NOTE

EQUALIZING WORKERS IN TIES AND COVERALLS: REMOVAL OF THE WHITE-COLLAR EXEMPTION TO THE FAIR LABOR STANDARDS ACT

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I. Introduction

White-collar, middle class workers are working harder and longer hours now than they ever have in the past.[1] Further, white-collar

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[1] *See* JILL ANDRESKY FRASER, WHITE-COLLAR SWEATSHOP: THE DETERIORATION OF WORK AND ITS REWARDS IN CORPORATE AMERICA 17-21 (W.W. Norton & Co. 2001). Fraser states:

> Currently, over 25 million Americans work more than forty-nine hours each week, some a good bit more. Here's how those numbers break down: Nearly 12 percent of the workforce, about 15 million people, report spending forty-nine to

middle-management workers have a waning sense of purpose and less confidence in their work than in the past.[2] To compound problems for these workers, they cannot take advantage of wage and hour protection pursuant to the Fair Labor Standards Act ("FLSA").[3] The white-collar class[4] does not get the benefit of overtime pay and workweek limitations that their blue-collar[5] counterparts do.[6] Regardless, both blue and white-collar workers now share common concerns for job security and satisfaction.[7]

> fifty-nine hours weekly at the office; another 11 million, or 8.5 percent, say they spend sixty hours or more there. Most of these people are white-collar professionals: among them, corporate managers, marketing staffers, investment bankers, office administrators, software designers, lawyers, editors, engineers, accountants, business consultants, and the secretaries, word processors, computer programmers, and back-office clerks who support their activities.

Id. at 21. Fraser gives an example of a typical corporate, white-collar worker's ascent within a company. *Id.* at 17. She tells the tale of Catherine, who rose from a junior management position within a corporation to a higher management position. *Id.* Catherine describes how, in her twenties, she would sometimes work twenty-four hour days. *Id.* This was later modified so that, when Catherine was promoted, she was merely "on call" twenty-four hours a day. *Id.* Fraser recounts a conversation that occurred with Catherine. See FRASER, supra note 1, at 18. Catherine stated:

> At two o'clock in the morning, you would get calls from a customer. But you were still expected to be in the office by 8 a.m. I did it for two years. I'd come home at eight or nine at night. In the midst of that, I had my first back operation. The pace was insane. When you'd get home, you'd go for the wine. And then, pretty much crash and go to sleep.

Id.

[2] *See* CHARLES HECKSCHER, WHITE COLLAR BLUES: MANAGEMENT LOYALTIES IN AN AGE OF CORPORATE RESTRUCTURING 18 (Basic Books 1995).

[3] 29 U.S.C.A. §§ 201-219.

[4] The white-collar class is defined under the FLSA as administrators, professionals and executives. 29 U.S.C.A. § 213(a)(1). White-collar is generally understood as "of or relating to workers whose work usually does not involve manual labor and who are often expected to dress with a degree of formality." http://www.yourdictionary.com/ahd/w/w0127500.html

[5] Blue-collar workers are not explicitly defined in the FLSA, as they are generally considered all workers who do not fit into any exemption in the FLSA. *See* 29 U.S.C.A. §§201-219 (1998). But, the common understanding of blue-collar is "of or relating to wage earners, especially as a class, whose jobs are performed in work clothes and often involve manual labor." http://www.yourdictionary.com/ahd/b/b0344100.html (last visited Oct. 4, 2003).

[6] *See* 29 U.S.C.A. § 213 (1998).

[7] *See* Heckscher, *supra* note 2, at 95. Heckscher gives descriptions of how white-collar workers now perceive their jobs, and the dissatisfaction that has caused middle managers to lose loyalty towards their employers. *Id.* For example, Heckscher offers the following quotes from white-collar workers to illustrate how these workers are fearful of their job safety:

> "We [the middle managers in the company] don't go out to lunch, we're afraid

This note traces the social and historical development of the white-collar class in conjunction with the passage of the FLSA, specifically the White-collar Exemption found in §213(a).[8] Part II argues that the exemption should be eliminated, due to the diminishing of perceived differences between white and blue-collar workers, the original intentions of the passers of the FLSA, and the difficulties in administering the white-collar exemption.[9] Part III examines the historical context in which the FLSA was passed, and the economic and social factors that influenced the legislation.[10] Part IV examines the white-collar exemption and its two major components, the salary basis test and the duties test.[11] These two tests are scrutinized with respect to their purpose in both the past and current workplace, and case studies are used to underscore the incongruous results between societal perceptions and legal applications that the exemption causes.[12] Part V concludes with suggestions on how and why removal of the exemption could serve to streamline the employer's duties under the FLSA and provide white-collar workers with protections that are more consistent with their roles in society.[13]

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the doors will be locked when we get back. I'm not confident about the future. Not many people are these days."

"I don't understand why they bring in people from the outside. They come in and say everything stinks. And we say we did OK without you."

"I'm anxious, I'm fearful, I distrust people now. It's a corporation now, rather than people.

Id. at 40. These statements can be contrasted with statements of blue-collar workers, which demonstrate the same level of job dissatisfaction:

"You got some guys that are uptight, and they're not sociable. It's too rough. You pretty much stay to yourself. You get involved with yourself."

"Proud of my work? How can I feel pride in a job where I call a foreman's attention to a mistake, a bad piece of equipment, and he'll ignore it. Pretty soon you get the idea that they don't care. You keep doing this and you are titled a troublemaker. So you just go about your work."

MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS 21 (Foundation Press 1998). Both the white-collar and blue-collar class express similar dissatisfaction with the social environment and economic realities of their jobs. *See* Malamud, *infra*, note 14.

[8] *See infra* Part I.

[9] *See* discussion *infra* Part II.

[10] *See* discussion *infra* Part III.

[11] *See* discussion *infra* Part IV.

[12] *Id.*

[13] *See* discussion *infra* Part V.

II. Perceived Differences Between Blue And White-collar Workers And These Perceptions' Impact On The Definitions Within The FLSA

American society identifies a difference between the general lifestyles of blue-collar and white-collar workers.[14] This perceived difference stems from the distinctly different historical development of both groups of workers.[15] In this context, Congress passed the FLSA in 1938 at the height of President Roosevelt's New Deal.[16] However, the white-collar exemption written into the statute has its historical precedents in the pre-New Deal labor movements of both classes of

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[14] Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2214-15 (1998). Malamud states:

> While class has not been recognized as a category in American civil rights jurisprudence, class line drawing has long been a pervasive activity of the American legal system. *At least* since the New Deal, Congress and administrative agencies operating in the fields of labor, welfare and tax law have routinely selected categories of people for coverage on the basis of class-like criteria—by which I mean social or economic criteria (such as occupation) that are part of the complex of social and economic distinctions referred to in popular or academic discourse as "class."

Id. at 2215. To illustrate this perceptional difference between white and blue-collar classes, Malamud gives the example of the statements of Lorena Hickok, who issued a reported to president Franklin Delano Roosevelt on white-collar employment in Alabama. *Id.* at 2218. Malamud observes that Hickok made "every effort to preserve their [white-collar workers] dignity . . . " in the suggestions on how to relieve the effects of the Depression on these workers. *Id.* It was suggested by Hickok that white-collar workers would not have to visit relief offices and be subject to fewer home visits by social workers. *Id.* These actions illustrate the societal perceptions of the difference between white and blue-collar workers at the time of the passage of the FLSA. *See id.*

[15] *See* Malamud, *supra* note 14, at 2218.

[16] The New Deal was a series of legislation advocated and passed by the Roosevelt Administration in order to deal with the economic disaster of the Great Depression. *See* AARON ABELL, ET AL., A HISTORY OF THE UNITED STATES OF AMERICA 544 (Fordham University Press 1951). Almost 15,000,000 people were out of work by the spring of 1933. *Id.* In order to deal with this crisis, proponents of the New Deal sought to reform capitalism so all socio-economic groups, including farmers, wage earners, businessmen and financiers, could have a safe financial future. *Id.* The New Deal created government agencies to deal with the problems of the depression. *See id.* Examples of such agencies were: The Works Progress Administration, created to afford work relief and increase employment through the government employment of workers, and The National Youth Administration, created to give cash allowances and employment opportunities to high school and college students. *Id.* at 546. These two acts are exemplary of the types of agencies and programs that passers of the New Deal implemented in order to deal with the Great Depression. *See id.*

workers.[17]

Wage and hour protection for blue-collar workers has a long history in both American custom and law.[18] The earliest American wage regulation took place in some colonies prior to the American Revolution.[19] Yet the most pressing need for government regulation arose in the early twentieth century, due to the influx of immigrants and the migration of people from rural to urban areas.[20] These factors created a situation in which men, women, and children were forced into working long hours in sweatshops for little pay.[21] At that time, the progressive movement[22] supported the adoption of policies utilized in other nations, and recommended state regulation of minimum pay and maximum hours.[23] Already, legislatures had enacted statutes protecting

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[17] *Id.* at 2223.

[18] SAR A. LEVITAN, ET AL., PROTECTING AMERICAN WORKERS 79 (BNA Books 1986). At least one commentator has argued that the idea of mandatory time off of work for a rest period dates back to the ancient Hebrew Sabbath. Peter D. DeChiara, *Rethinking the Managerial Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139, 144 (1993). DeChiara argues that this fact illustrates how mandatory hour regulations have been present since before the government regulation began, and thus was not a new concept at the time of the New Deal. *See id.* This illustrates the long history of wage and hour protections that workers have enjoyed. *See id.*

[19] LEVITAN, *supra* note 18, at 79. American wages have been regulated consistently since pre-colonial times either through customs within the industries being regulated, or by law. *See id.* Further, several colonies actually established scales or set maximum wages for workers. *Id.*

[20] *Id.* Advocates of the limited workday claimed that limiting hours worked would have many benefits. DeChiara, *supra* note 18, at 144. Among those benefits were:

> (1) constricting the supply of labor and thereby raising wages; (2) spreading work among more individuals, thereby reducing unemployment; (3) reducing job fatigue, thereby making workers more productive and less prone to dangerous accidents; and (4) increasing the amount of time workers have to devote to activities outside of work, such as raising a family or engaging in educational, religious, political or other nonwork activities.

Id.

[21] *Id.* Two of the most notorious and significant events in United States labor history, the Haymarket Riot and the Steel Strike of 1919, arose when workers demanded a limited workday. DeChiara, *supra* note 18, at 144.

[22] ABELL, *supra* note 16, at 432. "The progressives favored measures for improvement of social and labor conditions. In fact, the progressives placed in the statute books more social and labor legislation than had been enacted in all previous American history." *Id.*

[23] DeChiara, *supra* note 18, at 144. Wage and hour laws were consistently overturned by the courts based on the idea that the laws interfered with the freedom to contract. *Id. See also* Lochner v. New York, 198 U.S. 45 (1905) (overturning, based on a constitutional right to freedom of contract, a New York law that sought to set the maximum number of hours bakers could work at sixty hours per week); Connally v. General Const. Co., 269 U.S. 385 (1926) (holding that a statute providing "that not less than the current rate of per diem

women and children.[24]

As the blue-collar workers were organizing and progressives were advocating statutory protection for factory workers,[25] white-collar workers failed to undertake any such activity.[26] White-collar workers did not seek to organize because they identified with their bosses.[27] Further, they believed that hard work and free market capitalism would bring them economic success.[28] Moreover, society's perception of white-collar workers was that they should work longer hours, because their hard work would bring more economic advancement.[29] This perception, which existed before and during the time the FLSA was

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wages in the locality" shall be paid to laborers was uncertain enough to be unconstitutional). Regulations that did survive judicial scrutiny were not very kind to workers, and have been described as "not enough to make life rich and a welcome experience, but just enough to secure existence amid drudgery in gray boarding houses and cheap restaurants." DeChiara, *supra* note 18, at 144.

[24] Prior to judicial acceptance of the New Deal, only statutes regulating the hours of women and children, or those regulating jobs that were hazardous to the public or to the workers doing them were deemed to not violate the constitutional right to freedom of contract. *See id.* at 145. *See also* Radice v. People of State of New York, 264 U.S. 292 (1924) (holding that a statute which limited the hours women could work as waitresses per week was not unconstitutional). In addition, these statutes were only passed by the states. DeChiara, *supra* note 18, at 145. Prior to the national crisis of the Great Depression, the Federal government did not attempt to regulate workers hours. *Id.*

[25] *See* ABELL, *supra* note 16, at 432. Blue-collar workers projected an image of class unity. *See* STEVE BABSON, BUILDING THE UNION, SKILLED WORKERS AND ANGLO-GAELIC IMMIGRANTS IN THE RISE OF THE UAW 1 (Rutgers University Press 1991). Babson notes a passage from "The United Auto Worker", the national newspaper of The United Auto Workers, published in 1937. *Id.* The passage describes a union rally: "As though they were one man the workers of Detroit got in motion . . . all in one mass, men and women, Negro and white, all together." *Id.* This is the type of class solidarity that unions portrayed in their early days. *See id.*

[26] Malamud, *supra* note 14, at 2225.

[27] *Id.* Malamud defines this desire of white-collar workers to be like their bosses as "upward identification." *Id.* Malamud further states that the upward identification is crucial to the operation of the American capitalist system of class stratification. *Id.* Also, Malamud uses the theories of Leon C. Marshall to argue that white-collar workers perceived superiority amongst themselves towards blue-collar workers. *See id.* at 2226. Marshall stated, "the fact that some jobs give the holder social position makes them attractive to certain persons." *Id.* These social perceptions explain why some people go into white-collar as opposed to blue-collar work, simply because of perceived prestige over jobs "requiring overalls." *See* Malamud, *supra* note 14, at 2226.

[28] *Id.* This belief seems to be unfounded, based on social science studies from the 1920's and 1930's. *Id.* Interestingly, social scientists observed less class mobility in 1935 than in 1925. *Id.* at 2228.

[29] *Id.* at 2226. As a result of these conditions, it was an inappropriate time for white-collar workers to seek government intervention and protection from long working hours. *Id.* at 2232.

enacted, would persist through the years following its passage.[30]

III. Historical and Economic Factors Leading to The Passage of the Fair Labor Standards Act and The White Collar Exemption

As the Great Depression destroyed the American economy, and also destroyed society's opinions of the proper working conditions for white and blue-collar employees, Congress passed the FLSA in 1938.[31] The FLSA was the final statute in a series of legislative enactments that Roosevelt promoted throughout the 1930's dealing with wage and hour regulation in order to mitigate the depression.[32]

Wage and hour regulation was a key part of the Roosevelt reform plan from the beginning of the New Deal, as is evidenced by its inclusion in the National Industrial Recovery Act of 1933 ("NIRA").[33] Before the NIRA was passed, Roosevelt held a conference with key advisors and included among the topics to be discussed, "short hours as a means of further employment."[34] Some leaders believed that the Great Depression was caused by over-production, and advocated restricting workers' hours as a means to cut production.[35] Further, on the day of the passage of the NIRA, Roosevelt made a speech in which he stated the statute's intended coverage: "[B]y workers I mean all workers —

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30 *See* Malamud, *supra* note 14, at 2232.

31 *See* discussion *infra*.

32 *See* STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION 444 (Robert F. Koretz ed., McGraw Hill Text 1970) [hereinafter LABOR ORGANIZATION].

33 *See* Malamud, *supra* note 14, at 2235. In an early memorandum, Alexander Sachs, who was a Roosevelt advisor and would later go on to become the NRA's first director of the Division of Research and Planning, expressly exempted white-collar workers in "executive, administrative and supervisory positions" from regulation. *Id.* at 2236.

34 *Id.* Senator Hugo Black was a major proponent of the new wage and hour legislation, and his belief in the legislation was based on the concept of work spreading as a means to alleviate unemployment. *Id.* at 2234. Black stated, in a memo to Roosevelt, "our unemployed cannot be put to work unless the National Government legally requires a shorter work week and a shorter work day." *Id.* Black further stated, in a radio address in support of his bill, that "it is not just to continue to exact 50, 60 and in some instances, 70 hours per work week from men and women while others are driven into poverty and misery from unemployment." *See* Malamud, *supra* note 14, at 2234. This theory came to be known as work-sharing, and it enabled the economy to maintain a consistent level of production, since the work done in a long work week would not decline, it would merely be done by more workers. *See id.* Also, benefits would be distributed more fairly because more workers would now be paid wages, and higher wages at that. *See id.*

35 *Id.* Sen. Hugo Black was a proponent of this theory on the cause of the Great Depression. *Id.* at 2235. Black believed that in order to achieve long term stability the economy would have to distribute benefits fairly, and without new growth. *id.*

the white-collar class as well as the men in overalls."[36]

The NIRA created the National Recovery Administration ("NRA"),[37] which was supposed to deal with the implementation of Roosevelt's policies under the NIRA.[38] Despite Roosevelt's intention for the NIRA to protect both white and blue-collar workers, the NRA's decisions consistently reinforced the idea that blue and white-collar workers should be treated differently with respect to hour and wage legislation.[39] The NRA was judicially terminated in 1935,[40] but its upholding of workplace differences between blue and white-collar workers would influence the next pieces of legislation that sought to regulate workers hours and wages.[41]

Roosevelt sent the initial drafts of the FLSA to Congress in 1937.[42] On the same day he sent these drafts, bills containing identical language were introduced into the Senate, in S. 2475, and the House, in H.R. 7200.[43] Similar to the NIRA, the original bills made no distinction

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[36] *See* Malamud, *supra* note 14, at 2255. Roosevelt himself did not have a precise definition of what a white-collar class was, but he did intend to protect it. *Id.* Some documents evidence Roosevelt's intent to exclude professionals from his definition of white-collar, but it is not clear that Roosevelt intended to exempt "executive, administrative and supervisory workers" as earlier memos had indicated. *See id.*

[37] 15 U.S.C.A. § 702 (1966). This section of the NIRA established agencies to administer the NIRA, among them the NRA, The National Emergency Council and The National Resources Committee. *Id.*

[38] Malamud, *supra* note 14, at 2255.

[39] *Id.* at 2278.

[40] *Id.* The Court ordered the NRA to cease operations in the case of Schechter Poultry Corporation v. U.S., 295 U.S. 495 (1935).

[41] Malamud, *supra* note 14, at 2281. When the NIRA was invalidated by the Supreme Court, President Roosevelt further insisted on implementing labor standards. LABOR ORGANIZATION, supra note 32, at 444. Roosevelt deplored the abandonment of federal wage and hour legislation. *Id.* Roosevelt was adamant in getting protection for workers, even in the fact of judicial hostility for that type of legislation. *Id.* The Democratic Party platform of 1936 urged national action on working conditions, by way of constitutional amendment if it was necessary. *Id.* After winning the election, Roosevelt now had a mandate from the people to implement his wage and hour legislation. *See id.*

[42] *Id.* at 446-47. Numerous drafts of the legislation were prepared by the Roosevelt administration. LABOR ORGANIZATION, *supra* note 32, at 445. At the same time, Roosevelt unveiled his plan for reorganization of the federal judiciary. *Id.* It was announced that wage and hour legislation would be passed after the judiciary was reorganized, as the need for wage and hour legislation was considered so important that it would guarantee the passage of the bills reorganizing the courts. *See id.* Upon hearing this, the Supreme Court reversed its positions of minimum wage legislation, and upheld other social legislation such as the National Labor Relations Act and the Railway Labor Act. *Id.* This paved the way for the introduction of the wage and hour legislation that would become the FLSA. *See id.*

[43] *Id.* The original bills proposed that a Fair Labor Standards Board be in charge of

between factory and office workers, and merely excluded office workers from their definition of employee.[44] Thus the protection of the statute did not extend to "any person employed in an executive or supervisory capacity."[45] Nevertheless, the United States Department of Labor ("DOL") expressed an early concern over the exemption, and argued that the exemption should only be given to bona fide executives.[46]

As enacted by President Roosevelt on June 25, 1938, the FLSA exempted from the statute's maximum hour provisions all "executive, administrative and professional" employees.[47] The FLSA did not define these crucial terms, but gave the power to define them to the DOL.[48] Thereafter, this provision came to be known as the "white-collar exemption."[49]

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administering the FLSA, with Congress setting statutory minimum wages and maximum hours. *Id.* at 446. The Board would have had the authority to create non-oppressive wage and hour standards based on minimum "fair" wages and maximum "reasonable" workweeks. *See* LABOR ORGANIZATION, *supra* note 32, at 446. "Extreme flexibility was the keynote of this draft." *Id.*

[44] Malamud, *supra* note 14, at 2286.

[45] *Id.*

[46] *Id.* at 2288. The DOL's opinion had become important because the House proposal of the FLSA had advocated creating a wage and hours division within the DOL to administer the FLSA, instead of the originally proposed board. *See* LABOR ORGANIZATION, *supra* note 32, at 452. Flexibility was once again emphasized in wage and hour regulation in the third proposed FLSA bill in the House. *Id.* at 453. Under this plan, the Secretary of Labor was in charge of administration of the FLSA. *Id.* This plan was the House version of the FLSA that garnered the most support, and was passed on May 24, 1938 by a vote of 314 to 97. *Id.*

[47] *Id.*

[48] LABOR ORGANIZATION, *supra* note 32, at 466. In the original bill, the power to define these terms was going to be given to the Fair Labor Standards Board, with the thought that the definitions would be flexible. *Id.*

[49] The White Collar Exemption does not have a clear legislative history to show what the terms "administrative," "professional," or "executive" mean. *See id.* Most other terms, like "employer," were explicitly defined by the FLSA. *Id.* Specific employers, such as small retailers or agricultural farm owners, were defined and exempted, thus removing speculation from the hands of the DOL. *See id.* This is not the case with the White Collar Exemption, and thus judicial determinations have to be made on a highly fact specific basis. *See* discussion *infra*.

IV. The White Collar Exemption to the FLSA – An Inefficient, Under-protective Mess

A. *General Information on the FLSA*

The FLSA functions to protect workers through regulation of their hours and wages.[50] It does so by regulating three crucial areas.[51] First, the FLSA establishes the federal minimum wage.[52] Secondly, the FLSA regulates child labor.[53] Finally, the FLSA establishes hour regulations.[54]

Section 13(a)(1) of the FLSA exempts executive, administrative and professional workers from the regulations.[55] However, there is no definitive list of occupations and job requirements that satisfy this

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[50] MARK A. ROTHSTEIN, ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 303 (West Legal Publishing 1987). Rothstein goes on to state that although the FLSA seems highly complicated due to the complex statutory definitions of coverage, wages and hours, the FLSA is actually quite simple. *Id.*

[51] *Id.* at 334. As originally passed, the FLSA predicated coverage of employees on the job duties of that employee, not on the nature of their employer's business. *Id.* Employees are covered if they are engaged in commerce or in the production of goods for commerce. *Id.* at 335. By Supreme Court decision, these requirements were meant to cover the "farthest reaches of interstate commerce." *See* ROTHSTEIN, *supra* note 50, at 335; *See also* Overstreet v. North Shore Corp., 318 U.S. 125, 128 (1943).

[52] ROTHSTEIN, *supra* note 50, at 304. Section 6 of the FLSA requires a minimum wage to be paid to all workers, except those who are specifically exempt. *See id.* at 341. The wage does not necessarily have to be hourly. *See id.* However, the wages must be paid in cash or some negotiable instrument. *Id.* Rothstein argues that minimum wage protection is most important to those who hold low-level, unskilled jobs. *Id.* At the time of publication, this amounted to about 85% of the non-supervisory workforce. *Id.*

[53] *See* ROTHSTEIN, *supra* note 50, at 304. Generally, children under the age of twelve are not employable. *Id.* The minimum age for most jobs is sixteen, with some hazardous jobs being restricted to those over eighteen. *Id.* at 358.
Exceptions were made to this general rule for agricultural work and work that children may get as actors or performers. *Id.* The exceptions also apply to such areas as newspaper delivery, evergreen wreath making and employment of the child by a parent or guardian in non-hazardous occupations. *Id.* at 359.

[54] *See id.* at 303. This requirement mandates an employee be paid a minimum wage for all "hours worked", and "hours worked" was given a liberal meaning by an early trilogy of Supreme Court cases. *See* ROTHSTEIN, *supra* note 50, at 345. Employees are entitled to the minimum wage for the first forty hours worked in a week, and at least one and a half times their regular pay rate for additional hours. *Id.* Hours worked was given a liberal construction as well. *Id.* Employees have to be paid of all "physical or mental" exertion, but also for idle time spent in incidental activities. *Id.* These terms were all given liberal construction to, in essence, require an employer to count as hours worked all time that an employee was at their job, regardless of whether they were actively exerting themselves in order to accomplish a task for the employer. *See id.* at 345-9.

[55] 29 U.S.C.A. § 213(a)(1) (1998).

exemption.[56] As a result, courts are required to determine which persons qualified for the white-collar exemption soon after the passage of the FLSA.[57] Currently, the DOL issues guidelines in an attempt to give the courts guidance.[58]

In order to deal with employees who are not easily classified, the regulations require that employees meet two tests to be exempted from the FLSA: the salary basis test, which determines whether an employee is paid hourly or salaried wages, and the amount of those payments; and the duties test, which measures the duties, responsibilities and independence of the employee.[59] An employer must satisfy both of these tests to legally exempt an employee from the FLSA, and enjoy the benefits of that categorization.[60]

Due to the difficulty in complying with the FLSA and in characterizing employees as exempt or not, the FLSA has started to betray its original purpose.[61] The FLSA was intended to deal with the unemployment difficulties of the Great Depression, and to stop the exploitation of workers by management.[62] However, the FLSA forces the current workplace to comply with archaic rules, to the detriment of workers that were supposed to benefit from its protection.[63] Further,

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[56] Michael A. Faillace, *Automatic Exemption of Highly-Paid Employees and Other Proposed Amendments to the White-Collar Exemptions: Bringing the Fair Labor Standards Act into the Twenty First Century*, 15 LAB. LAW. 357 (2000).

[57] *Id.*

[58] *Id.* at 364.

[59] *Id.* (quoting 29 C.F.R. §§ 541.1-542.2 (1994)). The duties test has been defined as "a close scrutiny of the actual duties performed by an individual to determine whether the position is of such a complex nature that it may be exempted from the requirements of the Act." Faillace, *supra* note 56, at 358.

[60] *See* discussion *infra.*

[61] *See* Daniel V. Yager, et al., *Reinventing The Fair Labor Standard Act To Support The Reengineered Workplace*, 11 LAB. LAW. 321 (1996).

[62] *See* discussion *infra.*

[63] Yager, *supra* note 61, at 322. Yager argues that progressive, worker-friendly employment practices are being discouraged by the FLSA. *Id.* For example, Yager lists a number of practices that give more flexibility to a worker's schedule, but are not allowed under the FLSA:

> allowing employees to deviate from the standard 40-hour workweek by working 40-plus hours some weeks in exchange for longer weekends in other weeks;
>
> paying employees for overtime with time and a half compensatory time, thus allowing more family or recreation hours over and above their regular paid leave benefits;
>
> rewarding an employee or team of employees with a financial bonus for exceeding certain production or quality goals;

employers carry a tremendous compliance burden, resulting in a less efficient workplace.[64]

B. *Salary Basis Test*

The salary basis test is easier to satisfy than the duties test in exempting employees from the FLSA, but still gives rise to litigation.[65] The salary basis test queries whether employees have a predetermined level of compensation during each pay period without considering how many hours were worked during that period.[66] This appears to be a relatively simple inquiry, but various factors have created a complex web of problems.[67] For example, an employer's disciplinary method can create an issue as to whether a worker is salaried or not.[68] Further, in an attempt to avoid FLSA requirements, employers restrict overtime pay for white-collar workers as a result of the salary basis test.[69] Finally,

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encouraging and assisting movement of employees among geographically separate facilities within the same company;

allowing professional and other white-collar employees to take unlimited unpaid leave to meet family and personal necessities.

Id. at 321-22. These practices would be considered possible FLSA violations, but they obviously help employees. *See id.*

[64] *Id.* at 325. Yager states:

In addition, the FLSA limits the employer's ability to manage its work force. Businesses are forced to streamline operations and lay off employees in order to cut costs and remain competitive. The lack of flexibility imposed by the FLSA in compensating employees for overtime work adds to the employer's burden by making it difficult to keep operating costs down.

Id. This downsizing is actually contrary to Roosevelt and his advisor's purpose of limiting unemployment.

[65] *Id.* at 366.

[66] *See* 29 C.F.R. § 541.118(a) (1994). This salary basis test has produced a wealth of litigation to deal with minor technicalities that call into question whether an employee is salaried or not, and do not represent Congress' original intention in passing the FLSA. Faillace, *supra* note 56, at 366. These types of problems include but are not limited to: docking of pay for hourly absences, additional compensation beyond salary level for extra time worked by exempt employees, whether the docking was part of an established policy or just simple practice. *See* Shockley v. City of Newport News, 997 F. 2d 18 (4th Cir. 1993) (holding that police officers paid on a salary basis were not exempt because they were subject to disciplinary unpaid suspensions for failure to report to work).

[67] *See* Yager, *supra* note 61, at 337-38.

[68] *See id.* An employee is not a salaried worker if he is subject to a suspension without pay for less than a full week. *Id.* The first case to deal with this problem was Klein v. Rush-Presbyterian-St. Luke's Hospital, 990 F. 2d 279 (7th Cir. 1993); *see also* discussion *infra* Part IV(c).

[69] Yager, *supra* note 61, at 338. Courts have interpreted the language of the DOL's Regulations stating that an employee's pay "must not bear a direct causal relationship to the

partial day absences have also thrown a wrench in the works of the salary basis test.[70] In each of these situations, workers who were paid a fixed amount regardless of the time they worked have sometimes been classified as non-exempt, because they did not receive their paychecks in their entirety.

The salary basis test is simpler than the duties test, but there are enormous difficulties in its application.[71] The problems discussed above become more clear through a case study.[72]

C. *Case Study Analysis*

The complexities of the test become evident in comparing two cases, which were decided somewhat contrary to intuition: *Cooke v. General Dynamics Corp.*[73] and *Klein v. Rush-Presbyterian-St. Luke's Medical Center.*[74] One commentator has observed, "this salary basis test has resulted in an inordinate amount of senseless litigation over minor technicalities that in no way reflect Congress' original intent in passing the FLSA."[75] The following analysis of these two cases demonstrates the problem.[76] Accordingly, the case study reveals the

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quality or quantity of the work performed," as a limitation on overtime that a worker than an employer is seeking to classify as exempt. *Id.* Thus, overtime is not seen as a viable option for employee compensation for those employers attempting to avoid the provisions of the FLSA. *See id.* Yager goes on to note the irony of this rule is that employers are discouraged from giving away more wages to employees who work longer hours, when the original intent of the FLSA was to adequately compensate workers in these situations. *Id.*

[70] The current standard in many Circuits is that if an employer's actions in deciding how to compensate an employee for a partial day absence resemble "pay docking" in the traditional sense of the word, then the employee is not salaried. *Id.* at 338-39. Under this rule, which is implied in the regulations, an employer must pay a salaried employee for the whole day, even if the employee only worked part of the day in order to avoid the implication that pay is being "docked." *Id.* District courts have taken this interpretation even further, and implied that an employer cannot charge a partial day absence even when a paid leave account exists. *Id.*; *see also* Thomas v. County of Fairfax, Va., 758 F.Supp. 353, 366 (E.D. Va. 1997). Another irony exists in this situation, as Yager notes. Yager, *supra* note 61, at 339. "The net result is that many employers accommodate the rule by requiring their employees to take leave in full-day increments." *Id.* The irony of this situation is that workers are deprived of pay when they are willing to work, which is contrary to the original intentions of the FLSA. *Id.*

[71] *See* discussion *infra* Part IV(c).

[72] *Id.*

[73] Cooke v. Gen. Dynamics Corp., 993 F. Supp. 50 (D. Conn. 1997).

[74] *Klein*, 990 F. 2d at 279.

[75] Faillace, *supra* note 56, at 365-366.

[76] *See* discussion *infra.*

difficulties in administering the salary test by examining two similar compensation methods – both of which society would not consider to be a salaried form – and how courts view these compensation methods contrary to societal perception.[77]

Cooke v. General Dynamics Corp. dealt with workers who were required to work eighty hours every two weeks, and thus were considered by their employer to be salaried workers.[78] The District Court for the District of Connecticut had to decide whether a mandatory deduction from a salaried employee's vacation and personal time violates the salary basis test, when that employee does not work the minimum forty hours per week.[79] Specifically, the problem in *Cooke* was that the plant in question closed over the winter holidays.[80] Workers could either take time off without pay or use their paid benefit time.[81] If an employee did not have enough vacation time and wanted to be paid during this period, General Dynamics Corp. required that the hours be considered "unpaid personal," and had the employees borrow personal time against future accruals.[82] Faced with these facts, the Court had to decide if the employees were considered salaried under the FLSA.[83]

The District Court held that General Dynamics Corp. carried its

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[77] *See* discussion *infra*.

[78] 993 F. Supp. at 50. The workers in *Cooke* were classified by General Dynamics Corp. as "salaried exempt" workers for FLSA purposes. *Id.* at 50-51. These workers performed duties such as parts ordering, contract accounting and logistics work in the production of submarines. *Id.* The court chose not to decide if the work performed by the plaintiffs was discretionary enough to satisfy the duties test for an exemption. *See id.* This work can easily be considered clerical, such that a duties test analysis may have been necessary. *See* discussion *infra* Part IV (d).

[79] *Cooke*, 993 F. Supp at 53. The situation the workers in *Cooke* found themselves in was as follows: "If an individual plaintiff worked less than eight hours per day, he or she was required to make up the time on another day during the same work week or was required to use paid benefit time (sick leave, vacation or personal leave) in order to record a minimum of forty hours per week." *Id.* at 50. Further, plaintiffs were required to record all the hours that they worked. *Id.* at 49-51. When weather problems prevented workers attendance at work, this time had to be made up or charged as vacation time. *Id.* General Dynamics Corp. even went so far as to charge the workers for time missed at work to be deposed in this case. *Id.* at 51.

[80] *Id.*

[81] *Cooke*, 993 F. Supp. at 51.

[82] *Id.* at 51-52.

[83] *Id.* This is the type of fact sensitive inquiry that courts have been forced to deal with due to the unclear definitions and societal perceptions of who falls into the blue and white-collar categories.

burden and proved that the employees were salaried under the FLSA.[84] In doing so, the Court relied on the Department of Labor's definition of a salary basis to decide the issue.[85] The Court also utilized a fairly loose standard in interpreting the Department of Labor's regulation, by adopting the holding of *Auer v. Robbins*.[86] Using this broad standard, the Court held the workers were salaried for the purposes of the FLSA.[87] In making its decision, the Court relied upon subjective elements such as the nature of General Dynamics Corp.'s business, and the need to "carefully account for the hours charged to various government projects on which plaintiffs worked."[88] The subjective determination made by the District Court shows the salary test has become highly fact-sensitive, and can be decided contrary to societal perceptions as to what a salary is.[89]

In *Cooke*, the Court also noted that other circuits have taken a

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[84] *Cooke*, 993 F. Supp at 55.

[85] *Id.* at 53. The regulations provide that an employee is paid on a salary basis as follows:

> 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.*

29 C.F.R. § 541.118 (1994) (emphasis added). The italicized text was the crux of the issue for the court to decide. *See Cooke*, 993 F. Supp. at 52. The district court clarified this test by stating, "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." *Id.*

[86] *Id.* at 53. *See also* Auer v. Robbins, 519 U.S. 452 (1997). *Auer* adopted an approach to interpreting the salary test that was consistent with the DOL. *See id. Auer* gave deference to the Secretary of the DOL's opinion, and rejected a wooden requirement to decide who was salary exempt. *Id.*

[87] The court stated:

> Neither the fact that plaintiffs were required to work and account for eight hours per day, forty hours per week, nor the fact that they were occasionally paid overtime, undermines the reality that each plaintiff regularly received each pay period . . . 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.

Cooke, 993 F.Supp. at 56.

[88] *Id.* at 55.

[89] *See* discussion *infra*. Society would normally determine that a person who has to account for hours they miss during a workweek is actually being paid only for the hours they have worked, and thus not a salaried employee. The District Court in *Cooke* decided differently, which exemplifies the difficulties that both employees and employers can have in deciding who is salaried and who is not salaried.

different approach in deciding cases with similar fact patterns.[90] Specifically, the Court mentioned *Klein v. Rush Presbyterian-St. Luke's Medical Center*, which held that a policy of docking comp time for every hour an employee missed work was against the spirit of the white-collar exemption.[91] Thus, the plaintiff in *Klein* was not a salaried employee for purposes of the FLSA.[92] In relevant part, Klein was a nurse at Rush-Presbyterian-St. Luke's Hospital, where she was paid on a salary basis.[93] In 1990, she was dismissed, and she brought suit against the Hospital to recover unpaid overtime.[94] Under these circumstances, the Seventh Circuit Court of Appeals found that Klein was not a salaried employee for the purposes of the white-collar exemption.[95] Applying the same regulations as the District Court did in *Cooke*, the Circuit Court found that Klein was not a salaried employee because she was not paid the same amounts regardless of the number of hours she worked.[96] The Court engaged in a complex factual inquiry into the working of the positive and negative comp time system to reach its decision.[97] In essence, the Seventh Circuit adopted a case-by-case, fact-sensitive approach in deciding who qualified as a salaried

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[90] *Cooke*, 993 F. Supp at 52. The court also stated, "The United States courts of appeals have split on the issue of whether a docking of pay must have actually occurred to place an employee outside the scope of the exemption." *Id.* The court then observed that the Fifth, Eighth and Eleventh Circuits require an actual pay deduction, while most circuits have read the regulation in the exact opposite manner. *See id.*

[91] *See* 990 F.2d at 284.

[92] *Id.* at 280-81.

[93] *Id.* Klein was hired in 1979 on a per hour basis. *Id.* In 1982, the Hospital changed over to a bi-weekly salary basis, and instituted a number of changes in working hour policy. *Id.* Each nurse was paid for eighty hours of work each two weeks. *See* Klein, 990 F. 2d at 281. Further, any hours worked in excess of the eight hours per day was put in a comp time "bank" as positive comp time. *Id.* The nurses could then draw on whatever positive hours they had in their bank for additional time off when it was needed. *Id.* However, a nurse that worked less than an eight-hour shift was required to supplement the missed time with positive comp time, or have their "bank" go into negatives. *Id.* Nurses could be paid for positive time if they wanted, but were never charged for negative comp time. *Id.* Klein was subject to this policy, but her supervisors were not. *Id.*

[94] Klein, 990 F. 2d at 282.

[95] *Id.*

[96] *Id.* at 284.

[97] *Id.* at 279-84. The court reasoned that the negative comp time policy was analogous to a policy in which salaries were docked, and therefore the policy was more like an hourly rate of pay than a salary basis. Lawrence Peikes, *Tightening the White-collar Exemptions-The Courts Breathe New Life Into the Fair Labor Standards Act*, 10 LAB. LAW. 121, 133 (1994). Peikes goes on to criticize the decision because it was "unfaithful" to the plain language of the DOL's regulations and the intent of the FLSA. *See id.*

employee.[98] Ultimately, the holding of *Klein* is that a nurse who is subject to comp time procedures is not a salaried employee, even though she has a guaranteed bi-weekly payment due to them.[99]

These two cases go against the common sense definition of white and blue-collar workers.[100] A nurse, a well-educated professional, is deemed unsalaried under the FLSA because she is subject to an overtime policy allowing for increased pay.[101] However, an employee who performs the traditional clerical tasks of an office worker is considered salaried, even though she is subject to similar comp time policies.[102] These inconsistencies, along with the conflicting definitions that various circuits employ when evaluating white-collar workers, evidence that the salary portion of the white-collar exemption to the FLSA is difficult to theoretically conceive and is not applied with any uniformity.[103] This lack of consistency frustrates the purposes of the FLSA and stands contrary to societal perceptions on what a salaried employee is.[104] Therefore, the salary basis test should be eliminated from white-collar exemption analysis.

D. *Duties Test*

The duties test has generated even more questions and litigation in determining what duties constitute professional, administrative or executive capacities.[105] Certain statutory requirements aid in deciding which workers qualify, but the determination still remains a question of fact in most situations.[106] Regulations promulgated by the Department

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[98] *Id.*

[99] *See Klein*, 990 F.2d at 279. The holding of this case stands directly opposite *Cooke*, in that workers in both cases were paid through very similar compensation plans. The societal perception is that both of these groups of workers should be considered non-salaried, or that, at least, these similarly situated workers both fall into the same definition, either salaried or non-salaried.

[100] *See* discussion *supra* Part II. White-collar workers were traditionally believed to be better educated and in a better position to bargain with employers, and therefore not needing the governmental protections of the FLSA. *Id.* Further, white-collar jobs were considered salaried and discretionary. *Id.*

[101] *See Klein*, 990 F.2d at 279.

[102] *See Cooke*, 993 F.Supp. at 50.

[103] *See* discussion *infra* Part IV (c).

[104] *See* discussion *infra.*

[105] Mark J. Ricciardi & Lisa G. Sherman, *Exempt or Not Exempt Under the Administrative Exemption of the FLSA....That is the Question*, 11 LAB. LAW. 209 (1995).

[106] *Id.* at 211-12.

of Labor's Wage and Hour Division define the duties that will satisfy the exemption with respect to professional,[107] executive,[108] and administrative workers.[109] Further, if an employee has work

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[107] A professional employee is defined by the regulations as any employee:

(a)whose primary duty consists of:

(1) work requiring knowledge of an advanced type of science or learning acquired by a prolonged course of specialized intellectual instruction or (2) work that is original and creative in a recognized field of artistic endeavor or (3) teaching, tutoring, instructing or learning . . . as a teacher in a school system or educational establishment or (4) work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming and software engineering; and whose work requires the consistent exercise of discretion and judgment; and

(b) whose work is predominantly intellectual and varied in character; and

(c) who does not devote more than twenty percent of his time in activities which are not an essential part of and necessarily incidental to the work described in paragraphs (a) through (c); and

(d) who is compensated on a salary basis not less that $170 per week exclusive of board, lodging and other facilities.

29 C.F.R. § 541.113 (1994).

[108] The executive exemption requirements have six duties that are defined in the regulations. The regulations state:

The term employee in a bona fide executive capacity in section 13(a)(1) of the Act is defined by the regulations as an employee: (a) whose primary duty is managing the enterprise in which he is employed or of a customarily recognized department thereof; (b) who customarily and regularly directs the work of two or more other employees; (c) who has the authority to hire or 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; (d) who customarily and regularly exercises discretionary powers; and (e) who does not devote more than twenty percent of his time, or forty percent in the case of retail and service establishments, not directly related to the duties in paragraphs (a) through (d); and (f) who is compensated . . . on a salary basis at a rate of not less than $155 per week. . .exclusive of board lodging and other facilities . . . shall be deemed to meet all the requirements of the section.

29 C.F.R. § 541.1 (1994).

[109] Ricciardi, *supra* note 105, at 212-15. The regulations define an administrative employee as any employee:

whose primary duty consists of either:

(1) the performance of office or nonmanual work, directly related to management policies or general business operations of his employer or his employer's customers, or

(2) the performance of functions in the administration of a school system, or educational establishment . . . and who customarily and regularly exercises discretion and independent judgment; and

(1) who regularly and directly assists a proprietor or a bona fide executive or administrative employee, or (2) who performs work along "specialized

responsibilities that can be considered both administrative and managerial, an employee can qualify as exempt through the combination requirement, which allows certain employees to achieve an exempt status even though they cannot satisfy one exemption in its entirety.[110] These fact-sensitive inquiries have created a great deal of litigation.[111] Further, the duties test leads to counterintuitive decisions on who qualifies as exempt from the FLSA due to the fact sensitive nature of the test.[112]

The case of *Walling v. General Industries Co.*[113] was the first to

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> or technical lines requiring special training, expertise or knowledge", or (3) who executes under only general supervision special assignments and tasks; and who does not devote more than twenty percent of his time, or forty percent in the case of retail or service establishments not directly related to the duties in paragraphs (a) through (c); and who is compensated on a salary basis at a rate of not less than $155 per week exclusive of board, lodging or other facilities, shall be deemed to meet the requirements of this section.

29 C.F.R. § 541.2 (1994).

[110] Ricciardi, *supra* note 105, at 214. This is a stricter test for the employee to meet, because the employee must meet the stricter requirements of both salary and non-exempt work. *Id.* This situation usually occurs when an employee supervises two or more other employees and therefore qualifies for the executive exemption on some level. *Id.* These types of jobs also require a considerable amount of administrative work, so the employee can combine their administrative and executive duties to satisfy the requirements of the exemption. *Id.* at 215-15. Typically, an office manager who supervises more than two other employees and performs the necessary administrative work that goes along with this type of responsibility will qualify for the combination exemption if the stricter salary and non-exempt work requirements are met. *Id.*

[111] This fact sensitive inquiry that has lead to litigation actually serves to counter act one of the primary purposes of the FLSA: the FLSA was passed as part of Roosevelt's "Share the Work" effort, as even before the NIRA was passed work spreading was recognized as the official reason to restrict the hours that people could work. Malamud, *supra* note 14, at 2237. Top officials in the Roosevelt White House theorized that unemployment could be curbed if more people were put to work for shorter hours. *See id.* Ironically, the large amount of litigation and overall planning problems that have become synonymous with application of the white-collar exemption are actually serving to employ fewer white-collar workers. *See* discussion *infra*. This is further proof that the FLSA white-collar exemption has outlived its purpose and should be removed. *See* discussion *infra* Part V.

[112] Faillace, *supra* note 56, at 357-8. Faillace offers the example of a worker who has attained the position of account manager with a company, and earns roughly $95,000 per year. *Id.* at 357. Another example offered is that of a television news director who earns nearly $62,000 per year for assembling portions of the newscast and doing other pre-production work. *Id.* Both of these workers are considered non-exempt for FLSA purposes. *Id.*

[113] 330 U.S. 545 (1947) (holding that the Court of Appeals decision which stated that employees were performing substantial executive activities is upheld based on the concept that the general duties that a person performs decide that persons exempt or non-exempt

decide who is exempted from the FLSA under §13(a)(1), and remains the seminal case on the duties test.[114] In *Walling*, the United States Supreme Court decided that an employee's overall duties should be considered in light of all the employee did, in order for an employer to classify an employee as exempt.[115] Therefore, each inquiry on this topic would be highly fact sensitive.[116] This intense factual analysis has ultimately confused both employers and employees as to who is exempt.[117] Further, the test has lead courts to decide seemingly similar cases in distinctly different ways.[118]

The administrative exemption under the duties test offers an employer the best opportunity to exempt an employee from the FLSA, rather than the executive or professional exemptions.[119] This category is open to the most liberal reading, thus making classification as an exempt employee the least difficult.[120] Notably, the administrative

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status under the FLSA).

[114] *Walling* concerned engineers in the plant of General Industries Co. who were in charge of the plant powerhouse and performed duties generally incidental to the their typical job of supervision of a highly mechanized operation. *Id.* at 549. The engineers signed an agreement with General Industries stipulating that the engineers desired to be considered foremen and for their privileges and salary to reflect this fact. *Id.* at 550. The engineers did work that required immediate and continuous supervision of all machines in the powerhouse, and no other employees but the engineers were qualified to do this type of supervision. *Id.* The engineers spent a small amount of time oiling and cleaning the machines, but these activities were incidental to the supervision that required most of the engineers' time and effort. *Id.*

[115] *See id.*

[116] *See id.*

[117] Faillace, *supra* note 56, at 368.

[118] *Id. See also* Barner v. City of Novato, 17 F.3d 1256 (9th Cir. 1994) (holding that police captains and lieutenants had the primary duty of management for FLSA exemption purposes); Berg v. Newman, 982 F.2d 500 (Fed. Cir. 1992) (holding that government GS-12 employees who were electronic technicians were not to be considered exempt employees)

[119] Ricciardi, *supra* note 105, at 213.

[120] Faillace, *supra* note 56, at 367-68. Faillace goes on to state that:

> The administrative exemption is the most controversial of all exemptions because employers view it as the "catch-all" exemption for employees who do not qualify as executives, professionals, or outside sales person. The reason for this is that the test for this exemption does not have any of the specific requirements of the other exemptions, such as management of two or more employees, or completion of a higher degree. Essentially, an individual can be classified as an administrative exempt employee if his or her primary duty consists of either the performance of office work of non-manual work directly related to the management policies or general business operations of the employer . . . .

category is the easiest to satisfy because many employees assume managerial duties.[121] Furthermore, an employee can qualify for the administrative exemption when the employee's primary duty is office or non-manual work related to management policies or business operations of the employer.[122] Additionally, only employees whose work is of "substantial importance to management" fall under the administrative exemption.[123]

The second element an employer must show to qualify for the administrative exception is the "exercise of discretion and independent judgment."[124] Discretion and independent judgment is specifically defined, but employers confuse the terms with the use of an acquired skill taught to the employee.[125] The decisions that an administrative

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Id. at 367-68 (internal citations omitted).

[121] Ricciardi, *supra* note 105, at 213. Even though the exemptions are to be construed narrowly, the managerial duties test is the broadest test available to employers seeking to categorize workers as exempt from the FLSA. *See id.*

[122] *Id.* at 216 (citing 29 C.F.R. § 541.206(a) (1994)). To satisfy the primary duty rule, the fifty percent rule has been promulgated. Ricciardi, *supra* note 105, at 217. A worker who spends more than fifty percent of his time in a managerial role is usually considered to be engaging in the management of the business of the employer. *Id.* Yet, time is not dispositive, as relevant factors such discretionary power, freedom from supervision and the salary of the worker compared to other workers can be considered as factors in determining if an employee is concerned with management. *Id.* This test has further been stated as dividing into two questions. Faillace, *supra* note 56, at 368. The questions are (1) Are the employees' primary duties more closely related to the "production" or to the "administration" within the meaning of the statute and the regulations and (2) if the work is closely related to the administration, is the work performed by an employee of substantial importance to the employer or its customers. *Id.*

[123] Ricciardi, *supra* note 105, at 218-19. Interpretations of this standard recognize that specific rules cannot be set out to prove exactly when work becomes of substantial importance to management or the operation of the business. *Id.* Ricciardi gives the example of a cashier at a bank to illustrate this point:

> For example, a cashier at a bank performs work at a responsible level to qualify as performing work of substantial importance. On the other hand, bank tellers, bookkeepers, secretaries and clerical employees who hold "run-of-the-mine" [sic] positions are not performing work directly related to management policies or business operations.

Id. at 218. (internal citations omitted). Ricciardi further clarifies the position by stating:

> Employees who normally formulate or participate in the formulation of policy or exercise authority in 'substantial respects, financial or otherwise,' qualify as making 'real decisions in significant matters.' Example include personnel administration, labor relations, research, planning, or assisting a management official in carrying out the executive or administrative function of that official.

Id. at 218-19. (internal citations omitted).

[124] *Id.* at 219.

[125] *Id.* "The meaning of discretion and independent judgment is explained in the

employee makes need not be final in order to qualify for the exemption.[126] These standards are all subjective, thus making an administrative employee difficult to define.[127]

The other two exemptions - the professional and executive exemptions - are even more difficult to satisfy because they have specific requirements that are not present in the administrative employee exemption.[128] An executive is easier to define, because the FLSA sets forth specific numbers of people that must be overseen by the employee for her to qualify as an executive.[129] A professional is also easier to define than an administratively exempt employee.[130] The

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interpretations:

> (a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term as used . . . implies that the person has the authority or power to make an independent choice, free from immediate discretion or supervision and with respect to matters of significance."

Ricciardi, *supra* note 105, at 219. (internal citations omitted).

[126] *Id.* at 220. As a summary, Ricciardi includes a list of examples of positions that are exempt or non-exempt. Ricciardi states:

> Although job titles are not determinative, the interpretations recognize the following positions as exempt:
>
> 1.Assistant to a Proprietor, Executive or Administrative Employee, which include: Executive Assistant to president, Confidential Assistant, Executive Secretary, Assistant to the General Manager, Administrative Assistant, Assistant Manager and Assistant Buyer.
>
> 2.Staff Employees, which include: tax experts, insurance experts, sales research experts, wage-rate analysts, investment consultants, foreign exchange consultants, statisticians, credit managers, purchasing agents, buyers, safety directors, personnel directors and labor relations directors.
>
> 3. Persons who perform special assignments: lease buyers, field representatives of utility companies, location managers of motion picture companies, district gaugers for oil, special organization planners, customers' brokers (in stock exchange firms), account executives (in advertising firms) and contact or promotion persons.
>
> The interpretations identify the following positions that do not qualify for the administrative exemption: bank teller, messenger/runner, and inspector.

Id. at 220-21. (internal citations omitted).

[127] *See* Faillace, *supra* note 56, at 367-68.

[128] *Id.*

[129] *Id.* "For an employee to qualify as an executive, he or she must: (1) have as his or her primary duty the management of the enterprise in which he or she is employed; and (2) customarily and regularly direct the work of two or more other employees." *Id.* Because there is a specific number of employees that must be overseen to qualify as an executive, it is more difficult for an employer to place questionable employees into the executive exemption. *Id.*

[130] *See id.* at 367. "A professional must primarily perform 'work requiring knowledge of

exemption is best defined in terms of common understandings within industries as to who is and who is not a professional.[131] Even though this exemption is considered the more easily defined, it is still highly subjective and fact sensitive.[132] Although the professional and executive exemptions do not generate the same amount of litigation and problems for employers that the administrative exemption does, they are still difficult to determine and lead to a fair share of wasteful litigation.[133]

In light of these fact sensitive inquiries, a number of commentators have called for a reworking of the duties test, in order to make it applicable to the current workplace.[134] An additional problem cited by critics of the duties test is that the burden to prove exempt or non-

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an advanced type . . . acquired by a prolonged course of specialized intellectual instruction and study' or work that is 'original and creative in character in a recognized field of artistic endeavor." *Id.* (internal citations omitted). Nonetheless, even though professionals are easier to define than administrative employees, there have been problems with the definition of professionals even before the FLSA was passed. *Id.* Under the NRA, the editorial newspaper workers attempted to unionize and be subject to wage regulation. *See* Malamud, *supra* note 14, at 2267-68. In trying to decide if editorial employees of newspapers were subject to the NRA, a number of members of the Newspaper Guild, a trade organization formed for the purpose of unionization, testified in front of the NRA. *Id.* Among the statements made were, "We object to being classified as professional men and women for the purposes of depriving us of the NRA", and "[Designating reporters who earn more than $35 a week as professionals] is the highest compliment that has been paid to us since Edmund Burke looked above the clock in the House of Commons one day and dubbed us the Fourth Estate." *Id.* (internal citations omitted). Even what is considered to be a simple inquiry into the nature of an exempted employee can be difficult to define. Other commentators have pointed out the difficulties with the professional exemption. "When dealing with an actor or dentist, this exemption is easy to apply. Unfortunately, the application is not always so clear-cut, especially when dealing with professions that were not as prevalent when the regulations were drafted." Yager, *supra* note 61, at 333.

131 *Id.* Yager goes on to examine the problems that have arisen in the news media in defining professional employees. *Id.* DOL regulations dealt with television announcers and newspaper writers, yet one air reporters were note specifically included in the regulations. *Id.* Litigation arose on virtually every aspect of employee functions, in an effort to determine if the employees used any "original or creative" talents in their on-air reports. *Id.* Yager states:

> Ultimately the court concluded that the employees 'could' be exempt because there was evidence that they use 'originality, creativity, invention, imagination or talent.' Nevertheless, the court determined that they were not artistic professionals because their work was not 'primarily' inventive or creative.

Id.; *see also* Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990).

132 *See* Faillace, *supra* note 56, at 367-68.

133 *Id.*

134 *Id. See also* DeChiara, *supra* note 18, at 186 (proposing a statutorily defined workweek augmented by comp time for managers and professionals).

exempt status is on the employer.[135] Further, commentators argue that judicial interpretations have gone beyond the plain language of the FLSA, and even the legislative intent of the passers of the legislation.[136] As previously stated, these problems arise because courts are attempting to apply fifty-year-old legislation to a dramatically different workplace and different employer-employee relationships than the New Deal legislators could have imagined.[137] The duties test has become obsolete in its application and cannot be administered properly in its current form.[138] This impairment is a valid justification for the duties test's removal from the FLSA.[139]

V. Conclusion

The White-collar Exemption to the FLSA should be removed because it has ceased to be relevant in the workplace of the twenty-first century.[140] This over fifty-year-old legislation in incapable of dealing with the flexibility that the current work environment demands.[141] Further, the sociological differences in class between blue and white-collar workers that was present at the time of the passage of the FLSA has eroded at the present time.[142] Therefore, because the original foundations upon which the legislation was passed are no longer applicable, and the exemptions generate confusing and wasteful litigation without sufficiently protecting American workers, the exemption is not presently applicable.

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[135] *See* Faillace, *supra* note 56, at 364. "The employer has the burden of proving by clear and convincing evidence than an exemption applies to specific employee." *Id.* These employee exemptions are to be "narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Id.* at note 29 (quoting Reich v. Haemonitics Corp., 22 F. Supp. 512, 516 (D. Mass 1995)).

[136] Faillace, *supra* note 56, at 365-366.

[137] *See id.*

[138] *See id.*

[139] *See id.*

[140] *See* discussion *supra*.

[141] *Id.*

[142] *See* discussion *supra* Part II.