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EMPLOYMENT LAW—WELCOME TO *THE JUNGLE*¹: SALESPEOPLE AND THE ADMINISTRATIVE EXEMPTION TO THE FAIR LABOR STANDARDS ACT

INTRODUCTION

The landscape of working life in America has undergone a sea change since the dawn of our young country.² As our nation has industrialized and technology has advanced, so too have employers' expectations of their workers. However, as job duties evolve, it has become increasingly difficult to characterize whether a particular job fits into traditional labor law norms of jobs protected by the Fair Labor Standards Act.

Congress enacted the Fair Labor Standards Act³ (FLSA) in 1938 as New Deal legislation⁴ with the purpose of “neutraliz[ing] the ‘twin evils’ of overwork and underpay.”⁵ Pursuant to such goals, Congress set limitations on weekly working hours by establishing an overtime pay requirement.⁶ The FLSA dictates that employers requiring their employees to work in excess of the statutory maximum must pay an overtime rate “not less than one and one-half times” the employee’s usual rate of pay.⁷ Congress, however, indicated exceptions to the overtime pay requirement for “any employee employed in a bona fide executive, administrative, or professional capacity.”⁸

1. UPTON SINCLAIR, *THE JUNGLE* 1 (Doubleday, 1st ed. 1906). Upton Sinclair’s novel exemplifies the horrific working conditions in America which led to the eventual passing of the Fair Labor Standards Act in 1938.

2. See, e.g., U.S. GEN. ACCOUNTING OFFICE, *FAIR LABOR STANDARDS ACT, WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE*, GAO/HEHS-99-164, 1 (1999), available at <http://www.gao.gov/archive/1999/he99164.pdf> (indicating “the industrial profile of the American economy has shifted dramatically”).

3. 29 U.S.C. §§ 201-219 (2006).

4. Craig A. Cunningham, Note, *Mind the Gap: A Legal and Economic Analysis of Stockbroker Overtime Eligibility Under the Fair Labor Standards Act*, 2009 U. ILL. L. REV. 1243, 1246 (2009); see also Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22, 22 (1978).

5. Regan C. Rowan, Comment, *Solving the Bluish Collar Problem: An Analysis of the DOL’s Modernization of the Exemptions to the Fair Labor Standards Act*, 7 U. PA. J. LAB. & EMP. L. 119, 119 (2004).

6. 29 U.S.C. § 207(a)(1) (2006).

7. *Id.*

8. 29 U.S.C. § 213(a)(1) (2006). The FLSA indicates exemptions for other categories of workers such as, among others, computer technicians and farm workers. See

Although the employment landscape in the United States has changed dramatically, the exemptions to the FLSA's overtime requirements remained largely untouched for over fifty years.⁹ The outdated exemptions have been the source of much dispute, recently causing the Department of Labor (DOL) to promulgate amended regulations and issue guidance documents clarifying their application.¹⁰ Unfortunately, attempts to clarify the exemptions have only confused the issue further.¹¹

Due to the vagueness of the regulations regarding the administrative employee exemption, the circuits have split over whether to find certain types of employees exempt. In particular, courts have struggled with how to classify salespeople.¹² Courts examining the exempt status of salespeople have come down on opposite sides, often in cases involving similar fact patterns.¹³ Perhaps because a salesperson's primary job duties straddle both exempt (marketing) and not exempt (sales) duties, courts have varied in determining whether salespeople are entitled to overtime compensation.

29 U.S.C. § 213(a)(2)-(b)(30). A discussion of exemptions other than the administrative exemption is outside the scope of this Note.

9. U.S. GEN. ACCOUNTING OFFICE, *supra* note 2, at 3.

10. Cunningham, *supra* note 4, at 1246-48 (referencing the regulations codified at 29 C.F.R. § 541 (2004)). This Note will examine only the administrative exemption. For an in-depth look at the other exemptions, see Peter M. Panken, *The 2004 Revisions to the Overtime Regulations under the Fair Labor Standards*, in 2 AIRLINE AND RAILROAD LABOR AND EMPLOYMENT LAW, ALI-ABA COURSE OF STUDY MATERIALS 1027 (2004); Joseph E. Tilson, Jeremy Glenn & Nicholas Strohmayer, *Hot Topics in Wage and Hour Law*, in 2 38TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 681 (Practising Law Institute 2009).

11. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, *supra* note 2, at 23. Employers complained that the duties prong of the test was "confusing and applied in an inconsistent manner by the DOL," while DOL investigators claimed "determinations about independent judgment and discretion [could] be the most difficult part of a compliance review." Employees complained that "classifi[cation] as an exempt [status had] been increasingly simplified by judicial opinions," resulting in "few protections remain[ing]" for particular types of employees.

12. For the purposes of this Note, the terms "salespeople" and "sales personnel" will refer to employees who are paid on a salary, rather than an hourly basis. Workers paid on an hourly basis do not fall within the exemptions to the FLSA discussed in this Note. 29 U.S.C. § 213(a)(1) (2006). At the same time, the scope of the term "salespeople" will exclude *outside* sales workers, who are addressed in a separate exemption to the FLSA. *See* 29 U.S.C. § 213(a)(1).

13. *See, e.g.*, *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011); *Reiseck v. Universal Comm'n of Miami, Inc.*, 591 F.3d 101 (2d Cir. 2010); *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2416 (2010). *Contra* *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010); *Darveau v. Detecon, Inc.*, 515 F.3d 334 (4th Cir. 2008); *Cash v. Cycle Craft Co. Inc.*, 508 F.3d 680 (1st Cir. 2007).

This Note will examine how the FLSA classifies salespeople, and will conclude that salespeople should not be classified as administrative employees exempt from overtime wages pursuant to the FLSA. Part I will examine the background and history of the FLSA, including the administrative exemption. Part II will highlight several recent decisions among the various circuits reaching different conclusions regarding salespeople and the administrative exemption. Part III will examine the DOL's interpretation of the exempt status of salespeople. In Part IV, this Note will argue that sales personnel in today's service-based economy mirror the line workers contemplated by the FLSA in the production-based economy at the time the statute was originally enacted. As such, the protections within the FLSA for production workers should apply to sales personnel.

This Note will argue further that the DOL's position regarding the classification of salespeople is entitled to deference. In an effort to clarify their status, the DOL has commented several times recently on the application of the administrative exemption to sales personnel. Specifically, the DOL has interpreted the FLSA to indicate that salespeople are entitled to overtime pay.¹⁴ Because the DOL has been charged with the duty of enforcing the FLSA, the agency is entitled to deference regarding its interpretations of the statute, both in terms of the recent regulations and the more informal interpretive rules. As an expert in the field, the DOL is in the best position to speak to the application of the FLSA. Courts should defer to the DOL's interpretation of both the FLSA and its own regulations, as the Second Circuit has rightly done.¹⁵ As a general rule, courts should find that salespeople are not administrative

14. The DOL has indicated that the “‘exemptions to the Act are to be narrowly construed against the employer[.]’” See, e.g., Brief for the Sec’y of Labor as Amicus Curiae in Support of Plaintiffs-Appellants at 7 *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010) (No. 09-0437), 2009 WL 3405861 [hereinafter *Amicus Brief*]; U.S. DEP’T OF LABOR, WAGE & HOUR DIV., ADMINISTRATOR’S INTERPRETATION NO. 2010-1 (Mar. 24, 2010), available at http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAI2010_1.htm [hereinafter *ADMINISTRATOR’S INTERPRETATION NO. 2010-1*] (both quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)). Additionally, the DOL has deemed the production/administration dichotomy a useful tool in evaluating the exempt status of sales personnel. See, e.g., *ADMINISTRATOR’S INTERPRETATION NO. 2010-1*, *supra*. See *infra* Part III.

15. See, e.g., *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011); *Reiseck v. Universal Comm’n of Miami, Inc.*, 591 F.3d 101 (2d Cir. 2010); *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2416 (2010).

employees pursuant to the FLSA, and are therefore entitled to overtime compensation.

Such an application of the FLSA is necessary to promote the uniformity of its application. A uniform classification of salespeople will ensure protection to the greatest number of workers. It will also promote a just administration of the Act. It would be fundamentally unfair for similarly situated workers within the same industry to be subjected differently to the Act's overtime provisions. At the same time, employers need guidance in classifying workers in order to avoid the unfair surprise of costly judgments regarding overtime wages. A uniform standard of classification would prevent costly misclassification and prevent some companies from having an arbitrary economic advantage over their competition because they were permitted to avoid paying overtime wages.

Deference to the DOL's limited application of the administrative exemption ensures the most protection to the greatest number of workers. Such a limited application is particularly appropriate in the current dim economic climate.

I. THE FAIR LABOR STANDARDS ACT AND "WHITE COLLAR" EMPLOYEES

A. *History of the Overtime Requirement of the Fair Labor Standards Act*

The current landscape of American employment only minimally resembles the setting as it existed a century ago.¹⁶ After the Civil War and subsequent Reconstruction Era, the United States began a period of industrialization that dramatically altered working conditions.¹⁷ Although the Industrial Revolution benefitted the United States both in terms of economics and lifestyle, working conditions for the American worker disintegrated.¹⁸ This period of devastating economic and social conflict escalated into the Great Depression.¹⁹ In answer to the economic and social crisis of the time, Congress and President Franklin Delano Roosevelt enacted

16. See, e.g., U.S. GEN. ACCOUNTING OFFICE, *supra* note 2, at 1 (indicating "the industrial profile of the American economy has shifted dramatically").

17. Pamela N. Williams, *Historical Overview of the Fair Labor Standards Act*, 10 FLA. COASTAL L. REV. 657, 658 (2009).

18. *Id.* Services for Americans improved, such as transportation and improved food processing, but to the detriment of the conditions of the factories that provided such conveniences. *Id.*

19. *Id.* at 660.

legislation to address, among other concerns, the existing labor and employment issues.²⁰

On June 25, 1938, President Roosevelt signed into law the Fair Labor Standards Act, one of the pillars of Roosevelt's "New Deal" legislation.²¹ The FLSA included in its mission a standard for minimum wages and maximum hours for the working American.²² Specifically, the FLSA established criteria to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."²³ Implicitly, the legislation was meant "to ensure employees a reasonable quality of life outside the workplace."²⁴ To this end, the FLSA instituted an overtime pay requirement, mandating that employers pay "a rate . . . one and one-half times the [usual] rate" for hours worked in excess of the statutory maximum weekly hour allowance.²⁵

B. *Exemptions to the FLSA Overtime Requirement for Administrative Employees*

The policy goals of the FLSA overtime requirements were threefold: "a shorter work week, compensation for overworked employees, and work spreading (or 'work sharing')." ²⁶ The DOL has referred to the overtime requirements as "'among the nation's most important worker protections.'" ²⁷ However, these requirements were never intended to extend to the more affluent, or white-collar worker.²⁸ The original form of the FLSA exempted from the Act's wage and hour standards those "employee[s] employed in a bona

20. *Id.*; see also Grossman, *supra* note 4 (describing how prior to FLSA, President Roosevelt enacted the National Industrial Recovery Act [NIRA] "'to raise wages, create employment, and thus restore business'"). The National Labor Relations Act, or Wagner Act, "which 'guaranteed the rights of workers to join labor unions and to bargain collectively with their employers'" was also enacted prior to the FLSA. Williams, *supra* note 17, at 667.

21. Cunningham, *supra* note 4, at 1245-46.

22. *Id.*; see also Grossman, *supra* note 4.

23. Cunningham, *supra* note 4, at 1246 (citing 29 U.S.C. § 202(a) (2006)).

24. *Id.*

25. 29 U.S.C. § 207(a)(1) (1938).

26. Rowan, *supra* note 5, at 123.

27. Steven I. Locke, *The Fair Labor Standards Act Exemptions and the Pharmaceutical Industry: Are Sales Representatives Entitled to Overtime?*, 13 BARRY L. REV. 1, 3 (2009) (quoting Dep't of Labor, Wage & Hour Div., *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*; Final Rule, 69 Fed. Reg. 22,122-23 (Apr. 23, 2004) (codified at 29 C.F.R. § 541) [hereinafter "Final Rule"]).

28. See, e.g., Cunningham, *supra* note 4, at 1246; Rowan, *supra* note 5, at 124-25.

fide executive, administrative, or professional capacity.”²⁹ White-collar employees did not need the protections of the FLSA, due to the higher salary, potential for promotion, and greater job security associated with the typical white-collar position.³⁰ The FLSA charged the DOL with the duty of establishing the standards for the white-collar exemptions.³¹ To that end, the DOL formulated specific regulatory tests to determine which employees fell within the white-collar exemptions to the Act’s wage and hour requirements.³²

Prior to 2004, the DOL regulations indicated an employee must meet each of the requirements of a three-part test in order to be considered an exempt white-collar worker.³³ Particularly, the employee first must have been paid on a salary, rather than an hourly basis (the salary-basis test). The amount of the employee’s salary must have been sufficient to indicate managerial or professional status (the salary-level test). Finally, the employee’s job duties must have involved managerial or professional skills.³⁴ At this time, the statutory regulatory requirements for white-collar workers had changed little since 1954, the changes limited mostly to increases in the dollar amount within the salary-level test.³⁵

According to the statutory test, an employee who was compensated on a salary or fee basis at a rate of not less than \$250 per

29. 29 U.S.C. § 213(a)(1) (2006). The specific white-collar exemption relevant to this Note is the administrative exemption. Although the legislative history of the FLSA does not indicate an explanation for the exemption, the Minimum Wage Study Commission of 1981 asserted the “white collar” exemptions were warranted on the basis of the managerial and professional nature of these types of jobs. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 2 at 5.

30. *Id.*

31. *Id.* at 1.

32. *Id.*

33. *Id.*

34. *Id.* at 2.

35. *Id.* at 3. Prior to the 2004 Amendments, the DOL applied a “long test” to employees earning less than \$250 per week, and a “short test” to employees earning \$250 per week or more. The long and short tests were designed as part of the duties test with the presumption that an employee’s higher salary level directly correlated to the type of job duties he performed, thereby reducing the analysis required of the courts in examining whether the employee’s job duties indicated an exempt status. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 2, at 7 tbl. 1. For further analysis of the “short test,” see Rowan, *supra* note 5, at 128-29 (citing HARRY WEISS, U.S. DEPT. OF LABOR, WAGE & HOUR DIV., REPORT & RECOMMENDATIONS ON PROPOSED REVISIONS FOR REGULATIONS, PART 541, at 22 (1949)) (explaining the rationale behind the short tests). Over time, the “short test” became the test applied most often, as the salary level was last adjusted in 1975, and was not established to adjust with inflation. As a result, the majority of workers eventually qualified for the “short test.” Rowan, *supra* note 5, at 128-29.

week,³⁶ and “[w]hose primary duty consist[ed] of . . . office or non-manual work directly related to management policies or general business operations of the employer . . . ; and [w]hich . . . requir[ed] the exercise of discretion and independent judgment”³⁷ fell within the boundaries of the administrative exemption. Generally, the requirement that exempt employees exercise independent judgment and discretion indicated that they “ha[d] the freedom to make choices about matters of significance to their employers, without immediate supervision or detailed guidelines.”³⁸ Over time, the duties prong of the regulation’s requirement for exempt employees became increasingly more difficult to navigate,³⁹ with employers, employees, and DOL investigators alike unhappy with its application.⁴⁰ Recognizing how outdated the regulations had become, the DOL looked to amend the regulations.

By the early part of the new millennium, it became increasingly clear that the FLSA had begun to show its age.⁴¹ Employment law scholars complained “[w]ith the advent of the ‘virtual workplace,’ telecommuting by employees, and flexible scheduling arrangements, this depression-era statute is starting to show some signs of aging, and many . . . have called into question its relevance in the modern workplace.”⁴² As the industrial landscape changed, the specific white-collar exemptions to the overtime requirements be-

36. U.S. GEN. ACCOUNTING OFFICE, *supra* note 2, at 7 tbl. 1.

37. Panken, *supra* note 10, at 1033.

38. U.S. GEN. ACCOUNTING OFFICE, *supra* note 2, at 23.

39. Joseph E. Tilson & Jeremy J. Glenn, *New Law, New Cases, and Tough Issues Under the Fair Labor Standards Act*, in 33RD ANNUAL INSTITUTE ON EMPLOYMENT LAW 169, 174 (Practising Law Institute 2004).

40. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, *supra* note 2, at 23. Employers complained the duties prong of the test was “confusing and applied in an inconsistent manner by the DOL;” while DOL investigators claimed “determinations about independent judgment and discretion [could] be the most difficult part of a compliance review.” *Id.* Employees complained that classification as an exempt status had been “increasingly simplified by judicial opinions,” resulting in “few protections remaining” for particular types of employees. *Id.* at 25; *see also* Rowan, *supra* note 5, at 129 (indicating the duties test “proved to be particularly cumbersome for employers.”); G. Thomas Harper, *DOL dubs new overtime regulations ‘FairPay Initiative,’ but opponents cry foul*, FLA. EMP. L. LETTER 1 (May 2004), available at <http://www.harpergerlach.com/FELL/FELLMay04.pdf> (“The regulations and case law were imprecise, convoluted, confusing, and often contradictory.”).

41. Tilson & Glenn, *supra* note 39, at 169; *see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 2, at 1 (“Critics of the FLSA claim that [the] shift [from a manufacturing-based to a service-oriented economy] as well as the increased use of sophisticated technology, have left the FLSA and its regulations outdated and in need of revision.”).

42. Tilson & Glenn, *supra* note 39, at 169.

came more difficult to administer as well.⁴³ At the time the FLSA was adopted, the economy was primarily agricultural and manufacturing-based.⁴⁴ The white-collar exemptions were applicable in the economic setting of the time. In particular, the boundaries of white-collar workers' decision-making responsibilities were clearly defined, such workers were more likely to be management, and white-collar workers were better compensated than their modern day counterparts.⁴⁵

As the economy moved to a more service-oriented employee base, the number of American workers qualifying for exemption under the FLSA wage and hour requirements increased exponentially.⁴⁶ In 1998, for example, the service industries employed 24 million full-time workers, approximately double the number of service industry workers employed in 1983.⁴⁷ Nearly one quarter of all workers in the United States was employed in the service industry in 1998, making the service industry the largest employment sector.⁴⁸ Many argued this paradigm shift left the white-collar exemptions to the FLSA largely inapplicable to the current workforce.⁴⁹

The DOL recognized that the exemptions to the FLSA wage and hour overtime requirements had largely become ineffective.⁵⁰ On April 23, 2004, the DOL promulgated what it deemed a "Final Rule" defining and delimiting the exemptions for white-collar employees.⁵¹ According to the DOL, the purpose of the new regula-

43. Rowan, *supra* note 5, at 121 ("[T]he DOL's failure to modernize the tests to reflect changing labor conditions has muddied the regulatory waters."); *see also* Harper, *supra* note 40, at 1 ("Over the last decade or two, employers have found it increasingly difficult to decide which employees are entitled to overtime and which are not.")

44. Rowan, *supra* note 5, at 119.

45. Michael A. Faillace, *Automatic Exemption of Highly-Paid Employees and Other Proposed Amendments to the White-Collar Exemptions: Bringing the Fair Labor Standards Act into the 21st Century*, 15 LAB. LAW. 357, 358 (2000) (describing the characteristics of white-collar workers at the time the FLSA was adopted).

46. U.S. GEN. ACCOUNTING OFFICE, *supra* note 2, at 8.

47. *Id.*

48. *Id.*

49. *See, e.g., id.* at 21 (stating that discussions with employers and politicians demonstrated that many believed the "traditional limits of the white-collar exemptions [were] outdated in the modern work place").

50. Final Rule, *supra* note 27, at 22,122 ("The . . . overtime pay requirement . . . protections have been severely eroded . . . because the [DOL] has not updated the regulations [applicable to white-collar employees].").

51. Final Rule, *supra* note 27. The new regulations increased the salary level applicable to administrative employees for the first time since 1975. *Id.* at 22,166. Setting the new salary level required to meet exempt status at \$455 per week, the DOL believed it had struck a balance between properly defining the limits of the white-collar employees without improperly disqualifying a large number of employees from exemp-

tions was fourfold. First, revisions to the tests for exempt employees were needed “to restore the overtime protections intended by the FLSA which ha[d] eroded over decades.”⁵² Second, the DOL intended the new regulations to reflect both changes in the workplace and developments in federal case law surrounding the exemptions to the FLSA since the Act had last been amended.⁵³ Changes to the confusing and complex regulations were necessary to prevent unethical employers from using the uncertainty of the regulations to their advantage and refusing to pay overtime to employees where it was due.⁵⁴ Additionally, confusing regulations would have the effect of creating “a trap for the unwary” employer who honestly could not determine whether to classify certain employees as exempt.⁵⁵ Finally, the DOL sought to prevent employees from resorting to expensive and time consuming litigation to obtain overtime pay that was rightfully theirs.⁵⁶ In the Preamble to the new regulations, the DOL indicated it would violate its statutory duty to “‘define and delimit’ the section 13(a)(1) exemptions ‘from time to time’” if it allowed more time to pass without updating the regulations.⁵⁷

In addition to adjusting the salary level upwards, the new regulations made changes to the much-litigated “duties” test.⁵⁸ These changes were merely a watered-down version of those that were proposed, however.⁵⁹ While the proposed regulations eliminated much of the ambiguous language that had been the source of litigation,⁶⁰ the Final Rule diluted many of these changes, largely in response to complaints offered during the public comment period.⁶¹ However, the final version of the new regulations added a new requirement to “‘discretion and independent judgment,’” such that

tion. *Id.* at 22,171. Although the new regulations did not index the newly amended salary levels for inflation, partly because the DOL believed the FLSA did not grant it such authority, the DOL promised to update the salary levels more frequently. *Id.* at 22,171-72. A discussion of the salary test is not relevant to this Note.

52. Final Rule, *supra* note 27, at 22,122.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* For a discussion of the changes to the regulations in 2004, see *supra* notes 50-55 and accompanying text; *infra* notes 57-70 and accompanying text.

57. *Id.*

58. Adam T. Klein, Mark R. Humowiecki, Tarik F. Ajami & Cara E. Greene, *The DOL's New FLSA White Collar Exemption Regulations and Working with the DOL on FLSA Actions*, 10 EMP. RTS. & EMP. POL'Y J. 459, 466 (2006).

59. *Id.* at 466; see also Harper, *supra* note 40.

60. Rowan, *supra* note 5, at 133.

61. *Id.*

the “primary duty must include ‘the exercise of discretion and independent judgment *with respect to matters of significance.*’”⁶² The 2004 Final Rule attempted to clarify the new requirements of the duties test with reference to case law, stating “the exercise of discretion and independent judgment ‘involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered.’ The term ‘matters of significance’ refers to the level of importance or consequence of the work performed.”⁶³

While the new rules added the “matters of significance” requirement, they elected to retain the production/administration dichotomy test.⁶⁴ Specifically, the new rules retained the requirement that exempt employees perform “office or non-manual work directly related to the management or general business operations of the employer”⁶⁵ In an attempt to clarify which employees would be considered exempt based on the performance of work, the new regulations listed examples of exempt work: “tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.”⁶⁶

Notwithstanding the DOL’s attempts to clarify and streamline the white-collar exemptions,⁶⁷ response to the new regulations was not positive.⁶⁸ Many argued the new regulations did little to effectuate the necessary change.⁶⁹ General agreement could not be reached regarding which employees would or would not be considered exempt under the new regulations.⁷⁰ The significant rise in

62. Final Rule, *supra* note 27, at 22,139 (emphasis added).

63. Final Rule, *supra* note 27, at 22,139 (citing *Bothell v. Phrase Metrics, Inc.*, 299 F.3d 1120, 1125-26 (9th Cir. 2002)).

64. Final Rule, *supra* note 27, at 22,139.

65. *Id.* at 22,137.

66. 29 C.F.R. § 541.201 (2004).

67. Klein, Humowiecki, Ajami & Greene, *supra* note 58, at 465.

68. *See, e.g.*, Klein, Humowiecki, Ajami & Greene, *supra* note 58; Harper, *supra* note 40.

69. *See, e.g.*, Klein, Humowiecki, Ajami & Greene, *supra* note 58, at 465 (“While the DOL initially sought to substantially revise the duties test, the final version largely mirrors the short test under the old regulations.”); Harper, *supra* note 40, at 2 (“The changes made to the exempt duties tests have turned out to be a lot less dramatic than some of the language that was included in the proposed regulations.”).

70. Cunningham, *supra* note 4, at 1247.

multibillion dollar class action lawsuits regarding overtime claims in recent years⁷¹ indicates that even under the new regulations, the exemptions are frequently misunderstood, leading to misclassification by employers.⁷²

Perhaps the most significant problem with the new regulations lies in the fact that some employees, particularly salespeople, often perform job duties that can be construed as both exempt and non-exempt.⁷³ For example, while under the new regulations an employee must have the authority to make an independent decision without immediate direction or supervision in order to qualify as exempt,⁷⁴ the requirement will still be satisfied if there is *review* of such decisions by a supervisor.⁷⁵ In addition, the authority to make an independent decision will place an employee within the boundaries of the exemption even if the authority is limited to making a *recommendation* for a particular action rather than taking the action itself.⁷⁶ As a result, litigation regarding whether employees can be considered exempt has increased recently rather than decreased, resulting in judgments against employers in the hundreds of millions of dollars.⁷⁷ With the new regulations, the road was paved for the DOL to extend overtime benefits to salespeople.

II. CASE LAW REGARDING SALESPEOPLE AND THE ADMINISTRATIVE EXEMPTION

Much dissention has arisen among the courts regarding the exempt status of salespeople whose job duties place them potentially

71. Tilson & Glenn, *supra* note 39, at 171; *see also infra* note 275.

72. Tilson & Glenn, *supra* note 39, at 174; *see also* Harper, *supra* note 40, at 2 (“That increasingly led to misclassification of workers and lawsuits for unpaid overtime.”).

73. Harper, *supra* note 40, at 2.

74. 29 C.F.R. § 541.202(c) (2004).

75. 29 C.F.R. § 541.207(e) (2004).

76. *Id.*

77. Tilson, Glenn & Strohmayer, *supra* note 10, at 3 (noting that in 2008, Walmart settled cases regarding the administrative exemption to FLSA overtime requirements for 700 million dollars). *See also* Frederick C. Leffler et al., *Second Circuit Narrowly Reads FLSA Exemption in Novartis Ruling*, PROSKAUER ROSE LLP (July 27, 2010), <http://www.proskauer.com/publications/client-alert/second-circuit-narrowly-reads-flsa-exemptions-in-novartis-ruling/>. In response to the recent *Novartis* ruling, “businesses which rely heavily on the . . . administrative exemptions may find themselves targets of litigation” *Id.* At the same time, certiorari was recently denied in the *Novartis* case, leaving the pharmaceutical sales company with a very large standing judgment to pay its sales representatives overtime wages. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011). *See also supra* notes 68-69 and accompanying text.

both within and outside of the administrative exemption. The fundamental difficulty in classifying salespeople lies in the ambiguity of the regulatory tests which reviewing courts have struggled to apply. The Second Circuit has consistently and correctly held that salespeople cannot be considered “administrative employees” and are, therefore, not exempted from the FLSA overtime requirements.⁷⁸ Other circuits, however, have inappropriately held the opposite.⁷⁹

A. *Cases Holding Salespeople Not “Administrative Employees” Under the FLSA*

Several recent Second Circuit cases have that held salespeople are entitled to overtime compensation. These decisions have held that salespeople are not administrative employees and therefore not exempt from the FLSA’s overtime provisions. The cases focus on sales-specific aspects of the salesperson’s duties, although the employees in question may also have job duties that fall outside of the realm of exempt job duties.

In *Reiseck v. Universal Communications of Miami, Inc.*, the Second Circuit ultimately determined Plaintiff Lynore Reiseck did not fall under the administrative exemption.⁸⁰ As Regional Director of Sales, Ms. Reiseck’s job duties involved both direct and indirect sales or sales promotion,⁸¹ requiring Ms. Reiseck to “generat[e] advertising sales . . . for Universal’s magazine publication, *Elite Traveler*.”⁸² Ms. Reiseck was paid a base salary with commissions, but was paid no overtime during her employ.⁸³

In evaluating whether Ms. Reiseck’s job duties as a salesperson selling advertising space in a magazine qualified her as an administrative employee exempted from overtime wages,⁸⁴ the Second Circuit referenced the second prong of the regulatory test. The test

78. See, e.g., *Novartis*, 611 F.3d at 149; *Reiseck v. Universal Commc’ns of Miami, Inc.*, 591 F.3d 101 (2d Cir. 2010); *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009), cert. denied, 130 S. Ct. 2416 (2010).

79. See, e.g., *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011), cert. granted, 132 S. Ct. 760 (2011); *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010); *Darveau v. Detecon, Inc.*, 515 F.3d 334 (4th Cir. 2008); *Cash v. Cycle Craft Co.*, 508 F.3d 680 (1st Cir. 2007). The cases are largely fact-specific. Indeed, the new regulations indicate that “there must be a case-by-case assessment to determine whether the employee’s duties meet the requirement for [the] exemption.” Final Rule, *supra* note 27, at 22,144.

80. *Reiseck*, 591 F.3d at 108.

81. *Id.* at 103.

82. *Id.*

83. *Id.*

84. *Id.* at 105.

required that an exempt employee's duties be "'directly related to management policies or general business operations'"⁸⁵

The Second Circuit held that because *Elite Traveler* was distributed without cost, sale of advertising space was the primary source of revenue for the publication,⁸⁶ and thus was the defendant's "product."⁸⁷ Because the plaintiff's primary duty was to sell a product, she did not qualify as an administrative employee under the FLSA.⁸⁸ The court adopted the reasoning of the Third Circuit in *Martin v. Cooper Electric Supply Co.*⁸⁹ An employee who makes *specific* sales is not an administrative employee for the purposes of the FLSA, while an employee whose primary job responsibility is to increase sales among all customers *generally* falls within the exemption.⁹⁰ While the plaintiff arguably had job duties generally promoting the travel magazine's business in her position as Regional Sales Manager, the court looked only to her sales duties in finding her an employee eligible for overtime compensation under the FLSA.⁹¹

The Second Circuit also addressed the issue of whether salespeople qualify as administrative employees in *Davis v. J.P. Morgan Chase*. In *Davis*, the court held that a class of bank underwriters, whose primary job duty was to approve (or "sell") loans pursuant to detailed bank guidelines, qualified as administrative employees entitled to overtime pay.⁹²

In performing their required job duties, the plaintiffs consulted detailed bank guidelines, "the Credit Guide," to determine whether loan applicants qualified for a loan.⁹³ The Second Circuit determined that the plaintiffs did not qualify as administrative employees, basing its decision on the section of the regulations that

85. *Id.* (quoting 29 C.F.R. § 541.2(a) (2004)).

86. *Id.* at 106.

87. *Id.*

88. *Id.* at 107. The court referenced the regulations definition of "primary duty" as one "that consumes a 'major part, or over [fifty] percent, of the employee's time.'" *Id.* (citing 29 C.F.R. § 541.103 (2004)).

89. *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896 (3d Cir. 1991).

90. *Reiseck*, 591 F.3d at 107 (citing *Martin*, 940 F.2d at 905).

91. *Id.* at 108.

92. *Davis v. J.P. Morgan Chase*, 587 F.3d 529, 530 (2d Cir. 2009).

93. *Id.* Both the plaintiffs and the bank agreed that underwriters had the power to deviate from the Credit Guide and independently evaluate the credit worthiness of loan applicants. However, the parties disagreed over what level of discretion a loan underwriter had to make exceptions to the Credit Guide. *Id.* at 531. The court ultimately determined this discretion was not enough to bring the plaintiffs within the administrative exemption. *Id.* at 537.

addressed “[t]he production/administration dichotomy.”⁹⁴ The regulations further defined work that “related to management policies or general business operations . . . [as] ‘those types of activities relating to the administrative operations of a business *as distinguished from* ‘production’ or, in a retail or service establishment, ‘sales’ work.’”⁹⁵

Relying on a recent analysis of the production/administration dichotomy by the DOL, the court held that the primary job duties of loan underwriters involved the “production” of loans rather than the “general business operations” of the bank.⁹⁶ Furthermore, the bank itself referred to the work of loan underwriters as “production work.”⁹⁷ The court also held that measuring the loan underwriters’ output was another indication that the employees in question were engaged in production work.⁹⁸ In short, an underwriter employed by the defendant was “directly engaged in creating the ‘goods’—loans and other financial services—produced and sold by Chase.”⁹⁹

Ultimately, the court concluded that because the plaintiffs’ primary job function was to carry out the production of the bank’s goods (here, loans), they did not perform work directly related to management policies or general business operations of the bank.¹⁰⁰ As such, the plaintiffs did not fall within the administrative exemption to the FLSA.¹⁰¹

The recent Second Circuit case, *In re Novartis Wage and Hour Litigation*,¹⁰² dealt with the issue of whether the administrative ex-

94. *Id.* at 532. The court evaluated the exempt status of the underwriters by applying the regulatory test as it existed prior to the 2004 amendments. *Id.* at 531 n.2. See *infra* notes 168-169 and accompanying text.

95. *Davis*, 587 F.3d at 531 (citing 29 C.F.R. § 541.205(a) (2004)) (emphasis added).

96. *Id.* at 534 (citing DEP’T OF LABOR, WAGE & HOUR DIV., OPINION LETTER OF FEB. 16, 2001, 2001 WL 1558764, at *1. Interestingly, the court did not address a 2006 DOL Wage and Hour Division opinion letter published Sept. 8, 2006, which indicated mortgage loan officers *were* exempt administrative employees. This opinion letter has since been withdrawn by the DOL in an Administrative Interpretation published March 24, 2010, subsequent to the date of this opinion. See ADMINISTRATOR’S INTERPRETATION No. 2010-1, *supra* note 14; see also discussion *infra* Part III.A.

97. *Id.* The loan underwriters were not expected to provide customers with advice regarding which loans best suited their needs, but rather, were primarily expected to adhere to the Credit Guide. *Davis*, 587 F.3d at 534.

98. *Id.* Loan underwriters were compensated based on the number of loans they produced that met the standards outlined in the Credit Guide. *Id.*

99. *Id.* at 535.

100. *Id.* at 537.

101. *Id.*

102. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).

emption to the FLSA applied to salespeople in the context of pharmaceutical sales representatives.¹⁰³ The plaintiffs, a class of approximately 2,500 sales representatives, alleged that Novartis, a drug manufacturing company, violated the FLSA by wrongly classifying them as employees exempted from overtime benefits.¹⁰⁴

In concluding that Novartis sales representatives did not qualify as administrative employees, the court focused primarily on an amicus brief filed by the Secretary of Labor on behalf of the plaintiffs.¹⁰⁵ In the brief, the Secretary asserted that because the Novartis representatives did “not exercise discretion and independent judgment, they [did not fall] within the . . . ‘administrative’ employee categor[y] that [was] exempted from the FLSA overtime pay requirements.”¹⁰⁶ The court deferred to the Secretary of Labor’s interpretation of the regulations that the representatives were not

103. *Id.* at 144. The court also reviewed whether the sales representatives were exempted from the FLSA’s overtime requirements under the outside salesperson exemption; however, that issue is beyond the scope of this Note. For further discussion on the outside salesperson exemption, see Locke, *supra* note 27. See also *Chenensky v. New York Life Ins. Co.*, No. 7 Civ. 11504 (WHP), 2010 WL 2710586 (D.N.Y. June 24, 2010) (discussing plaintiff who assisted customers in obtaining life insurance products conducted “sales” under the FLSA); *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011) (noting that pharmaceutical sales representatives who promoted drug products to physicians fell within the outside sales exemption). Because the court found the sales representatives to be exempt pursuant to the outside sales exemption, it did not evaluate them according to the administrative exemption. *Id.* at 398. *Contra* *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F.Supp.2d 254, 268 (D. Conn. 2008) (explaining that pharmaceutical sales representatives “do not and cannot make or produce any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition of Defendant’s products . . .”) (internal quotations omitted).

104. *Novartis*, 611 F.3d at 144.

105. *Id.* at 149.

106. *Id.* The Secretary of Labor outlined specific aspects of Novartis representatives’ job duties to indicate they did not meet the third prong of the test. When calling on physicians, Novartis representatives provide doctors with information regarding Novartis products in an effort to persuade them to prescribe Novartis products to their patients. Amicus Brief, *supra* note 14, at 2. See also 29 C.F.R. § 541.200(a)(3) (2004). In speaking with doctors, Novartis representatives are required to deliver the company’s “core message” by means of a scripted dialog. Amicus Brief, *supra* note 14 at 3. Representatives are not permitted to stray from the script, and if asked a question for which they do not have a scripted response, they are instructed to contact their supervisor before providing the physician with an answer. *Id.* at 6. Novartis representatives must “close” the sale by asking the doctor for a commitment, although non-binding, to prescribe Novartis medications. *Id.* at 5. Novartis trains its sales representatives in sales techniques, and representatives are paid on commission, based on the volume of prescriptions written by physicians to whom they are assigned. *Id.*

administrative employees, and held that the Secretary's interpretations were entitled to "controlling" deference.¹⁰⁷

The court and the Secretary referenced the section of the regulations indicating that an administrative employee must have primary job duties that "include[] the exercise of discretion and independent judgment with respect to matters of significance."¹⁰⁸ In the Amicus Brief, the Secretary asserted that in order to "exercise discretion and independent judgment," something more than applying techniques or procedures established by the employer was needed.¹⁰⁹ The level of authority permitted the Novartis representatives was simply not enough to amount to the exercise of discretion and independent judgment.¹¹⁰ Because the court found it appropriate to defer to the Secretary's interpretation, it held that the Novartis sales representatives were "not bona fide administrative employees within the meaning of the FLSA and the regulations."¹¹¹

B. *Cases Holding Salespeople "Administrative Employees" Under the FLSA*

Some courts have taken the opposite position from those discussed in the previous section, holding that salespeople should be classified as administrative employees and exempted from the overtime requirements of the FLSA. Courts that find salespeople to be administrative employees focus on the managerial or administrative aspects of the salesperson's duties.

In the First Circuit case *Cash v. Cycle Craft Company, Inc.*,¹¹² the court classified Plaintiff Thomas Cash as an administrative employee exempt from the FLSA's overtime provisions.¹¹³ Cash was hired as "New Purchase/Customer Relations Manager," responsible for sales and solving customer service issues.¹¹⁴ Cycle Craft Company fired him and Cash subsequently filed suit, alleging, *inter alia*,

107. *Novartis*, 611 F.3d at 149 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)); see discussion *infra* Part IV.C.

108. *Novartis*, 611 F.3d at 155 (citing 29 C.F.R. § 541.200(a) (2004)).

109. *Id.* at 156.

110. *Id.*

111. *Id.* at 157.

112. *Cash v. Cycle Craft Co., Inc.*, 508 F.3d 680 (1st Cir. 2007).

113. *Id.* at 681.

114. *Id.*

that the dealership had violated the FLSA by not paying overtime wages during the course of his employ.¹¹⁵

On appeal, the First Circuit focused primarily on the second and third prongs of the regulatory test. The court analyzed whether Cash's job duties related to management or business operations,¹¹⁶ and whether he exercised "discretion and independent judgment with respect to matters of significance."¹¹⁷

The court held that the plaintiff was an administrative employee, relying on the reasoning from *Reich v. John Alden Life Ins. Co.*¹¹⁸ Applying the third prong of the test, the court held that like the plaintiffs in *John Alden*, Cash was "'not merely [a] 'skilled' worker[] who operate[d] within a strict set of rules,'"¹¹⁹ but instead he exercised discretion in carrying out his job duties. The court indicated, somewhat vaguely, that "Cash exercised discretion in reacting to the unique needs of Boston Harley's customers."¹²⁰ The First Circuit affirmed the lower court's judgment that Cash's job related to the management and business operations of the store, and thus he qualified as an exempt administrative employee within the meaning of the FLSA.¹²¹

The Third Circuit also recently held that a pharmaceutical sales representative qualified for the administrative exemption pursuant to the FLSA in *Smith v. Johnson & Johnson*.¹²² In holding that the Plaintiff Patty Lee Smith qualified for the administrative exemption, the court considered the second and third prongs of the regulatory tests. The court found that because her job possessed "independent and managerial qualities,"¹²³ and required a degree of planning and foresight to implement a strategic plan, Smith met the requirements of an administrative employee.¹²⁴

115. *Id.* at 682. Cash was fired on the spot due to an emotional problem at work. *Id.*

116. *Id.* at 684.

117. *Id.* (citing 29 C.F.R. § 541.200 (2004)).

118. *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997); see discussion *infra* Part IV.A.2.

119. *Cash*, 508 F.3d at 685 (quoting *Reich*, 126 F.3d at 14).

120. *Id.* at 686.

121. *Id.* at 681, 685.

122. *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010).

123. *Id.* at 285.

124. *Id.* The Third Circuit determined that the job duties of Smith satisfied the second prong of the test regarding administrative employees because "[h]er non-manual position required her to form a strategic plan designed to maximize sales in her territory." *Id.* According to the court, because she followed a strategic plan she devel-

Clearly, the courts are not having any less difficulty classifying salespeople than are employers, as evinced by the recent divergence in outcomes. Such broad misclassification indicates that a uniform system for classifying salespeople is warranted.

III. THE DEPARTMENT OF LABOR AND THE ADMINISTRATIVE EXEMPTION

In recent years, the Department of Labor has spoken on several occasions regarding its interpretation of the application of the administrative exemption. A clear pattern has emerged, demonstrating that the DOL, like the Second Circuit, interprets the FLSA to indicate that salespeople do *not* fall within the administrative exemption.¹²⁵ In addition to the 2004 amendments to the FLSA, promulgated through formal notice and comment rulemaking procedure, the DOL has declared that salespeople qualify for overtime through informal guidance documents.

A. *The Wage and Hour Opinion Letters Regarding Mortgage Loan Officers*

In September 2006, the DOL issued a Wage and Hour Opinion Letter indicating that employees who performed duties typical of a mortgage loan officer qualified for the administrative exemption to the FLSA and were therefore not entitled to overtime pay.¹²⁶ On March 24, 2010, the DOL issued a new type of guidance document, described as an “Administrator’s Interpretation” (AI).¹²⁷ Significantly, the AI *retracted the DOL’s previous position* regarding the exempt status of mortgage loan officers indicated in the 2006 Opinion Letter.¹²⁸ The DOL argued the 2006 Opinion Letter was based on “misleading assumption[s] and selective and narrow analysis,”¹²⁹

oped on her own, Smith’s job duties directly related to the management or general business operations of her employer. *Id.*

125. *See, e.g., In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011); *Reiseck v. Universal Commc’ns of Miami, Inc.*, 591 F.3d 101, 107 (2d Cir. 2010); *Davis v. J.P. Morgan Chase*, 587 F.3d 529, 534 (2d Cir. 2009).

126. U.S. DEP’T OF LABOR, WAGE & HOUR DIV., OPINION LETTER FLSA 2006-31, at 1-2 (Sept. 8, 2006), *available* at http://www.dol.gov/whd/opinion/FLSA/2006/2006_09_08_31_FLSA.pdf. The DOL referenced job duties such as evaluating customer financial criteria to designate the appropriate loan product, responding to customer inquiries and advising them about the risks and benefits of various loan products, and other “customer-specific persuasive sales activity.” *Id.*

127. ADMINISTRATOR’S INTERPRETATION NO. 2010-1, *supra* note 14.

128. *Id.*

129. *Id.* (“Because of its misleading assumption and selective and narrow analysis, Opinion Letter FLSA 2006-31 does not comport with this interpretive guidance and

and as such it was compelled to issue a new guidance document addressing the issue.

In the 2006 Opinion Letter, the DOL applied the test enunciated in the 2004 amended regulations in order to determine whether mortgage loan officers qualified as administrative employees.¹³⁰ The DOL conceded that the newly amended regulations indicated “that employees whose primary duty is inside sales cannot qualify as exempt administrative employees,”¹³¹ but stated that the new regulations further clarified that “many financial services employees [such as mortgage loan officers] qualify as exempt administrative employees, even if they are involved in some selling to consumers.”¹³² According to the Opinion Letter, mortgage loan officers generally had primary job duties other than sales.¹³³ The 2006 Opinion Letter claimed mortgage loan officers’ job duties indicated they performed “work directly related to the management or general business operations of the employer,” meeting the second prong of the test.¹³⁴

Finally, the 2006 Opinion Letter indicated that mortgage loan officers met the third prong of the test and performed duties that required the “exercise of discretion and independent judgment.”¹³⁵ The Opinion Letter determined the mortgage loan officers quali-

is withdrawn. Similarly, an Opinion Letter dated February 16, 2001, 2001 WL 1558764, also is withdrawn as inconsistent with this analysis.”).

130. U.S. DEP’T OF LABOR, OPINION LETTER FLSA 2006-31, *supra* note 126, at 3. Specifically, assuming the employees earned at least \$455 per week and thus fulfilled the salary prong of the test, the Opinion Letter evaluated whether mortgage loan officers first performed “[w]ork that is ‘directly related to the management or general business operations’ of the employer,” and second, whether the mortgage loan officers’ “primary duty include[d] the exercise of discretion and independent judgment with respect to matters of significance.” *Id.* (quoting 29 C.F.R. § 541.201(a) (2004)).

131. Final Rule, *supra* note 27, at 22,146.

132. *Id.* The new regulations also made reference to case law indicating financial services employees who sold financial products could also qualify as exempt employees. *See* Hogan v. Allstate Ins. Co., 361 F.3d 621 (11th Cir. 2004); Reich v. John Alden Life Ins. Co., 126 F.3d 1 (1st Cir. 1997); Wilshin v. Allstate Ins. Co., 212 F.Supp.2d 1360 (M.D. Ga. 2002).

133. U.S. DEP’T OF LABOR, OPINION LETTER FLSA 2006-31, *supra* note 126, at 4-7. Specifically, the Opinion Letter indicated their work required them to analyze a customer’s financial information, advise about various loan products, and determine whether the customer qualified for a loan. Like the employees described in the preamble to the new regulations, the mortgage loan officers also “service[d] their employer’s financial services business[es] by marketing, servicing, and promoting the employer’s financial products.” *Id.* at 5.

134. *Id.*

135. *Id.* at 6. Such discretion generally “involve[d] the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.” *Id.* (citing 29 C.F.R. § 541.202(a) (2004)).

fied as exempt employees because they “evaluate[d] . . . products, options, and variables . . . to determine which mortgage products might serve customer’s needs.”¹³⁶

The 2010 Administrator’s Interpretation analyzed mortgage loan officers differently. In finding such workers *did not* qualify as administrative employees, the AI also addressed the typical job duties of mortgage loan officers, referencing the regulations.¹³⁷ Mortgage loan officers’ job duties demonstrated that they did not exercise discretion or independent judgment with respect to matters of significance, nor were they involved in running or servicing their employers’ businesses.¹³⁸

The AI indicated exemptions from the FLSA overtime requirements “‘are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.’”¹³⁹ To this end, the AI determined the job duties of mortgage loan officers placed them within the category of “production” workers.¹⁴⁰ To reach this conclusion, the AI invoked a number of definitions in the regulations, emphasizing that when examined in total, the regulations clearly stated the production nature of a typical mortgage loan officer’s job placed the employee *outside* the scope of the administrative exemption.¹⁴¹

Initially, the DOL applied the production versus administrative dichotomy within the regulations. The relevant language states:

The phrase “directly related to the management or general business operations” refers to the type of work performed by the em-

136. *Id.*

137. 29 C.F.R. § 541.2 (2004).

138. ADMINISTRATOR’S INTERPRETATION NO. 2010-1, *supra* note 14. According to the DOL, mortgage loan officers generally receive internal leads and contact customers, or field direct contacts from customers generated by the mortgage company’s marketing efforts. *Id.* Mortgage loan officers also collect financial information and run credit reports on the customers that contact the mortgage company, in order to determine whether the customers qualify for a particular loan product. *Id.* After running the customer’s information through industry-specific software, mortgage loan officers determine which available loan product would best suit the customer’s individual needs. *Id.* Finally, mortgage loan officers frequently compile customer documents and assist the underwriting department with finalizing loan documents for closing. *Id.*

139. *Id.* (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

140. ADMINISTRATOR’S INTERPRETATION NO. 2010-1, *supra* note 14.

141. Robert W. Pritchard, R. Brian Dixon & Andrew J. Voss, *Department of Labor Reverses Course: Mortgage Loan Officers Do Not Meet the Administrative Exemption’s Requirements*, ASAP LITTLER MENDELSON NEWSLETTER (Mar. 2010), available at http://www.littler.com/files/press/pdf/2010_03_Wage_DOL_ReversesCourse_MortgageLoanOfficers.pdf.

ployee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.¹⁴²

According to the AI, the legislative history of the FLSA illustrates the intention of Congress that “the administrative exemption is ‘limited to those employees whose primary duty relates ‘to the administrative as distinguished from the production operations of a business.’”¹⁴³ More specifically, the administrative exemption “‘relates to employees whose work involves [the] servicing [of] the business itself—employees who ‘can be described as staff rather than line employees.’”¹⁴⁴

In order to determine whether mortgage loan officers’ job duties were analogous to “running [or] servicing the business” or were, instead, more sales related, the AI looked to the regulations for guidance.¹⁴⁵ Factors that indicate whether an employee’s primary job duty is sales-related, according to the regulations, are the employee’s job description and qualifications, sales training, compensation structure (for example, commission-based), and what proportion of the employee’s earnings can be attributed to sales.¹⁴⁶

The AI referenced recent case law in support of its claim that a mortgage loan officer’s primary job duties were related more to sales than running the business.¹⁴⁷ This indicated that “a careful

142. 29 C.F.R. § 541.201(a) (2004).

143. ADMINISTRATOR’S INTERPRETATION No. 2010-1, *supra* note 14 (quoting Final Rule, *supra* note 27, at 22,141).

144. *Id.* (quoting Final Rule, *supra* note 27, at 22,141). The AI cited case law that had recently relied on the “production versus administration dichotomy.” *Bothell v. Phase Metrics*, 299 F.3d 1120, 1127 (9th Cir. 2002), (quoting *Bratt v. County of Los Angeles*, 912 F.3d 1066, 1070 (9th Cir. 1990)) (“‘[P]roduction versus administration dichotomy’ is intended to distinguish ‘between work related to the goods and services which constitute the business’ marketplace offerings and work which contributes to running the business itself.”); *Davis v. J.P. Morgan Chase*, 587 F.3d 529, 535 (2d Cir. 2009) (“[W]e have drawn an important distinction between employees directly producing the good or service that is the primary output of a business and employees performing general administrative work applicable to the running of any business.”).

145. Pritchard, Dixon, & Voss, *supra* note 141, at 2.

146. 29 C.F.R. § 541.504(b) (2004).

147. Pritchard, Dixon, & Voss, *supra* note 141, at 2. *See Martin v. Cooper Electric Supply Co.*, 940 F.2d 896, 905 (3d Cir. 1991), *cert. denied*, 503 U.S. 936 (1992) (“Any [job] duties undertaken . . . in the course of ordinary selling do not constitute administrative-type ‘servicing’ of Cooper’s wholesale business These activities are only routine aspects of sales *production*.”); *Casas v. Conesco*, No. Civ.00–1512 (JRT/SRN), 2002 WL 507059, at *9 (D. Minn. Mar. 31, 2002) (Mortgage loan officers were “production rather than administrative employees”).

examination of the law as applied to the mortgage loan officers' duties demonstrate[d] that their primary duty [was] making sales and, therefore, mortgage loan officers perform[ed] the production work of their employers."¹⁴⁸

Clearly, the DOL interprets the regulations to indicate that a primary duty of making sales is mutually exclusive to a primary duty "directly related to the management or general business operations of their employer or their employer's customers."¹⁴⁹ Because mortgage loan officers have the primary duty of selling loan products of their employers, they do not qualify for an administrative exemption, according to the AI.¹⁵⁰ The DOL was so certain about the exempt status of this particular type of salesperson, it created a *new category* of guidance document to remedy its previous mistake.

B. *The Secretary of Labor's Amicus Brief in Support of the Plaintiffs in In re Novartis Wage and Hour Litigation*

Further indicating the DOL's position on administrative employees, the Secretary of Labor filed an amicus brief on behalf of the plaintiff pharmaceutical sales representatives in the 2010 Second Circuit Appeals Court case, *In re Novartis Wage and Hour Litigation*.¹⁵¹ The brief indicated that determining the sales representatives in question qualified for the administrative exemption ran contrary to "the regulatory requirement that employees must exercise discretion and independent judgment with respect to

148. ADMINISTRATOR'S INTERPRETATION NO. 2010-1, *supra* note 14. The cases indicated that in analyzing the financial qualifications of a particular customer, "loan officers [were] performing 'screening for the benefit of the employer, rather than *servicing* for the benefit of the customer.'" *Id.* at 5 (quoting *Pontius v. Delta Financial Corp.*, No. 04-1737, 2007 WL 1496692, at *9 & n.20 (D. Pa. Mar. 20, 2007)). Additionally, mortgage loan officers were historically paid on commission, based on the number of sales made or loans closed by a particular loan officer, another factor demonstrating sales was their primary duty. Pritchard, Dixon & Voss, *supra* note 141, at 3. Mortgage loan officers were also trained in sales techniques, and evaluated on the basis of the number of loans they closed, further indicating the job duties of a mortgage loan officer were sales-related. *Id.*

149. ADMINISTRATOR'S INTERPRETATION NO. 2010-1, *supra* note 14.

150. *Id.*

151. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011). The Secretary of Labor is charged with "administer[ing] and enforce[ing] the FLSA . . . and [therefore] has a compelling interest in ensuring that it is interpreted correctly." Amicus Brief, *supra* note 14, at 1 (citation omitted). See also 29 U.S.C. §§ 204(a), (b), 211(a) (2006). For a discussion of deference to the DOL's interpretation of its own regulations, see *infra* Part IV.C. See also discussion of the *Novartis* case, *supra* Part II.A.

matters of significance in order to qualify for the administrative exemption.”¹⁵²

The DOL amicus brief detailed the primary job duties of a pharmaceutical sales representative. Arguing that although Novartis representatives exercise *some* discretion in carrying out their primary job duties, the Secretary of Labor indicated the level of discretion exercised was not sufficient to bring them within the boundaries of the administrative exemption.¹⁵³ Novartis did not meet its burden of proving its sales representatives exercised discretion and independent judgment sufficient to qualify them for the exemption.¹⁵⁴ The applicable section of the regulations defines the type of discretion that would qualify an employee for the exemption.¹⁵⁵ Some of the examples point to whether the employee has authority to deviate from established procedures without prior approval, whether the employee has authority to negotiate and bind the company on significant matters, and whether the employee provides consultation or expert advice to management.¹⁵⁶ The Preamble to the Final Rule indicated that employees who met at least two or three of the examples listed would be considered to have exercised discretion and independent judgment.¹⁵⁷

Exemptions to the FLSA are intended “to be narrowly construed against the employers seeking to assert them.”¹⁵⁸ The Secretary of Labor, in *Novartis*, argued that the job duties of the Novartis pharmaceutical sales representatives did not comport with the examples listed in the regulations and, therefore, Novartis representatives could not be considered to have exercised discretion and independent judgment.¹⁵⁹ Because Novartis representatives did not meet the third prong of the regulatory test for administrative employees, the Secretary of Labor argued they did not qualify for the exemption.¹⁶⁰

152. Amicus Brief, *supra* note 14, at 2. See 29 C.F.R. § 541.200(a)(3) (2004). See also discussion of the *Novartis* case, *supra* Part II.A.

153. Amicus Brief, *supra* note 14, at 2.

154. *Id.* at 10.

155. *Id.* at 10 n.6.

156. *Id.* at 18 (quoting 29 C.F.R. § 541.202(b) (2004)).

157. Amicus Brief, *supra* note 14, at 11.

158. *Id.* at 7.

159. *Id.* at 21.

160. *Id.* at 9-15.

IV. TODAY'S SALESPERSON IS YESTERDAY'S STRAW BOSS;
APPLYING THE FAIR LABOR STANDARDS ACT TO
THE MODERN WORKPLACE

The disparity among the courts as to whether to classify salespeople as administrative employees illustrates the need for a streamlined system of legal analysis; one that promotes efficiency and fairness in administering FLSA overtime claims. The production/administration dichotomy is a useful tool in understanding how to classify salespeople. Construing the exemptions to the FLSA narrowly, it becomes clear that the category of production employees includes salespeople; sales personnel, then, cannot be exempted from the FLSA's overtime protections. Furthermore, the DOL has been clear that sales personnel are within the category of workers entitled to overtime. Deferring to the DOL, as is appropriate in these circumstances, would result in courts finding that salespeople must be paid overtime pursuant to the FLSA.

A. *Reviewing Courts Should Apply the Production/Administration Dichotomy*

The administrative exemption was always intended to apply only to those employees whose job duties relate to running a business.¹⁶¹ From the original promulgation of the FLSA, the DOL has indicated a clear distinction between “production” and “administration” work,¹⁶² the goal being that “only those employees involved in the *business of business* qualified [for the exemption].”¹⁶³

The preamble to the 2004 amended regulations described the production/administration dichotomy as follows:

The Department believes that the dichotomy is still a relevant and useful tool in appropriate cases to identify employees who should be excluded from the exemption. As the Department [has] recognized . . . , this exemption is intended to be limited to those employees whose duties relate “to the administrative as distinguished from the ‘production’ operations of a business.”

161. Snider and Associates, LLC, *Administrative/Production Dichotomy—DOL Revisions to FLSA Regs*, http://www.sniderlaw.com/articles/Administrative_Production_Dichotomy_FLSA_and_DOL.pdf (last visited Apr. 15, 2012).

162. *Id.*

163. *Id.* (emphasis added); see also *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002) (“[The dichotomy distinguishes] between work related to the goods and services which constitute the business’ marketplace offerings and work which contributes to running the business itself.”) (citations omitted) (internal quotation marks omitted).

Thus, it relates to employees whose work involves servicing the business itself—employees who “can be described as staff rather than line employees, or as functional rather than departmental heads.” Based on these principles, the Department provided in proposed section 541.201(a) that the administrative exemption covers only employees performing a particular type of work—work related to assisting with the running or servicing of the business.¹⁶⁴

When the FLSA was promulgated originally, the regulations referred to production jobs such as “key punch operators, legmen, straw bosses and gang leaders,” which no longer exist in the modern workplace.¹⁶⁵ To be sure, the Preamble to the 2004 regulations indicates that the purpose of the change to the regulations was “to restore the overtime protections intended by the FLSA,” which had become “severely eroded,” principally because the DOL has failed to update the regulations and properly define the exceptions¹⁶⁶ Such language illustrates the DOL’s intention to apply the regulations broadly, so as to provide overtime benefits to a greater number of workers who had, according to the DOL, lost the protections of the FLSA over time.¹⁶⁷

Significantly, the current regulations retain the distinction between production and administrative employees.¹⁶⁸ Discussed within the context of the second prong of the regulatory test for administrative employees, the regulations emphasize the dichotomy as follows:

To meet th[e] requirement [of performing work directly related to the management or general business operations], an employee must perform work directly related to assisting with *the running or servicing of the business*, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.¹⁶⁹

In the most general sense, a worker who assists with production within a business is outside the boundaries of the administrative exemption, while an employee who is involved with running the busi-

164. Final Rule, *supra* note 27, at 22,141.

165. *Id.* at 22122; *see also supra* notes 46-49 and accompanying text (discussing the shift in the American economy to a more service-oriented employment base).

166. Final Rule, *supra* note 27, at 22,122. Although the preamble also discussed the other white-collar exemptions, references to the other exemptions have been eliminated as a discussion of the other exemptions is outside the scope of this Note.

167. *Id.*

168. 29 C.F.R. § 541.201(a) (2004).

169. *Id.* (emphasis added).

ness in some way is not entitled to overtime compensation. These examples from the legislative history of the FLSA illustrate why reviewing courts should apply the production/administration dichotomy in order to determine whether employees qualify for the administrative exemption.

Some courts have applied the production/administration distinction. The Second Circuit, for example, held in *Davis v. J.P. Morgan Chase*,¹⁷⁰ that according to the second prong of the regulatory test, the plaintiff employees performed work that qualified as *either* administrative or “production/sales,” but not both.¹⁷¹ The *Davis* court, relying on *Reich v. State of New York*,¹⁷² construed “production” broadly¹⁷³ and held that the reasoning in the *Reich* case, regarding the production/administration dichotomy, applied to the facts of the current case. The court indicated that a “literal reading of ‘production’ to require tangible goods ha[d] no basis in law or regulation.”¹⁷⁴

The Second Circuit again applied the production/administration dichotomy in *Reiseck v. Universal Communications of Miami, Inc.*, in evaluating whether an advertising saleswoman was entitled to overtime pay.¹⁷⁵ Initially, as it had done in the *Davis* case, the Second Circuit interpreted “production” broadly, holding that the advertising space the plaintiff sold was the “product” of the defen-

170. *Davis v. J.P. Morgan Chase*, 587 F.3d 529 (2d Cir. 2009).

171. *Id.* at 532. The primary job duty of the plaintiff underwriters in the *Davis* case was to sell the bank’s loan products. *Id.* at 534. As such, the court held the plaintiffs’ contribution to the company did not involve management decisions or decisions regarding the general business operations of the company, such as the human resource or advertising worker hypothesized in the regulations. *Id.* (referencing the pre-amendment regulations); see 29 C.F.R. § 541.2 (2002). Instead, the Plaintiffs’ work concerned the “‘production’ of loans—the fundamental service provided by the bank.” *Id.* at 534.

172. *Reich v. State of New York*, 3 F.3d 581 (2d Cir. 1993), *cert. denied* 510 U.S. 1163 (1994) (regarding the exempt status of state police investigators).

173. *Davis*, 587 F.3d at 532. In *Reich*, the Second Circuit considered the criminal investigations conducted a “product” and held that state police investigators did not qualify for the administrative exemption because “‘the primary function of the Investigators . . . [was] to conduct—or ‘produce’-its criminal investigations,’ the . . . Investigators fell ‘squarely on the production side of the line’” and were therefore found to be entitled to overtime pay. *Id.* at 532 (quoting *Reich*, 3 F.3d at 587-88). Further clarifying, the court indicated intangible goods, such as criminal investigations and the loans that were the subject of the current case, were to be considered “products” pursuant to the FLSA. *Id.* at 532-33.

174. *Id.* at 532.

175. *Reiseck v. Universal Commc’ns of Miami, Inc.*, 591 F.3d 101 (2d Cir. 2010).

dant employer.¹⁷⁶ As a sales employee, Reiseck did not qualify for the administrative exemption.¹⁷⁷

To reach this conclusion, the court referenced the section of the amended regulations addressing financial sector workers.¹⁷⁸ Again applying a broad interpretation of “production” to intangible products, the court analogized the plaintiff’s sale of advertising space to the sale of financial products considered in the regulations.¹⁷⁹ Through application of the production/administration dichotomy, the Second Circuit again reached the conclusion that a plaintiff salesperson was not an administrative employee under the FLSA.¹⁸⁰

Certainly, an argument can be made that the production/administration dichotomy does not *automatically* indicate the exempt status of an employee.¹⁸¹ Indeed, some reviewing courts have declined to apply the dichotomy, finding it inapplicable in certain contexts.¹⁸² In fact, the Preamble to the 2004 regulations emphasized that the “dichotomy has always been illustrative—but not dispositive—of exempt status”¹⁸³ The dichotomy should be used as

176. *Id.* at 106 (considering “sales” and “production” work interchangeably).

177. *Id.* at 107 (relying on the description of the plaintiff’s job duties in the record, the court held Reiseck should be considered a sales employee).

178. *Id.* at 107-08. Specifically, the regulations made the distinction between a financial sector worker whose primary duty is to “‘market[], service[], or promote[] the employer’s financial products,’ . . . [and] ‘an employee whose primary duty is *selling financial products.*’” *Id.* (referencing 29 C.F.R. § 541.203(b) (2004)) (emphasis added by the court). The former would qualify for the administrative exemption, while the latter would not. *Id.* at 108.

179. *Id.* at 107. “Universal’s sale of advertising space is similar to a financial services company’s sale of financial products. Neither fits neatly within the traditional retail sales model, yet both are standard products sold directly to the clients.” *Id.* at 108.

180. *Id.* at 108. The court adopted the Third Circuit’s interpretation of the regulations in the *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896 (3d Cir. 1991), *cert. denied*, 503 U.S. 936 (1992). In *Martin*, the court interpreted the phrase “promoting sales” to mean increasing sales generally, rather than selling directly to customers. *Martin*, 940 F.2d at 905.

181. *See, e.g.*, Pritchard, Dixon, & Voss, *supra* note 141 (referencing the language in the Preamble to the 2004 regulations specifying the dichotomy has “always been illustrative-but not dispositive-of exempt status”). Final Rule, *supra* note 27, at 22,141.

182. *See, e.g.*, McLaughlin v. Nationwide Mut. Ins. Co., No. Civ. 02–6205–TC, 2004 WL 1857112, at * 13-14 (D. Or. Aug. 18, 2004) (claiming Final Rule had moved away from the dichotomy in the service industry context); Heffelfinger v. Elec. Data Sys. Corp., 580 F.Supp.2d 933, 956 (D. Cal. 2008) (administrative/production “dichotomy is often of limited use outside of the manufacturing context in which it was devised”); Roe-Midgett v. CC Servs., Inc., 512 F.3d 865, 870 (7th Cir. 2008) (finding that dichotomy no longer applies in the modern service industry context).

183. Final Rule, *supra* note 27, at 22,141.

“one piece of the larger inquiry,” and provide a definitive answer regarding whether an employee qualifies for the administrative exemption “only when work falls squarely on the production side of the line.”¹⁸⁴

However, it is important to note the DOL indicated the dichotomy should be *illustrative*. A genuine need for a distinguishing test arises in the case of sales personnel who, as the division among the courts indicates, have some job duties that arguably place them in both camps. Certainly, a salesperson’s duties involving the general operations of his or her employer’s business might well indicate he or she should be considered an administrative employee.¹⁸⁵ But in this regard, while not dispositive, the production/administration dichotomy can be used as a *baseline* determination of the salesperson’s exempt status.¹⁸⁶ From this starting point, the primary duties of the salesperson should be measured against the regulatory requirements, where it will be shown that the employee does not qualify for the exemption.¹⁸⁷ Since salespeople are “producing” the products of their respective employers, they will not be found to be exercising discretion and independent judgment, and it will be clear they do not qualify for the exemption.¹⁸⁸

A strong policy argument can be made for using the production/administration dichotomy when analyzing the exempt administrative status of salespeople. As indicated in the *Davis* case, the fundamental purpose of the overtime requirements was both quantitative and qualitative. The overtime requirements were intended to increase the *quantity* of available jobs by pressuring employers to spread employment across a greater number of workers in order to avoid paying the higher wage.¹⁸⁹ Additionally, the requirements were intended to raise the *quality* of the work performed, by compensating workers at a higher rate for the “burden of a workweek beyond the hours fixed in the Act.”¹⁹⁰

184. See, e.g., Pritchard, Dixon, & Voss, *supra* note 141, at 2 (citing Final Rule, *supra* note 27, at 22,141) (internal quotations omitted) (citations omitted).

185. Snider and Associates, LLC, *supra* note 161, at 2.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 535 (2d Cir. 2009) (citing *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 577-78 (1942), *superseded by statute*, Portal-to-Pay Act of 1947, ch. 52 § 1, 61 Stat. 84 (codified as amended at 29 U.S.C. § 251 (2006))).

190. *Id.*

The policy behind the overtime requirements is particularly relevant today. The FLSA was promulgated in the Depression era as New Deal legislation.¹⁹¹ Our country is now faced with many of the same challenges faced by Americans in 1938. More than two years after the official end of the worst economic downturn since the Great Depression, unemployment continues to hover at significantly high rates.¹⁹² In light of the current economic conditions, the protections of the FLSA are as relevant now as they were when the Act was first promulgated.

Applying the production/administration dichotomy is a means to achieve the end result of the policy behind the FLSA. The *Davis* court indicates that although any type of job can be spread among several workers, work can more readily be spread among production employees than among those classified as administrative.¹⁹³ There is a “direct correlation between hours worked and materials produced in the case of . . . production workers, [a measurement that] does not exist [with] administrative employees.”¹⁹⁴ As such, considering any worker paid on a production basis, for example salespeople compensated by commission on the basis of their sales or production, would broaden the application of the FLSA to a greater number of employees. Applying the FLSA to a greater number of employees fulfills the original work-spreading mission of the FLSA,¹⁹⁵ and comports with the aim of the 2004 regulations to restore overtime provisions to workers who lost the protections of the FLSA over time.¹⁹⁶

The production/administration dichotomy is an essential tool in analyzing whether a salesperson qualifies as an exempt administrative employee. Current conditions in our national economy in par-

191. Cunningham, *supra* note 4, at 1245-46; *see supra* note 21 and accompanying text.

192. *See World Bank: Economy worst since Depression*, CNNMONEY.COM (Mar. 9, 2009, 7:04 AM), http://money.cnn.com/2009/03/09/news/international/global_economy_world_bank/. (regarding the status of the current economic downturn); *see Databases, Tables & Calculators by Subject, Unemployment Rate*, BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, <http://data.bls.gov/timeseries/LNS14000000> (last visited Apr. 15, 2012) (demonstrating the unemployment rate from 2002 to the present). The chart on the website indicates the unemployment rate during the recession was highest in October, 2009 at 10%. *Id.* The rate reported in March, 2012 remained high, reducing only slightly to 8.2%. *Id.* At the start of the recession in January, 2008, the unemployment rate was 5%. *Id.*

193. *Davis*, 587 F.3d at 535.

194. *Id.*

195. *Id.*

196. Final Rule, *supra* note 27, at 22,123.

ticular make application of the production/administration dichotomy sound policy when analyzing the status of salespeople.

B. *Exemptions to the FLSA Overtime Requirements Should Be Narrowly Construed*

Since the Supreme Court decided *Arnold v. Ben Kanowsky, Inc.* in 1960,¹⁹⁷ courts have held that exemptions to remedial employment statutes must be construed narrowly against employers seeking to assert them, and should be “‘limited to those establishments plainly and unmistakably within [the exemption’s] terms and spirit.’”¹⁹⁸ However, in examining case law interpreting the administrative employee exemption to the FLSA, it is clear that courts have applied these principles differently.

The Second Circuit has correctly followed the intentions of the *Arnold* court. Construing the administrative exemption to the FLSA narrowly would require courts to include a wide variety of job designations among those qualifying for overtime wages. Particularly because the nature of jobs available to the American worker has changed so dramatically from the time the FLSA was promulgated, courts must examine a litigant’s job with the “terms and spirit”¹⁹⁹ of the FLSA in mind, as applying the FLSA literally to the modern job market is no longer possible.²⁰⁰ This Note argues that the Second Circuit has properly interpreted the FLSA as applying to a broader category of modern jobs. This broad application succeeds in narrowly construing the exemptions to the FLSA, as well as limiting the Act’s exemptions to those jobs “plainly and unmistakably within [the exemption’s] terms and spirit.”²⁰¹

1. The Second Circuit

In *Reiseck v. Universal Communications of Miami*, the Second Circuit acknowledged that a magazine publisher was not the prototypical business originally contemplated by the FLSA, as it was

197. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960).

198. *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 7 (1st Cir. 1997) (quoting *Arnold*, 361 U.S. at 392).

199. *Arnold*, 361 U.S. at 392. For a discussion regarding the changing nature of jobs available to the American worker, see *supra* note 161 and accompanying text.

200. *Tilson & Glenn*, *supra* note 39, at 171. See also *supra* notes 42-49 and accompanying text (discussing background of how the job market has changed since the original promulgation of FLSA).

201. *Arnold*, 361 U.S. at 392.

neither a manufacturer nor a retailer.²⁰² Designating whether the plaintiff's work qualified as exempt pursuant to the FLSA was therefore more difficult.²⁰³

The *Reiseck* court interpreted the regulations broadly in favor of employees by determining that Reiseck's primary job duties placed her outside the administrative exemption.²⁰⁴ As discussed, the *Reiseck* court defined advertising space as a "product" of the magazine.²⁰⁵ If magazine space was a product, and Reiseck's primary job duty was to sell that product, her job duties placed her on the *production* rather than the *administration* side of the company. According to the regulations, performing production work indicated that an employee's primary job duty was not "'directly related to management policies or general business operations of [the] employer,'"²⁰⁶ and therefore was outside the boundaries of the administrative exemption.²⁰⁷

Universal's sale of advertising space is similar to a financial services employee's sale of financial products.²⁰⁸ "Neither fits neatly [into] the traditional retail sales model" within the original FLSA, yet both are considered products sold directly to clients.²⁰⁹ The *Reiseck* court's broad application of the production/administration dichotomy and broad analogy to the financial services employees

202. *Reiseck v. Universal Commc'ns of Miami, Inc.*, 591 F.3d 101, 106 (2d Cir. 2010). See discussion *supra* Part II.A.

203. *Reiseck*, 591 F.3d at 106.

204. *Id.* at 107. The court conceded Reiseck performed duties other than actual sales during the course of her employ. *Id.* However, the court relied on the definition within the regulations that "an employee's 'primary duty' is the duty that consumes a 'major part, or over [fifty] percent, of the employee's time.'" *Id.* (quoting 29 C.F.R. § 541.103 (2004)) ("[D]efining 'primary duty' for the executive employee."). The court also referred to 29 C.F.R. § 541.206, which "appli[es] the definition of 'primary duty' for the executive employee to the administrative employee." *Reiseck* 591 F.3d at 107 (quoting 29 C.F.R. § 541.206 (2004)).

205. See discussion *supra* Part II.A.

206. *Reiseck*, 591 F.3d at 105 (citing 29 C.F.R. § 541.2(a) (2004)).

207. *Id.* at 107. Although this case evaluated the plaintiff's exempt status by applying the pre-2004 regulations, the court indicated the new regulations were entitled to some deference if the reviewing court deemed them persuasive. *Id.* at 105-08 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

208. *Id.* at 108. The court analogized the discussion of financial sector employees within the 2004 regulations in determining the sale, or production, of the company's advertising space placed Ms. Reiseck outside the administrative exemption. *Id.* Like the financial sector employee who sold her employer's financial products directly, in selling her employer's product of advertising space, Ms. Reiseck also fell outside of the boundaries of the administrative exemption. *Id.*

209. *Id.*

discussed within the regulations are examples of the Second Circuit construing the exemptions narrowly against employers.

In holding the plaintiff class of pharmaceutical sales representatives did not qualify for the administrative exemption, the Second Circuit also construed the exemptions narrowly in *In re Novartis Wage and Hour Litigation*.²¹⁰ The *Novartis* court focused on the third prong of the regulatory test, whether the employees “exercise[d] discretion and independent judgment with respect to matters of significance.”²¹¹ Although the court conceded that the sales representatives’ job duties permitted *some* discretion and independent judgment, the court held the sales representatives did not exercise *enough* discretion and independent judgment to elevate them to the status of an exempt employee.²¹² Such an interpretation of the job duties of the plaintiff sales representatives indicates the *Novartis* court construed the exemptions narrowly against the employer.

The Second Circuit also construed the exemptions to the FLSA narrowly in *Davis v. J.P. Morgan Chase*.²¹³ The court determined that the plaintiffs had a primary job duty of selling loans for their bank employer. As discussed, the Second Circuit also applied the production/administration dichotomy in evaluating the exempt status of the loan officers. As it had done in the *Reiseck* decision, the court reasoned that because the plaintiffs’ primary duty was to sell loan products, their work was unrelated to either setting management policies of the bank or to its general business operations, and instead concerned the “production” of loans.²¹⁴ As such, the loan officers did not meet the second prong of the regulatory test, that their “work [be] directly related to management policies or general

210. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 157 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011); *see* Leffler, *supra* note 77 (“Rejecting a broad reading of the FLSA’s exemptions, the Second Circuit relied upon the [] DOL’s narrow interpretation of the regulations . . .”). The *Novartis* court relied heavily on the amicus brief filed on behalf of the plaintiffs by the DOL. *See* discussion *supra* Part III.B.

211. *Novartis*, 611 F.3d at 149. The sales representatives had the freedom to decide in what order to call on physicians, how to best use the budget they were given for sales presentations, and how to designate the use of the free samples they were given for distribution. *Id.* at 157. Additionally, sales representatives tailored their presentations to best suit the particular physician audience, and selected which speakers would be most appropriate to present to doctors reluctant to accept individual sales calls. *Id.* at 145-46.

212. *Id.* at 144-46.

213. *Davis v. J.P. Morgan Chase*, 587 F.3d 529, 535 (2d Cir. 2009).

214. *Id.* at 534. The Second Circuit decided the *Davis* case a few weeks before hearing arguments on the *Reiseck* case. *See id.* at 537.

business operations”²¹⁵ Thus, they did not qualify for the administrative exemption. In viewing the job duties of the loan officers in this way, the Second Circuit again construed the exemptions narrowly against the bank employer.

Construing the exemptions to the FLSA narrowly creates a presumption *against* the exemption. To rebut the presumption, an employer seeking to apply the exemption has the burden to prove an employee qualifies for the exemption.²¹⁶ Courts in the Second Circuit have ruled on the exempt status of the employees in question as though they were presumed not to be exempt. As such, the Second Circuit has construed the exemptions to the FLSA narrowly.

2. The Majority Rule

The majority of courts ruling on whether sales personnel qualify as exempt administrative employees has not followed the directive of *Arnold*, which requires exemptions to the FLSA to be narrowly construed against employers.²¹⁷ The First Circuit, for example, has fallen short of *Arnold's* mandate. In *Cash v. Cycle Craft Co., Inc.*,²¹⁸ the court addressed whether a salesperson qualified for the administrative exemption in a setting that had been *directly addressed* in the regulations, a retail store.²¹⁹

In holding that the plaintiff was an administrative employee, the First Circuit relied on the reasoning from *Reich v. John Alden Life Ins. Co.*, where the court held that the life insurance company's marketing representatives were administrative employees.²²⁰ Similarly, the *Cash* court held that Cash's job duties placed him within the boundaries of the administrative exemption.²²¹ The First Cir-

215. *Id.* at 537. The court indicated that a “literal reading of ‘production,’” limited only to “tangible goods has no basis in law or regulation.” *Id.* at 532.

216. *Novartis*, 611 F.3d at 150 (“The burden of proving that employees fall within such an exemption is on the employer.”).

217. *See, e.g.*, *Smith v. Johnson & Johnson*, 593 F.3d 280, 285 (3d Cir. 2010); *Darveau v. Detecon* 515 F.3d 334, 339 (4th Cir. 2008); *Cash v. Cycle Craft Company, Inc.*, 508 F.3d 680, 686 (1st Cir. 2007).

218. *Cash v. Cycle Craft Company, Inc.*, 508 F.3d 680, 684 (1st Cir. 2007).

219. 29 C.F.R. § 541.201(a) (2004). The regulation states that in order for work to be considered as directly related to the management or general business operations of the employer, it must be “directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or *selling a product in a retail or service establishment.*” *Id.* (emphasis added).

220. *Cash*, 508 F.3d at 685.

221. *Id.* at 686. The plaintiff was hired as a New Purchase/Customer Service Manager, whose job duties included working with various departments within the com-

cuit held that Cash qualified for the administrative exemption because he “did not simply produce a product; he exercised independent judgment as he engaged in the company’s business operations.”²²²

Such a literal and limited interpretation of the regulations does not comport with the command that the exemptions be construed narrowly.²²³ *Arnold’s* holding, that the exemptions apply “to those establishments plainly and unmistakably within [the exemptions] terms and spirit,”²²⁴ indicates that the Supreme Court interpreted the regulations to require that any business fitting within the “spirit” of the FLSA should have its exemptions narrowly construed.

As a retail establishment, the business at issue in this case is exactly the type of establishment that should fall outside of the exemption.²²⁵ A narrow application of the exemption would likely result in finding that the work performed by Cash was *incidental* to sales, and therefore qualifying as direct sales or production work. The regulations indicate that “[p]romotional work [which] is actually performed incidental to and in conjunction with an employee’s own outside sales or solicitations is exempt work[, while] promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.”²²⁶

While the marketing representatives in the *John Alden* case worked with agents outside of their company to make sales, Cash

pany to ensure customers received their motorcycles outfitted as they had ordered, and liaison between customers and the company to ensure the motorcycle was delivered and the customer was satisfied with the purchase. *Id.* at 682. Cash was “engaged in something more than routine selling efforts focused simply on particular sales transactions.” *Id.* at 685 (quoting *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 10 (1997)). Also, because “Cash exercised discretion in reacting to the unique needs of [the company’s] customers, . . . [he was] ‘not merely [a] ‘skilled’ worker[] who operate[d] within a strict set of rules.’” *Id.* at 686 (quoting *Reich*, 126 F.3d at 14).

222. *Id.*

223. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); see *Cash*, 508 F.3d at 683.

224. *Arnold*, 361 U.S. at 392.

225. 29 C.F.R. § 541.201(a) (2004) (addressing retail establishments).

226. 29 C.F.R. § 541.503(a) (2004). Although this section of the regulations addresses the outside sales exemption rather than the administrative exemption, other sections of the regulations apply a definition within one exemption to another of the exemptions. See 29 C.F.R. § 541.103 (2004); 29 C.F.R. § 541.206 (2004). For example, § 541.103 defines “primary duty” for the executive employee, while § 541.206 applies the definition of “primary duty” for the executive employee to the administrative employee. *Id.*; 29 C.F.R. § 541.103. Such a practice is an indication the different sections of the regulations are intended to apply to each other.

worked with other employees within the same business to do the same.²²⁷ His role can be interpreted as another step in the line of producing or selling the product of the company, the Harley Davidson motorcycle. In other words, he helped “produce” the motorcycles, as his role was to ensure customers received what they ordered, and were satisfied with their purchases. He was not involved with management decisions, or with running the business. As a production worker, he is the prototypical employee intended to be protected by the FLSA,²²⁸ and therefore, outside the boundaries of its exemptions.

The Third Circuit, like the First Circuit, has failed to follow *Arnold*'s mandate. In *Smith v. Johnson & Johnson*,²²⁹ the court held that the plaintiff was exempted from the overtime requirements of the FLSA as an administrative employee.²³⁰ However, the Third Circuit's application of the principle enunciated in the *Arnold* case falls short.²³¹ In holding that Smith performed duties directly related to the general business operations of the company, the court referred only to the strategic plan Smith developed.²³² To be sure, Smith had no involvement in determining the overall business strategy of Johnson & Johnson. The court disregarded the strict parameters within which the plaintiff was expected to perform her job.²³³ Although Smith executed her job without oversight, she was told what to do and say when calling upon referring physicians.²³⁴ In these ways, Smith's job was analogous to the “line worker,” or *production* worker, contemplated by the original iteration of the FLSA.²³⁵ The *Smith* case indicates that the Third Circuit has not held the defendant employer to its burden of proving the plaintiff

227. *Cash*, 508 F.3d at 685.

228. 29 C.F.R. § 541.201(a).

229. *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010).

230. *Id.* at 285. In so deciding, the court referred to several aspects of her job. *Id.* at 282. Although her employer, Johnson & Johnson, gave Smith a list of how many physicians to call on each day, she decided which doctors to see and when. *Id.* While Smith was given a budget, she had control over how to spend the money she was allocated. *Id.* The court also relied on the testimony of the plaintiff, in which she indicated that she had freedom and responsibility in her job because she was unsupervised most of the time. *Id.* In her deposition, Smith also claimed she ran her territory in the manner she wanted. *Id.* at 282-83. See discussion *supra* Part II.B.

231. See *Smith*, 593 F.3d at 284.

232. *Id.* at 285.

233. *Id.* at 282. For example, the plaintiff was given a list of specific doctors to target, a prepared “message” to convey to the physicians, and was provided with visual aids to use during sales meetings. *Id.*

234. *Id.*

235. See, e.g., Final Rule, *supra* note 27, at 22,142.

fell within the exemption, and has not succeeded in construing the exemption narrowly.

The failure of the Third Circuit to construe the exemption narrowly raises an important issue regarding the application of the regulatory test. The court conceded that applying the test as they have could prompt different results based on slightly different facts.²³⁶ A test so susceptible to different interpretations is fundamentally unfair. The court itself indicated that such a test could lead to a circumstance where two representatives employed by the same company might find themselves in a situation where one received overtime benefits and one did not.²³⁷ Such an imbalance is a further indication that courts should follow the Second Circuit's lead in construing the exemptions to the FLSA narrowly.

While the Second Circuit has construed the exemptions narrowly, the majority of reviewing courts, in holding generally that salespeople are exempt administrative employees, have not done so. When a salesperson's job duties have aspects of exempt and nonexempt work, as is often true, case law dictates the exemptions to the regulations are to be construed narrowly and the employer's burden in exempting an employee from overtime pay is high. Such a high burden of proof indicates sales personnel are more likely than not to fall outside the administrative exemption, as selling is considered "production" in the production/administration dichotomy. Through their literal and limited application of the regulations, courts in the majority have set up a circumstance where the regulations apply differently to employees with identical job duties, and apply exemptions to jobs the FLSA clearly intended to protect. Permitting such an outcome flies in the face of the purpose of construing the exemptions narrowly, and of the FLSA overall.

C. *The DOL is Entitled to Deference*

The DOL has spoken on a number of occasions regarding the exempt status of sales personnel.²³⁸ This Note argues that because the DOL is entitled to deference in interpreting the FLSA and its own regulations, reviewing courts should follow the lead of the

236. *Smith*, 593 F.3d at 283 n.1 (“[W]e recognize that based on different facts, courts, including this Court, considering similar issues involving sales representatives for other pharmaceutical companies, or perhaps even for J & J, might reach a different result than that we reach here.”).

237. *Id.*

238. *See supra* Part III (regarding the DOL's interpretation of the exempt status of salespeople in recent years).

DOL, as the Second Circuit has done, thereby holding that, as a general rule, salespeople *do not* qualify for the administrative exemption.

1. The 2004 Amendments: The “Final Rule”

Pursuant to the express language of the statute, the Secretary of Labor has the delegated power to administer and enforce the FLSA.²³⁹ After undergoing the requisite notice and comment procedure, the DOL promulgated amended regulations defining and delimiting the overtime exemptions to the FLSA.²⁴⁰ When the language of a statute is ambiguous, reviewing courts are required to give controlling deference to an agency’s interpretation of the statute unless the interpretation is found to be arbitrary, capricious, or contrary to the statute.²⁴¹

The FLSA does not unambiguously define the parameters of the white-collar exemptions. The statute merely exempts “any employee employed in a bona fide . . . administrative capacity . . .”²⁴² without indicating which workers qualify as administrative employees. Because the statute is ambiguous, the agency regulations must define what is meant by an “administrative employee.” In fact, the statute gives the Secretary of Labor a clear directive to “define[] and delimit[] [administrative employees] from time to time by regulations.”²⁴³ In the 2004 Final Rule, the DOL outlined the appropriate method to determine whether an employee is exempt from the Act’s overtime provisions.²⁴⁴ The DOL’s official position regarding how the FLSA is to be interpreted is entitled to controlling deference, and therefore has the force of law.²⁴⁵

239. See 29 U.S.C. §§ 204(a)-(b), 211(a), 216(c), 217 (2006).

240. Final Rule, *supra* note 27, at 22,122; see *supra* notes 51-66 and accompanying text.

241. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984).

[T]he court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

Id. at 843; see also *Long Island Care at Home, Ltd v. Coke*, 551 U.S. 158, 165-68, 171-75 (2007); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).

242. 29 U.S.C. § 213(a) (2006).

243. *Id.*

244. 29 C.F.R. § 541.201(a) (2004).

245. *Chevron*, 467 U.S. at 842-44.

The FLSA was established as a remedial statute, and, therefore, must be interpreted broadly in favor of protecting the right of employees to receive overtime pay.²⁴⁶ As indicated, the Final Rule construes the statute broadly by including a wide array of workers in the category of those entitled to overtime compensation.²⁴⁷ At the same time, the Final Rule illustrates the DOL's conscious decision to retain the production/administration dichotomy in the amended regulations.²⁴⁸ Because the DOL is entitled to controlling deference regarding its interpretation of the FLSA, reviewing courts have been charged with the duty of both construing the Act broadly and applying the production/administration dichotomy in evaluating the status of employees as administrative.

The Second Circuit has succeeded in giving due deference to the DOL's position. Recent case law indicates that the Second Circuit has both construed the FLSA broadly in favor of employees and applied the production/administration dichotomy.²⁴⁹ Both the *Reiseck* and *Davis* cases are evidence of the Second Circuit properly applying the 2004 regulations.

Conversely, the majority of the reviewing courts have not met the DOL's directive to construe the FLSA broadly in favor of employees.²⁵⁰ The First Circuit ignored the directive of the DOL in

246. See, e.g., *Herman v. Fabri-Ctrs. of Am., Inc.* 308 F.3d 580, 585 (6th Cir. 2002). The FLSA is "'remedial and humanitarian in purpose,' and 'must not be interpreted or applied in a narrow, grudging manner.'" *Id.* (quoting *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)).

247. See *supra* Part III.

248. To that end, the 2004 regulations limited the administrative exemption to only those employees whose "work directly relate[d] to assisting with the running or servicing of the business" as distinguished from production or selling. 29 C.F.R. § 541.201(a) (2004); see *supra* Part III.

249. See, e.g., *Reiseck v. Universal Comm'ns of Miami, Inc.*, 591 F.3d 101, 108 (2d Cir. 2010). The court's treatment of the advertising space the plaintiff sold as the "product" of the employer magazine in the *Reiseck* case is an example of such broad construction. *Id.* at 106-07. Also, the court applied the production/administration dichotomy in holding that because Ms. Reiseck's primary duty was to sell the product of the magazine, her work fell into the production category, and thus did not contribute to the business of running the business. *Id.* at 107. See also *Davis v. J.P. Morgan Chase*, 587 F.3d 529, 537 (2d Cir. 2009). The court construed the FLSA broadly by holding the loans sold by the plaintiff underwriter to be a "product" of the bank. *Id.* at 534. Additionally, in determining the plaintiff was not exempt, the court referenced the specific section of the regulations addressing the production/administration dichotomy. *Id.* at 535. The Second Circuit effectively established a rule that intangible goods, such as the loan products which were the subject of the *Davis* case, can be considered "products" under the FLSA. *Id.* at 532.

250. See, e.g., *Smith v. Johnson & Johnson*, 593 F.3d 280, 285 (3d Cir. 2010), *Cash v. Cycle Craft Co., Inc.*, 508 F.3d 680 685-86 (1st Cir. 2007); see also *Darveau v. Detecon, Inc.*, 515 F.3d 334, 337-39 (4th Cir. 2008). The Fourth Circuit failed to con-

the 2004 regulations in *Cash v. Cycle Craft Co., Inc.*²⁵¹ Despite the fact that the plaintiff's role appeared to clearly fall on the production side of selling motorcycles, the First Circuit explicitly shunned the broad application of the FLSA favoring employees and found the plaintiff to be exempt from the overtime requirements.²⁵²

In *Smith v. Johnson & Johnson*, the Third Circuit also held that the plaintiff qualified as an exempt administrative employee.²⁵³ In reaching this conclusion, the court relied on limited facts, such as the fact that the plaintiff developed her own strategic plan to execute the duties of her position.²⁵⁴ The court disregarded the dichotomy test within the regulations, ignoring the fact that the plaintiff's primary duty was to sell the product of the employer pharmaceutical sales company.²⁵⁵

2. The 2010 Administrator's Interpretation

In the 2010 Administrator's Interpretation, the DOL strongly posited that sales personnel within the mortgage loan industry were not exempt from the FLSA's overtime protections.²⁵⁶ In making such a determination, the DOL again relied on the production/ad-

strue the regulations broadly by holding the plaintiff salesperson exempt from FLSA overtime protections. *Id.* at 338. The plaintiff's work was analogous to a line worker producing the product of the company for which he worked. Here, the company product was wireless telecommunication service. *Id.* at 336. Darveau "produced" the cell service by selling the service to new customers. *Contra id.* at 338-39. His contribution to the company did not advance the overall policies of the business. *Contra id.* at 339. In addition, Darveau had no authority to make independent decisions, and therefore did not perform his duties with discretion and independent judgment. *Contra id.* at 338-39. Had the Fourth Circuit construed regulations broadly, the court would have held that Darveau qualified for overtime compensation. Interestingly, in support of its holding, the court referenced the 2006 Wage and Hour Opinion letter, subsequently withdrawn by the DOL. *Id.* at 338. *See supra* Part III.A (discussing DOL withdrawal of 2006 Wage and Hour Opinion letter).

251. *Cash*, 508 F.3d 686.

252. *Id.* The court determined the plaintiff did not coordinate motorcycle ordering or delivery, nor did he supervise any employees. *Id.* at 682. Although he occasionally attended management meetings, his role was merely to report to management about the status of pick-up and delivery of the products sold—the motorcycles. *Id.* "Often, after Cash provided these reports, [the manager] told him to leave the meeting." *Id.* "In sum, Cash did not simply produce a product; he exercised independent judgment as he engaged in the company's business operations." *Id.* at 686.

253. *Smith*, 593 F.3d at 285.

254. *Id.*

255. *Id.*

256. ADMINISTRATOR'S INTERPRETATION No. 2010-1, *supra* note 14; *see supra* Part III.A.

ministration dichotomy within the regulations.²⁵⁷ The Department enunciated standards that apply to salespeople *in general*, in addition to mortgage loan officers.²⁵⁸ The AI is entitled to controlling deference, as the DOL's interpretation of the regulations in the AI is neither clearly erroneous nor inconsistent with the regulations.²⁵⁹

To be sure, courts have struggled with the level of deference to give agency-issued pronouncements such as Opinion Letters and other interpretive materials.²⁶⁰ However, in *United States v. Mead Corp.*,²⁶¹ the Supreme Court enunciated a "category" of agency interpretations that should still be afforded controlling deference, despite the fact that the interpretation did not involve formal rulemaking procedure such as notice and comment.²⁶² In other words, lack of formal rulemaking procedure was not dispositive of controlling deference.²⁶³ If Congress intended to establish controlling deference, courts should accord such deference.²⁶⁴

257. ADMINISTRATOR'S INTERPRETATION NO. 2010-1, *supra* note 14; *see supra* Part III.A.

258. ADMINISTRATOR'S INTERPRETATION NO. 2010-1, *supra* note 14; *see supra* Part III.A. The AI stated that an employee who had the primary duty of sales qualified as a non-exempt production employee under the FLSA. In addition, the AI indicated that in order to determine whether an employee's primary duty was making sales, "work performed *incidental* to sales should . . . also be considered sales work." ADMINISTRATOR'S INTERPRETATION NO. 2010-1, *supra* note 14 (emphasis added).

259. *See, e.g.*, *Fed. Express Corp v. Holowecki*, 552 U.S. 389, 390 (2008).

260. *See, e.g.*, *Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000) (finding opinion letters and guidance documents do not warrant controlling deference); *Kilgore v. Outback Steakhouses of Fla., Inc.*, 160 F.3d 294, 303 (6th Cir. 1998) (finding a DOL opinion letter unpersuasive). *Contra* *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) (controlling deference given to an agency's advisory memorandum); *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002) (determining that an agency's informal pronouncement was entitled to controlling deference regardless of the lack of notice and comment rulemaking).

261. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

262. *Id.* at 230-31.

263. *Id.* at 231. The court's position regarding notice and comment in *Mead* was a shift in thinking. *See, e.g.*, *Hector v. U.S. Dep't of Agric.*, 82 F.3d 165, 167-69 (7th Cir. 1996) (holding that if an agency pronouncement is intended to be binding, notice and comment is required).

264. Ronald M. Levin, *Mead and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 774 (2002). The *Mead* Court indicated that if "a plausible case [could] be made that Congress would want . . . a delegation [of rulemaking authority] to mean that agencies enjoy *primary* interpretational authority," controlling deference should apply to informal agency procedures. *Mead*, 533 U.S. at 230 n.11 (quoting Thomas W. Merrill & Kristen E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 872 (2001)) (emphasis added). This position is not without its detractors, however. Professor Levin argues "the congressional intent criterion would . . . give . . . lower courts essentially no meaningful guidance." Levin, *supra* at 774. Levin indicates a better reading of *Mead* would interpret an agency's action as binding, or having the force of

The 2010 AI falls within the category of agency interpretations deserving of controlling deference enunciated in the *Mead* case. The DOL was given the express authority to administer and enforce the FLSA.²⁶⁵ In order to properly meet this directive, the DOL must ensure the regulations are interpreted and applied correctly. Indeed, the preamble to the 2004 regulations describes the DOL's "statutory duty to define and delimit the section 13(a)(1) exemptions from time to time."²⁶⁶ By issuing the AI, the DOL has met this statutory directive by clarifying what it described to be a "misleading assumption and selective and narrow analysis" enunciated in the 2006 Opinion Letter regarding mortgage industry sales personnel.²⁶⁷ As the preamble to the regulations makes clear, their purpose is to both restore overtime protections where they had eroded over time, and to bring the FLSA in line with the changes to the American workplace since the statute was enacted.²⁶⁸ Classifying mortgage salespeople as production workers entitled to overtime compensation as the AI did meets these goals of the amended regulations. As such, the AI is entitled to controlling deference.

While this Note argues that the AI qualifies for controlling deference pursuant to the principles in *Mead*, the AI is still entitled to *persuasive* deference if a court finds otherwise. The *Mead* holding indicates that if a court determines that an agency's interpretation is not entitled to controlling deference, this does not place it "outside the pale of any deference whatever."²⁶⁹ The rule regarding controlling deference did not displace, but merely supplemented the rule from *Skidmore v. Swift & Co.*²⁷⁰ *Skidmore* argued that agency interpretations are entitled to *some* deference.²⁷¹ The reasons for

law, "if it alters or determines legal rights or obligations." *Id.* at 775. Either reading of *Mead*, however, would yield the same result. Because the Administrator's Interpretation does not answer a *specific* set of facts, it is intended to have binding effect on the exempt status of a particular category of worker, here, salespeople.

265. See 29 U.S.C. §§ 204(a)-(b), 211(a), 216(c), 217 (2006).

266. Final Rule, *supra* note 27, at 22,122 (internal quotations omitted).

267. ADMINISTRATOR'S INTERPRETATION NO. 2010-1, *supra* note 14, at 8.

268. Final Rule, *supra* note 27, at 22,122. See *supra* Part III.A (discussing the Final Rule). "By way of this rulemaking, the Department seeks to restore the overtime protections intended by the FLSA . . . which have eroded over the decades. In addition, workplace changes . . . and federal case law developments are not reflected in the current regulations." Final Rule, *supra* note 27, at 22,122.

269. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

270. *Skidmore et al. v. Swift & Co.*, 323 U.S. 134 (1944).

271. *Id.* at 139 ("The weight of [the agency's interpretation] will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

such deference are twofold. First, an agency such as the DOL is considered the expert in the field addressed in the litigation.²⁷² The agency has access to “broader investigations and information” than that which is available to courts interpreting a particular statute.²⁷³

Second, uniform application of the law is essential.²⁷⁴ It would be fundamentally unfair for a mortgage broker, for example, working for one bank to be ineligible for overtime compensation, while a broker working for a different bank would be entitled to overtime pay for identical job duties. At the same time, employers need a uniform standard by which to classify salespeople in order to avoid costly litigation.²⁷⁵ Deferring to the DOL’s position classifying salespeople as production workers ensures the FLSA will be enforced in a uniform manner.

The DOL itself reinforced this principle in the Preamble to the 2004 regulations, which indicated the regulations were being updated “to ensure that employees could understand their rights, employers could understand their legal obligations, and the Department could vigorously enforce the law.”²⁷⁶ Therefore, even if the AI does not qualify for controlling deference, because it is thorough in its analysis, well-reasoned, and consistent with the 2004 regulations, it is entitled to persuasive deference under *Skidmore*.²⁷⁷

272. *Mead*, 533 U.S. at 234.

273. *Id.* (quoting *Skidmore*, 323 U.S. at 139).

274. *Id.*

275. The current pharmaceutical industry litigation is an example of why a clear standard for classifying sales personnel is warranted. As indicated earlier in this Note, courts reviewing the exempt status of pharmaceutical sales representative have differed in their classification of such workers. Without a clear standard, some pharmaceutical companies have found themselves subject to large judgments, while others have avoided liability. See *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011). *Contra* *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011).

276. Final Rule, *supra* note 27, at 22,122.

277. Some scholars suggest that even when courts apply persuasive *Skidmore* deference as opposed to controlling *Chevron* deference, courts are more likely to defer to the agency’s interpretation. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1275 (2007). In a sample of courts applying the *Skidmore* standard, deference to an agency was given approximately sixty percent of the time. *Id.*

3. The Amicus Brief on Behalf of the Plaintiffs in *Novartis*

The DOL's amicus brief in the *Novartis* case²⁷⁸ is entitled to controlling deference as it can be considered an interpretation of the DOL's own regulation.²⁷⁹ Since 1945, courts have held that an agency's interpretation of its own regulations should be upheld "unless it is plainly erroneous or inconsistent with the regulation."²⁸⁰ The Secretary of Labor enunciated this standard in the amicus brief, stating "[t]his principle holds true whether the Secretary's interpretation is found in a Preamble to a final rule published in the Federal Register, an opinion letter or other interpretive materials, or in a legal brief."²⁸¹

In *Auer v. Robbins*,²⁸² the Supreme Court addressed the specific issue of the level of deference due the DOL's interpretation of the regulatory test for exempt employees when the interpretation came in the form of an amicus brief.²⁸³ The Court indicated that the fact that the DOL's interpretation was enunciated in an informal agency pronouncement such as an amicus brief was of no consequence, as the brief was an agency's interpretation of its own regulation.²⁸⁴

Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.²⁸⁵

278. Amicus Brief, *supra* note 14. In the brief, the Secretary took the position that the plaintiffs were not exempt from the overtime requirements of the FLSA as the plaintiffs did not exercise discretion and independent judgment in carrying out the duties of their respective jobs. *Id.* at 7.

279. *See, e.g., Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008) ("Just as [the courts] defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance, . . . the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force."); *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

280. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see also Fed. Express Corp.*, 552 U.S. at 397; *Auer*, 519 U.S. at 461.

281. Amicus Brief, *supra* note 14, at 7 n.3.

282. *Auer*, 519 U.S. 452.

283. *Id.* at 461.

284. *Id.* at 462.

285. *Id.*

The amicus brief is not “‘plainly erroneous or inconsistent with the regulation.’”²⁸⁶ In fact, in determining that the pharmaceutical sales representatives did not exercise the requisite discretion and independent judgment, the Secretary referenced specific sections of the regulations.²⁸⁷ A reading of the regulations indicating that sales reps did not exercise discretion and independent judgment in performing their job duties is simply an interpretation the Secretary is entitled to make and courts are required to respect. Because the DOL is entitled to deference in interpreting the FLSA, and the interpretation is neither erroneous nor inconsistent with the regulation, reviewing courts should defer to the holding in the amicus brief and find that salespeople do not qualify for the administrative exemption.

CONCLUSION

The FLSA is one of the most important worker protections in America.²⁸⁸ The Act’s overtime protections have afforded benefits to millions of employees throughout its history.²⁸⁹ In light of the devastating effect the recent “Great Recession” has had on the American worker, the protections of the FLSA are as relevant now as they ever were.²⁹⁰ Due to the broad remedial nature of the statute, any exemptions to the FLSA must be narrow and limited.²⁹¹ The FLSA should therefore apply as though there is a presumption *against* the exemptions.

Salespeople, as service personnel, are analogous to the line worker or production workers in the original FLSA, and among the category of worker the FLSA was established to protect.²⁹² By analogizing salespeople to production workers, salespeople generally fall outside the boundaries of the administrative exemption. The production/administration dichotomy has been a useful tool in

286. *Id.* at 461 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

287. Amicus Brief, *supra* note 14, at 12 (referencing 29 C.F.R. §§ 541.202(e), 541.203(g)-(i) (2004)).

288. Final Rule, *supra* note 27, at 22,123.

289. *Id.*

290. *See, e.g., Great Recession Transforms the Workplace*, MSNBC.COM (Sept. 27, 2009), http://www.msnbc.msn.com/id/33020534/ns/business-success_in_hard_times (“The Great Recession has reshaped the American workplace and work force in ways that will last years, if not longer . . . Perhaps the most enduring change is the permanent loss of millions of jobs across the manufacturing, services and retail sectors.”).

291. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

292. ADMINISTRATOR’S INTERPRETATION NO. 2010-1, *supra* note 14 (quoting Final Rule, *supra* note 27, at 22,141).

extending the protections of the FLSA to the greatest number of workers.

There are myriad benefits to evaluating sales personnel as production workers. First, it creates a uniform system of employee classification. Such a classification promotes both just administration of the law and efficiency within the legal system. A uniform standard will enable employers to ensure similarly situated workers are subject to the FLSA overtime pay provision in the same manner. At the same time, uniformity will prevent one employer not required to pay overtime wages from having an unfair economic advantage over another employer in the same industry who is required. A uniform system minimizes misclassification of employees. Employers will have guidance regarding which employees are entitled to overtime, preventing the unfair surprise of a judgment indicating large sums of overtime pay are due employees. Proper classification will also reduce time consuming and costly litigation, promoting efficiency in the judicial system.

Through recent regulation and informal interpretive rules, the DOL has succeeded in both extending the protections of the FLSA to the greatest number of workers and creating a uniform system of employee classification. Classifying sales personnel as production workers and applying the requirements of the FLSA overtime provision as if there is a presumption against any exemptions furthers these goals. The DOL is entitled to deference both because it has been charged with the duty of enforcing the FLSA and it is interpreting its own regulations. Reviewing courts should follow the lead of both the DOL and the Second Circuit, and find, as a general rule, salespeople do not qualify for the administrative exemption. Like the production workers protected by the original iteration of the FLSA, salespeople are entitled to protection under the Act and should be paid overtime compensation.

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