Order Code RL32323

CRS Report for Congress

The Fair Labor Standards Act: Defining "Professional" for Overtime Pay Purposes Under Section 13(a)(1)

March 30, 2004

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

Prepared for Members and Committees of Congress

The Fair Labor Standards Act: Defining "Professional" for Overtime Pay Purposes Under Section 13(a)(1)

Summary

The Fair Labor Standards Act of 1938, as amended, is the basic federal statute dealing with minimum wages, overtime pay, and related issues. Section 6 of the Act prescribes minimum wage requirements; Section 7, those relating to overtime pay. Section 13 sets forth a series of exemptions. Under current law, Section 13(a)(1) provides that Section 6 and Section 7 "shall not apply" with respect to:

> ... any employee employed in a bona fide executive, administrative, or professional capacity ... (as such terms are defined and delimited from time to time by regulations of the Secretary...)

Early on, the Secretary determined that a worker, to be *bona fide*, would need to be *salaried* (as opposed to being paid at an hourly rate). In addition, the Secretary prescribed two general tests or requirements. First. A worker had to be paid at a rate befitting an executive, administrator or professional. Second. A worker had to perform the actual work (duties) of an executive, administrator or professional.

On March 31, 2003, the Department of Labor (DOL) proposed a new regulation governing implementation of Section 13(a)(1), increasing the earnings thresholds and redefining the concepts of executive, administrative, and professional. The increased threshold levels sparked little controversy; but the new definitions of executive, administrative, and professional which, it was alleged, would significantly broaden the exemption proved contentious. In general, the proposed regulatory revision seems to have won support from employers — but it has been strongly opposed by unions.

A request by DOL for public comment produced about 80,000 responses. The pending revision has been controversial and has resulted in a number of legislative proposals that would, in various ways, restrict the ability of DOL to move forward with the new regulation. During consideration of the FY2004 Labor, Health and Human Services, Education, and Related Agencies Appropriations bill (H.R. 2660), the Senate (in action subsequently endorsed by the House) adopted language that would have prevented DOL from proceeding with the full regulation. However, the conference on the bill (H.R. 2673, now P.L. 108-199) deleted the restraining language. See also H.R. 2665 by Representative Peter King (R-NY), S. 1485 by Senator Edward Kennedy (D-MA), and S. 1611 by Senator Arlen Specter (R-PA). Early in the second session of the 108th Congress, DOL still had the proposed rule under review.

This report focuses, narrowly, upon the redefinition of "professional" for overtime pay purposes under Section 13(a)(1) including possible impacts for veterans. It will not be updated.

Contents

The Fair Labor Standards Act: Defining "Professional" for Overtime Pay Purposes Under Section 13(a)(1)

On March 31, 2003, the Department of Labor (DOL) proposed a major revision of the existing regulation (29 CFR 541) governing Section 13(a)(1) of the Fair Labor Standards Act (FLSA) (i.e., minimum wage and overtime pay treatment of *bona fide* executive, administrative and professional employees).[1] The proposal sparked wide controversy and concern — and considerable confusion.[2] Assertions about what the proposed rule would and would not do (if promulgated essentially in its proposed form) — particularly with respect to veterans, but for other workers as well — have been voiced on both sides of the issue. In Congress, efforts to block full implementation of the proposed rule were debated and approved both in the House and Senate but, ultimately, were not enacted.[3] In early 2004, DOL was proceeding with the rulemaking process.[4]

Through the years, 29 CFR 541 has been contentious and has been the subject of diverse litigation. This report focuses, narrowly, upon the definition of "professional" (both as it appears in the existing regulation and in the proposed rule), including problems associated with interpretation and implementation of the proposed rule, and examines how the change in the definition of "professional" might impact certain groups of workers.[5]

---

[1] For background, see CRS Report RL32088, *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, by William Whittaker.

[2] See comments of Assistant Secretary of Labor for Employment Standards Victoria A. Lipnic, quoted in Kirstin Downey, "Firms Plan Expansion of Overtime Exemptions," *The Washington Post*, Jan. 29, 2004, p. E4.

[3] During consideration of the FY2004 Labor, Health and Human Services, Education, and Related Agencies Appropriations bill (H.R. 2660), the Senate (in action subsequently approved by the House) adopted language preventing DOL redefinition of the terms "bona fide executive, administrative, or professional." The conference on that bill (H.R. 2673, now P.L. 108-199), deleted the restraining language. See also H.R. 2665 by Representative Peter King (R-NY) and S. 1485 by Senator Edward Kennedy (D-MA), each of which would restrict DOL authority with respect to the proposed rule. Senator Arlen Specter (R-PA), S. 1611, proposed creation of a commission to study FLSA overtime pay requirements — and hold the proposed rule in abeyance pending the commission's report.

[4] Bureau of National Affairs, *Daily Labor Report*, Jan. 29, 2004, p. S25.

[5] The existing and proposed regulations are broad. Restructuring of the regulation raises a number of potential questions. See, for example, CRS Report RL31995, *The Fair Labor*

(continued...)

Introduction and Context

The Fair Labor Standards Act of 1938 (as amended) is the primary federal statute dealing with minimum wages, overtime pay, and related issues. Section 6 of the Act prescribes minimum wage requirements; Section 7, those relating to overtime pay. Section 13 sets forth a series of exemptions. Under current law, Section 13(a)(1) provides that Section 6 and Section 7 "shall not apply" with respect to:

> ... any employee employed in a bona fide executive, administrative, or professional capacity ... (as such terms are defined and delimited from time to time by regulations of the Secretary...)[6]

Having delegated to the Secretary the authority *to define* and *delimit* the terms of the Section 13(a)(1) exemption, Congress provided little specific direction. Since the fall of 1938 when the first Section 13(a)(1) regulation was promulgated, the Secretary (or the Wage and Hour Administrator) has variously defined the concepts "bona fide executive, administrative, or professional" (EAP) and applied them in the workplace. That process has not been easy and has provoked a substantial amount of litigation.

During the late 1930s, the Secretary determined that a worker, to be a *bona fide* employee for Section 13(a)(1) purposes, would need to be *salaried* (as opposed to being paid at an hourly rate). In addition, the Secretary established two general tests or requirements. First. A worker had to be paid at a rate befitting an executive or administrator or professional. Second. A worker had to perform the work (duties) of an executive or administrator or professional.

Although the tests are applied to the worker, it is the employer who is the beneficiary of the Section 13(a)(1) exemption. Where the tests are met, the employer is not required to pay minimum wages or overtime pay to the exempt employee: thus, potentially, reducing the labor costs of the employer. The worker, conversely, loses his or her minimum wage and overtime pay protection. Reasonably, employers can be expected to seek an expansion of the exemption (to have it defined broadly) while workers can be expected to seek a narrow exemption with the widest application of minimum wage and overtime pay protections.

How does the Section 13(a)(1) exemption operate in practice? Ordinarily, under the FLSA, a covered worker must be paid at least the minimum wage and 1½ times his or her regular rate of pay for hours worked in excess of 40 in a single workweek. A worker qualifying under Section 13(a)(1) — that is, exempt from minimum wage and overtime pay protection — *can be expected* to work hours in excess of 40 per week without additional payment. He or she is, in terms of Section 13(a)(1),

---

[5] (...continued)
Standards Act: Exemption of "Executive, Administrative and Professional" Employees Under Section 13(a)(1), by William G. Whittaker.

[6] See 29 U.S.C. 213(a)(1). Although this report focuses primarily upon the issue of overtime pay, it is import to recall that Section 13(a)(1) deals *both* with the minimum wage and with overtime pay.

minimum wage and overtime pay exempt as a *bona fide* executive, administrator, or professional and, as such, is due no payment beyond his or her regular salary.[7]

How the basic concepts within the Section 13(a)(1) exemption are defined is critical. A small change in the wording of the implementing regulation has the potential to alter the minimum wage and overtime pay status of many workers. And, it could impact the labor costs and profits of employers. Thus, both workers and employers have reason to be concerned that the regulation is precisely and clearly stated and implemented evenly.

There are several immediate considerations. First. The salary tests, having declined in value through inflationary pressures, are relatively low and fairly easily satisfied, leaving an increasingly large number of workers potentially unprotected by the wage and hour requirements of the FLSA.[8] Second. Given the relatively low earnings threshold, the critical issue, then, becomes the duties test. From an employer perspective, this places a premium upon a broad definition of *bona fide* executive, administrative, or professional. Conversely, a narrow interpretation would be more favorable to workers. Third. Where employees can, reasonably, be converted from hourly to salaried pay status (since being *salaried* is a qualifying factor for exempt status), it would seem to be in the employer's interest to make that conversion and, thereby, to take advantage of the Section 13(a)(1) exemption where workers otherwise qualify. Fourth. Since, in the case of qualifying workers, overtime hours of work without extra compensation is essentially part of the position, it may make sense for an employer to engage his or her workers through extra hours

---

[7] Under the current regulation, the qualifying wage for an executive or administrator would be $155 per week; for a professional, $170 per week. The basic federal minimum wage for a 40-hour workweek is now $206 per week. Under the proposed regulation, the qualifying wage for the three categories would be $425 per week ($22,100 on an annual basis). Slightly different base wage standards, under the existing regulation, obtain for Puerto Rico, the Virgin Islands, and American Samoa. Under the proposed rule, special treatment of Puerto Rico and the Virgin Islands would be dropped. The new base wage for American Samoa would be $360 per week for each of the classifications.

[8] The general minimum wage rate, for covered employees, is set under Section 6 of the FLSA: $5.15 per hour. Section 13(a)(1) exempts both from the minimum wage and overtime pay requirements of the FLSA workers who meet wage, duties and related tests devised administratively by the Secretary of Labor. The salary (minimum wage equivalency) test is now set at a level slightly lower than the Section 6 rate. Annualized, the Section 6 rate is currently $10, 712 per year; the rate set by the Secretary under Section 13(a)(1) is currently $8,060 for executives and administrative personnel and $8,840 for professional employees. In practice, these latter rates appear to be *qualifying* rates rather than the rates actually paid — given both the general FLSA minimum wage requirements and market realities.

rather than hiring additional workers.[9] The dynamic of the situation, of course, could be modified through a collective bargaining agreement.

While the focus of this report is upon the *bona fide* **professional** employee, one may want to keep in mind that where a worker cannot be classified as professional, there is still the option, under different criteria, of classifying him or her as an **executive** or **administrator**. In some measure, the standards overlap. The proposed regulation deals with all three categories of workers.

The Existing and Proposed Regulation

The proposed regulation is not simply an amendment to the existing regulation. Rather, it restructures, revises, and condenses the existing rule, substituting new language for the current regulation.

Key to the professional exemption under Section 13(a)(1) is definition of concepts. Both the language of the existing regulation and that of the proposed rule may be viewed as somewhat ambiguous. The current regulation has the benefit of long years of implementation; but, nonetheless, it is still subject to dispute and litigation.

Section 13(a)(1) of the FLSA, *per se*, is relatively straightforward: persons employed in a "bona fide executive, administrative, or professional" capacity will not be protected by the Act's minimum wage and overtime pay requirements. The initial implementing regulation of 1938 was similarly brief: just two columns in the *Federal Register*. In the current (2003) edition of the Code of Federal Regulation, on the other hand, the implementing language takes up 53 pages. In addition, through the years, the Wage and Hour Administrator has issued *opinion letters* through which the statute (in the context of the regulation) is applied in particular workplaces. Finally, there is case law: the result of litigation brought by the interested parties.

A Matter of Interpretation

Because the proposed rule of March 31, 2003, is not merely an amendment of existing language but, rather, the replacement of one regulation with another, current interpretation — whether by the Department or by the courts — may need, largely, to be set aside. Thus, the proposed rule, if promulgated as published, may result in new legal challenges.

---

[9] Requiring an employee to work extra hours (until the work is finished) may be economically reasonable from an employer perspective where it is infrequent and, weighed against hiring an additional worker, cost effective. But, some may argue, that practice is contrary to the primary rationale for the overtime pay provisions of the FLSA (i.e., allowing workers sufficient rest and personal time, reducing the accident rate (potentially, the risk both to workers and to the general public), and spreading the available work during periods of high unemployment).

Interpretation of the proposed rule is not an easy task. Here, as we proceed through a discussion of the issues, it is important to recall that the rule under discussion is merely *proposed*. If it is ultimately published in final form, it may be quite different from the proposal of March 31, 2003. Whatever the structure and phrasing of a final rule, it will likely be interpreted through *opinion letters* and judicial review, modifying both its tone and substance. Thus, any assessment, at this point, must be tentative.

The Andrews Rule. The original version of the Section 13(a)(1) regulation was issued on October 19, 1938, just as the FLSA was about to take effect.[10] Thus, neither the Department nor the Wage and Hour Administrator, Elmer Andrews, had prior experience with the statute. The regulation developed by Andrews and his staff, as it relates to the professional exemption, reads as follows:

> Section 541.2 Professional. The term "employee employed in a bona fide ... professional ... capacity" in Section 13 (a)(1) of the Act shall mean any employee
> (a) who is customarily and regularly engaged in work
> (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work, and
> (ii) requiring the consistent exercise of discretion and judgment both as to the manner and time of performance, as opposed to work subject to active direction and supervision, and
> (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and
> (iv) based upon educational training in *a specially organized body of knowledge as distinguished from a general academic education and from an apprenticeship and from training* in the performance of routine mental, manual, mechanical or physical processes in accordance with a previously indicated or standardized formula, plan or procedure, and
> (b) who does no substantial amount of work of the same nature as that performed by non-exempt employees of the employer.[11] (Italics added.)

Andrews' filing is a substantial elaboration of the exemption in the FLSA which had placed no limits and no context upon the wage/hour treatment of professionals. Nonetheless, it is upon that brief statement that subsequent interpretation rests.

Retaining an Academic Anchor? A core element of a professional classification under the Andrews rule was education. A professional was not just someone who could perform his or her duties extremely well or who was especially talented in some particular activity. The professional classification was "based upon educational training in a specially organized body of knowledge." But the opposite was equally important (i.e., that certain types of educational training were not to be

---

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

[11] Ibid.

included when classifying a worker as professional). The appropriate education, for professional exemption purposes, was to be "distinguished from a general academic education" and, further, "distinguished from ... an apprenticeship and from training in the performance of routine" types of work.[12]

The educational core of the Andrews rule has persisted through the years, even retaining much of Andrews' original language. In the current regulation, reference is made to work "that requires theoretical and practical application of highly-specialized knowledge" and work that is "predominantly intellectual." It includes fields that "have a recognized status"[13] and that "are based on the acquirement of professional knowledge through prolonged study." While the current regulation would make exceptions in certain very carefully defined cases (for example, for a lawyer who may have "read" the law and gained access to the bar in that manner rather than through attendance at law school), such exceptions would appear to be few and infrequent. To allow for such infrequent exceptions, the existing regulation includes the word "customarily" with respect to the acquisition of knowledge — but it appears to represent an exception and not the norm.

Under the current regulation, to qualify as a professional worker, an educational requirement of a college degree *plus professional training* is often required — depending upon the field and discipline. For example, the regulation reads:

> A college education would perhaps give an executive or administrator a more cultured and polished approach but the necessary know-how for doing the executive job would depend upon the person's own inherent talent. The professional person, on the other hand, attains his status after a prolonged course of specialized intellectual instruction and study.[14]

Thus, it would seem, the Department has often had in mind not merely an educated person (college degree in hand) but one possessed of post-graduate professional training — or of a serious program of professional training following the requisite undergraduate study where a four-year degree may not be the norm. By way of emphasis, the current regulation cites journalists as members of a *quasi-profession* and not a real professional for Section 13(a)(1) purposes because "the bulk of the employees [in journalism] have acquired their skill by experience rather than by any formal specialized training."[15]

A Shifting of Focus? The proposed regulation would break sharply with tradition. Compare, for example, the following requirements for professional status.

---

[12] Ibid.

[13] See discussion of the computer technology workers' exemption, below.

[14] 29 CFR 541.301(e)(2).

[15] 29 CFR 541.301(d). The exemption appears to operate on an individual basis, taking into account particular duties and training/education. Of course, the structure of professional academic requirements (and of academic course offerings) has changed through the years. If some fields where professional academic training was only infrequently available a few decades back, it may now be the norm. But, that would not appear to alter the general principle or thrust of the current regulation.

> **From the existing regulation:** "Work requiring knowledge of an advance[d] type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study *as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes,...."*[16] (Italics added.)
>
> **From the proposed regulation:** "The term 'advanced knowledge' means knowledge that is customarily acquired through a prolonged course of specialized instruction [~~and study~~], *but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience."*[17] (Italics added.)
>
> The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word 'customarily' means that *the exemption is also available to employees in such professions who have substantially the same knowledge level as the degreed employees, but who attained such knowledge through a combination of work experience, training in the armed forces, attending a technical school, attending a community college or other intellectual instruction.*[18] (Italics added.)

Is a "professional", in the context of the proposed rule, still primarily an intellectual or academically trained individual; or, should a professional be something other than that (i.e., one possessed of work experience and, perhaps (but not necessarily), some lower measure of academic or technical training)?

The effect, here, would seem to be: *first*, a dilution of the rationale upon which the current Section 13(a)(1) professional exemption is based; and, *second*, at least potentially, a significant expansion of the professional exemption based upon interpretation of specific terms and qualifying requirements.

The Time Factor. From the beginning, there was concern that an exempt professional should do "no substantial amount of work of the same nature as that performed by non-exempt employees of the employer."[19] Through the years, that restraint was translated into a specific workhours limitation. The existing regulation provides that an exempt professional must "not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to" his responsibilities that are classified as professional.[20]

The rationale for the workhours limitation seems clear. Absent such a constraint, an employee engaged only in a few "professional" tasks could be classified as a *bona fide* professional for Section 13(a)(1) purposes. The proposed

---

[16] 29 CFR 541.3(d).

[17] 29 CFR 541.301(a), proposed rule.

[18] 29 CFR 541.301(d), proposed rule.

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

[20] 29 CFR 541.3(d).

rule eliminates the 20% time requirement (which some may view as difficult to assess) while providing no clear alternative methodology for measurement.

In a related provision, the proposed rule states that an employee, to qualify for exemption, "must have a 'primary duty' of performing exempt work." It explains:

> The term "primary duty" means *the principal, main, major or most important duty* that the employee performs.... Factors to consider when determining the primary duty of an employee include, but are not limited to the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work;...

But, how much work of each type? And, how is the relative importance of an employee's duties to be ascertained? Absent a duties/time requirement, the proposed rule acknowledges that "the amount of time spent performing exempt work can be a useful guide" to a worker's professional status — while not controlling.[21]

Some Recent Experience

Over time, the Department has held that FLSA exemptions should be rare except in those cases in which the intent of Congress is clear. Even then, exemptions "'are to be narrowly construed against the employer seeking to assert them' and their application limited to those who come 'plainly and unmistakably within their terms and spirit'..."[22]

By way of example, two cases may be of interest as indicative of the instincts of the Department and of the criteria that DOL sets with respect to exemption of professionals. It may also be useful to note that, on occasion, Congress has become directly involved in setting standards under the Section 13(a)(1) exemption — or has sought the same end through alternative means. Several proposals currently before Congress would, if enacted, expand various wage/hour exemptions.

Computer Technology Workers. In the mid-1960s, DOL began to receive requests that computer workers be classified as professional and, therefore, exempt from minimum wage and overtime pay protection. The Department pointed to the qualifying consideration of "discretion and independent judgment" and argued, in demurring, that a major portion of the worker's time would need to be devoted to work of a professional character.[23] An inquiry a year later drew a similar reply. DOL affirmed that while a computer operator's work was "highly technical and mechanical" and "based on skill," it did not require advanced learning of a scholarly

---

[21] 29 CFR 541.700 of the proposed rule. In practical terms, for enforcement/compliance purposes, it may not be feasible to monitor the percentage of time each professional employee for whom a claim of exemption is made spends engaged in professional and in nonprofessional work. But, if that is not done, upon what is the exemption (of denial of exemption) based?

[22] The Department, here, refers to *Phillips v. Walling*, 324 U.S. 490(1945); *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290 (1959); and *Arnold v. Kanowsky*, 361 U.S. 388 (1960).

[23] Opinion letter, Clarence T. Lundquist, Wage-Hour Administrator, Apr. 14, 1966.

character — the use of "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study...."[24]

During the 1970s, computer technology was rapidly developing as a specialized discipline; and, in that context, DOL commenced a reevaluation of its treatment of workers in data processing and related fields. That raised concerns of a different sort. Computer-related workers, DOL stated, "are identified by a multitude of titles, including program operator, programmer, systems analyst, and many others. They have varied experience and training, and perform a variety of tasks which are difficult to measure in terms of their significance and importance to management."[25]

DOL's review of the application for professional exemption under Section 13(a)(1) brought comment both from management and workers. Employers "contended that computer programmers and systems analysts should be considered professional employees" and, thus, be minimum wage and overtime pay exempt. Some urged that a "junior programmer" should also be exempt. Employee interests pointed out that data processing was still a "relatively new occupational area," still "in a state of flux," and that "job titles and duties are not regularized and overlap and intermix in a confusing manner." They contended "that to expand the exemption was an invitation for employers to work such employees longer hours with no additional compensation." Both employers and employees concurred that a college degree was not then "a requirement for entry into the data processing field."[26] Thus, DOL concluded that the variations were such that they did not provide the Department with *a recognized status* for the fields of work.

DOL demurred but pressure from industry continued. In response, the Department emphasized that the professional exemption under Section 13(a)(1) required knowledge "of an 'advanced type' which is customarily acquired by a prolonged course of specialized intellectual instruction and study."[27] It maintained that a bachelor's degree was a standard prerequisite for a professional, defining the concept of "a prolonged course of specialized instruction and study" as "four academic years of preprofessional and professional study in an accredited university or college."[28] DOL affirmed that it could not "give a blanket determination as to the exempt status of any group or class of employees since the problem is a factual one dependent upon *the particular situation with respect to each individual employee.*"[29] (Italics added.) The Department viewed itself as "constrained by judicial decision

---

[24] Opinion letter, Clarence T. Lundquist, Wage-Hour Administrator, May 22, 1967.

[25] *Federal Register*, Sept. 10, 1970, pp. 14268-14269.

[26] *Federal Register*, Dec. 2, 1971, pp. 22976-22979.

[27] Opinion letter, Warren D. Landis, Acting Wage-Hour Administrator, June 9, 1974.

[28] Opinion letter, Warren D. Landis, Action Wage-Hour Administrator, Mar. 5, 1976.

[29] Opinion letter, Warren D. Landis, Acting Wage-Hour Administrator, Nov. 10, 1975.

to interpret exemptions from the Act's provisions narrowly [and] ... limited to those who come plainly and unmistakably within their terms and spirit."[30]

Employers continued to press for exemption of their computer services workers under Section 13(a)(1); and, in late 1990, Congress directed the Secretary, within 90 days, to "promulgate regulations" that would permit various categories of computer services workers, subject to certain standards, "to qualify as exempt executive, administrative, or professional employees under section 13(a)(1)...."[31] As directed, the Department modified the definition of a professional to include certain computer services workers (29 CFR 541.3(a)(4)). But, some pressed for further clarification and/or expansion of the computer services worker exemption and, in 1996, Congress amended the FLSA to add a new categorical exemption, Section 13(a)(17), which exempted, by definition, "any employee who is a computer systems analyst, computer programmer, software engineer, *or other similarly skilled worker*," subject to certain duties and earnings requirements. (Italics added.)[32]

Thus, in effect, Congress took discretion and initiative (the authority to *define* and *delimit*) away from the Secretary of Labor, in the case of computer services workers, and acted directly. With computer services workers designated as exempt under Section 13(a)(17), there was no longer any need for the Wage and Hour Division to define "bona fide" or "professional" as the concepts affected those workers. The exemption was now categorical with a statutory salary test for workers where "compensated on a hourly basis."[33]

Funeral Directors and Embalmers. Through a number of years, some funeral industry employers have sought exemption from the minimum wage and overtime pay requirements of the FLSA by having funeral directors (and, subsequently, embalmers) classified as "professional" under Section 13(a)(1). In general, DOL has regarded funeral directors as retail/service employees and embalmers as technicians — not as "professionals" for Section 13(a)(1) purposes. It refused to accede to industry appeals.

With the computer services example before them, employers turned to Congress. In 1998 (the 105th Congress), Senator Lauch Faircloth (R-NC) introduced legislation that would exclude, as a categorical exemption, "any employee employed as a licensed funeral director" from the minimum wage and overtime pay protections of the FLSA. In presenting the proposal (which would have added a new Section 13(a)(18) to the Act), Senator Faircloth pointed to "the economic hardship" and "financial strain" such requirements place on small business owners who have "to

---

[30] Opinion letter, Warren D. Landis, Acting Wage-Hour Administrator, Mar. 5, 1976. In these cases, one finds repetitive language but also consistency of interpretation.

[31] P.L. 101-583.

[32] P.L. 104-188.

[33] Precisely how 29 CFR 541.3(a)(4), implementing Section 13(a)(1) and the new Section 13(a)(17) would operate, in practice, may raise questions. On this general issue, see CRS Report RL30537, *Computer Services Personnel: Overtime Pay under the Fair Labor Standards Act*, by William G. Whittaker.

allocate revenues for that purpose" (i.e., paying their employees at least the minimum wage and overtime pay for hours worked in excess of 40 per week). Companion legislation was introduced by Representative Lindsey Graham (R-SC). Similar proposals were introduced in the 106th and 107th Congresses — and have been introduced in the 108th Congress.

From a review of the industry, it appears that funeral directors (where they are not owners of mortuaries) are most often retail/service personnel. Embalmers, although highly skilled, are regarded by the Department as technicians. Neither would qualify as *professionals* under the Section 13(a)(1) exemption as currently interpreted by the DOL. Whether they would be exempt under the proposed regulation — with its expanded definition of the qualifications for professional status — is not clear. But, it is at least possible that the funeral industry might be able to able to achieve through the regulatory process an exemption that it has not yet been able to secure from the Department or to effect through legislation.[34]

Further Quests for Exemption. Intermittently since 1938, employers have sought to broaden exemption from the FLSA's minimum wage and overtime pay requirements.

In the 108th Congress, legislation to exempt funeral directors and embalmers has again been introduced by Senator Lindsey Graham, with a companion bill by Representative Patrick Tiberi (R-OH): respectively, S. 292 and H.R. 2065. Legislation introduced by Senator Lindsey Graham (S. 495) and, in the House (H.R. 1996), by Representative Joe Wilson (R-SC) would refine the computer services exemption under Section 13(a)(17). Representative Sam Johnson (R-TX) has introduced legislation (H.R. 2263) to exempt "any employee employed, on a seasonal basis, at a facility or location the primary source of revenue of which is derived from the sale of fireworks directly to consumers...." Senator Lindsey Graham has introduced a bill (S. 237) that would similarly exempt "certain construction engineering and design professionals." And, in a more technical move, Representative Cass Ballenger (R-NC) has proposed (H.R. 2516) that Christmas tree farming be defined as "agriculture" in order to insure its exemption from the minimum wage and overtime pay requirements of the FLSA.

At the commencement of the second session of the 108th Congress, no action had been taken on any of these bills beyond assignment to the committees of jurisdiction. Were the proposed regulation governing implementation of Section 13(a)(1) to be promulgated in a final form closely paralleling its initial provisions, it is possible that some of these bills — notably, those dealing with the computer and funeral industries and covering "engineering and design professionals" — would be rendered superfluous. Legislation would still likely be necessary to effect exemption of workers engaged in the sale of fireworks and in Christmas tree farming.[35]

---

[34] See CRS Report RL30697, *Funeral Services: The Industry, Its Workforce, and Labor Standards*, by William G. Whittaker.

[35] Overall, see CRS Report RL32215, *The Fair Labor Standards Act: Overtime Pay Issues in the 108th Congress*, by William G. Whittaker.

Possible Areas of Dispute and Contention

In March 2003, the Wage and Hour Division proposed "to update and revise" the Section 13(a)(1) regulation — including modification of the definition of "professional". Having conferred with various stakeholders and having "carefully examined issues of concern raised by the interested parties," the Division issued a call for "public comment."[36]

By the end of the comment period (June 30, 2003), DOL had received in excess of 80,000 responses. From public reaction, it appears that there is some consensus that updating and revision of the existing regulation was needed. There also appears to be a substantial disagreement as to the precise nature of any change in the rule — and, perhaps in some measure, with respect to the purpose and basic scope or thrust of the exemption itself.

Crafting an implementing regulation that complies with the Secretary's obligation to define and delimit the scope of the Section 13(a)(1) exemption and that is satisfactory to the several parties (employers, labor, and the Department) — and taking into account the sparse direction from Congress — may be viewed as a daunting task. Under the circumstances, it may not be surprising that numerous questions and concerns continue to arise.

Starting Over.[37] As noted above, the proposed rule would replace the existing regulation. Although it includes much of the language currently in effect, it condenses that language and makes editorial changes in what remains.

From a policy (and enforcement/compliance) perspective, it may be important to know why changes were made and what the authors of the new regulation intended. In some instances, a small variation in the language can yield a large difference in implementation. For example, 541.3(a)(1) of the existing regulation speaks of "knowledge of an advance[d] type" acquired through "a prolonged course of specialized intellectual instruction and study...." The new regulation (541.300(a)(2)(i)) omits the words "and study." Is the omission of "and study" significant? Were the words simply dropped for brevity?

Because the proposed regulation is wholly new (though incorporating language from the old regulation), case law and opinion letters anchored in the old regulation *may be* largely irrelevant. The interpretation of arcane provisions, relied upon in some cases for decades, may need to be set aside. Thus, once the new rule is promulgated in final form and takes effect (assuming that it is and does), there may well be a period of intense litigation, crafting of opinion letters, and general confusion before uniform enforcement and compliance can take place.[38]

---

[36] *Federal Register*, Mar. 31, 2003, p. 15560 forward.

[37] In the paragraphs that follow, emphasis (bolding or italics) has been added by the author unless otherwise specified.

[38] Sen. Arlen Specter (R-PA), recalling a Jan. 20, 2004, hearing at which Secretary Elaine (continued...)

Broadening Acceptable Knowledge/Academic Requirements. The existing regulation begins with the explanation that a professional is one whose "primary duty" consists of work:

> ... requiring knowledge of an advance[d] type in a field of science or learning **customarily** acquired by a prolonged course of specialized intellectual instruction **and study**, as distinguished from **a general academic education and from an apprenticeship**, and from training in the performance of routine mental, manual, or physical processes ... (541.3(a)(1))

The roughly counterpart passage in the proposed rule drops the words "and study" and "as distinguished from a general academic education and from apprenticeship." In its place, the proposed language reads:

> Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, **but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience**; .... (541.300(a)(2)(i))

Later, in a description of learned professionals, it is noted in the proposed rule that their work would be "predominantly intellectual in character, as opposed to routine, mental, manual, mechanical or physical work." (541.301(a))

The existing language would seem to use "customarily" to cover a rare case in which a worker, through some unusual and exceptional means, has acquired knowledge comparable to that of a *learned professional*.[39] The proposed regulation appears to have something different in mind. It states:

> ... the word "customarily" means that the exemption is also available to employees in such professions who have **substantially the same knowledge level as the degreed employees**, but **who attained such knowledge through a combination of work experience, training in the armed forces, attending a technical school, attending a community college or other intellectual instruction**. (541,301(d))

---

[38] (...continued)
Chao testified, stated: "We analyzed the current regulations, we analyzed the new regulations, and it was apparent the new regulations will not do anything to reduce the litigation." The hearing, he stated, made it clear "... that the objective of reducing litigation will not be accomplished by the new regulations." See *Congressional Record*, Jan. 21, 2004, p. S98.

[39] In the current regulation, 541.301(d), it is noted: "The requisite knowledge ... must be customarily acquired by a prolonged course of specialized intellectual instruction and study. Here it should be noted that the word 'customarily' has been used to meet a specific problem occurring in many industries. As is well known, even in the classical profession of law, there are still a few practitioners who have gained their knowledge by home study and experience." Later, it adds: "The word 'customarily' implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession."

There would seem to be two elements immediately involved. First. The new rule would move away from a strictly academic approach to the concept of "professional. Second. It would open the concept to a far wider interpretation — allowing the definition of a "learned professional" to include, potentially, individuals and groups of individuals whose professional status may not now be immediately apparent.

At some point (and through some mechanism), it will likely be necessary to define, precisely, what is implied by each of the terms used in the new regulation: for example, "substantially the same," "degreed employees,"[40] "work experience," and "other intellectual instruction."

Tailoring the Exemption to the Individual. It seems apparent from various segments of the proposed rule that the exemption will be highly individual. For example, in assessing a worker's "primary duty," the proposed rule states:

> The term 'primary duty' means the principal, main, major or most important duty that **the employee performs**. Determination of an employee's primary duty **must be based on all the facts in a particular case**. (541.700)

Also in explanatory material, the Department states that an exemption "is not presumed under the FLSA, but must be affirmatively established" and "depends *on the specific duties and responsibilities of each employee's job.*" Turning again to the proposed rule, the individual character of the exemption process is emphasized.

> **A job title alone is insufficient** to establish the exempt status of an employee. The exempt or nonexempt status **of any particular employee** must be determined **on the basis of whether the employee's salary and duties meet the requirements of the regulations**.... (541.2)

At a minimum, such an individualized process would present an enormous challenge in terms of enforcement/compliance personnel. (See discussion below.) It *could*, arguably, leave the entire process open to the judgment of individual technical specialists within the Department of Labor — and *could* open the door to inconsistent decisions and irregular enforcement.

Under such a system, could any employer be absolutely certain of his options — or a worker, confident that his or her rights were protected? In each case, substantial amounts (wages, penalties, etc.) could potentially be at risk.[41]

A Question of Measurement. By moving away from standard academic degrees and recognized credentials, the proposed regulation seems to enter largely uncharted territory. Not only might this entail an assessment of individual workers

---

[40] For instance, would a person with a certificate from a technical school be regarded as a "degreed" employee? How much "work experience" would one need to qualify as a professional?

[41] Where there is a collective bargaining agreement in place, the issues could be more easily resolved. More difficult might be the process where there is no collective agreement and both parties are left to negotiate with the staff of the Department of Labor.

with respect to their duties, level of knowledge and skill, and salary but, also, the nature of each industry and the position/status of the individual within it.[42]

For example, consider an embalmer in the funeral industry. Job requirements may be similar from one firm to another; but the educational requirements to qualify as an embalmer vary from state to state, as do the curricula of schools and colleges that offer instruction in embalming. Qualifications for work in the computer industry may vary even more widely — and, if the Department's assessment through recent decades is correct, are constantly shifting. As the proposed rule argues: "A job title alone is insufficient to establish the exempt status of an employee."

An absence of precise definitions in the proposed rule could render extremely difficult the task of enforcement and compliance.[43] Among the many potential questions might be the following.

- How much of the worker's time must be spent engaged in "professional" work? If one assumes that the characteristics of professional work include exercise of discretion and judgment, how much of the worker's time much be so characterized?[44]
- For one who qualifies as a professional in terms of salary and education, how are his or her duties to be assessed? Is performance of one professional activity once a year, for example, sufficient to render a worker exempt? An intellectual/scholarly/academic activity may be both qualitatively and quantitatively different from other types of work. Can one rely upon the importance assigned to that professional action?[45]
- Reference is made to "alternative means *such as....*" with respect to the acquisition of the knowledge needed to qualify for exemption. Are these intended only as examples? If so, it could be read to open a range of alternative options through which to acquire the requisite knowledge. Or, the phrasing could be read narrowly.

  What other types of learning/training/experience might an employer cite when seeking an exemption? Or, conversely, might the Department reject a requested exemption on the ground that the

---

[42] The preface to the proposed rule explains: "This proposed standard test for learned professionals would focus on the knowledge of the employee and how that knowledge is used in everyday work, not on the educational path followed to obtain that knowledge." *Federal Register*, Mar. 31, 2003, p.15567.

[43] Some may argue that failing to provide precision in the proposed regulation misses an opportunity to correct what some perceive as the deficiencies of the existing regulation.

[44] The preface to the proposed rule explains: "This restructuring and simplification would eliminate the percentage limitation on nonexempt work and the consistent exercise of discretion and judgment requirement" because these concepts "have proven difficult standards to apply uniformly." *Federal Register*, Mar. 31, 2003, p. 15567.

[45] The proposed regulation includes a definition of "customarily and regularly" (541.701) but it is not clear that it applies to the activities of professionals. Nor is it clear how it *could be* applied to the work of a professional.

alternative means of learning is not among those listed in the regulation?

- What is meant by "an equivalent combination of intellectual instruction and work experience?"

  How are "intellectual instruction" and "work experience"defined? How are these concepts limited — especially if applied to the universe of American workplaces? Is the hour-long briefing of a new employee sufficient to qualify as *intellectual instruction*? How would one treat learning acquired directly (but, often, informally) from peers?

- The preface to the proposed rule explains: "We have not proposed any specific formula in the regulations for determining the equivalencies of intellectual instruction and qualifying work experience...."[46]

  How is *equivalency* to be measured, by whom, and by what standard? While it seems unlikely that the Department would administer tests to the individual workers, what system could reasonably be effected through which to make such assessments?

  For a combination of "intellectual instruction"and "work experience," however defined, how are these elements balanced? Eighty percent work experience and 20% intellectual instruction? Fifty-fifty? Would the percentages be the same in all professional fields?

  For purposes of equivalency, how would work experience be measured? How would employer-provided *intellectual instruction* be measured against the instruction provided by a college or university? Would instruction in "a technical school" or "a community college" be equated with that provided by a university? Is the Department equipped to make such determinations?

  Since the criterion is to be an "alternative means" and not a standard college or university degree, how much classroom instruction would be required — if any? A two-year degree? Six hours of credit in a field related to the employee's workplace responsibilities?[47] How often would such instruction need to be utilized by the worker — and

---

[46] *Federal Register*, Mar. 31, 2003, p. 15568.

[47] The preface to the proposed rule states: "The Department ... assumed that six years or more of work experience would be considered equivalent to a bachelor's degree for the learned professional exemption." See *Federal Register*, Mar. 31, 2003, p. 15577. Sen. Hillary Clinton (D-NY), *Congressional Record*, Sept. 10, 2003, p. S11267l, states of the proposed *six year* standard. "... this assumption is not grounded in the rule. In fact, the Department of Labor's rule requires no minimum education standard."

how closely would such instruction need to be related to the work actually performed by the individual worker?

- What is inferred when the proposed rule includes "training in the armed forces" within the concept of *alternative means*? (See discussion below.)

Enter the Bureaucracy. In 1998, according to the General Accounting Office, from "19 to 26 million workers" were executive, administrative, or professional employees exempt under Section 13(a)(1).[48]

The proposed rule emphasizes the individual character of the Section 13(a)(1) exemption, stressing that each individual's education and employment situation will need to be taken into account and evaluated.

Although the initial judgment on exempt status will be made by the employer, for enforcement/compliance purposes, the Department will need to review the employer's decision — and will need to have a reasonable basis for affirming or rejecting the position of the employer.

If one assumes that DOL is going to assess each individual case, taking into account the duties, earnings, level of function, status within a firm, and equivalency of knowledge (in this instance, justifying assignment of professional status), the task could be extremely difficult. If the Department decides to move away from standard academic credentials (measurement) and into "an equivalent combination of intellectual instruction and work experience," some may question whether the task is even reasonably possible.

- Operationally, how would the Department proceed? Would DOL establish a bureau (a testing and certification service) within the agency through which to measure *equivalency*?

  How would DOL assess training received in the military — whether given in the States or abroad? Since "work experience" is part of the equation, it could include, for example, operation (monitoring, repair, etc.) of technical systems under a variety of employment circumstances sometimes not regarded a places of work. Who would document that training and work experience?

  Compared to college or university instruction, inclusion of "training in the armed services" may be especially troublesome — both because it could be difficult to document and difficult to evaluate. Such training may have been given (or learned) in an academically

---

[48] U.S. General Accounting Office, *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place*, GAO/HEHS-99-164, Sept. 1999, p. 2. GAO qualifies its data by stating: "Our estimate includes only those employees who would most likely be properly classified as exempt workers under the DOL regulations. It may not include all employees who are classified as exempt workers by employers."

unorthodox environment. Would there be comparability of standards and of evaluation? Some standard of measurement is at least implied (if unspecified) by the proposed regulation.

Presumably, military training would not have been given (or evaluated) in terms of *equivalency* with the civilian workplace. Would military training translate easily to non-military work?

If the training (however defined and measured) were received, for example, during the Vietnam War (now, 30 years ago), would some control be imposed to assure that the training was current? Some training received during the First Iraq War could now be wholly obsolete — as could community college instruction or on-the-job training from years past.[49] Is the judgment of currency (and equivalency) left to the employer? Or, in individual cases, to DOL?

- There would need to be some reasonable methodology for evaluating the "intellectual instruction" that a worker may have received at some point, combining that with "work experience," reaching "an equivalent," and then weighing that body of knowledge/experience against some other more generally accepted standard, to assure that it was "substantially the same knowledge level" as that of a *degreed employee.* But, against what standard? And, using what methodology?
- What level of personnel (and dollar cost) would be required to undertake such a measurement task? Would this entail a substantial increase in personnel for the Department of Labor? Or, would staff simply be moved from other areas of labor standards enforcement?

The Proposed Rule in Operation? In the first instance, it is the employer who determines that his or her employee ought properly to be exempt under Section 13(a)(1).

Exemption is not automatic. The employer who claims an exemption, according to the Department, "has the burden of showing that it applies."[50] Indeed, the purpose of the revised regulation "... is to clarify, consolidate, simplify, and update the existing criteria for compliance with the exemption ... for all businesses including small businesses."[51] The rule (and any accompanying explanation), therefore, would need to be sufficiently clear and unambiguous to permit an employer — and,

---

[49] Evaluation of an academic transcript, however difficult, is at least somewhat standardized so that both employers and public agencies have become accustomed to working with such documentation. Of course, in some fields, the level of coordination between the military and industry may be close enough so that assessment of knowledge may not prove burdensome.

[50] 29 CFR 780.2.

[51] *Federal Register*, Mar. 31, 2003, p. 15581.

potentially, an employee — to make a reasonable judgment with respect to its applicability.[52]

A lack of precision in the regulatory language *might* be a positive factor for an employer — permitting him or her, at least in the first instance, to expand the exemption substantially. An employer, seeking exemption, could cite an "equivalent combination of intellectual instruction and work experience" as justification.

For workers in security, some medical and teaching fields, computer technology, etc., an employer might affirm that his employee had attained "substantially the same knowledge level as the degreed employees" in those fields through "a combination of work experience, training in the armed forces, attending a technical school, attending a community college *or other intellectual instruction.*"[53] (Italics added.) It is not clear what an employee would need to do if he or she disagreed.

If challenged, DOL would seem to have the responsibility of proving that the worker's level of knowledge was not "substantially the same" as degreed employees in comparable fields. DOL would, presumably, have to show that the employee (each employee in each workplace) had not received "a combination of work experience, training in the armed forces," etc., sufficient to achieve a level of *equivalency*. This would appear to shift some of the burden of proof from the employer (under current regulations) to the Department.

Moving from a test by academic credentials to a test based on experience and knowledge may, arguably, be a good policy — but how would it be administered? Would the Department be able to determine not only the qualifications of a worker whose exempt status was questioned but, also, those of other exempt workers with whom he or she was being compared. Absent such determination, could this regulation be enforced?

Of course, the employee could protest that he (or she) does not have the level of knowledge that his (or her) employer asserts. But, some might argue, that could result in the employee being branded as uncooperative — or having his employment terminated on the *justifiable* grounds that he or she, by his or her own admission, was simply not qualified for the job.

---

[52] During a hearing by the Subcommittee on Labor, Health and Human Services, and Education, Senate Committee on Appropriations, Jan. 20, 2004 (transcript from Federal Document Clearing House, Inc.), Sen. Specter suggested that "it is hard to see how there will be any significant improvement" over the existing regulation in terms of clarity. Secretary Elaine Chao affirmed that the proposed regulation would "put an end to needless litigation." When Sen. Specter stated that he found it hard to see "how the new regulation is going to avoid litigation," Secretary Chao allowed that the language of the regulation was "very complicated."

[53] *Federal Register*, Mar. 31, 2003, p. 15589.

Controversy Is Sparked

Issuance of the Department's proposed regulatory revision sparked immediate interpretative differences. It also provoked controversy.

Initial Debate in the House (July 2003)

As House floor consideration commenced with respect to the FY2004 DOL appropriations, overtime regulation (the Departmental initiative) emerged as a point of contention. Representative Ralph Regula (R-OH) stated that the proposed rule would give "a million workers access to time and a half that do not now have it" but also observed that "it would limit some of the white-collar type of workers to not getting the time and a half under the existing rules." Representative Regula affirmed: "... white-collar workers understand that that is part of the condition of the job, that they may ... have to work some extra time and not necessarily get time and a half."[54] Urging that the Department not proceed with the proposed regulation, Representative David Obey (D-WI) discussed "an estimated 8 million workers [who] will become ineligible for overtime because of changes in the rules."[55] Impact estimates varied. Statistical assessment of that impact, given potential variations in the definition of the concepts embodied in the proposed rule, would seem extremely difficult (perhaps impossible) to achieve with confidence.[56]

As consideration of the overtime issue progressed, critics of the proposal attempted to put a human face on its likely impact. Frequently, they referred to "our first responders, law enforcement officers, emergency medical technicians [who] ... will no longer be eligible for overtime pay because the Bush administration is changing the definition" of coverage.[57] They also argued that women could be especially hard hit were the rule to take effect in something approximating its proposed form.[58]

---

[54] *Congressional Record*, July 10, 2003, p. H6568.

[55] Ibid.

[56] Concerning impact statistics, see *Economic Analysis of the Proposed and Alternative Rules for the Fair Labor Standards Act (FLSA) Regulations at 29 CFR 541*, report prepared for the U.S. Department of Labor, CONSAD Research Corporation (Pittsburgh, PA), Feb. 10, 2003; Ross Eisenbrey and Jared Bernstein, *Eliminating the Right to Overtime Pay: Department of Labor Proposal Means Lower Pay, Longer Hours for Millions of Workers*, briefing paper, Economic Policy Institute, undated (spring 2003); testimony of Assistant Secretary of Labor Victoria Lipnic, Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services, and Education, July 31, 2003; and testimony of Secretary of Labor Elaine Chao, Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services, and Education, Jan. 20, 2004.

[57] *Congressional Record*, July 10, 2003, p. H6568.

[58] Ibid., p. H6570. See, for example, the July 10, 2003, comments of Rep. Rosa DeLauro (D-CT), p. H6570; Rep. Joseph Crowley (D-NY), p. H6571; Rep. Sheila Jackson-Lee (D-TX), p. H.6572; Rep. Lynn Woolsey (D-CA), p. H6572; Rep. Louise Slaughter (D-NY), p. H6573; Rep. Hilda Solis (D-CA), p. H6573; and Rep. Betty McCollum (D-MN), p. H6573.

On July 10, 2003, the House defeated an amendment to the Labor, Health and Human Services, and Education, and Related Agencies Appropriations bill (H.R. 2660), proposed by Representative Obey, that would have restricted, in part, DOL's option of redefining *bona fide* executive, administrative and professional under Section 13(a)(1). The vote was 210 ayes to 213 nays: the Obey amendment failed.[59]

Initial Debate in the Senate (September 2003)

When H.R. 2660 was called up in the Senate, Tom Harkin (D-IA) proposed an amendment roughly parallel to that offered by Mr. Obey. "If one reads the proposed rules and regulations," Senator Harkin explained, "they really do wipe away the overtime pay protections for I don't know — the figures are all over — 8 million, 10 million, 6 million. I don't know what the proper number is, but I can tell you it wipes out overtime pay protection for millions of Americans who have it right now."[60]

Debate in the Senate, if broader, generally followed the pattern of the House of Representatives. Senator Carl Levin (D-MI) pointed to the impact that the regulation could have for "... workers with certain specialized training such as policemen, firefighters, paramedics, EMTs, as well as other white-collar professionals such a secretaries, bookkeepers, and paralegals" — and "our Nation's first responders." Senator Levin queried: "How can President Bush and Secretary Chao possibly tell law enforcement officers across this Nation that they no longer deserve to be paid overtime for their work?"[61] Senator Frank Lautenberg (D-NJ) added "nursing home workers" to the list of those potentially injured.[62] But Senator Jeff Bingaman (D-NM) expressed a different sort of concern.

> ... given the current record of the Bush administration on key labor issues — be it outsourcing, minimum wage, FMLA , workplace protections, or anything else — I am not convinced that it is time to give it "flexibility" to apply regulations of any type that will affect American workers.[63]

Others defended the proposed regulation. Senator Orrin Hatch (R-UT) argued that the FLSA overtime pay regulations were "outdated" and "confusing" and charged: "You can imagine the complexity and confusion that businesses have to deal with when they try to determine which workers have to be paid overtime and which do not." The regulation, he stated, will "... modernize the definition of 'executive, administrative, or professional' work to reflect better the realities of today's workforce and to reduce the incomprehensible regulatory definitions that businesses have had to interpret." He added: "They [the existing rules] have created a maze of uncertainty for business owners...." Senator Hatch added:

---

[59] *Congressional Record*, July 10, 2003, pp. H6579-H6580.

[60] Ibid., p. S11264.

[61] *Congressional Record*, Sept. 10, 2003, p. S11265.

[62] Ibid.

[63] Ibid., p. S11266. (The Family and Medical Leave Act.)

> These rules are part of this administration's broader agenda for long-lasting, long-term wage growth. These clearer, simpler regulations will increase the efficiency and productivity of American businesses. And since higher productivity is the key to higher wages, I expect these regulations to help increase the typical American's standard of living.[64]

Just as firmly, Senator Pete Domenici (R-NM) stated: "The purpose of these new regulations is not ... to take away overtime pay from hard-working Americans; nobody wants that to occur."[65] And Senator Judd Gregg (R-NH) concluded the proposed regulation would be "a net win for America's workers."[66]

On a rollcall vote, the Harkin amendment was approved: 54 yeas to 45 nays.[67] Under its provisions, DOL would have been precluded from moving forward with redefinition of the terms *bona fide* executive, administrative, or professional during the fiscal year. The Senate vote of September 10, 2003, would not be the final word.

The Omnibus Without the Harkin/Obey Amendment

With a conference pending, the House approved (221 ayes to 203 nays) a second Obey amendment instructing its conferees to support the Harkin amendment.[68] Yet, when the conference report appeared, observed Representative Louise Slaughter (D-NY), the Harkin amendment had been dropped.[69] On December 8, 2003, the House voted to approve the conference report: 242 yeas to 176 nays.[70]

Following the winter recess, the Senate took up consideration of the House-approved omnibus appropriations bill (H.R. 2673, of which the Department of Labor appropriations measure was now a part). Action occurred in two steps: first, votes to secure cloture; and, second, a vote on the appropriations measure *per se*.

On January 20, Senator Bill Frist (R-TN) called for a cloture vote on the Consolidated Appropriations Act of 2004. He warned Members that failure to approve the omnibus measure could result in "a continuing resolution" and pointed to the likely consequences were the bill not approved.[71] Cloture was not approved until a second vote (61 yeas to 32 nays), January 22, after which H.R. 2673 was

---

[64] *Congressional Record*, Sept. 10, 2003, pp. S11266-S11267.

[65] Ibid., p. S11269.

[66] Ibid.

[67] Ibid.

[68] *Congressional Record*, Oct. 2, 2003, pp. H9155-H9166.

[69] As the first session of the 108th Congress drew to a close, H.R. 2660 became part of an omnibus appropriations bill, H.R. 2673. Thus, in the House (and subsequently in the Senate), it was the conference report on the omnibus appropriations bill that was under consideration. In that context, the issues in contention were more numerous and the debate more far-reaching. See H.Rept. 108-401.

[70] *Congressional Record*, Dec. 8, 2003, p. 12845.

[71] *Congressional Record*, Jan. 20, 2004, pp. S1-S2.

approved by a vote of 65 yeas to 28 nays and signed into law the following day (P.L. 108-199).[72] In the absence of the Harkin/Obey language, DOL is free to proceed with the proposed Section 13(a)(1) regulation.

Disagreement on Policy: Veterans as *Professionals*

Publication of the proposed rule in March 2003 sparked continuing debate and conflicting affirmations about its likely impact. One case in which interpretive disagreement was sustained was how veterans might be affected, as workers, under the rule if implemented.

An Emerging Issue. In early November 2003, during a session arranged by the Senate Democratic Policy Committee to consider the proposed regulatory changes under Section 13(a)(1), John Garrity, a civilian electronics technician from Philadelphia, stated: "To add insult to injury, the new rules will eliminate overtime pay for military veterans who gained their technical training in the military."[73] The issue, as Garrity stated it, was that of veterans, recipients of training in the military, who then return to civilian life and go to work in the domestic labor force. Concern would mount, in some quarters, through the next several weeks.

With the return of Congress on January 20, 2004, Senator Specter took up the overtime pay regulation during a hearing by the Appropriations Subcommittee on Labor, Health and Human Services, and Education. Labor Secretary Chao was the lead witness. Asked by Senator Patty Murray (D-WN) about DOL's "attempts to lower the educational requirements" for the professional exemption, the Secretary "urged Murray to remember the rule is still in a proposed stage." Then Senator Murray asked specifically about the veterans issue, noting that "there is no guidance on how to make the determination on whether or not a veteran's training in the military is equivalent to a four-year degree." Secretary Chao, perhaps misunderstanding the question, replied that "the military is not covered by these regulations" — adding, "in terms of training as a general observation, overtime will not be taken away."[74]

The issue was raised again by Richard Trumka, Secretary-Treasurer of the AFL-CIO, a later witness. In a general defense of overtime pay protection, Trumka asserted as "particularly reprehensible" the action of the Administration (through the proposed rule) in "stripping overtime rights from veterans who have received technical training in the military." Under the proposed rule, he argued, if "an employer determines" that training received in the military is sufficient ("equivalent") to professional training, "that employer will now be allowed to deny

---

[72] *Congressional Record*, Jan. 22, 2004, p. S156.

[73] Hearing by the Senate Democratic Policy Committee, Washington, D.C., Nov. 3, 2003, text in Federal Document Clearing House, Inc.

[74] Transcript of hearing, Jan. 20, 2004, Subcommittee on Labor, Health and Human Services and Education, Senate Appropriations Committee, LEXIS-NEXIS document, pp. 8-9. See also Bureau of National Affairs, *Daily Labor Report*, Jan. 21, 2004, p. AA2.

those veterans overtime eligibility and refuse to pay them anything for overtime work."[75]

An Intensified Dispute. In a discussion of overtime pay associated with the omnibus package (January 20 and 22), Senator Kennedy pointed to what he regarded as the likely adverse impact of the proposed regulation for "the nurse," "the firefighter and the first responder." Then, he added:

> I am fighting for our veterans and our men and women serving so bravely now in Iraq and across the world, who return to civilian life only to find that the training they earned in the military is cruelly used to deny them their right to overtime pay.
>
> Under current regulations, workers can be denied overtime protection if they fall within the category of what they call professional employees, workers with a 4-year degree in a professional field. It is changed this year under the Bush administration. The plan would do away with the standard and allow equivalent training in the Armed Forces. You go and serve in Iraq and get the training to serve in Iraq, and come back here and you are ineligible, under these regulations, for overtime pay.[76]

The treatment of veterans under the proposed rule was one to which Senator Kennedy would often return. Those to be excluded from FLSA overtime pay protection "... will be those who receive the standard requirement and equivalent training in the Armed Forces." Again:

> We have 200 training programs in the military. Great numbers of them fall within this particular provision of training in the Armed Forces. For the life of me, I cannot believe why this administration would write into their proposal that the training in the Armed Forces will mean you are going to be excluded from overtime pay.

Senator Kennedy concluded: "I wish those on the other side of the aisle who support that particular provision would come out here and explain that."[77]

Senator Hillary Clinton (D-NY) agreed that veterans would be one of the groups "most impacted" by the proposed regulation. She averred:

> ... under the law as it is written before this regulation can go into effect, only workers with a 4-year degree in a professional field can be labeled professional, and, therefore, denied overtime. The Bush administration, under this regulation, would do away with this requirement. They would allow training in the Armed Forces to substitute for a 4-year degree.

---

[75] Testimony of Richard Trumka, in U.S. Congress, Senate Appropriations Subcommittee, on Labor, Health and Human Services and Education, Jan. 20, 2004.

[76] *Congressional Record*, Jan. 20, 2004, p. S4. See also comments of Sen. Jack Reed (D-RI), *Congressional Record*, Jan. 21, 2004, p. S72.

[77] *Congressional Record*, Jan. 22, 2004, pp. S132-S133.

Arguing that we are "breaking faith with our veterans," she stated that young men and women enter the armed service, in part, for the training the military provides; but, when they leave the military, "that education ... is going to count against you." Again, Senator Clinton affirmed: "You take a job where otherwise you would be entitled to overtime — say you become a police officer and an MP in the Army; you don't have a college degree, but you served as an MP. All of a sudden, guess what. You are not eligible for overtime anymore."[78]

Though Senators Kennedy and Clinton were not immediately challenged, DOL officials later reportedly assured that "no veterans will be affected unless they are professionals."[79]

A Response From the Secretary. As the days passed, the Department decided to reply to allegations that veterans could be disadvantaged, unfairly, by being classified as professionals for Section 13(a)(1) purposes.

On January 27, Secretary Chao addressed a letter to Speaker Dennis Hastert (R-IL). In it, the Secretary charged that critics of the proposed overtime rule "intended to confuse and frighten workers."[80] Assistant Secretary of Labor Victoria Lipnic asserted: "This is a new low in the disinformation campaign against the Department of Labor's proposal to strengthen overtime pay protection for workers."[81] And Representative Sam Johnson (R-TX) took to the floor of the House "... to denounce an effort by Big Labor to scare our Nation's veterans and service men and women into thinking the Department of Labor is out to take away their overtime." Johnson continued: "It is a sad day indeed when the men and women of our forces are exploited for political gain." He concluded: "Opponents of these regulations ought to be ashamed."[82]

In her letter to the Speaker, Secretary Chao sought "to correct the record." She stated:

> The recent allegations that military personnel and veterans will lose overtime pay, because of proposed clarifications of the Fair Labor Standards Act (FLSA) "white-collar" exemption regulations, are incorrect and harmful to the morale of veterans and of American servicemen and women. I want to assure you that *military personnel and veterans are not affected by these proposed rules by virtue of their military duties or training.*

---

[78] Ibid., pp. S136-S137.

[79] Helen Dewar, "Senate Passes Funding and Democrats Relent," *The Washington Post*, Jan. 23, 2004, p. A5.

[80] Bureau of National Affairs, *Daily Labor Report*, Feb. 2, 2004, p. A4.

[81] Lipnic is quoted by Leigh Strope, "Unions Say Veterans Risk Losing Overtime," *Chattanooga Times Free Press*, Jan. 30, 2004, p. C2.

[82] *Congressional Record*, Feb. 4, 2004, p. H368. Secretary Chao's letter to Speaker Hastert was printed in the *Congressional Record* at Representative Johnson's request. See also statement on the AFL-CIO website at [http://www.aflcio.org], visited Feb. 24, 2004; extension of remarks by Rep. Marilyn Musgrave, *Congressional Record*, Feb. 12, 2004, p. E172; and editorial, "Overtime for Vets," *St. Louis Post-Dispatch*, Jan. 30, 2004, p. B8.

> First, the Part 541 "white collar exemptions" *do not apply to the military*. They cover only the civilian workforce.
>
> Second, *nothing in the current or proposed regulation makes any mention of veteran status*. Despite claims that military training would make veterans ineligible for overtime pay, members of Congress should be clear that *the Department of Labor's proposed rules will not strip any veteran of overtime eligibility*.[83] (Italics added.)

As discussed above, the Department, in developing the proposed rule, had moved away from a narrow academic foundation for a "professional" to one that included, *inter alia*, "training in the armed forces." At least potentially, the proposed rule might include within the professional exemption an unknown number of workers who would not currently be a part of the professional classification.

It is correct that the overtime pay requirements of the FLSA do not apply to persons in the military. It is also correct, in a narrow sense, as the Secretary stated, that "... military personnel and veterans are not affected by these proposed rules by virtue of their military duties or training": i.e., *as veterans*. Similarly, she was technically correct in stating that the proposed rule does not make "any mention of veteran status." But, persons who received training in the course of their service in the military could in some cases be classified under the proposed regulations as professionals — **not because they are veterans** but because they are trained workers and could fall within the revised definition of a "professional".

By widening the definition of a *learned professional*, the proposed regulation would also widen the Section 13(a)(1) exemption to include those who meet the salary test ($425 a week) and who satisfy the applicable knowledge requirements as defined by the Department. Some veterans could well lose their wage/hour protection — but so could non-veterans who have received training or taken classes that in the Department's opinion renders them exempt as a professional.

A Continuing Rebuttal. Gradually, the issue of denial of overtime protection for veterans gained visibility. An appearance by Secretary Chao before the House Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies, on February 12, 2004, provided an opportunity to clarify the issue.[84]

Well into Secretary Chao's presentation, Representative Jesse Jackson (D-IL) raised the overtime issue — and the Secretary responded:

> ... there has been an active campaign of disinformation on the so-called part 541 of the Fair Labor Standards Act white-collar regulation. There has been accusations and allegations that nurses, first responders, firefighters, police, construction workers, veterans would be impacted adversely by these regulations.

---

[83] *Congressional Record*, Feb. 2, 2004, pp. S351-S352.

[84] Quotations, here, are drawn from the transcript of the hearing prepared by the Federal Document Clearing House, Inc.

She countered: "None of those groups are impacted by the current proposed regulations, which have not yet emanated from the department." [85] Getting the rules out, she argued, "would show that a lot of — 99 percent of the allegations — which are potentially very damaging to workers are essentially not true."

Following a discussion of other labor issues, Representative Steny Hoyer (D-MD) asked the Secretary about assertions DOL had issued an advisory to employers on "how to avoid paying overtime." The Secretary labeled the assertion a "malicious rumor" that could "potentially be very, very harmful to workers." She explained:

> ... it is a misinterpretation of an economic analysis that was required back in March of 2003 in the OMB submission. OMB required that all legal ways for interpretation be placed and that's what happened.[86]

Representative Hoyer turned directly to the veterans' issue, pointing to the expanded definition of a learned professional that is "new language in your regulation" that has caused "fear ... by some of the veterans groups and by others" that training received in the military will be regarded as "professional training which will then be used to exempt people from overtime eligibility." Secretary Chao responded that "... there is a great deal of malicious disinformation on this rule." The Hoyer/Chao dialogue continued:

> CHAO: ... These regulations are very, very hard now to enforce. Our own investigators are sometimes at a quandary as to how to fully enforce these rules. And what's happening is that the courts themselves are very confused....
>
> Veterans, I don't know how — the people who spread the rumors that veterans would lose all overtime ought to be ashamed of themselves because they are, again, potentially endangering veterans. They are frightening them for no good purpose. And as I mentioned, there is no such provision in the proposed rule affecting veterans. Our final rule has not even come out yet....
>
> HOYER: But you didn't reference as to why the language was added.
>
> CHAO: I don't think it was added at all. It was not added. There is no impact at all on veterans. There was some aspect about the military training. This is a white-collar regulation, so that's why it does not affect workers such as construction workers, because it's blue collar. First responders, it doesn't — it's only white-collar workers.
>
> Second issue was about — and this rule only applies to civilian workforce. it does not apply to the military workforce.
>
> HOYER: ... Veterans are for the most part civilians.
>
> CHAO: Well, this — that is not the case. Veteran status has got nothing to do with qualifying for the professional exemption. Military training does not, in and of itself, qualify someone for the professional exemption. So that is not true.

---

[85] Asked by Representative Ralph Regula (R-OH) when the regulation would be promulgated in final form, the Secretary stated "... that we hope to get it out by the first quarter."

[86] See *Federal Register*, Mar. 31, 2003, p. 15576. The Secretary's response to Rep. Hoyer may have become somewhat scrambled under the pressure of questioning. She appears to have meant that OMB required a full statement of compliance options as part of the explanatory information associated with the proposed rule.

The Secretary then responded more generally. "The current regulations are very, very complex and the outdated nature of the regulations have made it even more ambiguous and difficult to interpret.... very, very confusing."[87]

Some Observations

Clearly, the Fair Labor Standards Act and the regulations through which it is administered can be "complex" and "very, very confusing." But, some would argue, the proposed rule could be as confusing. And, some have argued that there "are still the same ambiguities regarding the various categories of personnel, making it evident ... that the objective of reducing litigation will not be accomplished by the new regulations."[88] Critics view the proposed regulation as a basic weakening of labor standards. It is "a stealth attack on the 40-hour workweek, pushed by the White House," charged Senator Harkin, which "will effectively end overtime pay for dozens of occupations...."[89]

Some argue that expansion of the Section 13(a)(1) professional exemption is appropriate: perhaps, even, that it represents the interpretation that Congress intended in 1938 when it devised the language governing minimum wage and overtime pay treatment of *bona fide* professional employees. Proponents view the proposed regulation as a "restructuring and simplification" that "reflects changes in the 21st century workplace."[90] Amanda Landers of the Boeing Company suggests, that "you should look at all the knowledge and skills" an employee has acquired in determining Section 13(a)(1) exemption.[91] Others may question whether an exemption is needed at all — or, if needed, they might argue that an earnings threshold alone would provide an adequate and far less cumbersome test for exemption.

---

[87] The discussion would continued during a hearing before the House Committee on Ways and Means on the FY2005 Budget, Mar. 4, 2004, and intermittently, in Senate floor debate.

[88] *Congressional Record,* Jan. 21, 2004, p. S98.

[89] Ibid., p. S92.

[90] *Federal Register*, Mar. 31, 2003, p. 15567.

[91] Ms. Landers is quoted in Kirstin Downey, "Firms Plan Expansion of Overtime Exemptions," *The Washington Post*, Jan. 29, 2004, p. E4.