

# CRS Report for Congress

## The Fair Labor Standards Act: Continuing Issues in the Debate

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## Summary

On May 25, 2007, the President signed into law changes in the minimum wage under the Fair Labor Standards Act (FLSA): P.L. 110-28. Although the wage issue may now have been momentarily settled, the act includes other provisions that have been subject to legislation through the years and may again become the focus of legislative consideration. Examples include the following issues.

- A youth sub-minimum wage, instituted in 1996, was not included in the 2007 amendments, and is \$4.25 per hour.
- The cash wage employers of ‘tipped employees’ must pay, last updated in 1996, is \$2.13 per hour.
- In 1989, the ‘small business exemption’ was restructured to exempt from minimum wage requirements qualifying firms with an income of under \$500,000; but, as administered, exemptions have only been available for employees not involved in interstate commerce.
- In 2001, the Clinton Administration proposed restructuring of the ‘companionship exemption’ under the FLSA; in 2002, the measure was withdrawn. The issue has recently been the subject of a Supreme Court ruling (2007) and of proposed legislation (H.R. 3582 and S. 2061).
- Through nearly a century, some economists (and, later, some Members of Congress) have proposed, in various formats, indexation of the federal minimum wage — an issue that still sometimes arises.
- In 1986, Section 14(c) of the act was amended to remove any specific minimum wage floor for handicapped workers, replacing it with a negotiated wage ‘commensurate’ with the worker’s productivity. It has been contested through the years.
- In 2003, a proposal was issued dealing with overtime pay for persons classified as ‘executive, administrative, or professional’ employees under Section 13(a)(1) of the act. At that time, the issue was extremely contentious. How has it worked out in practice?
- Industry has threatened to leave American Samoa and the Commonwealth of the Northern Mariana Islands were the full FLSA to be made applicable there, as it would be under P.L. 110-28. What will be the impact upon those islands?
- Increasingly, the states (now 34 in number) have moved to provide minimum wage rates higher than the federal rate. What implications can be expected, both in economic and political terms?

This report will be updated as the need may arise.

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# The Fair Labor Standards Act: Continuing Issues in the Debate

## Introduction

On May 25, 2007, President George Bush signed into law a supplemental appropriations bill (H.R. 2206: P.L. 110-28) which included an increase in the federal minimum wage under the Fair Labor Standards Act (FLSA). It was the first such increase in a decade.<sup>1</sup> Under P.L. 110-28, among other things, the federal minimum wage, which had been \$5.15 per hour, is increased in steps to

\$5.85 per hour on July 24, 2007

\$6.55 per hour on July 24, 2008

\$7.25 per hour on July 24, 2009.

In addition, the bill raised wages in two insular territories of the Pacific: the Commonwealth of the Northern Mariana Islands and American Samoa. The level of wages in the islands will rise at different rates to equal the federal minimum.<sup>2</sup>

Under the FLSA, an increase in the minimum wage has been the element around which other aspects of the act have clustered. It was often the vehicle for consideration of overtime pay, child labor, industrial homework, and similar issues that are a part of the FLSA.<sup>3</sup>

The federal minimum wage, now having been raised, may, perhaps, be dormant for a time. This could provide an opportunity, absent a more sustained pressure for a new rate increase, to examine the basic concept of the Fair Labor Standards Act and its various component parts. This report discusses a few of the topics that, collectively, make up the FLSA.

In some cases, the report is historical because there is a long and, often, important history to the evolution of the act. On other occasions, it tends to focus

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<sup>1</sup> The Fair Labor Standards Act (the FLSA) was adopted in 1938. It sets the federal minimum wage, establishes overtime pay standards, regulates child labor, and controls industrial homework. It is the primary federal labor standards statute in these areas.

<sup>2</sup> For a history of the 2007 FLSA amendments, see CRS Report RL33754, *Minimum Wage in the 110<sup>th</sup> Congress*, by William G. Whittaker.

<sup>3</sup> In 1996, a procedural change occurred. Minimum wage was added as a very small item in a series of tax and related issues of special interest to industry. The same pattern was followed with the 2007 amendments to the FLSA. The related aspects of the act have tended to be considered on their own merits.

upon the administration of the act and the interpretation of provisions which Congress has left, largely, to the discretion of the Secretary of Labor. This report also considers judicial decisions which, inevitably, make up a substantial part of wage/hour issues and have an impact upon enforcement of the statute.

The several issues discussed, here, are suggestive and by no means definitive. None of these issues needs to be taken up in the sense that they are obligatory; and, indeed, the Congress may choose not to address any of them. For many of these issues, general CRS background papers exist and are listed in the footnotes.

## The Youth Sub-Minimum Wage

Under current law, a sub-minimum wage at \$4.25 per hour is allowed for youth workers (under 20 years of age) through the first 90 consecutive days of employment with an employer. No change was made by the 2007 amendments.

### Background

During the 1960s and 1970s (when major employers of youth workers such as retail and service industries were brought under the FLSA), the issue of a youth sub-minimum wage became extremely active. Proponents of the concept (most notably from the hotel and restaurant industries, but other segments of the economy as well) urged that youth workers be paid at a rate lower than the standard minimum wage, regardless of experience or the quality of work they performed.

The period was marked by a very high youth unemployment rate: especially among black teenagers. Some suggested that, by reducing the wage rate, more young workers could be employed. Others charged that the plan was one more general reduction in wages — and a chipping away at the minimum wage. Further, in a market overflowing with willing workers, reducing the wage floor would seem to benefit chiefly employers who might otherwise hire youth workers at the full minimum.<sup>4</sup>

**Early Attempts at a Sub-Minimum Wage.** The concept of a reduced wage for youth had been pending for a number of years; but, it seems only to have been given serious attention during the 1960s and later as industry took up its advocacy. Conversely, organized labor and civil rights groups were strongly opposed,

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<sup>4</sup> See Walter E. Williams, “The Shameful Roots of Minority Unemployment,” *Readers Digest*, October 1979, pp. 21-26; and “Racism and Organized Labor,” *Lincoln Review*, spring 1979, pp. 25-33. See also J. Willard Marriott, Jr., “How the Minimum Wage Destroys Jobs,” *Fortune*, January 29, 1979, pp. 101-103; and Andrew Brimmer, “Higher Minimum Wage Will Hurt Blacks,” *Black Enterprise*, August 1977, pp. 27-30. Conversely, see Pete Berlinski, “Is Cheap Labor Too Expensive?” *Restaurant Business*, July 1977, pp. 76-80, 129; Sol C. Chaikin and Phil Comstock, “Subminimum Wage: Sub-Par Idea,” *The Journal: Institute for Socio-Economic Studies*, January 1983, pp. 74-89; and Martin Hochbaum, “The Subminimum Wage: Less than Meets the Eye,” *The Christian Science Monitor*, August 15, 1983, p. 23.

suggesting that the ‘minimum wage’ was truly that minimal. Any further reduction would be inequitable and counter-productive, they argued.<sup>5</sup>

During the Nixon Administration (1972), Representative John Erlenborn (R-IL) proposed an 80% sub-minimum, but the initiative failed. In 1974, Erlenborn and Representative John Anderson (R-IL) presented a new proposal but that, too, failed. To that date, the initiative had been associated, largely, with Republicans; but, in 1977, two Democrats became sponsors: Representatives Robert Cornell (D-WI) and Paul Simon (D-IL). The Cornell/Simon proposal called for employment of youth, less than 19 years-of-age, for up to six months at a rate of 85% of the standard minimum wage — a proposal that some viewed as opening up the labor market to disadvantaged youth. Representative Parren Mitchell (D-MD), a member of the Congressional Black Caucus, though “exceedingly grateful for the keen interest that is now being demonstrated in minority youth employment,” argued that a youth differential would be a mistake, observing that “unemployment is chronic and endemic and deep across the board in the black community, and it does not make any sense at all to play one group of workers off against another.”<sup>6</sup> Again, the effort failed, as did other similar proposals during the period.

President-elect Ronald Reagan (1980) was believed to support a youth sub-minimum wage. He had been widely quoted to the effect that the minimum wage, per se, had “caused more misery and unemployment than anything since the Great Depression.”<sup>7</sup> As the new Administration commenced, various hearings were conducted on the issue but, again, without legislative success. Representative Erlenborn viewed the issue as a standoff: that some will want a higher minimum wage for all workers; that others will call for a sub-minimum rate for youth. For either side, it may have been “too high a price to pay.”<sup>8</sup> It would be a stand-off that would continue throughout the Reagan Presidency.

**Bush and Experimental Youth Wages.** What had been ‘a sub-minimum wage’ gradually evolved into ‘a youth opportunity wage’ by the 1980s, and then, once more, morphed into ‘a training wage’ by the late 1980s and 1990s. The concept was still the same: lowering wages would produce jobs for young persons.

When George H. W. Bush became President in 1989, he agreed to sign a new minimum wage increase if, among other things, it included a general sub-minimum

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<sup>5</sup> U.S. Congress. House. Committee on Education and Labor. General Subcommittee on Labor, *Hearings on H.R. 7130 to Amend the Fair Labor Standards Act of 1938*. April 20, 1971 ff. Washington, U.S. Govt. Print. Off., 1971, p. 124.

<sup>6</sup> *Congressional Record*, September 15, 1977, p. H9457. See also: “House Vote Kills Legislation Raising Minimum Wage,” *Congressional Quarterly: CQ Almanac (1972)*, Congressional Quarterly, Inc., 1972, pp. 361-371; and, “Nixon Signs Minimum Wage Increase,” *Congressional Quarterly: CQ Almanac (1974)*, Congressional Quarterly, Inc., 1975, pp. 239-244.

<sup>7</sup> *Christian Science Monitor*, December 9, 1980, p. 5.

<sup>8</sup> Bureau of National Affairs, *Daily Labor Report*, January 14, 1981, p. A2. See also James W. Singer, “A Subminimum Wage — Jobs for Youths or a Break for Their Employers?” *National Journal*, January 24, 1981, pp. 146-148.

wage for workers beginning new employment.<sup>9</sup> Congress balked and the President vetoed the measure. There followed a new round of hearings and negotiations. After extended reconsideration, Congress presented the President with a new bill, which he did sign and which contained a sub-minimum wage for youth.<sup>10</sup>

The youth wage was initially \$3.35 per hour and after April 1, 1991, not less than \$3.35 an hour or 85% of the otherwise standard rate, whichever is higher. The program was divided into two parts and focused upon youth under 20 years-of-age. Part one covered “a cumulative total of 90 days” at the sub-minimum wage with no conditions beyond those imposed by the employer and a youth’s willingness to accept the work. Part two was more complex. It involved an additional 90-day period and included a training wage component.<sup>11</sup> At the close of 180 days, a regular minimum wage (or more, at the employer’s discretion) would be required for the employee. The program was experimental, to begin on April 1, 1990, and to end on April 1, 1993. At the end of the trial period, the Secretary of Labor was to provide Congress with an assessment. As it turned out, almost no one used the training wage and it was not extended.<sup>12</sup>

**Clinton and the Youth Wage Made Permanent.** In 1996, minimum wage legislation came up as a floor amendment to a bill containing tax and other considerations. The sub-minimum wage for youth was just one of its provisions. Following floor debate and approval in the House, the measure was forwarded to the Senate. Negotiations continued in the Senate and, ultimately, the measure was passed with the sub-minimum wage in place. The bill was subsequently signed into law by President William Clinton (P.L. 104-188).<sup>13</sup> As enacted, the bill allowed an

<sup>9</sup> Initially, the Bush proposal would have provided a “training wage to all ‘new-hire’ workers, regardless of how old they were or how long they had been employed in the past.” See “Minimum-Wage Impasse Finally Ended,” *Congressional Quarterly: CQ Almanac* (1989), Congressional Quarterly, Inc., 1990, p. 333.

<sup>10</sup> See “Minimum-Wage Impasse Finally Ended,” *Congressional Quarterly: Almanac (101)*, Congressional Quarterly Inc., 1990, pp. 333-340.

<sup>11</sup> “The term ‘on-the-job training’ means training that is offered to an individual while employed in productive work that provides training, technical and other related skills, and personal skills that are essential to the full and adequate performance of such employment.” See P.L. 101-157, Section 6(g)(2).

<sup>12</sup> P.L. 101-157, Section 6: training wage. See U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, *Report to the Congress on the Training Wage Provisions of the Fair Labor Standard Act Amendments of 1989 from the Secretary of Labor*, Robert B. Reich, April 21, 1993, 24 pp.; and Kevin G. Salwen, “Subminimum Wage of \$3.62 an Hour Is on Deathbed but Draws Few Mourners,” *Wall Street Journal*, March 12, 1993, p. A4.

<sup>13</sup> In signing the bill, President Clinton observed, “I should note that I disagree with certain provisions added to the minimum wage title of the Act, such as the provision creating a new sub-minimum wage for young people and the one denying increased cash wages to most employees who rely on tips for part of their income. Still, those defects do not obscure the central accomplishment of this Act — securing the first minimum wage increase since 1991.” See *Public Papers of the Presidents of the United States: William J. Clinton*, Book (continued...)



employer to pay a youth (under 20 years of age) a sub-minimum wage of \$4.25 per hour through the first 90 consecutive days of employment with an employer.

Having set the youth rate for persons under 20 years of age, Congress then raised the general minimum to \$5.15 an hour, but without linking the youth worker option to the new standard. When, in May 2007, Congress again raised the general minimum wage, no mention was made of a sub-minimum wage for youth. Thus, under current law, a youth may be hired at \$4.25 cents an hour. Legislatively, the youth rate is a separate issue from the general wage floor.<sup>14</sup>

## The ‘Tip Credit’ Provisions

During the 1960s and 1970s, the FLSA was progressively expanded to cover retail and service employees. Some of these workers were ‘tipped employees’ and, their employers argued, that since they were given tips by the public, they (the employers) should not be required to pay such employees a full minimum wage.

As things stand (under the *tip credit* provisions of the FLSA), all covered workers do receive at least the federal minimum wage. Of that wage, at least \$2.13 per hour must come directly from the employer. The employer may have to include a higher amount in order to supplement tips that the employee receives (i.e., to make up for a deficiency). But, whatever tip income the worker receives, employers must pay at least \$2.13 per hour. Through the years, the level of the tip credit (the difference between \$2.13 per hour and the minimum wage) has varied.

## Background

How much of a tipped worker’s wage should be accounted for through tips; how much should be paid directly by the employer? Speaking generally, organized labor (and tipped employees) may be said to prefer a zero tip credit: the standard minimum wage should be paid directly by the employer. Whatever income is derived from tips, they suggest, should be the property of the tipped employee. Conversely, still speaking generally, industry (and employers) would prefer a 100% credit. From this viewpoint, the employer provides the context for the worker’s services (the quality of the food, the ambience) and deserves to be reimbursed, so long as the worker is actually paid through tips. The tip credit, thus, has become an issue of equity and of percentages.

**The Early Statute.** Initially, persons in the retail and services trades, among others, were exempted from coverage under the FLSA. In the 1961 amendments, the Secretary of Labor was instructed to explore “the complex problems involving rates

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<sup>13</sup> (...continued)

II, 1996, Washington: United States Government Printing Office, 1998, p. 1317.

<sup>14</sup> See “Congress Clears Wage Increase With Tax Break for Business,” *Congressional Quarterly: Almanac, 104<sup>th</sup> Congress, 2<sup>nd</sup> Session, 1996*, Congressional Quarterly Inc., 1997, Section 7, pp. 3-9.

of pay of employees in hotels, motels, restaurants, and other food service enterprises who are exempted from the provisions of this Act” and to submit a report to the Congress. The result was two reports, heavily statistical, that examined the general issue of tipped (and non-tipped) employment in the targeted areas. Through that mechanism, the visibility of the issue was raised and the foundations were laid for subsequent actions.<sup>15</sup>

In the 1966 amendments, despite significant opposition, the new tip credit provision was added to the FLSA. A tipped employee was defined as one who “customarily and regularly receives more than \$20 a month in tips.”<sup>16</sup> An employer could count up to 50% of the applicable minimum wage as a tip credit. In case of dispute, appeal could be made to the Secretary. Thereafter, adjustment of the tip credit provision became largely technical, moving either up or down as Congress judged appropriate.

When the basic minimum wage was raised in 1974, the credit remained at 50%.<sup>17</sup> In 1977, the tip credit was restructured and the threshold was moved from \$20 to \$30 per month in tips. At the same time, Congress diminished the value of the credit from 50% down to 45% and to 40% by January 1, 1980.<sup>18</sup> Then, in 1989, Congress essentially reversed its action of 1977. New amendments to the act provided that the tip credit would rise to 45% of the minimum wage as of April 1, 1990, and to 50% after March 31, 1991.<sup>19</sup>

**The 1996 FLSA Amendments and Beyond.** In 1996, revisions of the FLSA differed, somewhat, from earlier measures in that they came to the floor as amendments incorporated into a bill of special interest to industry, the essence of which had little to do with standard wage/hour issues.<sup>20</sup>

The bill provided that the credit would remain at \$2.13 per hour or 50% of the then statutory rate of \$4.25 per hour.<sup>21</sup> Then, with the minimum cash wage for tipped employees locked into place, Congress raised the general minimum wage, in steps,

<sup>15</sup> P.L. 87-31, Section 13. See U.S. Department of Labor, Wage and Hour and Public Contracts Divisions, *Hotels and Motels and Restaurants and Other Food Service Enterprises*, February 1962.

<sup>16</sup> P.L. 89-601, Section 101.

<sup>17</sup> P.L. 93-259, Section 13.

<sup>18</sup> CRS Report 78-171, *The Fair Labor Standards Act Amendments of 1977 (P.L. 95-151): Discussion with Historical Background*, by Charles Ciccone and William Whittaker, August 15, 1978, pp. 62-76. This report is available from the author.

<sup>19</sup> P.L. 101-157, Section 5.

<sup>20</sup> On the linkage of business interest with the minimum wage, see Alissa J. Rubin, “Congress Clears Wage Increase with Tax Breaks for Business,” *Congressional Quarterly*, August 3, 1996, pp. 2175-2177; Julie Kosterlitz, “A Bounty for Business,” *National Journal*, October 26, 1996, pp. 2289-2292; and, later, Juliet Eilperin, “Business Seeks Tax Breaks in Wage Bill: Pay Raise Is Viewed as Best Chance at Cuts,” *Washington Post*, May 14, 2001, pp. A1-A12.

<sup>21</sup> P.L. 104-188, Section 2105(b).

to \$5.15 per hour. The result was that the cash wage for tipped employees remained at \$2.13 per hour while the basic minimum wage was raised. By moving away from a percentage figure (50% of \$4.25 or \$2.13 per hour) to a specific number (\$2.13 per hour to be paid by the employer), there was a decrease in the employer's statutory obligation to his or her employees, now to 41.4%.

When the 2007 increase in the federal minimum (to \$7.25) takes effect in July 2009, the cash wage obligation will sink to 29.4% of the minimum wage. (See Table 1.) The employer, however, will still be required to supplement the difference between the \$2.13 per hour and the amount theoretically earned through tips where the latter may be insufficient to reach the minimum amount.

By retaining the current structure of the tip credit, the real value of the cash contribution of the employer to the tipped employee can be expected to decline with inflation. In that context, payment of a tipped employee will be transferred from the employer, per se, to the customer at his or her discretion.

It may be that the current tip credit arrangement is satisfactory. Conversely, some modification in the basic formula might be in order, either raising or lowering the terms of the credit or going back to a straight percentage figure. There may be other possibilities as well.

**Table 1: The Tip Credit Under the 2007 Amendments to the Fair Labor Standards Act: Dollars per Hour and Percentages**

Statutory federal minimum wage	Cash Wage from employer, mandatory under statute	Tip Credit (between \$2.13 and the statutory minimum wage)	Tip Credit as a % of the minimum wage	Mandatory employer cash contributions as a % of minimum wage
\$5.15 (to July 24, 2007)	\$2.13	\$3.02	58.6%	41.4%
\$5.85 (July 24, 2007)	\$2.13	\$3.72	63.6%	36.4%
\$6.55 (July 24, 2008)	\$2.13	\$4.42	67.5%	32.5%
\$7.25 (July 24, 2009)	\$2.13	\$5.12	70.6%	29.4%

## Companionship Services under the FLSA

In June of 2007, a unanimous Supreme Court decided *Long Island Care at Home v. Coke* (U.S., No. 06-593, 6/11/07). Evelyn Coke, through the years, had provided companionship services through Long Island Care and, now, charged denial of overtime pay and minimum wage.<sup>22</sup>

In Justice Breyer's opinion for the Court, all third party employees who provide companionship services (those hired by firms like Long Island Care at Home) were termed exempt from minimum wage and overtime pay coverage.<sup>23</sup>

### Background

Through the early 1970s, there had been efforts to extend coverage under the FLSA to new groups of workers. Among them were persons employed to provide companionship to persons who were aged or infirm.<sup>24</sup> These companions, however, may be asked to provide substantially more: that is, anything that does not require the services of a licenced practitioner.

At the same time, there was considerable opposition to extending minimum wage and overtime coverage to these workers. Much of this opposition was due to the potential cost to employers. Allen Nixon, president of the Southern States Industrial Council, expressed one aspect of the dilemma. Nixon was concerned about his mother-in-law "who recently had a total stroke." He stated that the cost of in-home care would be \$22,204 a year. "She cannot lift her hand, She cannot eat. She cannot do anything. That is the serious, serious problem ... because her money is going to run out and I will have to take care of her."<sup>25</sup>

At the request of DOL, the Bureau of the Census had conducted a survey of wages, weekly hours of work and fringe benefits for domestics: some care-givers, some babysitters, others of more diverse background and skill. In 1971, there was a total of 2.4 million persons employed as private household workers. Excluding babysitters with no housekeeping duties, their number was 1.8 million. "Nationwide, females comprised three-fourths of the domestic workforce..." Some 23.7% were in the 20 to 44 age bracket; 43.7% were 45 years of age and over. Many older workers, the report implied, seemed to have little economic alternative to being domestics.<sup>26</sup>

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<sup>22</sup> Bureau of National Affairs, *Daily Labor Report*, June 12, 2007, pp. AA1-AA5.

<sup>23</sup> See also CRS Report RL31755, "*Family Caregiving to the Elderly by Employed Persons: The Effects on Working Caregivers, Employers, and Federal Policy*," by Linda Levine.

<sup>24</sup> See *Congressional Record*, July 10, 1973, p. 24801.

<sup>25</sup> U.S. Congress. House. *Fair Labor Standards Amendments of 1973*. 93<sup>rd</sup> Cong., 1<sup>st</sup> Sess., March 14, 1973, p. 139. (Cited hereafter as House Hearings, 1973.)

<sup>26</sup> U.S. Department of Labor. *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act*. Economic Effects Study, Submitted to Congress, 1973, pp. 27- (continued...)

**Some Early Problems.** Early interest in the companionship provisions of the FLSA seems to have focused upon domestics in a broader sense. Their hours tended to be irregular as did their work. Nor was it always clear how they might fit into a family unit: not quite servants and yet not really professionals.<sup>27</sup> Their wages were low.<sup>28</sup> There was also concern that employers of companionship workers might not accurately report their earnings for social security and related purposes.<sup>29</sup>

Devising FLSA coverage for care-givers posed a number of problems. Robert Thompson, for the Chamber of Commerce, thought that “a minimum wage on domestic employment ... will double the number of people in that field who are on welfare.”<sup>30</sup> Carl Perkins (D-KY) said “exactly the opposite will occur.” By extending coverage to these workers, he stated, “we will provide more respectable working conditions” and a sense of dignity.<sup>31</sup>

When new legislation was introduced in 1974, there were still differences to be resolved. H.R. 4757 of the 93<sup>rd</sup> Congress applied both the minimum wage and overtime pay to most domestic workers/care-givers.<sup>32</sup> The AFL-CIO supported the measure.<sup>33</sup> But, Representative Bella Abzug (D-NY), objected. “There is an unfortunate exception in the present bill: domestic workers who ‘live in’ will not be entitled to overtime compensation.” Here, again, there was the issue of the ‘family status’ of live-in maids or care-givers.<sup>34</sup> In the final bill (P.L. 93-259), minimum wage and overtime pay provisions were included — but not unambiguously. Congress did not render judgment on each and every category of companionship arrangement. Thus, it provided that coverage would be established for such persons “as such terms are defined and delimited by regulations of the Secretary.”<sup>35</sup>

**Interpretation by the Wage/Hour Administrator.** Once the 1974 amendments were in place, it was left up to the Wage and Hour Administrator, Betty

<sup>26</sup> (...continued)

<sup>53</sup>. Distinction between *domestics* and *companionship workers* may not always be clear.

<sup>27</sup> *Congressional Record*, July 20, 1972, p. 24704.

<sup>28</sup> *Congressional Record*, July 20, 1972, p. 24711.

<sup>29</sup> *Congressional Record*, July 20, 1972, p. 24702.

<sup>30</sup> House Hearings, 1973, p. 228.

<sup>31</sup> *Congressional Record*, June 5, 1973, p. 18158.

<sup>32</sup> House Hearings, 1973, p. 12. The bill stated: “Any employee who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less” than the FLSA minimum rate.

<sup>33</sup> House Hearings, 1973, p. 92.

<sup>34</sup> House Hearings, 1973, pp. 86-85. Senator Harrison Williams (D-N.J.) explained: “In the case of live-in domestics, where it is difficult to determine the exact hours worked, any reasonable agreement of the parties ... will be accepted as a proper basis for determining hours worked.” See *Congressional Record*, July 19, 1973, p. 24799.

<sup>35</sup> P.L. 93-259, in *United States Statutes at Large* (1974), Vol. 88, Part 1 (U.S. General Accounting Office, 1976), p. 62.

Southard Murphy, to interpret the statute and to write the rules under which they would be governed. As part of that process, her role was to ‘define’ and to ‘delimit’ the terms used by the Congress. Certain of the targeted employees, she seemed to suggest, were not covered by the new requirement because they were already covered under “sections 3(r) and 3(s)(1) of the Act.”<sup>36</sup>

When the final regulations appeared, there may have been a reversal. Murphy noted in an introductory section that “one major change” was made to section 29 CFR 552.109 that deals with the concept of third party employment. The new regulations read that domestic employees employed by a third party “*are exempt* from the Act’s minimum wage and overtime pay requirements by virtue of 13(a)(15).” (Emphasis added.) She stated: “This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions.”<sup>37</sup>

Once enacted, the statute’s new provision seems not to have attracted major attention.<sup>38</sup> In November 1976, the National Committee on Household Employment (NCHE), a trade association with special interest in the field, indicated that there had been “little compliance” with the new law.<sup>39</sup>

## Clinton, Bush and the Companionship Exemption

In 1993 and again in 1995, proposed rules were published governing the nature of the companionship exemption under the Fair Labor Standards Act. In neither case did they move forward. Finally, under date of January 19, 2001, just as the Clinton Administration was leaving office, a proposed rule was published.<sup>40</sup>

**The Clinton Proposal.** The role of family and friends in providing companionship services had begun to change before the 1974 amendments, making a shift to some level of institutionalization of such services. These changes produced workers “who today provide in-home care” and are performing “types of duties and working in situations that were not envisioned” a few years ago. Thus, the wage/hour

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<sup>36</sup> *Federal Register*, October 1, 1974, p. 35385. Section 13(a)(15), as codified, deals with babysitting and companionship services. Section 3(r) and 3(s)(1) deal with the enterprise tests. Murphy stated: “This results from the fact that their employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act’s protection to previously covered domestic service employees.”

<sup>37</sup> *Federal Register*, February 20, 1975, pp. 7407, 7404 and 7405. See also Bureau of National Affairs, *Daily Labor Report*, February 20, 1975, p. A8. Murphy deleted an “8-hour a week limitation on the amount of nonexempt work which may be performed by individuals engaged in rendering companionship services....”

<sup>38</sup> *Congressional Record*, January 16, 1975, p. 507; and Bureau of National Affairs, *Daily Labor Report*, January 17, 1975, p. A12.

<sup>39</sup> Bureau of National Affairs, *Daily Labor Report*, November 9, 1976, p. A13. See also Phyllis Palmer, “Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act,” *Journal of Policy History*, vol. 7, no. 4, 1995, pp. 426-432, 439-440.

<sup>40</sup> *Federal Register*, January 19, 2001, pp. 5481-5489.

exemptions of 1974 were stretched “far beyond” what Congress had intended. As a result, the Clinton Department of Labor felt that it was necessary to narrow the exemption so that more workers would be covered under wage/hour standards.<sup>41</sup>

The Clinton proposal focused upon the charity/companionship nexus under three scenarios. Under the first scenario, “no specific percentage of time” would need to be devoted to fellowship with the patient, but it would need to be “a significant component of the companion’s duties.” Under the second scenario, fellowship and related duties must take up “at least 50%” of the care-giver’s time. Finally, under the third scenario, a companion would need to spend “at least 80%” of his or her time in companionship responsibilities. In each case, some patient-related non-fellowship duties could be accommodated (cooking a meal, washing clothing, changing a bed) but, clearly, such activities would need to be marginal. The rule could be interpreted to mean that all third party employment would be subject to minimum wage and overtime pay legislation.<sup>42</sup>

As the Clinton proposal defined *companionship*, it might involve “reading a book or a newspaper to the person, chatting with him or her about family or other events, playing cards, watching television, or going for a walk.” The activity “must involve personal interaction between the in-home care provider and the care recipient in order for the proposed companionship services exemption to apply.” A distinction would need to be made between an impersonal maid and a personal ... *companion*.<sup>43</sup>

**The Bush Administration’s Reaction.** Having inherited the Clinton rule, the Bush Administration (in late April) extended the comment period to July 23, 2001. DOL, in a general way, reviewed the Clinton proposal and noted that “continuing interest” had been expressed concerning the measure.<sup>44</sup>

As of the July deadline, the Bureau of National Affairs reported, DOL had received “more than 800 responses.” Employers in the home health care industry “are stridently resisting the change.” Some from within the Administration were also opposed. Turning from the provider to the recipient of services, it was noted that the change “would force third-party employers to charge higher hourly fees for the services of the care providers.”<sup>45</sup>

Attorneys for the health care industry argued that the “existing regulations ... are entirely consistent with the statute and accompanying legislative history” and that “current regulations all have been approved by the courts as an accurate portrayal of

<sup>41</sup> *Federal Register*, January 19, 2001, p. 5482. The companionship exemption is written in double negatives. From the Clinton Administration’s perspective, the intent was to reduce or narrow the exemption so that fewer workers would qualify as exempt and, thus, that more workers would be protected under minimum wage and overtime pay requirements.

<sup>42</sup> *Federal Register*, January 19, 2001, pp. 5488-5489.

<sup>43</sup> *Federal Register*, January 19, 2001, p. 5484.

<sup>44</sup> *Federal Register*, April 23, 2001, p. 20411. See also Bureau of National Affairs, *Daily Labor Report*, April 23, 2001, pp. A14-A15.

<sup>45</sup> Bureau of National Affairs, *Daily Labor Report*, November 26, 2001, p. C1 ff.

congressional intent.” Others thought the proposal ill-timed given the “shortage of health care workers and the growing need for long-term care.”<sup>46</sup> Representatives for workers applauded DOL’s initiative. Given the shortage of home care services, “... it is more important than ever to foster working conditions that create a stable workforce” and to promote conditions that “... include adequate wages and benefits, good training, supervision, and advancement potential...”<sup>47</sup>

In April 2002, DOL withdrew the Clinton companionship proposal. The notice observed: “Based on its review of the rulemaking record as a whole, the Department has decided to withdraw the proposed rule and terminate the rulemaking action.”<sup>48</sup>

## Recent Legislative Interest

In the wake of DOL’s withdrawal of the companionship rule, the matter returned to the courts. The issue is one about which reasonable people may disagree; and, indeed, the Second Circuit Court had ruled, twice, against Long Island Care. However, the Supreme Court has now ruled, unanimously, affirming the exemption of third party employees who provide companionship services from the requirements of the FLSA.<sup>49</sup>

In September 2007, bills were introduced in the House and Senate, the stated purpose of which was to redress a perceived imbalance with respect to employment of care-givers and, further, to redefine the concept. [See H.R. 3582 (Woolsey) and S. 2061 (Harkin)]. In the House, on October 25, 2007, a hearing was held with a variety of representatives from labor and industry.<sup>50</sup>

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<sup>46</sup> Bureau of National Affairs, *Daily Labor Report*, November 26, 2001, p. C1 ff.

<sup>47</sup> Bureau of National Affairs, *Daily Labor Report*, November 26, 2001, p. C1 ff.

<sup>48</sup> *Federal Register*, April 8, 2002, p. 16668.

<sup>49</sup> Bureau of National Affairs, *Daily Labor Report*, June 12, 2007, p. AA1 ff.

<sup>50</sup> A factor in Long Island Care at Home was the authority of the Department for “gap-filling” — that Congress had delegated its authority to the Department to fill-in-the-gaps in the language. Here, in each bill, there is also a reference to “as such terms are defined and delimited by regulations of the Secretary.”



## Indexation of the Minimum Wage?

Indexation of the minimum wage has been a topic of discussion among economists through nearly a century. Increasingly, during recent years, the states have moved in this direction, with several states having indexed their own minimum wage: among them, Arizona, Missouri, Montana, Oregon, Vermont and Washington. Might indexation work at the federal level? Some think that it might; others are less certain, while still others reject the concept outright.

### The Concept of Indexation

Various theories have been offered with respect to indexation of the minimum wage. In general, the concept would be to anchor the minimum to an independent economic variable, such as the consumer price index (CPI) or average hourly earnings in manufacturing (AHE). Other options are also available.

According to some proponents of indexation, if one were to link the minimum wage to the CPI, for example, it could be expected, automatically, to keep pace with inflation. However, use of indexation would seem to imply looking backward to a last quarter or to last year and using that level of increase as the basis for increasing the federal minimum wage. Given the variation in the economy, a backward looking model may have certain drawbacks.

Although indexation may be viewed as a device through which Members of Congress would be relieved of responsibility for wage settings, some suggest that having Members actively involved, rather than having a formula, is useful. This depends upon one's interpretation of the minimum wage: whether it represents social policy or, conversely, is primarily an economic measure to be used, on occasion, in response to general economic conditions.

Having the minimum wage associated with a relatively stable economic variable could provide assurance to low-wage workers that, as the cost-of-living increases, their earnings will also increase. Under the present system, there have been relatively long periods during which the minimum wage was not raised — sometimes for as long as a decade — while the general economy moved along an upward trajectory. At times, this was the result of philosophical design; on other occasions, it may have resulted from the press of business before the Congress. However, during such periods, the statutory wage of the working poor has been allowed to atrophy.<sup>51</sup>

### Early Concerns and Equity

During 1937 and 1938, Congress debated the federal minimum wage. Under severe pressure from certain parts of the country (notably, the south), it agreed to a 25 cent per hour minimum, to be phased up to 40 cents an hour over the next seven years. In the process, there was a two-prong approach: a general structure of wages

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<sup>51</sup> For a more serious study of indexation, see CRS Report RL30927, *The Federal Minimum Wage: The Issue of Indexation*, by Gerald Mayer.

plus a wage board. The latter, an appointed body under the Secretary of Labor, would inspect various industries (since most covered workers were industrial) and assess whether and how soon they could meet the 40 cent minimum.<sup>52</sup>

During the 1940s and 1950s, the issue of indexation arose in hearings with considerable bi-partisan support, but no action was taken. In the early 1970s, the concept received somewhat more consideration with an early proposal by Representative John Dent (D-PA) which would have raised the minimum wage to \$3.00 an hour and, thereafter, indexed it to the CPI.<sup>53</sup> But, again, no action was taken on the Dent bill.

Consideration of indexation was renewed during the Carter Administration. Ray Marshall, Secretary of Labor throughout the Carter era, proposed in 1977 a \$2.50 minimum, followed by indexation at 50 percent of the straight time hourly earnings of production and non-supervisory workers. Dent had a proposal from the AFL-CIO: a floor at \$3.00 an hour with “an automatic mechanism in the law” to provide for 60% of average hourly earnings in manufacturing (AHE).<sup>54</sup> Meanwhile, another proposal emerged in the Senate: a \$2.65 minimum, followed by 53% of the AHE formula.<sup>55</sup> The House acted first. Representative John Erlenborn (R-IL) proposed to rid the bill, as he termed it, of the “mindless, thoughtless rule” of indexation.<sup>56</sup> Erlenborn carried the day by a vote of 223 ayes to 193 nays. Indexation, for all practical purposes, was dead for the duration of the 95<sup>th</sup> Congress.

## Subsequent Legislative Interest

During the Reagan Administration, proposals to increase the minimum wage — whether through indexation or by other more direct means — were largely set aside. When George H. W. Bush took office in 1989, congressional interest in raising the wage and indexing it resumed. Some Members were concerned about indexation, but not always through hostility toward the concept. An exchange between Gerald Kleczka (D-WI) and Austin Murphy (D-PA), the latter, chair of the Subcommittee on Labor Standards, may be illustrative.

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<sup>52</sup> The wage board concept continued up into the 1940s; but, after the War, it fell into disuse. In more recent times, the concept has been utilized with respect to the offshore territories (American Samoa, Puerto Rico, and the Virgin Islands). It has now been retired. See CRS Report RL30235, *Minimum Wage in the Territories and Possessions of the United States: Application of the Fair Labor Standards Act*, by William G. Whittaker.

<sup>53</sup> U.S. Cong., House. *Fair Labor Standards Amendments of 1975*, Hearings before the Subcommittee on Labor Standards, Committee on Education and Labor, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess., October 22, 1975, ff. U.S. Government Printing Office, 1975, pp. 3-4.

<sup>54</sup> U.S. Cong., House, *Fair Labor Standards Amendments of 1977*, Hearings before the Subcommittee on Labor Standards, Committee on Education and Labor, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess., March 9, 1977, ff., p. 6.

<sup>55</sup> U.S. Cong., Senate, *Fair Labor Standards Amendments of 1977*, Hearings before the Committee on Human Services, Subcommittee on Labor, Hearing, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess., July 28, 1977, ff., pp. 3-7.

<sup>56</sup> *Congressional Record*, September 15, 1977, p. 29436.

“Mr. MURPHY. I take it you are not, then, opposed to the [Mario] Biaggi approach of a 3- to 4-year mandatory increase plus indexing, but you think —

“Mr. KLECZKA. The chances of getting that signed into law, I think are very remote.

“Mr. MURPHY. Your objections are practical, then, rather than philosophical?

“Mr. KLECZKA. Right. Let’s get the bill signed.”

Representative Tommy Robinson (D-AR) concurred. “If we put indexing in the minimum wage, I think it will be veto bait and it will be vetoed.”<sup>57</sup> Once again, new legislation was enacted without the indexation formula (P.L. 101-157).<sup>58</sup>

Following the 1989 amendments, there seems to have been a change in the approach to indexation of the minimum wage. Although the issue was raised in almost every Congress through a series of individual bills, the concept was not linked to the more general enactments that were adopted in 1996 and in 2007. Still, interest has been sustained and, given its long legislative history, it may not be unlikely that someone will once again introduce the issue.<sup>59</sup>

## The Small Business Exemption

Under the FLSA, provision has been made for small businesses to be exempt from the minimum wage and/or the payment of overtime where their workers are employed for more than 40 hours a week. The terms of such provisions have varied through the years. Under the 1989 FLSA amendments (still in effect), small businesses, defined as those that earn \$500,000 or less in gross receipts, are exempt. However, there is an offsetting provision: where a worker is engaged in interstate commerce, he or she may be individually covered by the statute.

### Early History of the Small Business Provision

The Fair Labor Standards Act initially applied largely to industrial employees. Significant numbers of workers were exempt (or not covered) by its provisions: for example, agricultural, retail and service workers (including public employees) and those who would be defined as not being engaged in interstate commerce. In this manner, among other things, a substantial number of workers employed by small businesses were excluded from the act.

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<sup>57</sup> U.S. Cong., House, *The Minimum Wage Restoration Act of 1987*, Hearings before the Subcommittee on Labor Standards, Committee on Education and Labor, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess., vol. 1, April 9, 1987, ff., p. 20.

<sup>58</sup> CG Almanac: 1989, “Minimum-Wage Impasse Finally Ended,” *Congressional Quarterly Inc.*, Washington, 1990, pp. 333-334.

<sup>59</sup> For a variation on the theme, see S. 2514 (Clinton). See also CRS Report RL33791, *Possible Indexation of the Federal Minimum Wage: Evolution of Legislative Activity*, by William G. Whittaker.

Still, there were numerous small business people who (rightly, as it turned out) anticipated that the act would gradually be expanded through the years to include progressively greater numbers of employers and workers. Some of the concerns expressed by the small business community were generic, having to do with federal regulation of industry by government. Other concerns were rooted in the particular features of the wage/hour legislation then before Congress. But the question some raised (and still raise) was: Should small businesses, if profitable, be allowed an exemption and be permitted to pay their workers less than the otherwise standard federal minimum wage based solely upon their size? Conversely, should profitability be a consideration in wage/hour applicability?

Much of the early argument against the minimum wage was framed in terms of small business. Some argued that “the tremendous amount and prohibitive cost of the bookkeeping and records involved” would make payment of the minimum wage inequitable for small business and involve such businesses in processes “with which they are unfamiliar.”<sup>60</sup> As was frequently true, the case for small business was argued not in terms of the owners (i.e., a personal loss of profit) but, rather, as a defense of employees of a small firm who would surely be hurt if profits for their employers were affected. “It is the little fellow for whom I am talking,” observed one Member. “It is the little industries in my district that are giving employment to those few people situated way up on the mountains and out in the country that cannot pay this wage. Those people,” he suggested, “will be out of employment.”<sup>61</sup>

While some expressed concern that adoption of a minimum wage would have a negative impact upon the economy, others expressed a sense that employers, under the profit motive, were opposing such legislation in order to enhance their personal or corporate gain. One Senator proposed that firms “employing 10 or fewer than 10 persons” be automatically excluded from wage/hour coverage.<sup>62</sup> Yet another argued: “...I do not care whether the manufacturing unit is a small one or a large one; the American people are opposed to the exploitation and oppression of workers in plants of any size.”<sup>63</sup> A Member from Texas affirmed: “I think that we can all agree that any industry that serves a useful economic purpose should be able to pay this wage [the projected minimum] and operate on this workweek.”<sup>64</sup> While a Member from Pennsylvania responded: “No industry can be but of negative value to society if its existence is predicated upon paying of wages lower than that required to support the American family up to established standards in America.”<sup>65</sup>

Others were, perhaps, less dramatic. “I look upon a minimum wage such as will afford a decent living as part of a sound national policy,” affirmed Senator William

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<sup>60</sup> *Congressional Record*, May 23, 1938, p. 7299.

<sup>61</sup> *Congressional Record*, May 23, 1938, p. 7238.

<sup>62</sup> *Congressional Record*, July 30, 1937, p. 7863. See also H.R. 5368 of the 109<sup>th</sup> Congress.

<sup>63</sup> *Congressional Record*, July 29, 1937, p. 7809.

<sup>64</sup> *Congressional Record*, May 23, 1938, p. 7276.

<sup>65</sup> *Congressional Record*, May 23, 1938, p. 7393.

Borah (R-ID). “I am unable to get away from that theory. I feel, as a legislator, that I owe a duty to the minimum-wage employees in the United States...”<sup>66</sup>

## Small Business and Current Policy

Debate about the impact of a minimum wage or small business exemption eventually came down to the actual wording of the statute. The intent of the legislation may not always have been clear.

As the act was expanded and new groups of workers were included, protests arose from employers. On some occasions, Congress designed an exemption to meet a particular industry and it wrote into the statute very specialized language. On other occasions, exemptions were more generic: that is, employers earning less than a given amount would not be covered. The various modes of exemption came to exist side-by-side. In 1977, a general small business exemption was set at \$362,500, but with other options included for particular industries. The result seems to have caused confusion among employers — and possibly among workers.<sup>67</sup>

With the 1989 amendments to the FLSA, there was some effort at consolidation. A figure of \$500,000, taking into account increased general wages and prices, seemed reasonable to some, and Congress adopted it.<sup>68</sup> As reported in the House, it was explained:

“Small enterprises whose total volume of sales or business done is less than \$500,000 would no longer be covered. In eliminating several confusing tests to determine applicability of the act to various industries, the Committee continues to demonstrate it’s [sic] support for the principle of a true small business exemption.”

The Report continued: “This streamlined threshold test, coupled with the elimination of exemptions elsewhere in the Act, should make it much easier to determine which enterprises are covered and which are not.”<sup>69</sup> The measure was signed into law in mid-November 1989.

In early February, an article in *The Nation’s Restaurant News* explained that, in consolidating and simplifying the language of the act, the meaning had been altered requiring that some firms that might have been exempt under a dollar volume test (\$500,000) would now fall under an interstate commerce test. As a result, employers will need “to categorize each employee ... to determine which ones engage in

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<sup>66</sup> *Congressional Record*, July 29, 1937, p. 7793.

<sup>67</sup> In some states, small business exemptions were arranged under state law, either superseding the federal standard or adding nuances of interpretation to it. Generally, the standard, more nearly in the interest of the worker, prevails; but, that may not always be readily apparent to the parties concerned.

<sup>68</sup> See Section 3(a) to (e) of P.L. 101-157.

<sup>69</sup> U.S. Cong., House, *Fair Labor Standards Amendments of 1989, Report Together with Minority and Additional Views, to Accompany H.R. 2710*, H.Rept. 101-260, Part I, 101<sup>st</sup> Congress, 1<sup>st</sup> Sess., September 26, 1989, p. 18.

commerce or in the production of goods for commerce.”<sup>70</sup> Thus, there would now seem to be two tests for the small business exemption: a general test at \$500,000 but, also, an individual test based upon the work performed by each employee.

During the next several months, bills were introduced that proposed to correct what some Members viewed as a miscalculation by drafters of the 1989 legislation but what others saw as a clear statement of policy. Ultimately, Congress moved on to other matters without altering the 1989 amendment. When the 1996 and 2007 FLSA amendments were before Congress, the dispute over the small business exemption was superceded by other interests.<sup>71</sup>

## Treatment of Persons with Disabilities

Under Section 14(c) of the FLSA, special treatment is afforded to persons with physical or mental disabilities. Under certificates issued by the Secretary of Labor, such persons can be employed at rates below those otherwise specified in the FLSA and with no absolute minimum. Wages for persons with disabilities are based upon the relative productivity of the individual: that is, the *commensurate wage rate*.

### Origins of Section 14(c)

The origins of Section 14(c) are linked to the National Industrial Recovery Act of the early New Deal. Codes of conduct, which normally included minimum wages and overtime pay, were written for most industries. Once in place, they provoked complaints that employers “took advantage of the codes to break down” decent standards for workers. Some charged that ordinary workers were artfully classified to exempt them from otherwise applicable labor standards. This may have been, according to some observers, especially notable with respect to older workers and to minorities.<sup>72</sup>

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<sup>70</sup> *The Nation's Restaurant News*, February 12, 1990, p. 4.

<sup>71</sup> See P.L. 104-188 and P.L. 110-28.

<sup>72</sup> See Bernard Bellush, *The Failure of the NRA* (New York: Norton and Company, Inc., 1975), pp. 43-44, 55, 74-78, and 166; and Raymond Wolters, *Negroes and the Great Depression: The Problem of Economic Recovery* (Westport, Conn.: Greenwood Publishing Corporation, 1970), pp. 110-112.

Concerning various strategies for dealing with disabled persons (and methods to cope with such strategies), see U.S. Department of Labor, *Twenty-Second Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30, 1934* (Washington: GPO, 1935), p. 7; “Enforcement of Code Provisions Limiting Employment of Handicapped Workers,” *Monthly Labor Review*, May 1934, p. 1058; “Exemption of Handicapped Workers and Sheltered Workshops from Code Provisions,” *Monthly Labor Review*, April 1934, p. 804; Margaret H. Schoenfeld, “Analysis of the Labor Provisions of NRA Codes,” *Monthly Labor Review*, March 1935, p. 574-603; “Enforcement of Code Provisions Limiting Employment of Handicapped Workers,” *Monthly Labor Review*, May 1934, p. 1058; and Executive Order 6711-A by President Franklin D. Roosevelt, May 15, 1934, compiled in United States Executive Orders, available in the Law Library, Library of Congress.

In mid-1938, the FLSA was adopted and, under Section 14 [later, Section 14(c)], the several approaches were drawn together. The Wage and Hour Administrator (DOL) set a floor of not less than 75% of the standard 25 cent federal minimum wage. However, fearing that the specified rate might disrupt “the work of rehabilitation being carried on by ... charitable groups,” he ruled that the wages in sheltered workshops (special facilities employing the disabled) would be set “on the basis of earning capacity.”<sup>73</sup> Thus, in practice, a dual standard was established: a productivity wage in sheltered workshops and a specific minimum rate for other sheltered employment.

From the beginning, the social services industry tended to dominate the program and generally spoke for employers of the disabled. It was not clear, however, who spoke for persons with disabilities. Once the program had been established, it continued in place through the next several decades.

## Reform and Oversight

Practical problems arose in the administration of the program. Some, though disabled, sought employment in the private sector, and at the minimum wage or better. Their compensation would be arranged, whether collectively or individually, on the same basis as other workers. Some workers remained ‘sheltered’ under a variety of programs.

A more complex issue was the basic structure of the program. Within the system, some workers were marginally disabled and, with minor assistance, could function nearly as well (or, in some cases, better) than the standard worker. Others were severely disabled, perhaps victims of several inter-related disabling conditions. Often, the two groups — the marginally disabled and the severely disabled — seem to have found themselves associated in a single work environment and under circumstances that affected mutual productivity. This may have been especially notable where production was shared or where an integrated unit was produced. In such cases, how were each of the parties, responsible for only a segment of a product, to be paid?<sup>74</sup> These questions have persisted through the years.

Advocacy groups for the disabled tended to be fragmented, representing groups of individuals with different types of disabilities; and to this were added other problems. For example, whether the disabled were to be regarded as ‘clients’ or as ‘patients’ was an important consideration where treatment was concerned. Over time, the issues continued to be debated. In 1986, new hearings resulted in a more formal treatment of the disabled — and a new compensation structure: *the commensurate rate*. Under this formula, wage rates were to be determined as follows:

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<sup>73</sup> U.S. Department of Labor, Wage and Hour Division, Press Releases, R. Series, October 12, 1938, and November 10, 1938.

<sup>74</sup> In theory, shared work (with shared responsibility) might assist the more severely disabled to develop better industrial skills. But, in practice, it seems to have been a source of endless dispute among the parties, creating a sense of frustration on both sides — since, in practice, all of the non-supervisory workers were in some measure disabled.

“(A) lower than the minimum wage applicable under section 206 of this title,

“(B) commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work, and

“(C) related to the individual’s productivity.”<sup>75</sup>

Thus, the system continued at the discretion of employers, administrators, parents or guardians and, only after the rules and procedures had been established, it appears, were those individuals actively engaged in work or therapy (either a patients or as clients) brought into the picture.

## The Current Structure

In mid-March of 1994, Representative Austin Murphy (D-PA), chairman of the Labor Standards Subcommittee, convened an oversight hearing on experience under the 1986 legislation. Murphy explained that in 1986, “we listened primarily to the nonprofit employers” and “carefully considered the explanations of the work administrators.” The result had been an arrangement which had offered expedited hearings on complaints of disabled workers. Few complaints had emerged, however, and the subcommittee wanted to learn why. Was there a lack of problems, or some difficulty in reporting them?<sup>76</sup>

Testimony seemed to fall into three groups. (a) Industry representatives seemed satisfied with things as they were. (b) A spokesman for the blind, James Gashel, was more blunt. “I am here to tell you that the safeguards are not working.” Gashel then proceeded to lay out the case for the blind or vision impaired.<sup>77</sup> (c) There was testimony from Donald Elisburg, a former Assistant Secretary of Labor in the late 1970s. Elisburg characterized the “present system for challenging workshop abuses [as] ... a study in futility.” He reminded the Subcommittee that persons filing these complaints were fighting for the option of being paid only at the federal minimum wage. The hearings, though contentious, did not produce legislation.<sup>78</sup>

The issue continues today very much as it has through the greater part of the past century. In 2000, Representative Johnny Isakson (R-GA) and Senator Christopher Dodd (D-CN) introduced legislation that dealt with treatment of the blind and

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<sup>75</sup> 29 USCA 214(c)(1).

<sup>76</sup> U.S. Congress, House, Subcommittee on Labor Standards, Occupational Health and Safety, Committee on Education and Labor, *Section 14(c) of the Fair Labor Standards Act*. Hearings, 103<sup>rd</sup> Cong., 2<sup>nd</sup> Sess., March 16, 1994. Washington, D. C., Govt. Print Off., 1994, pp. 1-2. (Cited hereafter as House Subcommittee on Labor Standards, *Section 14(c) of the Fair Labor Standards Act*.)

<sup>77</sup> House Subcommittee on Labor Standards, *Section 14(c) of the Fair Labor Standards Act*, p. 11.

<sup>78</sup> House Subcommittee on Labor Standards, *Section 14(c) of the Fair Labor Standards Act*, pp. 20-25. See CRS Report RL30674, *Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act*, by William G. Whittaker.



handicapped. No action was taken on the measures. In 2001, Representative Isakson introduced new legislation. That bill died at the close of the 107<sup>th</sup> Congress. Since then, the issue seems once again to have become dormant.

## American Samoa and the CNMI

The minimum wage under the FLSA generally applies to any state, territory, or possession of the United States. Special treatment (a reduced wage rate, generally consistent with the insular economy) was afforded to Puerto Rico and the Virgin Islands; but, by the 1990s, they had come under the full minimum wage structure. Guam has always been under the act. This has left two major jurisdictions — American Samoa and the Commonwealth of the Northern Mariana Islands (or CNMI) — that are still under a reduced rate structure.

In the 2007 FLSA amendments (P.L. 110-28), American Samoa and the CNMI were brought under the national minimum wage, in steps (though at a slightly different rate), until the national minimum should be reached. Thereafter, according to the 2007 legislation, they will proceed along in tandem with the FLSA standard. In addition, a study was to be made by DOL that would focus on insular conditions in the wake of changing wage rates.<sup>79</sup>

### American Samoa

The Samoan Islands are of two segments: Western Samoa, formerly British and now independent; and American Samoa, a cluster of seven islands with a small population, governed from the insular capital of Pago Pago. There has been an American presence in Samoa since the latter 19<sup>th</sup> century but, with the Spanish-American War (1898), there developed a series of treaties and leases between the insular officials and the United States. In 1900, President William McKinley directed the Navy to assume responsibility for Eastern (thereafter, American) Samoa. In 1951, authority was transferred to the Department of the Interior (DOI) and that agency began a concerted recruitment for an economic base that could replace the naval station as it closed down.

In 1938, it appears, no mention was made of minimum wage coverage for American Samoa but, generally, it was assumed that it was covered just as were Puerto Rico and the Virgin Islands. In 1948, a legal action involving the British territory of Bermuda [*Vermilya-Brown Co., Inc., et al. v. Connell et al.* [335 U.S. 377 (1948)]] raised eyebrows and prospects of insular wage rates. Though *Vermilya-Brown* did not deal with Samoa, its implications were felt there.

In 1956, Van Camp Sea Foods, recruited by DOI to come to Samoa, sought a special arrangement under the FLSA: an administered minimum wage as was then operational in Puerto Rico and the Virgin Islands. The issue was referred to the

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<sup>79</sup> *Impact of Increasing Minimum Wages on the Economies of American Samoa and the Commonwealth of the Northern Mariana Islands*, prepared by Office of the Assistant Secretary for Policy, U.S. Department of Labor, January 2008.

Congress which amended the statute to accommodate insular development. Some fifty years later, the insular minimum wage had remained at a sub-minimum level, and tuna canning had become the largest private sector industry in the islands. Government was the largest public sector employer. Each has supported maintaining low wage rates.

Now, under the 2007 FLSA amendments, the insular minimum wage has once more been restructured. The rate, by industry, was raised by 50 cents per hour on July 24, 2007. It was scheduled to be increased, by industry, by another 50 cents per hour on May 25, 2008. It will then be increased each May 25 (again, by industry) until the federal rate has been reached. American Samoa will then fall under the same minimum wage structure as the States of the Union.

## **Commonwealth of the Northern Mariana Islands**

The CNMI (controlled sequentially by Spain, Germany and Japan) was part of the United Nations Trust Territory administered by the United States after World War II. During the mid-1970s, a movement for expanded self-determination commenced. This led, ultimately, to the creation and ratification of the Covenant of Association (1975-1976) between the Mariana Islands and the United States, establishing the current commonwealth status.

Like Guam and American Samoa, the Northern Mariana Islands are lightly populated, culturally different from the United States, and geographically distant. Most of the population resides on Saipan, but with several other islands (notably, Tinian and Rota) sharing in density. As a Trust Territory, unlike Guam or Samoa, the Mariana Islands were not initially thought of as part of the United States per se. Rather, they seem to have been regarded as in temporary association with the United States. Thus, establishment of U.S. standards for the local population may not have been a high priority.

In 1947, shortly after the close of World War II, the Northern Marianas were still undergoing a transition to a cash economy and lacked both trade unions and traditional wage standards.<sup>80</sup> With time, things seem to have changed little. In 1976, the Department of State reported that “[t]here is no minimum wage law for the Trust Territory” and that “wage rate determination is very much up to each employer.”<sup>81</sup>

With the adoption of the Covenant, responsibility for labor standards was divided between the CNMI and the United States. The United States assumed responsibility, for example, for regulating overtime pay but left issues related to the minimum wage in the hands of the CNMI. Meanwhile, the CNMI (Saipan) took responsibility for alien labor immigration. It was also agreed that goods produced in the CNMI would move in commerce under a *Made in America* label.

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<sup>80</sup> U.S. Department of State. 27<sup>th</sup> Annual Report to the United Nations. *Trust Territory of the Pacific Islands, 1974*. Washington, U.S. Govt. Print. Off., 1948. pp. 57-58.

<sup>81</sup> U.S. Department of State. 29<sup>th</sup> Annual Report to the United Nations. *Trust Territory of the Pacific Islands, 1976*. Washington, U.S. Govt. Print. Off., 1976. p. 72.

The US-DOL may have moved slowly in dealing with its responsibilities in the distant possessions, only gradually arriving on the scene during the late 1980s. During the decade since the Covenant had been in place, however, things had changed dramatically. The CNMI had become, it appears, a major center for the assembly of garments, with the garment industry now established as the island's primary employer. Further, aliens, largely imported from China (but from other countries as well), had come to rival the native population in terms of numbers.<sup>82</sup> Now alert to insular developments, congressional hearings focused on what were alleged to have been 'sweatshop' conditions — along with other nefarious labor-management practices.<sup>83</sup>

Under the 2007 FLSA amendments, the CNMI rate was raised, across the board, by 50 cents on July 24, 2007. Thereafter, the insular minimum will be raised by 50 cents each year on the anniversary of the enactment (May 25) until the CNMI rate is equal to the general FLSA rate, after which the two rates will move forward in tandem.

## Complications

In each of these jurisdictions (American Samoa and the CNMI), the problems are quite similar: finding work for their resident populations. The circumstances were, it appears, somewhat different. In the CNMI, the garment industry has largely left the islands, reportedly the victim of tariffs and wage rates. In American Samoa, the tuna canneries have threatened to leave (though they have not yet done so), reportedly for similar reasons.

Given the economy of the general area (the proximity to other low-wage countries), can suitable employment be found? And, can these islands emerge as prosperous members of the American community?<sup>84</sup> As the insular minimum wage increases toward parity with the Federal minimum, Representative Eni F. H. Faleomavaega and Governor Benigno Fitial, respectively of American Samoa and the CNMI, have joined forces to attempt to resolve the current situation.<sup>85</sup>

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<sup>82</sup> The Covenant was revised with P.L. 110-229, signed into law by President Bush on May 8, 2009.

<sup>83</sup> See, for example, U.S. House. Subcommittee on Insular and International Affairs, Committee on Interior and Insular Affairs, *Northern Mariana Islands' Garment Industry*, Hearings, July 30, 1992, 102<sup>nd</sup> Cong., 2<sup>nd</sup> Sess., 608 pp.. Subsequent hearings, both in the House and in the Senate, have developed themes explored in the 1992 hearings in the House.

<sup>84</sup> See CRS Report RL30235, "Minimum Wage in the Territories and Possessions of the United States: Application of the Fair Labor Standards Act," and CRS Report RL34013, "The Federal Minimum Wage and American Samoa," both by William G. Whittaker.

<sup>85</sup> See Press Release from Representative Faleomavaega, April 25, 2008.

## Minimum Wage: Federal -v- State Jurisdiction

Minimum wage statutes had originated with the states early in the 20<sup>th</sup> century. Massachusetts, Wisconsin, Oregon, the District of Columbia, California, and other jurisdictions had experimented with various aspects of wage regulation, but, often, where such efforts were effective, they were overturned by the courts.

Then, in 1937, the Supreme Court, in *West Coast Hotel Co. v. Parrish*,<sup>86</sup> reversed a long tradition of opposing federal regulation of labor standards by affirming the right of the state of Washington to regulate working conditions. Federal legislation was promptly introduced. With passage of the Fair Labor Standards Act the following year, attention focused upon the federal jurisdiction. And, intermittently, the federal Act has been expanded.

### A New Focus of Legislative Authority

After 1938, the thrust of minimum wage and related legislation came to rest in Washington, D.C. While the states continued, frequently, to enact (and to update) their state minimum wage laws, these seem largely to have been peripheral: filling in gaps in the federal legislation or, where deemed appropriate, extending coverage to specific groups that had been exempted under the federal statute.

**Decline of Value of the Federal Standard.** Up to the 1980s, consideration of the minimum wage remained largely with the federal government. Then, during the 1980s, the statute remained somewhat dormant. In 1989, there was a momentary boost during the Bush presidency as the rate moved, in steps, from \$3.35 an hour (in place since 1981) to \$4.25 an hour by 1991.<sup>87</sup>

After the 1989 round, the minimum wage declined in value (under the impact of attrition) until 1996 when a two-step increase was enacted bringing the wage floor to \$4.25 (in 1996) and to \$5.15 in 1997. Nothing further occurred for more than a decade. In 2007, the wage was once more raised, in steps, to a projected level of \$7.25 an hour by mid-2009. However, by the time that the 2007 increases will have been given effect, the real value of the minimum wage will have declined substantially, leaving the field open, once again, to the states.<sup>88</sup>

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<sup>86</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). See also Elizabeth Brandeis, "Organized Labor and Protective Labor Legislation," in Milton Derber and Edwin Young (eds.), *Labor and the New Deal* (Madison, The University of Wisconsin Press, 1961), pp. 217-237.

<sup>87</sup> See P.L. 101-157. The 1989 increase, under President George Bush, also included an experimental sub-minimum wage for youth. The 'youth wage' was allowed to expire in 1993.

<sup>88</sup> See P.L. 104-188 and P.L. 110-28. Brian W. Cashell, in his CRS Report RS20040, "Inflation and the Real Minimum Wage: Fact Sheet," states that had the minimum rate been adjusted for purchasing power to equal its highest rate (February 1968), the minimum would have reached about \$9.50 an hour by July 2007.

**Devolution to the States.** In 1989 and again in 1996, marginal increases were made in the minimum wage but, generally, the federal statute failed to keep pace with inflation. During periods in which there was no action at the federal level, the focus shifted back to the states. (See **Table 2**.) There are now 34 states and other jurisdictions that have wage rates in excess of the federal minimum, and several of the states have indexed the minimum rate to increase at regular intervals. (See section on indexation.)

The shift from federal action back to the states may seem appropriate to some; but, it may also have implications for public policy. For industry and for labor, it means dealing with a variety of jurisdictions, each with its own standard. It may also mean renewed competition between a high-wage state and a state with relatively low wages.<sup>89</sup> For investors, it could also be a factor (among many) in considering where to invest, especially in regions where there may be significant cross-border traffic or where other factors come into play (for example, in states with ‘right-to-work’ laws)<sup>90</sup>.

Though wage rates may differ from one state to the next, other aspects of wage/hour law may also be different. For example, in some states, a tip credit may not be allowed, while, just across the state border, it may be. Or, hiring youth workers at a ‘sub-minimum’ rate may be permitted in one state but precluded in a neighboring state. In short, each state may prescribe its own conditions for employment so long as they do not conflict with the federal standard under the FLSA. (Where there is a conflict between state and federal standards, the requirements most in favor of the worker — the higher standard — normally will prevail.) As state rates rise relative to the federal standard, states could find themselves in competition for jobs and for development.

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<sup>89</sup> One of the elements discussed in the 1937 debates was interstate competition based upon wage rates. More recently, during hearings in 1995, Senator Nancy Kassebaum (R-KA), noting that Massachusetts had raised its state minimum wage above the federal, inquired of Senator John Kerry (D-MA): “If we keep it [the federal minimum wage] at \$4.25, do you think businesses would consider relocating in, say, Kansas or somewhere else if there is that disparity, because it obviously is going to be a consideration for some businesses.” Senator Kerry responded: “That was and is an issue that was raised, and it is a very legitimate question. I am passionately committed to not having Massachusetts be disadvantaged as to other States, and clearly, one of the things any business will look at is the question of the minimum wage.” See U.S. Senate. *Fair Labor Standards Act: The Minimum Wage*, Hearings of the Committee on Labor and Human Resources. December 15, 1995, Washington, GPO, 1996, p. 6.

<sup>90</sup> In **Table 2**, based on January 2008 reporting, the then-current minimum wage in Washington is \$8.07 and in Oregon it is \$7.95. (In these states, the rates have been indexed.) Compare these figures with \$5.85 for neighboring Idaho — where the rate will increase along with the federal rate.

**Table 2: Status of State Minimum Wage Rates  
(as of January 2008)**

<b>Jurisdictions with minimum wage rates <i>higher than</i> the federal FLSA</b>		
Alaska (\$7.15)	Maine (\$7.00)	North Carolina (\$6.15)
Arizona (\$6.90)	Maryland (\$6.15)	Ohio (\$7.00)
Arkansas (\$6.25)	Massachusetts (\$8.00)	Oregon (\$7.95)
California (\$8.00)	Michigan (\$7.15)	Pennsylvania (\$7.15)
Colorado (\$7.02)	Minnesota (\$6.15)	Rhode Island (\$7.40)
Connecticut (\$7.65)	Missouri (\$6.65)	Vermont (\$7.68)
Delaware (\$7.15)	Montana (\$6.25)	Virgin Islands (\$6.15)
District of Columbia (\$7.00)	Nevada (\$6.33)	Washington (\$8.07)
Florida (\$6.79)	New Hampshire \$6.50)	West Virginia (\$6.55)
Hawaii (\$7.25)	New Jersey (\$7.15)	Wisconsin (\$6.50)
Illinois (\$7.50)	New Mexico (\$6.50)	
Iowa (\$7.25)	New York (\$7.15)	
<b>Jurisdictions with minimum wage rates <i>at the same level as</i> the federal FLSA (\$5.85)</b>		
Guam	Nebraska	Texas
Idaho	North Dakota	Utah
Indiana	Oklahoma	Virginia
Kentucky	South Dakota	Wyoming
<b>Jurisdictions with minimum wage rates <i>less than</i> the federal FLSA</b>		
American Samoa <sup>a</sup>	Commonwealth of the Northern Mariana Islands <sup>a</sup>	Puerto Rico <sup>a</sup>
Kansas (\$2.65)	Georgia (\$5.15)	
<b>Jurisdictions with <i>no</i> state minimum wage requirement</b>		
Alabama	Mississippi	Tennessee
Louisiana	South Carolina	

**Source:** U.S. Department of Labor, Wage and Hour Division, Employment Standards Administration, [<http://www.dol.gov/esa/minwage/america.htm>], visited March 2008.

**Note:** Coverage patterns vary from one jurisdiction to another: some new changes are already scheduled. Some jurisdictions have a structured minimum wage system (i.e., different rates for various industries, sizes of firms, etc.). The table refers to the highest standard applicable under current state law. In some jurisdictions, the rate is linked to the federal FLSA.

- a. For American Samoa, the CNMI and certain industries in Puerto Rico, the minimum wage rate is lower than the general federal minimum wage but, under P.L. 110-28, will rise, in steps, to meet standards set by federal legislation.

## The Executive, Administrative and Professional Exemption under FLSA

On March 31, 2003, Wage/Hour Administrator Tammy McCutchen published in the *Federal Register* a proposed rule updating Section 13(a)(1), that portion of the FLSA that deals with minimum wages and overtime coverage for executive, administrative or professional (EAP) workers. Under Section 13(a)(1), bona fide staff in the several categories are exempt from the basic wage and hour provisions of the statute.

The McCutchen proposal was contentious, triggering several congressional hearings. Speaking generally, organized labor was strongly opposed to the new regulation; the Department of Labor was strongly in support of the change. With modification, a final rule was issued in April 2004, taking effect in August 2004. Since that time, DOL has been engaged in a review of the operation of the rule, offering a series of new opinion letters (administrative advisories) on classification of workers.

### About the Rule

The original rule governing EAP workers, with roots going back to the early New Deal era, had been given effect in 1938 and had been revised periodically up to 1975. Thereafter, although various suggested changes were announced, the regulation was not updated until the 2003-2004 rulemaking. As implemented, in order to qualify for exemption from the FLSA, targeted workers have to be paid at least \$23,660 per year and be engaged in activities that would qualify one as an executive, administrator or professional. For persons paid in excess of \$100,000 per year, there is a presumption that he or she has met the qualifying criteria, absent any contention to the contrary.

What does it mean 'to qualify' for exempt status? If one meets the salary and duties tests, one is an EAP employee. This means, in effect, that one does not need to be paid for overtime hours worked regardless of how frequent and extensive such 'overtime' may become. Working through to the completion of one's task is merely part of the responsibility that goes along with being an executive, an administrator, or a professional. Thus, there is a trade-off. Each of these categories may have certain advantages associated with them; but, in wage/hour terms, the bottom line is relatively simple. EAP workers do not need to be paid overtime for hours worked in excess of 40 per week.

There are two tests for qualification under the rule. The first test is one of salary, as noted above. The second test involves duties. Each position is judged individually, but the duties of each individual worker can present a problem. For example. When is an emergency medical technician 'a professional' or simply a staffer with very serious work but with no real 'professional' responsibility? How about a funeral director, a journalist, a paralegal, or a chef?

In each of these fields (and in many others), a clear distinction between exempt and non-exempt must rest upon a precise analysis of the work that is being

performed: the duties test. A number of questions need to be asked. Does the worker exercise independent discretion and judgment? Does he have a choice of work assignments and some measure of independence over the content of his work? Does she have the power to hire or fire subordinates? What is their ‘primary duty,’ and, as telling, how important is their ‘primary duty’ to their employer? Such questions, under DOL regulations, need to be addressed for each type of work and, frequently, must be defined in the context of the work environment and culture.

In some cases, though it may no longer be controlling, the amount of time that one spends in performance of a task may assist in determining EAP status. Is one task — an executive or administrative or professional function — performed once a year sufficient to render a worker exempt? Or, if one looks at the element of ‘hiring and firing’ of subordinates, does the decision rest strictly with the putative EPA worker? Or, is there an internal review panel that oversees such actions? How much real latitude does the worker have?

The duties test can be enormously complex, involving categories of workers across the entire spectrum. It can also be a source of near endless litigation as persons move into and out of exempt or non-exempt status.

### **‘In Place’ and ‘Being Tested’**

The new rule is in place and being tested.<sup>91</sup> During recent months, the Department has been engaged in numerous reevaluations of the work processes of EAP workers. Mainly, these reviews and analyses deal with the duties test; but, such efforts tend to be of limited reach, often resting upon a specific case and particular assumptions and unable to be applied, with confidence, to general categories of workers.

In early 2004, prior to release of the final rule, Labor Secretary Elaine Chao stated that the “primary goal” of the proposed rule “is to have better rules in place that will benefit more workers” — especially “low-wage workers.” Its intent, she affirmed, is “to restore overtime protections, especially to low-wage, vulnerable workers who have little bargaining power with employers.” Ms. Chao added: “Clear, concise and updated rules will better protect workers and strengthen the Department’s ability to enforce the law.”<sup>92</sup> When the final rule was released in April 2004, Ms. Chao stated: “The Department is very proud of the final rule.”<sup>93</sup> She added that she was “pleased to see people recognize the significant gains to workers under our final rule” and noted that “there can be no doubt that workers win.”<sup>94</sup>

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<sup>91</sup> See CRS Report RL32088, *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, by William G. Whittaker.

<sup>92</sup> Testimony of Labor Secretary Elaine Chao, January 20, 2004, Senate Appropriations Committee website, visited January 29, 2004.

<sup>93</sup> Secretary Chao, testimony before the House Committee on Education and the Workforce, April 28, 2004.

<sup>94</sup> Secretary Chao is quoted in Kirstin Downey, “Plan Expands Eligibility for Overtime Pay,” (continued...)



But, again, there are two tests involved. Raising the qualifying floor to \$23,660 may be a “win” for certain low income workers.<sup>95</sup> How the law (or regulation) might affect a worker, earning \$30,000 a year (higher than required but, in some regions, a low wage), assigned as a ‘primary duty’ an executive or administrative or professional function, and be stripped of his/her overtime pay protections, may be less clear.<sup>96</sup>

The dispute continued through the implementation date in August 2004 and into the 109<sup>th</sup> Congress (2005), but largely without effect. “The predictions were not accurate,” Howard Radzely, then DOL’s Solicitor, was quoted as saying shortly after the new regulations had gone into effect. “Almost without exception, the reports indicate people are gaining overtime protection.”<sup>97</sup> Later, Radzely was quoted as saying: “We have not seen a single incident — let alone the predicted 6 million incidents — of an employee who has lost pay as a result of the regulations.” And further: “[o]nce we got past the extreme rhetoric ... there have been surprisingly few issues” in contention.<sup>98</sup>

The real test may come with the administration of the rule: in particular, the long-term impact upon the kinds of workers to which Ms. Chao has referred. Recently, the Bureau of National Affairs reported that “[t]hree years after the new Fair Labor Standards Act white-collar exemption regulations were implemented,” referring to discussion by a panel of attorneys at the American Bar Association’s Employment Law Section, “...the changes have opened the door to new areas of wage and hour litigation that were not predicted when the rules were launched.” Steven Zeiff, an attorney from San Francisco, suggested that the “increased emphasis on the duties test has occurred because the new regulations clarified that the white-collar exemption analysis should look to an employee’s duties and not merely the job title.” Zeiff stated: “Courts are all over the place when it comes to the duties test...”<sup>99</sup>

The Administration is several years into the new Section 13(a)(1) regulations. Have workers been bumped up (or down) in terms of pay and duties as a result of these tests in order to assist them in qualifying for exemption? How many non-EAP workers, from before the rule was implemented, now find themselves with the status

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<sup>94</sup> (...continued)

*Washington Post*, April 20, 2004, p. A8.

<sup>95</sup> Under the 1975 regulation, in effect until August 2004, an executive or administrator could be paid \$155 per week (\$8,060 per year); a professional, \$170 per week (\$8,840 per year) — and could still qualify for EAP status. The minimum wage, at that time, would have earned a worker roughly \$10,712.

<sup>96</sup> In presenting the final rule, the Department affirmed: “The existing duties tests are so confusing, complex and outdated that often employment lawyers, and even Wage and Hour Division investigators, have difficulty determining whether employees qualify for the exemption.” See *Federal Register*, April 23, 2004, p. 22122.

<sup>97</sup> Bureau of National Affairs, *Daily Labor Report*, October 18, 2004, p. A7 ff.

<sup>98</sup> Bureau of National Affairs, *Daily Labor Report*, April 8, 2005, p. C3.

<sup>99</sup> Bureau of National Affairs, *Daily Labor Report*, November 13, 2007, p. C3 ff.

of an executive, administrative or professional? Has the new regulation clarified EAP status, resulting in reduced litigation — an outcome pledged by DOL?<sup>100</sup>

It is possible that the new Section 13(a)(1) regulation could have an important impact upon the workforce and labor-management relations. How many persons might be affected by the change may be impossible to tell, given the conflicting documentation and interpretation from each side of the dispute.

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<sup>100</sup> The Bureau of National Affairs, *Daily Labor Report*, March 31, 2008, p. C2, in discussing comments of David Borgen, a partner with Goldstein, Demchak, Baller, Borgen & Dardarian of Oakland, California, spoke of the “unintended consequence of spurring more litigation” as a result of the Section 13(a)(1) changes.