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A CALL FOR BRIGHT-LINES TO FIX
THE FAIR LABOR STANDARDS ACT

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INTRODUCTION

The Fair Labor Standards Act1 ("FLSA") was enacted in 1938 to combat unemployment and help safeguard the standard of living for low paid employees. One of the ways Congress sought to further these goals was through the creation of a maximum hours standard.2 Under the FLSA, employers are required to pay employees who work over the maximum hours standard (forty hours per workweek) overtime premium pay equal to one and one-half times their regular rate of pay.3 Congress has created certain statutory exemptions from the maximum hours standard.4 In an effort to define who qualifies for these exemptions, the Department of Labor has promulgated regulations concerning who may be classified as exempt.5 The outcome of these exemptions and regulations is a shaky framework which is at best problematic. As a result, there is currently a resounding cry for federal wage-hour law reform.

In response to the increasing attention given to the overtime provisions of the FLSA, various entities have offered proposals for

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FLSA reform. The AFL-CIO has issued its perennial recommendation that overtime pay be raised to double time. Additionally, bills have been introduced in Congress which would permit administrative, executive and professional employees to remain exempt from the maximum hours standard even though they are not paid a salary. Such pronouncements, although indicative of the attention being paid to the need for reform, are short-sighted. The FLSA requires a much more extensive overhaul.

Recently the exemptions that have drawn the most comment are the "white-collar" exemptions that exempt administrative, executive and professional employees from the maximum hours standard. These exemptions apply to workers who perform certain primary duties, but only if they are paid on a salary basis. This requirement is what is commonly known as the salary basis test.

The salary basis test has proven to be unworkable. Its rigidity does not take into account the increasing flexibility used in establishing methods of compensation, such as paid leave policies. Further, the wording of the test itself is unclear and provides little guidance to either employers seeking to comply with its provisions or employees seeking to enforce their rights. Perhaps most significantly, courts across the country as well as the Department of Labor have interpreted the scope of the salary basis test differently and hence have provided no help to those who have turned to them for guidance. In 1994, the United States Supreme Court refused to attempt to rectify the circuit courts' split over administration of the salary basis test. The scope of the problem is enormous. The potential exposure from...
unpaid overtime pay premiums and penalties for private employers who misclassified employees because of a misinterpretation of the salary basis test could reach thirty-nine billion dollars.12

This article will discuss problems inherent in the salary basis test. Next, it will explain the resulting confusion over the proper classification of administrative, executive and professional employees as either exempt or non-exempt from the FLSA’s overtime pay requirements. Finally, it will propose a solution designed to offer bright-line guidance to employers and employees who must operate within the confines of the FLSA.

I. AN OVERVIEW OF THE FAIR LABOR STANDARDS ACT

Congress passed the Fair Labor Standards Act in 1938, largely as a response to the Great Depression.13

The Act was a response to a call upon a Nation’s conscience, at a time when the challenge to our democracy was the tens of millions of citizens who were denied the greater part of what the very lowest standards of the day called the necessities of life; when millions of families in the midst of a great depression were trying to live on incomes so meager that the pall of family disaster hung over them day by day; when millions were denied education, recreation, and the opportunity to better their lot and the lot of their children; when millions lacked the means to buy the products of farm and factory and by their poverty denied work and productiveness to many other millions; and, when one-third of a Nation was ill-housed, ill-clad, and ill-nourished.14

The law had several objectives. Congress theorized that the FLSA would create an economic incentive for employers to increase the size of their workforce, thereby reducing the unemployment rate.15 Congress believed that requiring employers to pay an overtime premium whenever an employee worked over forty hours in a work-

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Another objective of the FLSA was to ensure a fixed, fair minimum wage and a reasonable workweek for industries where workers did not have sufficient bargaining power to achieve "fair working conditions and collective agreements." The FLSA, therefore, was primarily aimed at the "unprotected, unorganized and lowest paid of the nation's working population." Unfortunately, instead of achieving these laudable goals, the FLSA's evolution has created a maze of laws, regulations, opinion letters and interpretative manuals which defy logic.

Although the assumption that overtime premiums resulted in increased employment was accepted in 1938, it is no longer sound. As opposed to 1938, markets are now international in scope. As markets have become internationalized, economic theories based solely on national supply and demand factors have become flawed. Additionally, many factors, including increased "moonlighting" by employees, different skill distributions between employed and unemployed workers, difficulties integrating new workers into team production processes, establishment size, and non-compliance with the FLSA, have been found to blur any correlation between the FLSA maximum hours standard and employment levels.

The FLSA's failure to address Congress' other concern, protecting unprotected workers, is illustrated by an analysis of the scheme of overtime pay exemptions. For example, Congress created an exemption for agricultural workers; however, given Congress' intent to protect the downtrodden, an exemption for low-paid agricultural workers seems irrational. Similarly, the exemption of many sales em-

20. Ronald G. Ehrenberg & Paul L. Schumann, Longer Hours or More Jobs?: An Investigation of Amending Hours Legislation to Create Employment (1982). The assumption that "executive work" was not easily divided among employees was used to support the executive exemption because "executive" work was not "spreadable" among a greater number of employees. Harold Stein, U.S. Dep't of Labor, Report and Recommendations of the Presiding Officer at Public Hearings on Proposed Revisions of Regulations, Part 541, at 22 (1940) [hereinafter "Stein Report"].
employees, including low wage earners, appears to belie the intent to provide such protection.22 Such groups seem to be the exact population which the FLSA was enacted to protect. On the other hand, high-paid technical workers, and even high-paid executives and administrative employees, are entitled to overtime if they are not paid on a salary basis.23 There seems to be no justification for a law that provides an exemption from overtime premium pay requirements to an administrative employee earning $24,000 a year, but requires overtime premium pay for some salespeople and technicians earning four times as much.24

Segregation between clerical and blue collar workers and administrative, executive and professional employees was fairly well delineated in 1938. The explosion of job classifications and blurring of job titles did not occur until much later.25 Reflecting upon the history of the FLSA, one senator found that the "needs, structure and the composition of the workplace have changed drastically... Not only is the composition of the work force more diverse,... but there is a need for diverse work arrangements."26 Because there are now so many more types of administrative, executive and professional employees who require more flexible work schedules, the rigid FLSA exemptions are no longer serving the same objectives that they served in 1938.

The United States Department of Labor, federal courts, employment counsel, and human resource professionals have devoted tremendous resources to determine who is entitled to receive overtime pay under the FLSA. 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.27 Much of the work required to determine who may be

24. See, e.g., Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 906 (3d Cir. 1991). “[W]e find no error in the district court’s reasoning and judgment that Cooper’s inside salespersons fail to qualify for section 13(a)(1)’s administrative exemption from the Act’s overtime requirement...” Id.
25. Reich, supra note 19, at 49-50.
27. In fact, the FLSA has had a problem with clearly defining exempt categories since its inception, although at that time the confusion stemmed from deciding what industries to exempt, not applying the duties and the salary basis test. See generally Nordlund, supra note 13, at 724-27.
deemed exempt from the FLSA's overtime pay requirements involves identifying individual workers' primary duties and deciding whether such primary duties involve discretion and independent judgment. This is an onerous and burdensome, if not impossible, job. Classification of many positions is further complicated by varying notions of supervision, discretion and judgment. Further, job duties often change. These problems are compounded by the fact that the criteria upon which the positions are judged were drafted based upon now outdated assumptions of workplace structure.

In short, requiring overtime premium pay was originally enacted as a means to: (1) ensure that employees with little bargaining power were not overworked, and (2) decrease unemployment levels. These goals have not been reached. Employees are working more hours than they did forty years ago. Further, there is no definitive evidence to support the proposition that the FLSA's overtime pay requirement decreases unemployment levels. The objectives of the FLSA as it applies to today's workforce must, therefore, be rethought.

II. FLSA OVERTIME PAY EXEMPTIONS

The FLSA provides exemptions from its wage-hour provisions for a wide variety of businesses and occupations. Examination of legislative history indicates that these exemptions were motivated by concerns for the national economy (such as decreasing unemployment

28. 29 C.F.R. § 541.1(a)-(e) (1993); 29 C.F.R. § 541.2(b)-(d) (1993); 29 C.F.R. § 541.305 (1993).
29. Governmental adherence to these outdated notions of workplace structure is evidenced by the U.S. Census' use of "social-economic status" categories that, as of 1990, were 40 years old. See Reich, supra note 19, at 173-174. The inherent change from the original structure of the workplace that existed when the FLSA was drafted is also exhibited by the fact that at one time the regulations utilized a joint definition for administrative and executive employees. See Stein Report, supra note 20, at 3.
30. See supra notes 17-18 and accompanying text.
31. See supra notes 15-16 and accompanying text.
32. Schor, supra note 15, at 1. Schor estimates that, by the end of the century, American workers will be working as much as they did in the 1920s. Id.
levels and keeping prices of certain commodities low) and concerns for the well-being of specific industries (which were not thought to be able to withstand higher labor costs). The result is that there is no uniform scheme for these exemptions. The “hodge-podge” of exemptions has also left agencies responsible for enforcing this law with an administrative nightmare.

Congress was concerned that application of the FLSA to certain industries would destroy them altogether. It thus provided exemptions for these industries. For example, legislative history reveals that Congress’ exemption of homeworkers who made Christmas wreaths was based upon its belief that the industry was made up of families who engaged in that activity to provide extra funds during the holidays, and that requiring overtime payments in such an environment would destroy the industry. Similarly, the FLSA initially provided an exemption for the laundry and drycleaning industry because of the low profit margin in that industry and the fear that, in the face of overtime payment requirements, owners would discharge employees and switch to coin operated establishments. Analogous reasoning was used to arrive at the agricultural exemption. Specifically, the legislative history of the agricultural exemption indicates that it was based upon the fear that application of overtime requirements would result in higher produce prices, would impact most harshly upon

34. Concern was expressed in Congress that industries such as agriculture and commercial laundries (to name a few) would not be able to survive if employers in these industries were compelled to pay an overtime premium. See 107 Cong. Rec. 6244-45 (1961); see also 112 Cong. Rec. 11361 (1966).

35. See supra note 34.

36. Homeworkers engaged in the making of evergreen wreathes are exempt from the overtime provisions of the FLSA. 29 U.S.C. § 213(d) (1988). Examination of the Congressional Record indicates that Congress felt that this was “for all practical purposes, a wholesome family project which one would like to think would be encouraged rather than limited or prohibited.” 105 Cong. Rec. 17335 (1959).

37. When this issue was debated in Congress in 1961, various reasons were given in support of this exemption. Senators cited the increase in the number of coin-operated laundries as well as the greater affordability of washing machines generally as reasons for the exemption. The argument relied upon the theory that if commercial laundries were subject to the wage-hour provisions of the FLSA, they would have to increase their prices. If such prices were increased, “women” would begin doing their laundry at coin operated laundromats, or convince their husbands to buy them a washing machine. Senators also argued that laundries traditionally have operated at a very low profit margin — less than two and one-half percent. 107 Cong. Rec. 6244-45 (1961). In addition, the Labor Department stated that between 1947 and 1960, the laundry industry lost approximately 60,000 jobs (at a time when employment in most industries was on the rise). Id.


smaller growers and would prove unmanageable where growers utilized piece-rate harvesters. Lobbyists were successful in persuading Congress to exempt other industries as well by arguing that the maximum hours standard would drive up prices and harm fisheries, logging operations, bulk petroleum distributors and local newspapers and broadcasters. It is unclear why Congress believed that the FLSA was a threat to these industries and not others.

The three exemptions that are the focus of this article are those that apply to executive, administrative and professional employees. Three factors are examined when determining whether a given employee qualifies for any of these exemptions. These factors are (1) amount of payment, (2) job duties, and (3) method of payment. The first factor requires a minimum weekly salary. Since the minimum weekly salary under the regulations is $250, and since most employees occupying positions which may arguably fall under this exemption earn at least this amount, the minimum salary factor has become largely obsolete.

The second factor used to determine whether an employee qualifies for the executive, administrative or professional exemption relates to the employee’s job duties. While the job duties factor may have been a valuable tool in determining how to classify an employee at the time it was implemented, examination of an employee’s job duties is now both more difficult and less relevant in determining the importance of his position. Because of changing job requirements, a multitude of job categories and varying skills and abilities required by many positions, therefore, examination of an employee’s duties has proven to be unworkable in determining whether he or she is entitled

40. Id.  
41. See supra note 34.  
43. See generally 29 C.F.R. § 541.117 (1993).  
44. See generally 29 C.F.R. § 541.205 (1993).  
45. See generally 29 C.F.R. § 541.118 (1993). Aside from employees paid on a fee basis, employees must be paid on a salary basis to qualify for any of these exemptions. See supra note 9.  
46. See supra note 34.  
47. See supra note 19, at 174.
to overtime pay.

As noted above, when the FLSA was written, the workplace tended to be segregated in terms of white-collar and blue-collar workers and employers clearly identified their executives, administrators and professional employees. Today, the workplace has become much more complex. The distinctions between clerical, sales and technical employees and administrators, executives and professionals have blurred. There is no clear delineation that is used to determine which workers may be classified as bona fide executive, administrative or professional workers.

The efficacy of the duties test is therefore in doubt. The duties test to determine who may be exempt from the FLSA’s overtime pay requirements is simply too amorphous to be the basis of any enforcement policy. As a result, the United States Department of Labor has historically preferred to look at how employees are paid (whether they qualify under the salary basis test) and not analyze employees’ duties when conducting company-wide audits to determine who may be entitled to overtime premium pay.

The “salary basis test” is the third factor analyzed when determining whether an individual may be exempted from overtime pay requirements. To qualify for the exemption, administrative, executive and professional employees must be paid on a salary basis. Unfortunately, no one knows what it means to be paid on a salary basis. It is also unclear why there is a salary basis test.

49. See supra note 25 and accompanying text.

50. In fact, the regulations themselves recognize that “[t]he effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case.” 29 C.F.R. § 541.118(a)(6) (1993).

51. HARRY WEISS, REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS OF REGULATIONS, PART 541, at 8-9 (1949) [hereinafter “WEISS REPORT”]. The Department of Labor has stated the salary basis test is useful in enforcement of the FLSA. It justified this position in 1949 by arguing that “[i]n the years of experience in administering the regulations, the Divisions have found no satisfactory substitute for the salary test.” Id. at 8. It is hard to believe that no satisfactory substitute could be found in the past 50 years!

52. 29 C.F.R. § 541.118 (1993).

53. In one report, the Department of Labor implied that the salary basis test is not designed to distinguish employees based on their value to their employer. See WEISS REPORT, supra note 51. However, in a subsequent report, the Department of Labor found that an employee’s salary is “a good indicator of the degree of importance attached to a particular employee’s job.” HARRY S. KANTOR, REPORT AND RECOMMENDATIONS ON PROPOSED REVISION OF REGULATIONS, PART 541, at 2 (1958).
III. THE SALARY BASIS QUAGMIRE

In 1938, when the FLSA was written, employees were generally not paid when they did not work. The concept of paid sick time, vacation time, holidays or compensatory time off was virtually unknown. The definition of a salary was therefore simple and easily understood. Employees were either paid on an hourly basis for hours they actually worked or were paid a weekly salary. The Department of Labor's regulations attempt to define “salary basis” by providing that:

An employee will be considered to be paid “on a salary basis” within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.\footnote{29 C.F.R. § 541.118(a) (1993) (emphasis added).}

Ironically, the salary basis test has been defended as an easily applied method of distinguishing exempt administrative, executive and professional employees. For example, in a report concerning proposed amendments in 1949, the Department of Labor stated that determining an employee’s exempt status on the basis of salary was appropriate as “a ready method of screening.”\footnote{See WEISS REPORT, supra note 51, at 8.} The test was defended because payment on a salary basis was considered “the only method of payment consistent with the status implied by the term ‘bona fide’ executive.”\footnote{See WEISS REPORT, supra note 51, at 24.} Further, unlike the status of the workplace today, payment on a strict salary basis was deemed a “recognized [attribute] of administrative and professional employment.”\footnote{See WEISS REPORT, supra note 51, at 24.}

Now that paid time off policies have become so varied and sophisticated, the differences between salaried and hourly paid employees are almost indistinguishable. It is for this reason that the salary basis test is no longer an effective indicator for determining whether employees should receive overtime premium payments.

\footnote{54. See WEISS REPORT, supra note 51, at 8.}
Abshire v. County of Kern was the first circuit court case to hold that employees are not paid on a salary basis if their wages are subject to policies requiring reduction for part-day absences, even if their wages are not actually reduced. Prior to Abshire, it was clear that employees paid on a salary basis could not be docked for missing a part day of work. Abshire expanded the notion of what it meant to be docked. In Abshire, an employee was deemed to be “docked” if his or her bank of accrued vacation time was reduced, thereby subjecting the employee’s actual wages to reduction if the employee used up all of his or her vacation time.

In Abshire, battalion chiefs of the Kern County Fire Department brought a class action against Kern County seeking overtime pay plus interest which they alleged was due to them under the overtime provisions of the Fair Labor Standards Act. They argued that because their pay was subject to potential deductions for absences from work of less than a day’s duration, they were not paid on a salary basis, and therefore were entitled to overtime pay.

Kern County’s written policy was that a battalion chief who missed work for a duration of less than a day must charge the missed hours of work to his bank of accrued paid or compensatory leave. Battalion chiefs who had exhausted their accrued paid or compensatory leave in a given pay period would, under the County’s rules, have their pay docked on an hourly basis for any time that they were tardy or absent from work. Based upon this written policy, the court concluded that the battalion chiefs were not paid on a salary basis, and were therefore entitled to overtime pay under the FLSA.

The Abshire court stressed the fact that in order to satisfy the salary basis test, an otherwise exempt employee’s pay cannot be subject to deductions for absences of less than a day. According to the court,

58. 908 F.2d 483 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991).
59. Abshire thus went beyond the Department of Labor regulations which state that employees paid on a salary basis must use sick days in full day increments. 29 C.F.R. § 541.118(l)(a) (1993). The regulations do not expressly prohibit partial day use of vacation, compensatory time or other forms of paid leave. Id.
60. 908 F.2d at 484.
61. Id. at 485.
62. Id.
63. Id.
64. Id. at 489.
65. Id.
Subjecting an employee's pay to deductions for absences of less than a day, including absences as short as an hour, is completely antithetical to the concept of a salaried employee. A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed. It is precisely because executives are thought not to punch a time clock that the salary test for "bona fide executives" requires that an employee's predetermined pay not be "subject to reduction because of the variations in the . . . quantity of work performed" . . . especially when hourly increments are at issue.  

The County argued that although the battalion chiefs' pay was subject to the deductions described above, these employees should still be considered salaried because no deductions were ever actually made. The court responded to this plea by stating that the fact that no deductions had ever been made was both misleading and irrelevant. The court stated that the dispositive factor was that under the County's policy, the employees' pay was, at all times, subject to deductions for tardiness or partial days absence.

The Abshire court therefore held that if an employee's bank of accrued but unused paid time off is reduced because of a part-day absence, the employee is not paid on a salary basis, even though the employee's actual gross pay is not reduced. The court's reasoning was based on the possibility that, under such a policy, a part-day reduction could result in an actual payroll deduction at a later date. The court also found that so long as an employee's pay was subject to impermissible docking, even if the docking (or part-day reduction of paid time off) never occurred, the employee was not paid on a salary basis.  

There is, however, no uniform interpretation of the Abshire decision among the circuit courts and, therefore, no true guide for employers and employees. Some other courts have also held that employees whose leave time is reduced for absences of less than a day are not salaried even though their actual pay is not reduced. How-

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66. Id. at 486.
67. Id. at 487.
68. Id.
69. Id.
70. Id.
71. Id.
ever, at least one court has held that accumulated paid leave may be used to cover partial day absences without defeating an employee's salaried status.73 The court in that case focused on the fact that employees never actually lost any pay due to partial day absences.74 Other courts have held that docking accrued leave and compensatory time is not equivalent to docking base pay, and therefore does not affect an employee's salaried status.75

Although the Abshire decision was an attempt to clarify the application of the salary basis test, the decision has left even more unanswered questions complicating the test's enforcement. It is, for example, unclear whether an exempt employee may use compensatory time off in part-day increments. Many employers reward employees for working long hours with compensatory time off which may be taken at a later date. If an exempt employee takes off a part day and reduces his or her bank of compensatory time by a corresponding amount, that may also ruin the employee's exempt status. The Ninth Circuit Court of Appeals in Abshire indicated that docking an employee's bank of compensatory time and accrued leave for missed hours of work is indicative of non-salaried status.76 Following the Abshire court's lead, a Nevada district court has held that docking accrued leave and compensatory time for partial day absences is essentially the same as docking an employee's pay.77

In the case of Benzler v. Nevada,78 state employees brought suit alleging that Nevada's practice of docking accrued leave and compensatory time for hours of work missed was indicative of payment on a non-salary basis.79 The employees therefore argued that they were entitled to time and one-half of their regular rate of pay for all overtime hours worked.80 The state of Nevada argued that its actions did not run afoul of the FLSA or the Abshire decision because the employees' compensation was not subject to decreases based upon

73. McDonnell v. City of Omaha, 999 F.2d 293, 296 (8th Cir. 1993). "[W]e do not believe that a contingent deduction in pay defeats salaried status." Id.
74. Id.
76. 908 F.2d at 487 n.3.
78. Id.
79. Id. at 1305.
80. Id.
variations in the amount of work performed. The state contended that docking accrued leave and compensatory time was not tantamount to reducing plaintiffs' "compensation."

The District Court of Nevada agreed with the employees. The court reasoned that an employee's compensation includes more than the amount of cash received at the end of each pay period. Items such as health insurance, life insurance, and other fringe benefits must also be included when determining an employee's compensation. The court concluded that,

By reducing such benefits [accrued leave and compensatory time] when the employee's amount of work is reduced by less than one day, the employer is reducing part of the predetermined amount of compensation on the basis of the amount of work done. Presumably, since vacation benefits and compensatory time are part of an employee's benefits, they form part of the decision in deciding whether or not to take the job. Like docking base pay, docking compensatory time and accrued leave indicates non-salaried status because the employee's compensation is reduced on account of the amount of work done.

As the above indicates, courts are not in agreement about how the salary basis test should be interpreted with respect to accrued leave time and compensatory time. In certain jurisdictions, reducing an employee's bank of compensatory time for partial day absences will destroy that employee's salaried status; while in other jurisdictions an employee retains his salaried status even if his compensatory time is reduced, so long as his actual pay is not subject to reduction for partial day absences.

Herein lies the problem. The disagreement among courts in different parts of the country makes it virtually impossible for an employer or an employee to know whether a given policy is in compliance with the much misunderstood salary basis test. The problem can be easily illustrated by imagining the confusion faced by employers that operate in more than one state — the law is the same but the interpretation by the courts may be different. Further, the United

81. Id.
82. Id.
83. Id. at 1307.
84. Id.
85. Id.
86. Id.
87. The compounded confusion that can result from the application of state wage-hour
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States Department of Labor has made contradictory statements about the salary basis test. In a number of written opinion letters, the Department of Labor has stated that partial day reductions of vacation time are not inconsistent with being paid on a salary basis. However, in its appellate brief in the *Malcolm Pirnie* case, the U.S. Department of Labor, citing *Abshire* with approval, argued that such partial day deductions will result in a finding that a salary has not been paid.

This problem is compounded by the fact that there is also no uniform agreement about *Abshire*’s conclusion that employees may lose their exempt status simply by mere subjection to impermissible docking. The *Abshire* court concluded that whether a deduction from an employee’s pay had ever actually been made was irrelevant for purposes of the salary basis test. The *Abshire* court focused solely on whether an employee’s pay was “subject to” a deduction for partial day absences in determining whether the employee was paid on a salary basis. Likewise, many courts both before and after *Abshire* have also relied on this “subject to” language.

However, as one court was quick to point out, whether a deduction was actually ever made from an employee’s pay can prove to be highly relevant. In the case of *Michigan Association of Governmental Employees v. Michigan Department of Corrections*, the Sixth Circuit Court of Appeals criticized *Abshire*’s apparent disregard of how a policy is actually implemented. The court pointed out that

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88. Opinion letter from Karen R. Keesling, Acting Administrator, Department of Labor, Wage & Hour Division (Apr. 9, 1993) (on file with the Department of Labor); Opinion letter from Karen R. Keesling, Acting Administrator, Department of Labor, Wage & Hour Division (Apr. 14, 1993) (on file with the Department of Labor).
91. *See supra* notes 73-76 and accompanying text.
92. 908 F.2d at 487.
93. *Id*.
95. *See Michigan Ass’n of Governmental Employees v. Michigan Dep’t of Corrections*, 992 F.2d 82 (6th Cir. 1993).
96. 992 F.2d 82 (6th Cir. 1993).
when a policy is ambiguous (as it happened to be in the Michigan case), application of the policy is highly relevant.\textsuperscript{97} According to the court,

\begin{quote}
We disagree with the Abshire court’s determination that actual implementation of the pay deduction policy is an irrelevant consideration. Actual application of the policy may well have been less relevant under the specific facts of Abshire, but in this case, where the policy language is ambiguous and the proper interpretation is disputed, application of the policy is highly relevant. The execution of the policy may shed more light on the actual policy than an ambiguous excerpt from an employee manual. In this case, the fact that no plaintiff’s pay has ever been reduced for absences of less than one day supports the defendant’s interpretation of its own sick leave policy.\textsuperscript{98}
\end{quote}

It therefore appears that if a paid leave policy is ambiguous with respect to whether an employee’s paycheck may be subject to reduction because of a part-day absence, employees may be deemed to be paid on a salary basis unless their wage has actually been docked. Some employers may therefore be encouraged to promulgate ambiguous leave policies. In so doing, they could prompt employees to account for all of their paid time while simultaneously avoiding overtime penalties by ensuring that no employee’s salary is actually reduced because of a part-day absence. The case law regarding the salary basis test may thus encourage greater ambiguity and confusion.

Judicial application of the \textit{Abshire} decision by most courts further complicates the problem. According to William J. Kilberg, former Solicitor, United States Department of Labor, “[T]he majority of courts have viewed \textit{Abshire} not as limited to its facts, but rather as establishing a universally applicable standard akin to a Newtonian rule of physics: partial-day deductions equal loss of exemption.”\textsuperscript{99} Kilberg’s report also stated his belief that “[t]he end result of these judicial interpretations is the civil law equivalent of capital punishment for spitting on the sidewalk.”\textsuperscript{100}

The Ninth Circuit Court of Appeals recently revisited its holding

\textsuperscript{97} Id. at 86.
\textsuperscript{98} Id.
\textsuperscript{100} Id. at 40.
in Abshire in the case of Barner v. City of Novato. In that case, which was factually similar to Abshire, the Ninth Circuit took a step back from its earlier holding in Abshire by holdings that, "in the absence of an express policy subjecting an executive or administrative employee's pay to reduction for absences of less than one day, deducting accrued leave time is not conduct which puts the employee outside the applicable exemption." The court went on to say that it had merely "hinted" in Abshire that an express policy of deducting an employee's accrued paid leave for absences of less than one day could violate the professional/managerial exemption.

Although it was not addressed in Abshire, it is also unclear whether employees may be deemed as paid on a salary basis if they receive additional compensation for working in excess of an established workweek. If the additional remuneration is not clearly related to the number of additional hours, a salary basis may still be found. However, if additional pay is based on the number of additional hours worked, courts disagree on whether the employee is being paid a salary. The litigation this question has generated has proven how complex the administration of the salary basis test has become.

The fact that the issues noted above arose in the context of litigation illustrates the inefficacy of the administration of the salary basis test. Employment policies involving compensatory time off

102. Id. at *1.
103. Id. at *2.
104. It is unclear whether paying exempt employees on an hourly basis when they work in excess of 40 hours in a work week will ruin their exempt status. Further, employees whose pay is reduced because of disciplinary unpaid suspensions because of failure to report to work, rude behavior or poor judgment have also been found not to be paid on a salary basis because such penalties were not for major safety violations. Shockley v. City of Newport News, 997 F.2d 18 (4th Cir. 1993); Klein v. Rush-Presbyterian-St. Luke's Medical Ctr., 990 F.2d 279 (7th Cir. 1993).
105. Michigan Ass'n of Governmental Employees v. Michigan Dep't of Corrections, 992 F.2d 82 (6th Cir. 1993).
107. Rather than take sides with any particular circuit's interpretation of the salary basis test, we believe the issue should be settled by legislative abandonment of the test and instituting a proposal similar to the one we have proffered. Further, this article will not address
and accrual of paid time off are commonplace and, in fact, are considered basic components of compensation by a large segment of today’s workforce. The vacation and sick day policies enforced by Kern County are typical of such policies throughout both the public and private sector. The outdated nature of the salary basis test is highlighted by the fact that it takes no notice of these aspects of compensation, and leaves determination of such crucial matters to often inconsistent and contradictory judicial interpretations.

Congress’ recent enactment of the Family and Medical Leave Act (“FMLA”) both complicates this issue and further demonstrates why the current salary basis test is untenable. Under the FMLA, an employer may be required to grant a part-day leave because of an employee’s serious health condition. Under specific FMLA provisions that state that “the employer may make deductions from the employee’s salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee,” that employee would still be deemed exempt from overtime pay premium requirements, despite the reduction of his accrued but unused sick or vacation time.

Consider, therefore, the administrative nightmare an employer that utilizes a policy of docking employees’ accrued leave time for partial-day absences and that is covered by the FMLA would face if two employees required part-day absences to visit a doctor. If one employee’s appointment stemmed from a serious medical condition, the FMLA’s provision permitting an employee to be docked a part-day increment from his bank of sick or vacation time and still be deemed paid on a salary basis would be activated. However, if the other employee saw the same doctor for a condition not covered by the FMLA, and her bank of accrued but unused sick or vacation time was also reduced, she may lose exempt status under the salary basis

inadvertent penalties for part-day absences and whether a window of correction should be permitted as the implementation of the proposal discussed herein would render these topics moot.

108. See infra notes 139-41 and accompanying text.

109. The question of the impact of deductions based on partial absences was actually noted in the consideration of proposed amendments to the regulations in 1949. At that time, the question of the effect of deductions arose because, during the war, employers made a practice of using deductions as a disciplinary measure to combat absenteeism among executive and administrative employees. The Department of Labor viewed this practice as a “peculiar wartime [condition].” WEISS REPORT, supra note 51, at 24-25.


111. 29 C.F.R § 825.206(a) (1993).
test depending on who administered the salary basis test. The potential for disaster resulting from such a statutory scheme is clear.

The "new" more restricted salary basis test initiated by the Abshire decision sent shivers down the spine of public employers who had a widespread practice of subjecting employees to possible docking for part-day absences. The Acting Administrator of the Wage-Hour Division, U.S. Department of Labor has called the Abshire decision troubling and blamed the decision for a "growing crisis" in the public sector.115 In 1992, largely in response to the Abshire decision, the regulations implementing the FLSA were amended116 to provide that a public employee who otherwise qualifies for the managerial, professional or executive exemption does not lose such exempt status if the public entity employing him makes deductions for hours which he has not worked.117 Congress deemed the public sector worthy of legislative relief "to ensure accountability to the public for the expenditure of its tax dollars by making sure that employees are only paid for the time they actually work unless the absences are paid through the use of earned leave." The fact that public employers faced billions of dollars in back pay liabilities was the motivating force behind the new regulation.118

The salary basis test has recently been placed under close scrutiny in the private sector as well, and few commentators find any
justification for it.\textsuperscript{118} At the first Congressional hearing on legislatively overturning \textit{Abshire} with respect to the public sector, Congressman Fawell questioned the Department of Labor’s representative about extending a new salary basis test to the private sector. He was told that there was not enough time to discuss the private sector.\textsuperscript{119} Upon further prodding by Congressman Fawell, the Department of Labor’s representative admitted not knowing what to recommend about the private sector.\textsuperscript{120}

Recent legislative proposals regarding amendments to the FLSA have focused on abandoning the salary basis test, a suggestion that first took root in hearings as early as 1949.\textsuperscript{121} In 1993, The Workplace Leave Fairness Act was introduced in the House of Representatives to do just that.\textsuperscript{122} A similar bill has been introduced in the Senate.\textsuperscript{123}

Unfortunately, the solution for the public sector — modifying the salary basis test — does not provide an easily applicable pattern for solving the problems of classifying workers as exempt or non-exempt in the private sector. The Department of Labor will not be able to effectively enforce the FLSA overtime pay requirements because cases have to be decided on an individual basis by analyzing the primary duties of a position at each worksite. There are simply too many positions in the private sector to rely solely on the duties test to classify workers. The fact that a private sector remedy would require

\textsuperscript{118} One commentator has called the salary basis problem the Trojan horse of liability to American industry. William J. Kilberg, \textit{DOL’s Salary Basis Regulations}, 18 EMPLOYEE REL. L.J. 181, 183 (1992). The idea of abolishing the salary basis test, however, is not new. It was first officially proposed in a U.S. Department of Labor Hearing in 1949. \textit{See} WEISS REPORT, supra note 51, at 7 n.17.

\textsuperscript{119} His response to this was “Ah, shucks.” Keesling, supra note 113, at 35.

\textsuperscript{120} Keesling, supra note 113, at 36.

\textsuperscript{121} \textit{See} WEISS REPORT, supra note 51, at 7 n.17.

\textsuperscript{122} Specifically, on March 11, 1993, a bill was introduced in the House of Representatives which would amend the FLSA to allow employers to give employees partial day unpaid leave without losing the employee’s exemption from overtime requirements. H.R. 1309, 103d Cong., 1st Sess. (1993). The bill, entitled the “Workplace Leave Fairness Act,” was co-sponsored by Congressmen Robert Andrews (D-N.J.) and Thomas Petri (R-Wis.). \textit{Id}.

\textsuperscript{123} Legislation was proposed in the Senate on August 4, 1993, by Senator Nancy Kassebaum (R-Kan.) and co-sponsored by Senators Thad Cochran (R-Miss.), James M. Jeffords (R-Vt.) and Larry Pressler (R-S.D.). S. 1354, 103d Cong., 1st Sess. (1993). The Senate bill goes further than the House bill by addressing additional wage-hour practices that could result in a loss of exempt status. For example, it proposes amendments to the FLSA so that employees would not be disqualified from overtime exemptions because of an employer’s policies concerning recording hours worked, disciplinary measures involving suspension without pay, the establishment of regular work hours and compensation above the salaried level. \textit{Id}.
more thought than the one implemented in the public sector does not, however, negate the pressing need for a solution. The question then remains — what is to be done about the salary basis test in the private sector?

IV. A BRIGHT-LINE IS NEEDED

If the salary basis test for overtime payment requirements is legislatively discarded by the Workplace Leave Fairness Act or other similar legislation, the United States will be left with an outdated duties test to determine which workers may be classified as exempt administrative, executive or professional employees. The objectives of such exemptions would be unclear. Even if there were legitimate reasons for such exemptions, a case by case duties analysis is undesirable because classification of employees as exempt or non-exempt will become even more harrowing as the nature of our workforce becomes increasingly complex. Furthermore, employers would be left with no way to classify positions in light of the changing nature of the duties they require their workforce to perform.

Now is the time to determine whether there are any redeeming reasons for an overtime pay requirement. If so, a clear law must be fashioned which accounts for the evolution of our industries from industrial businesses to high-technology, service and information based operations. The two objectives behind the FLSA’s overtime pay requirement, namely decreasing unemployment levels and helping workers with little bargaining power obtain a reasonable workweek, are not readily achieved by the FLSA.

The overtime pay requirements are simply not well suited as a device to regulate employment levels. The Federal Unemployment Tax Act and other payroll taxes may be much better tailored for such a purpose because they can be used to discourage layoffs by increasing taxes on those employers who layoff employees. Similarly, costs of production, interest rates, foreign exchange rates and protectionist strategies have a much greater impact on employment levels than the number of hours worked by certain employees. Increased

124. See supra note 122 and accompanying text.
125. Subsidies which stimulate employers to reduce hours and increase employment have been implemented in France. See MICHAEL WHITE, WORKING HOURS: ASSESSING THE POTENTIAL FOR REDUCTION 77 (1987).
government payrolls, expanded public work projects and increased military spending also have been tried as a means to increase employment levels.\textsuperscript{127}

There is no longer a compelling reason for the federal government to require that the majority of workers receive overtime premium pay in order to increase employment levels.\textsuperscript{128} In fact, in industries which compete directly with foreign companies, the FLSA’s overtime pay requirement may decrease employment levels. Without becoming mired in the debate over the effects of the North American Free Trade Agreement,\textsuperscript{129} suffice it to say that some employers making a decision to move positions to Mexico or other countries would be less likely to make such a move if the marginal cost of employment was not statutorily increased by the FLSA.\textsuperscript{130} If the overtime pay requirements were less costly for employers, an employer’s labor costs would decrease. If the employer’s profits derived from each employee increased, such employers may be encouraged to hire more workers.

Congress’ other goal in promulgating the FLSA was to prevent employers from overworking employees who may have no recourse.\textsuperscript{131} However, the FLSA’s overtime pay requirements are not well tailored for accomplishing this objective. The average workweek is increasing dramatically, while real wages are decreasing.\textsuperscript{132} There is no reasonable correlation between the workers in need of protection from excessive work schedules and the workers currently covered by

\textsuperscript{127} \cite{Huncutt1988}

\textsuperscript{128} Indeed, one commentator believes that there is insufficient evidence to establish that a shorter workweek has ever increased employment levels. \cite[See White, supra note 125, at 1, 28, 74. White argues that if a maximum hours standard does increase employment levels, it is at the expense of the lowest wage earners. Id. at 29.]


\textsuperscript{131} \textit{See supra} notes 17-18 and accompanying text.

\textsuperscript{132} \textit{See Schor, supra} note 15. Other studies do not show as dramatic an increase in working hours. \textit{See White, supra} note 125, at 5. In any event, many workers are undoubtedly working long workweeks, regardless of whether they are covered by the overtime pay provisions of the FLSA.
A Call for Bright-Lines to Fix the FLSA

The overtime provisions of the FLSA.

The FLSA overtime pay provisions further fail because they have become so complicated that employees do not understand their rights and employers do not understand their obligations. Many employees simply do not understand whether they have a right to overtime premium pay for working over forty hours in a workweek. Because they do not know whether they are legally entitled to overtime premium pay, many employees do not question their exempt classification when they are told by their employer that they are not entitled to such pay. Further, employers are faced with such an inextricably tangled mass of regulations that they themselves are not sure whether their employees should be classified as exempt or non-exempt from overtime pay requirements. Reform is therefore required because, no matter how well-intended the legislation, it is fatally flawed because employees do not understand their rights and employers have difficulty understanding their obligations.

This does not mean, however, that there is no need for an overtime pay penalty (a maximum workweek standard) for some workers. There are social costs associated with overtime work which should not be ignored. Our economy requires that workers have free time to spend money. Our social fabric requires workers to develop friendships and family bonds, which requires non-work time. Our collective mental health requires that workers have non-work time. An overtime premium should be viewed as a method of taxing employers for the social cost of requiring overtime work in order to dissuade employers from requiring such work. Such a tax would then only be reasonable when there is in fact a social cost from requiring overtime work and when such a tax would be necessary to discourage such overtime work. The beneficiaries of this "tax" would be those working overtime.

Senator Edward Kennedy (D-Mass.) has stated that an overtime premium is necessary to compensate employees for "denial of that employee to be with his or her family and to be able to enjoy any kind of normal existence." However, a "normal existence" in modern society is not based on a nine to five job or a forty hour work-

133. This may be presumed from the fact that the U.S. Department of Labor and courts have conflicting interpretations of the FLSA. See supra notes 87-88 and accompanying text.
134. The FLSA notice requirement is not effective because it does not explain who is entitled to overtime pay. See [1 Wages-Hours] Lab. L. Rep. (CCH) ¶ 23,990 (Oct. 11, 1991).
135. See WHITE, supra note 125, at 24, 26.
week. Not all work in excess of forty hours in a workweek is undesirable. Many employees would prefer to take compensatory time off in lieu of receiving overtime pay to spend more time with their families during a slow week. Families with two wage earners may be able to spend more time with their children if the parents are able to work flexible hours. Conversely, many employers would operate more efficiently if permitted to increase their workweek. For example, some facilities are designed to run with twelve hour shifts, seven days a week. Both management and employees at some of these facilities may prefer a four day on, four day off schedule. Such a schedule is not currently accommodated by the FLSA because some workweeks would necessarily be over forty hours.

The use of flexible work schedules instead of overtime pay by some companies, rather than harming or depriving the American worker (as Senator Kennedy seems to suggest) could actually further many important national interests.

The changes in work scheduling that have taken place during the last decade have substantially increased employee choices over their personal and professional lives. But work scheduling is more than a purely social issue; flexible work schedules can help further national goals, particularly in energy conservation and productivity growth. Compressed workweeks, for example, can substantially cut energy consumption. Flexible schedules of all kinds can raise employee morale and boost productivity. And work sharing, which avoids layoffs by distributing reduced work time among all of a plant’s employees, can serve as a cushion against cyclical recessions.

137. According to one commentator, "It would be presumptuous to offer a recommendation about the appropriate hours of work time. In a democratic society, this outcome should reflect the interests and views of the more than one hundred million Americans who work in the marketplace and their employers." John D. Owen, Reduced Working Hours: Cure for Unemployment or Economic Burden? 141 (1989).


139. Interestingly, in the 1940s an argument was made that overtime penalties penalized workers because employers were required to place certain employees on inconvenient "staggered" shifts. The Department of Labor dismissed this argument by inaccurately predicting that such shifts would only be adopted by a small percentage of employers. Stein Report, supra note 20, at 7.

140. Work in America Institute, Inc., New Work Schedules for a Changing Society 3 (1981). The text also indicates that flexible work schedules are essential to strengthening family life, and that the use of these types of work schedules would allow
One commentator has coined the term “equiflex,” which means equitable flexibility — “by providing reduced and restructured worktime and work-site options at wage and prorated benefit levels that make these alternative modes truly comparable to full-time, on-site work.” The commentator believes that equiflex is necessary to build a strong, viable organization because of international market forces, to encourage our aging workforce to work additional years and to help employees cope with more diverse and pressing non-work responsibilities.

Allowing an employee some flexibility in the type of work schedule which he follows will also improve the quality of such employee’s job.

From the individual worker’s point of view, the ability to exercise greater choice over working time would represent a significant addition to his/her level of discretion in the workplace- extending worker influence beyond the way tasks are performed and the conditions under which they are performed, to the issue of for how long they are undertaken.

Thus, because the salary basis test may discourage employers from permitting more flexible work schedules, it is not only failing to protect workers, but harming them as well.

Reform is also needed to dissuade employers from overworking employees who may not have the bargaining power to limit their workhours and to give both employees and employers the flexibility required by our diverse workforce. If properly implemented, an overtime pay premium may still help to fulfill these goals. Individuals with a high degree of skills and abilities (bargaining power) are more likely to be able to find a job which permits a satisfactory amount of non-working time. Such workers will be able to make their own decisions regarding the number of hours that they will work when making career decisions. Other workers may not be able to obtain a

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141. BARNEY OLMSTED & SUZANNE SMITH, CREATING A FLEXIBLE WORKPLACE: HOW TO SELECT AND MANAGE ALTERNATIVE WORK OPTIONS 405 (1989). The term “flexible life scheduling” has also been used by some commentators to describe the match between individual choice over work hours and organizational requirements. See generally WHITE, supra note 125, at 74.

142. See OLMSTED & SMITH, supra note 141, at 408.

143. PAUL BLYTON, CHANGES IN WORKING TIME 166 (1985).

144. See WHITE, supra note 125, at 3.
position which requires fewer hours. The overtime pay requirements should help ensure that workers who are unable to obtain positions which permit sufficient non-working time have some acceptable level of non-working time. The overtime premium may thus be viewed as a tax to encourage employers not to overwork employees who do not have the bargaining power to command a reasonable workweek.

Many employees earning close to the minimum wage presumably do not have sufficient bargaining power (either individual or collective) to say no when requested to work in excess of forty hours. Employers will often be motivated to request such employees to work in excess of forty hours in a workweek, rather than hire additional workers. Employers would benefit from having employees work longer hours — rather than hiring additional workers, because of the high fixed costs of employment and relatively low marginal cost of overtime work. Presumably, employees would be asked to work until diminishing productivity due to long work hours reached a certain level.¹⁴⁵

On the other hand, higher paid workers may be voluntarily willing to work long hours to further their careers or to earn more money, or both. Many professionals must work long hours at the start of their careers as a right of passage. Other workers may be willing to work long hours because they value extra compensation over more non-worktime. Because of the FLSA’s overtime pay requirements, many employees are forced to work two jobs because their first employer will not allow overtime work. The FLSA must be more flexible so that employees and employers may make their own decisions about the length of the workweek when such decisions do not result in unwanted social costs.

We therefore believe that legislative reform must fulfill several goals. First, workers who would be otherwise vulnerable should be protected from excessive work schedules. Second, employees should be given clear notice of whether they are entitled to overtime premium pay. Third, a legislative solution must recognize the need for flexibility in the workplace. Lastly, the legislative scheme must provide a clear framework within which employers can operate and employees can seek recourse if there is a violation.

¹⁴⁵. See White, supra note 125, at 95.
V. A PROPOSAL FOR FURTHER STUDY

We suggest a solution with several components: precise cut-offs based on earnings and explicit notification of specific employment terms for certain employees. Specifically, workers earning over six and one-half times the minimum wage should not be covered by the FLSA’s overtime pay requirements. Workers who earn below three times the minimum wage may not be classified as exempt administrative, executive or professional employees. Workers earning between three and six and one-half times the minimum wage must negotiate a written wage agreement which contains specific information including wages, whether the employee will receive any overtime pay or compensatory time off for working over a set number of hours and the maximum number of hours that the employee may be asked to work in a week. Such agreements must be signed by both parties before commencement of the employment relationship.

This proposal acknowledges that employees at the low end of the wage scale generally require statutory protection from employers motivated to work them over forty hours in a workweek because of high fixed costs and low marginal costs of employment. We also assume that market forces will permit employees earning at least three times the minimum wage to obtain employment which offers an acceptable work schedule. Employees will be able to choose employment options based, inter alia, on written wage agreements which state the maximum hours an employee may be asked to work.146

Lastly, we assume that employees earning over six and one-half times the minimum wage do not need legislative assistance to enable them to work an acceptable work schedule.147

Obviously, these assumptions require further study, and may require testing. Some employees would undoubtedly earn less money and work longer hours. Low paid administrative, executive and professional workers would likely either earn more money or work fewer hours. Other workers would likely seek to bargain collectively to ensure that they continue to receive overtime pay. Both employers requiring fluctuating workweeks and employees desiring flexible hours

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146. Forty percent of full-time workers would likely forgo some income for a reduction in work hours. See White, supra note 125, at 72.

147. These assumptions are, in part, based upon the theory that individual employees should be categorized by their value (i.e. their wage) and not by where they may fall on an organizational chart. See Reich, supra note 19, at 99.
would likely be afforded such options under our proposal. Overall, any outcome is likely to be more desirable than the current situation because employees will know their rights and employers will know their obligations.

A. Employees Earning Less Than Three Times the Minimum Wage Require Protection

In order to help ensure that employees at the low end of the wage spectrum are not overworked, we propose that employees earning less than three times the minimum wage not be deemed exempt from overtime pay requirements. The Department of Labor has been grappling with the minimum salary administrators, executives and professionals must receive before they may be deemed exempt from the FLSA’s overtime pay requirements.148 Historically, the minimum salary required to be deemed exempt has fluctuated between approximately one and one-half and three times the minimum wage.149 The Department of Labor therefore believes that employees earning a salary less than that minimum should not be deemed exempt administrative, executive or professional employees. We therefore suggest that employees earning three times the minimum wage or less not be treated as exempt administrative, executive or professional employees. These employees must therefore be paid one and one-half times their normal rate of pay for all overtime hours worked.

148. Regulatory changes were proposed to increase the minimum salary in 1981. See 29 C.F.R. § 541.1(f) (1993). The effective date of this amendment to the regulations has been postponed indefinitely. 46 Fed. Reg. 11,972 (1981). There are technically two tests which apply to determine whether such workers may be deemed exempt. Currently, workers earning a salary of $155 per week may be exempt under the “long test” if their exempt duties constitute at least eighty percent of their worktime. Workers earning a salary of $250 per week may be exempt if their exempt duties constitute over one-half of their worktime.

149. The long test is not considered herein as it provides that exempt employees may earn less than the minimum wage.
B. Employees Earning Between Three and Six and One-Half Times the Minimum Wage Require Flexibility and Clear Notice of Employment Terms

Although this segment of the workforce may not require the same protection as those employees earning less than three times the minimum wage, it still may require some equalization of bargaining power. Any such protection, however, must be granted in such a way that it would afford employees and employers much needed flexibility, but not deprive them of clear notice of their respective rights and obligations.

Equiflex options, twelve hour shifts, rotating schedules, business cycles, parental responsibilities, rush orders, and flexible leave policies are just some of the reasons both employers and employees may want to deviate from a forty hour workweek. Compensatory time off in lieu of overtime pay is an option often desired by both employees and employers. The FLSA serves no redeemable purpose by restricting the use of compensatory time and other flexible work schedules.

The U.S. Department of Labor should not dictate specifically which employees must receive overtime pay, especially if the employees may prefer to receive compensatory time off in lieu of overtime pay. Further, regulations should not mandate when employees must have their work time recorded, especially when some employees would find such records demeaning. 150

Rather, before the employment relationship commences, the employer and employee should be required to enter into a written wage agreement which specifies the employee's wage, overtime eligibility, maximum number of permissible work hours and any other equiflex parameters. 151 The individual wage agreement would substitute for the FLSA's maximum hours standard. If employees know at the commencement of their employment relationship about their right to receive overtime pay after working a certain number of hours in a workweek, they will better understand their rights and employers will better understand their obligations. 152 Market forces will then come

151. The wage agreement may also provide for compensatory time in lieu of overtime pay. The benefits of compensatory time off are articulated by Senator Malcolm Wallop (R-Wyo.) in the Congressional Record. 135 Cong. Rec. S3743-44 (daily ed. Apr. 12, 1989) (statement of Sen. Wallop).
152. Employers should also be required to put any statements regarding job security in
in to play to determine which employees will receive overtime premium pay.\textsuperscript{153} Employees should be permitted to decide whether to accept an employment offer based upon an employer’s promises regarding wages, overtime pay, compensatory time off and maximum hours. Employers would then be restricted from altering the wage agreement downward.\textsuperscript{154}

The required wage agreements proposed herein would address several of the predominant problems with the salary basis test. They would provide both employers and employees with clear notice of employment terms. They would also allow employers to tailor schedules to those required by their individual workforces without imposing penalties upon them for doing so. Additionally, they would permit employees to make informed decisions concerning their choice of employment. Finally, wage agreements would eliminate the need to rely upon inconsistent court decisions and constantly changing job duties to determine whether employees are subject to overtime pay premium requirements. Although a method of enforcing such agreements will then be required, there are various formats by which this may be accomplished. For example, labor tribunals or efficient administrative hearings may be used as a quick means of adjudicating wage agreement disputes.

Critics will obviously argue that employees earning over three times the minimum wage still have unequal bargaining power and thus will be forced to work longer hours. Our response is that a national crisis would not result if the workweek is made longer for some employees. Few people will complain about a longer workweek if more people are working, employees are permitted to work flexible such a pre-employment agreement as well so employees are able to more intelligently to make decisions whether to accept a job. For example, a clear statement that an employee is employed at will would serve both to notify employees of their at-will employment relationship and insulate employers from breach of contract suits. However, this aspect of the agreement is not the subject of this article.

\textsuperscript{153} See supra notes 146-47 and accompanying text.

\textsuperscript{154} For example, a six month notice term could be required before a wage agreement could be changed if an at-will employment relationship exists. Without such a term, the employer would be free to offer an agreement and then change the employee’s working conditions right after the employee begins his or her employment. Such a requirement would not affect an employer’s obligations concerning job security, as it would merely state the terms of employment during the employment relationship. Regulations would have to be promulgated which define when the six month notice must be given and whether there may be any exceptions to this general rule. For example, one exception to this general rule would arise when an employee desires to switch from receiving overtime pay to compensatory time for working over a set number of hours.
hours, more low wage earners are covered by the FLSA's maximum hours standard, employees know their rights, employer profits are increased and companies based in the United States are more competitive in international markets. Further, unions can play a vital role assisting employees with negotiating more preferable wage agreements in situations where employers are seeking to take advantage of any unequal bargaining power which may exist. Additionally, an efficient, inexpensive method of enforcing wage agreements would place employees in a much better position to enforce their rights. Lastly, many of the rights afforded employees by the FLSA are currently ignored because employees do not understand their rights and because it is often very burdensome, expensive and time consuming to enforce such rights. There is currently no effective method for employees to enforce their FLSA rights. Although this proposal may not provide absolutely equal bargaining power to employees, it will provide them with clear notice of their rights and more effective ways to enforce those rights.

C. Employees Earning Over Six and One-Half Times the Minimum Wage Would Be Deemed Exempt

Our proposal concerning employees earning over six and one-half times the minimum wage is based upon Congress' recent use of this cut-off in its creation of an exemption for computer analysts. When computers were first utilized, the individuals programming them required advanced degrees. These individuals were clearly professionals. Now, children may be expert computer programmers. The concept of a "professional" as a computer programmer is no longer useful. Another exemption was therefore created for individuals who program computers based on their hourly wage rather than their classification as an executive, administrative or professional employee. Computer programmers and analysts who earn over six and one-half times the

155. One study concludes that employers will prefer to increase wages, and not reduce hours in collective bargaining. See WHITE, supra note 125, at 56. However, collective bargaining can still help ensure that employees are not overworked.
156. See EHRENBERG & SCHUMANN, supra note 20, at 62-83.
157. 29 C.F.R. § 541.312 (1993). Pursuant to Public Law 101-583, payment "on a salary basis" is not a requirement for exemption in the case of those employees in computer-related occupations, as defined in § 541.3(a)(4) and § 541.303 who otherwise meet the requirements of § 541.3 and who are paid on an hourly basis if their hourly rate of pay exceeds six and one-half times the minimum wage provided by § 6 of the Act. Act of Nov. 15, 1990, Pub. L. No. 101-583, § 2, 1990 U.S.C.C.A.N. (104 Stat.) 2871.
minimum wage may now be deemed exempt from the FLSA’s overtime premium pay requirement. These workers were exempted from the overtime pay requirement because they are, “... highly educated, highly skilled and highly paid. They are the backbone of many of the high-technology industries that fuel our growing economy. It is imperative that they be exempted from these provisions so that they are able to provide services as efficiently and productively as possible.”

If the reasons to exempt the computer analysts earning such a wage are valid (for example, key employees are more efficient and productive if exempt from the FLSA’s overtime pay requirements), then all employees earning such a wage should be exempt from the FLSA’s overtime pay requirements. We therefore propose that employees earning more than six and one-half times the minimum wage be deemed exempt from overtime pay requirements.

CONCLUSION

The FLSA’s maximum hours standard is in need of an overhaul. The validity of its original objectives is suspect, its effects are largely unknown and compliance is difficult. The swamp of exemptions which currently exists is mired in inconsistencies and antiquated assumptions. The failure of the salary basis test has expedited the need for FLSA reform because of the huge potential exposure left in the wake of the Abshire decision. The mythical forty hour workweek should not be supported by a maze of regulatory requirements having vague objectives. However, some employees should have protection from being overworked.

Admittedly, the solution proposed is not a miraculous “cure-all.” Regulations concerning its implementation must still be drafted to cover a number of issues, such as situations where employees do not earn one set wage, and exemptions may still be required for certain industries. However, the most drastic problems which currently exist will be addressed. The decisions that must be made concerning terms and conditions of employment will be made by the parties most affected — employers and employees — not the courts. We believe this

158. 29 C.F.R. § 541.3(e) (1993).
160. Id.
161. Perhaps the notion of a mandatory wage agreement could be extended to this group as well once a mechanism to properly enforce such agreements is fine-tuned.
solution will permit employees and employers to negotiate wage agreements which account for varied employment schedules desired by both employees and employers, possibly increase employment levels by increasing profits for employers per employee, help prevent low wage earners from working unreasonable workweeks and provide a simpler FLSA to administer and enforce.