

FLSA: EXEMPTING PARALEGALS FROM OVERTIME PAY

I. INTRODUCTION

The practice of law in the United States has undergone significant transformation in response to the changing economic, social and political climate of American society. Americans are often recognized for their litigious nature, and recent statistics support this position.¹ In order to provide clients with quality legal representation without imposing severe financial and administrative costs, law firms have increasingly turned to paralegals² or legal assistants to aid them in performing legal services.³

1. The Federal system is inundated with lawsuits. In 1991, plaintiffs filed 207,610 new cases in United States District Courts. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 2 (1993). By 1993, plaintiffs had filed 228,162 cases. *Id.*

Not all commentators agree that the United States is overly litigious. See, e.g., Randall R. Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?*, 54 LAW & CONTEMP. PROBS. 5, 8 (1991) (noting that although many consider Americans highly litigious, most malpractice victims do not file claims); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5-6 (1983) (rebutting claims of an American litigation explosion); Marc S. Klein, *Megatrends in International Product Liability Law*, 949 A.L.I.-A.B.A. 113, 120 (Aug. 19, 1994) (questioning whether America's unique products liability system results from the litigious nature of Americans).

2. In this Note, the term "paralegal" includes "legal assistants," "nonlawyer practitioners," James Podgers, *Legal Profession Faces Rising Tide of Non-Lawyer Practice*, ARIZ. ATT'Y, Mar. 1994, at 24, and "nonlawyer assistants," David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators & Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791 (1995), employed by law firms. Paralegals working in prisons are not addressed in this Note. For a discussion of prison paralegals, see James K. Haslam, *Prison Labor Under State Direction: Do Inmates Have the Right to FLSA Coverage and Minimum Wage?*, 1994 B.Y.U. L. REV. 369, 372 (1994) (concluding that the FLSA should not cover prisoner paralegals because Congress did not intend the statute to extend this far and because it would undermine public policy supporting prisoner incarceration). See also *Prisoners' Legal Ass'n v. Roberson*, 822 F. Supp. 185, 190-91 (D.N.J. 1993) (stating that interference with paralegal inmates' rights to assist other prisoners with complaints, appeals, and petitions would violate the Fourteenth Amendment right to Due Process).

This Note similarly omits self-employed paralegals that the legal community commonly refers to as "legal technicians." See Rosalind Resnick, *Looking at Alternative Services: The Lawyer/Non-Lawyer Wall Continues to Erode*, NAT'L L.J., June 10, 1991, at 1, 32. Legal technicians are non-lawyers who fill out legal forms, assist in real estate transactions, and finalize divorces. *Id.* Supporters of legal technicians argue that they provide assistance to an otherwise forgotten area of society, namely poor and middle-class Americans, by charging lower fees, offering convenient locations, and taking on smaller cases. Rosalind Resnick, *Legal Technicians Face Regulation*, NAT'L LAW J., June 22, 1992, at 42. Opponents argue that legal technicians often engage in the "unauthorized practice of law" ("UPL") by performing duties reserved for licensed attorneys. *Id.* A discussion of the concerns raised by legal

This trend has resulted in confusion as to appropriate limits on paralegal responsibilities⁴ and the proper classification of paralegals under state and federal employment statutes.⁵

The Fair Labor Standards Act of 1938 ("FLSA")⁶ exempts certain classes of employees from the right to receive overtime pay⁷ based on the salary received, the type of work performed and the amount of discretion and individual judgment exercised.⁸ Paralegals once performed mostly clerical tasks including filing, pulling cases off shelves and photocopying.

technicians is beyond the scope of this Note given the extensive number of articles written on the subject. *See, e.g., id.*; Jeff Simmons, *Nonlawyer Practice Rules: No Turning Back*, ARIZ. ATT'Y, Mar. 1994, at 19. For a discussion of UPL as it relates to law firm paralegals, see *infra* notes 139-52 and accompanying text.

For an explanation of the overtime pay exemption as it relates to public sector employees, see Exemptions From Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employers, 57 Fed. Reg. 37,666 (1992).

3. In the 1970s, law firms generally consisted of attorneys, financial support staff, and secretaries. *See* Richard S. Granat and Dana K. Saewitz, *Paralegals Move Up to Management*, NAT'L L.J., Jan 30, 1989, at 19. Today, increased competition among firms has restrained partners' availability to perform basic legal tasks and thus necessitated increased delegation of routine duties and administrative practices. *Id.*

4. For a discussion of the ethical and legal limits of paralegal practice, *see infra* notes 138-52 and accompanying text.

5. This Note addresses paralegal classification under the Fair Labor Standards Act of 1938. 29 U.S.C. § 206 (1988 & Supp. IV 1992). For examples of similar state classifications, see ALASKA STAT. § 23.10.055 (Supp. 1994); CONN. GEN. STAT. ANN. § 31-76 (1995); MINN. STAT. ANN. § 177.23 (West 1993); IDAHO CODE § 67-5302 (1989).

6. 29 U.S.C. §§ 201-219 (1988).

7. Section 213 of the FLSA provides that "the provisions of sections 206 . . . and section 207 of this title shall not apply with respect to—(1) any employee employed in a bona fide executive, administrative, or professional capacity . . ." 29 U.S.C. § 213(a)(1) (1988 & Supp. IV 1992). Section 206 provides:

(a) Employees engaged in commerce . . .

Every employer shall pay to each of his employees who work in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than \$3.35 an hour during the period ending March 31, 1990, not less than \$3.80 an hour during the year beginning April 1, 1990, and not less than \$4.25 an hour after March 31, 1991; . . .

29 U.S.C. § 206 (1988 & Supp. IV 1992). Section 207 provides that "it is important to note that exemption does not become an issue under the FLSA until it is determined that the employee is 'covered' by the Act. That is, unless the employee is engaged in commerce or in the production of goods for commerce, determination of exemption is unnecessary." 29 U.S.C. § 207 (1988 & Supp. IV 1992). *See also Krill v. Arma Corp.*, 76 F. Supp. 14, 17 (E.D.N.Y. 1948) (refusing to find an employee covered by the Act when he did "not engage in commerce or in the production of goods for commerce").

8. 29 C.F.R. §§ 541.01-541.602 (1993).

Today, paralegals often engage in tasks involving more sophisticated legal skills. Nonetheless, the Department of Labor ("DOL") maintains that paralegals are not exempt under the FLSA and are, thus, entitled to overtime pay.⁹ In March 1994, for example, the DOL filed suit against a Texas law firm¹⁰ alleging violations of the FLSA overtime pay requirements. Although the DOL emphasizes the need to evaluate each exemption claim on a case-by-case basis,¹¹ to date, it has not exempted paralegals under the Act.

The problem with labelling all paralegals "non-exempt" is that law firms and paralegals disagree as to whether exemption is appropriate in this context. For example, one survey revealed that only fifty-eight percent of paralegals questioned believed that they should receive overtime pay.¹² Furthermore, the approaches adopted by law firms lack uniformity.¹³ Under the FLSA, the penalties for failure to pay required overtime wages can be severe, leaving law firms open to liability if they erroneously classify their paralegals.¹⁴

The question then remains whether paralegals should be exempt from the overtime pay requirements of the FLSA. This Note argues that the American Bar Association ("ABA") should develop consistent standards of certification in order to exempt all paralegals. The benefits of such a scheme would be uniformity, increased morale among paralegal employees, and more productive and efficient use of paralegal skills. The occupational status of paralegal practice is currently unsettled because paralegals do not clearly fall within or without the definition of exemption found in the

9. The DOL expressed its opinion in its brief filed in *Reich v. Page & Addison*, No. 3:91-CV-2655-P, slip op. (N.D. Tex. March 10, 1994). Despite DOL opposition, the court in *Page & Addison* held that the paralegals employed at the Page & Addison law firm were administratively exempt from the FLSA and thus not entitled to overtime compensation. *Id.* See *infra* notes 153-59 and accompanying text (discussing *Page & Addison*). The DOL did not challenge this ruling. *Reich v. Page & Addison*, No. 94-10435, slip op. (5th cir. Sept. 21, 1994) (dismissing appeal).

10. Brief for the Department of Labor, *Reich v. Page & Addison*, P.C., (N.D. Tex. 1994) (No. 3:91-CV-2655-P).

11. Telephone Interview with Vonda Marshall, Staff Attorney, Department of Labor (Sept. 26, 1994) [hereinafter Marshall Interview].

12. Richard T. Cassidy & Jan L. Browning, *Paralegal Overtime: Yes, No, or Maybe*, TEX. BAR J., Jan. 1994, at 32 (citing *LEGAL ASSISTANT TODAY*, May/June 1992).

13. *Id.* Sixty-three percent of the survey respondents reported that their firms did not pay them overtime wages. *Id.*

14. 29 U.S.C. § 216 (1988 & Supp. IV 1992) (imposing fine of up to \$1000 for each violation of sections 206 or 207).

regulations accompanying the FLSA.¹⁵ Careful analysis, however, reveals that exemption is both consistent with the modern definition, and a mutual benefit to all parties involved.

Part II of this Note addresses the criteria for executive, administrative, and professional exemption under the FLSA. Part III explores penalties for overtime pay violations. Part IV discusses the history of paralegals in American law firms, their roles in the legal process, and the dangers inherent in delegating paralegal responsibilities. Part V enumerates and analyzes the various arguments for and against paralegal exemption, and suggests possible methods of fitting paralegals within the exemption definitions. Part VI concludes that paralegals should be exempt from overtime pay under the FLSA, and offers proposals for implementation of this new status.

II. EXEMPTION UNDER THE FAIR LABOR STANDARDS ACT OF 1938

Although the FLSA exempts executives, administrators and professionals from minimum pay and maximum hour requirements,¹⁶ the Act's legislative history provides no guidance for this exclusion.¹⁷ One author¹⁸ suggests alternative reasons for the exemptions: the Act's primary purpose of protecting workers who are most susceptible to exploitation;¹⁹ the drafters' fears about the constitutionality of covering these employees;²⁰ absence of a need for government regulation;²¹ unattractive financial burdens on employers;²² or potential infeasibility of regulating these employees.²³ The author enumerates problems with each of these rationales, however,²⁴ and concludes that the "professional-managerial"

15. See, e.g., EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL 369 (1987) (listing paralegals as providing "miscellaneous business services").

16. 29 U.S.C. § 213(a)(1) (1988).

17. See, e.g., *Joint Hearings Before the Committee on Education and Labor on S. 2475 and H.R. 7200*, 75th Cong., 1st Sess. 45 (1937).

18. Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139 (1993).

19. *Id.* at 161.

20. *Id.* at 162.

21. *Id.* at 165.

22. *Id.* at 176.

23. *Id.* at 182.

24. *Id.* at 160-86.

exemptions should be eliminated altogether.²⁵

Given the unlikelihood of eliminating the FLSA exemptions, it is necessary to understand their operations to assess whether employees meet the criteria.²⁶

A. *Operation of the Exemptions*

Whether an employee falls within one of the exemptions enumerated in the FLSA is determined by the trier of fact.²⁷ In the Act, Congress authorized the Secretary of Labor ("the Secretary") to define the terms "executive," "administrative" and "professional."²⁸ The guidelines developed by the Wage and Hour Division of the DOL do not carry the force of law, but courts generally accept the guidelines as valid.²⁹ The Act states that executive, administrative and professional employees—exempt employees—need not receive compensation for hours worked in excess of the standard work week.³⁰ However, the FLSA does not further classify the types of employees covered.³¹ The regulations advanced by the Wage and Hour Division of the DOL ("Wage and Hour Regulations") purport to clarify what types of employees fit within each of these categories,³² but

25. *Id.* at 189. The author explains that Congress adopted the exemptions when only a small portion of the workforce was "managerial-professional." *Id.* at 153-60. "Managerial-professionals" were predominantly male, enjoyed a high level of respect and stature, worked fewer hours and almost never experienced unemployment. *Id.* The author suggests that such justifications no longer exist because of recent changes in size, composition, stature, hours, and stability of "managerial-professional" occupations. *Id.* He proposes that the hours of managers and professionals should be regulated, with such workers receiving mandatory "comp time" instead of overtime pay. *Id.* at 186-88. See also ROSABETH M. KANTER, WHEN GIANTS LEARN TO DANCE: MASTERING THE CHANGES OF STRATEGY, MANAGEMENT AND CAREERS IN THE 1990S 267-80 (1989); JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE 66-67 (1991), cited in DeChiara, *supra* note 18, at 140 n.4.

26. The executive, administrative and professional exemptions have been an integral part of the FLSA since its passage in 1938. Congress has never indicated an intent to change this exemption policy.

27. See, e.g., *Walling v. General Indus. Co.*, 330 U.S. 545, 546-47 (1947) (indicating that the district court made "special findings of fact" in exempting employees under the FLSA); see also *Hoyt v. General Ins. Co. of America*, 249 F.2d 589, 590 (9th Cir. 1957) (stating that authorities are "uniform" in analyzing the question of employee exemption as "an ultimate question of fact").

28. 29 U.S.C. § 213(a)(1) (1988).

29. But see *Hoyt*, 249 F.2d at 590 (finding that although courts may use the regulations of the Wage and Hour Division as guidelines, they do not constitute binding authority).

30. 29 U.S.C. § 213 (1988). Conversely, non-exempt employees are entitled to overtime pay for each hour worked beyond the standard 40 hours per week. 29 U.S.C. § 206 (1988 & Supp. IV 1992).

31. 29 U.S.C. § 213 (1988).

32. 29 C.F.R. §§ 541.1-541.3 (1995).

there is disagreement as to the application of the delineations.³³ Further complicating the analysis, neither title³⁴ nor salary³⁵ alone determines exemption status.

1. Executive Exemption

The Wage and Hour Regulations set forth six requirements for executive exemption. First, the employee's primary duty must be management of the employing establishment.³⁶ Second, the employee must "customarily and regularly direct the work of two or more employees."³⁷ Third, the employer must have authority to hire, fire, and promote employees directly

33. The large number of exemption disputes between employers and employees underscores the ambiguity of the exemption classification. *See, e.g.*, *Dalheim v. KDFW-TV*, 918 F.2d 1220 (5th Cir. 1990) (granting overtime pay to general-assignment reporters, producers, directors and assignment editors); *Jackson v. Kentucky*, 892 F. Supp. 923 (E.D. Ky. 1995) (granting employees overtime pay after misclassification as exempt administrators); *Mueller v. Thompson*, 858 F. Supp. 885 (W.D. Wis. 1994) (finding state employees properly exempt under FLSA and not entitled to overtime pay); *Freeman v. National Broadcasting Co., Inc.*, 846 F. Supp. 1109 (S.D.N.Y. 1993) (finding employees of news division of television network not exempt as professionals or administrators); *Hilbert v. Washington, D.C.*, 784 F. Supp. 922 (D.D.C. 1992) (granting overtime pay to police captains and lieutenants given their failure to qualify for executive, administrative or professional exemption); *Harris v. District of Columbia*, 741 F. Supp. 254 (D.D.C. 1990) (granting overtime pay to supervisory housing inspectors); *Palardy v. Horner*, 711 F. Supp. 667 (D. Mass. 1989) (finding technical employees of Department of Navy not exempt as administrators or professionals); *Pezzillo v. General Tel. & Electronics Info. Sys., Inc.*, 414 F. Supp. 1257 (M.D. Tenn. 1976) (denying administrative exemption for computer programmers). Unfortunately, courts have failed to resolve the cases consistently. *See, e.g.*, *Quark v. Baltimore County, MD*, 895 F. Supp. 773 (D. Md. 1995) (finding emergency medical service captains exempt executives); *Amshay v. United States*, 26 Cl. Ct. 582 (Cl. Ct. 1992) (granting overtime pay to sergeants and lieutenants in Secret Service). For examples of occupations deemed both exempt and non-exempt, see 29 U.S.C.A. § 213 (West 1988).

34. *See, e.g.*, *Justice v. Metropolitan Gov't of Nashville, Davidson City, Tenn.*, 4 F.3d 1387 (6th Cir. 1993) (noting that classification of employees as exempt depends upon responsibilities and tasks, not titles). The label attached to a given job cannot be the only factor in deciding exemption because of potential injustice. *See Freeman v. Nat'l Broadcasting Co., Inc.*, 846 F. Supp. 1109 (S.D.N.Y. 1993) (titles can be had cheaply and are of no determinative value) (citing § 541.201(b)). A secretary entitled to overtime pay could be deprived of these wages by changing her title to "administrative assistant." Similarly, a non-executive, administrative, or professional job title does not automatically remove an employee from exemption. Because job titles do not necessarily reflect the actual duties performed, they often are insufficient indicators of exempt status.

35. *See George Lawley & Son Corp. v. South*, 140 F.2d 439, 444 (1st Cir.), *cert. denied*, 322 U.S. 746 (1944). The *Lawley* court indicated that salary alone does not exempt an employee from overtime wages: because "the component parts of [the Wage and Hour Division's] regulations are stated in the conjunctive, an employee must come within all of them in order to be exempt." *Id.* at 444. Thus, compliance with the salary requirement is insufficient to exempt an employee absent compliance with the other requirements.

36. 29 C.F.R. § 541.1(a) (1995).

37. *Id.* § 541.1(b).

or through influential suggestions.³⁸ Fourth, the employer must "customarily and regularly" exercise discretionary powers.³⁹ Fifth, the employer must devote only a limited amount of time to non-exempt activities.⁴⁰ Finally, the employer must compensate the employee on a salary basis.⁴¹

This "long test" applies to employees earning less than \$250 per week.⁴² Employees earning over \$250 per week need only satisfy the requirements of the "short test." These include regularly overseeing two or more supervisors, and exercising discretionary powers.⁴³ Courts give only three of the "short" and "long test" requirements significant attention and explanation.

First, executives must "customarily and regularly" exercise discretionary powers.⁴⁴ This requirement does not entail routine decisionmaking, but rather "discretion as to policy."⁴⁵ Employee discretion must involve decisions beyond those made by experienced, skilled workers in their daily

38. *Id.* § 541.1(c).

39. *Id.* § 541.1(d).

40. *Id.* § 541.1(e).

41. *Id.* § 541.1(f). The complete definition of "executive" as advanced in the Wage and Hour Division Regulations is as follows:

The Term *employee employed in a bona fide executive . . . capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent . . . of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: . . . ; and

(f) Who is compensated for his services on a salary basis at a rate of not less than \$155 per week . . . exclusive of board, lodging, or other facilities: *Provided*, That an employee who is compensated on a salary basis at a rate of not less than \$250 per week . . . exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

29 C.F.R. § 541.1 (1995).

42. BRUCE McLANAHAN, FAIR LABOR STANDARDS ACT CHECKLIST (PLI Litig. & Admin. Practice Course Handbook Series no. H4-5219, 1995). The \$250 threshold is subject to change. See KAREN L. CORMAN, EMPLOYMENT REGULATIONS, OVERVIEW AND UPDATE (PLI Litig. & Admin. Practice Course Handbook Series no. H4-5189, 1994).

43. 29 C.F.R. § 541.1(f) (1995). *See also* McLANAHAN, *supra* note 42, at 612-13.

44. 29 C.F.R. § 541.1(d) (1995).

45. *See* Carstarphen v. Windleg, 112 F. Supp. 692, 694 (E.D.N.C. 1953).

activities.⁴⁶ However, the existence of “well-defined employer policies” is not enough to automatically remove an employee from this category.⁴⁷ In *Anderson v. Federal Cartridge Corp.*,⁴⁸ the Federal Court for the District of Minnesota held that because no business can operate effectively without such policies, exemption cannot logically depend on the ability to change them.⁴⁹

Second, executives must devote a limited amount of time to nonexempt work.⁵⁰ In *George Lawley & Son Corp. v. South*,⁵¹ an employer wanted the court to exempt an employee from the FLSA requirements.⁵² The employer contended that “not devot[ing] more than 20 percent”⁵³ of work hours to nonexempt activities referred to twenty percent of the hours worked by all nonexempt employees, not just the employee whose status was in question.⁵⁴ The First Circuit concluded that such an interpretation would create an anomalous result by exempting every employee with five or more individuals working under him.⁵⁵

The third issue receiving judicial scrutiny is the requirement that executives be compensated “on a salary basis at a rate of not less than \$155 per week.”⁵⁶ If an employee’s salary falls within this range, exemption is possible but not conclusive.⁵⁷ The reviewing court must still apply the “salary basis” test.⁵⁸

The salary basis test requires that an employee receive fixed compensation regardless of work quality or hours worked.⁵⁹ This requirement

46. *Schanck v. Lehigh Valley R.R.*, 52 N.Y.S.2d 491, 492 (N.Y. City Ct. 1944).

47. *Anderson v. Federal Cartridge Corp.*, 62 F. Supp. 775, 781 (D. Minn. 1945), *aff’d*, 156 F.2d 681 (8th Cir. 1946).

48. 62 F. Supp. 775.

49. *Id.* at 781.

50. 29 C.F.R. § 541.1(e) (1995). Exempt employees may not spend more than 20% of their time on non-exempt activities. *Id.*

51. 140 F.2d 439 (1st Cir.), *cert. denied*, 322 U.S. 746 (1944).

52. *Id.* at 443.

53. 29 C.F.R. § 541.1(e) (1994).

54. 140 F.2d at 444.

55. *Id.*

56. 29 C.F.R. § 541.1(f) (1995).

57. See *George Lawley & Son Corp. v. South*, 140 F.2d at 444.

58. The “salary basis” test is identical for executives and administrators. See 29 C.F.R. §§ 541.1(f), 541(e)(1) (1995). For professionals, the test only differs by fifteen dollars. See 29 C.F.R. § 541.1(f), 541.2(e)(1) (1994)). Thus, the “salary basis” test covers all three exemptions.

59. The Wage and Hour Regulations define “salary basis” as follows:

(a) An employee will be considered to be paid “on a salary basis” within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his

exposes employers to unanticipated liability by placing otherwise exempt employees outside the exemption, thereby entitling them to back-pay.⁶⁰ For example, an employer who denies an employee overtime pay for two years by claiming exemption, may become liable for that money by making salary deductions for jury duty.⁶¹ A 1992 study indicated that private-sector employers may be liable for over thirty-nine billion dollars in unpaid overtime wages, yet fail to modify their practices to avoid liability.⁶²

In practice, application of the executive exemption to employees has not resulted in a uniform standard.⁶³ Courts emphasize different aspects of the definition and focus on different facts in reaching their conclusions.⁶⁴ For example, a Michigan Federal District Court exempted a bookkeeper under the FLSA because he monitored his employer's banking activities and heavily influenced his superiors' decisions.⁶⁵ In contrast, an Oklahoma Federal District Court did not exempt a bookkeeper who supervised his employer's business transactions and monitored company payments.⁶⁶

compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

29 C.F.R. § 541.118(a) (1995). However, as commentators indicate, paying an employee a "salary" as opposed to an hourly wage does not satisfy this definition. See Matthew M. Smith & Steven H. Winterbauer, *Overtime Compensation Under the FLSA: Pay Them Now or Pay Them Later*, 19 EMP. REL. J. 23, 25 (1993). The authors also note that the DOL has interpreted "salary basis" as not allowing exempt employees to receive salary deductions for missing a few hours of work. *Id.*

60. See Smith & Winterbauer, *supra* note 59, at 25. See *infra* notes 106-10 and accompanying text for a description of the penalties for provision violations.

61. *Id.*

62. See Smith & Winterbauer, *supra* note 59, at 25, 47 n.5 (citing *The Private Sector Costs of the Department of Labor's Pay Docking Policy*, Policy Paper, Employment Policy Foundation, 1992). Authors Smith and Winterbauer identified six policies likely to subject employers to liability:

- (1) salary deductions for part-day absences;
- (2) benefits deductions for part-day absences from sick, personal, or vacation leave;
- (3) payment of additional compensation, including overtime pay or compensatory time off, tied directly to the number of extra hours worked;
- (4) suspensions without pay for disciplinary infractions;
- (5) salary deductions for absences caused by jury duty, attendance as a witness, or temporary military leave; and
- (6) suspensions without pay for temporary budget-related business requirements.

Id. at 25.

63. Compare *Wells v. Radio Corp. of America*, 77 F. Supp. 964 (D.N.Y. 1948) (finding foreman was an exempt executive); *Hoff v. North American Aviation*, 67 F. Supp. 375 (D. Tex. 1946) (holding foreman of airplane factory was an exempt executive); *with Anderson v. Federal Cartridge Corp.*, 72 F. Supp. 639 (D. Minn. 1947) (finding shift foreman was not an exempt executive); *Gibson v. Atlantic Co.*, 63 F. Supp. 492 (D. Ga. 1945) (holding night foreman was not an exempt executive).

64. See cases cited *supra* note 63.

65. *Burke v. Lecrone-Benedict Ways*, 63 F. Supp. 883, 885-86 (E.D. Mich. 1945).

66. *Patton v. Williams*, 61 F. Supp. at 884, 885-86 (E.D. Okla. 1943).

Ultimately, executive status does not guarantee exemption. Exemption determinations focus on the particular employee's duties, not on job titles or wages.

2. *Administrative Exemption*

Qualification as an administrative⁶⁷ employee may also be accomplished under either a "short test"⁶⁸ or "long test."⁶⁹ The "short test" applies to employees earning at least \$250 per week,⁷⁰ and requires that (1) the employee primarily perform work directly related to "management policies or general business operations of his employer or his employer's customers,"⁷¹ and (2) the employee "customarily and regularly exercise discretion and independent judgment."⁷² In contrast, the "long test" requires satisfaction of both elements of the "short test," as well as the remaining provisions of the Wage and Hour Regulations.⁷³ Because most employees satisfy the \$250 threshold, courts rarely apply the "long test."⁷⁴

One part of the "short test" analyzes the level of employee discretion and

67. The Wage and Hour Division's regulations define an "administrative" employee as one:

- (a) Whose primary duty consists of either:
 - (1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or
 - (2) The performance of functions in the administration of a school system . . . ; and
 - (b) Who customarily and regularly exercises discretion and independent judgment; and
 - (c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or
 - (2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or
 - (3) Who executes under only general supervision special assignments and tasks; and
 - (d) Who does not devote more than 20 percent . . . of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and
 - (e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than \$155 per week . . . exclusive of board, lodging, or other facilities, or
 - (2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis . . .

29 C.F.R. §§ 541.2(a)-541.2(e)(2) (1995).

68. See *Ahern v. New York*, 807 F. Supp. 919, 925 (N.D.N.Y. 1992) (explaining the "short test").

69. See *Schockley v. City of Newport News*, 997 F.2d 18, 25 (4th Cir. 1993) (distinguishing the "short" and "long test").

70. *McLanahan, supra* note 42, at 612-13.

71. 29 C.F.R. § 541.2(a)(1).

72. *Id.* § 541.2(b).

73. See *Ahern*, 807 F. Supp. at 924-26.

74. See *McLanahan, supra* note 42, at 61. The author notes that because the \$250 threshold is so low, "almost all employees having any responsibility will qualify." *Id.*

independent judgment.⁷⁵ Under this test, an employee must "choose a course of action from among a number of possible alternatives" to qualify for exemption.⁷⁶ A primary concern is whether the employee actually has authority to make decisions.⁷⁷ One court defined this as requiring "more discretion than an experienced, skilled worker might exercise . . . in his day-to-day activities."⁷⁸

Although courts consider how frequently superiors reverse or review discretionary decisions, this factor alone will not automatically preclude a finding of exemption.⁷⁹ Courts evaluate the tests performed to assess the validity of exemption. In *Shockley v. City of Newport News*,⁸⁰ the Fourth Circuit held that "media relations sergeants"—police sergeants who collect information off the "crime line," develop broadcasts, and handle press relations⁸¹—were not administrators under the Act because they lacked the requisite authority and discretion.⁸² Similarly, in *Berg v. Newman*,⁸³ the Federal Circuit Court of Appeals refused to categorize air traffic control repairmen as exempt administrators because, despite their expertise, they did not exercise discretion on a daily basis.⁸⁴ Both *Shockley* and *Berg* indicate that administrators must maintain some level of autonomy to qualify for exemption.

Additionally, courts require that decision-making employees possess a significant degree of choice regarding matters of substantial importance to the employer's operations.⁸⁵ For example, even though New York State police investigators have a primary duty to prevent and investigate crimes, the Northern District of New York refused to exempt them because they did not administer the business affairs of the agency.⁸⁶ Thus, absent an ability to affect the employer's business, even employee autonomy is insufficient for exemption.

75. *Id.* at 925. See also 29 C.F.R. § 541.2(b) (1995).

76. Smith & Winterbauer, *supra* note 59, at 34.

77. *Id.*

78. See *Schanck v. Lehigh Valley R.R.*, 52 N.Y.S.2d 491, 492 (N.Y. City Ct. 1944).

79. See *Dymond v. U.S. Postal Serv.*, 670 F.2d 93 (8th Cir. 1982) (finding administrative exemption viable for employee notwithstanding supervisor reversal).

80. 997 F.2d 18 (4th Cir. 1993).

81. *Id.* at 28.

82. *Id.* at 28-29.

83. 982 F.2d 500 (Fed. Cir. 1992).

84. *Id.* at 503.

85. See *Christenberry v. Rental Tools, Inc.*, 655 F. Supp. 374, 376 (E.D. La. 1987). See also 29 C.F.R. § 541.207.

86. See *Ahern v. New York*, 807 F. Supp. 919, 926 (N.D.N.Y. 1992).

A second element of the “short test” requires employees to engage in work “directly related to management policies.”⁸⁷ According to one article,⁸⁸ work must be broken down into “production” tasks and “administrative” tasks.⁸⁹ Employees are not administratively exempt unless they perform duties beyond the basic services of the employer’s business.⁹⁰ For example, in *Schockley*, the Fourth Circuit refused to find that media relations sergeants were exempt employees because none of their duties rose to the level of discretionary authority or managerial decisionmaking.⁹¹

3. Professional Exemption

The DOL scrutinizes employee education when applying the professional exemption test.⁹² The “short test” requires that the employee engage in work requiring “knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes.”⁹³ It also requires consistent exercise of judgment or discretion, and applies to employees earning over \$250 per week.⁹⁴ Employees who do not meet the \$250 salary threshold must satisfy all requirements of the wage and hour regulations.⁹⁵ The educational requirement for this exemption distinguishes it from both the executive and administrative exemptions.⁹⁶ Thus, analysis of this criterion is essential in determining whether the professional exemption applies.

The Wage and Hour Regulations make “knowledge of an advanced type”⁹⁷ necessary for professional exemption.⁹⁸ The regulations require

87. *Id.* at 925. *See also* 29 C.F.R. § 541.2(a)(1) (1995).

88. Smith & Winterbauer, *supra* note 59, at 23.

89. *Id.* at 36.

90. *Id.*

91. 997 F.2d 18, 28-29 (4th Cir. 1993).

92. Marshall Interview, *supra* note 11.

93. 29 C.F.R. § 541.301(a) (1995). *See* McLanahan, *supra* note 42, at 612.

94. *Id.* § 541.301(e). *See* McLanahan, *supra* note 42, at 612.

95. *See* McLanahan, *supra* note 42, at 612.

96. *Id.* § 541.301(a).

97. *Id.* § 541.301(b).

98. The Wage and Hour Regulations define a “professional employee” as one:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from

an employee to acquire a degree beyond a high school diploma.⁹⁹ Although this will often lead to an advanced degree, it is the knowledge and not the degree that is most important.¹⁰⁰ For example, in *Otis v.*

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- training in the performance of routine mental, manual, or physical processes, or
(2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or
(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge . . . , or
(4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering . . . ; and
(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and
(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and
(e) Who is compensated for services on a salary or fee basis at a rate of not less than \$170 per week . . . exclusive of board, lodging, or other facilities: *Provided*, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further*, That an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week . . . exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a)(1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section . . .

29 C.F.R. § 541.3 (1995).

99. 29 C.F.R. § 541.301(b) (1995). See also Ernest N. Votaw, *The Professional Exemption in the Fair Labor Standards Act*, 5 VAL. U. L. REV. 511, 515 (1970) (discussing the education requirements of professional exemption). A letter ruling issued by the DOL's Wage and Hour Division determined that a bona fide professional employee should possess "at least a bachelor's degree." Priv. Ltr. Rul. (June 12, 1984) (no number assigned), reprinted in WAGE AND HOUR DIVISION, DEP'T OF LABOR, FAIR LABOR STANDARDS HANDBOOK app. III at 74-75 (1986) [hereinafter FLSA HANDBOOK]. The Administrator exempted physician's assistants from this requirement. *Id.*

100. See Votaw, *supra* note 99, at 515. Votaw disagrees with the use of education level to evaluate whether an employee is exempt. *Id.* at 516. He examines several areas that do not lend themselves to realistic classification under the Wage and Hour Division's criteria. Among these are journalism, computer science, electronics and engineering. *Id.* at 517-19. Votaw emphasizes the inequity of characterizing a job requiring two years of solid, hands-on experience as "non-professional," while characterizing a job with identical requirements, but necessitating a four-year degree, as "professional." *Id.* at 519.

Mattila,¹⁰¹ the Minnesota Supreme Court refused to exempt an accountant notwithstanding his advanced accounting degree, because he failed to exercise the requisite discretion.¹⁰²

Furthermore, courts analyze exempt status by scrutinizing the duties performed, not by deferring to the employee's title.¹⁰³ For example, in *Walling v. Morris*,¹⁰⁴ the Sixth Circuit refused to exempt an individual working as "superintendent of maintenance" because he devoted twenty-five percent of his working hours to routine tasks identical to those performed by those he supervised.¹⁰⁵

B. Penalties for Overtime Pay Violations

Employers who do not comply with the FLSA requirements¹⁰⁶ leave themselves vulnerable to rather severe penalties. Section 216(b) of the Act provides that a violation of the minimum wage and maximum hour requirements will result in liability to the affected employee "in the amount of their unpaid minimum wages, or their unpaid overtime compensation," as well as an equal amount in liquidated damages.¹⁰⁷ Furthermore, repeat violations may result in a civil penalty of up to \$1,000 per violation.¹⁰⁸

A recent case, *Reich v. Newspapers of New England, Inc.*,¹⁰⁹ provides an example of the heavy monetary penalties employers may face for misclassifying their employees. The defendant, a small New England newspaper, failed to pay its reporters, editors, and photographers overtime wages, believing they were professionally exempt under the FLSA.¹¹⁰ The Federal District Court of New Hampshire found the paper liable for \$10,445.80 in unpaid overtime.¹¹¹ *Reich* illustrates the importance of properly classifying employees' positions under the FLSA.

101. 160 N.W.2d 691 (Minn. 1968).

102. *Id.* at 696.

103. See *supra* note 34.

104. 155 F.2d 832 (6th Cir. 1946), vacated on other grounds *sub nom.* *Morris v. McComb*, 332 U.S. 422 (1947).

105. *Id.* at 836.

106. See *supra* notes 6-8.

107. 29 U.S.C. § 216(b) (1988).

108. 29 U.S.C. § 216(e) (1988).

109. 834 F. Supp. 530 (D.N.H. 1993), *aff'd*, 44 F.3d 1060 (5th Cir. 1995).

110. *Id.* at 533.

111. *Id.* at 539-42.

III. THE HISTORICAL ROLE OF THE PARALEGAL

A. *Definition of Paralegal*

Because the FLSA focuses on duties performed and authority exercised, the definition of "paralegal" is crucial in determining how such employees will be treated.¹¹² A general definition of "paralegal" is a person qualified through education, training, or work experience, to perform substantive legal work under the supervision of a practicing attorney.¹¹³ However, because the breadth of authority and duties given paralegals varies by firm, individual firms may manipulate the work description of their paralegals to fall within or without the FLSA's coverage. Thus, because paralegals' positions are defined by the specific tasks they perform, paralegals may fall under different FLSA classifications.

B. *Origins of the Paralegal Profession*

The recent growth of the paralegal profession began in the early 1970s.¹¹⁴ In 1968, the ABA Special Committee on the Availability of Legal Services formally recognized the use of nonlawyer services to "free[]

112. For a description of the regulatory classification and requirements of executive, administrative, and professional exemption, see *supra* notes 41, 67 and 98.

113. This definition represents a compilation of definitions espoused by the National Federation of Paralegal Associations ("NFPA"), the ABA, and Black's Law Dictionary. The NFPA defines a paralegal/legal assistant as, "a person qualified through education, training or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer." *Workshops for Legal Assistants: 1995, NFPA Paralegal Responsibilities*, 525 A.L.I. 165 (1995) [hereinafter *Workshops for Legal Assistants*]. The ABA defines a legal assistant as:

[A] person, qualified through education, training, or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney, specifically—delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.

Dominic Latorraca, *Regulation of Paralegals: An Upcoming Issue*, 22 COLO. LAW 493 (Mar. 1993) (citing ABA Standing Committee on Legal Assistants, ABA Board of Governors (Feb. 1986) (unpublished policy paper)).

In Black's Law Dictionary, a paralegal is defined as a "person with legal skills, but who is not an attorney, and who works under the supervision of a lawyer in performing various tasks relating to the practice of law or who is otherwise authorized by law to use those legal skills." BLACK'S LAW DICTIONARY 1111 (6th ed. 1990).

114. See *Paralegal Inst., Inc. v. American Bar Ass'n*, 475 F. Supp. 1123, 1126 (E.D.N.Y. 1979), *aff'd*, 622 F.2d 575 (2d Cir. 1980).

a lawyer from tedious and routine detail.”¹¹⁵ The Committee also created another special committee to determine the necessary training, the appropriate tasks and the foreseeable benefits of paralegals.¹¹⁶

The use of paralegals started gaining prominence in the 1970s as the increasing complexity of legal casework necessitated the use of legal assistants to continue effective representation and maintain reasonable financial costs.¹¹⁷ This prompted the increased need for paralegal schools and led to the creation of representative paralegal institutions.¹¹⁸ After several years of investigative studies and reports, the ABA Committee issued guidelines for accreditation of paralegal training institutions in 1974.¹¹⁹ That same year, the National Federation of Paralegal Associations (“NFPA”) formed to “maintain[] a communications network to assist in the development of the paralegal profession.”¹²⁰ The paralegal market’s rapid expansion led to the creation of a second nation-wide association. In 1975, the National Association of Legal Secretaries (“NALS”), recognizing the new trend towards alternative legal services, created a section for legal assistants.¹²¹ Within a year, the section severed ties with the NALS and organized as the National Association of Legal Assistants (“NALA”).¹²² Thirteen years later, the Supreme Court validated the importance of paralegal services in *Missouri v. Jenkins*,¹²³ holding that paralegal time

115. *Id.*

116. *Id.*

117. See Cassidy & Browning, *supra* note 12, at 32.

118. *See id.*

119. See *Paralegal Inst.*, 475 F. Supp. at 1127. As amended in 1990, the current ABA accreditation standards require that:

An institution provide the necessary resources and administration to properly educate and train the legal assistants

ABA STANDING COMM. ON LEGAL ASSISTANTS, GUIDELINES AND PROCEDURES FOR OBTAINING ABA APPROVAL OF LEGAL ASSISTANT EDUCATION PROGRAMS (1990) [hereinafter ABA GUIDELINES].

This includes establishing a program designed to qualify graduates for work in all law-related occupations, as well as maintaining a curriculum consistent with an accrediting agency’s requirements. *Id.* G-301, G-303(c). Institutions must be led by competent and qualified directors and instructors, and must provide students with adequate library facilities. *Id.* G-401, G-601.

120. NATIONAL FEDERATION OF PARALEGAL ASSOCIATIONS, INC., EXPANDING THE PARALEGAL PROFESSION (June 1994).

121. Cassidy & Browning, *supra* note 12, at 32.

122. *Id.* The ABA Standing Committee on Legal Assistants estimates that there are over 172 paralegal schools or programs in the U.S. Teri L. Clarke, *How to Evaluate the Qualifications of Legal Assistants*, ARIZ. ATT’Y, May 1994, at 28 (discussing paralegal training, certification and degree programs).

123. 491 U.S. 274 (1989).

must be included in the reimbursement of attorneys' fees.¹²⁴

Today, paralegals remain an important part of law firm communities. Paralegals' recent success in the recession¹²⁵ evidences their importance. In a fall 1993 report, the DOL predicted that the number of paralegals will increase eighty-three percent between 1992 and 2005.¹²⁶ The existence of approximately 77,000 paralegals in the United States legal industry demonstrates the importance of their services to law firms.¹²⁷ Between 1989 and 1992, paralegals' billable hours increased by 5.7%, with the average paralegal billing 1,429 hours in 1992.¹²⁸ These figures indicate not only the dramatic increase in demand for paralegal services, but also their established role in law firms.

C. Scope of Paralegal Duties

Paralegal duties vary significantly.¹²⁹ First, different law firms have different expectations of paralegals' roles and require varying skill levels.¹³⁰ Second, because there are currently no uniform paralegal licensing requirements, there is a wide range of skills and ability, especially at the entry-level.¹³¹ Although the ABA has developed accreditation criteria for paralegal training institutes,¹³² not all paralegals attend facilities with ABA approval. Many law firms preferring to hire individuals without any formal paralegal education nonetheless opt to specially train them in-house.¹³³ Consequently, while some paralegals could actually be classified as "legal secretaries" or "clerks," others engage in more substantive legal tasks.

For example, Firm A may limit paralegal responsibilities to filing legal

124. *Id.* at 285. See also John S. Pierce & Beverly A. Brand, *Recent Developments in Attorney Fee Disputes*, 7 U.S. F. MAR. L.J. 205 (1994) (discussing paralegal fees and billing, and their relation to job assignments).

125. Tom Weidlich, *Surviving the Downturn: After Slump, Paralegal Work on Rebound; They Faced Less Dire Layoffs Than Associates and Billable Hours Are Up*, NAT'L L.J. Apr. 25, 1994, at 1.

126. *Id.*

127. *Id.*

128. *Id.*

129. For a proposal on uniform regulation of paralegal job descriptions, see BARBARA L. ALBERT, *LEGAL ASSISTANT PROGRAM PROPOSAL* (PLI Litig. & Admin. Practice Course Handbook Series no. H4-5131, 1992).

130. See Carole A. Bruno, *Training Paralegals In-House*, PA. LAW., Mar. 1986, at 31 (suggesting training techniques for maximizing paralegal effectiveness and job satisfaction).

131. Cf. Jeffrey C. Freedman, *Overtime in the Law Office*, L.A. LAW, July/Aug. 1988, at 24 (noting that state and federal law have similar exemptions but different requirements).

132. See ABA GUIDELINES, *supra* note 119, at 1-37.

133. See Bruno, *supra* note 130, at 31-36.

documents, locating cases and writing letters, while Firm B may allow its paralegals to write briefs, attend depositions and prepare motions.¹³⁴ Given their lack of authority and discretion, paralegals in Firm A appear nonexempt under the FLSA.¹³⁵ Classifying paralegals in firms that fall in between is substantially more difficult.¹³⁶

For paralegals who are not clearly nonexempt under the FLSA, an important issue arises regarding the duties they perform. At what point do paralegal responsibilities cross the line into the realm of “unauthorized practice of law” (“UPL”)?¹³⁷

D. The Unauthorized Practice of Law

States vary in their definitions of what constitutes UPL.¹³⁸ However, most UPL statutes prohibit any individual who is not a licensed attorney

134. The Fifth Circuit enumerated paralegal duties of this latter nature in *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir.), *cert. denied*, 464 U.S. 1009 (1983), *cited in Cassidy & Browning, supra* note 12, at 33. The Court acknowledged that the paralegals involved in the suit “assisted the lawyers at trial, organized and reviewed class members’ claims, participated in telephone conferences with lawyers, witnesses, and class members, and performed complex statistical work.” *Id.* at 1023. The Court included the value of the legal secretary’s work in the attorneys’ fees award despite the fact that, without attorney supervision, this work may have constituted the unauthorized practice of law. *See infra* notes 138-52 and accompanying text.

135. *See* 29 U.S.C. § 213(a)(1) (1988); 29 C.F.R. §§ 541.1(d), 541.2(b), 541.301(2) (1995).

136. Consider Firm C which employs paralegals in *both* of these capacities.

137. Another relevant issue is paralegal ethics. Although paralegals may abide by the ABA Model Rules of Professional Conduct and the Model Code of Professional Responsibility, these regulations specifically govern the conduct of attorneys, not paralegals. *See generally AMERICAN BAR ASS’N, MODEL RULES OF PROFESSIONAL CONDUCT (1983), reprinted in 1995 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 1-145 (Thomas O. Morgan & Ronald D. Rotunda eds., 1995) [hereinafter SELECTED STANDARDS]; AMERICAN BAR ASS’N, MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981), reprinted in SELECTED STANDARDS, *supra* at 146-538; see also NAT’L FED’N OF PARALEGAL ANN’N, THE ETHICAL WALL: IT’S APPLICATION TO PARALEGALS (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5192, 1993) [hereinafter ETHICAL WALL]. To remedy this problem, the NFPA adopted ethical standards for its members. NAT’L FED’N OF PARALEGAL ASS’NS, MODEL CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY 9 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5174, 1993). For a discussion of the potential conflict of interest problems accompanying a paralegal’s change in law firms, see ETHICAL WALL, *supra*, at 19; see also Smart Indus. Corp. v. Superior Court, 876 P.2d 1176, 1181 (Ariz. 1994) (finding ethical rules of imported disqualification applied to non-lawyers).*

138. *See, e.g.*, ALA. CODE §§ 34-3-1 (1991) (making it a misdemeanor to practice law without a license); CAL. BUS. & PROF. CODE § 6002 (West 1990) (making it a misdemeanor to practice law without state bar membership); GA. CODE ANN. § 15-19-51 (1990) (making it unlawful to hold oneself out as an attorney); 705 ILCS 205/1 (Smith-Hurd 1995) (requiring a license to practice law); ME. REV. STAT. ANN. tit. 4, § 807 (West 1989) (making it unlawful to practice law without admission to state bar); N.J. STAT. ANN. § 2C:21-22 (West 1995) (finding the UPL a “disorderly persons offense”); TEX. GOV’T CODE ANN. § 81.102 (West 1988) (requiring admission to state bar in order to practice law).

from providing legal services or representation.¹³⁹ The ABA Model Code of Professional Responsibility¹⁴⁰ contains the following broad definition:

It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment¹⁴¹

To assist attorneys' effective use of paralegal services, the ABA adopted Model Guidelines for the Utilization of Legal Assistant Services.¹⁴² These guidelines allow attorneys to delegate tasks to legal assistants so long as the law does not specifically prohibit them.¹⁴³ Under the Guidelines, prohibited tasks include: providing legal advice, discussing legal fees with clients, retaining clients, writing briefs for court submission, and falsely identifying oneself as an attorney.¹⁴⁴

The growth of the paralegal profession has created a debate among attorneys, legal scholars and paralegals regarding the rules governing the unauthorized practice of law. While many attorneys insist on insulating the

139. ALA. CODE § 34-3-1 (1975). For example, Alabama's code states that:

If any person shall, without having become duly licensed to practice, or whose license to practice shall have expired either by disbarment, failure to pay his license fee within 30 days after the day it becomes due, or otherwise, practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer, he shall be guilty of a misdemeanor and fined not to exceed \$500.00, or be imprisoned for a period not to exceed six months, or both.

Id.

140. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5, 3-6 (1981), reprinted in 1995 SELECTED STANDARDS, *supra* note 137, at 176.

141. *Id.* EC 3-5.

142. AMERICAN BAR ASS'N, MODEL GUIDELINES FOR UTILIZATION OF LEGAL ASSISTANT SERVICES (1991), reprinted in Merle L. Isgett, *The Role of the Legal Assistant: What Constitutes the Unauthorized Practice of Law* at 18 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5118, 1991).

143. *Id.* Guideline 2 provides:

Provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a legal assistant any task normally performed by the lawyer except those tasks proscribed to one not licensed as a lawyer by statute, court rule, administrative rule or regulation, controlling authority, the ABA Model Rules of Professional Conduct, or these Guidelines.

Id.

144. See generally Isgett, *supra* note 142, at 7.

legal practice from outside infiltration,¹⁴⁵ paralegals and paralegal supporters contend that the practical benefits of allowing nonlawyer practitioners to perform more important tasks justify relaxing the rules.¹⁴⁶

Opponents of nonlawyer services argue that increasing paralegal duties will result in increased UPL and undermine attorney services.¹⁴⁷ Another concern is that paralegals do not receive formal legal training, and therefore are not competent to perform complicated legal tasks.¹⁴⁸ Therefore, opponents argue that clients are better served by having attorneys working on their cases.¹⁴⁹

Proponents of nonlawyer practitioners focus on the necessity of legal services in segments of our society that cannot otherwise afford quality representation. They argue that clients should have a choice between expensive attorney fees and cheaper paralegal services.¹⁵⁰ Other proponents view increased job responsibility as integral to the sustained demand for paralegals,¹⁵¹ whose services are invaluable in today's expensive legal market.

Because it is the duties performed that determine exemption, resolving the UPL issue is a critical factor in deciding whether paralegals merit exemption from overtime pay.¹⁵² Although exempting paralegals means

145. See Podgers, *supra* note 2, at 24. The author cites a Gallup Poll, conducted for the A.B.A. Journal, in which 86% of the responding attorneys endorsed acting against paralegals engaging in the unauthorized practice of law. *Id.* at 24. According to Martin D. Omoto, the legislative director of the California Coalition for Legal Access, "Lawyers hate the fact that they've got to share their profession with someone who didn't go to law school." *Id.* at 28.

146. See, e.g., Rose D. Ors, *Effective Paralegal Use Cuts Costs*, NAT'L L.J., Apr. 20, 1992, at 13, 31 (arguing paralegal use reduces client and firm costs, and promotes efficiency through organization and coordination of tasks); Barry Weisberg, *Cure for a System in Chaos*, NAT'L L.J., Oct. 19, 1992, at 13, 15 (proposing that an "extensive system of neighborhood paralegal advisers" would promote access to legal services for civil disputes).

147. See Podgers, *supra* note 2, at 26. Although UPL is recognized as a problem, one commentator pointed out that even bar leaders realize that rigid enforcement policies are unlikely to rectify this growing dilemma. *Id.*

148. *Id.* at 27. P. Terry Anderlini, former California State Bar President, questioned the ability of paralegals to adequately serve the public: "People don't show up with a nice, simple legal problem in a small neat box." *Id.* Anderlini expressed concern for paralegals' competency to "diagnose the problem in a complete sense." *Id.*

149. *Id.*

150. *Id.* at 28. Frustration with attorneys is evidenced by the rise in citizen self-representation. *Id.* at 27 (citing an ABA report indicating that in Arizona, 15,939 divorces in 1990 involved at least one self-represented party).

151. See Cheryl Frank, *Paralegal Burnout: Challenging Work Wanted*, A.B.A. J., Dec. 1984, at 30 (discussing how paralegals desire challenging, responsible work).

152. For a discussion of the various definitions of paralegal, see *supra* note 113 and accompanying text.

granting them more responsibility, UPL may be thwarted by ensuring that an attorney supervises the work performed. Thus, in the private sector, UPL may become a secondary concern.

IV. THE DEBATE OVER THE EXEMPTION OF PARALEGALS

In *Reich v. Page & Addison*,¹⁵³ a jury found paralegals administratively exempt from overtime pay under the FLSA.¹⁵⁴ The case has raised the question whether and to what extent paralegals should be exempt.¹⁵⁵ Answering this inquiry is rather difficult because the DOL, law firms, paralegal associations and even paralegals themselves do not agree on the proper response.¹⁵⁶ The DOL claims to evaluate each situation on a case-by-case basis,¹⁵⁷ but to date, the Department has never exempted a paralegal.¹⁵⁸ The NFPA has refrained from adopting a position, reasoning that its members are split on the issue.¹⁵⁹ The division among paralegals confirms the NFPA's posture. Some paralegals support exemption while others covet the overtime pay they receive as nonexempt employees.¹⁶⁰ These conflicting positions will be examined below.

A. The Argument for Nonexemption

The DOL has consistently held that paralegals do not qualify for exemption under the FLSA. A Letter Ruling issued by the DOL on August 17, 1979¹⁶¹ determined that paralegals "generally are not involved in the performance of duties . . . required by the regulations for exemption."¹⁶² Specifically, the Department found that paralegals use "skills rather than discretion and independent judgment."¹⁶³ Another Letter Ruling, issued

153. No. 3:91-CV-2655-P, slip op. at 1 (N.D. Tex. March 10, 1994).

154. *Id.*

155. For a general overview of paralegals, exemption and overtime pay, see Patricia H. Hicks & Michelle R. Neal, *Wage & Hour Laws: A Potential Pitfall for Unsuspecting Law Firms*, NEV. LAW., Dec. 1993, at 30.

156. See *supra* notes 12-13 and accompanying text.

157. Marshall Interview, *supra* note 11.

158. *Id.*

159. Telephone interview with Lu Hangley, Managing Director, National Federation of Paralegal Associations, Missouri Office (Sept. 26, 1994).

160. *Id.*

161. Priv. Ltr. Rul. (Aug. 17, 1979) (no number assigned), reprinted in FLSA HANDBOOK, *supra* note 99, app. III at, 72.

162. *Id.*

163. *Id.*

approximately one month later,¹⁶⁴ defined specific duties paralegals perform.¹⁶⁵ These included, “interviewing clients, identifying and refining problems[,] . . . drafting pleadings and petitions[,] . . . acting as general litigation assistant[,] . . . conducting formal and informal hearings . . . and performing outreach services.” The DOL found all of these duties nonexempt because they necessitated attorney supervision and did not require independent judgment.¹⁶⁶

A significant segment of the paralegal community does not view itself as executively, administratively or professionally exempt and supports the DOL’s position.¹⁶⁷ These paralegals enjoy their entitlement to overtime pay and refuse to sacrifice this compensation for a “title.”¹⁶⁸ Some of these paralegals believe that law firms are merely attempting to evade paying paralegals their just compensation.¹⁶⁹

One consistently advanced argument is that if paralegals actually perform tasks with discretion and judgment, they necessarily are engaging in UPL.¹⁷⁰ This argument receives little recognition among private sector paralegals working in law firms because most have attorney supervision.¹⁷¹

Attorneys who support the DOL’s position—that paralegals should remain nonexempt employees under the FLSA—may fear that exempting paralegals could undermine their practice. Many attorneys want to maintain their status as the only professionals licensed to practice law.¹⁷² Exempting paralegals would grant greater standing and legitimacy to non-lawyers by recognizing them as executives, administrators or professionals who

164. Priv. Ltr. Rul. (Aug. 17, 1979) (no number assigned), reprinted in *FLSA HANDBOOK*, *supra* note 99, app. III, at 72-73.

165. *Id.*

166. Priv. Ltr. Rul. (June 12, 1984) (no number assigned), reprinted in *FLSA HANDBOOK*, *supra* note 99, at 74-75. For a brief endorsement of the DOL viewpoint, see Chris Quasebarth, *Paralegals Entitled to Overtime Rates*, W. VA. LAW Feb. 1992, at 21.

167. Telephone Interview with Jan L. Browning, Certified Legal Assistant, Page & Addison, P.C. (Oct. 28, 1994). In *Page & Addison*, Browning testified on behalf of the firm in arguing for exemption. She co-authored an article on the subject in response to the lawsuit. See Cassidy & Browning, *supra* note 12.

168. *Id.*

169. *Id.* One commentator espouses an analogous argument in a non-paralegal context. Marc Linder, *Labor Department is Subverting Wage Law*, NAT’L L.J., Jan. 17, 1994, at 15 (exploring the fairness of labeling over nine million employees “executives” and making them work overtime without pay).

170. For a discussion of UPL, see *supra* notes 138-52 and accompanying text.

171. Lawyers are more legitimately concerned with UPL among legal technicians who practice without attorney supervision. See *supra* note 2.

172. See Podgers, *supra* note 2, at 24.

possess the discretion and authority to work on legal matters. The recent movement to deregulate independently practicing paralegals¹⁷³ probably concerns attorneys who believe that their importance in society will diminish.

Paralegals who oppose exemption generally believe that they receive great benefits from overtime pay, emphasizing their perceived monetary gain.¹⁷⁴ Working in excess of forty hours per week entitles nonexempt employees to time and a half, double time or some other overtime pay schedule.¹⁷⁵ To these paralegals, overtime compensation is worth more to them than the prestige or increased duties that flow from exemption.

A final concern with FLSA exemption is the potential unfairness of exempting paralegals with vastly disparate job descriptions. Because some paralegals are trained by law firms while others obtain certification, their duties vary widely.¹⁷⁶ It is arguably unfair to lump all such paralegals together and exempt individuals who are closer to "legal secretaries" than "administrators," "executives" or "professionals."¹⁷⁷ Thus, exemption potentially raises both equity and feasibility issues. Who is entitled to exemption, and how should that determination be made?

B. *The Argument for Exemption*

Proponents of paralegal exemption focus on the quality of their legal responsibilities.¹⁷⁸ Paralegals on this side of the debate are typically certified and have formal training. Exemption proponents believe that the primary issue is respect, not money, and they perceive benefits accruing to

173. *Id.* at 24, 25. See also Simmons, *supra* note 2, at 19 (describing Arizona's proposed rule regarding non-lawyer practitioners, and concluding that the rule is an appropriate response to the concerns of protecting public interests and increasing access to the judicial system); Meredith Ann Munro, *Deregulation of the Practice of Law: Panacea or Placebo?*, 42 HASTINGS L.J. 203-48 (1990) (discussing the California movement for deregulation of the legal profession). However, the majority of such movements have failed upon initiation within the states. *Id.* at 205. Only Washington has a statute allowing nonlawyer practice. *Id.* Connecticut, Montana, Nevada, New Mexico, Oregon, Texas and Utah recently rejected similar proposals. Podgers, *supra* note 2, at 25.

174. See Browning Interview, *supra* note 167.

175. For a discussion of these overtime pay methods, see *infra* notes 186-91 and accompanying text.

176. See Freedman, *supra* note 131, at 24 (noting that while paralegals often hold both college degrees and paralegal certification, these achievements are not required, and much of the work they perform does not require such advanced education).

177. For a discussion on possible ways to eliminate this disparity of duties dilemma, see *infra* notes 217-23.

178. See Browning Interview, *supra* note 167.

both paralegals and firms.¹⁷⁹

The first argument supporting exemption recognizes that labelling paralegals as exempt affords them greater status and thus increases their job satisfaction and performance.¹⁸⁰ Lawyers often view paralegals as members of the "support staff" and exclude them from important meetings concerning case dispositions.¹⁸¹ This alienates paralegals who feel that they contribute substantially to legal representation and who also feel they possess the qualifications to participate in discussions relating to their work.¹⁸² Although paralegals recognize that ultimate decisions rest with the attorneys and clients, they believe that their unique perspectives on the cases can provide invaluable assistance.¹⁸³ Granting paralegals exempt status would confer greater respect and integrate them into the firm community, thereby enhancing their ultimate performance.¹⁸⁴

Another factor supporting exemption is the ambiguous qualifications for "overtime." Under the FLSA, nonexempt employees working in excess of forty hours per week must be paid at least one and a half times their regular wage for each additional hour.¹⁸⁵ Unfortunately, the wage calculations become very complicated when employees work short weeks or have fluctuating hours.¹⁸⁶ Exemption proponents argue that employers do not uniformly follow the time and a half policy, and that overtime schedules often provide no added wages at all, thus eliminating the ostensible benefit.¹⁸⁷

In addition to time and a half, employers also utilize double time and straight time systems. Under the double time system, employers pay employees twice their regular wage rate for each hour worked in excess of

179. *Id.*

180. Frank, *supra* note 151, at 30.

181. See Browning Interview, *supra* note 167.

182. *Id.*

183. *Id.*

184. See Clyde Leland, *All in a Day's Work*, CA. LAW., Oct. 1985, at 19 (noting benefits of professional exemption for paralegals).

185. 29 U.S.C. § 207(a)(1) (1988).

186. See Louis B. Livingston & Sharon Toncray-Parker, *Fair Labor Standards Act: Substance and Procedure*, in COMMITTEE ON CONTINUING PROFESSIONAL EDUC., AMERICAN LAW INST.—AM. BAR ASS'N, 2 RESOURCE MATERIALS: LABOR AND EMPLOYMENT LAW 1759, 1767-73 (6th ed. 1992) (explaining overtime pay calculations under various working conditions). Because paralegals work closely with attorneys, their hours likely correspond to the supervising attorney's caseload. Prior to a large trial, for example, paralegals may work longer hours preparing documents and exhibits. This renders overtime pay schedules more unpredictable and may lead to undercompensation.

187. See Browning Interview, *supra* note 167.

forty.¹⁸⁸ Under the straight time system, employers compensate employees at their standard wage rate for each overtime hour worked.¹⁸⁹ Some paralegals perceive overtime as an illusory concept that appears to increase income but in practice keeps employees at a set pay level.¹⁹⁰ Firms either refuse to pay overtime at all, or they pay overtime but correspondingly reduce base pay to compensate.¹⁹¹ Thus, proponents argue that paralegals receive greater benefits from exemption because overtime pay does not necessarily supplement regular earnings at all.

Firms may also benefit from exempting paralegals by increasing the quality of work, thereby facilitating competition and ensuring longevity of the paralegal staff.¹⁹² Almost all workers want their employers to recognize and appreciate their contributions. Furthermore, satisfied employees produce better results, keep their jobs longer, and become a valuable asset to their employers.¹⁹³ Ultimately exemption imbues paralegals with self-worth and respect, qualities that are likely to increase the value of both employees and the businesses that employ them.¹⁹⁴

Exemption proponents also cite employee exemption in similar professions.¹⁹⁵ Although the DOL determines exemption on a case-by-case basis,¹⁹⁶ it is useful to compare the duties performed by other similar employees who receive exemption under the FLSA. A profession closely analogous to paralegals is physicians' assistants. In 1974,¹⁹⁷ the DOL

188. See Marc Linder, *Closing the Gap Between Reich and Poor: Which Side is the Department of Labor On?*, N.Y.U. REV. L. & SOC. CHANGE, at 1 (1993-94).

189. See Michael Faillace, FAIR LABOR STANDARDS ACT: RECENT CASE LAW DEVELOPMENT (PLI Litg. & Admin. Practice Course handbook Series no. H4-5219, 1995). For a complete discussion of overtime pay, see Roger J. Abrams & Dennis R. Nolan, *Time at a Premium: The Arbitration of Overtime and Premium Pay*, OHIO ST. L.J. at 837 (1984) (explaining overtime pay methods in relation to collective bargaining agreements).

190. See Brown Interview, *supra* note 167.

191. See Frank, *supra* note 151.

192. *Id.*

193. *Id.*

194. This argument is, of course, not unique to paralegals. It is self-evident that people generally seek happiness and gratification from their jobs and are more effective when they enjoy their work. Feelings of uselessness, worthlessness and boredom contribute to low output and high rates of resignation. See David I. Levine, *REINVENTING THE WORKPLACE: HOW BUSINESSES AND EMPLOYEES CAN BOTH WIN*, Washington, D.C., Brookings Inst. 1995; Frank J. Landy, *PSYCHOLOGY OF WORK BEHAVIOR*, Pacific Grove, Calif., Brooks/Cole Pub. Co. 1989, 4th ed.

195. See Browning Interview, *supra* note 167.

196. See Marshall Interview, *supra* note 11. Marshall believes that it is useful to compare duties performed by similar employees as a means of determining FLSA exemption.

197. Priv. Ltr. Rul. (May 13, 1974) (no number assigned), cited in Priv. Ltr. Rul. (June 12, 1984) (no number assigned), reprinted in *FLSA HANDBOOK*, *supra* note 99.

determined that physician assistants are professionals within the FLSA exemptions.¹⁹⁸ Even though these physicians' assistants were technically outside the FLSA exemptions because they lacked bachelor's degrees, the DOL granted an exception. The DOL reasoned that they were "directly engaged in the practice of medicine, subject to the physician's approval, while performing duties requiring considerable analysis, interpretation and discretion."¹⁹⁹

In distinguishing paralegals from physicians' assistants, the DOL explained that paralegals lack discretion and independent judgement.²⁰⁰ However, just as physicians' assistants may make decisions about patients subject to doctor approval, paralegals may make decisions regarding cases subject to attorney approval. The arguably similar discretion possessed by physicians' assistants and legal assistants lead exemption proponents to question the DOL's measuring criteria.²⁰¹ Furthermore, as evidenced by the District Court's ruling in *Reich v. Page & Addison, P.C.*, at least one court has refused to automatically exclude paralegals from FLSA exemptions.²⁰²

Notwithstanding the positive results exemption would create, paralegals must still meet the requirements of the executive, administrative or professional exemptions of the FLSA.²⁰³

1. Executive Exemption

The executive exemption most readily applies to paralegals occupying managerial positions within a firm. Many firms employ supervisory paralegals to oversee the entire legal assistant staff because they are "uniquely qualified to recruit, manage and evaluate legal assistants."²⁰⁴

198. *Id.*

199. *Id.*

200. See *Reich v. Page & Adison*, No. 3:91-CV-2655-P, slip op. at 1 (N.D. Tex. March 10, 1994). See *supra* notes 161-66 and accompanying text.

201. *Id.*

202. *Id.*

203. 29 C.F.R. §§ 541.1-541.3. See Linda S. Jevaharian, *More Firms Use Paralegal Managers*, NAT'L LAW J., Feb. 25, 1991, at 23.

204. Jevaharian, *supra* note 203, at 23; see also Richard S. Granat & Dana K. Saewitz, *Paralegals Move up to Management*, NAT'L LAW J., Jan. 32, 1989, at 19. The benefits of using paralegal managers include providing enhanced career mobility to legal assistants and improving the overall quality of the paralegal staff. Jevaharian, *supra* note 203, at 23. Because paralegals are familiar with the responsibilities of the profession, they are most adept at managing and recruiting qualified paralegals for the particular firm. *Id.* In addition, promoting current paralegals to managerial positions assists the firm by giving authority to an individual already familiar with firm practices and personnel. Granat &

These paralegals exercise the requisite authority for FLSA exemption because they typically earn a sufficient salary, exercise discretion, and supervise numerous other employees.²⁰⁵

2. Administrative Exemption

Paralegals may be considered administratively exempt if they meet the work performance qualifications under the FLSA.²⁰⁶ First, paralegals must perform duties directly related to "management policies or general business operations" of the firm's clients.²⁰⁷ Paralegals perform essential services for law firms because they analyze data and draw conclusions which are "important to the determination of, or which, in fact, determine financial, merchandising, or other policy . . ."²⁰⁸ Additionally, paralegals frequently analyze case data and offer opinions and evaluations based on their research.²⁰⁹

Paralegals also exercise "discretion and independent judgment" in their job capacities.²¹⁰ Legal problems vary in their nature and complexity, and paralegals often apply their knowledge and skill to each unique issue. Thus, a paralegal's duties may include "a careful analysis of the problem, deciding what information is required for resolution, determining the form the resolution should take, or ascertaining the documentation required to prove a case."²¹¹ These duties involve discretion and judgment as required by the FLSA.

3. Professional Exemption

Proponents of paralegal exemption have not focused on the professional exemption.²¹² However, a recent case, *Oxman v. Hamilton & Samuels*,²¹³ provided a significant step towards recognition of paralegals

Saewitz, *supra*, at 19. Furthermore, promoting from within eliminates the costs associated with seeking to fill the position and provides added work performance incentives to lower-level paralegals. *Id.*

205. For a description of the requirements for executive exemption under the FLSA, see *supra* notes 69-93 and accompanying text.

206. 29 C.F.R. § 541.2 (1995).

207. Cassidy & Browning, *supra* note 12, at 33 (citing Prentice-Hall GUIDE TO EMPLOYMENT LAW AND LABOR REGULATION, § 11,353.5).

208. 29 C.F.R. § 541.2 (1995).

209. See Browning Interview, *supra* note 167.

210. Cassidy & Browning, *supra* note 12, at 34.

211. *Id.*

212. *Id.*

213. *Oxman v. Hamilton & Samuels* (Cal. Labor Stds. Enforcement, Feb. 28, 1992), cited in Cassidy & Browning, *supra* note 12, at 34.

as professionals.²¹⁴ In *Oxman*, the California Division of Labor Standards Enforcement found that "an ABA-approved course of study for legal assistants does meet the educational criteria of the professional exemption."²¹⁵ Although no court has adopted a similar finding, *Oxman* suggests that proper accreditation may satisfy the requirements for professional exemption under the FLSA.

V. PROPOSED EXEMPTION OF PARALEGALS

Given paralegals' disparate skills and duties, they have had difficulty finding a uniform standard of education, training, and classification that would entitle them to FLSA exemption. The lack of uniformity has created confusion among employers and paralegals, and apprehension among paralegals' organizations. This Note now addresses how the legal community should alleviate these problems and create a practical standard.

Legislators, paralegal organizations, and employers should require paralegals to obtain a license from a competent training institution. In September 1992, the NFPA approved licensing to regulate paralegals working under attorney supervision.²¹⁶ However, the NFPA found expansion of paralegal duties to be the crucial aspect of such licensing.²¹⁷ One author proposed implementing state-by-state licensing to assure a minimum level of proficiency among even entry-level paralegals.²¹⁸ Under a licensing proposal, a paralegal would receive a license by attaining a minimum score on an examination designed to assess character and test legal proficiency. Further, no applicant could take the examination unless he or she fulfilled a minimum education standard. Although certification programs currently exist, they are wholly voluntary, and fail to account for the divergent practices among various states.²¹⁹ Licensing would ensure that every paralegal would enter the profession with the same basic skills, making regulation more feasible and equitable.

Presumably, employers would recognize licensing as conferring heightened authority and would grant paralegals greater responsibilities,

214. *Id.* The agency based its conclusion in part on the fact that the paralegals were all certified through an ABA-accredited program, compensated at a rate of \$100 dollars per hour, and considered a "distinct group . . . with authority to delegate work . . ." *Id.*

215. *Id.*

216. See Latorreca, *supra* note 113, at 493; *Workshops for Legal Assistants*, *supra* note 113, at 165.

217. See Latorraca, *supra* note 113.

218. Hope V. Samborn, *Legal Assistants: Has the Time Arrived for State-By-State Licensing?*, A.B.A. J., Dec. 1992, at 42.

219. *Id.*

including increased discretion over the disposition of cases. The promotion would not only ensure higher morale, but also improve the final work product. Firms would be confident and secure in the competence of their paralegals, and ultimate attorney supervision would remain as a check on the UPL.²²⁰ Although some firms would still prefer to train their paralegals in-house to maintain uniform methods, licensing would start paralegals at a higher plateau in the legal community.

Some firms have implemented "tiers of paralegals," with entry-level employees performing more clerical tasks and advanced employees tackling more substantive issues.²²¹ Such a system, on its face, alleviates the problem of disparate skills among paralegals. However, the problem of where to draw the line between exempt and non-exempt employees still remains. At what point do "clerical paralegals" become "administrative paralegals" or "professional paralegals?"²²² In addition, paralegal dissension may develop if some paralegals are exempted while others are not. Tiering alone will not rectify the problem, but if used in conjunction with licensing, it may create a valuable incentive program to keep paralegals motivated and satisfied with their job prospects.

Assigning paralegals responsibilities that automatically entitle them to exemption will serve the interests of uniformity and equality. Automatic exemption eases implementation and protects law firms from liability for misclassification. Of course, the DOL still requires analysis on a case-by-case basis²²³ when disputes arise, but disputes would decrease under a simple, uniform classification system. In addition, automatic exemption is equitable because it treats all paralegals uniformly. If all paralegals receive the same training, they all would be entitled to exemption and the attendant increase in responsibilities that exemption bestows.

220. For a discussion of the issues raised by the UPL, see *supra* notes 138-52 and accompanying text.

221. See *Ors*, *supra* note 146, at 31. The author describes a large firm that developed three tiers of paralegals: "entry-level paralegals," "senior paralegals" and third-level paralegals denoted "senior paralegal II" or "paralegal specialist." *Id.* A paralegal's duties and responsibilities increase proportionately with advancement to each level. *Id.*

222. By way of comparison, suppose the firm in question has a tiered system. See *supra* note 221. Do second-tier "senior paralegals" perform functions sufficient for exemption? Is exemption based on promotion alone? These questions suggest that creating tiers of paralegals only serves to further complicate an already complex issue.

223. See Priv. Ltr. Rul. (June 12, 1984) (no number assigned), *supra* note 197.

VI. CONCLUSION

The complexity of legal issues in today's society has resulted in a growing need for paralegal services. Attorneys must often delegate various tasks to legal assistants so they may concentrate their efforts on a client's key legal questions. An efficient, well-trained paralegal staff is crucial to the law firm community. Uniform licensing requirements would ensure that all paralegals are proficient in the fundamentals of paralegal research and job responsibilities, thereby improving the overall quality of legal representation.

Paralegals are often an under-utilized resource, in part because attorneys are unsure about their level of aptitude. Uniform licensing would provide attorneys with some measure of a paralegal's skill, and enhance any individualized training mandated by each firm. As client expectations increase, law firms must find effective ways to meet the new demands. Improving the paralegal staff is an easy way to satisfy client needs, and ensure employee longevity and job satisfaction.

Allison Engel