WHAT DOES IT MEAN TO BE A SALARIED EMPLOYEE? THE FUTURE OF PAY-DOCKING

*Kimberly A. Pace**

I. INTRODUCTION

> The United States has experienced a demographic revolution in the composition of the workforce, with profound consequences for the lives of working men and women and their families . . . . Today, according to the Bureau of Labor Statistics, 96 percent of fathers and 65 percent of mothers work outside the home . . . . Today more than 45 percent of the U.S. labor force are women. Equally dramatic has been the substantial increase in the number of single parent households.[1]

Congress enacted the Family and Medical Leave Act[2] ("FMLA") to respond to the need for job protected leave created by these economic and social changes and to protect the integrity of the modern family.[3] Following the enactment of the FMLA, and, purportedly in further pursuit of those same interests, the Workplace Leave Fairness Act ("WLFA") was introduced in both the House and the Senate.[4] Proponents of this bill, which would amend the Fair Labor Standards Act ("FLSA"), claim that its purpose is to reverse a Department of Labor ("DOL") ruling which limits workplace flexibility.[5] They claim that the current ruling is inconsistent with the purpose of the FMLA because it prevents employers from granting unpaid leave to salaried employees for less than a full day.[6] Proponents also claim that there is a need for this bill be-

---

* Associate, Kirkland & Ellis. J.D. (cum laude) 1994, Georgetown University Law Center; M.S. 1991, B.S.E.E. 1990, Massachusetts Institute of Technology. I would like to thank Professor Michael Gottesman of the Georgetown University Law Center for his assistance with this article. The views expressed in this article do not necessarily reflect the policies or opinions of Kirkland & Ellis.

1. S. REP. NO. 3, 103d Cong., 1st Sess. 5-6 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 7-8.

2. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified in scattered sections of 2 U.S.C., 5 U.S.C., and 29 U.S.C. (1993 and Supp. 1993)).

3. The stated statutory purpose of the FMLA is:

> (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
>
> (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

29 U.S.C. § 2601(b).

4. *See* H.R. 1309, 103d Cong., 1st Sess. (1993); S. 1354, 103d Cong., 1st Sess. (1993).

5. *See* 139 CONG. REC. E622-02 (daily ed. Mar. 11, 1993) [hereinafter Andrews] (statement of Rep. Andrews); 139 CONG. REC. E616-03 (daily ed. Mar. 11, 1993) [hereinafter Petri] (statement of Rep. Petri); *Pay-Docking Rule Could Cost Employers Billions, Former Labor Solicitor Says*, Daily Lab. Rep. (BNA) No. 126 at d3 (July 2, 1993) [hereinafter Kilberg] (statement of William J. Kilberg Former Solicitor, United States Department of Labor before the House Subcommittee on Labor Standards); 139 CONG. REC. S10,381-02 (daily ed. Aug. 4, 1993) [hereinafter Kassebaum] (statement of Sen. Kassebaum); 139 CONG. REC. S10,382 (daily ed. Aug. 4, 1993) [hereinafter Pressler] (statement of Sen. Pressler).

6. *See* sources cited *supra* note 5; *Sen. Kassebaum Will Introduce Bill To Eliminate DOL's Pay-*

cause recent court interpretations of the FLSA have misconstrued the law and hindered the ability of the workplace to be family-friendly.[7]

This article argues that while conflicting court opinions on the pay-docking and leave provisions of the FLSA do leave employers without guidance as to the legitimacy of their leave provisions, the amendments contained in the WLFA are not the family-friendly answer that they claim to be. The proposed bill attacks the very foundation of what it means to be a salaried employee. The WLFA would result in a windfall for employers, who would be allowed to dock employees for partial day absences, without being required to compensate them for overtime. The actual purpose of the bill is to diminish the potential liability companies face in this era of DOL enforcement, not to assist the modern family or to create a more flexible workplace as its proponents claim.

Part II of this article examines the purpose behind the recently enacted FMLA. Part III details the relevant portions of the FLSA and the conflicting court opinions about pay-docking which have left the law unsettled and confusing for employers and courts alike to follow. Part IV considers the WLFA as proposed in the House and Senate. It discusses the bill's alleged purpose and its relationship to the FMLA, as well as the actual effects the bill would have if it were enacted by Congress. It argues that the proposed bill is not well suited to its alleged purpose. Part V suggests that the confusion and unpredictability in the law, created by conflicting court opinions, leaves unsuspecting employers exposed to potentially enormous liability if their pay practices are found to violate the FLSA. Therefore, this article suggests that Congress or the Supreme Court should act to end the confusion over the salary basis test and clarify the law. Part V also proposes the structure for such a solution—one that, unlike the proposals now before Congress, would not destroy the fundamental concept of being a salaried employee.

II. THE FAMILY AND MEDICAL LEAVE ACT OF 1993

The enactment of the FMLA was long overdue. The United States was one of the last industrialized countries in the world without a family leave law.[8] The FMLA was the product of an eight year federal effort to enact legislation to respond to the needs of the modern workforce and modern family.[9] This effort was thwarted twice by President Bush who vetoed prior bills.[10] Upon signing the FMLA into law on February 5, 1993, President Clinton stated: "[t]he need for this legislation is clear. The American workforce has changed dramatically in recent years. These changes have created a substantial and growing need for family and medical leave for working Americans."[11]

The FMLA addresses the working parents' need for flexibility in the workplace

---

Docking Rule, Daily Lab. Rep. Current Dev. (BNA) No. 148, at A-4 (Aug. 4, 1993).

7. *Sen. Kassebaum Will Introduce Bill To Eliminate DOL's Pay-Docking Rule, supra* note 6.

8. *See* S. REP. NO. 3 at 19, 1993 U.S.C.C.A.N. at 21. However, 35 states have enacted some form of family leave legislation. *See The Family and Medical Leave Act of 1993*, Daily Lab. Rep. Special Supplement (BNA) No. 24, at S-3 (Feb. 8, 1993) (eight year effort to pass federal leave act).

9. *See The Family and Medical Leave Act of 1993, supra* note 8 (eight year effort to pass federal leave act).

10. *See Clinton Signs Family Leave Bill Into Law, Proclaims End of Gridlock*, Daily Lab. Rep. Current Dev. (BNA) No. 24, at AA-1 (Feb. 8, 1993).

11. Statement by President William J. Clinton Upon Signing H.R. 1, 29 WKLY. COMP. PRES. DOC. 144 (Feb. 5, 1993).

by mandating that employers allow their employees to take up to twelve weeks of unpaid leave per year for family emergencies.[12] Congress enacted this legislation to protect the integrity of the family because while the demographics of the workforce and the structure of the American family had changed, employer leave policies had not.[13] "Private sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family. This failure continues to impose a heavy burden on families, employees, employers and the broader society."[14]

Although the FMLA applies equally to workers across the economic spectrum, it is specifically designed to protect the low wage workers because these workers are least likely to be covered under any existing family leave policies.[15] The FMLA mandates that eligible employees[16] are entitled to twelve workweeks of unpaid leave per year for the birth or adoption of a child or for serious health conditions[17] of the employee or the employee's family member.[18] The employee is free to take leave to care for herself or a family member in whatever increments are medically necessary.[19] If partial day absences are necessary to address a family medical crisis, the employee can work partial days and the employer can dock the employee's pay for these partial day absences.[20]

The FMLA mandates that employers provide the leave which falls within the bounds of the statute without repercussions. It is unlawful for employers to interfere with or deny the employee's use of qualified FMLA leave.[21] It is also unlawful for employers to retaliate against any employee who takes qualified medical leave.[22] They cannot discharge the employee or discriminate against him for taking leave that com-

---

12. *See id.*; *see also* 29 U.S.C. § 2612; S. REP. NO. 3 at 4, 1993 U.S.C.C.A.N. at 6.

13. In the FMLA, Congress found that:

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

29 U.S.C. § 2601(a).

14. S. REP. NO. 3 at 4, 1993 U.S.C.C.A.N. at 6.

15. S. REP. NO. 3 at 16-18, 1993 U.S.C.C.A.N. at 18.

16. Employees are eligible for unpaid family and medical leave under the FMLA if they have been employed by their present employer for at least 12 months and have worked at least 1,250 hours during that 12 month period. In addition, the FMLA only applies to employers with a minimum of 50 employees. 29 U.S.C. § 2611(2).

17. A serious health condition is defined by the FMLA as "an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." *Id.* § 2611(11).

18. *Id.* § 2612(a). The employee may take this medical leave in order to care for the employee's spouse, son, daughter, or parent. *Id.* § 2602(a)(1)(C). The FMLA defines a son or daughter to include biological children, foster or step children, a legal ward or a child of a person standing in loco parentis who is under eighteen or over eighteen but unable to care for themselves because of a disability. *Id.* § 2611(12).

19. *Id.* § 2612(b)(1).

20. *Id.*

21. *Id.* § 2615(a)(1).

22. *Id.* § 2615(a)(2).

plies with the FMLA.[23] The statute also requires that the employee be restored to his original position or an equivalent position when he returns from FMLA leave.[24] The statute even requires that the employer maintain the employee's health benefits during his absence.[25]

To ensure compliance with the FMLA, employers are required to keep records detailing their participation, and the Secretary of Labor has the authority to investigate them.[26] If an employer violates any provision of the FMLA, an affected employee can bring a civil action to recover damages and obtain equitable relief.[27] Alternatively, the Secretary of Labor can bring either an administrative action or a civil action.[28] The Secretary of Labor also has the power to issue regulations that are necessary to carry out this statute.[29]

III. THE FAIR LABOR STANDARDS ACT

Under the FLSA, an employer is prohibited from employing a person for a "workweek longer that forty hours unless such employee receives compensation . . . at a rate not less than one and one-half times [his] regular rate."[30] The goal of the FLSA is to eliminate low wages and long hours which endanger the health and well being of the workers and to establish certain minimum labor standards.[31] The forty hour workweek was established by the FLSA to protect the well being of the workers and to discourage overtime work in order to spread employment and thereby reduce the nation's unemployment.[32]

> The objective of the 40 hour week was to improve the quality of life for workers, both on and off the job . . . . It is not safe to work workers long hours, . . . it erodes social values, and it is not in the public interest to work some workers long hours while society pays public assistance to those without work.[33]

---

23. *Id.*
24. *Id.* § 2614(a)(1).
25. *Id.* § 2614(c)(1).
26. *Id.* § 2616.
27. *Id.* § 2617(a)(1). Monetary damages include the lost wages or benefits, interest and liquidated damages unless the employer can prove that he acted on a good faith belief that he was not violating the Act. *Id.* § 2617(a)(1)(A). The court has the discretion to award the employee whatever equitable relief it deems appropriate which may include reinstatement or promotions. *Id.* § 2617(a)(1)(B).
28. *Id.* § 2617(b).
29. *Id.* § 2654.
30. *Id.* § 207(a)(1)(1993).
31. *See, e.g.*, Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292 (1960); Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419 (1945); Usery v. Pilgrim Equip. Co., 527 F.2d 1308 (5th Cir. 1976), *cert. denied*, 429 U.S. 826 (1976); Brennan v. Plaza Shoe Store, Inc., 522 F.2d 843 (8th Cir. 1975); Brennan v. Wilson Bldg., Inc., 478 F.2d 1090 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973); Foremost Dairies, Inc. v. Wirtz, 381 F.2d 653 (5th Cir. 1967), *cert. denied*, 390 U.S. 946 (1968); Mitchell v. Empire Gas Eng'g Co., 256 F.2d 781 (5th Cir. 1958); *see also Pressler*, *supra* note 5, at S10,382.
32. *See* S. REP. NO. 145, 87th Cong., 1st Sess. 109-10 (1961); *see also* Otto Nathan, *Favorable Implications of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 416, 420 (1939) (the FLSA's forty hour workweek will increase the health of the worker and his family).
33. *Pay-Docking Rule Could Cost Employers Billions, Former Labor Solicitor Says*, *supra* note 5, at d3 [hereinafter Zalusky] (testimony of John Zalusky, Head of the Office of Wages and Industrial Relations, Before the House Subcommittee on Labor Standards).

A. The FLSA Exemption for Professional, Executive and Administrative Employees

However, Congress created an exemption from the FLSA's overtime provision for qualified, bona fide executive, administrative or professional employees.[34] The statute itself offered no definition for executive, administrative or professional employees but instead, delegated the authority to define and delimit these terms to the Secretary of Labor.[35] The DOL regulations establish that an employer must prove that an employee meets both a "duties test" and a "salary test" in order to qualify for the exemption.[36] First, the employee must perform the duties of an executive, administrative, or professional employee as defined by the regulations.[37] Second, the employee must be compensated for his services on a salary basis.[38] Thus, an employee who meets both requirements is not entitled to overtime for hours worked in excess of forty per week. The employer has the burden of proving that the employee meets these tests and, therefore qualifies for the exemption.[39] The employer must prove that the employee qualifies by clear and convincing evidence[40] because the exemption provided by § 213(a)(1) is to be narrowly construed in order to further Congress' goal of providing broad employment protection.[41]

Congress exempted professionals, administrators and executives because it be-

---

34. 29 U.S.C. § 213(a)(1) (1988).

35. *Id.* It is well established that the DOL regulations which define and delimit these terms are valid and binding and have the force and effect of law. *See, e.g.*, Marshall v. Hendersonville Bowling Ctr., Inc., 483 F. Supp. 510 (M.D. Tenn. 1980), *aff'd*, 672 F.2d 917 (6th Cir. 1981); Craig v. Far West Eng'g Co., 265 F.2d 251 (9th Cir. 1959); Sun Publishing Co. v. Walling, 140 F.2d 445 (6th Cir. 1944), *cert. denied*, 322 U.S. 728 (1944); Smith v. Porter, 143 F.2d 292 (8th Cir. 1944); Walling v. Yeakley, 140 F.2d 830 (10th Cir. 1944); Wirtz v. Patelos Door Corp., 280 F. Supp. 212 (E.D.N.C. 1968).

36. *See* 29 C.F.R. §§ 541.1-3 (1993); *see also* Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 613 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992); McDonnell v. City of Omaha, 999 F.2d 293, 294 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1188 (1994); Abshire v. County of Kern, 908 F.2d 483, 484 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991); Shockley v. City of Newport News, 997 F.2d 18, 21-22 (4th Cir. 1993); Kinney v. District of Columbia, 994 F.2d 6, 8 (D.C. Cir. 1993); Yourman v. Dinkins, 826 F. Supp. 736, 740 (S.D.N.Y. 1993).

37. *See* 29 C.F.R. §§ 541.1-3 (1993).

38. *Id.* §§ 541.1(f), 541.2(e)(1), 541.3(e). In addition to being paid on a salary basis, these employees must receive a certain minimum salary each week to qualify for the exemption. However, the salary floor requirement no longer functions as a test for exempt status because it is too low. According to the regulations, professional employees must earn $170 per week and administrative or executive employees must earn $155 per week to qualify for the exemption. *Id.* These salary floors have not kept pace with the times. Current minimum wage is $4.25 per hour which amounts to a weekly salary of $170. Hence, any minimum wage employee earns enough to meet the salary floor requirement. The salary floor test for professional, executive or administrative status is obsolete as written. The continued existence of this obsolete portion of the exemption test is an indication that the regulations need modernization.

39. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974); *McDonnell*, 999 F.2d at 296; *Abshire*, 908 F.2d at 484; Brock v. Claridge Hotel and Casino, 846 F.2d 180, 183 (3d Cir. 1988), *cert. denied, sub nom.* Claridge Hotel and Casino v. McLaughlin, 488 U.S. 925 (1988).

40. *See Shockley*, 997 F.2d at 21.

41. *See* Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 211 (1959); Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960) (the overtime exemption is limited to those employees who are "plainly and unmistakably within [its] terms and spirit"); *McDonnell*, 999 F.2d at 295; *Malcolm Pirnie, Inc.*, 949 F.2d at 614; *Yourman*, 826 F. Supp. at 740; Kuchinskas v. Broward County, 840 F. Supp. 1548, 1553 (S.D. Fla. 1993).

lieved that these employees have some control over their hours.[42] They have the responsibility of determining which tasks require their attention and how much time they will devote to the task.[43] Exempt employees have the discretion to manage their time and activities.[44] They do not get paid according to the number of hours they log. "A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed."[45] The workweek of a professional may vary from week to week, a slow week may be followed by a period of intense work.

> Salary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. In other words, the salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it. With regards to hourly employees, it is the employer who decides the worth of a particular task, when he determines the amount to pay the employee performing it. Paying an employee by the hour affords that employee little of the latitude the salary requirement recognizes.[46]

B. The Salary Basis Test

According to the DOL regulations, an employee is paid on a salary basis if:

> he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.[47]

Thus, to retain their salaried status, employees must be paid their full weekly salary in any week in which work is performed, regardless of the number of days or hours the employee actually worked.[48] However, a salaried employee need not be paid for any week in which he performs no work at all.[49] The practical effect of the salary basis test is that an exempt employee is not entitled to overtime when he works more than forty hours per week and the employer is not allowed to dock his pay when he works less than forty hours per week.

The regulations do carve out some exceptions to the no pay-docking rule. The employer is allowed to make deductions from an employee's pay for absences of a day or more for personal reasons[50] or for sickness or disability, when such deductions are made in accordance with a bona fide plan.[51] In addition, the regulations permit deductions from pay for any length of time for penalties and disciplinary purposes which are

---

42. *See* Zalusky, *supra* note 33.
43. *See* Gustafson v. Nichols, No. 76-0009-Civ-6, 1979 WL 2027, at *4 (E.D.N.C. Oct. 2, 1979).
44. *See Kinney*, 994 F.2d at 11.
45. *Abshire*, 908 F.2d at 486.
46. *Brock*, 846 F.2d at 184 (footnote omitted).
47. 29 C.F.R. § 541.118(a) (1993). Administrative and professional employees may be paid on a fee basis and still qualify for this exemption. *Id.* §§ 541.2(e)(1), 541.3(e). This interpretation of the salary basis test has been in effect since 1954. *See* 19 Fed. Reg. 4405 (1954).
48. *See* 29 C.F.R. § 541.118(a); *see also* McDonnell v. City of Omaha, 999 F.2d 293, 294-95 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1188 (1994); Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta, 920 F.2d 800, 805 (11th Cir. 1991).
49. *See* 29 C.F.R. § 541.118(a).
50. *See id.* § 541.118(a)(2).
51. *See id.* § 541.118(a)(3).

imposed for major safety violations.[52] However, an employer loses the benefit of the exemption if the employee's pay is docked for absences caused by the employer, or by the operating requirements of the business, jury duty, attendance as a witness in court, temporary military leave, or for personal absences less than a full day.[53]

The regulation excludes from the exemption employees who are subject to partial day pay-docking. "An employee who can be docked pay for missing a fraction of a workday must be considered an hourly, rather than a salaried, employee."[54] Docking an employee for partial day absences will convert an otherwise salaried employee to an hourly employee who will be entitled to the payment of overtime. This conversion not only forces the employer to compensate the employee for future overtime, but the employee is eligible for back overtime for the preceding two years or, in the case of willful violations, for the preceding three years, if it is determined that the employer enjoyed the power of partial day pay-docking during that period.[55] The partial day pay-docking prohibition has recently come under close scrutiny by both the judiciary and the DOL.

C. Private Litigation Over the Salary Basis Test

The two prong test for exemption from the FLSA's overtime provisions has been in place since 1938.[56] "The salary requirement has been an integral part of the 541 regulations since 1940."[57] The current regulatory interpretation of the salary basis test including the partial day pay-docking prohibition has been in effect since 1954.[58] However, the application of the salary basis test has only been the subject of extensive litigation in the last five years. Prior to the inclusion of public sector employees, the DOL was lax in its enforcement of this feature of the FLSA and there were few cases brought for violation of the salary basis test. The extension of the FLSA to public sector employees in 1985 focused the DOL's attention on the issue and triggered a more active and rigorous enforcement of its provisions against private and public sector employers alike. The judiciary's recent attempts to interpret the salary basis test

---

52. *See id.* § 541.118(a)(5).

53. *See id.* §§ 541.118(a)(1) & (4). However, the DOL has issued regulations that allow employers to dock their employee's pay for partial day absences that are taken in accordance with the FMLA without losing their professional, administrative or executive employee exemption. *See id.* § 825.206(a) (1993). The DOL regulations are explicit that only when the leave qualifies as FMLA leave can the employer dock pay without losing the exemption; in all other circumstances, the employer is forbidden from making partial day deductions if it wishes to maintain the exempt status of its employees. *See id.* § 825.206(b) (1993). The DOL took this position in response to the Congressional enactment of the FMLA in 1993. The FMLA itself made no distinction between exempt and non-exempt employees. Although the DOL has chosen to allow the salary of exempt employees to be docked for the limited purposes enumerated in the FMLA without losing their exempt status, Congress did not explicitly require such a result. It is possible to read the statute as requiring employers to grant their employees FMLA leave but not allowing them to dock for partial day absences without forfeiting exempt status. It could be that employers can dock for these partial day absences, but they do so at the expense of their exemption. It seems that this interpretation would be more consistent with the notion of salary status. Unfortunately, the DOL did not interpret the statute this way.

54. Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 615 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992).

55. *See* 29 U.S.C. § 255(a) (1992).

56. The existing regulatory interpretation of the salary basis test has been in effect since 1954. *See* 19 Fed. Reg. 4405 (1954).

57. 57 Fed. Reg. 37,666 (1992).

58. *See* 19 Fed. Reg. 4405 (1954).

have resulted in great confusion in the law, and the circuits have taken contradictory positions on which pay practices defeat salaried status.[59] The unsettled nature of the law has left employers exposed to potentially enormous and generally unexpected liability for back overtime for employees who would have been exempt except for the court's recent interpretations that certain long standing pay policies may now fail the salary basis test. Examples of such conflicting interpretations include: (1) whether the employee's pay must actually be docked before he loses his salaried status or whether the mere possibility of a deduction is sufficient to fail the salary basis test; (2) whether employers can dock their employees' accrued vacation or compensatory time for partial day absences; and (3) when, if ever, the "window of correction" applies to relieve a company from inadvertent violations. The circuits are split in their interpretation of these and other issues[60] regarding an employee's salaried status, leaving employers without guidance as to the legitimacy of their pay and leave policies. "This area of the law is currently churning, and federal courts issue often contradictory opinions on a daily basis."[61] These issues are important to employers because if, for instance, the mere possibility of a partial day deduction defeats salaried status, then any employer policy authorizing a prohibited deduction would cause the conversion of the employer's entire exempt labor force from salaried to hourly. No actual deduction would ever have to occur, just subjecting the employees to the policy would defeat their salaried status, and entitle them to past and future overtime. Such liability has the potential to cripple unsuspecting businesses.

1. Are Actual Deductions from Pay Required Before an Otherwise Exempt Employee is Considered Hourly?

The DOL regulations state that if an employee's pay is "subject to reduction" for partial day absences then the employee is not exempt because he fails the salary basis test.[62] This language indicates that any policy which could result in improper deductions from the employee's pay would defeat exempt status. Yet, the circuits vary on whether an "actual" deduction is necessary before an employee will be converted from salaried to hourly. The Second, Sixth, Seventh, Ninth and District of Columbia Circuits have held that the mere possibility that an employee's pay could be docked for partial day absences is sufficient to convert a salaried employee to hourly.[63] These courts

---

59. This article suggests that the conflicting judicial opinions are to a large extent the result of the struggle the courts have had in enforcing the FLSA against state and local governments. In an attempt to insulate public sector employers from potentially devastating liability if the court were to find them in violation of the provisions of the exemption, the courts have attempted to find ways for government defendants to escape liability at every turn.

60. For a detailed analysis of the conflicting court opinions over whether a salaried employee can receive overtime or bonuses for working long hours, *see* McDonnell v. City of Omaha, 999 F.2d 293, 296-98 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1188 (1994). *See also* Michigan Ass'n of Governmental Employees v. Michigan Dep't of Correction, 992 F.2d 82, 84 (6th Cir. 1993); Klein v. Rush-Presbyterian-St. Luke's Medical Ctr., 990 F.2d 279, 284 (7th Cir. 1993).

61. Yourman v. Dinkins, 826 F. Supp. 736, 748 n.21 (S.D.N.Y. 1993) (citing Pautlitz v. City of Naperville, 781 F. Supp. 1368, 1374 (N.D. Ill. 1992)).

62. *See* 29 C.F.R. § 541.118(a).

63. *See, e.g.*, Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 617 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992); *Yourman*, 826 F. Supp. at 744; *Michigan Ass'n of Governmental Employees*, 992 F.2d at 86 (the threat of potential deductions destroy the salary basis); *Klein*, 990 F.2d at 279 (the fact that a pay deduction could be made for an impermissible reason is enough to deny exempt status regardless of whether an actual deduction occurred); Abshire v. County of Kern, 908 F.2d at 483, 483

have held that no actual deduction is necessary because the language of the DOL regulation focuses on whether an employee's pay can be docked, not whether it has been docked.[64] Further support for the proposition that an actual deduction is not necessary to defeat salaried status comes from the DOL's explicit refusal at the time it modified the applicability of the salary basis test to public employees, to alter the regulations to require an actual deduction before finding salary status defeated.[65]

Opposing this interpretation of the DOL regulations, the Fifth, Eighth, and Eleventh Circuits have held that an "actual" deduction for a partial day absence must occur before the employee's exempt status is lost.[66] These courts have claimed that they have not disregarded the DOL regulations, they have just construed them in a different manner.[67] "We, however, do not read the 'subject to' language of the regulation to mean that a 'possible' or 'contingent' reduction in salary automatically means that pay is 'subject to reduction,' and in violation of the salary basis test."[68] One circuit even has held that an occasional prohibited deduction from compensation would not cause an employee to lose his exempt status.[69] In reliance on a DOL Opinion Letter, some courts have held that partial day deductions from the pay of public employees would have to be regular and recurring before an employer would lose the ability to claim the exemption because its employee failed the salary basis test.[70] These courts have con-

---

(9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991); Kinney v. District of Columbia, 994 F.2d 6, 11 (D.C. Cir. 1993). In addition, several district courts in other circuits have agreed that the possibility of partial day pay deductions defeat exempt status. *See* Banks v. City of North Little Rock, 708 F. Supp. 1023, 1025 (E.D. Ark. 1988); Hawks v. City of Newport News, 707 F. Supp. 212, 215 (E.D. Va. 1988); Persons v. City of Gresham, 704 F. Supp. 191, 194 (D. Or. 1988); Knecht v. City of Redwood City, 683 F. Supp. 1307, 1311 (N.D. Cal. 1987); Lacey v. Indiana State Police Dep't, 810 F. Supp. 244, 248 n.1 (S.D. Ind. 1992); Service Employees Int'l Union, Local 102 v. County of San Diego, 784 F. Supp. 1503, 1510 (S.D. Cal. 1992). Many of the cases cited pertain to public employees. Prior to the issuance of DOL regulation 29 C.F.R. § 541.5d in 1992, private and public employees were treated identically for purposes of the salary basis test. *See infra* notes 116-117 and accompanying text.

64. The judiciary is bound to follow the DOL regulations as it would a statute because Congress expressly authorized the DOL to issue regulations implementing the FLSA. *See supra* note 35 and accompanying text.

65. *See* 57 Fed. Reg. 37,673 (1992).

66. *See, e.g.*, York v. City of Wichita Falls, 944 F.2d 236, 242 (5th Cir. 1991) (salaried executive employees do not lose their exempt status unless an actual deduction of their pay occurred); McDonnell v. City of Omaha, 999 F.2d 293, 296-97 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1188 (1994); Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta, 920 F.2d 800, 805 (11th Cir. 1991) (an employee does not lose his exempt status absent proof that the employee incurred actual deductions in his pay). Some district courts have agreed that the mere possibility that an employee's pay could be docked for a partial day absence is insufficient to defeat exempt status. *See, e.g.*, Kuchinskas v. Broward County, 840 F. Supp. 1548, 1555 (S.D. Fla. 1993) (only those employees who have suffered actual reductions in pay for partial day absences lose their exempt status).

67. The DOL regulations are valid and binding upon the courts and must be given the force and effect of law. *See supra* note 35 and accompanying text. However, the courts may, as these courts have, differ in their interpretation and application of the regulations. *See McDonnell*, 999 F.2d at 297.

68. *McDonnell*, 999 F.2d at 297.

69. *See* International Ass'n of Fire Fighters, Alexandria Local 2141 v. City of Alexandria, 720 F. Supp. 1230, 1232 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990). *See also* Harris v. District of Columbia, 709 F. Supp. 238, 241 (D.D.C. 1989) and District of Columbia Nurses' Ass'n v. District of Columbia, No. C.A. 87-1675, 1988 WL 156191, at *2 (D.D.C. Jan. 28, 1988), which embraced the same view; the latter, however, no longer has force in light of the District of Columbia's ruling in *Kinney*, 994 F.2d at 11, that even potential pay-docking converts the employees to non-salary status.

70. *See* Department of Labor, Wage and Hour Division, Opinion Letter, Jan. 15, 1986, *reprinted in* [6A Wages & Hours Manual] Lab. Rel. Rep. (BNA) 99:5043 (1993). This Opinion Letter stated that an occasional improper deduction would only cause the loss of the exemption in the workweek

cluded that granting windfalls of back overtime to employees who never experienced any actual deductions in pay would be fundamentally unfair and inequitable. Further compounding this confusion, the DOL has suggested that occasional partial day pay-docking of public employees[71] only resulted in loss of exempt status for those employees who were actually docked and it only resulted in loss of exempt status for the week in which the employees were actually docked. The employees' exempt status would remain intact for all preceding and subsequent workweeks.[72]

2. Can Employers Dock an Exempt Employee's Accrued Vacation or Sick Leave for Partial Day Absences Without Defeating Exempt Status?

As the foregoing indicates, the courts all agree that when a private employee's pay is actually docked for a partial day absence, the employee is not exempt from the FLSA overtime provision because he does not meet the requirements of the salary basis test. However, the law is less clear concerning the application of the same rule to deductions from an employee's accrued vacation or sick leave for partial day absences. Such deductions would reduce the employee's available leave, but would not reduce his actual pay. In effect, the issue becomes whether the vacation and sick leave, which is part of an employee's compensation package, should be treated the same as his pay for partial day pay-docking purposes.

The regulations state that the employee's "compensation" cannot be subject to reduction.[73] Since the regulations do not define compensation, the courts are left to determine whether the DOL intended to include vacation and sick leave. If the vacation and sick leave is considered part of the employee's predetermined compensation, then it would follow that deductions from an employee's leave, like deductions from his pay would be prohibited. Moreover, the very fact that Congress is considering amendments to the FLSA which would allow partial day deductions from an

---

when the deduction is made. However, if the improper deductions are regular and recurring then the exemption should be denied in all workweeks because the employee would not be paid on a salary basis. *Id. See also Hawks*, 707 F. Supp. at 214; *Knecht*, 683 F. Supp. at 1311. The courts who oppose this view and who claim that the possibility of improper deductions is sufficient to lose exempt status have argued that this Opinion Letter is being misinterpreted, that the frequency of actual deductions is immaterial when the employer has a policy that permits improper deductions. *See Abshire*, 908 F.2d at 488; Yourman v. Dinkins, 826 F. Supp. 736, 743 (S.D.N.Y. 1993); *Knecht*, 683 F. Supp. at 1311. These courts also suggest that even if the Opinion Letter is being interpreted correctly by those who require regular and recurring deductions before exempt status is lost, they are not bound to follow the Opinion Letter because it cannot override the express provisions of the DOL regulations. *See Abshire*, 908 F.2d at 488; *Yourman*, 826 F. Supp. at 743.

71. It is important to keep in mind that some of these cases and Opinion Letters were decided and promulgated before the issuance of 29 C.F.R. § 541.5d which permits partial day pay-docking for public employees. However, private employers remain prohibited from docking the compensation of their employees for partial day absences.

72. *See* 57 Fed. Reg. 37,669 (1992) (citing Department of Labor, Wage and Hour Division, Opinion Letter, Jan. 15, 1986, *reprinted in* [6A Wages & Hours Manual] Lab. Rel. Rep. (BNA) 99:5043 (1993)); Department of Labor, Wage and Hour Division, Opinion Letter, July 17, 1987, *reprinted in* [6A Wages & Hours Manual] Lab. Rel. Rep. (BNA) 99:5173 (1993). *See also McDonnell*, 999 F.2d at 297 (citing Department of Labor, Wage and Hour Division, Opinion Letter, Jan. 9, 1987 (exemption will not be denied for otherwise exempt public employees whose pay is docked for short absences because the employee has exhausted his available leave)). It is plausible that these decisions by the DOL were an attempt to insulate public employers, such as state and local governments, from the potentially enormous liability they could face if the regulations regarding the salary basis test were strictly interpreted.

73. *See* 29 C.F.R. § 541.118(a).

employee's accumulated leave without jeopardizing the employer's exemption suggests that this protection does not presently exist.[74] Furthermore, the Second and Seventh Circuits, as well as several district courts in other jurisdictions, have held that an employee will not be salaried under the FLSA if his employer deducts his accrued leave to cover partial day absences.[75] These courts have held that docking an employee's leave is tantamount to docking his compensation because fringe benefits are an integral part of an employee's compensation. "Like docking base pay, docking compensatory time and accrued leave indicates non-salaried status because the employee's compensation is reduced on account of the amount of work done."[76]

On the other hand, the Fourth, Fifth, Eighth and Ninth Circuits, as well as a few district courts, have disagreed. These courts have held that deducting accrued leave for partial day absences does not convert otherwise salaried employees to hourly.[77] "While personal leave, sick leave and/or compensatory time may be part of an employee's compensation package, it does not constitute salary."[78] These courts relied on a DOL Opinion Letter which concluded that a salaried employee does not lose his exempt status when his employer makes deductions from his accrued leave for partial day absences.[79] In 1992, the DOL reaffirmed the view that a deduction in accrued leave is not the same as a deduction in pay under the salary basis test.[80] It stated, "[i]t is the Department's position that an employer can require an employee to substitute paid leave for absences of less than a day without losing the exemption for that week because, in such circumstances, the employee does not experience a deduction from pay."[81] Yet, despite this seemingly clear language from the DOL, many courts continue to reach the opposite conclusion. These courts reason that if the regulation includes vacation, then a mere Letter Ruling that is contrary has no legal effect.

3. When Does the "Window of Correction" Apply to Relieve a Company of the Consequences of an Inadvertent Violation of the Salary Basis Test?

The DOL regulations state:

> [t]he effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case . . . . [W]here a deduction

---

74. *See* H.R. 1309, 103d Cong., 1st Sess. (1993); S. 1354, 103d Cong., 1st Sess. (1993).

75. *See, e.g.*, Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 615 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992); Klein v. Rush-Presbyterian-St. Luke's Medical Ctr., 990 F.2d 279, 284 (7th Cir. 1993); *Abshire*, 908 F.2d at 487 n.3; Benzler v. State of Nevada, 804 F. Supp. 1303, 1306 (D. Nev. 1992); Service Employees Int'l Union, Local 102 v. County of San Diego, 784 F. Supp. 1503, 1510 (S.D. Cal. 1992); Aaron v. Wichita, 797 F. Supp. 898, 907 (D. Kan. 1992); Thomas v. County of Fairfax, 758 F. Supp. 353, 357 n.8 (E.D. Va. 1991); Banks v. City of North Little Rock, 708 F. Supp. 1023, 1024 (E.D. Ark. 1988); *Knecht*, 683 F. Supp. at 1311-12.

76. *Benzler*, 804 F. Supp. at 1306.

77. *See* Barner v. City of Novato, 17 F.3d 1256, 1261-62 (9th Cir. 1994); International Ass'n of Fire Fighters, Alexandria Local 2141 v. City of Alexandria, 720 F. Supp. 1230, 1232 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990); Hartman v. Arlington County, 720 F. Supp. 1227, *aff'd*, 903 F.2d 290 (4th Cir. 1990); York v. City of Wichita Falls, 912 F.2d 236, 242 (5th Cir. 1991); *McDonnell*, 999 F.2d at 295-97; Kuchinskas v. Broward County, 840 F. Supp. 1548, 1555-56 (S.D. Fla. 1993); Keller v. City of Columbus, 778 F. Supp. 1480, 1486 (S.D. Ind. 1991).

78. *Fire Fighters Local 2141*, 720 F. Supp. at 1232.

79. Department of Labor, Wage and Hour Division, Opinion Letter, July 17, 1987, *reprinted in* [6A Wages & Hours Manual] Lab. Rel. Rep. (BNA) 99:5173 (1993).

80. 57 Fed. Reg. 37,666, 37,676 (1992).

81. *Id.*

> not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.[82]

This regulation created what has become known as a "window of correction." It allows an employer who improperly makes partial day pay deductions to restore the employee's exempt status by reimbursing the employee and promising to comply with the salary basis test in the future.[83] Courts have held that even when the partial day pay deductions were made pursuant to a long standing written leave policy the "window of correction" can still apply.[84] One court held that even though the employer did not reimburse the employees who had suffered the improper deductions until a lawsuit was brought against him, he could still use the "window of correction" to escape liability.[85]

Even though the regulation indicates that an improper deduction does not automatically trigger a loss of the exemption, many courts have been interpreting the salary basis test as an iron clad rule, where even the possibility of an improper deduction causes the loss of exempt status.[86] These courts have given the "window of correction" very limited applicability.

Extensive debate regarding the "window of correction" has centered around whether the regulation should be read disjunctively.[87] The language of the regulation allows employers who make improper deductions to correct their mistakes when the deduction "is inadvertent, *or* is made for reasons other than lack of work."[88] A dis-

---

82. 29 C.F.R. § 541.118(a)(6).

83. *See, e.g.*, Kuchinskas v. Broward County, 840 F. Supp. 1548, 1556-57 (S.D. Fla. 1993); Simmons v. City of Fort Worth, 805 F. Supp. 419, 424 (N.D. Tex. 1992); Keller v. City of Columbus, 778 F. Supp. 1480, 1486 (S.D. Ind. 1991); Hartman v. Arlington County, 720 F. Supp. 1227, 1230 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990); Thomas v. County of Fairfax, 758 F. Supp. 353, 357 (E.D. Va. 1991); Chadwick v. Norfolk, 29 Wage & Hour Cas. (BNA) 1407, 1408 (E.D. Va. 1988) (window of correction applicable despite policy that allowed for improper deductions); Harkins v. City of Chesapeake, 29 Wage & Hour Cas. (BNA) 1399, 1400-03 (E.D. Va. 1988).

84. *See, e.g., Kuchinskas*, 840 F. Supp. at 1556-57 ("window of correction" available despite three year written policy of making unauthorized deductions); *Hartman*, 720 F. Supp. at 1229-30 ("window of correction" is applicable despite written pay policy which was in effect for two years and ten months which allowed improper pay deductions); *Thomas*, 758 F. Supp. at 357 ("window of correction" is applicable despite written pay policy which was in effect for two years which docked lieutenants pay for partial day absences); *Simmons*, 805 F. Supp. at 424-25 ("window of correction" was applicable despite four year pay policy which made improper deductions to over 20% of the exempt employees); *Keller*, 778 F. Supp. at 1487 ("window of correction" applicable despite three year policy making unauthorized deductions); International Ass'n of Fire Fighters, Alexandria Local 2141 v. City of Alexandria, 720 F. Supp. 1230, 1232 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990) (the City properly qualified for the "window of correction" because it revised its policy of making improper partial day deductions and promised to comply in the future).

85. *See Keller*, 778 F. Supp. at 1487. *But see* Service Employees Int'l Union, Local 102 v. County of San Diego, 784 F. Supp. 1503, 1511-12 (S.D. Cal. 1992) (the "window of correction" is not available after litigation has begun because there would be no incentive to comply with the law).

86. *See, e.g.*, Abshire v. County of Kern, 908 F.2d 483, 489 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991) (the "window of correction" is only applicable to an employer who makes one improper deduction and then corrects it); Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 616 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992); Klein v. Rush-Presbyterian-St. Luke's Medical Ctr., 990 F.2d 279, 288 (7th Cir. 1993) (when salary deductions are made pursuant to the employer's written policy, they are not inadvertent).

87. *See* Petition for a Writ of Certiorari at 13-15, *Malcolm Pirnie* (No. 91-1748), *cert. denied*, 113 S. Ct. 298 (1992).

88. 29 C.F.R. § 541.118(a)(6) (emphasis added).

junctive reading of the regulation would allow employers who deliberately made improper deductions for reasons other than lack of work to use the "window of correction" and escape the penalty imposed by the statute for non-compliance.

Some courts have agreed that the plain language of the regulation requires that it be read disjunctively.[89] These courts have held that when regulations are written disjunctively, meeting any one of the terms within the provision will be sufficient.[90]

> Whether the policy allowing hourly deductions was inadvertent need not be considered. The regulation provides that the 'window of correction' option applies when a deduction is inadvertent 'or is made for reasons other than work.' Thus, if a policy allowed a deduction 'for reasons other than lack of work' then the 'window of correction' is open regardless of whether the error was inadvertent.[91]

In its application to the Supreme Court for Certiorari, Malcolm Pirnie, argued that "[i]t is a hornbook rule of construction that every word in a regulation is deemed to have meaning . . . . The regulation plainly allows the use of the "window of correction" for reasons other than 'inadvertence,' otherwise the regulation would not use the term 'or'."[92] Supporters of a disjunctive reading of the "window of correction" believe that a good faith requirement should be read into the regulation.[93] A non-disjunctive reading of the regulation would so narrow the applicability of the provision that it would be virtually useless. In addition, a non-disjunctive reading would discourage businesses from correcting policies which allow for improper deductions (even when no actual deductions have occurred) because of the catastrophic consequences of admitting to and confronting a salary basis test violation.

On the other hand, some other courts believe that the regulation should be read conjunctively, not disjunctively.[94] These courts have concluded that a better reading of the regulation is that both conditions, inadvertence and for reasons other than lack of work, must be met before an employer can avail itself of the "window of correction."[95] They point out that the regulation also says that the effect of an improper de-

---

89. *See, e.g., Kuchinskas*, 840 F. Supp. at 1557; *Keller*, 778 F. Supp. at 1487; Brown v. Eckerd Drugs, Inc., 24 Wage & Hour (BNA) 114, 115 (M.D.N.C. 1979); Martin v. Pierce Processing, Inc., No. C-1-89-15, slip op. at 9 (S.D. Ohio Mar. 25, 1992).

90. *See* George Lawley & Son Corp. v. South, 140 F.2d 439 (1st Cir. 1944), *cert. denied*, 322 U.S. 746 (1945); Hodgson v. Prophet Co., 472 F.2d 196 (10th Cir. 1973) (use of the word "or" in the FLSA indicates that Congress intended alternatives); *cf.* Walling v. Morris, 155 F.2d 832 (6th Cir. 1946), *cert. granted*, 330 U.S. 817, *vacated sub nom.*, Morris v. McComb, 332 U.S. 422 (1947) (when the regulations are written in the conjunctive an employer is required to meet all of the terms in order to qualify); Smith v. Porter, 143 F.2d 292 (8th Cir. 1944).

91. *Keller*, 778 F. Supp. at 1487 (citations omitted) (emphasis omitted).

92. Petition for Writ of Certiorari at 14, *Malcolm Pirnie*, (No. 91-1748), *cert. denied*, 113 S. Ct. 298 (1992).

93. *See, e.g., id.* at 14 n.10.

94. *See, e.g.*, Klein v. Rush-Presbyterian-St. Luke's Medical Ctr., 990 F.2d 279, 287 (7th Cir. 1993) (employer was not entitled to use the window of correction because the improper deductions were not inadvertent, despite the fact that they were made for reasons other than lack of work); Dole v. Malcolm Pirnie, Inc., 758 F. Supp. 899, 906 (S.D.N.Y. 1991), *rev'd sub nom.* Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992); Pautlitz v. City of Naperville, 781 F. Supp. 1368, 1373 (N.D. Ill. 1992); Brief for the Respondent, Petition for Writ of Certiorari at 9, *Malcolm Pirnie*, (no. 91-1748), *cert. denied*, 113 S. Ct. 298 (1992).

95. Service Employees Int'l Union, Local 102 v. County of San Diego, 784 F. Supp. 1503, 1511-12 (S.D. Cal. 1992) (the window of correction is not available to the County because they did not prove that the deductions were inadvertent).

duction "will depend on the facts of the case."[96] It would be unfair to allow employers to cure all deliberate improper deductions other than those made for lack of work.[97] Allowing employers who did not meet the requirements of the salary basis test to preserve the exemption when they made deliberate improper deductions would undermine the very effectiveness of the FLSA.[98]

D. Public vs. Private Employees

As originally enacted in 1938, the FLSA did not apply to public sector employees.[99] "The history of the FLSA as applied to state and local government employees involves a number of actions by Congress, the U.S. Department of Labor (DOL), and the U.S. Supreme Court since 1966."[100] The first attempt by Congress to expand the protections afforded by the FLSA to public employees came in 1966. These amendments extended the statute's minimum wage and overtime provisions to a limited group of public sector employees.[101] In 1968, the Supreme Court upheld the constitutionality of applying the FLSA to these limited public sector employers.[102] In 1974, Congress amended the definition of "employer" to include all public employers, thereby extending FLSA coverage to virtually all federal, state and local government employees.[103] However, in 1976 the Court held that it was unconstitutional to apply the FLSA to state and local government employees who were engaged in traditional government activities.[104] In 1985, the Court reversed its earlier decision and held that Congress is within its power to extend FLSA coverage to public employees.[105] The Court held that subjecting public sector employees to the overtime and minimum wage requirements of the FLSA was not unconstitutional and did not destroy state sovereignty.[106] After this decision, Congress amended the FLSA to address the particular concerns of state and local government employers and to shield these employers from

---

96. *See* 29 C.F.R. § 541.118(a)(6).

97. *See* Brief for the Respondent, Petition for Writ of Certiorari at 9, *Malcolm Pirnie,* (no. 91-1748), *cert. denied,* 113 S. Ct. 298 (1992).

98. *See Klein,* 990 F.2d at 287.

99. *See* S. REP. NO. 145, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S.C.C.A.N. 1620, 1625 [hereinafter FLSA Amendments of 1961]; 57 Fed. Reg. 37,666 (1992); S. REP. NO. 159, 99th Cong., 1st Sess. 4 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 652 [hereinafter FLSA Amendments of 1985].

100. FLSA Amendments of 1985, *supra* note 99, at 4.

101. *See* S. REP. NO. 1487, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3003. The public sector employees which were included in the Act's coverage included: state and local transit company employees, state and local hospital employees, employees of state and local government agencies, government institutions of higher education, and federal government employees. *See id.* at 3006-08. *See also* H.R. REP. NO. 913, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2816.

102. Maryland v. Wirtz, 392 U.S. 183 (1968) (the Commerce Clause provides a constitutional basis for Congress to extend coverage under the FLSA to state and local governments).

103. *See* Fair Labor Standard Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55, 59-60 (1974) (codified as amended at 29 U.S.C. § 203 (1993)). *See also* H.R. REP. NO. 913, 93d Cong., 1st Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2812-13, 2837-38. However, elected officials and their staffs remain exempt from the FLSA. *See* Fair Labor Standard Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55, 59-60 (1974) (codified as amended at 29 U.S.C. § 203 (1993)).

104. *See* National League of Cities v. Usery, 426 U.S. 833 (1976) (the Commerce Clause does not empower Congress to enforce the FLSA minimum wage and overtime provisions against states whose employees are engaged in traditional government functions), *overruled by* Garcia v. San Antonia Metro. Transit Auth., 469 U.S. 528 (1985).

105. *See Garcia,* 469 U.S. at 528.

106. *Id.*

liability for one year while they brought their pay policies into compliance with the FLSA.[107] These amendments did not address the application of the professional, executive, or administrative exemption to public employees.

The DOL quickly recognized the problems in applying the salary basis test to state and local government employees. The current regulatory interpretation of the salary basis test including the no partial day pay-docking rule was developed in 1954 to be consistent with the pay practices that were prevalent in the private sector.[108] There was no consideration of the prevalent pay practices in state and local governments at that time because public employers were excluded from the FLSA's coverage.[109] When the FLSA was extended to public sector employees, the DOL discovered that the FLSA pay-docking provisions were inconsistent with most state and local government pay policies. These state and local government pay practices had evolved over the years in compliance with statutes and ordinances that had been in place long before FLSA coverage was extended to public employees.[110] "Such pay systems are generally premised on a concept derived from principles of public accountability that government employees should not be paid for time not worked due to the need to be accountable to the taxpayers for the expenditure of public funds."[111] In 1985, the pay policies of most public employers required all employees to use accrued leave or to incur a reduction in their pay for any absence from work.[112] The DOL recognized that it would be difficult for state and local governments to change these widespread, long-standing pay policies and, in 1987, it adopted a non-enforcement policy with respect to public employers while it considered proposed changes to the salary basis test.[113] This non-enforcement policy permitted public employers to dock their employees for partial day absences without forfeiting their exempt status as long as their pay policy was adopted to comply with an existing state or local law.[114] Hence, public employers could dock their salaried employees for partial day absences without losing the FLSA exemption. However, the DOL explicitly stated that its non-enforcement policy did not affect the rights of public employees to file lawsuits against their employers for violating the FLSA.[115]

In 1992, the DOL issued regulation section 541.5d that expressly permits public sector employers to dock an exempt employee for partial day absences without jeopardizing the employer's exemption.[116] The regulation is limited to public sector employers and does not apply to their private sector counterparts. Section 541.5d does not

---

107. *See* S. REP. NO. 159, 99th Cong., 1st Sess. (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 655-56. The 1985 amendments authorized state and local governments to continue to provide their employees with compensatory time in lieu of overtime pay for hours in excess of forty per week. *See* Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787, 787-88 (1985) (codified as amended at 29 U.S.C. § 201 (1993)).

108. *See* 57 Fed. Reg. 37,666 (1992).

109. *Id. See also* McDonnell v. City of Omaha, 999 F.2d 293, 297 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1188 (1994).

110. *See* 57 Fed. Reg. at 37,667 (1992).

111. *Id.*

112. *Id.*

113. Exemptions From Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employers, 57 Fed. Reg. 37,666 (1992) (to be codified at 29 C.F.R. pt. 541).

114. *Id.* at 37,668.

115. *Id.*

116. *See* 29 C.F.R. § 541.5d (1993).

entirely eliminate the salary basis test for public employers. The regulation provides that public employers whose employees meet all of the requirements for exempt status except for the no partial day pay-docking prohibition, still qualify for the exemption despite government policies that permit an employee's accumulated leave or base pay to be docked for partial day absences.[117] The no pay-docking rule was eliminated for public sector employers because of state laws which prohibit state and local governments from paying their employees for hours not actually worked. There is no similar statutory provision that applies to private sector employees, therefore, they continue to be bound by the salary basis test as it appears in the DOL regulations. When section 541.5d was issued, the DOL considered and rejected proposals and comments that private sector employers should likewise be able to dock their employees for such absences. The DOL was explicit in its declaration that public sector pay systems have to be analyzed differently from their private sector counterparts.[118] The DOL found that its regulations, as written, were not appropriate for application to state and local government employers because they deprived them of the opportunity to benefit from the exemption.[119]

The DOL announced two rationales for its new regulation. First, it recognized that public employees are paid pursuant to pay systems which were established in compliance with laws based on public accountability.[120] It found a strong government interest in the principle of public accountability which precludes paying public employees for time not worked because governments are accountable to their taxpayers for expenditures of public funds, including employees' salaries.[121] "Public accountability embodies the concept that elected officials and public agencies are held to a higher level of responsibility under the public trust that demands effective and efficient use of public funds in order to serve the public interest."[122] The DOL concluded that few public employers would ever be able to avail themselves of the professional, executive or administrative exemption for their employees due to the government's duty of accountability owed to its citizens without the new regulation.

Second, the DOL concluded that state and local governments would be crippled by the potential liability for back pay that would be sought by otherwise exempt employees who would be deemed hourly solely because of the pay policy requiring partial day deductions.

> Because of concerns that the unexpected liabilities threatened to seriously impair the fiscal integrity of many state and local governmental agencies, and would disrupt widespread, long-standing pay practices that had been designed to serve the public trust, the Department undertook a separate rulemaking on the specific issue of application of the 'salary basis' rule to public sector employees.[123]

However, the new regulation, section 541.5d, does not relieve public employers of their potential liability for back overtime pay for improper deductions prior to its issuance because the FLSA does not authorize retroactive rulemaking.[124]

---

117. *See* 57 Fed. Reg. 37,671 (1992).
118. *Id.* at 37,670.
119. *Id.*
120. *Id.*
121. *Id.* at 37,667.
122. *Id.* at 37,676.
123. *Id.* at 37,670.
124. *See generally* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) (statutory grant of

IV. THE WORKPLACE LEAVE FAIRNESS ACT

The WLFA was introduced on March 11, 1993, in the House of Representatives.[125] It sought to amend the FLSA to allow all employers to make partial day pay deductions from an employee's accumulated leave or pay without jeopardizing the employee's exempt status.[126] The bill would override the DOL regulations and require the DOL to change the salary basis test. It would allow private sector employers to reduce their employees' accrued leave or dock their pay for partial day absences, but would leave intact all of the other requirements of the salary basis test. In effect, it is just an extension of DOL regulation section 541.5d to private employers.

A companion Senate bill, also entitled the WLFA, was introduced on August 4, 1993.[127] It would result in a more extensive change in the law. In addition to extending section 541.5d to private employers, it would permit employers to establish regular employee working hours, require employees to record the number of hours worked, and allow employers to suspend employees without pay for any disciplinary reasons.[128] If passed, this bill would effectively eliminate the salary basis test. Both bills indicate that they are to apply retroactively, in order to relieve employers of any liability for past instances of improper deductions.[129]

A. The Alleged Purpose Behind These Bills

Proponents of the WLFA assert two general purposes for the bill: to respond to the needs of modern families by increasing flexibility in the workplace, and to relieve American businesses of the unfair and unexpected potential liability they face because of the DOL's pay-docking rule. Proponents claim that the bill's primary purpose is to increase flexibility in the workplace for the employee by reversing a DOL ruling.[130]

> The [DOL] rule is a slap in the face of employers trying to provide flexibility to a segment of their workforce. The rule is a serious inconvenience to salaried employees, who now must take a full day of unpaid leave even if personal obligations only require a few hours away from work.[131]

Proponents of the bill claim that it allows employers to provide their workers with the option of taking a partial day off for personal reasons. Representative Robert E. Andrews, who introduced the bill in the House, claims that exempt employees are currently prohibited from taking a partial day off from work. He interprets the existing DOL pay-docking rule as, in effect, requiring exempt employees to either take a whole day off or work a whole day.[132] He discusses the evolution of the modern workplace demographics and concludes that the current interpretation of the salary basis test is

---

legislative rulemaking authority does not encompass the power to promulgate retroactive rules unless expressly granted by Congress). Since the FLSA does not expressly authorize the DOL to issue retroactive rules or regulations, it is without this power. *See* 57 Fed. Reg. 37,678 (1992).

125. *See* H.R. 1309, 103d Cong., 1st Sess. (1993).

126. *Id.*

127. *See* S. 1354, 103d Cong., 1st Sess. (1993).

128. *Id.*

129. H.R. 1309 § 3; S. 1354 § 3.

130. *See* Andrews, *supra* note 5, at E622; Petri, *supra* note 5, at E616; Kilberg, *supra* note 5; Kassebaum, *supra* note 5, at S10,381.

131. Pressler, *supra* note 5, at S10,383.

132. *See* Andrews, *supra* note 5, at E622.

not family-friendly. For example, he believes that the rapid increase of women in the workforce has created a need that the existing law does not meet. He claims that the WLFA responds to this change in workplace demographics.[133]

Likewise, Representative Thomas E. Petri, who joined Representative Andrews in introducing the WLFA in the House, appeals to the need for more family-friendly leave legislation.[134] He claims that the WLFA is just an expansion of the FMLA. Like his colleague, he believes that the current DOL policy prohibits employers from having flexible leave policies for their salaried employees. He claims that the DOL issued regulation section 541.5d because "[t]he Department knows that this policy does not make sense. It has exempted its own employees and all other Federal workers from the rule."[135]

Senator Nancy Kassebaum, along with Senators Thad Cochran, James Jeffords, and Larry Pressler introduced the WLFA in the Senate on August 4, 1993. Senator Kassebaum believes that the FMLA is too narrow,[136] and the WLFA is needed to broaden the ability of employers to have family-friendly leave policies.[137] Senator Pressler concurs, adding that the flexibility to take partial day unpaid leave is needed because today's workforce is comprised of single parents or two working parent families.[138] The bill's proponents claim that the current DOL prohibition against partial day pay-docking has forced employers to require that their employees take a full day of leave if they need to leave work during the day.[139] The proponents claim that the WLFA is needed so that employers can have more flexible leave policies, and permit their employees to take a partial day absence when needed.

The proponents of the bill also claim that the WLFA is needed to relieve businesses of the unexpected and unreasonable liability that they face because of the pay-docking rule. Senator Kassebaum cites *Martin v. Malcolm Pirnie, Inc.*,[140] as an illustration of the severity of the current DOL regulations and the devastating effects this policy can have on a company.[141] Malcolm Pirnie was a 900 employee engineering company which docked twenty-four employees a combined total of less than $3,300

---

133. *Id.*

134. *See* Petri, *supra* note 5, at E617.

135. *Id.*

136. It is interesting to note that Senator Kassebaum, who claims to be supporting the WLFA as an expansion of the FMLA, was actually opposed to the FMLA. In fact, the Senator was one of only four Senators on the Labor and Human Resources Committee who opposed the FMLA. *See* S. REP. NO. 3, 103d Cong., 1st Sess. 50-53 (1993). Such a change in views would certainly leave this author questioning the Senator's motives for supporting the WLFA if it really is an expansion of the FMLA. However, the WLFA is not an expansion of the family friendly legislation as its proponents claim. This article suggests that the bill's proponents are trying to ride on the coattails of the widely supported FMLA by claiming that the WLFA is consistent with the FMLA and hoping that no one will notice that the WLFA is actually pro-employer legislation.

137. *See* Kassebaum, *supra* note 5, at S10,382. The Senator is concerned that the FMLA does not apply to employers with less than fifty employees. In those cases the employers cannot grant partial day unpaid leave to salaried employees who have family or medical emergencies. The WLFA would create that option for compassionate employers. *Id.* While this article agrees that the scope of the FMLA should be expanded, it does not believe that the WLFA would achieve this result.

138. *See* Pressler, *supra* note 5, at S10,382.

139. *See, e.g.*, Andrews *supra* note 5, at E622; Petri, *supra* note 5, at E617; Pressler, *supra* note 5, at S10,383; Kassebaum, *supra* note 5, at S10,382.

140. *See* Kassebaum, *supra* note 5, at S10,382 (citing 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992)).

141. *See* Kassebaum, *supra* note 5, at S10,382.

over a nineteen month period. The pay deductions were primarily for employees who voluntarily accepted leave without pay, so that they could take off during the day for personal reasons. When the company realized that its pay deductions violated the DOL regulations, it immediately repaid the docked employees and changed its pay policy to be consistent with the DOL regulations. However, the DOL still filed suit against Malcolm Pirnie. The court held that because the company had a written policy which permitted partial day pay-docking from salaried employees, all of their employees, even those who were never actually docked, were hourly and not salaried and were, therefore, entitled to overtime. The result of this judgment was to entitle all the company's employees to overtime compensation for the two years preceding the litigation. This amounted to Malcolm Pirnie owing $750,000 in back overtime to employees who were already paid salaries between $40,000 and $70,000 annually. Needless to say, companies like Malcolm Pirnie are supporting the WLFA. Malcolm Pirnie's chairman, John Foster, stated, "[the WLFA] is not a pay-docking issue as some have reported; it is a flexibility issue."[142] Foster also claimed that his company was "blindsided" by the DOL's "new interpretation" of the FLSA.[143]

Senator Kassebaum, like the bill's other supporters, claims that the bill is necessary to relieve private sector employers from the potentially devastating liability they face for having pay policies that violate the current DOL policy. Kassebaum supports the WLFA's retroactive application "to relieve public and private employers from liability for back pay who have had flexible leave policies, but have been unaware of these Department of Labor rules."[144] Others, too, support the bill's retroactive application to eliminate the $39 billion in potential liability for back overtime pay that private employers would face for having flexible leave policies which permit their employees to take unpaid partial day leave.[145]

B. The Actual Effects of the Bill

If enacted, the WLFA would result in a windfall for employers, who would be able to dock employees for their absences and would not have to compensate them for their presence. Congress exempted professional, administrative, and executive employees from the FLSA's overtime provisions because these employees, unlike hourly employees, are paid for the general value of their services, not for the number of hours they work.[146] Exempt employees are paid an amount that bears no relationship to the number of hours worked in any particular week.[147] They do not punch a clock. To qualify for the exemption from overtime, employers must pay these employees on a salary basis. If the WLFA is enacted, it will essentially do away with the salary basis test. Employers will be free to dock their employees if they have to leave for a few hours during the day to take a child to the doctor, and they will have no obligation to compensate them the next day when they stay late to finish up a project. Docking employees for partial day absences is completely inconsistent with the notion of sala-

---

142. *Kassebaum Move Applauded*, Daily Lab. Rep. Current Dev. (BNA) No. 148, at A-4 (Aug. 4, 1993).

143. *Id.*

144. Kassebaum, *supra* note 5, at S10,382.

145. *See* Andrews, *supra* note 5, at E622; Petri, *supra* note 5, at E617; Pressler, *supra* note 5, at S10,383.

146. *See supra* notes 42-46 and accompanying text.

147. *See* Thomas v. County of Fairfax, 758 F. Supp. 353, 360 (E.D. Va. 1991).

ried status, and the FLSA in general. If enacted, the WLFA will undermine the goal of the FLSA—to provide broad employment protection—by making the exemption from overtime very easy to obtain. Since the WLFA effectively eliminates the salary basis test, and the minimum salary floor test is so low that any minimum wage employee would qualify,[148] employers would only have to prove that their employees meet the duties test to qualify for the exemption. This would greatly increase the number of employees who qualify for the exemption and, therefore, do not receive the overtime protections of the FLSA. The exemption would no longer be narrowly construed as Congress intended.[149] As John Zalusky, Head of the Offices of Wages and Industrial Relations, said in opposing the WLFA,

> In short, the docking test says that when an employer claims employees are not entitled to overtime protection because they are salaried and therefore exempt, it cannot chisel by docking employees for short absences. To do so would be trying to have it both ways. If this were allowed the Act's 40 hour week would become meaningless . . . . Not only is the docking test an efficient ingredient in limiting work to 40 hours per week, it is also fair. If a worker is expected to work long hours in one period [without receiving overtime premiums] it is just plain wrong to cut their pay when they need a few hours off.[150]

The claims by proponents of the WLFA that it is designed to increase worker flexibility and to respond to the needs of the modern workforce for family-friendly legislation are unpersuasive. The bill's proponents are trying to ride on the coattails of the much needed and well supported FMLA. The FMLA was enacted to protect the worker's need to respond to family and medical emergencies. Although it applies equally to workers across the economic spectrum, it was specifically designed to protect low wage workers.[151] The WLFA has no such purpose. The WLFA, unlike the FMLA, benefits the employer, not the employee, and is limited in scope to professional, executive and administrative employees. The DOL estimates that 22 million of the 115 million people in the civilian workforce are salaried.[152]

Instead of increasing employee benefits as the FMLA does, the WLFA benefits the employer at the expense of the employee. The WLFA does not require employers to allow their employees to take leave that they would not otherwise be entitled to, quite the contrary, it allows employers to dock employees for something that they already have.[153] It is important to remember that a salaried employee is not paid according to the number of hours that they log. "A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services

---

148. *See supra* note 38 and accompanying text.

149. *See supra* note 41 and accompanying text.

150. Zalusky, *supra* note 33.

151. *See* S. REP. NO. 3, 103d Cong., 1st Sess. 17-18 (1993). The DOL regulations clarify the FMLA's application to salaried professional, administrative and executive employees under the FLSA. The regulations permit employers to dock the pay of salaried employees for partial day absences made in conjunction with the FMLA without losing their exempt status. The regulations indicate that this pay-docking is only permitted for the those employees that qualify under the FMLA, and only for those purposes enumerated in the Act. *See* 29 C.F.R. § 825.206 (1993).

152. *See* Frank Swoboda, *Business Looks to Tilt the Law in Its Favor on Docking Salaried Employees*, WASH. POST, Aug. 22, 1993, at H02.

153. It is inconsistent with the notion of salaried status to deny an exempt employee his right to manage his own time—which includes his right to slip away from work for a few hours to attend to personal matters. *See infra* notes 156-161 and accompanying text.

performed."[154] The practical effect of salaried status is that an exempt employee is not entitled to overtime when he works more than forty hours per week and his employer is not allowed to dock him when he works less than forty hours.[155]

The proponents of the WLFA claim that without it, employers will not be able to allow unpaid partial day absences by their exempt employees. In actuality, the present law only prohibits the employer from docking the exempt employee's pay for partial day absences, it does not prohibit the employee from leaving work for a few hours for personal reasons. Salaried employees are already permitted partial day absences and they are not docked for them.[156] In *Yourman v. Dinkins*, the District Court for the Southern District of New York found that an employer's policy which did not permit salaried employees to "simply slip away from work for an hour in order to take care of personal business," but instead, required them to use leave or take leave without pay for these absences, was inconsistent with the DOL's definition of "salary basis."[157] The court suggested that salaried employees have a right to "slip away from work" if they need to and a restriction of this right would cause their employer to forfeit the benefit of their salaried status.[158] The Fourth Circuit agreed that an employee is not paid on a salary basis if they cannot leave work for a few hours without seeking and obtaining permission.[159] The Second Circuit held that the salary basis test is not met when employers require their employees to work at least eight hours a day.[160] These cases indicate that it would be inconsistent with the notion of salaried status to deny an exempt employee the discretion to manage his time. This discretion includes the right to leave work for a few hours without repercussions.[161] Therefore, the WLFA, which permits employers to dock employees for something that they already have a right to do, does not broaden the FLSA as claimed. What is family-friendly about reducing the salaries of employees when they respond to family emergencies? Clearly this bill is not well suited to its alleged purpose.

The bill's proponents claim that the no pay-docking rule prohibits employers from having flexible leave policies. They claim that the current law gives employers an incentive to force their salaried employees to take a full day of leave whenever they need to leave work for a few hours. However, the bill's proponents have not suggested how widespread this practice is. The no pay-docking rule has been an integral part of the regulations for forty years and the proponents of the WLFA have not cited a single

---

154. Abshire v. County of Kern, 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 498 U.S 1068 (1991). *See also* Kinney v. District of Columbia, 994 F.2d 6, 11 (D.C. Cir. 1993) (exempt employees have the discretion to manage their time).

155. *See supra* notes 42-49 and accompanying text.

156. Absent important business interests, the notion of salaried status indicates that the employee has a right to take a few hours off of work to attend to personal matters. Implicit in this claim is the assumption that if the employee's desire to take a few hours off conflicts with important business interests that exist concurrently, the employer has a right to require the employee to fulfill his employment obligations first.

157. Yourman v. Dinkins, 826 F. Supp. 736, 739-41 (S.D.N.Y. 1993).

158. *Id.*

159. *See* Shockley v. City of Newport News, 997 F.2d 18, 24-25 (4th Cir. 1993). *See also* Service Employees Int'l Union, Local 102 v. County of San Diego, 784 F. Supp. 1503, 1508 (S.D. Cal. 1992).

160. *See* Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 617 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992).

161. *See Shockley*, 997 F.2d at 24-25 (docking police officers' salaries for partial day absences constituted a penalty for disciplinary purposes which is prohibited by the DOL regulations).

instance of an employer denying an employee a partial day absence and requiring them to take a whole day off of work.[162] In fact, employers may not be able to require that their employees take the whole day off without forfeiting their exempt status. Although such a practice might appear to fall within a strict interpretation of the regulations, it would be completely inconsistent with the spirit of those regulations and the notion of salaried status. An employer cannot penalize an employee for exercising his right to slip away from work for a few hours to attend to personal matters. Perhaps this explains why the bill's proponents have not cited a single instance of an employer attempting to force this upon its employees. The bill's proponents are trying to gain support for the WLFA by claiming that its purpose is not only consistent with, but an extension of the FMLA, so they claim that the bill is needed so that employers can provide flexible leave to their employees. In actuality the bill's purpose is to relieve employers of potential liability for violating the FLSA.

Although the focus of attention on this bill is centering on the partial day pay-docking provision, the Senate bill would modify other portions of the salary basis test at the same time. The Senate bill would effectuate an even greater change in the current law by allowing employers to penalize their employees by docking their salaries for disciplinary reasons. Currently, the DOL regulations only permit deductions from pay for major safety violations that relate to the prevention of serious danger to the company, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.[163] The rationale for allowing the deduction is that the public interest in preventing violations that could cause such serious harm outweighs the need to narrowly construe the FLSA in these limited cases. However, the general rule is that penalizing an employee by docking his pay for disciplinary purposes is inconsistent with salaried status and will convert a salaried employee to hourly who is entitled to overtime, except in the limited circumstances which are dictated by the public interest.[164] Hence, a salaried employee's pay cannot be withheld for disciplinary purposes because it would constitute reduction in pay based on the quantity or quality of work which is strictly prohibited by the salary basis test. Courts have consistently ruled that deductions from pay for non-major infractions of safety rules will defeat exempt status.[165]

It is difficult to see how the proponents of the WLFA can argue that this change

---

162. In addition, employees can protect themselves from such behavior through collective bargaining or by contract.

163. *See* 29 C.F.R. § 541.118(a)(5).

164. *Id.*

165. *See, e.g.*, Yourman v. Dinkins, 826 F. Supp. 736, 739, 741 (S.D.N.Y. 1993) (subjecting employees to penalties for minor infractions such as: insubordination, abuse of sick leave, refusal to report for drug testing, conduct unbecoming, theft of agency property, and misuse of agency car will defeat salaried status); *Shockley*, 997 F.2d at 24-25 (disciplining police officers who left work during the day for a few hours without permission by reducing their salary was inconsistent with their salaried status); Klein v. Rush-Presbyterian-St. Luke's Medical Ctr., 990 F.2d 279, 285 (7th Cir. 1993) (nurse was not exempt from overtime because her salary was subject to reduction for tardiness and rude behavior toward fellow staff members); Lacey v. Indiana State Police Dept., 810 F. Supp. 244, 247-48 (S.D. Ind. 1992) (disciplining salaried employees by docking their pay for insubordination, discourtesy or insolence, abuse of sick leave, tardiness and uncleanliness defeated their salaried status); Pautlitz v. City of Naperville, 781 F. Supp. 1368, 1372 (N.D. Ill. 1992) (disciplining police officers for accepting gratuities by docking their pay is inconsistent with salaried status); Service Employees Int'l Union, Local 102 v. County of San Diego, 784 F. Supp. 1503, 1508-1511 (S.D. Cal. 1992) (disciplining probation officers who left work during the day for a few hours without permission was inconsistent with their salaried status).

in the law is family-friendly, when it actually allows employers to dock the employee's salary and thereby reduce the income available to support the family for any disciplinary reasons that the employer chooses. It removes the restriction that only major safety violations will warrant a reduction in salary and allows employers to dock their employees' salaries for virtually anything including: tardiness, insubordination, abuse of sick leave, refusal to report for drug testing, conduct unbecoming, being discourteous, theft of agency property, misuse of agency car, and anything else that the employer finds blameworthy. Proponents of the bill are, in effect, trying to pass pro-employer legislation that will diminish the rights and benefits already guaranteed to salaried workers under the guise of family-friendly legislation. They undoubtedly want to ride on the coattails of the FMLA, hoping that these pro-employer policies will go unnoticed.

The actual purpose of the bill, as its proponents allude to, is to let employers off the hook for past and present violations of the FLSA and to give employers virtually free reign to determine when and if they should make deductions from their employees' salaries.

> Legislation pushed by employer groups has been introduced in both the House and Senate to take businesses off the hook, or at least greatly reduce their potential liability when they violate federal wage hour laws for salaried employees. Employers would be allowed to dock the pay of salaried employees in most cases without risking the penalties of the Fair Labor Standards Act.[166]

Proponents of the bill allege that the fiscal integrity of American businesses is threatened by the unpredictability in this area of the law. This legislation will allow employers to escape liability for all past violations of the pay-docking prohibition. The actual purpose of the bill is to diminish the potential liability companies face in this era of DOL enforcement, not to assist the modern family or to create a more flexible workplace as its proponents claim. Prior to the extension of the FLSA to public sector employees, the DOL was not as diligent in its enforcement of the salary basis test. The attention brought by the extension of the FLSA to public sector employees focused the DOL's attention on the FLSA's exemptions for professional, administrative and executive employees and triggered more active enforcement of its provisions.

The proponents of the WLFA claim that the DOL allowed public sector employers to dock their employees for partial day absences because it realizes how unfair the existing policy was.[167] While it is true that the existing policy was unfair to public sector employers, the private sector cannot make the same claim. Any assertion that private sector employees are no different than public sector employees fails because of the extensive discussion by the DOL of the differences between the public and private sector pay systems.[168] Private sector employers have not been "blindsided" by the DOL prohibition against partial day pay-docking as some proponents claim.[169] This prohibition has existed for decades. The salary basis test was developed in accordance with private industry practices and employers have had forty years to bring their pay policies into compliance. As previously discussed, the public sector pay practices were

166. Swoboda, *supra* note 152.
167. *See supra* note 135 and accompanying text.
168. *See supra* notes 116-18 and accompanying text.
169. *See supra* notes 143-44 and accompanying text.

not taken into account because public employers were not encompassed by the statute until 1985. In contrast, the private sector has had decades of notice regarding the prohibition on partial day pay-docking of salaried employees. The DOL's lax enforcement for a period of years does not justify the manner in which private sector employers, like Malcolm Pirnie, ignored the clear language of the statute.[170] While the DOL did adopt a non-enforcement policy with respect to public employers, they were always clear to distinguish the private sector employers who continued to be bound by the regulations.

In summary, the WLFA is not well suited to its alleged family-friendly purpose. Its proponents are trying to tie it to the recently passed FMLA, claiming that it furthers the FMLA's goals. However, the FMLA was enacted to protect the need of low wage workers to take leave to address family and medical emergencies because most employer pay policies did not provide such flexibility. The legislative history of the FMLA details the changes in the composition of the modern family and the demographics of the workforce which have created a need for this legislation. In contrast, the WLFA only applies to executive, professional and administrative employees, and employers, not employees, are the recipients of the benefits of the act. This bill has no relation to the goals of the FMLA. Although it is true that the WLFA increases flexibility, it does so for the employer, not the employee. If this bill is enacted, the employer will have the flexibility to reduce their employees' salaries for whatever purposes it chooses. The proposed changes to the rule that prevents penalizing the employee for disciplinary reasons by docking his pay illustrates the true intent of the act, to increase the rights of employers, not employees.

V. THE EMPLOYER RELIEF ACT

Although the WLFA is not the worker-friendly bill it claims to be, there may be some merit to allegations by the bill's proponents that the unpredictability in the law is unfairly subjecting private sector American businesses to potentially devastating liability. The actual purpose of the bill, to relieve employers of liability for past and present violations of the pay-docking rule, may be warranted by the muddled state of the law which has left employers and courts alike with little guidance as to the legitimacy of

170. Senator Kassebaum suggests that the WLFA should apply retroactively to relieve both private and public employers of liability for back pay because they were "unaware" of the DOL rules. *See supra* note 144 and accompanying text. There are two problems with the Senator's suggestion. First, there are several arguments supporting the proposition that private and public sector employers deserve different treatment. *See supra* notes 116-18 and accompanying text. It is likely that in addition to trying to ride on the coattails of the FMLA, the Senator is trying to ride on the coattails of the public employers' exemption from the no pay-docking rule. When the DOL passed § 541.5d which allowed public sector employers to dock their employees for partial day absences, it tried to relieve those employers of their potential liability for back pay as well. The DOL found that the no pay-docking rule was never well suited to public employers' pay policies. The DOL was forced to retract the proposal because it did not have the power to issue retroactive regulations. However, the DOL does clearly support relieving public employers from liability for back pay. *See* 57 Fed. Reg. 37,678 (1992). The Senator is trying to gain support for relieving the private sector businesses of liability by lumping them with the state and local governments who are deserving of relief. The second problem with the Senator's suggestion that employers should be relieved of liability because they were "unaware" of the DOL rules is that ignorance is no excuse for violation of the law. The DOL rules pertaining to the salary basis test have been in effect for decades. These are not new regulations being imposed on unsuspecting businesses. It is the employer's duty to know and fulfill the requirements of the salary basis test if they wish to benefit from the overtime exemption. For these reasons, the Senator's argument to relieve these employers because they were "unaware" of the rules is unpersuasive.

pay policies. Perhaps the claim by the proponents of the WLFA, that the fiscal integrity of many American businesses is in jeopardy because of the confusion in the law, is correct and the solution is to relieve those businesses of liability for their past improper deductions; however, the WLFA proponents should not mask such an attempt with claims that the bill is family-friendly.

This article agrees with the claims by proponents of the WLFA that the current state of the law pertaining to private sector employee leave, and in particular, the application of the salary basis test to exempt employees, has left employers without guidance as to the legitimacy of their leave provisions. The judiciary's recent attempts to interpret the salary basis test have resulted in great confusion in the law, and the circuits have taken contradictory positions on which pay practices defeat salaried status.[171] This article detailed three parts of the DOL regulations which have been subject to such conflicting interpretations. First, although the language of the DOL regulations regarding partial day pay-docking seems clear—that any policy which subjects an exempt employee's pay to improper deductions causes the loss of exempt status—some courts have held that such policies do not cause the forfeiture of the exemption, as long as no deductions actually take place.[172] These courts have interpreted the regulations in favor of the employer. Second, the regulations are silent regarding the employer's ability to dock an employee's vacation time for partial day absences. This has resulted in conflicting court interpretations of the term compensation.[173] Finally, according to the literal language of the DOL regulations, employers were entitled to avoid liability by correcting their mistakes under the "window of correction." This provision has been the subject of extensive recent litigation in which some courts have narrowed the window's availability to employers.[174] The unsettled nature of the law has left employers exposed to potentially enormous and generally unexpected liability for back overtime for employees who would have been exempt except for recent interpretations that certain long-standing pay policies may now fail the salary basis test and that the "window of correction" may no longer be available to them.

This article argues that either Congress or the Supreme Court[175] must address the issue of partial day pay-docking, in order to dispense with the non-uniformity in the circuits. The solution is not to eliminate the pay-docking rule as the WLFA suggests, but to clarify the existing law. It would be unfair to salaried employees to allow their employers to dock their pay in the manner suggested by the WLFA. Exempt employees receive no compensation for overtime in exchange for a guarantee of consistency in their compensation. It would be unfair to penalize them for absences from work without rewarding them for overtime. After all, employers can dock employees when they take a full day off of work, the pay-docking prohibition is very limited in scope, it only applies to partial-day absences.

---

171. *See* section III. C. entitled "Private Litigation over the Salary Basis Test" for a detailed analysis of examples of the contradicting views held by federal courts on which pay practices defeat exempt status.

172. *See supra* notes 62-72 and accompanying text.

173. *See supra* notes 73-81 and accompanying text.

174. *See supra* notes 82-98 and accompanying text.

175. However, the Supreme Court has consistently refused just such a request. *See, e.g.*, Abshire v. County of Kern, 908 F.2d 483, 484 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991); Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992); McDonnell v. City of Omaha, 999 F.2d 293 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1188 (1994).

Since the circuits have taken contradictory stances on which pay practices cause an employee to fail the salary basis test, a higher authority needs to address the issue to end the confusion. Clarification could appropriately come from either Congress or the Supreme Court. A bill or holding which proposes to clarify the law would need to specifically address: (1) whether an existing policy permitting improper deductions is sufficient to defeat salaried status or whether actual deductions are necessary; (2) whether deductions from compensatory time should be treated the same as pay deductions for purposes of the salary basis test; and, (3) when the "window of correction" can be employed to relieve employers of liability. A solution must also consider whether to grant public and private employers relief from the potentially enormous back pay liability they face.[176]

This article suggests that the most efficient solution would be for the Supreme Court to review a salary basis test case to clarify the law. This would bring a quicker end to the confusion and unpredictability created by lower court decisions.[177] Congress could still enact legislation if it disagreed with the Court's interpretations. Ultimately, congressional legislation may in fact be necessary to relieve public and private employers of past liability which could cripple, or in many cases completely bankrupt, American businesses and governments.[178]

The Court should hold that the language of the regulations clearly indicates that whenever an employee's salary is "subject to reduction" for improper purposes, the employee fails the salary basis test and the employer loses the FLSA exemption.[179] It would be inconsistent with the clear language of the regulations to allow employers to retain the benefit of the exemption while proffering a policy which would improperly penalize employees for taking partial day absences. The employer should not be allowed to deter employees from taking partial day absences with the threat that their pay will be docked, when in fact, the regulations prohibit such a deduction unless the employer is prepared to forfeit its exemption. The employer should not be able to threaten an improper deduction any more than it should be allowed to force employees to take a whole day off when they only need a few hours. Both of these practices are contrary to the notion of salaried status and in violation of the language and intent of the DOL regulations.

The statute's intent is to provide broad employment protection, and whether an employer receives the benefit of the FLSA exemption for his employees is completely within the employer's control. The employer establishes leave policies and if it wishes to benefit from the FLSA exemption, it must comply with its terms. Hence, if an employer has a policy which subjects an employee's pay to improper deductions, that employee is deemed hourly not salaried, regardless of whether any actual deductions

---

176. Studies indicate that private sector employers face as much as $39 billion in back pay liability. *See* Andrews, *supra* note 5, at E622; Petri, *supra* note 5, at E617; Pressler, *supra* note 5, at S10,383.

177. Getting a bill through Congress can take years as illustrated by the FMLA which was an eight year federal effort. The Supreme Court has the power to dispel confusion more quickly.

178. State and local governments remain exposed to retroactive liability for past violations of the no pay-docking rule because the DOL is only authorized to make prospective regulations. *See supra* note 124 and accompanying text.

179. The DOL's recent refusal to alter the regulations to require an actual deduction to trigger loss of the exemption is further proof that the DOL's intent was that whenever an employee's pay is "subject to" an improper deduction the exemption is lost. *See* 57 Fed. Reg. 37,666, 37,673 (1992).

were made. It is important to keep in mind that the employer is only restricted from docking the employee for partial day absences in order to retain the employee's exempt status, the employer is free to dock an employee's pay when he takes a whole day off.[180]

Holding that the mere possibility of improper deductions is sufficient to reject an assertion of exempt status by an employer may force a severe penalty on employers who previously believed that only an actual deduction would cause the loss of the exemption. If an employer is found to violate this provision, the employer's entire exempt workforce would be converted from salaried to hourly and they would be entitled to back overtime pay for the preceding two years.[181] Such liability could devastate unsuspecting employers who operate in jurisdictions where the courts have held that more than a mere possibility is necessary to lose the exemption, and who believed that they were complying with the FLSA.[182]

However, the Portal to Portal Act[183] provides an escape for employers who in good faith[184] complied with and relied upon "any written administrative regulation, order, ruling, approval, or interpretation . . . or any administrative practice or enforcement policy" of the DOL.[185] Such a showing constitutes a bar to any action or proceeding regardless of whether the decision is later modified or rescinded.[186] This section provides a complete defense from any liability or punishment if the employer meets its requirements.[187]

In the case of employers who, like some courts, in good faith relied upon the DOL Letter Rulings which stated that improper deductions would have to be regular and recurring before exempt status would be lost, courts could relieve them of their back pay liability under the Portal Act because they reasonably relied upon a ruling of the DOL.[188] Likewise, the Court could hold that good faith reliance upon court opin-

---

180. However, an employer cannot avoid the intent of the regulations by forcing the employee to take a full day off because the salaried employee has a right to manage his own time, absent an important business interest which might require him to be present at certain times. *See supra* notes 156-162 and accompanying text.

181. *See* 29 U.S.C. § 255(a) (1992).

182. However, employers in jurisdictions where the courts have interpreted the regulations to indicate that any policy which subjects an employee's pay to improper deductions would not fall within the category of "unsuspecting employers" because they have a duty to know the law. Likewise, employers in jurisdictions who have yet to rule on this particular issue are not "unsuspecting employers." These employers are not free to choose from among the conflicting holdings the one which benefits them most, and then rely on it. The contradictory rulings should be sufficient to put them on notice that their pay policies could be interpreted to be in violation of the FLSA, and until their jurisdiction rules on the issue they should formulate policies which comply with the strictest interpretations of the regulations.

183. Portal to Portal Act of 1947, ch. 52, 61 Stat. 84 (codified as amended at 29 U.S.C. § 251 (1982)).

184. "Good faith is a 'subjective requirement, shown if the employer had an honest intention to ascertain and follow the dictates of the Act.'" *See* Brock v. Claridge Hotel and Casino, 846 F.2d 180, 187 (3d Cir. 1988) (citations omitted), *cert. denied, sub nom.* Claridge Hotel and Casino v. McLaughlin, 488 U.S. 925 (1988).

185. 29 U.S.C. § 259 (1988).

186. *Id.*

187. *Id.*

188. For a discussion of the relevant Opinion Letters *see supra* notes 70-72 and accompanying text. In Yourman v. Dinkins, 826 F. Supp. 736, 745-746 (S.D.N.Y. 1993), the court held that the Portal Act defense based upon a Letter Ruling which required actual deductions for partial day absences before exempt status would be lost could bar liability for back pay, but was limited to partial day absences and did not apply to other types of salary basis test violations. However, the court, in

ions which interpreted these Letter Rulings to indicate that only actual deductions would cause a loss of exempt status could relieve employers of back pay liability.[189] However, this defense should not be available to employers in the jurisdictions which interpreted the DOL regulations to mean that the possibility of improper deduction causes the loss of exempt status.[190]

> The defense of good faith is intended to apply only where an employer innocently and to his detriment, followed the law as it was laid down to him by government agencies, without notice that such interpretations were claimed to be erroneous or invalid. It is not intended that this defense shall apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him.[191]

The regulations are not as clear whether requiring an employee to take leave for partial day absences would defeat salaried status. This article suggests that the Supreme Court should hold that accrued leave should not be treated the same as salary for purposes of the salary basis test. Employers grant their employees leave in order to allow them to take time off of work when they need to. It only seems practical to require them to actually use the leave when they do take the time off. The DOL seems to agree that employers may dock an employee's leave without forfeiting their exempt status.[192]

Finally, the Supreme Court should effectively grant relief to American businesses who face potentially devastating liability by interpreting the "window of correction" broadly. The Court should read the language disjunctively, as written, and read in a good faith requirement. This interpretation would be consistent with the language of the statute and the DOL regulations. The result of such an interpretation would be to prevent the egregious offenders from escaping liability, while at the same time offering some relief to employers who in good faith believed themselves to be complying with the law. For example, an employer who reimburses his employees on the eve of trial for improper deductions would not be entitled to benefit from the "window of correction." If the Court interpreted the "window of correction" in this manner, all cases brought for back liability could be dismissed as long as the employer had responded promptly when alerted to his non-compliance. This could save many American businesses from destruction. However, such a holding would only apply to private sector employers, it would not relieve state and local governments of the potentially devastating liability they face for violating a provision that should never have been applied to them in the first place.[193]

Yourman, held that the requirements of the Portal Act were not met because the Letter Ruling did not discuss deductions for disciplinary penalties, temporary military leave or court attendance. *Id.* In *Brock*, the court held that the ambiguity of the regulation and the government's inconsistency on the legitimacy of a certain pay practice supported the defendant's position that he had a reasonable basis for believing that his pay practice complied with the FLSA provisions. *See* 846 F.2d at 187.

189. The Fifth, Eighth, and Eleventh Circuits, as well as several district courts have reached such a conclusion. *See supra* notes 66-72 and accompanying text.

190. *See supra* note 63 and accompanying text.

191. *Yourman*, 826 F. Supp. at 747.

192. *See supra* notes 79-81 and accompanying text. If however, the Court should decide that docking leave for partial-day absences does fail the salary basis test, employers could again find refuge in the Portal Act by proving a good faith reliance upon the DOL Letter Rulings and court interpretations of these Letter Rulings which have reached the opposite conclusion. *See id.*

193. Even though public employers are currently exempt from the no partial-day pay-docking rule,

It may be better for Congress to consider the liability faced by private and public employers for past violations of the FLSA. The legislature, not the judiciary, would be the proper place to consider the public's interest in relieving private and public employers of the liability which should attach for past improper deductions. At the present time, even public employers (state and local governments) who no longer fall within the scope of the FLSA's partial day pay-docking prohibition are still exposed to potentially devastating liability for back overtime.[194] Congress should enact legislation that would relieve public sector employers from liability for past overtime. The salary basis test was not designed with public employers in mind, and compliance, for these employers, was impossible in light of the duty they owed to their citizens. In addition, the back pay owed could cripple many state and local governments, leaving them unable to function properly. Congress is well equipped to balance these considerations against the need to punish non-compliance with the DOL regulations.

Likewise, the legislature is better equipped than the judiciary to balance the need to punish businesses for their non-compliance with the FLSA during an era of non-enforcement[195] with the need not to cripple American business. If penalizing American businesses that made improper deductions in the past would result in their bankruptcy, would their employees be better off? It is doubtful that many of these employees would prefer the back overtime to continued employment. It is the legislature's province to make such a public policy decision.

An alternative to blanket relief from liability for back overtime would be for Congress to amend the FLSA to decrease the penalty businesses face for non-compliance and make this amendment retroactive. For example, Congress could change the FLSA to allow recovery for one year or six months of back overtime when improper deductions are made, instead of two years as the statute currently provides. However, Congress would need to balance the need to relieve employers from devastating liability with the need to deter future non-compliance. If the penalty is too light, businesses will not be deterred from making improper deductions in the future.

This article recognizes that contradictory court opinions alone might not be a sufficient rationale to support relieving employers of their potential liability for violating the FLSA. However, when determining whether to grant employers relief from the potentially enormous back pay liability that they face, Congress should consider whether the penalty for these violations is commensurate with the crimes. Awarding back pay to an employee who never actually had any improper reduction in his salary results in a windfall to the employee. Even for those employees whose pay was actually reduced in accordance with an impermissible policy, the salary reduction is tiny compared to the windfall of back pay. However, the legislature must determine whether the penalty is meant to be compensatory or punitive in nature, and whether the severity of the penalty is necessary for deterrent purposes.

This article suggests that while Congress should relieve the public employers from liability, it should hold their private sector counterparts accountable for their

---

the potential for retrospective liability for past violations still threatens state and local governments. *See supra* note 124 and accompanying text.

194. The DOL could not make § 541.5d retroactive without express authority from Congress.

195. Neither ignorance, nor the belief that penalties for non-compliance would not be enforced justify violating the law, but Congress may find that the effect of enforcing the penalties that the law provides for violators is too great.

blatant violations of a law that has regulated private sector pay policies for decades.[196] After all, the salary basis test was designed to be consistent with the pay practices in the private sector. It is likely that Malcolm Pirnie, like other companies who violated the FLSA provisions, either thought they could get away with violating the law because the DOL was not enforcing it rigorously, or they were truly unaware that the law existed. In either event, Congress should not reward businesses for such behavior. Certainly, those businesses who knowingly made illegal deductions from the salaries of their employees deserve to be punished. Furthermore, Congress should hold businesses to their duty to know the law. Ignorance of the law is no excuse for violating it. This law has been in effect and applied to private sector employers for decades. If employers want to benefit from the FLSA exemption from overtime, they must comply with its requirements. It is the employer's obligation to know the law and abide by it. Congress should not reward a business' attempt to shield itself from liability by claiming ignorance of the law. In either event, businesses should be held liable for their violations of the law.

Finally, this article suggests that the DOL regulations have become outdated and are unable to fulfill their intended purpose as currently written. The DOL needs to update their regulations. For instance, the salary floor test for professional, administrative and executive employees is so low that any minimum wage employee meets its requirements.[197] The salary floor test has not been changed since 1975, when it was issued, yet minimum wage has more than doubled since then.[198] Clearly those salaries that denoted executive, professional and administrative status in 1975, do not continue to do so in 1994. This article suggests that in order to ensure that the salary floor requirement keeps pace with the times, it should be set at three times minimum wage.[199] This way whenever minimum wage increases, the salary floor test will increase to continue to function effectively as a threshold for professional, executive or administrative status. The DOL needs to update its regulations in order to continue to promote Congress' intent that the FLSA have broad application and, therefore its exemptions should be narrowly construed.[200] The Labor Department currently estimates that 22 million of the 115 million people in the civilian workforce are salaried, that is almost twenty percent of the workforce.[201]

VI. CONCLUSION

The current non-uniform state of the law is unfair to employers. However, the proposed WLFA bill is not the answer. The proposed bill attacks the very foundation of what it means to be a salaried employee. It would radically change the salary basis test and result in a windfall for employers, who would be allowed to dock employees for partial day absences, without being required to compensate them for overtime. If enacted, the WLFA will undermine the goal of the FLSA to provide broad employment protection, by making the exemption from overtime very easy to obtain. This

196. However, the article fully supports relieving employers who in good faith complied with and relied upon DOL Letter Rulings and court interpretations for back pay liability under the Portal Act.

197. *See supra* note 38 and accompanying text.

198. Minimum wage was $2.10 in 1975. *See* Fair Labor Standards Amendments of 1974, Pub. L. 93-259; 88 Stat. 55 (1974). Minimum wage is currently $4.25.

199. *See* Zalusky, *supra* note 33.

200. *See supra* note 41 and accompanying text.

201. *See* Swoboda, *supra* note 152.

would greatly increase the number of employees who qualify for the exemption and, therefore do not receive the overtime protections of the FLSA. The exemption would no longer be narrowly construed as Congress intended.[202] Furthermore, the bill does not assist modern families as it claims. It is an employer relief bill which has been proposed to respond to the potentially devastating liability American businesses face because of the unpredictability in a law with a very severe penalty for violations. The actual purpose of the bill is to diminish the potential liability companies face in this era of DOL enforcement. However, such an end may be desirable for public policy reasons.

This article argues that the Supreme Court would be an ideal place to clarify the existing law and end the confusion and unpredictability in the circuits. In addition, Congress needs to address the issue of whether public and private businesses should be excused from past non-compliance because this requires a value judgment most appropriately left to the legislature in our democratic system.

202. *See supra* note 41 and accompanying text.