

Public Commentary and the GAO Report

Suggested changes to the part 541 regulations have been the subject of extensive public commentary for years, including a report issued by the General Accounting Office (GAO) in September 1999.¹² In this report, GAO chronicled the background and history of the exemptions, estimated the number of workers who might be included within the scope of the exemptions, identified the major concerns of employers and employees regarding the exemptions, and suggested possible solutions to the issues of concern raised by the affected interests. In general, the employers contacted by GAO were concerned that the regulatory tests are too complicated, confusing, and outdated for the modern work place, and create potential liability for violations when errors in classification occur.¹³

Employers were particularly concerned about potential liability for violations of the complex "salary basis" test and the exacting requirements of the so-called "no-docking" rule, which has been the focus of lawsuits against employers in recent years brought collectively by groups of highly paid managerial and professional employees. This test in effect limits employers' ability to "dock" exempt employees' pay for partial-day personal absences and disciplinary violations, which limits employers' ability to hold exempt employees accountable for their time and actions. In addition, employers believed that limiting the administrative and professional exemptions to "nonproduction" employees did not account for the effects of modern technology on employment today. They also noted the traditional limits of the exemptions have blurred in the modern work place, citing highly skilled and highly paid technical workers without college degrees who do not qualify as exempt professionals but who perform essentially the same job as exempt engineers who have the required academic degrees. Manufacturing employers pointed to new technology used in factories, which requires advanced technical skills but far less traditional "manual" labor. They also told GAO that, while these workers may

have to follow precise written guidelines to perform their work, prescribed procedures were important to modern quality control. Employers also believed adherence to precise written guidelines—one major distinction between exempt and nonexempt workers under the existing regulations—is necessary in a modern, efficient work place. Employers also complained that the discretion and independent judgment requirements for administrative and professional employees are confusing and applied inconsistently by Wage and Hour Division investigators in classifying similarly-situated employees, and are particularly difficult to apply. Thus, employers were unsure how to classify administrative personnel. GAO's discussions with employers and Wage and Hour Division investigators, and its review of compliance cases, confirmed that this part of the duties test involved particularly difficult and subjective determinations, for both the employers and the investigators, and that it was a source of contention in Department audits.

Employee representatives contacted by GAO, in contrast, were most concerned that the use of the exemptions be limited to preserve existing overtime work hour limits and the 40-hour standard work week for as many employees as possible. They believed the tests have become weakened as applied today by judicial rulings and do not adequately restrict employers' use of the exemptions. When combined with the low salary test levels, the employee representatives felt that few protections remain, particularly for low-income supervisory employees. They believed that inflation has severely eroded the salary-level limitations originally envisioned by the regulations. Because of inflation, according to the employee representatives, the current salary test levels are now near the minimum wage level, rendering application of the regulations to the current work force virtually meaningless.

GAO's report noted that the conflicting interests affected by these rules have made consensus difficult and that, since the FLSA was enacted, the interests of employers to expand the white collar exemptions have competed with those of employees to limit use of the exemptions. To resolve the issues presented, GAO suggested that employers' desires for clear and unambiguous regulatory standards must be balanced with employees' desires for fair and equitable treatment in the work place. The GAO recommended that the Secretary of Labor comprehensively

review the regulations and restructure the exemptions to better accommodate today's workplace and to anticipate future work place trends.

The House Subcommittee on Workforce Protections of the Committee on Education and the Workforce held a hearing in May 2000 to receive testimony from GAO and other interested parties on GAO's September 1999 report. Testimony provided by the GAO, representatives of business and labor organizations, and the Department of Labor confirmed GAO's assessment of the issues and the difficulty in moving forward with constructive changes due to the differing views of the many affected and interested parties, and the potential impact of possible changes. Representatives of worker interests opposed making changes that would remove overtime protections for workers now covered, while business interests and employer groups advocated modernizing the regulations to exempt more classifications of workers from overtime pay.

III. Summary of Current Regulatory Proposal

Structure and Organization

Part 541 presently contains two subparts. Subpart A provides the regulatory tests that define each category of the exemption (executive, administrative, professional, and outside sales). Subpart B provides interpretations of the terms used in the exemptions. Subpart B was first issued as an explanatory bulletin effective in January 1950 to provide guidance to the public on how the Wage and Hour Division interpreted and applied the exemption criteria when enforcing the FLSA. The Department proposes to eliminate the current distinction between the "regulations" in subpart A and the "interpretations" in subpart B. This will consolidate and streamline the regulatory text, reduce redundancies, and make the regulations more understandable and easier to decipher when applying them to particular factual situations, providing much-requested simplification. In addition, eliminating the distinction between the subpart A "regulations" and the subpart B "interpretations" will eliminate confusion regarding the appropriate level of deference to be given to the provisions in each subpart.

The proposed rule reorganizes the subparts according to each category of exemption, and consolidates common elements (such as a new subpart containing common definitions), in order to eliminate unnecessary duplication and repetition of regulatory

and for budget-driven furloughs (see 29 CFR 541.5d).

¹² Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place (GAO/HEHS-99-164, September 30, 1999).

¹³ Under the FLSA, employees may sue their employer (individually or collectively) for up to two, or in some cases three, years of back wages, plus an equal amount in liquidated damages and attorney fees and court costs, for violations of the FLSA's minimum wage and overtime requirements.