definitions of these terms through interpretive regulations." The DOL definitions regarding the white-collar exemptions "were originally set forth by the DOL almost fifty years ago and have changed very little, despite the revolutionary changes in the workplace in recent decades." While the DOL has stated that it desires to update these definitions, no changes have been made to the regulations.

The regulations defining the white-collar exemptions are set forth in 29 C.F.R. § 541. The regulation dealing with the white-collar exemptions for an executive employees cover an employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivisions thereof; and

123. 29 C.F.R. §§ 541.2, 541.3, 541.5.
124. Yager & Boyd, supra note 5, at 331.
125. Faillace, supra note 30, at 359-60; see also Robert D. Lipman et al., A Call for Bright-Lines to Fix the Fair Labor Standards Act, 11 Hofstra Lab. L.J. 357, 360 (1994); O'Leary, supra note 12, at 2172.
129. Krueger, supra note 36, at 1101.
130. Id.
131. Yager & Boyd, supra note 5, at 332.
132. Id.
133. Id.; see also 63 Fed. Reg. 61,284, 61,288 (Nov. 9, 1998).
(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: Provided, [t]hat this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20 percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: Provided, [t]hat an employee who is compensated on a salary basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.\(^{135}\)

The white-collar exemption regulation covering an administrative employee is quite similar to that for the executive employee in many respects. The DOL has indicated that an administrative employee will be exempt from the overtime provisions contained in the FLSA when the employee is one:

(a) Whose primary duty consists of either:
(1) The performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers, or

\(^{135}\) Id.
(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and 
(b) Who customarily and regularly exercises discretion and independent judgment; and 
(c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or 
(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or 
(3) Who executes under only general supervision special assignments and tasks; and 
(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and 
(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week ($130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or 
(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: Provided, [t]hat an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week ($200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section. 

The regulation, which provides the white-collar exemption for a professional employee, is similar to the previously listed regulations extending exemptions to executives and administrators. A professional employee is an employee:

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

(1) Work requiring knowledge of an advance 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, or

(2) Work that is original and creative in character in a recognized field or artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed, or

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

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week ($150 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: Provided, [t]hat this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as
provided in paragraph (a)(3) of this section: Provided further, [t]hat an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a) (1), (3) or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: Provided further, [t]hat the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this sections and who is compensated on an hourly basis at a rate in excess of 6½ times the minimum wage provided by section 6 of the Act.

B. Eligibility for White-Collar Exemptions

While the regulations governing the white-collar exemptions seem easily applied, the test used to determine whether an employee is eligible for an exemption is quite complicated. The DOL has established long and short tests to “determine whether an employee is exempt from the overtime provisions of FLSA.” Both tests focus on “(1) the duties, responsibilities, and degree of independence from supervision (‘duties test’), and (2) the method and amount of payment (‘salary basis test’).” In order to satisfy the requirement of the long test, employees must be “compensated for [their] services on a salary basis at a rate of not less than $155 per week.” However, under the short test, the employee must be compensated on a salary basis of at least $250 per week. The pay of an employee is rarely an issue when attempting to determine whether the employee is exempt from the overtime provisions of the FLSA. The primary reason why the compensation of an employee is a non-issue is because most employees earn in excess of $250 per week.

137. 29 C.F.R. § 541.3 (1998).
139. Id.
140. 29 C.F.R. § 541.1(f) (1998).
141. Id.
142. As a result of the application by the DOL of the meager weekly salaries listed in the test, most American workers will earn a sufficient salary to meet the first phase of the test. Therefore, employees' pay is not as important as the manner in which their hours are tracked or whether they receive a deduction in pay for a partial day absence or disciplinary violation.
143. Krueger, supra note 36, at 1101.
In light of this fact, the employee’s defined duties and method of compensation become the focal point of the determination of an employee’s exemption status.\textsuperscript{144}

1. The Duties Test

The duties test is based on the language contained in the regulations, which define an executive, administrative, and professional employee.\textsuperscript{145} An executive employee is one whose duties primarily involve managing the enterprise in which the employee is employed.\textsuperscript{146} An executive employee also customarily and regularly directs the work of two or more employees.\textsuperscript{147} An administrative employee primarily performs “office or non-manual work directly related to management policies or general business operations of his employer or his employer’s customers.”\textsuperscript{148} These duties must include work requiring the exercise of discretion and independent judgment.\textsuperscript{149} Finally, a professional employee performs work requiring knowledge of an advanced type.\textsuperscript{150} The ability to perform advanced-type work is acquired by a prolonged course of specialized intellectual instruction and study.\textsuperscript{151} The work performed by a professional must be original and creative in character in a recognized field of artistic endeavor.\textsuperscript{152}

The duties test is performed in a subjective manner.\textsuperscript{153} Yet, it is “dependent on fact-sensitive determinations of what constitutes supervision, responsibility, judgment, and knowledge—terms of art that are malleable and difficult to define with precision.”\textsuperscript{154}

2. The Salary Basis Test

While the duties test is highly subjective, the salary basis test is relatively objective.\textsuperscript{155} According to the DOL regulations, an employee

\begin{footnotesize}
\begin{enumerate}
\item[144.] Id.
\item[145.] Id. at 1102.
\item[146.] 29 C.F.R. § 541.1 (1998).
\item[147.] Id.
\item[148.] Id. § 541.2.
\item[149.] Id.
\item[150.] Id. § 541.3.
\item[151.] 29 C.F.R. § 541.3.
\item[152.] Id.
\item[153.] Krueger, supra note 36, at 1102.
\item[154.] Id.
\item[155.] Lawrence Peikes, Tightening the White-Collar Exemptions—The Courts Breathe New Life into the Fair Labor Standards Act, 10 LAB. LAW. 121, 124 (1994).
\end{enumerate}
\end{footnotesize}
who is paid on a salary basis can be exempt from the overtime provisions of the FLSA "if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." In addition, the regulation states that "the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked ... subject to the general rule that an employee need not be paid for any workweek in which he performs no work."

The purpose of the salary basis test is to differentiate white-collar decision makers from hourly workers. A review of the legislative history indicates that Congress sought to distinguish between the base-line employees (those who needed the protection of the FLSA) and their supervisors. In essence, Congress intended to protect the non-supervisory employees when it enacted the FLSA. While on its face the salary basis test appears to be straightforward, the actual application of the test has generated enormous controversy.

When the FLSA was enacted, there existed a clear separation between those employees the legislation was designed to protect and the rest of the workforce. Individuals who earned a salary had set themselves apart from the base-line worker. Salaried employees had attained a certain status within the management ranks, while the base-line employees were simply trying to survive and "stay afloat" in the workplace. Employers, therefore, paid supervisors a salary, while base-line employees received their compensation by the hour.

With the passage of time, the gulf separating supervisors from base-line workers has been reduced significantly. Due to the ever-changing workplace in America, one can no longer easily differentiate between the supervisor and the employee in need of statutory protection. As a result, the salary basis test has become quite difficult to apply in today's workplace.

The determination of whether an employee is being paid on a salary basis is a critical issue for employers. The DOL regulations and recent

156. 29 C.F.R. § 541.118(a) (1998).
157. Id.
court decisions have increased the concerns of many employers.\(^{160}\) "Enforcement of the FLSA occurs either through the Wage and Hour Division of the [DOL] or through a private lawsuit brought by an aggrieved employee."\(^{161}\) Based on the regulations issued by the DOL, an employer who violates the FLSA’s overtime provisions can face liability for the unpaid wages, plus attorneys’ fees and court costs.\(^{162}\) The liability an employer could face is potentially enormous. For example, the DOL penalized employers who violated the overtime provisions of the FLSA by ordering them to pay $142 million in damages in fiscal year 1992.\(^{163}\)

V. DETERMINING THE STATUS OF AN EMPLOYEE

Many factors are reviewed by courts prior to determining whether an employee is being paid a salary and therefore exempt from the overtime provisions of the FLSA.\(^{164}\) A single factor is rarely sufficient to allow for a determination of an employee’s status.\(^{165}\) However, employees are not always considered exempt from the overtime provisions of the FLSA merely because they receive a salary.\(^{166}\) When attempting to address the status of a salaried employee, several employment practices must be reviewed.\(^{167}\) The employment practices, which have been deemed inconsistent with payment on a salary basis, are: 1) tracking hours worked, 2) deductions as a result of a partial day absence from the workplace, 3) deductions as a result of disciplinary violations, and 4) payment of straight-time overtime.

A. Method of Tracking Hours

Persons who are compensated on a salaried basis generally receive their pay on a biweekly or monthly basis. Their compensation is based on a predetermined amount without regard to the number of hours worked or the quality of the work performed.\(^{168}\) Salaried employees do not “punch a clock” or sign in and out; they are not paid by the hour.

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\(^{160}\) Yager & Boyd, supra note 5, at 336.

\(^{161}\) Id. at 322-23.

\(^{162}\) Id. at 323.


\(^{164}\) Yager & Boyd, supra note 5, at 336-37.

\(^{165}\) See Smith & Winterbauer, supra note 163, at 24.

\(^{166}\) Id. at 25.

\(^{167}\) See, e.g., Brock v. Claridge Hotel & Casino, 846 F.2d 180, 183-84 (3d Cir. 1988).

\(^{168}\) 29 C.F.R. § 541.118(a) (1998).
Furthermore, they are not docked pay if they fail to work forty hours in a given week. One court stated that it is the general value of services provided by the salaried employee for which he or she is being compensated, instead of the number of hours actually worked. Therefore, when courts are determining whether an employee is an exempt employee, they will look to determine if the employee was required to track his or her work hours. For example: Did the employee submit a time sheet indicating the number of hours worked? Was the employee required to submit documentation which would account for his or her time at work during the workweek? If so, it is highly unlikely that the employee will be deemed a salaried employee. Some employers have attempted to argue that as long as they meet the threshold requirements of the salary test, they should be allowed to pay an executive a salary regardless of the fact that hourly calculations can be used to determine the amount of the salary.

In *Brock v. Claridge Hotel & Casino*, the Third Circuit rejected an employer's argument that its hotel and casino supervisors were exempt executives. The court described an inherent conflict between the employee paid on an hourly basis and the executive who is paid a salary. The court specifically stated that

> salary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. In other words, the salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it. With regards to hourly employees, it is the employer who decides the worth of a particular task, when he determines the amount to pay the employee for performing it. Paying an employee by the hour affords that employee little of the latitude the salary requirement recognizes. Thus, a basic tension exists between . . . a salary requirement and any form of hourly compensation.

*Claridge* involved an intriguing compensation scheme, where supervisors received a minimum guarantee of $250 per week. Any wages received in excess of the $250 per week were calculated

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169. Abshire v. County of Kern, 908 F.2d 483, 486 (9th Cir. 1990).
170. See id.
171. *Claridge*, 846 F.2d at 184.
172. *Id.* at 180.
173. *Id.* at 183.
174. *Id.* at 184-85.
175. *Id.* at 184.
176. *Claridge*, 846 F.2d at 182.
according to the number of hours the supervisor worked. In other words, the employee was guaranteed compensation of at least $250 per week as long as he performed work during the workweek. However, the employee's total compensation, which was in excess of the $250 per week, was based on the number of total hours worked during the week. The employee's compensation was consistently higher than the guaranteed minimum.

The Third Circuit had little difficulty determining that the employer was simply paying his employees on an hourly basis. In fact, the employer's payroll records showed that one could calculate a supervisor's pay by simply multiplying an hourly wage by the number of hours worked.

The employer in Claridge argued that the DOL regulations allowed for its creative compensation scheme. Specifically, the employer cited 29 C.F.R. § 541.118(b). This regulation states:

(b) Minimum guarantee plus extras. It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary.
basis.” For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.185

The court answered the employer’s arguments by reasoning:

Claridge’s method of computing “salary” differs significantly from commissions and profit-bonuses, the first two examples provided in the regulation. In both examples, the employee is paid a clear, fixed sum for his work; the additional compensation is truly added on, providing an incentive for the employee to perform better. The “additional” compensation claimed by Claridge, on the other hand, varies with the numbers of hours worked. If an incentive at all, it does not encourage the supervisor to make better use of his time, but only to work more hours. Such encouragement is inconsistent both with salary payment and executive employment. Where, as here, the employee’s usual weekly income far exceeds the “salary” guarantee, the guarantee can have no impact on the employee’s performance or his status.186

The conclusion reached by the Claridge court was not a surprise. In this case, it was clear that the employer was attempting to circumvent the overtime provisions of the FLSA. Its employees received a minimum guarantee, which was far less than their actual weekly compensation.187 The compensation system in Claridge was simply an hourly wage system stacked on top of a base payment which all employees received. Therefore, to obtain the true hourly wage, add the base payment plus any additional compensation and divide by the total hours worked. What is clear from the court’s rationale is that an employee can be paid additional compensation to supplement his pre-determined salary.188 However, the additional compensation is limited to such benefits as commissions and bonuses.189

B. Reduction in Pay for Partial Day Absences

In 1997, Congress proposed legislation allowing employees to maintain their exempt status despite the fact they receive a reduction in pay when absent.185, 29 C.F.R. § 541.118(b) (2000).186 The Claridge, 846 F.2d at 185.187 Id. at 187.188 Id. at 184.189 Id.
pay due to partial day absences. According to DOL regulations, salaried employees should not receive a reduction in pay for absences of less than one day. However, employees who receive reductions in pay for partial day absences are not exempt and must be paid overtime for any hours worked in excess of forty hours per week. The issue of reductions in pay for partial day absences stemmed from several court decisions. These court decisions led Congress to draft legislation allowing reductions in pay for partial day absences without causing employees to lose their exempt status.

The case of Martin v. Malcolm Pirnie, Inc., created a major concern for employers. In that case, the Second Circuit ruled that four hundred employees had lost their exempt status and, as a consequence, the employer was liable to the DOL for an $875,000 claim. In other words, the court ruled that four hundred of the salaried employees of Malcolm Pirnie, Inc., each of whom earned up to $70,000 a year, must be paid overtime. The ruling of this case disturbed a number of employers. A total of twenty-four employees, all of whom were deemed "professionals," elected to allocate some of their partial day absences to a special "absence without pay" category. This practice amounted to a total of only $3,269.78 of their salary being "docked." However, as a result of the ruling, four hundred professional employees became subject to the overtime provisions of the FLSA.

Many employers regularly encounter situations similar to those in Malcolm Pirnie and consider this practice a mere technical violation. Most employers believe that a technical violation of this nature is the sort considered by the DOL when promulgating its regulations, which

191. 29 C.F.R. § 541.118(a) (1998).
192. See id.
194. See H.R. 4266, 104th Cong. § 4 (1996); see also H.R. 647.
195. 949 F.2d 611 (2d Cir. 1991).
196. See id. at 617.
197. Id.
198. See id. at 616.
199. Id.
200. Malcolm Pirnie, 949 F.2d at 617.
201. Clark, supra note 4, at 345-46.
allow employers to correct minor errors.\footnote{202} These regulatory provisions are commonly referred to as the "window of correction" provisions issued by the DOL.\footnote{203} To the dismay of many employers, the court denied Malcolm Pirnie, Inc., safe harbor under these provisions.\footnote{204} The "window of correction" provisions would have forgiven the inadvertent and good faith mistakes of the employer regarding the DOL salary-docking regulations.\footnote{205} Many employers fear other courts could issue findings consistent with that of Malcolm Pirnie and expose them to extensive liability.\footnote{206}

These employers argue that an entire class of salaried employees would lose their exempt status if the Malcolm Pirnie finding is followed.\footnote{207} This practice is particularly troubling for companies during periods of economic instability. While the American economy is comparatively strong, many fear that the volatility seen in foreign markets will someday call America its home. In a period of economic instability, a million-dollar penalty here and/or a half-million-dollar penalty there could be disastrous to a company. Some argue that these "potential" court rulings would be grossly unfair in their effect.\footnote{208} If the ruling of the Second Circuit was followed in other cases, the increases in financial liability for employers could have dire consequences.

Employer groups have claimed that the potential liability of employers for these sorts of technical violations could reach upwards of one billion dollars.\footnote{209} Employers, faced with low earnings and stagnant gains, would be forced to consider downsizing. Most downsizing efforts affect lower-waged employees; therefore, the consequences would hurt the employees the FLSA was enacted to protect.\footnote{210} Those who want Congress to resolve this "problem" also argue that there could potentially be an unwarranted windfall for highly compensated employees who have suffered no actual harm.\footnote{211} Despite these fears, the

\footnotetext[202]{202} The regulations allow employers that make impressible, but inadvertent, deduction to the compensation of otherwise salaried employees to correct the error and bring their compensation scheme into strict compliance with 29 C.F.R. § 541.118(a)(6) (1998).\footnotetext[203]{203} Id. § 541.118(a)(6) (2000).\footnotetext[204]{204} Malcolm Pirnie, 949 F.2d at 616.\footnotetext[205]{205} Clark, supra note 4, at 345.\footnotetext[206]{206} Id.\footnotetext[207]{207} Id.\footnotetext[208]{208} Id.\footnotetext[209]{209} Id.\footnotetext[210]{210} Clark, supra note 4, at 346.\footnotetext[211]{211} Id. at 345.}
Second Circuit's ruling appears to be completely consistent with a plain reading of the language contained within the DOL regulations.\footnote{212} The Ninth Circuit has also ruled that deductions for partial day absences are not consistent with the exempt status of an employee.\footnote{213} In \textit{Abshire v. County of Kern},\footnote{214} the Ninth Circuit held that "[s]ubjecting an employee's pay to deductions for absences of less than a day, including absences as short as an hour, is completely antithetical to the concept of a salaried employee."\footnote{215} In addition, the holding in \textit{Abshire} concluded that an infraction of a single "salary basis" rule could eliminate the exemption regardless of the circumstances.\footnote{216} The infraction results in not only a loss of exempt status for the employee in question, but for all employees subject to the same policy or practice.\footnote{217}

Interestingly, the employee groups have not offered rebuttal arguments regarding the merits of the claims of employers. Those opposed to Congress taking action on this issue simply argued the bill was "unwise and unnecessary."\footnote{218} They argued the legislation was the equivalent of killing a gnat with a sledgehammer.\footnote{219} Many have stated that the regulations governing the FLSA need to be revisited and updated to meet the needs of an evolving workplace.\footnote{220} "Until the rules governing the white-collar exemption are overhauled, further anomalies will continue to arise, resulting in costly litigation and disruption of compensation systems."\footnote{221} Nicholas Clark, the Assistant General Counsel for the United Food & Commercial Workers International Union, stated that the concerns of employers could "easily be addressed by a simple change of the regulation."\footnote{222}

In reality, there have been compelling arguments raised on both sides of this issue. However, the proposed changes to the FLSA would

\footnote{212}{According to the Code of Federal Regulations, salaried employees receive their weekly compensation regardless of the quality or quantity of his or her work. 29 C.F.R. § 541.118(a) (1998). In addition, the regulation specifically states that "the employee must receive his full salary for any week" in which work was performed, "without regard to the number of days or hours worked." \textit{Id}. Therefore, if employers choose to reduce employees' pay because the employees missed a portion of a workday, the employers cannot consider the employees to be salaried. Instead, the employees are hourly employees subject to the overtime provisions of the FLSA.}

\footnote{213}{Abshire \textit{v.} County of Kern, 908 F.2d 483, 484 (9th Cir. 1990).}

\footnote{214}{908 F.2d 483 (9th Cir. 1990).}

\footnote{215}{\textit{Id}. at 486.}

\footnote{216}{\textit{Id}.}

\footnote{217}{Yager & Boyd, \textit{supra} note 5, at 337.}

\footnote{218}{Clark, \textit{supra} note 4, at 345.}

\footnote{219}{See \textit{id}. at 346.}

\footnote{220}{Yager & Boyd, \textit{supra} note 5, at 341.}

\footnote{221}{\textit{Id}.}

\footnote{222}{Clark, \textit{supra} note 4, at 343, 345.}
have done more harm than good. The proposed amendment would have allowed employers to avoid paying an “executive, administrative, or professional” employee overtime pay, yet still would have allowed them to dock the employee’s pay for every hour spent attending their child’s music recital or meeting with their parent’s caretaker.223

Arguably, proponents of the change failed to produce their strongest argument. If this legislation was narrowly focused on the status of middle managers, then a more compelling argument could be put forth. Middle managers are not easily distinguishable from the baseline workers whom they oversee. They are not as valuable to employers as upper level managers (i.e., top executives). Middle managers may be paid on a salary basis; however, their presence at the workplace is essential. They provide the constant on-site supervision of the baseline workers. When middle managers miss time at work, baseline employees are not being supervised. Therefore, employers have reason to monitor and track the time at work of a middle manager.

Consequently, while middle managers have some value to employers, that value does not warrant employers granting them partial day absences with pay. However, proponents of the change do not take this approach. The change, as proposed, was a weak attempt to give already powerful employers even more power in their relationship with employees. In fact, the judicial decision that gave rise to this legislation has been followed very few times.224 The ruling was rejected by at least three other federal courts of appeals.225 Moreover, after this amendment was introduced, several employer groups proposed alternative solutions because they were able to forecast the certain death of the amendment.226

C. Deductions for Disciplinary Violations

In Klein v. Rush-Presbyterian-St. Luke’s Medical Center,227 the Seventh Circuit adopted the view that a reduction in pay for a partial day absence causes employees to lose their exempt status.228 The factual scenario in Klein is vastly different from the cases that have reached

223. Id. at 345.
224. Id.
225. See e.g., McDonnell v. City of Omaha, 999 F.2d 293, 296-98 (8th Cir. 1993); York v. City of Wichita Falls, 944 F.2d 236, 241-43 (5th Cir. 1991); Atlanta Prof’l Firefighters Union, Local 134 v. City of Atlanta, 920 F.2d 800, 809 (11th Cir. 1991).
226. Clark, supra note 4, at 346; see also Yager & Boyd, supra note 5, at 339-41.
227. 990 F.2d 279 (7th Cir. 1993).
228. Id. at 280-81.
similar rulings regarding loss of exempt status. The Seventh Circuit looked at the reduction in pay not simply because of a partial day absence, but as a result of disciplinary action. In Klein, a salaried nurse was terminated due to job performance and conduct problems. The nurse had spent approximately six months under a formal disciplinary plan for tardiness. This plan specified that if Klein was more than ten minutes late for work, she would receive verbal and written warnings. Upon the fourth tardy, she would be suspended for one day. If she was late for work more than four times while on this disciplinary plan, Klein would be terminated. On September 27, 1989, approximately five years after serving under the disciplinary plan for tardiness, Klein was suspended for “being rude, abrupt, and irritable to fellow staff members, as well as an incident with a patient’s visitor.” She was compensated for one hour of work on that day, but was not compensated for the remainder of the workday. Klein was suspended again on January 31, 1990. During this three-day suspension, Klein was compensated only for one and one-half hours of work. On August 26, 1990, Klein was suspended for six days without pay. On September 28, 1990, after several serious safety problems, Klein was suspended for one day. Finally, the employer terminated Klein on October 3, 1990.

As in a number of cases where employees are terminated, Klein filed suit against her employer. The basis of her suit was not discrimination or wrongful discharge. Instead, Klein sued her employer claiming damages for overtime pay for which she claimed her employer was obligated. Ironically, the Seventh Circuit agreed with Klein and

230. Klein, 990 F.2d at 281-82.
231. Id. at 281.
232. Id.
233. Id.
234. Id.
235. Klein, 990 F.2d at 281.
236. Id. at 282.
237. Id.
238. Id.
239. Id.
240. Klein, 990 F.2d at 282.
241. Id.
242. Id.
243. Id.
244. Id.
awarded her damages. The Seventh Circuit reasoned that because Klein was suspended without pay for performance problems, she was not a salaried employee, and could not be treated as an exempt employee under the DOL regulations. The theory behind this holding is that salaried employees are paid based on their value to the company regardless of the quality of work performed. According to DOL regulations, employees who are subject to suspensions for reasons related to job performance may not be treated as exempt from the overtime provisions.

This holding clearly follows the plain language of the regulation. However, it is uncertain whether Congress or the DOL considered the impact of the current status of the law. The impact evidences itself when a court ruling requires the reclassifying of not one, but a whole class of employees. There is a provision of the regulation which allows for a deduction in pay without affecting the exempt status of the employees if the reasons for the deductions were serious safety problems. This provision is logical when one considers certain occupations in the petrochemical or nuclear energy industries. When employees perform poorly in these fields, there is a substantial risk to the employee, his or her co-workers, and the society at large. However, there are other industries where poor performance affects the business in a catastrophic manner without having a direct impact on society. To “punish” employers who attempt to take appropriate action against employees who have caused their company severe harm is absurd. Why should employers continue to compensate salaried employees who have been suspended because they caused the company serious injury? Some would say that employers could simply terminate the employees in question. However, termination may create its own set of problems. Employers could face litigation costs or, more importantly, the employees may retain some value to the companies despite the harm they have caused. The employer is in a “no-win” situation.

To remedy this problem, the DOL should amend its regulations and allow for deductions in compensation for employees being disciplined

245. Klein, 990 F.2d at 288.
246. Id. at 283-87.
247. Id.
248. 29 C.F.R. § 541.118(a) (2000).
249. Id.
250. For example, when highly-valued male employees, who are excluded from the overtime provisions of the FLSA, commit acts of sexual harassment in small workforces comprised mostly of women. The problem may be amplified if the workplace is secluded, such as a mining camp in Alaska or an oil platform in the Gulf of Mexico.
for causing serious harm to their employer. Currently, the DOL regulations provide that

[p]enalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.251

While this regulation covers an area of legitimate concern, it completely ignores the need to offer similar flexibility in other occupations. There are industries upon which society depends daily to be in operation, such as the communication and transportation industries. Salaried employees can engage in poor performance in these industries in such a manner that could cause the company to become defunct, or provide services in a less than efficient manner. While the impact on society is not as immediate as that of an oil refinery failure, the impact will eventually become apparent. Employers should be granted the choice of punishing employees engaging in performance that would cause the entity serious harm without risking the loss of the exempt status of an entire class of employees.

While recognizing the great deference given to administrative agencies regarding the interpretation of their regulations, the FLSA should not be utilized as a means of "curtail[ing] employer discretion in imposing discipline on white-collar employees."252 The decision in Klein indicates, albeit unintentionally, that termination is acceptable, but unpaid suspension is not.253 Ironically, employees who engage in improper conduct will be indirectly rewarded for the misconduct, because they maintain a job that others may not.254 Employers are not inclined to terminate employees, but instead want to impose appropriate

251. 29 C.F.R. § 541.118(a)(5).
252. Peikes, supra note 155, at 135.
253. Id.
254. This point is especially apparent when considering the difference in treatment that white-collar workers may receive as compared to blue-collar workers in similar situations. For example, suppose that two male employees are harassing female employees by making offensive statements regarding sexual acts with women in the workplace. The female employees complain that the male employees are creating a hostile work environment. Imagine how differently the two men would be treated if one were a top executive who recently generated an enormous amount of wealth for the company's stockholders. Conversely, the other employee, who received several accommodations for his work, was employed in the mailroom. The executive would most likely retain his job, the mailroom clerk would be fired.
punishment. While the appropriate punishment would be unpaid suspension, the Klein decision precludes that option, unless employers are willing to bear incredible costs.  

VI. STRAIGHT-TIME OVERTIME PAY  

Another issue facing the DOL regarding white-collar exemptions is “straight-time” overtime pay. The DOL has yet to take a position on whether the salary basis test serves as a “cap” for the compensation of white-collar employees. However, “[s]ome courts have actually interpreted the salary basis test as a ceiling for pay for white-collar employees.” The question is whether salaried employees can receive additional compensation for hours worked and maintain their exempt status. Some courts take the position that straight-time overtime is inconsistent with payment on a salary basis. The underlying rationale for this position is that exempt employees’ pay “must not bear a direct causal relationship to the quality or quantity of the work performed.”

Some have argued that the DOL should promulgate regulations allowing for the payment of straight-time overtime. Several factors contribute to this conclusion. First, the FLSA is intended to regulate the compensation of salaried employees, such as executives, professionals, and administrative employees. Second, the DOL regulations allow for the payment of straight-time overtime. Third, legislative history supports the payment of straight-time overtime; court rulings to the contrary are inconsistent with this history. Proponents of straight-time

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255. Klein, 990 F.2d at 285; see also Peikes, supra note 155, at 135.
256. Straight-time overtime pay can be determined by dividing an employee’s annual salary by fifty-two (number of weeks in a calendar year), then dividing that result by forty (number of allowable hours worked in one week without incurring overtime penalty). The amount of money is then paid to the employee for every hour worked in excess of forty during a one-week period.
257. Yager & Boyd, supra note 5, at 338.
258. Id.
259. Thomas v. County of Fairfax, 758 F. Supp. 353, 360 (E.D. Va. 1991); cf. Mich. Ass’n of Gov’t’l Employees v. Mich. Dep’t of Corr., 992 F.2d 82, 84 n.3 (6th Cir. 1993) (holding that bona fide employees are exempt from the overtime provisions of the FLSA, and defining bona fide employees as those employees with supervisory duties paid on a salary basis); York v. City of Wichita Falls, 944 F.2d 236, 241-42 (5th Cir. 1991) (holding that salaried employees are exempt from the FLSA).
262. Krueger, supra note 36, at 1108.
263. Id.
Trying to Give Private Sector Employees a Break: Congress's Effort

While it is true the overtime provisions allow for executive, professional, and administrative employees to be exempt from overtime payments in certain situations, it is quite clear that the regulations also protect base-line employees. The FLSA was enacted to bring structure and order to the American workforce. The stated purpose of the FLSA is to eliminate "conditions detrimental to the maintenance of the minimum standard of living," This purpose applies to the entire workforce. However, it is clear the FLSA has as its primary purpose the protection of low-wage earners. The congressional record indicates that even President Roosevelt stated that the FLSA was enacted to protect the wage earners at the bottom of the pay scale.

Despite the comments regarding the FLSA's purpose, one cannot escape the obvious. In addition to executive, professional, and administrative employees, outside sales employees are also exempt from overtime provisions. Although outside sales employees do not always earn the same level of compensation as the executive, professional, and administrative employees, they are still excluded from overtime provisions. These employees are not excluded based on the amount of money they earn, but because of what they offer their employer. Their value to their employer, and the work they perform, is often more valuable than that of base-line employees. The highly-valued employees are considered assets. In theory, the employer gains no benefit by mistreating valued employees. In fact, mistreatment of valued employees could result in the company losing its assets, thereby hurting the company. In contrast, there is no similar disincentive with regard to base-line employees. The FLSA serves as a firewall for the base-line employees and ensures they receive minimal guarantees. While the degree of protection is quite different between base-line employees and

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264. Id. at 1109.
265. Id. at 1108; see also supra notes 147-54 and accompanying text (describing the higher degree of skills needed by exempted employees in comparison to base-line employees).
266. Lipman, supra note 125, at 359-60; see also Abbott, supra note 23, at 255-56.
268. Id. § 202(a)(1).
269. See supra note 127 and accompanying text.
270. See supra notes 10-13 and accompanying text.
271. Yager & Boyd, supra note 5, at 331.
272. See supra notes 146-52 and accompanying text (describing the higher degree of skills needed by exempted employees need in comparison to base-line employees).
those who manage and/or supervise them, the fact remains that on any
given day the need for protection exists for all employees.

The DOL regulations, as currently drafted, do not allow for
payment of straight-time overtime. The regulations clearly state that
"additional compensation besides the salary is not inconsistent with the
salary basis of payment." The DOL provides examples that reflect the
intent of the regulations. The examples do not remotely include any
form of payment consistent with straight-time overtime. Proponents of
straight-time overtime pay argue that the examples are not exclusive.
Yet one would have to stretch the imagination to believe that even a list
of illustrative examples would be sufficient to indicate an intent to
include a theory inconsistent with the listed examples.

As mentioned, proponents of straight-time overtime pay have stated
that the salary basis test is outdated and no longer applicable to the
workforce of today. While it is true that the salary basis test requires
retooling, the retooling should not result in the availability of straight-
time overtime pay. The salaries listed in the salary basis test should be
modified upward to reflect the effect of inflation as it relates to the value
of compensation. Many of the poorest employees earn a salary in excess
of $250.00 per week. In fact, as of January 2002, the minimum wage
workers earn $206.00 per week (based on a forty-hour workweek).
The DOL should adjust its standards for inflation, because failure to do
so will result in a number of employees being erroneously exempted
from overtime provisions. Yet, these adjustments should not allow for
the payment of straight-time overtime. It is evident from legislative
history and the plain language of the regulations that straight-time
overtime pay is unacceptable.

VII. CONCLUSION

Since the FLSA is an old and long-standing piece of legislation, it
should be handled with care and diligence, and changed only after much
deliberation and forethought. To ensure the principles embodied in the
FLSA remain intact, the Working Families Flexibility Act should not be

273. 29 C.F.R. § 541.118(b) (2000).
274. Id.
275. Id.
276. Id. (suggesting use of commissions, profit-sharing, payment, and a daily or shift basis in
lieu of straight-time overtime pay).
277. Krueger, supra note 36, at 1109.
278. Id. at 1101.
enacted without explaining when the use of compensatory time would "unduly disrupt the operations of the employer." Congress should also extend the scope of the WFFA to include public sector employees. In addition, the white-collar exemptions in the DOL regulations should be amended to allow for the deduction in pay as the result of disciplinary action in cases where the employee's performance caused the employer serious harm. Finally, the salary basis test should be modified to adequately reflect the impact of inflation to the value of current American salaries, and the DOL regulations should not allow for straight-time overtime pay.
