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### Has the FLSA Failed to ADapt to the New Information and Service Economy? The Case of Insurance Adjusters

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# Has the FLSA Failed to Adapt to the New Information and Service Economy?

## The Case of Insurance Adjusters

### I. Introduction

The Fair Labor Standards Act (FLSA) was passed in 1938 following the New Deal legislation amidst a climate of support for labor and an understanding that a way to keep unemployment down was to distribute work by minimizing the hours a person could work. The law sought to eliminate the exploitation of workers forced to work extremely long hours for low pay.<sup>1</sup> The shortened workweek was intended to result in, “less employee fatigue, fewer accidents, higher productivity and efficiency, and more employee time for education and family duties.”<sup>2</sup> The FLSA set up minimum wage requirements, maximum hour levels and prohibited child labor.<sup>3</sup> Congress created exemptions for employees employed in a professional, administrative, and executive capacity because they were seen as having sufficient bargaining power and salary to not need protection.<sup>4</sup>

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<sup>1</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,122, 22124 (April 23, 2004) (to be codified at 29 C.F.R. § 541).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> The legislative history of the FLSA demonstrates that, “...the exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the non-exempt workers entitled to overtime pay.” Defining and Delimiting the Exemptions for Executive, Administrative, professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,122, 22124 (April 23, 2004) (to be codified at 29 C.F.R. 541).

The FLSA requires that non-exempt employees be paid at least the minimum wage for the time they work and time and a half for hours worked beyond the 40 weekly maximum hours, defined as premium pay.<sup>5</sup> Exempt employees are paid by salary and employers do not pay them overtime if they work additional hours beyond their shift. The act delegated to the Secretary of Labor the power to “define and delimit” the scope of the exemptions to ensure their applicability over time.<sup>6</sup> In 1938, the distinction between unskilled workers in need of protection from the FLSA was clear. Unskilled, low paid workers dominated the labor market in textile, automobile and steel factories.<sup>7</sup> Today, the distinction between exempt and non-exempt jobs is not as clear-cut in the current information economy.

An information economy is one in which information-related work exceeds work in other sectors.<sup>8</sup> Service sector jobs are jobs in which people perform services, and production jobs are typically manufacturing jobs involved in the production of goods.<sup>9</sup> In 1993 just over half of the U.S. Gross Domestic Product (GDP), came from the service sector, indicating the U.S. has transformed into an information/service economy.<sup>10</sup> The

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<sup>5</sup> 29 U.S.C. § 207(a)(1).

<sup>6</sup> *Id.*

<sup>7</sup> Thomas A. Bailey, David M. Kennedy & Lizabeth Cohen, *The American Pageant* 795-814 (11<sup>th</sup> ed. 1998).

<sup>8</sup> “According to a widely cited estimate of Marc Uri Porat, in 1967 (almost three decades ago), 25.1 per cent of the U.S. Gross National Product originated with the production, processing, and distribution of information goods and services sold on the market. In addition, the purely informational requirements of planning, coordinating, and managing the rest of the economy consumed another 21.1 per cent. In other words, workers whose tasks were predominately informational accounted for almost one-half of the total U.S. labor income at the time. Since then, the information economy certainly has grown by leaps and bounds.” Michael Perelman, *Position Paper: Software Patents and the Information Economy*, 2 Mich. Telecomm. Tech. L. Rev. 93, 93 (1996).

<sup>9</sup> Jacob DeRooy, *Economic Literacy What Everyone Needs to Know About Money and Markets* 8-9 (Crown Trade Paperbacks 1995).

<sup>10</sup> *Id.*

service sector continues to exceed the manufacturing sector.<sup>11</sup> The Department of Labor (DOL) attempted to address the shifting economy and to clarify the exemptions by promulgating new regulations in 2004.<sup>12</sup> Nevertheless, the issue of whether employees are classified as exempt or non-exempt continues to be litigated.<sup>13</sup> Due to the increasing number of traditional “white collar” jobs and the decreasing number of “blue collar” jobs, there has been confusion over how to determine which jobs qualify to be exempted from the FLSA overtime pay requirements.<sup>14</sup> The 2004 changes to the FLSA have failed to adapt to this new economy in which information-related work exceeds manufacturing, by failing to adequately protect “information production workers.”

This paper will focus primarily on insurance claim adjusters as an illustration of how the FLSA has failed to adapt to the information economy. Claims adjusters determine the amount of insurance compensation people are entitled to receive when they make a claim.<sup>15</sup> The 2004 changes to the FLSA have created a new “Example” section that results in insurance adjusters being exempt in almost all cases.<sup>16</sup> Part I will offer background on claims adjusters, the goals of the FLSA and the economy that existed when it was enacted as compared to the current information economy. In this section the

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<sup>11</sup> *Id.*

<sup>12</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,122, 22124 (April 23, 2004) (to be codified at 29 C.F.R. 541).

<sup>13</sup> In January of 2007, IBM was forced to pay 65 million in a settlement to technical and support workers asserting they had been misclassified as exempt. Molly Selvin, *Court Backs Employees who Missed Breaks*, L.A. Times, April 17, 2007 at 1. Smith Barney paid \$98 million. Evelyn Juan, *Smith Barney Mulls Changes to Brokers' Compensation*, Wall St. J., Nov. 22, 2006. UBS forced to pay \$89 million for misclassifying trainees and financial advisors as exempt; Morgan Stanley paid \$42.4 million. Philip M. Berkowitz, *Class Action Rulings Offer Good News for Employers*, New York Law Journal, Jan. 11, 2007.

“According to the Administrative Office of the U.S. Courts, there were more than 4,000 FLSA-based civil suits filed last year. That's a nearly 50 percent increase over the number of wage-and-hour cases filed in 2003 -- the year before the DOL revised the law.” John Goff, *Pain-and-a-Half*, CFO Magazine, Oct., 2006.

<sup>14</sup> In a search on Westlaw of Federal cases under FLSA and overtime 3,560 documents were found.

<sup>15</sup> Comprehensive Career Profile List: Office Careers, <http://careers.stateuniversity.com/pages/177/Claims-Adjuster.html> (last visited May 10, 2007).

<sup>16</sup> 29 C.F.R. § 541.203 (2007).

pre-2004 FLSA regulations will be described along with the 2004 changes to the regulations. Part II will describe how the 2004 changes created a truncated analysis that puts claims adjusters into the exempt category, without a thorough analysis of their duties. Part III will demonstrate that claims adjusters are production workers and should be classified as non-exempt. Part IV will show that the placement of claims adjusters into the exempt category runs counter to the congressional intent of the FLSA.

## II. Background

This section will first describe the goals of the FLSA and the nature of the economy that existed when it was enacted. Then, the FLSA regulations, both prior to and after the 2004 changes, will be discussed in the context of the current information economy.

### A. The Economy that Existed When the FLSA Was Enacted

When Franklin Delano Roosevelt (FDR) was inaugurated on March 4, 1933, the United States was desperate for change.<sup>17</sup> The Depression hit Americans hard. One out of every four Americans was jobless.<sup>18</sup> In an effort to provide immediate relief, FDR summoned the Congress for a special session to create new laws to cope with the emergency.<sup>19</sup> As part of this new legislation multiple agencies were created including the Civilian Conservation Corps (CCC), the Work Progress Administration (WPA), and the

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<sup>17</sup> Thomas A. Bailey, David M. Kennedy & Lizabeth Cohen, *The American Pageant* 798 (11<sup>th</sup> ed. 1998).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

National Recovery Administration (NRA).<sup>20</sup> All aimed to increase employment through public works.<sup>21</sup> These expenditures, known as the New Deal, brought a reduction in unemployment and made workers feel confident and assertive enough to demand protection.<sup>22</sup> The National Labor Relations Act was passed in 1935, establishing a Labor Relations Board and confirming the right of workers to unionize.<sup>23</sup> Unskilled workers dominated the labor market in the automobile, steel and mining industries.<sup>24</sup> With the emerging power of unions, unskilled workers demanded better wages and protections.<sup>25</sup> The Committee for Industrial Organization (CIO) became a powerful union, which successfully organized a sit-down strike at the General Motors plant in Flint, Michigan in 1937.<sup>26</sup> In 1938, Congress reacted to the increasing public support for labor and passed the Fair Labor Standards Act (FLSA).<sup>27</sup> The original requirements were a 40-hour week and a minimum wage of 25 cents per hour.<sup>28</sup> Workers working over 40 hours in a week must get “premium overtime pay,” defined as wages equal to time and a half for overtime.<sup>29</sup> The FLSA also promulgated rules for determining whether an employee is qualified to be exempt from the overtime pay requirements because the employee worked in an executive, professional or administrative capacity.

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<sup>20</sup> *Id.* at 801-05.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 819.

<sup>23</sup> *Id.* at 812.

<sup>24</sup> *Id.* at 814.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Jacob DeRooy, *Economic Literacy What Everyone Needs to Know About Money and Markets* 78 (Crown Trade Paperbacks 1995).

<sup>29</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,122, 22124 (April 23, 2004) (to be codified at 29 C.F.R. 541).

## B. FLSA Regulations Pre-2004

The Administrative Exemption is the focus of this paper and will be described in this section. There are two different ways to be an exempt employee according to the pre-2004 regulations, the short test and the long test. In order to fulfill either test payment must be made on a salary basis, defined as when, “the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.”<sup>30</sup> For the long test an employer was required to show that the employee is paid on a salary basis \$155 per week, performs the required job duties and exercises discretion and independent judgment.

For the long test, an administratively exempt employee is one:

- (a) whose primary duty consists of either:
  - (1) the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers or
  - (2) the performance of functions in the administration of a school system, or educational establishment . . . and
- (b) who customarily and regularly exercises discretion and independent judgment and
- (c) (1) who regularly and directly assists a proprietor, or . . . bona fide executive or administrative employee or
  - (2) who performs work “specialized or technical lines requiring special training, expertise, or knowledge or
  - (3) who executes under only general supervision special assignments and tasks and
- (d) who does not devote more than twenty percent of his time, or forty percent in the case of retail or service establishments not directly related to the duties in paragraphs (a) through (c); and

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<sup>30</sup> 29 C.F.R. § 541.602 (2007).

(e) who is compensated on a salary basis at a rate of not less than \$155 per week exclusive of board, lodging or other facilities, shall be deemed to meet all the requirements of this section.<sup>31</sup>

If an employee is compensated on a salary basis at least \$250 per week, the short test could be used.<sup>32</sup> This test required that the employer show that the employee exercises discretion and independent judgment while performing, “office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers or the performance of functions in the administration of a school system, or educational establishment.”<sup>33</sup> 29 C.F.R. § 205(a) required that the work must be of “substantial importance” to the “management or operation of the business of his employer.”<sup>34</sup>

### C. New Information Economy

The Department of Labor’s (DOL) obligation to “define and delimit” the exemptions at various intervals is codified by statute.<sup>35</sup> The evolution of the country’s economy has drastically changed the workplace and the nature of work, making many of the pre-2004 regulations obsolete. In 2005, the United States Department of Labor released statistics on the number of jobs in various sectors in 2004 and then projected numbers for 2014.<sup>36</sup> Jobs in business and financial operations were projected to increase 19.1%, in legal occupations by 15.9%, and in professional and related occupations by

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<sup>31</sup> 29 C.F.R. § 541.2 (1995) (citing Mark J. Ricciardi & Lisa G. Sherman, *Exempt or Not Exempt Under the Administrative Exemption of the FLSA...That is the Question*, 11 Lab. Law. 209, 213-14 (1995)).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Bothell v. Phase Metrics*, 299 F.3d 1120, 1125-26 (9<sup>th</sup> Cir. 2002).

<sup>35</sup> 29 U.S.C. § 213(a)(1).

<sup>36</sup> United States Department of Labor, Bureau of Labor and Statistics, *Employment by Major Occupational Group 2004 and projected 2014, 2005* <http://www.bls.gov/news.release/ecopro.t02.htm>.

21.2%.<sup>37</sup> Out of all the 24 sectors included in the study, traditionally defined production occupations and farming/fishing/forestry were the only ones that were expected to decrease over the ten-year period.<sup>38</sup> Production occupations, which are typically jobs involved in the manufacturing of goods, were expected to decrease by .7% and farming/fishing/forestry jobs were expected to decrease by 1.3%.<sup>39</sup> In an expanding economy, the significance of decreasing jobs in the production industry is noteworthy.

The economy today is a stark contrast from the one in which the FLSA was passed. Many automobile and steel factory jobs have moved elsewhere as evidenced by the decreasing percentage of production jobs in the U.S.

Employees employed in production jobs are typically paid by the hour and are classified as non-exempt. However, as production jobs continue to decrease, the number of non-exempt jobs will continue to decrease unless a new working definition is created. The DOL correctly realized that the obligation to “define and delimit” the exemptions had arisen, however the 2004 changes to the FLSA regulations appear to result in more workers being classified as exempt. The FLSA was passed at a time when Congress realized that there were some workers who needed protection from abuse. However, now these types of factory jobs are decreasing.<sup>40</sup> Workers that would have worked on the factory floor in an earlier era are the information production workers of today who need protection. The FLSA’s failure to adapt to the information economy has left many information economy workers without protection from exploitation.

### C. 2004 Changes

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> United States Department of Labor, Bureau of Labor and Statistics, *Employment by Major Occupational Group 2004 and projected 2014, 2005* <http://www.bls.gov/news.release/ecopro.t02.htm>.

The DOL's changes to the regulations were intended to simplify and update the regulations so that they would be more applicable to the new information economy.<sup>41</sup> The effect of some of these changes appears to run contrary to the original congressional intent underlying the FLSA in that they streamline many workers (claims adjusters in particular) into the exempt category. If the changes had truly reflected the goals of the FLSA in the changing economy, the opposite would have occurred.

Under current law workers are exempt from overtime if they pass each of three tests: (1) the salary level test (the employee must earn \$455 per week<sup>42</sup>) (2) the salary basis test (they must be paid by a salary) and (3) the job duties test. The job duties test differs according to the various exemptions: the executive exemption<sup>43</sup>, the administrative exemption, and the professional exemption.<sup>44</sup> The focus of this paper is the administrative exemption.

After an employee is found to earn \$455 per week, the analysis shifts to whether the compensation is indeed based on a salary. Payment on a salary basis is defined as

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<sup>41</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,122 (April 23, 2004) (to be codified at 29 C.F.R. 541).

<sup>42</sup> 29 C.F.R. § 541.600 (2007).

<sup>43</sup> In order to qualify for the Executive Exemption the following tests must be met:

- (1) the employee must be compensated on a salary basis;
- (2) the employee's primary duty must be management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision of the enterprise;
- (3) the employee must customarily and regularly direct the work of two or more other employees; and
- (4) the employee must have the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight. 29 C.F.R. § 541.600 (2007).

<sup>44</sup> In order to qualify for the learned professional exemption, the employee must be paid on a salary of at least \$455 per week, the employee's primary duty must be, "the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction," and the following three requirements must be met:

- (1) the employee must perform work requiring advanced knowledge;
- (2) the advanced knowledge must be in a field of science or learning; and
- (3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. 29 C.F.R. § 541.301 (2007). Jackson Lewis *Department of Labor Issues Final FLSA Overtime "White Collar" Exemption Regulations, 2004* available at <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=568>.

when, “the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.”<sup>45</sup> However, certain deductions in the salary are permissible if the employee takes more than one and half days for sick leave or personal reasons or for disciplinary or safety infractions.<sup>46</sup>

To qualify for the administrative exemption, the employee must meet the requirements of being paid on a salary at a rate not less than \$455 per week. In addition, the employee’s primary duty must be: “...the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.”<sup>47</sup>

In 2004 the salary level was increased to \$455 per week.<sup>48</sup> The last time the minimum salary level was updated was in 1975, when it was raised to \$155 per week.<sup>49</sup> Before the 2004 changes, the job duties requirements had not been changed since 1949.<sup>50</sup> In the DOL’s preamble to the 2004 rules, various reasons were cited as justifications for modernization of the rules: the changing workplace had caused many of the exemptions to blur together, case law no longer seemed to reflect the regulations and the protection for workers was eroding as many more employees could be classified as exempt.<sup>51</sup>

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<sup>45</sup> 29 C.F.R. § 541.602 (2007).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at § 541.200.

<sup>48</sup> *Id.* at § 541.600.

<sup>49</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,122 (April 23, 2004) (to be codified at 29 C.F.R. 541).

<sup>50</sup> *Id.*

<sup>51</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,122 (April 23, 2004) (to be codified at 29 C.F.R. 541).

The 2004 regulations, for the first time, created “Administrative exemption examples” which, for a few limited jobs, indicate the particular job is exempt provided the duties include certain activities.<sup>52</sup> One such job is insurance claims adjuster.<sup>53</sup> The administrative exemption example for insurance claims adjusters states:

(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.<sup>54</sup>

The insurance claims adjuster position was one of several for which the DOL created an “administrative exemption example.”<sup>55</sup> Others included were financial services employee, human resources manager and purchasing agents.<sup>56</sup> Each met exemption status within a prescribed set of duties.

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<sup>52</sup> 29 C.F.R. § 541.203(a) (2007).

<sup>53</sup> 29 C.F.R. § 541.203(a) (2007).

<sup>54</sup> *Id.*

<sup>55</sup> In 29 C.F.R. Section 541.203 employees in the financial services industry would also be exempt if they, “...analyzed information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advised the customer regarding the advantages and disadvantages of different financial products...”. The regulations further clarify that, “...an employee whose primary duty is selling financial products does not qualify for the administrative exemption.” 29 C.F.R. § 541.203(b) (2007).

Human Resources managers were also generally classified as exempt if their duties were to, “...formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization...”. 29 C.F.R. § 541.203(e) (2007).

Purchasing Agents were given as an illustrative example of a profession that would generally meet the requirements for the administrative exemption when they had the, “...authority to bind the company on significant purchases.” 29 C.F.R. § 541.203(e) (2007). The provision qualified Purchasing Agents as meeting the requirements for the administrative exemption even if they needed to, “consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.” 29 C.F.R. § 541.203(f) (2007).

<sup>56</sup> *Id.*

While the “administrative exemption examples” in the new regulations pigeonhole many jobs into the exempt category without going through the traditional duties analysis, the focus of this paper will be on claims adjusters. Claims adjuster duties vary greatly but typically their duties include confirming coverage, inspecting damaged property, reporting theft, and making cost estimates.<sup>57</sup> Some insurance companies require a claims adjuster to have a Bachelor’s degree but other types like Auto Physical Damage Adjusters are entry-level positions requiring no special education and limited experience.<sup>58</sup> Claims adjusters, sometimes referred to as a “Gray Collar Job”, work long hours with minimal perks.<sup>59</sup> In an October 2005 issue of Claims Adjuster Magazine entitled *Adjusters Sing the Blues*, claims adjusters were cited as complaining about low salaries, long hours and diminishing in-kind perks and benefits.<sup>60</sup> A Business Week article in March 2000 described a Silicon Valley claims adjuster who earned between

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<sup>57</sup> Investigates, confirms coverage, determines liability, establishes damages, reports status and negotiates the settlement of assigned cases (has authority to make payment of assigned claims within prescribed limits). Adjusts all types of claims. Inspects damaged property and vehicles, and determines claims related damage. Estimates the cost of repair or replacement of damaged or stolen property and vehicles. Determines and reports on subrogation potential. Initiates the sale of salvage vehicles, personal property, and miscellaneous salvage items. Reports theft, fraud, and arson losses as required to state and industry agencies. Performs most duties on an individual basis, and work has a direct bearing on Management results. Represents the Company from a public relations standpoint and must conduct oneself as a member of Management at all times. Personal contacts are a major part of activity and include policyholders, claimants, agents, witnesses, repair facilities, contractors, police and fire departments, state and county fraud and arson personnel, special investigators, attorneys, expert witnesses, members of the medical profession and all other persons incident to the investigation and processing of claims. Performs other duties as assigned.” Claims Adjuster duties with one year experience. Farmers Ins. Group Inc. [http://careers.peopleclick.com/careerscp/client\\_farmersgroup/external/jobDetails.do?functionName=getJobDetail&jobPostId=5555&localeCode=en-us](http://careers.peopleclick.com/careerscp/client_farmersgroup/external/jobDetails.do?functionName=getJobDetail&jobPostId=5555&localeCode=en-us) (Last visited May 10, 2007).

<sup>58</sup> “Training and entry requirements vary widely for claims adjusters. Although many in these occupations do not have a college degree, most companies prefer to hire college graduates.” <http://jobs.state.va.us/careerguides/InsuranceClaimsAdjuster.htm> (Last visited May 10, 2007).

<sup>59</sup> “As companies trim costs, however, benefits are being reduced across the board. Traditionally, company claim staff enjoyed much better benefit packages than those working for independent firms. For the first time, however, fewer company employees are receiving insurance. In the case of life and medical, the percentages have dropped below 1998’s numbers.” *Annual Salary Survey: Adjusters Sing the Blues*, Claims Magazine, Oct. 2005, at 36.

<sup>60</sup> *Id.*

15,000 and \$20,000 per year and was forced to go on welfare to pay hospital bills because her job did not provide medical insurance.<sup>61</sup>

### III. Effect of 2004 Regulations on Claims Adjusters

This section will first describe how the 2004 Regulations purported to codify pre-2004 law, but in reality created a truncated analysis that in almost all cases puts all claims adjusters into the exempt category. Pre-2004 cases in which the court applied the short test and focused primarily on the threshold question of whether the employee exercises discretion and independent judgment will be analyzed. Then the post-2004 cases will be described, as will the effects of the changes.

#### A. Truncated Analysis

One main effect of the 2004 changes has been to create a truncated analysis that in almost every case, puts claims adjusters into the exempt category. In adopting the administrative exemption examples for certain positions in 29 C.F.R. Section 541.203 the DOL would appear to be abandoning, at least for those positions, the more sophisticated analysis for the administrative exemption contained in 29 C.F.R. Section 541.200, 541.201 and 541.202. Nevertheless, the DOL contends that Section 541.203 does not represent a change in the law and is consistent with the old regulations.<sup>62</sup> Comments on

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<sup>61</sup> “She earned \$ 15,000 to \$ 20,000 a year as an insurance company claims adjuster. But the job had no medical benefits, so Lovett, a single mother, went on welfare to pay the hospital bills when her son Malcolm was born in 1995. Lovett soon returned to work, but she could only find temp jobs that paid on commission to do claims adjusting. She ended up back on welfare, and last September, she and Malcolm moved into EHC's San Jose shelter.” Aaron Bernstein, *Down and Out in Silicon Valley*, Business Week, March 27, 2000, at 76.

<sup>62</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,144 (April 23, 2004) (to be codified at 29 C.F.R. 541).

this section of the regulation were mentioned in the Federal Register.<sup>63</sup> The National Employment Lawyers Association stated that, the inclusion of examples in the regulations, “...flies in the face of the basic rule that job titles are not dispositive in determining whether employees are exempt. Many Insurance claims adjusters perform routine production work.”<sup>64</sup> 29 C.F.R. Section 541.203, seems to create a new simplified analytical process for insurance adjusters that puts all insurance adjusters, even those working on very small claims, under close supervision, into the exempt category.

#### B. Pre-2004 Case of *Farmers Insurance and Exchange*

In *In Re Farmers Ins. Exchange*, there were three different levels of claims adjusters contesting their classification as exempt: claims adjuster, senior claims adjuster and special claims adjuster.<sup>65</sup> The claims adjusters all performed similar duties including using computer software to assist them in assessing damages.<sup>66</sup> The main difference between the three levels of claims adjusters was their authority to settle claims, which was dependent on their level of experience.<sup>67</sup> The claims adjusters sued under the FLSA for the overtime they felt they were owed when they worked in excess of 40 hours per week and were not paid overtime.<sup>68</sup> The District Court found that the insurance company’s claims adjusters who, for the most part, handled claims in excess of \$3000 fit within the administrative exemption while lower level adjusters who regularly handled claims worth less than \$3000 did not.<sup>69</sup> The court analyzed the claims adjusters’ duties

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<sup>63</sup> *Id.*

<sup>64</sup> The test “directly related to management policies or general business operations” is met by, among other persons, “claim agents and adjusters.” 29 C.F.R. § 541.205(c)(5) (2007).

<sup>65</sup> *In Re Farmers Insurance Exchange*, Nos. 05-35080, 05-35145, 2006 U.S. App. LEXIS 26671, at \*6 (9<sup>th</sup> Cir. Oct. 26, 2006).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at \*2.

<sup>69</sup> *Id.*

under the DOL Regulations as they existed prior to the 2004 changes and in light of the FLSA’s requirement for exercise of discretion and independent judgment and found that,

...Property Claim Representatives who regularly handle routine claims do not have the ability and meaningful responsibility to “compare, evaluate, and choose from possible courses of conduct,” nor do they have the “authority or power to make an independent choice free from immediate direction or supervision and with respect to matters of significance.”<sup>70</sup>

A verdict of 52.5 million was awarded to claims adjusters who were wrongfully classified as exempt.<sup>71</sup>

### C. Post-20004 Cases

While the DOL asserts that Section 541.203 is consistent with the old regulations, its effect is to greatly diminish the importance of the traditional analysis of whether the employee exercises discretion and independent judgment with respect to matters of significance. This is apparent in an analysis of the post-2004 cases.

*In Re Farmers Ins. Exchange*, was appealed following the 2004 changes to the regulations. On appeal, the Ninth Circuit overruled the district’s court decision and concluded there was not any basis in the FLSA for distinguishing between claims adjusters based on the value of the claim they handled.<sup>72</sup> Unlike the District Court, the Ninth Circuit considered the 2004 changes to the regulations and relied heavily on 29 C.F.R. Section 541.203 holding that the court, “must give due deference to the interpretations of statutes and regulations by the agency charged with their

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<sup>70</sup> *In re Farmers Ins. Exchange*, 336 F. Supp. 2d 1077, 1089 (D. Or 2004).

<sup>71</sup> *Id.*

<sup>72</sup> *In Re Farmers Insurance Exchange*, Nos. 05-35080, 05-35145, 2006 U.S. App. LEXIS 26671 (9<sup>th</sup> Cir. Oct. 26, 2006).

administration.”<sup>73</sup> The court reasoned that the duties of the claims adjusters at issue were the same as the ones specified in Section 541.203<sup>74</sup>, and thus established that FIE's claims adjusters were exempt from the FLSA.<sup>75</sup>

In order for an employee to be exempt under the administrative exemption, the employee must earn at least \$455 per week and the employee’s primary duty must be: “...the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.”<sup>76</sup>

In *In Re Farmers Insurance and Exchange*, the Ninth Circuit overruled the district court’s holding and analysis of whether the claims adjusters exercised discretion and independent judgment and simply analyzed whether the jobs of the claims adjusters at issue performed the duties listed in 29 C.F.R. 541.203.<sup>77</sup> The job duties based example of an exempt claims adjuster in the C.F.R. is problematic because judges will be disinclined to perform an analysis to determine if the employee exercises discretion and independent judgment. A court is more likely to follow the example of the Ninth Circuit and perform a truncated analysis based mainly on whether the claim adjusters’ job duties track those listed in 29 C.F.R. 541.203.

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<sup>73</sup> *Id.*

<sup>74</sup> Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation 29 C.F.R. § 541.203 (2007).

<sup>75</sup> *Id.*

<sup>76</sup> 29 C.F.R. § 541.200 (2007).

<sup>77</sup> *In Re Farmers Insurance Exchange*, Nos. 05-35080, 05-35145, 2006 U.S. App. LEXIS 26671 at \*18 (9<sup>th</sup> Cir. Oct. 26, 2006).

The *In Re Farmers Insurance Exchange* case is particularly illustrative of how the 2004 changes to the FLSA regulations have adversely affected low-level insurance adjusters. While the Ninth Circuit found all the insurance adjusters involved in the litigation to be exempt after comparing the adjuster's duties to the duties listed in 29 C.F.R. 541.203, the district court had been obliged to do a more sophisticated analysis into whether the insurance adjusters exercised discretion and independent judgment with respect to matters of significance as required under the pre-2004 regulations. The district court actually did find that some adjusters did not exercise discretion and independent judgment, and should be classified as non-exempt.

Certainly (Auto Physical Damage Claims Representatives) APD CRs use some discretion in adjusting physical damage claims, but the evidence established that an APD CR's primary duties require the use of skill in applying techniques, procedures and specific standards, not the use of discretion and independent judgment in matters of consequence. Significantly, in most cases, a vehicle's VIN number tells the CR almost everything there is to know about the vehicle involved. Vehicle damage is finite and limited to the value of a known entity from standard sources. Certainly, an APD must make choices among options in adjusting a claim, but with the advent of CRN and the use of CCC, the choices are limited and do not involve "matters of significance." 29 C.F.R. § 541.207(a). Consequently, I conclude that APD CRs do not meet the "discretion and independent judgment" prong of the administrative exemption.<sup>78</sup>

The district court analyzed the duties of Property Claims Representatives and concluded that, "Many building and contents claims are routine and thus require the CR to exercise skill rather than discretion and independent judgment."<sup>79</sup>

The DOL's inclusion of the Administrative exemption examples found in 29 C.F.R. Section 541.203 in the new regulations seems to depart from the historical use of

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<sup>78</sup> *In re Farmers Ins. Exchange*, 336 F. Supp. 2d 1077, 1102 (D. Or. 2004).

<sup>79</sup> *Id.*

the regulations, in which duties were analyzed. The Administrative exemption examples appear to simply push almost all adjusters into exempt status. *In Re Farmers Ins. and Exchange*, the Ninth Circuit classified all the claims adjusters as exempt despite the findings of the lower court that many adjusters do not do work "requiring the exercise of discretion and independent judgment". The appellate court simply applied 541.203 and ignored this finding.

In the case of *In Re Farmers Insurance and Exchange*, the district court noted that defendant Farmers Insurance Exchange had 10,000 employees, 5,000 of which were claims adjusters.<sup>80</sup> Prior to the 2004 changes to the regulations, a determination that all 5000 adjusters qualified under the administrative exemption would have required a finding that each of the approximately 5,000 adjusters met the requirement that they exercise discretion and independent judgment with respect to matters of significance. Yet with the numbers alone, one has to wonder how fully half of the defendant's employees can be making decisions that are significant to the company. FIE has 10,000 employees, 5,000 of which are claims adjusters.<sup>81</sup> On average each of the 5000 claims adjusters is making decisions concerning 1/5000<sup>th</sup> of the total claim pay out. One has to question how 1/5000<sup>th</sup> of the company's payout is significant to that company. Certainly there are some adjusters making decisions on very large claims that could significantly affect the company's annual or quarterly profit. But there must be many more adjusters handling the common everyday claims that, even if mishandled, would not have a significant effect on the company's performance.

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<sup>80</sup> *In Re Farmers Insurance Exchange*, Nos. 05-35080, 05-35145, 2006 U.S. App. LEXIS 26671 at \*3 (9<sup>th</sup> Cir. Oct. 26, 2006).

<sup>81</sup> *Id.*

Questions used in determining what constitutes matters of significance are typically,

Whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business ... and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.<sup>82</sup>

The addition of the administrative examples in the 2004 regulations appears to have had the effect of greatly reducing the “matters of significance” requirement in judicial analysis of the administrative exemption. In *Robinson-Smith v. Government Employees Ins. Co.*,<sup>83</sup> the court considered the amount of all of the claims the Auto Damage Adjusters and Resident Auto Damage Adjusters handled in the aggregate to prove significance. The Court concludes the auto physical damage appraisers work is of substantial importance based on the fact that they, as a group, made 60% of payments.<sup>84</sup> Under this analysis, a single employee paying out 1% of company's payments would be an insignificant job while 5,000 employees paying out 60% of company's payments would be significant jobs. Using this reasoning one could group any large number of employees together and show that as a group they are making decisions on matters of significance.

In *Murray v. Ohio Cas. Corp.*,<sup>85</sup> an Auto Physical Damage adjuster sued to recover overtime wages. The court concluded her work was of "substantial importance"

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<sup>82</sup> *O'Bryant v. City of Reading*, No. 05-4259, 2006 U.S. App. LEXIS 18360 at \*137 (3<sup>rd</sup> Cir. June 8, 2006).

<sup>83</sup> *Robinson-Smith v. Government Employees Ins. Co.*, 323 F. Supp. 2d 12 (D.C. Cir. 2004).

<sup>84</sup> *Id.* at 23. Defendant has also demonstrated that the work done by the auto damage adjusters is of "substantial importance" to GEICO in that auto damage claims amount to 60 percent of GEICO's loss payments.

<sup>85</sup> *Murray v. Ohio Cas. Corp.*, No. 2:04-CR-539, 2005 U.S. Dist. Lexis 41374 (S.D. Ohio. Sept. 27, 2005).

to the company by concluding that over the course of a year her settlements totaled hundreds of thousands of dollars.<sup>86</sup> The flaw with this line of reasoning is that it fails to consider the employee's settlements in comparison to the total amount of settlements paid by the company, or in comparison to other employees. A finding that settlements totaled hundreds of thousands of dollars does not necessarily result in a finding of substantial importance. If one were to look at Ohio Casualty's earnings as a whole, one would discover that Murray's impact for a full year, consisting of a couple hundred thousand dollars in payouts is not even a tenth of 1% of \$218.3 million 2006 annual earnings of Ohio Casualty. If this is "Substantial Importance" then the requirement has lost any meaning.

In conclusion, the effect of the 2004 changes to the FLSA regulations is to greatly diminish the significance of the traditional administrative exemption analysis into whether an employee exercised discretion and independent judgment with respect to matters of significance. Though the 2004 changes did not eliminate the requirement that exempt employees exercise discretion and independent judgment on matters of significance, the effect of the administrative examples has been to cause even entry-level adjusters working on small claims to be classified as exempt employees.

#### IV. Claims Adjusters are the Production Workers of the Information Economy and Need Protection from the FLSA

The administrative/production dichotomy is an analytical tool used by courts to determine if a particular employee is exempt or non-exempt under the administrative

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<sup>86</sup> *Id.* at 19.

exemption.<sup>87</sup> When analyzing claims adjusters in the information economy, under this framework, claims adjusters are production workers and should be classified as exempt for either of two reasons: 1) Claims adjusting is a “Product” and the DOL incorrectly relied on a case that erroneously held to the contrary. 2) Even if the case was correct in concluding that the product being produced is the policy, not the adjusting services, customer service activities have been found to be a product.

A. Claims Adjusting is a “Product” When Analyzed Under a Production/Administrative Dichotomy Analysis; the DOL Incorrectly Relied on a Case that Erroneously Held to the Contrary

The classic example of the production/administrative dichotomy is, “a factory setting where the "production" employees work on the line running machines, while the administrative employees work in an office communicating with the customers and doing paperwork.”<sup>88</sup> If an employee is producing a product, they are classified as non-exempt and if an employee is performing service/administrative tasks, the employee is exempt. The analytical tool continues to be useful in white-collar cases for distinguishing white-collar production employees from true administrative employees.<sup>89</sup> According to the DOL Preamble to the 2004 Regulatory changes, the Production vs. staff dichotomy is

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<sup>87</sup> See footnote 65.

<sup>88</sup> *Shaw v. Prentice Hall Computer Publ'g.*, 151 F.3d 640, 644 (7<sup>th</sup> Cir. 1998). In *Shaw v. Prentice Hall Computer Publishing*, the Production editor, contesting her classification as exempt, was unsuccessful in using the production/administrative dichotomy argument. Her primary duties consisted of managing and coordinating book projects through the editorial and production process.

<sup>89</sup> *Id.*

useful in determining whether an employee is exempt or non exempt.<sup>90</sup> It appears that the majority of courts do continue to use it, even outside the manufacturing setting.<sup>91</sup>

In the case of *Palacio v. Progressive Insurance Company*, the analysis of the employee focused mainly on the types of job duties and whether or not they were administrative or production in nature.<sup>92</sup> The plaintiff, "...assessed liability, weighed evidence, determined credibility, reviewed insurance policies, negotiated with attorneys and claimants, and made recommendations to management based on skills, knowledge and training acquired over the course of several years."<sup>93</sup> The court found that because plaintiff's job duties did not involve producing the company's products or services, she was servicing the company's business, and was, therefore, an administrative employee.<sup>94</sup>

In the DOL's preamble to the new regulations, the DOL relied extensively on *Palacio* to suggest that claims adjusters were not white-collar production employees.<sup>95</sup>

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<sup>90</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,122, 22141 (April 23, 2004) (to be codified at 29 C.F.R. 541).

<sup>91</sup> "First, we disagree with the State that the production/administrative dichotomy has limited usefulness outside the manufacturing context. To the contrary, the analogy has repeatedly proven useful to courts in a variety of non-manufacturing settings. *See e.g.*, *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 903 (3d Cir. 1991) (applying analysis to salespersons: "The concept is not limited to manufacturing activities."), *cert. denied*, 112 S. Ct. 1473 (1992); *Dalheim*, 918 F.2d at 1230 (applying analysis to TV producers: "Section 541.205(a) is not concerned with distinguishing between white collar and blue collar employees, or between service industries and manufacturing industries."); *Gusdonovich v. Business Information Co.*, 705 F. Supp. 262 (W.D. Pa. 1985) (applying analysis to insurance claims investigator). Furthermore, courts have demonstrated little difficulty applying the "production worker" analogy to employees in the public sector. *See, e.g.*, *Roney v. United States*, 790 F. Supp. 23 (D.D.C. 1992) (applying analysis to deputy U.S. marshals); *Harris v. District of Columbia*, 741 F. Supp. 254 (D.D.C. 1990) (applying analysis to housing inspectors)."

<sup>92</sup> *Palacio v. Progressive Ins. Co.*, 244 F. Supp. 2d 1040 (C.D. Cal. 2002).

<sup>93</sup> *Id.* at 1045-46.

<sup>94</sup> *Id.*

<sup>95</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,122, 22124 (April 23, 2004) (to be codified at 29 C.F.R. 541).

The DOL used the case to justify Section 541.203, which pigeonholed claims adjusters into exempt status without much analysis of the employee's job duties.<sup>96</sup>

The following quote was included in the preamble:

Moreover, as the court in *Palacio* emphasized, claims adjusters are not production employees because the insurance company is in the business of writing and selling automobile insurance, rather than in the business of producing claims. Because the vast majority of customers never make a claim against the policy they purchase, the court concluded the claims adjusters do not produce the very goods and services that the employer offered to the public.<sup>97</sup>

The classifications of the claims adjusters as administrative in *Palacio v. Progressive Ins.* is based on unsound reasoning. The court was making a semantic distinction by saying that the policy is the product and not the claims adjusting. There is little validity in this assertion because very few people would purchase an insurance policy if it did not come with claims adjusting.<sup>98</sup> Claims adjusting includes duties such as determining the extent of the damage, hiring an attorney, and making settlements, which are all duties the insured seeks to avoid by purchasing a policy.<sup>99</sup> The insured purchases the policy because the insured anticipates that if someone does make a claim, the insurance company will investigate the claim and make determinations whether the

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<sup>96</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,122, 22124 (April 23, 2004) (to be codified at 29 C.F.R. 541).

<sup>97</sup>*Id.*

<sup>98</sup> “The insured in a contract like the one before us does not seek to obtain a commercial advantage by purchasing the policy -- rather, he seeks protection against calamity.” *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 819 (1979).

<sup>99</sup> *In Re Farmers Insurance Exchange*, Nos. 05-35080, 05-35145, 2006 U.S. App. LEXIS 26671 at \*18 (9<sup>th</sup> Cir. Oct. 26, 2006).

claim is valid. The insurance policy is nothing more than a contract of sale, and the product being sold is the adjusting services.<sup>100</sup>

## B. Customer Service that Goes to the Heart of a Company's Marketplace Offerings is a Product

Even if *Palacio v. Progressive Ins.* was correct in concluding that the product being produced is the policy, not the adjusting services, customer service activities have been found to be a product. In *Bothell v. Phase Metrics*,<sup>101</sup> the company designed, manufactured and sold test equipment. The Ninth Circuit found that customer service activities that went to the heart of the company's marketplace offerings were not internal administration.

Work relating to customer service of products sold is not necessarily "administrative" work as that term is commonly understood. In this case, for example, Phase Metrics does exist to design, manufacture, and sell test equipment. But, as Phase Metrics acknowledges, its equipment is "technologically advanced." Customers require installation, training, and service assistance in order to successfully operate the equipment and are unlikely to buy such equipment unless there is such assistance. Customer service activities, therefore, go to the heart of Phase Metrics' marketplace offerings, not to the internal administration of Phase Metrics' business (or that of its customers).<sup>102</sup>

Similarly, in the insurance industry, the providing of claims services by insurance adjusters goes to the heart of the insurance carrier's marketplace offerings. Customers would be unlikely to purchase insurance if they believed there would be no adjusters to handle future claims. Under the rationale of *Bothell v. Phase Metrics*, insurance adjusters would be considered nonexempt production employees.

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<sup>100</sup> "Insurance contracts are like many other contracts in that one party (the insured) renders performance first (by paying premiums) and then awaits the counter-performance in the event of a claim." *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 447(1996).

<sup>101</sup> *Bothell v. Phase Metrics*, 299 F.3d 1120 (9<sup>th</sup> Cir. 2002).

<sup>102</sup> *Id.* at 1126.

The use of the production versus administrative dichotomy as an analytical tool to determine non-exempt versus exempt status continues to have a role to play in the new information and services economy. When it is appropriately applied to the insurance industry the result is that claims adjusters are production workers either because a) claims adjusting is a “product” and the DOL incorrectly relied on a case that erroneously held to the contrary; or b) because customer service that goes to the heart of a company’s marketplace offerings is a “product.”

#### V. Placing Claim Adjusters into the Exempt Category Runs Counter to the Congressional Intent of the FLSA

In a 1999 letter to the Government Accountability Office written by the Secretary of the Department of Labor, the Secretary stated that,

The statutory terms “executive, administrative, or professional” imply a certain prestige, status and importance, and an employee’s salary serves as one indicator of his or her status in management or the recognized professions. It is an index that distinguishes the *bona fide* executive from the working squad leader, or distinguishes the clerk or technician from one who performs true administrative or professional duties. Salary remains a good indicator of the degree of importance attached to a particular employee’s job, which provides a practical guide, particularly in borderline cases, for distinguishing *bona fide* executive, administrative and professional employees from those who were not intended by the Congress to come within the categories of this exemption.<sup>103</sup>

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<sup>103</sup> U.S. Gen. Accounting Office, Report to Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives Fair Labor Standards Act White-Collar Exemptions in the Modern Workplace (1999).

If salary is a good indicator of the status of an employee, the salary of insurance claim adjusters should be higher than other jobs, which are non-exempt. However, salaries of claims adjusters are not consistent with their status.

According to Yahoo Jobs, claims adjusters in San Francisco average between 51,949- 66,214 per year.<sup>104</sup> As an exempt job, it should pay more than non-exempt jobs because it should reflect the relative importance of the job. However, paralegals who are generally characterized as non-exempt<sup>105</sup> earn 50,554- 78,443\$ per year, which is generally higher than claims adjusters.<sup>106</sup> Information Technology (IT) Support Specialists are not exempt from the FLSA when their duties consist of resolving problems related to computer systems, installing software, assisting in the purchase of software and answering computer related questions.<sup>107</sup> Nevertheless, an IT Support Specialist in San Francisco earns between 60,097-87,599\$ per year.<sup>108</sup> This is much higher than an insurance claim adjuster.

One could argue that based on this data, IT Support Specialists and Paralegals should simply be treated as exempt. However, the new regulations do not contain administrative examples that pertain to IT Support Specialists or Paralegals. Their classification as non-exempt workers is based on traditional analysis as to their exercise

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<sup>104</sup> Yahoo! Hot Jobs, <http://hotjobs.yahoo.com/salary> (Last visited May 11, 2007).

<sup>105</sup> "... Wage and Hour Division opinion letters (August 17, 1979; September 27, 1979; June 12, 1984; April 13, 1995; and February 19, 1998) have taken the position that paralegals are nonexempt, and that often a deciding factor has been the level of judgment and discretion exercised by the paralegal and the amount of supervision the attorneys provide. It continues to be our opinion that the duties of paralegal employees do not involve the exercise of discretion and independent judgment of the type required by section 541.200(a)(3) of the final regulations, thus an analysis of whether their work is related to management or general business operations is not necessary." U.S. Department of Labor Employment Standards Administration Wage and Hour Division (Dec. 16, 2005) available at <http://www.dol.gov/esa/whd/opinion/flsa.htm>.

<sup>106</sup> Yahoo! Hot Jobs, <http://hotjobs.yahoo.com/salary> (Last visited May 11, 2007).

<sup>107</sup> U.S. Department of Labor Employment Standards Administration Wage and Hour Division (Oct. 26, 2006) available at <http://www.dol.gov/esa/whd/opinion/flsa.htm>.

<sup>108</sup> Yahoo! Hot Jobs, <http://hotjobs.yahoo.com/salary> (Last visited May 11, 2007).

of discretion and independent judgment. IT Support Specialists and Paralegals seeking non-exempt status, have the benefit of an analysis of duties similar to the analysis that occurred prior to the 2004 regulatory changes. Claims adjusters appear to no longer enjoy that legal protection.

The Secretary of the Department of Labor has stated that salary is an important indicator of whether an employee is exempt. The fact that insurance claims adjusters are not paid what one would expect for an exempt employee, provides strong evidence they have not been properly classified.

## CONCLUSION

The 2004 changes to the FLSA have failed to adapt to the new information economy, by failing to adequately protect “information production workers.” Insurance claims adjusters serve as an illustration of how the FLSA has failed. The DOL should eliminate the administrative examples, particularly as they pertain to insurance claims adjusters.

An analysis of claims adjusters under the administrative/production dichotomy shows they should be classified as non-exempt employees. The providing of claims services by insurance adjusters is a product. However, the effect of the changes is to push claims adjusters even further into the exempt category. The DOL should eliminate the administrative example of the claims adjuster. The DOL should also redefine “matters of significance” to better reflect congressional intent with respect to the administrative exemption,

The purposes of the FLSA were to eliminate substandard working conditions in which employees worked long hours with low wages.<sup>109</sup> The shortened workweek was intended to result in, "... less employee fatigue, fewer accidents, higher productivity and efficiency, and more employee time for education and family duties."<sup>110</sup> The information technology era has resulted in a situation in which the problems the FLSA was intended to eliminate have presented themselves again. Insurance claims adjusters can be forced to work long hours, taking time away from family and education, yet they are not paid the premium salary one would expect for an exempt employee. Claims adjusters today are the information age equivalent of the factory worker, overworked, and exploited, without adequate protection from employers.

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<sup>109</sup> U.S. Gen. Accounting Office, Report to Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives Fair Labor Standards Act White-Collar Exemptions in the Modern Workplace p. 5 (1999).

<sup>110</sup> *Id.*