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## THE "MISCELLANEOUS EMPLOYEE": EXPLORING THE BOUNDARIES OF THE FAIR LABOR STANDARDS ACT'S ADMINISTRATIVE EXEMPTION

*By Blake R. Bertagna\**

### ABSTRACT

Judge Richard Posner recently opined that the Fair Labor Standards Act's administrative exemption is "pretty vague." Judge Posner's observation is a gross understatement. Indeed, federal courts have been grappling with this exemption's meaning since its creation in 1938. The confusion surrounding the administrative exemption is baffling given that it has existed for nearly seventy-five years, has been the object of numerous regulatory revisions by the Department of Labor, and is probably the most litigated of the Act's many exemptions.

Both Congress and the Department of Labor are responsible for immortalizing the administrative exemption's perplexity. Congress instigated the confusion by labeling two separate exemptions with virtually synonymous terms—"executive" and "administrative." The Department of Labor then cemented the entanglement of these two exemptions by qualifying as administrative employees those whose primary duty is "directly related to management."

The Department of Labor further broadened the administrative exemption by extending its scope to employees whose primary duty is related to "general business operations." Such language is so vague that there is little surprise that the exemption's architect viewed the exemption as broadly covering "persons performing a variety of miscellaneous . . . functions."

The administrative exemption's boundaries will be tested with even more frequency in America's ailing economy. As wages stagger and budgets constrict, employees and employers are likely to search for ways

to exploit the obscurity of the administrative exemption. And the judiciary is likely to continue its longstanding battle of identifying the boundaries of this elusive exemption, unless action is taken to rethink its purpose and limits.

## I. INTRODUCTION

America is currently mired in “the worst economic crisis since the Great Depression.”<sup>1</sup> The federal government has responded with efforts such as an \$830 billion stimulus package, corporate bailouts, the “Cash for Clunkers” program, and first-time homebuyer tax credits, which have ignited temporary sparks of economic recovery.<sup>2</sup> Yet, companies persist in downsizing, wages remain stagnant, foreclosures continue to amass, and the American Dream is increasingly fleeting.<sup>3</sup>

On September 9, 2011, President Barack Obama addressed a joint session of Congress to propose steps to relieve the nation’s economic woes. His plan focused on remedying the plight of the country’s jobless.<sup>4</sup> In his address, President Obama urged Congress to immediately enact his American Jobs Act, a \$447 billion jobs plan aimed at growing the economy in 2012.<sup>5</sup>

The parallels between America’s current crisis and the Great

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2. *The Latest Jobs Plan*, WALL ST. J., Sept. 9, 2011, <http://online.wsj.com/article/SB10001424053111904836104576558931723540102.html>.

3. Michael A. Fletcher, *Many in U.S. Slip from Middle Class, Study Finds*, WASH. POST, Sept. 6, 2011, [http://www.washingtonpost.com/business/economy/many-in-us-slip-from-middle-class-study-finds/2011/09/06/gIQA76ut7J\\_story.html](http://www.washingtonpost.com/business/economy/many-in-us-slip-from-middle-class-study-finds/2011/09/06/gIQA76ut7J_story.html); Joe Light, *Memo to Staff: Don’t Panic*, WALL ST. J., Aug. 15, 2011, <http://online.wsj.com/article/SB10001424053111903918104576504750371274700.html>. At the end of September 2011, unemployment remained over nine percent. Motoko Rich, *Adding Jobs, but Not Many, U.S. Economy Seems to Idle*, N.Y. TIMES, Oct. 7, 2011, <http://www.nytimes.com/2011/10/08/business/economy/us-adds-103000-jobs-rate-steady-at-9-1.html?pagewanted=all>. That same month, the Census Bureau reported that 46.2 million Americans are living in poverty, the highest number in the 52 years that the Census Bureau has recorded that statistic. Sabrina Tavernise, *Soaring Poverty Casts Spotlight on ‘Lost Decade’*, N.Y. TIMES, Sept. 13, 2011, <http://www.nytimes.com/2011/09/14/us/14census.html?pagewanted=all>.

4. Mark Landler, *Obama Challenges Congress on Job Plan*, N.Y. TIMES, Sept. 8, 2011, <http://www.nytimes.com/2011/09/09/us/politics/09payroll.html?pagewanted=all>.

5. Zachary A. Goldfarb, *Economists on Obama Jobs Plan: Something’s Missing*, WASH. POST, Sept. 10, 2011, at A12.

Depression are striking.<sup>6</sup> In the spring of 1937, the federal government was similarly searching for ways to relieve America's economic turmoil and improve the lot of America's working force. With the Great Depression's grip firmly around the nation's throat, a full third of America's wage earners found themselves without work, and many more faced the imminent demise of their livelihood.<sup>7</sup> On May 24th of that year, President Franklin D. Roosevelt stood before a joint session of Congress with a special message, proclaiming that the time had arrived for the nation's leaders to take control of America's financial crisis by guaranteeing America's "able-bodied working men and women a fair day's pay for a fair day's work."<sup>8</sup>

Congress responded with "one of the most bitterly fought pieces of legislation ever to be enacted"—the Fair Labor Standards Act of 1938 ("FLSA" or "Act").<sup>9</sup> After signing the FLSA, the President opined: "[e]xcept for the Social Security Act, [the FLSA] is the most far-reaching, far-sighted program ever adopted here or in any [other] country."<sup>10</sup>

Despite FDR's rhetoric, the FLSA was never intended to be far-reaching and far-sighted for everyone. From the moment the FLSA became the law of the land, a significant number of Americans were ineligible to receive its minimum wage and overtime protections, falling within one or more of the FLSA's "exemptions."<sup>11</sup> And no group of exemptions would become more numerous and significant than the so-called "white-collar" exemptions—those employed in "a bona fide executive, administrative, or professional capacity."<sup>12</sup>

In 2003, the Wage and Hour Division ("WHD"), the agency tasked with defining the white-collar exemptions, revisited the existing white-

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6. See, e.g., James B. Stewart, *Aftershock to Economy Has a Precedent that Holds Lessons*, N.Y. TIMES, Aug. 12, 2011, <http://www.nytimes.com/2011/08/13/business/financial-aftershocks-with-precedent-in-history.html?pagewanted=all> (discussing the parallels between the current crisis and the events of 1937-38, "the so-called recession within the Depression").

7. According to one author, it was a time when "collapse was in the air." IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER: 1920-1933*, at 312 (1960).

8. See H.R. REP. NO. 101-260, at 8-9 (1989), *reprinted in* 1989 U.S.C.A.N. 696-97.

9. John S. Forsythe, Note, *Legislative History of the Fair Labor Standards Act*, 6 LAW & COMP. PROBS. 464, 474 (1939).

10. Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 105 (1997) (internal quotation marks omitted) (alterations in original).

11. See generally Forsythe, *supra* note 9, at 485 (describing the numerous exceptions carved out by the FLSA).

12. 29 U.S.C. § 213(a)(1) (2006).

collar regulations.<sup>13</sup> It ultimately concluded that the FLSA's wage-and-hour protections had "been severely eroded . . . because the Department of Labor ha[d] not updated the regulations defining and delimiting the exemptions for 'white collar' executive, administrative, and professional employees."<sup>14</sup> The WHD, in particular, singled out the "administrative exemption" for revision, as the exemption had "generated significant confusion and litigation" and "provid[ed] little guidance for jobs of the 21st Century."<sup>15</sup>

Despite the agency's honorable intentions to clarify and restore meaning to the administrative exemption, the confusion and litigation persist today. More than seven years have passed since the Department of Labor ("DOL") set out to bring clarity to the administrative exemption. Yet even judicial luminary Judge Richard Posner recently characterized the administrative exemption as "pretty vague."<sup>16</sup> At bottom, the administrative exemption is unworkable and demands intervention.

This Article seeks to explain the nature of the administrative exemption's defectiveness. Part II highlights key events in the creation and development of the administrative exemption. Parts III and IV identify two sources for the unworkability of the administrative exemption. Part III argues that Congress and the DOL doomed the administrative exemption by effectively creating an exemption that was linguistically fused with the executive exemption. Part IV contends that the regulatory language crafted by the DOL to define the administrative exemption is so ambiguous that it has permitted the exemption to grow virtually unlimited in its scope, inhibiting its application to a defined set of employees. By uncovering the deep-seated flaws that have belied the administrative exemption's effectiveness since its creation, the Article has an objective of informing practitioners of the risks involved with staking litigation in this exemption and of motivating jurists and

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13. The FLSA created within the Department of Labor a new agency called the Wage and Hour Division, to be directed by a single Administrator who would be appointed by the President, by and with the advice and consent of the Senate. Fair Labor Standards Act of 1938, Pub. L. No. 718, § 4(a), 52 Stat. 1060, 1061. On July 15, 1938, President Roosevelt appointed Elmer Andrews, an engineer who had previously directed the New York Industrial Commission (i.e., New York's labor department), as the first Administrator of the Wage and Hour Division. Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2292 (1998).

14. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541).

15. *Id.* at 22,122 and 22,139.

16. *Verkuilen v. MediaBank, LLC*, 646 F.3d 979, 981 (7th Cir. 2011).

legislators to call for a comprehensive overhaul of the administrative exemption.

## II. THE FAIR LABOR STANDARDS ACT

On May 24, 1937, Senator Hugo Black of Alabama and Representative William Connery of Massachusetts introduced bills S. 2475 and H.R. 7200, respectively.<sup>17</sup> President Roosevelt concurrently delivered a special message to Congress. The President reminded legislators that "[o]ne third of our population . . . is ill-nourished, ill-clad, and ill-housed."<sup>18</sup> He expressed his "hope" that Congress would immediately enact legislation "to help those who toil in factory and on farm."<sup>19</sup> To that end, he insisted on a bill that would "define a general maximum working week," "put some floor below which the wage ought not to fall," and "rul[e] out the products of the labor of children from any fair market."<sup>20</sup> He urged lawmakers to action, closing with, "We cannot stand still."<sup>21</sup> Thirteen months later, on June 25, 1938, President Roosevelt signed the Fair Labor Standards Act into law.<sup>22</sup>

### A. Exemptions

The 75th Congress never intended to extend wage-and-hour protection to all workers.<sup>23</sup> Section 13 of the FLSA, entitled "Exemptions," stated that "[t]he provisions of sections 6 [covering minimum wages] and 7 [covering overtime] shall not apply with respect to . . . any employee employed in a bona fide executive, administrative, [or] professional . . . capacity."<sup>24</sup>

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17. Paul H. Douglas & Joseph Hackman, *The Fair Labor Standards Act of 1938*, 53 POL. SCI. Q. 491, 493 (1938).

18. 81 CONG. REC. H4983 (daily ed. May 24, 1937) (statement of President Franklin Delano Roosevelt).

19. *Id.*

20. *Id.*

21. *Id.*

22. Forsythe, *supra* note 9, at 473. For a discussion of the issues that prolonged the enactment of the FLSA, see *infra* pp. 506-13.

23. *Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669, 674 (W.D. Pa. 2009); see also *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945) ("The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect *certain groups* of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce") (emphasis added).

24. Fair Labor Standards Act of 1938, Pub. L. No. 718, § 13(a)(1), 52 Stat. 1060, 1067.

Congress “shr[a]nk from defining”<sup>25</sup> the meaning of the white-collar exemptions. Congress shifted this responsibility to the Wage and Hour Administrator.<sup>26</sup> On October 20, 1938, only days before the FLSA’s effective date, the WHD published its regulations defining and delimiting the white-collar exemptions.<sup>27</sup>

Congress’s statutory language appeared to have distinguished between employees working in an executive and administrative capacity. The Wage and Hour Administrator, however, did not construe the statutory language in such a manner. In its first set of regulations, it defined the terms “executive” and “administrative” in combination with one another.<sup>28</sup>

The term “employee employed in a bona fide *executive* [and] *administrative* . . . capacity” in Section 13 (a)(1) of the Act shall mean any employee whose primary duty is the management of the establishment, or a customarily recognized department thereof, in which he is employed, and who customarily and regularly directs the work of other employees therein, and who has the authority to hire and fire other employees or whose suggestions and recommendations as to the hiring and firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and who customarily and regularly exercises discretionary powers, and who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer, and who is compensated for his services at not less than \$30 (exclusive of board, lodging, or other facilities) for a workweek.<sup>29</sup>

The failure to separately define “executive” and “administrative” shortly became the subject of intense criticism.<sup>30</sup>

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25. MARC LINDER, “TIME AND A HALF’S THE AMERICAN WAY”: A HISTORY OF THE EXCLUSION OF WHITE-COLLAR WORKERS FROM OVERTIME REGULATION, 1868–2004, at 398 (2004) (quoting *Bagnall v. Levenstein, Ltd.*, 1 K.B. 531, 542 (1906) (bracket in original)).

26. § 13(a)(1), 52 Stat. at 1067 (“as such terms are defined and delimited by regulations of the Administrator”).

27. See Regulations Defining and Delimiting the Terms “Any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity or in the Capacity of Outside Salesman” Pursuant to Section 13 (A) (1) of the Fair Labor Standards Act, 3 Fed. Reg. 2515, 2518 (Oct. 20, 1938).

28. *Id.*

29. *Id.* (emphases added).

30. HAROLD STEIN, U.S. DEP’T OF LABOR WAGE & HOUR DIV., “EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL . . . OUTSIDE SALESMAN” REDEFINED 3 (1940) [hereinafter “Stein Report”].

*B. Stein Report*

After the issuance of the October 1938 regulations, the WHD stayed in close contact with "interested employers, employees, trade associations, and unions concerning the propriety of the definitions and their correct interpretation."<sup>31</sup> These communications ultimately signaled that revisions to the regulations were necessary. As a result, the agency conducted fourteen days of public hearings in Washington D.C. from April 10 to June 29, 1940 to "allow all interested parties to express their views on the regulations and to propose amendments."<sup>32</sup>

Harold Stein, Assistant Director of the WHD's Hearings Branch, presided over the regulatory hearings.<sup>33</sup> Stein heard testimony from over 160 different parties, producing a hearing transcript stretching 2,216 pages.<sup>34</sup> In addition to the testimonies, the WHD received nearly 180 written submissions.<sup>35</sup> Many points emerged from the mountain of data, but no criticism was "so frequently repeated as that the Administrator erred in not making separate definitions of the two words 'executive' and 'administrative.'"<sup>36</sup> All the evidence presented during and in connection with the hearings resulted in a "widely disseminated Report and Recommendation," generally known as the "Stein Report," which included the WHD's proposed amended regulations.<sup>37</sup>

In his Report and Recommendation, Stein answered the criticisms of the 1938 definition that resulted in a combined executive/administrative exemption. Stein concluded that "the regulations will be more easily understood and administered if a separate definition and delimitation is adopted for the term 'administrative.'"<sup>38</sup> Accordingly, in 1940, the WHD proposed separate definitions for the two exemptions. The newly minted executive exemption pertained to individuals:

(a) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

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31. *Id.* at 1.

32. *Id.*

33. LINDER, *supra* note 25, at 539.

34. *Id.* at 538.

35. *Id.*

36. Stein Report, *supra* note 30, at 3.

37. Malamud, *supra* note 13, at 2304.

38. Stein Report, *supra* note 30, at 5.



(b) who customarily and regularly directs the work of 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 is compensated for his services on a salary basis at not less than \$30 per week (exclusive of board, lodging, or other facilities), and

(f) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction: Provided, That 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.<sup>39</sup>

The new executive exemption largely tracked the 1938 combined executive/administrative definition. Aside from the addition of language providing a ceiling of twenty percent on the amount of nonexempt work that an exempt employee could perform, the language was nearly identical.

The newly crafted administrative exemption, however, bore little resemblance to its 1938 predecessor. In fact, the WHD created an entirely new definition for the administrative exemption. Under the new definition, an administrative exempt worker was one:

(a) who is compensated for his services on a salary or fee basis at a rate of not less than \$200 per month (exclusive of board, lodging, or other facilities), and

(b) (1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in [these] regulations . . .), where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or

(2) who performs under only general supervision, responsible

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39. 29 C.F.R. § 541.1 (1941).

nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or

(3) whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment.<sup>40</sup>

The stand-alone definitions thus made clear that by joining the executive and administrative exemptions into a single definition in 1938, the Wage and Hour Division had essentially jettisoned the administrative exemption as an independent exemption, distinct from the executive exemption.

The 1940 regulations would undergo substantive revisions nearly a decade later.<sup>41</sup> Nonetheless, with the language that Harold Stein crafted, he constructed the structural framework for the white-collar exemptions that remains today. Indeed, Professor Marc Linder has observed, Stein's "most enduring accomplishment at the WHD" was "his single-handed re-creation of the white-collar overtime regulations."<sup>42</sup>

### C. Weiss Report

The passage of time, unsurprisingly, required revisiting the adequacy of the 1940 regulations. Following the end of World War II, in 1947, the Wage and Hour Administrator realized that "changes in economic circumstances" called for the WHD to re-evaluate the white-collar exemptions.<sup>43</sup> As a result, on December 2, 1947, the WHD began a stretch of twenty-two days of hearings, which involved over 100 witnesses and 140 written submissions.<sup>44</sup> Harry Weiss, who was director of the Research and Statistics Branch of the WHD, presided over the hearings.<sup>45</sup> His goal would be to identify revisions that needed to be made in light of the then current U.S. economy.

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40. 29 C.F.R. § 541.2.

41. See *infra* pp. 494-96.

42. LINDER, *supra* note 25, at 531.

43. *Id.* at 752.

44. HARRY WEISS, U.S. DEP'T OF LABOR WAGE & HOUR & PUB. CONTRACTS DIV., REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS OF REGULATIONS, PART 541, at 2 (1949) [hereinafter "Weiss Report"].

45. LINDER, *supra* note 25, at 752.

The key focus of the hearings was the adequacy of the “salary test” for the white-collar exemptions. Harry Weiss heard a vast range of proposals, from making salary the exclusive test for exempt status, to eliminating the salary requirements altogether.<sup>46</sup> Weiss could not agree with the latter position, believing that payment of a fixed salary constituted “a vital element of the regulations.”<sup>47</sup> He did agree, however, that the salary levels used for the test had become “too low . . . to serve their purpose fully” and needed to be elevated “to more realistic figures.”<sup>48</sup> Consequently, he concluded that for the administrative exemption, a salary level of \$75 per week (the equivalent of \$300 a month) was “necessary to restore the salary tests to approximately the same effectiveness that they had in October 1940”—a fifty percent increase from the 1940 levels.<sup>49</sup>

Although Weiss rebuffed the proposal to make salary the sole requirement for exempt status, to some extent, he did make a concession to this position with the “Special Provisos for High Salaried Executive, Administrative, or Professional Employees”<sup>50</sup>—Weiss’s “chief innovation” of the 1949 regulations.<sup>51</sup> Under this shortcut, “persons who earn[ed] salaries of \$100 a week or more and who ha[d] as their primary duty the performance of work which is characteristic of employment in a bona fide executive, administrative or professional capacity” would be exempt.<sup>52</sup> Weiss deemed this “short test” for highly compensated employees to be appropriate based upon the WHD’s determination that “[a]t the higher salary levels . . . the employees have almost invariably been found to meet all the other duties requirements of the regulations for exemption.”<sup>53</sup>

Finally, Weiss created the “primary duties” test for the administrative exemption. In reality, Weiss’s role related more to reorganization than drafting. The 1940 definition, which had grown out of the Stein Report, had required an administrative employee to perform work in one of three categories. Weiss essentially pulled out language

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46. Weiss Report, *supra* note 44, at 6.

47. *Id.* at 8-9.

48. *Id.* at 8, 10.

49. *Id.* at 20-21.

50. *Id.* at 22-24.

51. LINDER, *supra* note 25, at 773.

52. Weiss Report, *supra* note 44, at 23.

53. *Id.* at 22. In time, the courts would routinely refer to and analyze FLSA exempt status under the short and long tests. See, e.g., *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 626 (11th Cir. 2004) (“The Department of Labor (DOL) has established both a ‘short’ and a ‘long’ duties test to determine whether someone is an exempt administrative employee”).

from those three preexisting categories (but still maintaining those three disjunctive areas of work) and organized them into separate elements of the primary duties test. The first element required the employee's primary duty to involve "office or nonmanual field work."<sup>54</sup> The next element required the employee's primary duty to be "directly related to management policies or general business operations."<sup>55</sup> The third element required the employee's primary duty to involve "the exercise of discretion and independent judgment."<sup>56</sup> The administrative exemption adopted by the Department of Labor in 1949 applied to workers:

whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers; and

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 these regulations), 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 of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in subsections (A) through (C) above; and

(E) who is compensated for his services on a salary or fee basis at a rate of not less than \$75 per week (or \$200 per month if employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging, or other

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54. Weiss Report, *supra* note 44, at 59-61.

55. *Id.* at 61-65.

56. *Id.* at 65-70.

facilities;

*Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than \$100 per week (exclusive of board, lodging, or other facilities) and whose primary duty consists the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or of his employer's customers, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section.<sup>57</sup>

Almost sixty-five years would pass before the DOL made any substantive revisions to how exempt status was determined under the regulations.<sup>58</sup>

#### *D. The 2004 Regulations*

By the late 1990s, tectonic shifts in America's economy had created an overt need to revisit the FLSA's white-collar exemptions. In 1999, the U.S. General Accounting Office ("GAO") observed that "the industrial profile of the American economy ha[d] shifted dramatically" since the FLSA's enactment, requiring revision of the outdated regulations, and in particular, those treating the white-collar exemptions.<sup>59</sup>

At the heart of this shift was the burgeoning service sector, which had become the largest employment sector in the U.S. economy, employing one-quarter of all full-time employees in 1998.<sup>60</sup> In the preceding fifteen years, the service sector had added 11 million additional employees, 3.6 million of which qualified as exempt white-collar employees.<sup>61</sup> Due to the failure of the regulations to keep pace with the evolving American economy, the GAO concluded that the DOL

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57. *Id.* In 1942, the WHD amended the administrative exemption by adding subsection (b)(4), an exemption for "pilots, copilots and navigators who were engaged in ferrying aircraft from the United States to points outside the country." *Id.* at 70. By 1949, the justifications for implementing that exemption had disappeared, and the exemption was removed. *Id.*

58. Between 1949 and 2004, the regulations underwent two types of revisions. One increased the salary level for white-collar employees, which occurred in 1958, 1963, 1970, and 1975. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-99-164, WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE 15 (1999). The other category expanded or minimized the coverage for certain kinds of employees, namely retail workers in 1961, teachers in 1967, and computer professionals and government employees in 1992. *Id.*

59. *Id.* at 1.

60. *Id.* at 2, 9.

61. *Id.* at 8-10.

had done little to "alleviate the general problems" with the white-collar exemptions and that it had become "important to readjust these tests to meet the needs of the modern work place."<sup>62</sup>

A few years following the GAO's report, the DOL was ready to act. Labor Secretary Elaine L. Chao herself characterized the white-collar exemptions as "literally ancient" and "absurdly complex."<sup>63</sup> A WHD official similarly observed that the "regulations no longer reflect[ed] the contemporary workplace, that they [we]re outdated, that they [we]re complicated, that they ha[d] obsolete job titles in them."<sup>64</sup>

As additional fuel to the fire, in the years following the GAO Report and prior to the DOL's new regulations, the courts witnessed a virtual "tidal wave of class-action lawsuits charging employers with robbing them of overtime."<sup>65</sup> White-collar employees were "transforming hundreds of nickel-and-dime wage claims into multimillion-dollar assaults on corporations."<sup>66</sup> Blue-chip employers, such as Rite Aid,<sup>67</sup> U-Haul,<sup>68</sup> Starbucks,<sup>69</sup> Bank of America,<sup>70</sup> and

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62. *Id.* at 34-35.

63. LINDER, *supra* note 25, at 880 (internal quotation marks omitted).

64. Maria M. Perotin, *Uncharted Territory; Gray Area of Overtime Qualifications Could Mean More Lawsuits*, FORT WORTH STAR-TELEGRAM, Nov. 4, 2002, at 16 (statement by Eric Dreiband, deputy administrator for the U.S. Labor Department's Wage and Hour Division). Many beyond the DOL recognized the inadequacy of the regulations on the white-collar exemptions. *See, e.g.*, Samuel D. Walker, *Overtime Overhaul Overdue*, N.J. L.J. 83, 84-85 (June 12, 1998) (characterizing the considerations in determining whether an employee is exempt under the white-collar exemptions as "subjective and sometimes downright murky," and recommending that the duties and salary basis tests be removed for those earning a "relatively high compensation level"); Peter S. Rukin, *Representing Workers Under the Fair Labor Standards Act and Illinois Minimum Wage Law*, 87 ILL. B.J. 208, 209 (1999) ("Determining the applicability of the 'white collar' exemption can be difficult for even the most experienced practitioner"); Daniel V. Yager & Sandra J. Boyd, *Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace*, 11 LAB. LAW. 321, 331 (1996) ("Few, if any, areas of employment law have proven themselves less adaptable to an evolving work force than the so-called white-collar exemption to the FLSA"); Robert D. Lipman et al., *A Call for Bright-Lines to Fix the Fair Labor Standards Act*, 11 HOFSTRA LAB. & EMP. L.J. 357, 361-62 (1994) ("Despite the expenditure of these resources, however, the test to determine which administrative, executive and professional workers may be exempt from the maximum hours standard is not clear. . . . This is an onerous and burdensome, if not impossible, job"); *see also* Cindy Skrzycki, *Labor Dept. to Propose New Overtime-Pay Rules*, WASH. POST, Mar. 27, 2003, at E01 (noting business groups' criticism of regulations as "antiquated and geared toward a manufacturing-based economy rather than one that is based on information and technology").

65. Lisa Girion, *Infuriated Managers Suing for Overtime—and Winning*, L.A. TIMES, June 8, 2001, at A1.

66. *Id.*

67. Rite Aid settled for \$25 million. *Id.*

68. U-Haul settled for \$7.5 million. *Id.*

69. Starbucks settled for \$18 million. Kirstin Downey, *Overtime-Pay Complaints End Up in Court More Often*, WASH. POST, Apr. 10, 2004, at D12.

RadioShack<sup>71</sup> were losing money by the millions.<sup>72</sup> For this reason, in January 2004, Secretary Chao, testifying before a Senate hearing on the need to revise the regulations, stated that the “needless litigation” generated from the antiquated rules was costing companies nearly \$2 billion a year.<sup>73</sup>

Words turned into action on March 31, 2003, when the Department of Labor published a Notice of Proposed Rulemaking and its proposed revisions.<sup>74</sup> In the Notice, the DOL immediately acknowledged that the “exemptions [had] engendered considerable confusion over the years regarding who is, and who is not, exempt.”<sup>75</sup> Unsurprisingly, the 75,280 comments that the DOL received during the ninety-day comment period “revealed significant misunderstandings regarding the scope of the ‘white collar’ exemptions.”<sup>76</sup> As a result, the DOL hoped to “simplify, clarify, and better organize the regulations defining and delimiting” the white-collar exemptions with the goal of “enhanc[ing] understanding of the boundaries and demarcations of the exemptions.”<sup>77</sup> To that end, the DOL made two conspicuous changes to the administrative exemption.

First, it eliminated the short and long tests. Under the existing framework at the time, the exempt status of employees earning a salary of \$155 and \$250 per week had been analyzed under a more rigorous test than those earning above \$250 per week.<sup>78</sup> The DOL determined that the complexity of the regulations would be reduced by “replacing the subjective and effectively dormant ‘long’ test requirements” with a “single standard duties test.”<sup>79</sup>

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70. Bank of America settled for \$4.1 million. *Id.*

71. RadioShack settled for \$29.9 million. Shirleen Holt, *Bank to Write Overtime Checks: \$4 Million Ends Suit by Staff Working Off Clock*, SEATTLE TIMES, May 2, 2003, <http://community.seattletimes.nwsourc.com/archive/?date=20030502&slug=bofa02>.

72. In one of the starkest examples, a jury in California awarded a \$90 million verdict to Farmers Insurance Exchange claims adjusters in a lawsuit alleging that Farmers had misclassified claims adjusters as exempt managers. *Id.*

73. Mark Wilson, *Omnibus Spending Bill Provisions Pt. I: New Overtime Law to End Pay for Up to 8 Million Workers*, DEMOCRACY NOW (Jan. 22, 2004), [http://www.democracynow.org/2004/1/22/omnibus\\_spending\\_bill\\_provisions\\_pt\\_i](http://www.democracynow.org/2004/1/22/omnibus_spending_bill_provisions_pt_i).

74. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15,560 (proposed Mar. 31, 2003) (to be codified at 29 C.F.R. pt. 541).

75. *Id.*

76. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541).

77. *Id.* at 22,125.

78. See, e.g., *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 626 (11th Cir. 2004).

79. Defining and Delimiting the Exemptions, 69 Fed. Reg. at 22,126-27.

The standard duties test for the administrative exemption dropped two long-standing elements of that exemption: (1) the three-part disjunctive test that had required an exempt employee to either assist an exempt employee or work under general supervision in some capacity; and (2) the twenty percent/forty percent cap on the amount of nonexempt work that an employee could perform without losing exempt status.<sup>80</sup>

Second, the DOL implemented a standard salary level, which applied to executive, administrative, and professional employees. A highly compensated employee exemption was created, which applied to employees receiving a total annual compensation of at least \$100,000.<sup>81</sup> Then, instead of the bifurcated \$155/\$250 per week salary level, the DOL put in place a requirement that an exempt employee be paid on a salary basis of \$455 per week (or \$23,660 annually).<sup>82</sup> The 2004 definition of an administrative employee reads as follows:

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(b) The term "salary basis" is defined at § 541.602; "fee basis" is defined at § 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.<sup>83</sup>

When the DOL rolled out its 2004 regulations, it did not equivocate in its determination that the regulations relating to the white-collar

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80. *Id.* at 22,127-28.

81. *Id.* at 22,123.

82. *Id.* at 22,126-27.

83. 29 C.F.R. § 541.200 (2005).



exemptions had become “confusing, complex, and outdated.”<sup>84</sup> In fact, they had become so “confusing, complex, and outdated” that “employment lawyers, and even Wage and Hour Division investigators [had] difficulty determining whether employees qualif[ied] for the exemption.”<sup>85</sup> The solution? Restore the meaning originally intended for the white-collar exemptions—the meaning that had “eroded over the decades.”<sup>86</sup>

The restoration would be especially vital to the administrative exemption. The DOL was not shy in expressing the inherent challenges to understanding the administrative exemption. It freely acknowledged that the administrative exemption was “the most difficult to apply” and “the most challenging . . . to define.”<sup>87</sup> It conceded that the exemption had “generated significant confusion and litigation” and “become increasingly difficult to apply with uniformity in the 21st century workplace.”<sup>88</sup> At bottom, “clearly defining and delimiting the administrative exemption” was undoubtedly a “difficult task.”<sup>89</sup> With a plain vision of the complications surrounding the administrative exemption, the DOL promulgated the present regulations.

Yet, the confusion and complexity persist over seven years later. Indeed, the confusion and complexity linger to such a degree that Judge Richard Posner characterizes the administrative exemption as “vague,”<sup>90</sup> and the Ninth Circuit casts the exemption as “elusive.”<sup>91</sup> In truth, the DOL’s 2004 regulations did little to restore meaning to the administrative exemption because there was, in fact, little meaning to restore. The meaning of the administrative exemption did not erode with time; rather, Congress and the DOL crafted an exemption with few definitional boundaries, producing an extremely vague and broad exemption that captured (and would continue to capture) an inestimable number of “white-collar” employees into its net.

Under the current framework, administrative employees must have as their “primary duty” “the performance of office or non-manual work directly related to the management or general business operations of the

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84. Defining and Delimiting the Exemptions, 69 Fed. Reg. at 22,122.

85. *Id.*

86. *Id.*

87. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15,560, 15,566-67 (proposed Mar. 31, 2003) (to be codified at 29 C.F.R. pt. 541).

88. *Id.*

89. Defining and Delimiting the Exemptions, 69 Fed. Reg. at 22,139.

90. *Verkuilen v. MediaBank, LLC*, 646 F.3d 979, 981 (7th Cir. 2011).

91. *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1126 (9th Cir. 2002).

employer or the employer's customers."<sup>92</sup> "The phrase 'directly related to the management or general business operations' refers to the type of work performed by the employee."<sup>93</sup> The duties test is phrased in the disjunctive. An employee can fall under the exemption by either: (1) being directly involved with management; or (2) being outside of the management function but primarily involved with the employer's "general business operations."<sup>94</sup>

Both prongs of today's primary duties test reveal two distinct layers of the challenge that resides in the task of defining the administrative exemption. The first prong aligns the administrative and executive exemptions in such a unified manner that it renders their distinction nearly imperceptible. The second prong stretches the boundaries of the administrative exemption so thin that the category of occupations that can come within the exemption's broad sweep is unlimited and ever growing in its variation.

### III. BLURRING THE BOUNDARY BETWEEN THE EXECUTIVE AND ADMINISTRATIVE EXEMPTIONS

In the seven-year span following the issuance of the DOL's revised regulations in 2004, hundreds of federal court decisions were reported in which a judge or jury reached a merits determination on the exempt status of the plaintiff under the administrative exemption. In that time, the job positions that the courts most commonly held to be exempt under the administrative exemption were those involving managerial authority—managers and supervisors<sup>95</sup>—the flagship attribute of the executive exemption. In the majority of those decisions, the managerial

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92. 29 C.F.R. § 541.200(a)(2) (2005). This primary duty test requires the performance of (1) "office or nonmanual work;" (2) "directly relat[ed] to . . . management policies or general business operations." *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 372 (7th Cir. 2005). The requirement of "office or nonmanual work," however, is rarely disputed. *See, e.g., id.* ("Since both parties agree that the plaintiffs do office or nonmanual work, our only inquiry is whether there is any meaningful dispute about whether their primary duties directly relate to ComEd's management policies or general business operations"). Since the 2004 regulations were issued, not one circuit court decision treating the administrative exemption has addressed this element of the duties test. The subject of this Article is on what types of duties bring employees within the administrative exemption. As a result, the salary basis and salary level tests, which are not unique to the administrative exemption, are also not the subject of this Article's discussion.

93. 29 C.F.R. § 541.201(a) (2011).

94. *Id.*

95. *See, e.g., Hines v. State Room, Inc.*, 665 F.3d 235, 246-47 (1st Cir. 2011); *Cash v. Cycle Craft Co., Inc.*, 508 F.3d 680, 686 (1st Cir. 2007); *Bagwell v. Florida Broadband, LLC*, 385 F. Supp. 2d 1316, 1320, 1329 (S.D. Fla. 2005).

and supervisory employees were held, as a matter of law, to be exempt under the administrative exemption.<sup>96</sup> A minority of the decisions held that the plaintiffs were nonexempt as administrative employees.<sup>97</sup> The table below reveals the figures for the top ten most common occupations at issue in these administrative exemption decisions.

Occupation <sup>98</sup>	# of Cases	Exempt	Non-Exempt
Manager	65	33	9
Sales Representative	23	11	9
Specialist	22	14	3
Supervisor	21	7	7
Adjuster	15	10	1
Director	14	7	3
Analyst	13	6	0
Officer	12	3	2
Representative (other than sales)	12	4	1
Coordinator	12	5	1

The overlap between these two exemptions is not recent history. Indeed, the administrative and executive exemptions have shared an inextricable tie, and the courts have oft found themselves tripping over and confusing the distinction between the two exemptions.

#### *A. Judicial Confusion*

The judiciary's struggles revealed themselves as soon as the WHD

96. See, e.g., *Cash*, 508 F.3d at 685 (citing 29 C.F.R. § 541.203(e) (2004)) ("human-resources managers who formulate, interpret, or implement employment policies generally meet the duties requirements for the exemption").

97. The figures for this analysis include only decisions where the court reached the merits of the administrative exemption. Thus, the reported decisions do not include decisions approving a settlement, decisions on a motion to dismiss, or decisions on a motion for certification or decertification of a class.

98. When assessing the status of any given employee, the regulations provide that "[a] job title alone is insufficient to establish the exempt status of an employee . . . [but rather] [t]he exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part." 29 C.F.R. § 541.2 (2011). Nonetheless, to assemble the type of quantifiable data used in this Article, the Author used job titles as a measuring stick for trends in the administrative exemption since the new regulations issued on August 23, 2004.

created the separate definitions in 1940. The decision in *Wilkinson v. Noland Co.*,<sup>99</sup> for example, was issued less than one year after Harold Stein's 1940 Report and Recommendation.<sup>100</sup> In that case, a company's purchasing agent sought damages under the FLSA.<sup>101</sup> The federal district court viewed "executive" as "a reasonably well understood term," pinpointing the executive's duties as those relating "to active participation in control, supervision and management of a business."<sup>102</sup> Despite the newfangled separation of the executive and administrative exemptions, the court's concept of an administrative employee differed little from that of an executive employee, defining an administrative employee as "one who directs, *manages*, executes or dispenses."<sup>103</sup> The district court proceeded to analyze the same set of factors to rule that the employee qualified under both exemptions.<sup>104</sup>

Federal courts throughout the 1940s continued to grapple with distinguishing the two exemptions. In *Burke v. Lecrone-Benedict Ways*,<sup>105</sup> the district court opined that "while an administrator is not necessarily an executive, the term 'executive' as it works out in practice is broad enough to include one who also has administrative duties, particularly when the border line is so close as to call for decision by the courts."<sup>106</sup> In *Hoff v. North American Aviation, Inc.*,<sup>107</sup> the district court concluded that the executive and administrative exemptions "are certainly in the same field," as "the very words, themselves, import authority, discretion and certain powers which are ordinarily incident to the not-at-all disliked American word, 'boss.'"<sup>108</sup> In *Marian v. Lockheed Aircraft Corp.*,<sup>109</sup> the district court stated that the administrative exemption "covers largely the same as that covered by" the executive exemption.<sup>110</sup> And numerous other federal courts held plaintiffs to be exempt as executive or administrative employees based on the same set of facts, making no distinction between the facts that favored the executive exemption and those that favored the administrative

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99. 40 F. Supp. 1009 (E.D. Va. 1941).

100. *Id.*

101. *Id.* at 1010-11.

102. *Id.* at 1011.

103. *Id.* (emphasis added).

104. *Id.* at 1012.

105. 63 F. Supp. 883, 885 (E.D. Mich. 1945).

106. *Id.*

107. 67 F. Supp. 375, 377 (N.D. Tex. 1946).

108. *Id.*

109. 65 F. Supp. 18, 19 (N.D. Tex. 1946).

110. *Id.*

exemption.<sup>111</sup>

Despite the DOL's honorable intentions in 2004 of "enhanc[ing] . . . the boundaries and demarcations of the exemptions,"<sup>112</sup> the dividing line between the executive and administrative exemptions continues to blur today. In *Jackson v. City of San Antonio*,<sup>113</sup> for example, a putative class of police officers filed a lawsuit under the FLSA against the City of San Antonio.<sup>114</sup> The City moved for summary judgment as to five officers, arguing they were exempt under the executive and administrative exemptions. The district court carefully walked through each of the factors of the executive exemption, concluding that the City had failed to meet its burden on summary judgment on the executive exemption.<sup>115</sup>

But no analysis occurred as to the administrative exemption. According to the district court, it had already performed the essential analysis for the administrative exemption when it earlier analyzed the executive exemption:

The analysis of the administrative and executive exemption are nearly identical. For the reasons stated in the discussion of the executive exemption, the Court is of the opinion that it . . . cannot find at this stage that the administrative exemption applies to these Officers, either independently or in combination with the executive exemption.<sup>116</sup>

The district court in *Pendlebury v. Starbucks Coffee Co.*<sup>117</sup> took exactly the same approach.<sup>118</sup> After noting that the term "primary duty" under the administrative exemption "carries the same definition that it does for the executive exemption," the district court issued the following ruling in holding that the employer had prevailed in defeating the employee's summary judgment motion on the *administrative* exemption: "For the same reasons already cited for the executive exemption, the Court concludes that Defendant has proffered evidence creating a

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111. See, e.g., *Rosenthal v. Atkinson*, 43 F. Supp. 96, 99 (S.D. Tex. 1942); *Sauls v. Martin*, 45 F. Supp. 801, 803 (W.D. S.C. 1942); *Christiansen v. U.S. Gypsum Co.*, 66 F. Supp. 835, 836 (N.D. Ohio 1946).

112. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,125 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541).

113. No. SA-03-CA-0049-RF, 2006 WL 2548545 (W.D. Tex. Aug. 31, 2006).

114. *Id.* at \*1.

115. *Id.* at \*8-11.

116. *Id.* at \*12.

117. No. 04-80521-CIV, 2008 WL 763213 (S.D. Fla. Mar. 13, 2008).

118. *Id.* at \*9.

question of fact as to whether Plaintiffs' primary duties were managerial."<sup>119</sup>

In *Bosch v. Title Max, Inc.*,<sup>120</sup> the district court reached its decision with a similar analysis as that used in *Burke* and *Pendlebury*, but in the reverse direction.<sup>121</sup> The district court started its analysis with the administrative exemption. But because it did not believe there was "one clear test" for the duties test, it engaged in an analysis "specifically applicable to the 'executive exemption,'" deciding that it "is also useful in considering whether a plaintiff's duties fall into the administrative exemption."<sup>122</sup> After concluding that summary judgment was appropriate in favor of the employer on the administrative exemption, the court concluded that "[g]iven the overlapping analysis of the administrative and executive exemptions, it also seems likely that . . . she was also exempt from the FLSA under the executive exemption."<sup>123</sup>

One of the most poignant illustrations of the modern struggle to distinguish these two exemptions comes from the Fifth Circuit's decision in *Vela v. City of Houston*.<sup>124</sup> In that case, a putative class of fire department employees sought overtime pay under FLSA and state law against the City of Houston.<sup>125</sup> In denying the City's motion for summary judgment, the Fifth Circuit analyzed the executive and administrative exemptions under the framework of "the Executive/Administrative exemption," holding that "[t]he evidence in this case does not satisfy the City's burden of proving the Executive/Administrative exemption."<sup>126</sup> The Fifth Circuit's analysis revealed little progress since the WHD's 1938 joint definition of the two exemptions.

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119. *Id.*

120. No. CIV.A.03-AR-0463-S, 2005 WL 357411 (N.D. Ala. Feb. 7, 2005).

121. *Id.*

122. *Id.* at \*5.

123. *Id.* at \*9 ("[B]ecause the much of analysis used to conclude that Parker met the administrative exemption is lifted from the executive exemption, . . . summary judgment is also appropriate under the 'executive exemption'").

124. *Vela v. City of Houston*, 276 F.3d 659, 676–77 (5th Cir. 2001).

125. *Id.* at 663.

126. *Id.* at 677. Various other court decisions since the 2004 regulations were issued illustrate the lingering confusion. *See, e.g.,* *Wright v. Monroe Cnty.*, No. 05-CV-6268T, 2007 WL 1434793, at \*4 (W.D.N.Y. May 4, 2007) (holding police captain was an "executive or administrative employee" because he was "the highest ranking official in the Department, and . . . supervise[d] more than 20 lower-ranking officers").

### B. Tools of Statutory Construction

The judiciary's longstanding inability to distinguish between the executive and administrative exemptions is bewildering. But it is unsurprising. In interpreting statutory terms, such as "executive" and "administrative," courts typically look at the ordinary meaning of the statutory text.<sup>127</sup> Tools such as dictionaries and thesauruses are often useful in shedding light on the ordinary meaning of certain terms.<sup>128</sup> Where no clear meaning manifests itself, the legislative history can prove useful.<sup>129</sup> In this case, unfortunately, the ordinary meaning of each of the words shared a linguistic link that inevitably blurred the distinction, if there was ever any, between the two exemptions. And Congress failed to provide any other guidance, in the legislative history or elsewhere, that would direct the courts to any different meaning.

#### 1. Dictionaries

Dictionaries current at the time of the FLSA's enactment reveal that members of the 75th-Congress would have viewed the terms "executive" and "administrative" as virtually synonymous. *Webster's New International Dictionary of the English Language* defined "administrative" to mean "of or pertaining to administration, esp. management; executive."<sup>130</sup> It defined "executive," in turn, as "any person charged with administrative or executive work."<sup>131</sup> Similarly, the *Oxford English Dictionary* defined "administrative" as "[p]ertaining to, or dealing with, the conduct or management of affairs; executive."<sup>132</sup>

Variations of the term "administrative" pointed in the same direction. *Webster's*—defined the term "administrator" as "one who administers; a manager, esp. one who directs, manages, executes."<sup>133</sup> The *Oxford English Dictionary* defined "administrator" as "[o]ne who

127. See *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

128. See, e.g., *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1264 (2011); *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1108 (2011); *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 611 (2009).

129. See *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 53, 62 (2004); see also *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) ("[O]ur obligation is to take statutes as we find them, guided, if ambiguity appears, by the legislative history and statutory purpose").

130. LINDER, *supra* note 25, at 429 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 892 (1942 [1934])).

131. *Id.*

132. *Id.* (quoting OXFORD ENGLISH DICTIONARY 1:118 (1961 [1933])).

133. *Id.* at 432 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 34 (1942 [1934])).

administers; one who manages."<sup>134</sup>

The entanglement of the terms "executive" and "administrative" persists today. The following list of definitions from modern dictionaries illustrates the thin line between these two key terms.

*Oxford Dictionary of English*

"administer": "manage and be responsible for the running of (a business, organization, etc.)."<sup>135</sup>

*The Concise Oxford Dictionary of Current English*

"administer": "attend to the running of (business affairs etc.); manage."<sup>136</sup>

"administrative": "concerning or relating to the management of affairs."<sup>137</sup>

*The New Oxford American Dictionary*

"administer": "manage and be responsible for the running of (a business, organization, etc.)."<sup>138</sup>

*The American Heritage Dictionary of English Language*

"administer": "to have charge of; manage."<sup>139</sup>

"administrator": "one who administers, especially one who works as a manger in a business, government agency, or school."<sup>140</sup>

*The Random House College Dictionary*

"administer": "to manage (affairs, a government, etc.); have executive charge of."<sup>141</sup>

*The Cassell Concise Dictionary*

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134. *Id.* (quoting OXFORD ENGLISH DICTIONARY 1:118 (1961 [1933])).

135. OXFORD ENGLISH DICTIONARY 21 (2d ed. 1998).

136. THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 17 (9th ed. 1995).

137. *Id.* at 18.

138. THE NEW OXFORD AMERICAN DICTIONARY 20 (2001).

139. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 22 (4th ed. 2000).

140. *Id.*

141. THE RANDOM HOUSE COLLEGE DICTIONARY 18 (rev. ed. 1984).



“administer”: “to manage or conduct as chief agent.”<sup>142</sup>

*Chambers Concise Dictionary*

“administer”: “to manage, govern or direct (one’s affairs an organization, etc.).”<sup>143</sup>

*Collins English Dictionary*

“administration”: “management of the affairs of an organization such as a business or institution.”<sup>144</sup>

*Webster’s New World Dictionary of the American Language*

“administrative”: “of or connected with administration; executive.”<sup>145</sup>

“administration”: “the act of administering; management; specif., the management of governmental or institutional affairs.”<sup>146</sup>

*The New York Times Everyday Dictionary*

“administer”: “manage.”<sup>147</sup>

## 2. Thesauruses

Modern thesauruses similarly reflect the synonymous nature of the terms “administrative” and “executive.” The *Oxford American Thesaurus of Current English* provides the following synonyms for “administrative”: “managerial, management, directorial, [and] executive.”<sup>148</sup> It provides the following for “administer”: “manage, direct, control, conduct, run, govern, operate, superintend, supervise, oversee, preside over.”<sup>149</sup> The *Longman Synonym Dictionary* gives the following synonyms for “administrative”: “managerial, directorial, . . . executive, executory, authoritative, official, [and] directive.”<sup>150</sup> *Roget’s 21st Century Thesaurus* defines the term “administration” as

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142. THE CASSELL CONCISE DICTIONARY 19 (1997).

143. CHAMBERS CONCISE DICTIONARY 14 (2004).

144. COLLINS ENGLISH DICTIONARY 19 (3d ed. 1991).

145. WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 18 (2d ed. 1982).

146. *Id.*

147. THE NEW YORK TIMES EVERYDAY DICTIONARY 8 (1982).

148. THE OXFORD AMERICAN THESAURUS OF CURRENT ENGLISH 14 (2002).

149. *Id.*

150. LONGMAN SYNONYM DICTIONARY 25 (1986).

"management of an organization or effort" and provides the following synonyms for "administrative": "executive," "in charge," "central," "commanding," "authoritative," "policy-making," and "managerial."<sup>151</sup>

### 3. Etymology

The etymology of the term "administer" is also enlightening as to the close relationship between these two terms. The term derives from the Middle English *administren*, which derives from the Old French *administrer*, which derives from the Latin *administrāre*.<sup>152</sup> The Latin term *administrāre* is a compound of *ad* and *ministrāre*.<sup>153</sup> The prefix of "*ad*" means "to."<sup>154</sup> The root "*ministrāre*" means "to serve" or "to wait upon,"<sup>155</sup> from which the modern English term "minister" derives.<sup>156</sup> The base of the Latin "*ministrāre*" comes from the Latin word for "minus" (meaning "less")<sup>157</sup> or "minor, lesser."<sup>158</sup> Accordingly, "[e]tymologically, a *minister* is a person of 'lower' status, a 'servant.'"<sup>159</sup>

This "servant" meaning eventually developed a specialized usage in important contexts. Specifically, by the Middle Ages, a "minister" was used to refer to a "church functionary," which is now associated with the present-day "clergyman."<sup>160</sup> And by the seventeenth century, the term "minister" took on a specialized political meaning to refer to a government official or officer, which still exists in governments today (e.g., Prime Minister of England).<sup>161</sup> The ecclesiastical "minister" was deemed to be the "servant of his congregation" and the governmental

151. ROGET'S 21ST CENTURY THESAURUS 17 (3d ed. 2005).

152. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 22 (4th ed. 2000) (under definition of "administer").

153. T.F. HOAD, THE CONCISE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 6 (1986).

154. OXFORD ENGLISH DICTIONARY 1118 (2d ed. 1998) (under definition for "ministration").

155. D.P. SIMPSON, CASSELL'S NEW LATIN DICTIONARY 373 (1959).

156. WALTER W. SKEAT, AN ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 8, 369 (2d ed. 1883).

157. THE OXFORD DICTIONARY OF WORD HISTORIES 328 (2002).

158. ERIC PARTRIDGE, ORIGINS: A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH 406 (1966).

159. JOHN AYTO, DICTIONARY OF WORD ORIGINS 349 (1990).

160. *Id.*; PARTRIDGE, *supra* note 158, at 406 (defining the Latin "minister" as "one who serves or assists another, hence at a religious cult, hence of a public office, finally one at the head of a political department"); ERNEST WEEKLEY, AN ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH 933 (1967) (noting that the Latin "minister" was "found in pre-Reformation times of an ecclesiastic charged with some spec. function. Sense of high officer of Crown from 17 cent.").

161. AYTO, *supra* note 158, at 349 (internal quotation marks omitted).

“minister” was understood to be “one serving the king or queen.”<sup>162</sup>

Although the “minister” was a servant to a greater or larger individual or entity, the minister possessed and exercised a significant, if not absolute, degree of authority over the members of the congregation or citizens of the state. It is, therefore, unsurprising that the Latin term “minister,” or “*ministrāre*,” from which our modern-day term “administer” derives, is associated with managing. Accordingly, *The American Heritage Dictionary* pairs the Latin term “*ministrāre*” with “to manage.”<sup>163</sup> Similarly, the *Oxford Dictionary of English* treats the Latin term for “administrate” as synonymous with “managed.”<sup>164</sup>

#### 4. Legislative History

Based upon the virtually identical meaning shared by the terms “administrative” and “executive,” the WHD and the courts received little aid from the ordinary meaning of these terms in construing Congress’s intent for these two exemptions.<sup>165</sup> In such circumstances, the legislative history could have proven an effective tool for discerning the congressional intent behind statutory language.

Further, given the impact of the white-collar exemptions, one would expect to find substantive commentary related to these exemptions in the FLSA’s legislative history. According to the first post-FLSA census, conducted in 1940, America’s workforce included over 16 million white-collar workers—about thirty percent of the working population.<sup>166</sup> The percentage of affected workers remained steady over time. In 1998, the DOL estimated that for the year 1996, over 31 million—approximately twenty-six percent of all wage and salary workers—were “exempt under the executive, administrative, professional exemption.”<sup>167</sup>

The legislative history, unfortunately, is hollow. The dearth of discussion on the white-collar exemptions has not gone unnoticed. In its 1999 report, the GAO observed: “The legislative history for the FLSA contains no explanation for the [white-collar] exemption.”<sup>168</sup> Similarly,

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162. WILLIAM & MARY MORRIS, *DICTIONARY OF WORD AND PHRASE ORIGINS* 178 (1971).

163. *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 22 (4th ed. 2000) (under definition of “administer”).

164. *OXFORD ENGLISH DICTIONARY* 21 (2d ed. 1998) (under definition for “ministration”).

165. *See supra* pp. 506-10.

166. LINDER, *supra* note 25, at 8.

167. *Id.* at 13.

168. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 58, at 5 n.4.

in connection with its proposed 2004 regulations, the DOL concluded that references to the white-collar exemptions in the legislative history are "scant."<sup>169</sup> Law professor Marc Linder, who has written extensively on wage-and-hour legislation in the United States, concluded:

Virtually nothing said at the extensive 1937 congressional hearings on the FLSA (transcribed on more than 1,200 printed pages) or during the 1937–38 protracted congressional debates (transcribed over almost 600 tightly printed, double-columned pages), or written in the Senate or House committee reports of those years sheds any light whatsoever on the purpose or scope of the exclusion of executive, administrative, or professional employees.<sup>170</sup>

One of the earliest academic treatments of the FLSA's legislative history concluded that "there were really only three main points of contention" at the heart of the year-long struggle to enact the FLSA.<sup>171</sup> One was the "administrative machinery" that would be responsible for the FLSA's enforcement, which ultimately resulted in the FLSA being administered by a single administrator of a newly created WHD.<sup>172</sup> Another centered "around the issue of flexib[ility] against rigid standards."<sup>173</sup> The other turned on the enforcement mechanism for the child labor provisions.<sup>174</sup>

Ten different bills swept through Congress amidst the debates on these hot-button issues, among others.<sup>175</sup> The original bill excluded those employed in an executive, administrative, and professional capacity. Beyond moving the placement for these exclusions from one section to another, virtually no one—Republican, Democrat, union representative, employer, or employee—voiced any concern or provided any input on the propriety, purpose, or scope of these white-collar

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169. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,123 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541); see also Michael Cicala, *Equalizing Workers in Ties and Coveralls: Removal of the White-collar Exemption to the Fair Labor Standards Act*, 27 SETON HALL LEGIS. J. 139, 147 n.49 (2002) ("The White Collar Exemption does not have a clear legislative history to show what the terms 'administrative,' 'professional,' or 'executive' mean"); Ashley M. Rothe, *Blackberrys and the Fair Labor Standards Act: Does a Wireless Ball and Chain Entitle White-Collar Workers to Overtime Compensation?*, 54 ST. LOUIS U. L.J. 709, 727-28 (2010) (noting that "the legislative history includes no explanation for the white-collar exemptions").

170. LINDER, *supra* note 25, at 385-86 (footnotes omitted).

171. See Forsythe, *supra* note 9, at 474.

172. See *id.* at 475-77.

173. See *id.* at 478-79.

174. See *id.* at 487-89.

175. See *id.* at 474.

exemptions. The silence is deafening.

### 5. Legal/Common Usage

With no distinct ordinary meaning for the administrative exemption and no legislative commentary on the meaning of this elusive exemption, the DOL and the courts may have looked to contemporary sources to understand the meaning of an administrative employee. Again, these resources offered little help.

Relevant federal court decisions are few in number. Between 1900 and the FLSA's enactment, the term "administrative employee" arises in only a few decisions.<sup>176</sup> And none of them are enlightening as to the meaning or scope of that term.<sup>177</sup>

The term "administrative staff" appears in a few cases.<sup>178</sup> They are similarly unhelpful. In fact, one of them demonstrates the entwinement of the terms "executive" and "administrative." The decision of *Jones v. Commissioner*<sup>179</sup> involved an appeal from a determination by the Board of Tax Appeals that a distribution of stock to a corporation's "officers and administrative staff" constituted a gift or compensation.<sup>180</sup> In reversing the Board's decision, the Third Circuit Court of Appeals characterized the "administrative staff" as including "every one from president to stenographers."<sup>181</sup> It confirmed, therefore, the broad scope of an administrative employee or staff.

There are also decisions from the time period mentioning employees working in an administrative "capacity" or "position." But as with the prior class of decisions, of those that do have any substance, they tend to reflect the shared meaning between the terms "executive" and "administrative." In *American Cigar Co. v. Commissioner*,<sup>182</sup> for example, the Board of Tax Appeals recited the following contractual provision: "You are to enter into the employ of the Cuban Land & Leaf Tobacco Company and devote such time and attention in a managerial or other administrative capacity to its affairs."<sup>183</sup> The contract, therefore,

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176. See, e.g., *Certain-teed Prods. Corp. v. Wallinger*, 89 F.2d 427, 432 (4th Cir. 1937).

177. See, e.g., *id.*; *T. Smith & Son, Inc. v. Comm'r*, 20 B.T.A. 1169, 1178 (B.T.A. 1930).

178. *Morrell v. Comm'r*, Nos. 74916-74918, 75822, 75875-75883, 75921, 76228-76230, 77226, 1936 WL 7054, at \*4 (B.T.A. 1936); *Blair v. Rosseter*, 33 F.2d 286, 287 (9th Cir. 1929); *Dold Packing Co. v. Doermann*, 293 F. 315, 317 (8th Cir. 1923).

179. 31 F.2d 755 (3d Cir. 1929).

180. *Id.* at 755-56.

181. *Id.* at 755.

182. 21 B.T.A. 464 (B.T.A. 1930).

183. *Id.* at 478-79 (emphasis added).

reflects an understanding that one functioning in a managerial position was also serving in an administrative position.

With its specialization in employment matters, the National Labor Relations Board ("NLRB") might produce a deeper pool of decisions shedding light on the concept of an administrative employee. Of course, the NLRB had only been around a few years at the time of the FLSA's enactment. Yet the few decisions mentioning an administrative employee before or around 1938 demonstrate the lack of an accepted meaning of this term. In *International Harvester Co.*,<sup>184</sup> the Board mentioned that a facility boasted 4,150 employees at a facility, 514 of which "were clerical, supervisory and administrative employees."<sup>185</sup> In *La Crosse Garment Industries*,<sup>186</sup> the NLRB certified a bargaining unit that consisted of the respondent company's "production employees . . . exclusive of maintenance, office and clerical workers and all employees in administrative and supervisory positions, including foreladies and instructors."<sup>187</sup> In both decisions, the NLRB communicated a view of the administrative and clerical employees as occupying distinct fields.

A later decision did not corroborate this position. In *Aluminum Co. of America*,<sup>188</sup> the Board certified the following bargaining unit for "administrative staff" of Aluminum Company of America, defined to include:

[O]ffice and clerical workers, metermen, lead men, routine chemists, chemists' assistants, and dust, gas, and laboratory technicians . . . excluding executives and department heads, foremen, shift foremen, and assistant foremen, the yardmaster and assistant yardmaster, research chemists, secretaries to all executives and department heads, employees in the cost department, and the personal chauffeur to the president.<sup>189</sup>

In this decision, the Board treated administrative employees as encompassing clerical workers.<sup>190</sup>

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184. 2 N.L.R.B. 310 (1936).

185. *Id.* at 317.

186. 5 N.L.R.B. 127 (1938).

187. *Id.* at 130-31.

188. 9 N.L.R.B. 141 (1938).

189. *Id.* at 145-46 (emphasis added).

190. *Id.* Law journals are not more illuminating. A review of law reviews during this time yields similar results. One *Harvard Law Review* article, for example, commented that two business organizations' "executive heads had evinced an administrative capacity that may reasonably be classed as of a superior order." Myron W. Watkins, *The Change in Trust Policy - II*, 35 HARV. L. REV. 926, 942 (1922). There are various other law journal articles, as well as court decisions,

Public, nonlegal sources also fail to reveal a common understanding of an administrative employee. Few articles from the *New York Times*, *Los Angeles Times*, and *Wall Street Journal* between 1900 and 1938 even mention an administrative employee.<sup>191</sup> The predominant use of the term “administrative employee” was in the context of government employees.<sup>192</sup> One *New York Times* article, for example, focused on the increased benefits to administrative employees or staff throughout the Albany school system.<sup>193</sup> In particular, the term “administrative employees” often arose in the context of those working within the Works Progress Administration.<sup>194</sup> These articles reflect what was evidently the most common understanding of an administrative employee, i.e., one who works for a government agency.<sup>195</sup> Thus, in this particular setting, references to administrative employees are of little assistance in interpreting the meaning Congress intended for the FLSA’s administrative exemption.

The most promising resource that the DOL and agencies had for understanding the FLSA’s administrative exemption was probably the competition codes enacted under the National Industrial Recovery Act, which served as important predecessors for the FLSA.<sup>196</sup> Numerous

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between 1900 and 1938 using the term of an administrative employee or capacity, but in the context of describing action by a government agency. See, e.g., Notes, *The Restraint of Proceedings in State Courts by the Federal Courts*, 36 HARV. L. REV. 461, 464 (1923); D. Meade Felid, Book Review, *Cases and Other Materials on Administrative Tribunals*, 16 TEX. L. REV. 140, 143 (1938); Chicago & N.W. Ry. Co. v. Bauman, 69 F.2d 171, 174 (8th Cir. 1934).

191. See, e.g., *Heavy Cut Ordered in Aid Force*, L.A. TIMES, Dec. 15, 1934, at A3; Virginia A. Small, *Chief Clerk in a Board of Education Bureau is Dead*, N.Y. TIMES, Sept. 19, 1929, at 25.

192. See *Inquiry Shows Status of Force Under S.E.R.A.*, L.A. TIMES, Oct. 8, 1934, at A1 (discussing financial status of administrative employees/staff at local government agency); “*White Collar*” *Unemployed Increase in Soviet Union*, N.Y. TIMES, Aug. 14, 1927, at xx5 (citing average monthly wage of “[g]overnment administrative employees” in Soviet Union); Small, *supra* note 187 (referring to the “Association of Administrative Employees” of Board of Education); *Heavy Cut Ordered in Aid Force*, *supra* note 187, at A3; *Grant Averts Relief Crisis*, L.A. TIMES, Feb. 8, 1935, at 2; *L.A.C.R.A. Will Cut Pay of 2400 on Staff Today*, L.A. TIMES, Jan. 10, 1936, at A1 (discussing salary reduction to administrative employees in Los Angeles County Relief Administration).

193. *School Rises Voted by Education Board*, N.Y. TIMES, Dec. 30, 1927, at 3.

194. *Dole Expose Links W.P.A.*, L.A. TIMES, Nov. 13, 1935, at 1; *Cruel and Unusual*, L.A. TIMES, Nov. 14, 1935, at A4; *W.P.A. Heads’ Pay Slashed*, L.A. TIMES, Dec. 28, 1935, at 3; *The Work-Relief Failure*, L.A. TIMES, Apr. 22, 1936, at A4; *Federal Relief Costs Expected to be Cut Sharply This Year*, WALL ST. J., Jan. 2, 1937, at 41; Turner Catledge, *Roosevelt Ousts Foe of Gov. Benson in Minnesota WPA*, N.Y. TIMES, June 11, 1938, at 1.

195. The D.C. Circuit recently acknowledged this specialized meaning of “administrative,” stating that the term “administrative” typically “refers to action by an agency.” *Singleton v. Babbitt*, 588 F.3d 1078, 1084 (D.C. Cir. 2009); see also WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 28 (1976) (defining “administrative law” as “law dealing with . . . authorized agencies in the executive branch of government”).

196. The National Industrial Recovery Act (“NIRA”), was “the first comprehensive, national

codes and proposed codes contained exemptions for administrative employees.<sup>197</sup> These codes, however, fell victim to the same lack of definition and direction. The Liquor Code, for example, prohibited employers from working their employees in excess of forty-two hours in one week, or eight hours in one workday, with the exception of several categories of employees, including certain "[e]xecutive, supervisory, technical, and administrative employees . . . and outside salesmen."<sup>198</sup> Although the Liquor Code defined other categories of excluded employees, such as "watchmen," it declined to define administrative employees.<sup>199</sup>

### C. *An Alternative to the Executive Exemption*

Harold Stein recognized the predicament underlying the co-existence of the executive and administrative exemptions. In his 1940 report, he recognized that these two terms "are used synonymously in common speech and in court decisions."<sup>200</sup> Further, Stein noted, "the use of the two terms is so vague and so overlapping that there is no generally recognized and precise line of demarcation between them."<sup>201</sup> Thus, by creating a distinct exemption for the "administrative"

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effort to regulate minimum wages and maximum hours for men and women in the United States." Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 105 (2000). The centerpiece of the NIRA was the formulation of industry codes, a process administered by the National Recovery Administration. See CONRAD BLACK, FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM 303 (2003). The NIRA authorized the President, upon application by a trade or industrial association, to promulgate "codes of fair competition" for the trade or industry. National Industrial Recovery Act, Pub. L. No. 67, § 3(a), 48 Stat. 195, 196 (1933). The NIRA required every code of fair competition to impose a condition upon all employers to "comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President." § 7(a), 48 Stat. at 199. The cotton textile industry provided the first of these codes. KENNETH S. DAVIS, FDR: THE NEW DEAL YEARS, 1933-1937, at 247 (1986). The Cotton Textile Code, signed by President Roosevelt on July 9, 1933, implemented a minimum hourly wage of \$13 in the North and \$12 in the South, established a 40-hour workweek, and outlawed child labor under the age of 16. *Id.* at 248. The Cotton Textile Code served as a model for the codes that followed. *Id.* at 247. The NIRA ultimately produced nearly 700 industry codes. *Id.* at 259. The code-making process ended when the NIRA was declared unconstitutional by the Supreme Court in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).

197. See, e.g., *Text of Substitute Code for Liquor Manufacturers*, WALL ST. J., Nov. 27, 1933, at 10, art. III (1)(a); *Text of Grain Exchange Fair Competition Code*, WALL ST. J., Apr. 2, 1934, at 8, art. III (d).

198. *Text of Substitute Code for Liquor Manufacturers*, *supra* note 193, at 10, art. III (1)(a).

199. *Id.* at art. II (h).

200. Stein Report, *supra* note 30, at 4.

201. *Id.*



employee, Congress “introduced a concept with which there had been little, if any, experience and the full implications of which were as yet unknown.”<sup>202</sup> It is therefore unsurprising that the WHD tried to evade distinguishing the synonymous terms by creating a joint executive/administrative exemption, thereby writing the term “administrative” out of the FLSA.<sup>203</sup>

Nonetheless, Stein still attempted to create a separate definition for the administrative exemption. By classifying administrative employees, in part, as those whose primary duty is “directly related to management,” the interchangeability of the administrative and executive exemptions—which stems from their strong lexiconic ties—was permanently incorporated into the administrative exemption’s very definition.<sup>204</sup> As a result, those who manage—and therefore perform the primary duty of the prototypical executive employee<sup>205</sup>—can concurrently fall under the administrative exemption. The First and Eleventh Circuits provide illustrative decisions.

In *Rock v. Ray Anthony International, LLC*,<sup>206</sup> a dispatcher for a crane rental company sued his former employer under the FLSA.<sup>207</sup> After identifying the responsibilities performed by the dispatcher, the court of appeals agreed with the district court that “[g]iven the amount of time [the plaintiff] spent on *managerial* duties, it is determined that [the plaintiff’s] primary duty was the *management* of Sunbelt’s crane rental division.”<sup>208</sup> Neither the district court nor the court of appeals held that the dispatcher was an exempt executive employee. In fact, the executive exemption was not even at issue. Rather, they both held that the dispatcher—in light of her primary duty of *management*—qualified as exempt under the administrative exemption.<sup>209</sup>

In *Cash v. Cycle Craft Co.*,<sup>210</sup> the First Circuit held that the New Purchase/Customer Relations Manager at a motorcycle store satisfied the administrative exemption because he met “the ‘management’ and ‘discretion’ requirements of the administrative exemption.”<sup>211</sup> Notably,

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202. Weiss Report, *supra* note 44, at 54.

203. *See id.*

204. *Id.* at 52.

205. *See infra* text accompanying note 216.

206. 380 F. App’x 875 (11th Cir. 2010).

207. *Id.* at 876.

208. *Id.* at 878 (emphases added) (internal quotation marks and ellipses omitted).

209. *Id.* at 876 (“In this appeal, we consider whether a salaried dispatcher for a crane rental company qualifies under the administrative exemption to the Fair Labor Standards Act”).

210. 508 F.3d 680 (1st Cir. 2007).

211. *Id.* at 686.

the court of appeals did not touch upon whether the employee's duties were directly related to the employer's general business operations. The satisfaction of the "management" prong of the administrative exemption was sufficient for the court of appeals to decide that the employee fell within the administrative exemption.

Accordingly, those individuals who manage—the prototypical executive employee<sup>212</sup>—fall within the administrative exemption under this management prong. As a result, the administrative exemption immediately sweeps in a whole class of employees already potentially exempt under the executive exemption. But it goes even beyond the executive exemption, reaching a vaster class of managerial employees. If an employee manages, for example, but does not satisfy the executive exemption's requirements of managing two or more full-time employees or possessing the authority to hire or fire, the employee can still qualify as an administrative employee with his or her management-related duties.<sup>213</sup> The administrative exemption, therefore, functions as an effective alternative to the executive exemption.

#### IV. EXEMPTION FOR THE "MISCELLANEOUS"

##### A. *The Prototypical Administrative Employee?*

Although employees exempt under the administrative exemption may perform management duties, the administrative exemption "is not to be limited solely to so-called 'management' personnel."<sup>214</sup> It "is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole."<sup>215</sup> It encompasses "a wide variety of persons" who perform work "directly related to . . . general business operations"—who do not manage and who have no involvement with creating the employer's policies, but who

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212. See *infra* text accompanying note 216.

213. See, e.g., *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326, 331-33 (5th Cir. 2000) (holding that employee was exempt under the administrative, but not executive, exemption).

214. *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 10 (1st Cir. 1997).

215. *Id.* With the 2004 regulations, the DOL removed the term "policies" from the preexisting requirement that the employee's primary duty involve "[t]he performance of office or nonmanual work directly related to management *policies* or general business operations of his employer or his employer's customers." Compare 29 C.F.R. § 541.2 (2003) (emphasis added) (stating the word "policies"), with 29 C.F.R. § 541.200 (2005) (failing to state the word "policies"). See also *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,137-38 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541). The deletion of the term "policies" arguably broadened the scope of the administrative exemption.

carry out “major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.”<sup>216</sup> The mere inclusion of the qualifier, “general,” alludes to the inclusive scope of functions that an employee can perform to qualify under this component of the administrative exemption.

For this very reason, the administrative exemption, in contrast to its fellow white-collar exemptions, carries with it no image of a prototypical administrative employee. On the other hand, both the executive and professional exemptions immediately conjure an image of the representative exempt employee, or at minimum, a defining attribute of the exempt employee.

As Harold Stein observed in 1940, the executive employee is the “boss.”<sup>217</sup> The manager of a retail store presents an effective illustration. The manager is the store’s highest-level employee who is responsible for nearly every aspect of the store’s operations. The manager opens and closes the store. The store manager trains, supervises, disciplines, evaluates, and fires employees. The manager orders and oversees the store’s inventory. The store manager handles relations and disputes with customers. The manager oversees the store’s budget and handles the incoming and outgoing money. In brief, the manager ensures that the store operates successfully and profitably. The defining attribute of the executive employee, therefore, is management.<sup>218</sup>

An analogous example of the professional employee is the medical doctor. A doctor completes over a decade of academic studies and intensive training to develop the skills and knowledge necessary to practice medicine. Indeed, the doctor cannot even enter the profession and lawfully practice his or her trade without such extensive prerequisites and certifications. The nature of the doctor’s work requires the doctor to make regular judgments that can permanently alter a patient’s health, happiness, and well-being. And the doctor could not make or execute those decisions without the advanced knowledge and skills laboriously acquired over thousands of hours of study and instruction.<sup>219</sup> The core attribute of the professional employee,

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216. *Reich*, 126 F.3d at 10.

217. Stein Report, *supra* note 30, at 4.

218. *See id.* at 24 (“[I]t is both convenient and appropriate to limits [sic] the term ‘executive’ to persons whose duties include some form of managerial authority—to persons who actually direct the work of other persons”).

219. The professional exemption is divided into two types of professionals: learned

therefore, is learning or knowledge.<sup>220</sup>

In contrast, the administrative exemption fails to evoke an image of any representative employee, or even a universal characteristic that defines the administrative employee. The perplexity of the administrative exemption is rooted in the tremendous scope afforded by the broad and ambiguous language, "general business operations." As one court recently observed:

In an abstract sense, this regulatory definition applies to all work performed in a business setting because all work is directly related to the "general business operations" of an employer. This, of course, cannot constitute the true meaning . . . because it would exempt all employees from earning overtime pay, in which case the exemption would amount to a self-defining nullity.<sup>221</sup>

### *B. Stein's Solution*

Harold Stein's Report and Recommendation is illuminating as to the extraordinary breadth originally envisioned for the administrative exemption, as understood by the agency delegated the authority to interpret the exemption only two years after the FLSA's enactment.<sup>222</sup> In particular, Stein's efforts to distinguish the executive and administrative exemptions are telling. He crisply concluded that the executive exemption is reserved for those with "managerial authority."<sup>223</sup> With his effective shortcut to defining executive employees, one would hope Stein would construct an equally cogent formula for defining administrative employees. His solution is to reserve the administrative exemption "for persons performing a variety of miscellaneous but important functions in business."<sup>224</sup> He bolstered the vague and expansive characterization of administrative employees by observing that the number of administrative employees "is large in modern industrial practice."<sup>225</sup>

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professionals and artistic professionals. *Id.* at 33. This illustration uses the learned professional as its model exempt professional employee.

220. *See id.* at 35.

221. *Hodge v. Aon Ins. Servs.*, 122 Cal. Rptr. 3d 364, 374 (Ct. App. 2011).

222. Stein Report, *supra* note 30, at 1-2. A government agency's interpretation of statutory language should be given more weight "if made near the time the statute was enacted when congressional debates and interest group positions were fresh in the administrators' minds." *Mayburg v. Sec'y of Health & Human Servs.*, 740 F.2d 100, 106 (1st Cir. 1984).

223. *See* Stein Report, *supra* note 30, at 24.

224. *Id.*

225. *Id.*

Stein's discussion of the "main aspects of the problem" with the administrative exemption further reveals the predicament that existed with this exemption from the outset.<sup>226</sup> He identified two problems. He first concluded that "the definition must be sufficiently broad and general to include employees performing a great variety of tasks."<sup>227</sup> This conclusion corroborates Stein's earlier determination that the administrative exemption embraces an undefined group of "miscellaneous" employees within a business. He then opined that "the definition must contain such delimiting requirements . . . as will prevent abuse."<sup>228</sup> In other words, Stein himself recognized that the group of employees swallowed up into the administrative exemption was so broad, so undefined, that it was naturally prone to manipulation.

Harold Stein's solution to placing limits on the administrative exemption, and thereby preventing abuse, only further demonstrates the tremendous scope of this exemption today. According to Stein, any type of duties test was bound to be ineffective.<sup>229</sup> He opined that "there is no description of duties or titles which in and of itself can . . . differentiate between those persons who may reasonably be exempt under the act and those who deserve and require its benefits."<sup>230</sup> His solution was the salary level. According to him, the salary test is the best way to check the validity of the exemption, as it shows that "the person whose exemption is desired is actually of such importance to the firm that he is properly describable as an employee employed in a bona fide administrative capacity."<sup>231</sup> To that end, he set the salary level at \$200 per month, in contrast to the executive employee's \$120 per month salary level.<sup>232</sup>

The problem with Stein's solution to correcting the administrative exemption is that it no longer has that feature under the DOL's 2004 regulations. First, there no longer exists a distinction among the white-collar employees based upon salary level. Today, the standard \$455 per month applies to executive, administrative, and professional employees.<sup>233</sup> Second, in 2004, the DOL adopted a salary level that was

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226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 26.

230. *Id.*

231. *Id.*

232. *See id.*

233. U.S. DEP'T OF LABOR, FACT SHEET #17: EXEMPTION FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER & OUTSIDE SALES EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2008), available at

below the inflation-adjusted amount of the prior salary levels.<sup>234</sup> When adjusted for inflation, the \$155 for the long test and the \$250 for the short test would have been \$530 and \$855 per week (approximately \$27,560 and \$44,460 per year), respectively.<sup>235</sup> In other words, Stein's "vital" guide for distinguishing exempt from nonexempt administrative employees has evaporated under the 2004 regulations. Now, under the present framework, the exempt analysis largely turns on the duties test. But Stein himself believed that the scope of an administrative employee's job duties was so "extremely diverse"<sup>236</sup> that any standardization of the duties performed by an exempt employee was unattainable.

### C. A Diverse Population

Case law following the 2004 regulations confirms Stein's 1940 classification of administrative employees as "miscellaneous." Exempt administrative employees range from police captains to racing officials, sales representatives, tax consultants, and "legislative liaisons."<sup>237</sup> Exempt administrative employees work in pharmaceutical companies, elementary schools, power companies, insurance companies, mortgage brokers, retailers, night clubs, accounting firms, and casinos. At bottom, the administrative employee cannot be squeezed into any one box. The table below lists positions that courts and juries, since the 2004 regulations were issued, have found to be exempt under the administrative exemption.<sup>238</sup>

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[http://www.dol.gov/whd/regs/compliance/fairpay/fs17a\\_overview.pdf](http://www.dol.gov/whd/regs/compliance/fairpay/fs17a_overview.pdf).

234. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,165 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541); *Fair Labor Standards Act (FLSA) Changes*, S.C. HUM. RESOURCES DIV., [www.ohr.sc.gov/OHR/employer/FLSA-Handout.doc](http://www.ohr.sc.gov/OHR/employer/FLSA-Handout.doc) (last visited May 16, 2012).

235. Defining and Delimiting the Exemptions, 69 Fed. Reg. at 22,165.

236. See Stein Report, *supra* note 30, at 25.

237. See, e.g., Thomas G. Paese, Management Directive, Commonwealth of Pennsylvania, 2 (Feb. 10, 1997), [http://www.state.pa.us/portal/server.pt/gateway/PTARGS\\_0\\_2\\_5337\\_0\\_0\\_43/http%3Bpubcontent.state.pa.us/publishedcontent/publish/global/files/management\\_directives/employee\\_development/52\\_5\\_15.pdf](http://www.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_5337_0_0_43/http%3Bpubcontent.state.pa.us/publishedcontent/publish/global/files/management_directives/employee_development/52_5_15.pdf) (noting that legislative liaisons are exempt administrative employees).

238. In reviewing the above-mentioned job titles that have been held to be exempt under the administrative exemption, care must be given to the well-accepted understanding that "analysis of the FLSA exemption is a fact-intensive inquiry." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 945 (9th Cir. 2009); see also *Adams v. United States*, 21 Cl. Ct. 795, 797 n.1 (1990) ("Exemption determinations are fact-intensive inquiries which frequently turn on the particular duties of specific employees"). Thus, the courts' findings on the exempt status of these positions may not be dispositive for a similar job title.

Sales Representative <sup>239</sup>	Underwriter <sup>240</sup>	Table Supervisor <sup>241</sup> Game
Medical Sales Consultant <sup>242</sup>	Domestic Drayage Coordinator <sup>243</sup>	Securities Broker <sup>244</sup>
Private Investigator <sup>245</sup>	City Dispatch Supervisor <sup>246</sup>	Recruiter <sup>247</sup>
Financial Analyst <sup>248</sup>	Chief Jailer <sup>249</sup>	Environmental Coordinator <sup>250</sup>
Insurance Claim Adjuster <sup>251</sup>	Network Operations Engineer <sup>252</sup>	Staff Supervisor <sup>253</sup>
Accountant <sup>254</sup>	Plant Engineer <sup>255</sup>	Director of

239. [B9] Baum v. Astrazeneca LP, 372 F. App'x 246, 247, 250 (3d Cir. 2010).

240. Whalen v. J.P. Morgan Chase & Co., 569 F. Supp. 2d 327, 330-31 (W.D.N.Y. 2008).

241. Allen v. Harrah's Entm't Inc., No. 2:04 cv 128, 2006 WL 3513857, at \*13 (N.D. Ind. Dec. 4, 2006).

242. Harris v. Auxilium Pharm., Inc., 664 F. Supp. 2d 711, 738-39 (S.D. Tex. 2009).

243. Carlson v. C.H. Robinson Worldwide, Inc., Nos. Civ.02-3780 JNE/JGL, Civ.02-4261 JNE/JGL, 2005 WL 758601, at \*11, \*14 (D. Minn. Mar. 30, 2005).

244. Hein v. PNC Fin. Servs. Grp., Inc., 511 F. Supp. 2d 563, 565, 575 (E.D. Pa. 2007).

245. Mullins v. Target Corp., No. 09 C 7573, 2011 WL 1399262, at \*1, \*8 (N.D. Ill. Apr. 13, 2011).

246. Perine v. ABF Freight Sys., Inc., 457 F. Supp. 2d 1004, 1005, 1009, 1016 (C.D. Cal. 2006).

247. Andrade v. Aerotek, Inc., No. CCB-08-2668, 2010 WL 4449333, at \*6 (D. Md. Nov. 5, 2010).

248. Paul v. UPMC Health Sys., No. 06-1565, 2009 WL 699943, at \*1, \*12 (W.D. Pa. Mar. 10, 2009).

249. Haley v. Crittenden Cnty., No. 3:05 cv 00024 LJH, 2007 WL 1540263, at \*1, \*4 (E.D. Ark. May 23, 2007).

250. Fairris v. City of Bessemer, 252 F. App'x 309, 310 (11th Cir. 2007).

251. Talbert v. Am. Risk Ins. Co., 405 F. App'x 848, 854 (5th Cir. Dec. 20, 2010).

252. Bagwell v. Florida Broadband, LLC, 385 F. Supp. 2d 1316, 1317, 1326 (S.D. Fla. 2005).

253. Goff v. Bayada Nurses, Inc., 424 F. Supp. 2d 816, 818, 824 (E.D. Pa. 2006).

254. Allen v. Centillium Commc'ns, Inc., No. C-06-06153 (EDL), 2008 WL 916976, at \*2-\*3 (N.D. Cal. Apr. 3, 2008).

		Marketing/Business Development <sup>256</sup>
Logistics Specialist <sup>257</sup>	Office Manager <sup>258</sup>	Vice President of Sales <sup>259</sup>
Police Captain <sup>260</sup>	Union Organizer <sup>261</sup>	Director of Investigations <sup>262</sup>
District Fire Chiefs <sup>263</sup>	Cyber Auction Manager <sup>264</sup>	Rehabilitation Specialist <sup>265</sup>
Dispatcher <sup>266</sup>	Events Coordinator <sup>267</sup>	Fair Housing Intake Specialist <sup>268</sup>
Chief Estimator <sup>269</sup>	Material Damage Appraiser <sup>270</sup>	Family Advocate <sup>271</sup>

255. Johnston v. Robert Bosch Tool Corp., No. 3:08CV-33-DW, 2008 WL 4534109, at \*1, \*42 (W.D. Ky. Oct. 7, 2008).

256. Bowers v. Foto-Wear, Inc., No. 3:CV-03-1137, 2007 WL 906417, at \*1, \*11 (M.D. Pa. Mar. 22, 2007).

257. Tuck v. Methanex Mgmt., Inc., No. 3:04-CV-1720-N, 2006 WL 6581525, at \*2 (N.D. Tex. Mar. 29, 2006).

258. Lott v. Howard Wilson Chrysler-Plymouth, Inc., 203 F.3d 326, 332, 339 (5th Cir. 2000).

259. Schwind v. EW & Assocs., Inc., 357 F. Supp. 2d 691, 694, 706 (S.D.N.Y. 2005).

260. Wright v. Monroe Cnty., No. 05-CV-6268T, 2007 WL 1434793, at \*4 (W.D.N.Y. May 14, 2007).

261. Savage v. UNITE HERE, No. 05 Civ. 10812(LTS)(DCF), 2008 WL 1790402, at \*1, \*10, \*11 (S.D.N.Y. Apr. 17, 2008).

262. Stout v. Smolar, No. 1:05-CV-1202-JOF, 2007 WL 2765519, at \*1, \*6 (N.D. Ga. Sept. 18, 2007).

263. Monroe Firefighters Ass'n v. City of Monroe, 600 F. Supp. 2d 790, 804 (W.D. La. 2009).

264. Orr v. James D. Julia, Inc., No. 07-51-B-W, 2008 WL 2605569, at \*1, \*14 (D. Me. June 27, 2008).

265. Gillum v. ICF Emergency Mgmt. Servs., LLC, No. 08-314-C, 2010 WL 370338, at \*1, \*11 (M.D. La. Jan. 29, 2010).

266. Rock v. Ray Anthony Int'l, LLC, 380 F. App'x 875, 876 (11th Cir. 2010).

267. Viola v. Comprehensive Health Mgmt., Inc., No. 8:09-cv-1980-T-23AEP, 2010 WL 5463080, at \*1, \*5 (M.D. Fla. Dec. 29, 2010).

268. O'Bryant v. City of Reading, 197 F. App'x 134, 135 (3d Cir. 2006).

269. Weis v. Advanced Constr. Servs., No. Civ. A. 04-52, 2005 WL 2176829, at \*1, \*4 (W.D. Pa. Aug. 19, 2005).

270. Roe-Midgett v. CC Servs., Inc., No. 04 CV 4051 DRH, 2006 WL 839443, at \*1 (S.D. Ill. Mar. 29, 2006).

271. Hamby v. Associated Ctrs. for Therapy, 230 F. App'x 772, 773, 784 (10th Cir. 2007).



Technical Writer <sup>272</sup>	Subrogation Analyst <sup>273</sup>	Bookkeeper <sup>274</sup>
Executive Assistant <sup>275</sup>	Human Relations Commission Administrator <sup>276</sup>	School Resource Officer <sup>277</sup>
School Principal <sup>278</sup>	Nursing Home Administrator <sup>279</sup>	Tax Consultant <sup>280</sup>
Industrial Property Officer <sup>281</sup>	Labor/Safety Relations Representative <sup>282</sup>	Wastewater Treatment Center Operator <sup>283</sup>
Racing Official <sup>284</sup>	Database Administrator <sup>285</sup>	Plant Training Consultant <sup>286</sup>
Account Manager <sup>287</sup>	Manager of Marketing <sup>288</sup>	Property Manager <sup>289</sup>
Lead Work Planner <sup>290</sup>	Customer Services Representative <sup>291</sup>	Administrative Assistant <sup>292</sup>

272. *Renfro v. Ind. Mich. Power Co.*, 497 F.3d 573, 574 (6th Cir. 2007).

273. *Guerrero v. J.W. Hutton, Inc.*, 458 F.3d 830, 831, 832 (8th Cir. 2006).

274. *See Mathews v. Bronger Masonry, Inc.*, No. 1:09-cv-478-SEB-DML, 2010 WL 4811914, at \*1006, \*1014 (S.D. Ind. Nov. 18, 2010).

275. *Seltzer v. Dresdner Kleinwort Wasserstein, Inc.*, 356 F. Supp. 2d 288, 289, 302 (S.D.N.Y. 2005).

276. *Rivera O'Bryant v. City of Reading*, No. Civ.A.03-CV-06635, 2005 WL 1971882, at \*2, \*16 (E.D. Pa. Aug. 11, 2005).

277. *Ferrell v. Gwinnett Cnty. Bd. of Educ.*, 481 F. Supp. 2d 1338, 1339, 1340 (N.D. Ga. 2007).

278. *Coleman-Edwards v. Simpson*, No. 03-CV-3779 (DLI)(VVP), 2008 WL 820021, at \*1, \*11 (E.D.N.Y. Mar. 25, 2008).

279. *Moon v. Ozark Health, Inc.*, No. 4:08 cv 00527 JLH, 2009 WL 737321, at \*1, \*2 (E.D. Ark. Mar. 20, 2009).

280. *Ho v. Ernst & Young LLP*, No. C 05-04867 JF, 2008 WL 619029, at \*3, \*5 (N.D. Cal. Mar. 4, 2008).

281. *Jarvis v. Griffin*, No. 6:08-cv-138-Orl-19KRS, 2009 WL 3064788, at \*1, \*4, \*11 (M.D. Fla. Sept. 21, 2009).

282. *Hazel v. Mich. State Emps. Ass'n*, 826 F. Supp. 1096, 1098, 1106 (W.D. Mich. 1993).

283. *Beamer v. Possum Valley Mun. Auth.*, No. 1:06-cv-1982, 2010 WL 1253476, at \*1, \*13 (M.D. Pa. Mar. 24, 2010).

284. *Desmond v. PNGI Charles Town Gaming, LLC*, Nos. 3:06-CV-128, 3:06-CV-129, 3:06-CV-135, 2008 WL 153492, at \*1, \*9 (N.D. W. Va. Jan. 14, 2008).

285. *Heffelfinger v. Elec. Data Sys. Corp.*, 580 F. Supp. 2d 933, 943, 968 (C.D. Cal. 2008).

286. *LaCourse v. GRS III LLC*, No. 05-73613, 2006 WL 3694623, at \*1, \*20 (E.D. Mich. Dec. 13, 2006).

287. *See Verkuilen v. MediaBank, LLC*, 646 F.3d 979, 980, 982 (7th Cir. 2011).

288. *Humann v. KEM Elec. Coop., Inc.*, 450 F. Supp. 2d 1006, 1009, 1019 (D.N.D. 2006).

289. *McKee v. CBF Corp.*, 299 F. App'x 426, 429, 431 (5th Cir. 2008).

290. *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 367, 376 (7th Cir. 2005).

Community Outreach Associate <sup>293</sup>	Supply Chain Business Analyst <sup>294</sup>	Legislative Liaison <sup>295</sup>
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The miscellaneous nature of the administrative exemption is even starker when juxtaposed against the executive exemption. The table below reflects roughly eighty percent of the federal court decisions reported in the seven-year window after the DOL's 2004 regulations that found that the plaintiff qualified as an exempt executive employee. It notes the job title and the number of decisions that ruled in favor of exempt status. The list of job positions found to be exempt under the executive exemption solidifies Harold Stein's defining attribute of the executive employee—managerial authority.<sup>296</sup>

Store Manager	32
Assistant Manager	10
Police/Fire Department Chief/Captain/Lieutenant/Sergeant/Deputy	9
Production Supervisor	5
Center Manager	3
Shift Manager/Supervisor	3
Site Manager	3
Warehouse Manager/Supervisor	4
Director	2
Crew Leader	1
Superintendent	2
Project Manager	1
Night Manager	1
Branch Manager	1
Operations Manager	1
Area Manager	1

291. *Gonzales v. Barrett Bus. Servs., Inc.*, No. CV-05-0104-EFS, 2006 WL 1582380, at \*1, \*21 (E.D. Wash. June 6, 2006).

292. *Goffron v. Picsel Techs., Inc.*, 804 F. Supp. 2d 1030, 1042 (N.D. Cal. 2011).

293. *Viola v. Comprehensive Health Mgmt., Inc.*, No. 8:09-cv-1980-T-23AEP, 2010 WL 5463080, at \*1, \*5 (M.D. Fla. Dec. 29, 2010).

294. *Wolfslayer v. Ikon Office Solutions, Inc.*, No. Civ.A. 03-6709, 2005 WL 181913, at \*1, \*11 (E.D. Pa. Jan. 26, 2005).

295. *Alberti v. Cnty. of Nassau*, 393 F. Supp. 2d 151, 157, 174 (E.D.N.Y. 2005).

296. See *supra* text accompanying note 216.

The present regulations also demonstrate the expansive nature of the “general business operations” language.<sup>297</sup> They indicate that the functional areas of a business in which an employee’s duties may fall so as to relate to general business operations are far-ranging.<sup>298</sup>

Tax	Finance
Accounting	Budgeting
Auditing	Insurance
Quality control	Purchasing
Procurement	Advertising
Marketing	Research
Safety and health	Personnel management
Human resources	Employee benefits
Labor relations	Public relations
Government relations	Computer network
Internet and database administration	Legal and regulatory compliance

These functional areas arguably cover every department of a modern company’s operations. And they are not even exhaustive. The regulations make clear that these comprehensive areas are merely illustrative. It can be stretched to include many other sorts of “similar activities.”<sup>299</sup>

But even within each of these functional areas, there are copious duties that an employee can carry out that qualify as being involved with the general business operations. In 1949, Harry Weiss concluded that duties that directly relate to general business operations include “advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control.”<sup>300</sup> The DOL echoed these responsibilities as typical of exempt work under the administrative exemption.<sup>301</sup> In fact, former 29 C.F.R. § 541.205(b), which was in place until the 2004 regulations, contained all of these functions as examples of work directly related to general

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297. See 29 C.F.R. § 541.201(b) (2011).

298. *Id.*

299. *Id.*

300. Weiss Report, *supra* note 44, at 63.

301. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,138 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541).

business operations.<sup>302</sup> Although this regulatory language is no longer in place, courts continue to rely upon these specific examples in holding that employees are exempt under the administrative exemption.<sup>303</sup>

The regulations further expand the field of duties that relate to general business operations. Two of the occupations that have been frequently litigated under the administrative exemption are insurance claims adjusters and financial services employees.<sup>304</sup> The regulations identify the duties carried out by these two categories of professionals that bring them within the ambit of the administrative exemption.<sup>305</sup> The breadth of the duties demonstrates the diverse functions an employee can perform to qualify as an administrative employee.

<b>Insurance Claims Adjusters</b> <sup>306</sup>	
Interviewing insureds, witnesses, and physicians	Inspecting property damage
Evaluating and making recommendations regarding coverage of claims	Determining liability and total value of a claim
Making recommendations regarding litigation	Reviewing factual information to prepare damage estimates
Negotiating settlements	

<b>Financial Services Employees</b> <sup>307</sup>	
Collecting and analyzing information regarding the customer's income, assets, investments, or debts	Determining which financial products best meet the customer's needs and financial circumstances
Advising the customer regarding the advantages and disadvantages of different financial products	Marketing, servicing, or promoting the employer's financial products

302. 29 C.F.R. § 541.205(b) (2002).

303. See, e.g., *Sanfratello v. Howell Tractor & Equip., LLC*, No. 2:09-CV-162, 2011 WL 2965541, at \*6 (N.D. Ind. July 20, 2011); *Gorey v. Manheim Servs. Corp.*, 788 F. Supp. 2d 200, 206 (S.D.N.Y. 2011); *McCumber v. Eye Care Ctrs. of Am., Inc.*, No. Civ.A. 09-1000, 2011 WL 1542671, at \*10 (M.D. La. Apr. 20, 2011); *Henry v. Quicken Loans Inc.*, No. 04-CV-40346, 2009 WL 3270771, at \*13 (E.D. Mich. July 16, 2009).

304. See 29 C.F.R. § 541.203 (2011).

305. See *id.*

306. § 541.203(a).

307. § 541.203(b).

Courts across the country similarly extend a wide radius around the types of activities that may not directly relate to management per se, but that directly relate to general business operations. A sampling from several circuits follows below, showing the job positions and the duties that the courts focused on in determining that the employees qualified as exempt administrative employees.

The First Circuit has held, as a matter of law, that the administrative exemption may include customer relations managers, auction managers, sales managers, and police lieutenants.<sup>308</sup>

<b>First Circuit</b>	
New Purchase/Customer Relations Manager <sup>309</sup>	Worked with other departments to ensure that products were properly outfitted and delivered; instructed the Service Manager concerning what needed to be done if parts were not installed; stayed in contact with the customers to make sure that they were happy; coordinated with various departments to ensure that customers were satisfied with their purchase
"Cyber Auction" Manager <sup>310</sup>	Developed relationships with potential clients; conducted research relating to the authenticity and value of the goods; evaluated items for inclusion in an auction
Sales Manager <sup>311</sup>	Convinced clients to book events; responded to individualized client concerns; answered questions while touring the properties with clients; determined how to pitch the venues
Police Lieutenant <sup>312</sup>	Scheduled training for subordinates; supervised other officers; oversaw and supervised the issuance of search warrants directed staff to carry out the warrants; acted as the internal affairs investigator;

308. See *infra* text accompanying notes 310-13.

309. Cash v. Cycle Craft Co., Inc., 508 F.3d 680, 685-86 (1st Cir. 2007).

310. Orr v. James D. Julia, Inc., No. 07-51-B-W, 2008 WL 2605569, at \*1, \*13-14 (D. Me. June 27, 2008).

311. See Hines v. Longwood Events, Inc., No. 1:08-CV-11653-PBS, 2010 WL 2573194, at \*3, \*8, \*9 (D. Mass. June 23, 2010).

312. Rooney v. Town of Groton, 577 F. Supp. 2d 513, 533 (D. Mass. 2008).

<b>First Circuit</b>	
	handled community complaints; disciplined employees; assisted in the new hire and promotion process; represented the Commonwealth of Massachusetts

The Eleventh Circuit has held, as a matter of law, that the administrative exemption may include hotel managers, property administrators, community outreach associates, and estimators.<sup>313</sup>

<b>Eleventh Circuit</b>	
Store Manager <sup>314</sup>	Directed and supervised her assistants' work; scheduled their work; recommended the hiring and firing of employees; made the decisions about what work could be delegated to assistant managers and what work she needed to do herself; trained new employees; balanced the store's checkbook; ensured deposits were made
Director of Investigations <sup>315</sup>	Interviewed witnesses; inspected automobile accident sites; reviewed information from accidents to determine what evidence needed to be preserved and whether expert witnesses would be necessary
Hotel Manager <sup>316</sup>	Oversaw the work of all staff members; trained and managed subordinate staff; scheduled working shifts of staff and security officers; managed overtime hours; hired hotel housekeepers and maintenance employees; disciplined subordinates; was responsible for the quality of hotel services; handled all cash transactions; was responsible for payroll and budgeting;

313. See *infra* text accompanying notes 315-21.

314. *Bosch v. Title Max, Inc.*, No. CIV.A.03-AR-0463-S, 2005 WL 357411, at \*6 (N.D. Ala. Feb. 7, 2005).

315. *Stout v. Smolar*, No. 1:05-CV-1202-JOF, 2007 WL 2765519, at \*6 (N.D. Ga. Sept. 18, 2007).

316. *Moody v. Intown Suites Mgmt., Inc.*, No. Civ.A.1:04CV1198-TWT, 2006 WL 870388, at \*1 (N.D. Ga. Mar. 31, 2006).

<b>Eleventh Circuit</b>	
	managed all guest conflicts and evictions for violations of hotel rules and policies
Property Administrator; Industrial Property Officer; Property Management Specialist <sup>317</sup>	Processed transfers of property; investigated losses; audited contractors; signed transfers of property; relieved contractors from liability; served as “focal point” for all contracts with contractor-accountable government property; directed activities of a trainee; interpreted regulations; offered advice regarding compliance
Community Outreach Associate <sup>318</sup>	Involved in developing, planning, and implementing strategies designed to promote brand; networked; acted as the “face” of employer in the market
Estimator <sup>319</sup>	Prepared bids that were necessary for employer to sell and/or produce their product
Network Operations Engineer <sup>320</sup>	Developed and improved network system to make it function reliably; wrote specifications for wireless network topology; wrote specifications for routers and switches used in network; designed and assured proper installation; maintained network availability and security; interacted with clients for support; consulted with clients for design and technical specifications; interacted with vendors for pricing and availability of materials; scheduled technical field staff for surveys and installations; recommended purchases of network equipment, evaluated emerging

317. *Jarvis v. Griffin*, No. 6:08-cv-138-Orl-19KRS, 2009 WL 3064788, at \*8 (M.D. Fla. Sept. 21, 2009).

318. *Viola v. Comprehensive Health Mgmt., Inc.*, No. 8:09-cv-1980-T-23AEP, 2010 WL 5463080, at \*4 (M.D. Fla. Dec. 29, 2010).

319. *Carlos Reyes v. Hollywood Woodwork, Inc.*, 360 F. Supp. 2d 1288, 1291 (S.D. Fla. 2005).

320. *Bagwell v. Fla. Broadband, LLC*, 385 F. Supp. 2d 1316, 1323 (S.D. Fla. 2005).

<b>Eleventh Circuit</b>	
	technologies, handled customer problems and complaints; assigned work to field technician; solved problems with the network

The Second Circuit has held, as a matter of law, that the administrative exemption may include underwriters, budget examiners, school principals, and union organizers.<sup>321</sup>

<b>Second Circuit</b>	
Underwriter <sup>322</sup>	Reviewed applications and recommending whether loans should be accepted or rejected
Budget Examiner <sup>323</sup>	Prepared spending projections; analyzed expenditures; controlled spending; approved purchases
School Principal <sup>324</sup>	Analyzed the results of standardized tests to determine which subject areas teachers needed to focus on; worked with teachers create lessons; interviewed and supervised teachers; made hiring and firing recommendations; developed recruitment strategy; met with parents; supervised custodial staff; proposed budgets; proposed teacher salaries
Executive Assistant <sup>325</sup>	Arranged travel; scheduled appointments; took care of executive's personal checking account; completed expense reports
Senior Specialist to the Emerging Europe Middle East and Africa Desk <sup>326</sup>	Responded to client research requests; created investment summaries; coordinated client events, meetings, and conferences; organized the content of road shows; communicated with attendees concerning schedules; hosted clients; resolved

321. See *infra* text accompanying notes 323-28.

322. *Havey v. Homebound Mortg., Inc.*, No. 2:03-CV-313, 2005 WL 1719061, at \*5 (D. Vt. July 21, 2005).

323. *Alberti v. Cnty. of Nassau*, 393 F. Supp. 2d 151, 174 (E.D.N.Y. 2005).

324. *Coleman-Edwards v. Simpson*, No. 03-CV-3779 (DLI)(VVP), 2008 WL 820021, at \*10-11 (E.D.N.Y. Mar. 25, 2008).

325. *Seltzer v. Dresdner Kleinwort Wasserstein, Inc.*, 356 F. Supp. 2d 288, 292, 302 (S.D.N.Y. 2005).

326. *Krause v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 10 Civ. 2603(RMB), 2011



	problems clients had
Union Organizer <sup>327</sup>	Recruited members to union; “was the face of the union for numerous UNITE members and unorganized workers”; represented union and its goals to the community and customers

The Seventh Circuit has held, as a matter of law, that the administrative exemption may include table game supervisors, warrant administrators, law specialists, account managers, and investigators.<sup>328</sup>

<b>Seventh Circuit</b>	
Table Game Supervisors <sup>329</sup>	Issued “service recoveries” and “comps” to casino customers; identified odd behavior or irregularities at the gaming tables; warned, counseled, coached, and recommended discipline of other employees
Assistant Service Manager/ Warranty Administrator <sup>330</sup>	Developed quotes for customers; tracked progress of projects; assigned service technicians; determine if equipment was under warranty; assisted in resolving warranty disputes
Office Manager <sup>331</sup>	Conducted bookkeeping; worked to make certain processes within the company “more efficient;” acted as employer’s representative in dealings with the company’s outside accountants and third party vendors; had authority to stamp checks on behalf of the company
Law Specialist <sup>332</sup>	Spoke to outside counsel; made notes of conversations she had with insureds and counsel; consulted with her supervisors; performed legal research relating directly to her

WL 1453791, at \*5, \*6 (S.D.N.Y. Apr. 13, 2011).

327. *Savage v. UNITE HERE*, No. 05 Civ. 10812(LTS)(DCF), 2008 WL 1790402, at \*8, \*11 (S.D.N.Y. Apr. 17, 2008).

328. *See infra* text accompanying notes 330-36.

329. *Allen v. Harrah’s Entm’t Inc.*, No. 2:04 cv 128, 2006 WL 3513857, at \*11, \*13 (N.D. Ind. Dec. 4, 2006).

330. *Sanfratello v. Howell Tractor and Equip., LLC*, No. 2:09–CV–162., 2011 WL 2965541, at \*6-\*8 (N.D. Ind. July 20, 2011).

331. *Mathews v. Bronger Masonry, Inc.*, 772 F. Supp. 2d 1004, 1013-14 (S.D. Ind. 2011).

332. *Austin v. CUNA Mut. Ins. Soc’y*, 240 F.R.D. 420, 423, 429, 431 (W.D. Wis. 2006).

	cases and to other matters; authorized settlements and created report summaries; handled third-party lawsuits brought against employer's policyholders
Account Manager <sup>333</sup>	Acted as intermediary between employees and software developers; trained staff of customers; answered questions and explained answers to the customer; teaching customer how to implement answers to questions; identified customers' needs; assisted customers in implementing solution
Investigator <sup>334</sup>	Analyzed data submitted by stores; identified possible investigations of theft; conducted investigations; evaluated strategies for the investigation; interviewed informants and suspects
Traffic Control Superintendent <sup>335</sup>	Instructed subordinates; determined allocation of personnel for vehicle and crowd control during special events and emergencies; approved the creation of subordinates' schedules and approved requests for time off; surveyed areas of assignment "to make sure that there [are] no glitches"; arranged for lunch and restroom breaks; prepared for and changed configuration of street closures; determined how and whether to move traffic aides depending on conditions

Finally, the Ninth Circuit has held, as a matter of law, that the administrative exemption may include systems engineers, city dispatchers, customer service representatives, and project engineers.<sup>336</sup>

333. *Verkuilen v. MediaBank, LLC*, 646 F.3d 979, 980, 982 (7th Cir. 2011).

334. *Mullins v. Target Corp.*, No. 09 C 7573, 2011 WL 1399262, at \*1, \*2, \*3, \*8 (N.D. Ill. Apr. 13, 2011).

335. *Conroy v. City of Chicago*, 644 F. Supp. 2d 1061, 1064, 1068-70 (N.D. Ill. 2009).

336. *See infra* text accompanying notes 338-343.

<b>Ninth Circuit</b>	
Systems Administrator/Engineer <sup>337</sup>	Served as employer's representative to outside entities; ensured that employer's software was compatible and complied with network protocols; recommended changes to the client's hardware systems; coordinated and directed work among subordinates; determined schedules; monitored the status of its projects; engaged in problem-solving; provided solutions for client's technical issues; served as "point man" for all technical issues; met with clients and advised them on best practices
City Dispatcher <sup>338</sup>	Coordinated drivers' routes for pickup of freight
Customer Services Representative <sup>339</sup>	Conducted background checks on job applicants; conducted skills evaluations of job applicants; hired temporary employees; disciplined and terminated temporary employees when problems arose; distributed and provided instruction to temporary workers on their time card procedures; produced temporary workers work schedules and locations
Accounting Staff <sup>340</sup>	Researched tax issues; reviewed the Tax Code; "translated complex tax issues into plain English for clients who did not have the tax expertise he did"; reviewed and analyzed legal cases; worked directly clients
On-Job Supervisor <sup>341</sup>	Studied and observed new delivery

337. Heffelfinger v. Elec. Data Sys. Corp., 580 F. Supp. 2d 933, 938-41, 968 (C.D. Cal. 2008).

338. Perine v. ABF Freight Sys., Inc., 457 F. Supp. 2d 1004, 1005, 1008-09, 1016 (C.D. Cal. 2006).

339. Gonzales v. Barrett Bus. Servs., Inc., No. CV-05-0104-EFS, 2006 WL 1582380, at \*1, \*21 (E.D. Wash. June 6, 2006).

340. Ho v. Ernst & Young LLP, No. C 05-04867 JF, 2008 WL 619029, at \*3, \*5 (N.D. Cal. Mar. 4, 2008).

341. Lopez v. United Parcel Serv., Inc., No. C 08-05396 SI, 2010 WL 3630619, at \*1, \*2, \*4

Ninth Circuit	
	routes to evaluate their efficiency; trained drivers on how to improve their accuracy, efficiency, and safety; studied maps of package delivery routes; rode with delivery drivers to observe the routes; participated in meetings and offered suggestions for improving the routes
Project Engineer <sup>342</sup>	Communicated owners about specific projects; signed subcontracts on behalf of employer; signed change orders; directed the work of employee; determined the number of employees needed at a job-site; determined the hours worked; scheduled the work; created the project schedules; sequenced the work; assisted with preparing monthly cost analyses; ensured compliance with required plans; along assisted with margin analyses on specific projects; ensured that projects met specifications; ensured that projects on which he worked stayed under budget

No administrative employee is going to carry out all the tasks identified above. Nor can an administrative employee possibly work in all the functional areas identified above. Only the highest-level executives at a business would be involved in such a vast range of functions.

Judge Posner agrees. In a recent decision, Judge Posner, after noting that the plaintiff-account manager was the "picture perfect example of a worker for whom the Act's overtime provision is not intended,"<sup>343</sup> held that the plaintiff was an exempt administrative employee, even though he did not perform certain functions that the

(N.D. Cal. Sept. 14, 2010).

342. *Black v. Colaska Inc.*, No. C07-823JLR., 2008 WL 4681567, at \*1, \*9, \*10 (W.D. Wash. Oct. 20, 2008).

343. *Verkuilen v. MediaBank, LLC*, 646 F.3d 979, 981 (7th Cir. 2011).

regulations identify as illustrative of an administrative employee.<sup>344</sup> Judge Posner suggested that such a result is the only logical result, stating that “below the highest executive level a modern business is a congeries of specialists,” and the plaintiff could not have performed his exempt duties had he also been carrying out other exempt administrative duties.<sup>345</sup>

In conclusion, as early as 1940, the administrative exemption embraced a class of employees that was so vast and so diverse that it essentially defied definition. Harold Stein, the architect of the administrative exemption, posited that drawing a “dividing line” between exempt and nonexempt administrative employees was nearly impossible without the vital restraint of salary level.<sup>346</sup> With the erosion of that primary divider under the new regulations, as well as the proliferation of the service sector and evolution of the American economy, that class of miscellaneous employees only continued to swell.

#### *D. Administrative/Production Worker Dichotomy*

Courts have attempted to answer the administrative exemption’s complexity with a simple solution in what is referred to as the “administrative/production worker dichotomy,” an analytical tool conceived to clarify the meaning of work “directly related to the management policies or general business operations.”<sup>347</sup> The dichotomy is “a concept that has an industrial age genesis.”<sup>348</sup> Accordingly, it is best illustrated with a scene that resonates with the factory-focused economy from which it sprang: “The typical example of the . . . dichotomy is a factory setting where the ‘production’ employees work on the line running machines, while the administrative employees work in an office communicating with the customers and doing paperwork.”<sup>349</sup>

While the dichotomy is intended to simplify, it is actually fraught with peril— particularly in cases outside the manufacturing context in which the dichotomy arose.

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344. *Id.* at 982-83.

345. *Id.* at 983.

346. See Stein Report, *supra* note 30, at 25.

347. *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002).

348. *Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 872 (7th Cir. 2008).

349. *Shaw v. Prentice Hall Computer Publ’g, Inc.*, 151 F.3d 640, 644 (7th Cir. 1998).

### 1. Dispositive or Discretionary?

First, the weight to be accorded the dichotomy is uncertain. On one hand, the Second Circuit has befriended a position that arguably treats the dichotomy as dispositive. In *Davis v. J.P. Morgan Chase & Co.*,<sup>350</sup> the court of appeals' administrative exemption analysis turned exclusively upon the dichotomy, leading to its conclusion that the plaintiffs-underwriters were not exempt because they "produce the services—loans—that are 'sold' by the business to produce its income."<sup>351</sup> On the other hand, the Seventh Circuit has exhibited its willingness to devalue the dichotomy where it does not appear to be analogous to the occupation at hand. In *Roe-Midgett v. CC Services, Inc.*,<sup>352</sup> the Seventh Circuit concluded that the dichotomy was "not terribly useful" to analyzing the exempt status of claims adjusters because they were "obviously neither working on a manufacturing line nor 'producing' anything in the literal sense."<sup>353</sup> In its 2004 regulations, the DOL itself made an effort to deemphasize the dichotomy's importance to the exemption analysis.<sup>354</sup>

### 2. Broad or Narrow?

Second, the meaning and scope of the terms "production" and "administrative" are unclear. The formula is intended to be simple:

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350. 587 F.3d 529 (2d Cir. 2009).

351. *Id.* at 534, 537.

352. *Roe-Midgett*, 512 F.3d at 865.

353. *Id.* at 872-73; *see also Shaw*, 151 F.3d at 644 (7th Cir. 1998) (describing the test but noting it may be "no longer . . . helpful" in every context); *In re RBC Dain Rauscher Overtime Litig.*, 703 F. Supp. 2d 910, 934 (D. Minn. 2010) ("The Court finds the production/administrative dichotomy similarly unhelpful in assessing whether securities brokers—particularly those who work for an employer that engages in the business of providing financial services, rather than providing particular investment products—are engaged in work that is directly related to management or general business operations of the employer or its customers").

354. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,141 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541) ("The Department's view that the 'production versus staff' dichotomy has always been illustrative-but not dispositive-of exempt status is supported by federal case law"). The California Supreme Court recently issued its first commentary on the dichotomy, where it reversed a court of appeal decision that had relied dispositively upon the dichotomy. *Harris v. Superior Court*, 53 Cal. 4th 170, 175, 183 (2011). The California Supreme Court criticized the court of appeal for its "overreliance" on the dichotomy. *Id.* at 182-83. It ruled that courts, in determining whether an employee qualifies under the administrative exemption, should conduct an inquiry that turns on the particular facts of the case rather than relying upon the oversimplified tool of the dichotomy. *See id.* at 190.

employees who do “production” work are covered by the FLSA; those who perform “administrative” work are not.<sup>355</sup> Growing out of a factory-driven economy, the dichotomy’s original vision of “production” work understandably would have encompassed work dealing directly with a tangible good. But as the nation’s economy has evolved into one driven by service-oriented businesses, courts “have adopted and modified its logic to less traditional ‘production’ situations.”<sup>356</sup> As the Second Circuit has noted of the dichotomy, “context matters.”<sup>357</sup>

As the dichotomy has been modified to keep up with modern circumstances, the concept of “production” has become increasingly fluid. For example, in holding that racing officials’ duties were not directly related to the general business operations of a racetrack operator, the Fourth Circuit characterized the racetrack operator as “produc[ing]” live horse races to place the officials on the production side of the dichotomy.<sup>358</sup> In another example, the Second Circuit, applying the dichotomy, held that state police officers were not exempt administrative employees because their “primary function” was to “‘produce’ . . . criminal investigations.”<sup>359</sup> Thus, it has been stretched to fit so many types of “products” that “production” arguably swallows any good or service that an employer provides, placing virtually every business activity on the “production” side of the dichotomy.<sup>360</sup> Further, even if employees may not actually “produce” the employer’s primary good or service, courts may still place them in “production” if their work “concerns”<sup>361</sup> or is “related” to the employer’s production work.<sup>362</sup> The line, therefore, marking the distinction between “production” and “administrative” is a fuzzy one that renders suspect the viability of this

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355. See 29 C.F.R. 541.201(a) (2005). In addition, the DOL has long applied a modified version of the dichotomy when the business is a retail or service establishment, in which case the dichotomy draws a line between “administrative” and “sales” work. See *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 901 (3d Cir. 1991) (citing former 29 C.F.R. § 541.205(a)); see also *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 531-32 (2d Cir. 2009) (“Employment may thus be classified as belonging in the administrative category, which falls squarely within the administrative exception, or as production/sales work, which does not”).

356. See *Desmond v. PNGI Charles Town Gaming, LLC.*, 564 F.3d 688, 694 (4th Cir. 2009).

357. *Davis*, 587 F.3d at 536.

358. *Desmond*, 564 F.3d at 694-95.

359. *Reich v. State of New York*, 3 F.3d 581, 587-88 (2d Cir. 1993), *abrogated on other grounds by Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

360. See, e.g., *Webster v. Pub. Sch. Emps. of Wash., Inc.*, 247 F.3d 910, 916 (9th Cir. 2001) (rejecting the plaintiff’s characterization of the defendant’s business and application of the dichotomy, stating that under the plaintiff’s approach, “any work—including that of a president or CEO— . . . would be production” and “would defeat the purpose of the administrative exemption”).

361. See *Davis*, 587 F.3d at 534.

362. See *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002).

"tool" in the modern era.<sup>363</sup>

### 3. Judicial or Business Decision?

Finally, the dichotomy inserts the court into a position that it is not qualified to fill. In certain contexts, courts around the country have recognized that "[c]ourts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' . . . business decisions."<sup>364</sup> In light of how the dichotomy has developed, however, courts effectively make business judgments by telling businesses what their primary product or service is, with the outcome of the dichotomy analysis turning on how the court characterizes the entity's primary business or mission.

The abundant litigation involving pharmaceutical sales representatives is illustrative. In *In re Novartis Wage and Hour Litigation*,<sup>365</sup> the district court defined the pharmaceutical company's products as "the pharmaceutical drugs that it researches, develops, and manufactures."<sup>366</sup> As a result, it decided that the company's sales representatives were not production workers because they had "nothing to do with producing [the company's] drugs."<sup>367</sup> Yet, in *Ruggeri v. Boehringer Ingelheim Pharmaceuticals, Inc.*,<sup>368</sup> a district court from the same circuit defined the pharmaceutical company's product differently.<sup>369</sup> It characterized the company's product as "the manufacture and sale of pharmaceuticals."<sup>370</sup> With sales being included in the definition of the company's product, the district court could not

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363. Numerous courts have declined to apply the dichotomy, characterizing it as obsolete. *See, e.g.,* *McLaughlin v. Nationwide Mut. Ins. Co.*, No. 02–6205–TC, 2004 WL 1857112, at \*4–5 (D. Or. Aug. 18, 2004) (refusing to apply an "outdated line of reasoning"); *Robinson-Smith v. Gov. Emps. Ins. Co.* 323 F. Supp. 2d 12, 22–23 n.6 (D.D.C. 2004) (refusing to analyze the issue "under an outmoded line of reasoning").

364. *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 825 (1st Cir. 1991); *see also* *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (stating that a court "does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination"); *Traylor v. Brown*, 295 F.3d 783, 790 (7th Cir. 2002) (explaining that a court does "not sit as a super-personnel department over employers scrutinizing and second-guessing every decision they make"); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (noting that federal courts do not sit "as a super-personnel department that reexamines an entity's business decisions").

365. 593 F. Supp. 2d 637 (S.D.N.Y. 2009).

366. *Id.* at 655.

367. *Id.*

368. 585 F. Supp. 2d 254 (D. Conn. 2008).

369. *See id.* at 273.

370. *Id.* (emphasis added).



hold that its sales representatives fell on the administrative side of the dichotomy.<sup>371</sup> Thus, with a slight shift in how the court characterized the employer's business, it completely altered the boundary of the dichotomy and the outcome of the employees' exempt status under the administrative exemption.

In brief, the dichotomy has fostered a lexiconic sleight of hand. Each party has an incentive to manipulate the characterization of the defendant's business to impact the scope of the "administrative" and "production" legs of the dichotomy. In the end, a judge—one with a limited history and familiarity with the employer's business model—dictates to the employer what its primary good or service is that it provides to the public.<sup>372</sup>

In light of the foregoing, it is unsurprising that courts have characterized the dichotomy as "an imperfect analytical tool"<sup>373</sup> that is "only useful by analogy in the modern service-industry context"—or in some cases, "not terribly useful" at all.<sup>374</sup> At bottom, the dichotomy's usefulness at solving the mystery of the exemption's ambiguous "general business operations" language is questionable.

### *E. A Fallback Exemption*

With the wide ambit of duties attached to the "general business operations" language, the administrative exemption serves as an effective supplemental or alternative exemption for employers.

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371. *Id.* at 273-74.

372. *See, e.g., Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 872-73 (7th Cir. 2008) (providing an example of a plaintiff characterizing the business of the defendant in a manner that was favorable for them on the dichotomy analysis, which the court rejected); *see also Foster v. Nationwide Mut. Ins. Co.*, 695 F. Supp. 2d 748, 756 (S.D. Ohio 2010) (illustrating the plaintiff and defendant's contrasting efforts to characterize the nature of the employer's primary business and employee's primary duty). The analysis of what constitutes the employer's primary business becomes even more complicated when the employer is hired by other companies to provide a service. *See, e.g., Ahle v. Veracity Research Co.*, 738 F. Supp. 2d 896, 903-04 (D. Minn. 2010) (holding that the plaintiffs' work was directly related to the management or general business operations of the employer, as their duties were ancillary to the primary business of the defendant's clients).

373. *Desmond v. PNGI Charles Town Gaming, LLC.*, 564 F.3d 688, 694 (4th Cir. 2009).

374. *Roe-Midgett*, 512 F.3d at 872. The Ninth Circuit has cautioned that it should be used "only to the extent it clarifies the analysis." *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002) ("Only when work falls 'squarely on the 'production' side of the line,' has the administration/production dichotomy been determinative"); *see also Kohl v. Woodlands Fire Dep't*, 440 F. Supp. 2d 626, 636 (S.D. Tex. 2006) ("The analytic difficulty of applying the 'production/administration' distinction has led some courts to question whether the dichotomy is analytically helpful in the context of modern service industries").

Employers appear to be appreciating the value of this tool. Between 2004 and 2011, a merits decision was reached in nearly three hundred federal court cases regarding the exempt status of the plaintiff under the administrative exemption.<sup>375</sup> In a strong majority of those cases, the administrative exemption was joined with another FLSA exemption. Employers, therefore, are evidently recognizing the value of the administrative exemption as an important alternative in the event that another (and perhaps, more obvious) exemption fails.

Employers typically seek and hope for a ruling that an employee qualifies as exempt under one of several exemptions. But in the event that one or more exemptions fail, the tremendous breadth of the administrative exemption provides employers with a formidable defense.

In *Coppage v. Bradshaw*,<sup>376</sup> an insurance agency's State Managing Director sought overtime compensation under the FLSA.<sup>377</sup> The parties cross-moved for summary judgment, with the employer arguing that the employee was exempt under the outside sales and administrative exemptions.<sup>378</sup> The district court denied the employer's motion on the outside sales exemption, holding there were issues of fact as to whether the plaintiff's primary duty was making sales (even though the employee had sold one hundred thirty products to eighty-eight clients in his few years with the company).<sup>379</sup> The district court, however, granted summary judgment to the employer on the ground that the employee was exempt as an administrative employee.<sup>380</sup>

In *Cruz v. Lawson Software, Inc.*,<sup>381</sup> a putative class of systems consultants, business consultants, and technical consultants sued a software development company under the FLSA.<sup>382</sup> On the employer's motion for summary judgment, the district court succinctly concluded that there was conflicting evidence on whether certain employees actually wrote computer code, an essential element of the computer professional exemption.<sup>383</sup> However, the district court held that the plaintiffs "squarely" fell within the administrative exemption and granted summary judgment to the employer.<sup>384</sup>

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375. See *supra* text accompanying note 96.

376. 665 F. Supp. 2d 1361 (N.D. Ga. 2009).

377. *Id.* at 1363.

378. *Id.* at 1363, 1365.

379. *Id.* at 1365.

380. *Id.* at 1367-69.

381. 764 F. Supp. 2d 1050 (D. Minn. 2011).

382. *Id.* at 1055.

383. *Id.* at 1062.

384. *Id.* at 1069-71.

Finally, in *Renfro v. Indiana Michigan Power Co.*,<sup>385</sup> a putative class of technical writers and nuclear specialists filed an FLSA lawsuit against the operator of a nuclear powered generating station.<sup>386</sup> The district court denied summary judgment to the employer on the learned professional exemption, pointing to evidence that certain nuclear specialists did not have college degrees and had acquired most of their knowledge on the job, in contrast to obtaining it “by a prolonged course of specialized intellectual instruction.”<sup>387</sup> However, the district court held that the nuclear specialists qualified as administrative employees, finding that they assisted with running the nuclear plant and exercising discretion and independent judgment in important matters.<sup>388</sup>

In all three of these cases, other FLSA exemptions likely appeared to be the go-to exemption for the occupations involved. An employer would likely look first to the outside sales exemption for an employee who sells insurance products, the computer professional exemption for an employee assisting a computer software company, and the learned professional exemption for an employee running a nuclear plant. In all three cases, however, these exemptions fell short under the facts of the cases. And in all three cases, the administrative exemption’s scope allowed it to fill in the gaps that the other exemptions could not, securing the employees’ exempt status under the FLSA.

#### *F. Combination Exemption*

When an employee’s duties do not fit neatly into the administrative exemption, or the employee performs administrative duties but not in the quantum necessary to constitute the employee’s “primary” duty, the so-called “combination exemption” serves as an alternative haven of relief. This exemption provides the following:

Employees who perform a combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional, outside sales and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative work and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any

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385. No. 1:99-cv-877, 2005 WL 4882704 (W.D. Mich. Jan. 25, 2005).

386. *Id.* at \*1.

387. *Id.* at \*16.

388. *Id.* at \*11-12, \*14.

other section.<sup>389</sup>

In brief, the combination exemption creates the ability to blend the exempt duties from distinct exemptions for purposes of satisfying the primary duties test. To invoke this exemption, the employer must demonstrate that (1) the employee engages in several types of exempt work; that (2) one type of work alone does not constitute the employee's primary duty; and that (3) all of the exempt work taken together comprises the employee's primary duty.<sup>390</sup> "Thus, an employee performing duties that fall under more than one individual exemption, none of which separately represents her primary duty, may be exempt under the combination exemption if those duties, when combined, constitute her primary duty."<sup>391</sup> For example, "an employee whose primary duty is neither management nor administration may fall under a combination exemption based upon his administrative and management responsibilities."<sup>392</sup>

The combination exemption does not necessarily ease the employer of its affirmative burden to establish exempt status. To satisfy the combination exemption with an employee who performs administrative duties, the employer must show that the employer meets the duties test of *each* individual exemption; the only burden that is alleviated is that the employee's administrative duties need not be the employee's "primary duty."<sup>393</sup>

But when satisfied, this hybrid exemption can serve as a potent tool for employers seeking to prove the exempt status of their employees, either as a basis for bolstering the exempt status that applies or serving as a backup for the exempt status that is vulnerable. In *Schmidt v. Eagle Waste & Recycling, Inc.*,<sup>394</sup> for example, a sales representative for a waste removal company was responsible for attracting new customers, as well as maintaining the business of existing customers.<sup>395</sup> The Seventh Circuit affirmed the district court's holding that the employee satisfied the outside sale exemption: her job was to solicit new customers, which she customarily and regularly did away from the office and without direct supervision.<sup>396</sup>

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389. 29 C.F.R. § 541.708 (2011).

390. *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1232 (5th Cir. 1990).

391. *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 294 (4th Cir. 2007).

392. *Auer v. Robbins*, 65 F.3d 702, 722 (8th Cir. 1995).

393. *See IntraComm*, 492 F.3d at 294.

394. 599 F.3d 626 (7th Cir. 2010) [hereinafter *Schmidt Appeal*].

395. *Id.* at 629.

396. *Id.* at 628-29; *see also Schmidt v. Eagle Waste & Recycling, Inc.*, 598 F. Supp. 2d 928,

The district court did not stop with the outside sales exemption. It further concluded that even if sales were not the plaintiff's primary duty, the employee would still have been exempt under the combination exemption.<sup>397</sup> "To the extent plaintiff's work was not 'sales,' it was 'administrative,'" such that "nearly all of the time plaintiff worked for defendant she was involved in exempt work under the FLSA."<sup>398</sup> The Seventh Circuit agreed on both the outside sales and combination exemptions, affirming the grant of summary judgment to the employer.<sup>399</sup>

The combination exemption provides the icing on the cake of the extraordinary scope of the administrative exemption. If the employee's duties do not fall within one of the virtually unlimited functional areas or exempt categories of activities that are directly related to the employer's general business operations, this hybrid exemption stands ready to fill in the gaps for the employee whose duties do not quite fit within the elusive exemption.

## V. CONCLUSION

In his 1949 report, Harry Weiss commented on the Wage and Hour Division's "little, if any, experience" with the administrative exemption at the time of the FLSA's enactment in 1938.<sup>400</sup> He conceded that the newly created agency could not comprehend the "full implications" of the novel exemption at that moment in time.<sup>401</sup>

The Wage and Hour Division, and federal courts and litigants alike, should appreciate the implications of the administrative exemption seventy years later. Between 1900 and 1938, there were fewer than fifty reported federal decisions reaching a decision on the merits of the administrative exemption.<sup>402</sup> In the seven years following the promulgation of the 2004 regulations, the number was closer to three hundred reported decisions.<sup>403</sup> The rapidly growing reliance upon the administrative exemption demonstrates the relevance of this exemption today and the importance of grasping its limits.

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935-36 (W.D. Wis. 2009).

397. *Id.* at 937.

398. *Id.*

399. Schmidt Appeal, 599 F.3d at 633.

400. See Weiss Report, *supra* note 44, at 54.

401. See *id.*

402. See *supra* text accompanying note 192.

403. See *supra* text accompanying note 96.

The FLSA's exemptions were likely intended to carve out reasonably narrow and clearly defined categories of workers that fell outside the FLSA's wage-and-hour protections. But the vague and expansive character of the administrative exemption has distorted the definition of an administrative employee to such an extent that the exemption has swallowed the other exemptions, and arguably, the FLSA. With paychecks and unemployment rates suffering, employers and employees are likely to seek protection in the elusive shade of this exemption. Unless Congress and the courts can undertake a comprehensive overhaul of the administrative exemption, however, both groups of litigants will likely tread along a continued path of confusion and uncertainty.

