

## The Bona Fide Professional Exemption of the Fair Labor Standards Act as Applied to Accountancy

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### INTRODUCTION

The Fair Labor Standards Act of 1938 (“FLSA”) established a uniform requirement that covered workers be paid a base amount per hour along with overtime pay at time and one-half their regular rate of pay for all hours worked over forty hours in a week, in addition to prohibiting child labor.<sup>1</sup> The provisions intended to guarantee a living wage, as well as to encourage employers to hire more workers and spread the available work, in an effort to avert the additional salary burden imposed if their workers qualified for overtime.<sup>2</sup> Designed to exclude goods produced under detrimental working conditions from interstate commerce and to prevent the interstate distribution of goods produced under substandard labor conditions,<sup>3</sup> the

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<sup>1</sup> Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C.S. §§ 201-219 (2011)). In addition to prohibiting child labor, the FLSA also created the Wage and Hour Division in Department of Labor to administer the provisions of the law, collect relevant data, and report annually to Congress. 29 U.S.C.S. § 204 (2012).

<sup>2</sup> Early state minimum wage legislation addressed the persistence of sweatshops where workers were paid wages below what was necessary to sustain themselves on their own, i.e., a living wage. N. SCOTT ARNOLD, *IMPOSING VALUES: AN ESSAY ON LIBERALISM AND REGULATION* 202 (2009).

<sup>3</sup> *Id.* § 202(a). For a discussion of the historical development of minimum wage legislation see Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19 (2000); Garrett Reid Krueger, Note, *Straight –Time Overtime and Salary Basis Reform of the Fair Labor Standards Act*, 70 WASH. L. REV. 1097, 1098-1100 (1995); William P. Quigley, “A Fair Day’s Pay for a Fair Day’s Work”: *Time to Raise and Index the Minimum Wage*, 27 ST. MARY’S L.J. 513, 514-30 (1996); Shawn D. Vance, *Trying to Give Private Sector Employees a Break: Congress’s Efforts to Amend the Fair Labor Standards Act*, 19 HOFSTRA LAB. & EMP. L.J. 311, 312-16 (2002).

FLSA was part of a broad legislative reformation effort in the 1930s commonly known as *The New Deal*.<sup>4</sup>

In the midst of the Great Depression, federal law sought to empower workers with new economic leverage.<sup>5</sup> As passed, and then amended in subsequent sessions of Congress, the Act requires covered employers to pay non-exempt employees a specified rate.<sup>6</sup> Most recently, the *Fair Minimum Wage Act of 2007* increased the threshold wage from \$5.15/hour to \$7.25/hour in three annual seventy-cent increments.<sup>7</sup> The FLSA also prohibits employers, which employ workers “engaged in commerce or in the production of goods for commerce,” from permitting workers to exceed forty hours per workweek unless the employees receive compensation at a rate not less than one and one-half times their regular hourly rate.<sup>8</sup> The term *commerce* is very broadly defined, is not limited to transportation or to commercial transactions involved in trade, and should be afforded a liberal construction by courts.<sup>9</sup> These rights to a minimum wage and overtime pay established by the FLSA cannot be waived by agreement or otherwise.<sup>10</sup> Violations are punishable by fines and imprisonment in addition to civil damages for unpaid wages and attorneys’ fees.<sup>11</sup>

Some categories of employment, however, are exempt from the protective legislation, such as certain employees in the agricultural sector and fishing industry,<sup>12</sup> domestic workers,<sup>13</sup> as

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<sup>4</sup> For a discussion of President Roosevelt’s program see ARTHUR SCHLESINGER, *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* (1958).

<sup>5</sup> For example, the Wagner Act gave American workers the basic right of association and of self-organization, and prohibited certain enumerated unfair labor practices by management. This inroad by Congress into the regulation of the labor market was upheld in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-41 (1937).

<sup>6</sup> 29 U.S.C. § 206 (2011).

<sup>7</sup> Pub. L. No. 110-28, 121 Stat. 189 (2007) (codified at 29 U.S.C. § 206 (2011)). The initial statutory rate of twenty-five cents translates to about \$3.60 in 2006 dollars. LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 224 (2008).

<sup>8</sup> 9 U.S.C. § 207 (2011). For a history of the movement to reduce weekly work hours see Scott D. Miller, *Revitalizing the FLSA*, 19 *HOFSTRA LAB. EMP. L.J.* 1, 1-26 (2001).

<sup>9</sup> *Overstreet v. North Shore Street Corp.* 318 U.S. 125, 128-30 (1943). The Supreme Court upheld the Act as a valid exercise of Congressional power designed to prevent the use of the facilities of interstate commerce to spread goods produced by the maintenance of substandard labor conditions, a method of unfair competition. *United States v. Darby*, 312 U.S. 100, 122-24 (1941).

<sup>10</sup> *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981). A recent case involving junior accountants and alleged violations of the FLSA’s overtime provisions found the arbitration agreement unenforceable because the waiver of class resolution would operate as a waiver of the plaintiff’s right to pursue statutory remedies pursuant to FLSA and would force plaintiff to bear costs. *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547 (S.D.N.Y. 2011).

<sup>11</sup> “Any employer who violates the provisions of [the minimum wage and maximum hours section] of this Act ... shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages... The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.” 29 U.S.C.A. § 216(b) (2012).

<sup>12</sup> *Id.* §§ 211, 213(a), 203(d) & (e).

<sup>13</sup> *Id.* § 213 (a)(15)

well as workers "employed in a bona fide executive, administrative, or professional capacity,"<sup>14</sup> as defined by regulations promulgated by the Department of Labor.<sup>15</sup> The *bona fide professional* category as defined in the regulations is not restricted to the traditional professions of law, medicine, and theology, but also embraces other *learned professions* requiring advanced knowledge.<sup>16</sup> The Secretary of Labor's interpretation of the FLSA as reflected in such regulations must be followed as long as it is based on a reasonable construction of the statute.<sup>17</sup> Nevertheless, because the Act is remedial, the exemptions must be strictly construed, with the party asserting an exemption establishing its applicability by clear evidence.<sup>18</sup> This paper will examine the bona fide professional exemption as applied to accountancy.

## I. LEARNED PROFESSIONS GENERALLY

Learned professions historically included law, medicine and theology.<sup>19</sup> These professions shared characteristics included "the need of unusual learning, the existence of confidential relations, the adherence to a standard of ethics higher than that of the market place and in a profession like that of medicine by intimate and delicate personal ministrations."<sup>20</sup> Learned professionals are characterized by intellectual skills resulting from extensive training, services beyond assessment by non-professionals, and concerns that exceed those of a particular individual.<sup>21</sup> That common professional calling to serve in the public interest is a hallmark of the practice of law, medicine and the ministry of the clergy.<sup>22</sup>

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<sup>14</sup> *Id.* § 213(a)(1). For a justification for the exemption see Christine Jolls, *Fairness, Minimum Wage Law and Employee Benefits*, 77 N.Y.U.L. REV. 47, 57-61 (2002) (describing the *fairness dynamic* which asserts that employers tend to pay difficult to monitor workers more money to encourage high levels of effort).

<sup>15</sup> The regulations were revised under the Bush administration, and the threshold for the minimum salary required for the exemption was increased from \$155 per week (\$8,060 per year) to \$455 per week (\$23,660 per year). William J. Kilberg, Jason Schwartz & Joshua Chadwick, *The George W. Bush Administration: A Retrospective: A Measured Approach: Employment and Labor Law During the George W. Bush Years*, 32 HARV. J.L. & PUB. POL'Y 997, 1002 (2009) (citing 29 C.F.R. § 541.601 (2004)). See also *infra* notes 52-88, and accompanying text.

<sup>16</sup> 29 C.F.R. §§ 541.300-301 (2012).

<sup>17</sup> Regulations validly promulgated are entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). The secretary's interpretation of the regulations is owed deference under *Auer v. Robbins*, 519 U.S. 452, 457 (1997). Deference does not require adherence to such interpretations by courts. Last term in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2169 (2012) the Supreme Court determined that deference under *Auer* was not due because the Department of Labor's interpretation was "flatly" inconsistent with the FLSA.

<sup>18</sup> *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211 (1959).

<sup>19</sup> *State Bar v. Arizona Land & Trust Co.*, 90 Ariz. 76, 82-4, 366 P. 2d 1, 6 (1961); *Commonwealth v. Brown*, 302 Mass. 523, 527, 20 N.E.2d 478, 481 (1939); *United States v. Laws*, 163 U.S. 258, 266 (1886).

<sup>20</sup> *McMurdo v. Getter*, 298 Mass. 363, 367, 10 N.E.2d 139, 142 (1937). See also *Commonwealth v. Brown*, 302 Mass. 523, 527, 20 N.E.2d 478, 481 (Mass.1939) (citing *McMurdo v. Getter* with approval).

<sup>21</sup> Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 704-05 (1977).

<sup>22</sup> The Bar's performance of work pro bono is indicative of its commitment to public service. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2010) (articulating aspirational goals for pro bono work).

Learned professionals are usually licensed or certified, share fiduciary relationships with clients, and because of their public calling adhere to an ethical code.<sup>23</sup> For example, attorneys must attain an advanced degree to practice law and pass a state licensure test. Attorneys are subject to the ethical commands of their respective bar associations, and are guided by the American Bar Association's *Model Rules of Professional Conduct*.<sup>24</sup> To protect the public from incompetent practitioners who are not policed by an enforceable Code of Ethics, states have statutes which make criminal the unauthorized practice of law, as well.<sup>25</sup> Attorneys also enjoy an attorney-client testimonial privilege for confidential communications.<sup>26</sup>

The list of learned professions has expanded beyond theology, law and medicine, as more professionals began sharing these three characteristics of education, ethics and confidentiality.<sup>27</sup> Some courts have presumed accountancy to be a learned profession.<sup>28</sup> While double-entry accounting dates to the end of the fifteenth century, systems of accounting did not develop until the nineteenth century, and there were no real accountants before the nineteenth century, only bookkeepers.<sup>29</sup> The Industrial Revolution, with its capital intensive economy, led to formal *public* accounting.<sup>30</sup> Concurrently, accountants transitioned from bookkeepers of the firm to auditors of the enterprise, assuming the role of public watchdog for fraudulent practices. Ultimately, in the United States, the Financial Accounting Standards Board ("FASB") emerged

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<sup>23</sup> Jack Ladinsky, *The Traffic in Legal Services Lawyer-Seeking Behavior and the Channeling of Clients*, 11 Law Soc'y 207, 210 (1976).

<sup>24</sup> *Model Rules of Professional Conduct*, AM. BAR ASSOC., available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html)

<sup>25</sup> The American Bar Association permits lawyers to only practice in jurisdictions in which they are properly admitted to the Bar. MODEL RULES OF PROF'L CONDUCT R. 5.5 (1983).

<sup>26</sup> The following four elements are generally required for the privilege to attach to a communication 1) there must be a relationship between attorney and client, 2) it must exist in reference to the matter to which the communication relates, 3) the communication must be made under circumstances showing the client intended to make communication in confidence, and 4) the client must demonstrate a reasonable expectation of confidentiality. See Robert S. Catz & Jill J. Lange, *Judicial Privilege*, 2 GA. L. REV. 89, 91, 95 (1987) (discussing testimonial privileges). See also Swidler & Berlin, et al. v. United States, 524 U.S. 399 (1998) (holding that the privilege is intended to encourage open and frank communications, and survives death in federal courts).

<sup>27</sup> See, e.g., *McMurdo v. Getter*, 298 Mass. 363, 367, 10 N.E.2d 139, 142 (1937) (stating that dentistry climbed to that professional plane); *Nat'l Soc. Professional Eng'rs v. United States*, 435 U.S. 679, 681 (1978) (asserting that engineering is an important learned profession); *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1070 (1st Cir. 1995) (concluding architects are included in the "learned professions" under labor department regulations).

<sup>28</sup> See, e.g., *Porter Muirhead Cornia & Howard v. Wyo. Bd. of Certified Pub. Accountants*, 844 P.2d 479, 482 (Wyo. 1992); *Port Authority v. Evergreen Int'l Aviation, Inc.*, 179 Misc. 2d 674, 686 N.Y.S.2d 269, 273 (1999); *Blatterfein v. Larken Assocs.*, 323 N.J. Super. 167, 179, 732 A.2d 555, 561 (1999); *Paul v. Petroleum Equipment Tools, Co.*, 708 F.2d 168, 173 (5<sup>th</sup> Cir. 1983); *Vanczak v. Romani*, No. 3397, 2002 Conn. Super. LEXIS 3397, at \*4 (Oct. 18, 2002); *Advest Group v. Arthur Andersen LLP*, 22 Conn. L. Rptr. 520, 525 (1998); *Lumbermens Mut. Cas. Co. v. Thornton*, 92 S.W.3d 259, 263-4 (Mo. App. 2002); *Chase Scientific Research, Inc. v. NIA Group, Inc.*, 749 N.E.2d 161, 166, 725 N.Y.S.2d 592, 597 (N.Y. Ct. App. 2001).

<sup>29</sup> Sean M. O'Connell, *Be Careful What you Wish For----- How Accountants and Congress Created the Problem of Auditor Independence*, 45 B.C. L. REV 741, 745 (2004).

<sup>30</sup> *Id.* at 745-46.

and established *Generally Accepted Accounting Principles* ("GAAP") for publically traded companies.<sup>31</sup>

Certainly accountants clearly are characterized by the first two prongs of the definition of a learned profession--distinctive educational requirements and a code of ethics.<sup>32</sup> The American Institute of Certified Professional Accountants ("AICPA") requires CPAs to pass a licensing examination and complete a minimum of 150 hours of post-secondary instruction.<sup>33</sup> AICPA formalized its first Code of Professional Ethics in 1917.<sup>34</sup> Indeed, the oversight of the accounting profession has only intensified with the enactment of Sarbanes-Oxley Act in 2002,<sup>35</sup> which revised financial practices to protect investments and restore public trust in financial markets.<sup>36</sup> In fact, the public outcry in the wake of the Arthur Anderson's behavior in the Enron debacle attests to the level of trust expected of public accounting firms, and the predictable outrage when such trust is betrayed.<sup>37</sup>

Recognizing confidentiality in communications between accountants and clients, however, seems somewhat incongruent with the public watchdog function of the profession, and a CPA's commensurate ethical duty to report to the public misrepresentations of the financial condition of a public entity,<sup>38</sup> an obligation that was reinforced by the Sarbanes-Oxley Act.<sup>39</sup> While the AICPA recognizes an ethical duty of confidentiality,<sup>40</sup> this ethical duty to treat

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<sup>31</sup> For a discussion of the development of this independent oversight system see William W. Bratton, *Private Standards, Public Governance: A New Look at the Financial Accounting Standards Board*, 45 B.C. L. REV 5 (2004).

<sup>32</sup> For a more in-depth discussion of these characteristics see *infra* notes 170-188, and accompanying text.

<sup>33</sup> To sit for the CPA exam and to qualify for AICPA regular membership beginning in January of 2013, the candidate "must have obtained 150 semester hours of education at an accredited college or university, including a bachelor's degree or its equivalent..." American Institute of CPAs, *AICPA Regular Member Eligibility Requirements*, available at <http://www.aicpa.org/Membership/Join/Pages/EligibilityRequirements.aspx>. Moreover, for each three-year reporting period after certification, maintenance of the license requires the completion of 120 hours, or its equivalent, of continuing professional education. *Id.* Currently, 40 states have passed a legislative requirement of 150 hours for licensure. American Institute of CPAs, *Jurisdictions That Have Passed the 150-Hour Education Requirement*, available at [http://www.aicpa.org/BecomeACPA/Licensure/DownloadableDocuments/150\\_Hour\\_Education\\_Requirement.pdf](http://www.aicpa.org/BecomeACPA/Licensure/DownloadableDocuments/150_Hour_Education_Requirement.pdf) (chart listing states).

<sup>34</sup> Peter E. Millspaugh, *The Supreme Court and State Restraints on CPA Business Solicitation*, 11 AKRON TAX J. 103, 104 (1995).

<sup>35</sup> Pub. L. No. 107-204, 116 Stat. 745 (July 30, 2002) (codified at 15 U.S.C. §§ 7201-78d-3 (2012)). For an overview of the legislation see Brian Kim, *Sarbanes-Oxley Act*, 40 HARV. J. ON LEGIS. 235 (2003).

<sup>36</sup> For a discussion of this legislative goal see Thomas C. Pearson & Gideon Mark, *Investigations, Inspections, and Audits in the Post-SOX Environment*, 86 NEB. L. REV. 43, 44-70 (2007).

<sup>37</sup> For a discussion of the calamity see K.C. Goyer, Note, *Nancy Temple's Duty: Professional Responsibility and the Arthur Andersen Verdict*, 18 GEO. J. LEGAL ETHICS 261 (2004). See also Darin Bartholomew, *Is Silence Golden When It Comes to Auditing?* 36 J. MARSHALL L. REV. 57 (2002) (examining Enron/Arthur Anderson and other cases involving auditor misconduct).

<sup>38</sup> Robert J. Tepper, *New Mexico's Accountant-Client Privilege*, 37 N.M.L. REV. 387, 428 (2007).

<sup>39</sup> Pub. L. No. 107-204, 116 Stat. 745 (July 30, 2002) (codified at 15 U.S.C. §§ 7201-78d-3 (2012)).

<sup>40</sup> AICPA CODE OF PROF. CONDUCT, ET § 300, Rule 301.01 (2011).



communications confidentially does not always translate into a testimonial privilege.<sup>41</sup> The Supreme Court has refused to recognize an accountant-client testimonial privilege in federal court,<sup>42</sup> although some states recognize the privilege between a CPA and a client, and a few states recognize the privilege between an unlicensed accountant and a client.<sup>43</sup>

The significance of being characterized as a learned profession is apparent in the interpretation of anti-trust laws.<sup>44</sup> Professionals are typically self-regulated and viewed as practicing a profession and not as being engaged in a commercial activity subject to laws regulating commerce, such as anti-trust acts.<sup>45</sup> While courts eventually recognized that professions did not enjoy a per-se exemption from anti-trust regulation either under the Sherman Antitrust Act<sup>46</sup> or the Federal Trade Commission Act (“FTCA”),<sup>47</sup> a distinction still remains between the practice of a trade and a profession.

For example, state Deceptive Trade Practices Acts are patterned after the FTCA, and provide aggrieved consumers with a cause of action for deceptive acts or practices in the conduct of trade or commerce within their state.<sup>48</sup> The issue in interpreting the applicability of these acts to the provision of professional services is whether or not the practice of a profession should be interpreted as the equivalent of conducting *trade or commerce*.<sup>49</sup> In determining whether or not state deceptive trade practices acts apply to the activities of professionals such as accountants, courts may draw a distinction between the commercial and non-commercial (or entrepreneurial)

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<sup>41</sup> For an overview of state statutes and how they treat an accountant testimonial privilege see Denzil Causey & Frances McNair, *An Analysis of State Accountant-Client Privilege Statutes and Public Policy Implications for the Accountant-Client Relationship*, 27 AM. BUS. L.J. 535 (1990) (arguing for the elimination of the testimonial privilege because of the public’s right to know about information communicated to public accountants). See also David A. Larson, *Accountant-Client Privilege Statutes: A Clear Need for Reform*, 8 SETON HALL LEGIS. J. 209 (1984) (reviewing state accountant privilege statutes and advocating their repeal).

<sup>42</sup> *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984). See also Thomas J. Molony, *Is the Supreme Court Ready to Recognize Another Privilege? An Examination of the Accountant-Client Privilege in the Aftermath of Jaffee v. Redmond*, 55 WASH. & LEE L. REV. 247 (1998) (arguing against the recognition of an accountant-client privilege in federal court).

<sup>43</sup> Causey & McNair, *supra* note 41, at 540 (summary chart). See also *infra* notes 177-188, and accompanying text (discussing ethical duty of confidentiality).

<sup>44</sup> *Rousseau v. Escleman*, 519 A.2d 243, 246-48 (N.H. 1986).

<sup>45</sup> *FTC v. Raladam Co.*, 283 U.S. 643, 653 (1931). See also *Atlantic Cleaners & Dryers, Inc. v. United States*, 486 U.S. 427 (1932) (discussing the meaning of the word trade in antitrust laws).

<sup>46</sup> *Goldfarb v. Virginia State Bar Ass’n*, 421 U.S. 773, 787 (1973) (attorneys);

<sup>47</sup> *American Medical Ass’n v. FTC*, 638 F.2d 443, 448 (2d Cir. 1980), *aff’d without opinion*, 455 U.S. 676 (1982).

<sup>48</sup> For a discussion of the applicability of such state legislation to accountants see Debra D. Burke & Max Bishop, *A Survey of the Potential Liability of Accountants Under State Deceptive Trade Practices Acts*, 23 MEMPHIS ST. L. REV. 805 (1993). See also Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 TENN. L. REV. 131 (2006) (arguing that there is no sound basis in law, history, precedent or public policy for exempting licensed professionals from the reach of the state deceptive trade practices acts).

<sup>49</sup> See David Skeels, Comment, *The DTPA’s Professional Services Exemption: Let ‘em Be Doctors and Lawyers and Such*, 55 BAYLOR L. REV. 783 (2003) (discussing legislative and judicial presumption that state act applied to accountants).

activities of professionals.<sup>50</sup> In other words, while the fraudulent advertising of professional services by accountants might be subject to the prohibitions of the Deceptive Trade Practices Acts, claims related to the strategic practice of the profession should remain exempt from such statutes.<sup>51</sup>

## II. PROFESSIONAL EXEMPTION UNDER THE FLSA

### A. Overview of the Bona Fide Professional Exemption

The FLSA professional exemption is predicated in part upon the historic classification of learned professionals and borrows much of its definition from that characterization.<sup>52</sup> In fact, the law was passed around the same time historically as when professions such as the practice of law were considered exempt from federal antitrust legislation because the practice of law was not considered to be an inherently commercial activity,<sup>53</sup> but rather a professional calling.<sup>54</sup> That there is little legislative history concerning the exemption<sup>55</sup> may be explained by the fact that the lines between what society considered to be a professional calling were much more delineated at that time than they are today, and the concept was generally understood and limited to a smaller class of workers. Few workers even had the hint of an opportunity to be considered professional, as only about 5% of the population had bachelor's degrees and slightly more than 40% held high school diplomas in 1947 compared to almost 25% and about 85% respectively today.<sup>56</sup>

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<sup>50</sup> See *Marjorie Webster Jr. College, Inc. v. Middle States Assoc. of Colleges & Secondary Schools, Inc.*, 423 F.2d 650, 654 (D.C. Cir. 1970) (concluding that the Sherman Act was not designed for the noncommercial aspects of the practice of a learned profession); *Short v. Demopolis*, 691 P.2d 163, 168 (Wash. 1984) (holding that deceptive trade practices prohibitions extend to the entrepreneurial aspects of the practice of law, not the actual practice of the profession); *Vanczak v. Romani*, No. 990080053, 2002 Conn. Super. LEXIS 3397, at \*5 (Oct. 18, 2002) (making the commercial and noncommercial distinction with practice of accountancy); *ShareAmerica, Inc. v. Ernst & Young*, No. X02CV 930150132S, 1999 Conn. Super. LEXIS 1910, at \*27 (July 2, 1999); *Gilmore v. Berg*, 761 F. Supp. 358, 375-76 (D.N.J. 1991) (distinguishing professional capacity of a lawyer and an accountant).

<sup>51</sup> See e.g., *Short v. Demopolis*, 691 P.2d 163, 168 (Wash. 1984) (allowing only deceptive trade practices claims for the entrepreneurial aspects of the practice of law); *Nelson v. Ho*, 564 N.W.2d 482, 486-87 (Mich. App. 1997) (holding that the entrepreneurial or commercial aspects of the practice of medicine may be the basis of a deceptive trade practices claim, but not medical malpractice); *Advest Group, Inc.*, No. CV 970571417, 1998 Conn. Super. LEXIS 2137 (July 20, 1998) (only claims arising out of the commercial or entrepreneurial aspects of accounting should fall under state deceptive trade practices legislation). See also *Rousseau v. Eshleman*, 519 A.2d 243 (N.H. 1986) (separately regulated professions are exempt from state deceptive trade practices legislation).

<sup>52</sup> For a discussion of the historical factors leading to the FLSA and the white collar exemption see Michael Cicala, Note, *Equalizing Workers in Ties and Coveralls: Removal of the White-Collar Exemption to the Fair Labor Standards Act*, 27 SETON HALL LEGIS. J. 139,145-48 (2002).

<sup>53</sup> See *supra* notes 44-51, and accompanying text.

<sup>54</sup> ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

<sup>55</sup> Allison Engel, Note, *FLSA: Exempting Paralegals from Overtime Pay*, 74 WASH. U. L. Q 253, 256 (1996) (citing Joint Hearings Before the Committee on Education and Labor on S. 2475 and H.R. 7200, 75th Cong., 1st Sess. 45 (1937)).

<sup>56</sup> *Educational Attainment in the United States: 2003*, U.S. Census Bureau, June 2004, available at <http://www.census.gov/prod/2004pubs/p20-550.pdf>.

The justification for the exemption is three-fold: 1) such employees do not need the protections of the overtime provisions because of their more than adequate remuneration, 2) the goal of decreasing unemployment by spreading the available work among more workers is less feasible with highly trained professionals, and 3) the value to the employer of professionals is unrelated to hours worked.<sup>57</sup> In addition to the assumption that these exempted workers earned more than the minimum wage and were entitled to other compensatory privileges and opportunities for advancement, the legislative history also indicates that the type of work these exempt employees performed was “difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA’s time-and-a-half overtime premium.”<sup>58</sup>

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as *bona fide executive, administrative, professional and outside sales employees*.<sup>59</sup> The burden of establishing that an employee is exempt is on the employer,<sup>60</sup> and as a remedial act, exemptions are to be narrowly construed.<sup>61</sup> Highly compensated employees who earn in excess of \$100,000 annually and who “customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee” are exempt as well.<sup>62</sup>

The Department of Labor revised the white-collar exemption in 2004,<sup>63</sup> and as revised, the regulations provide that in order to qualify for the *executive* exemption, employees must 1) be compensated on a salary basis at a rate of not less than \$455 per week, 2) have management

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<sup>57</sup> L. Camille Hebert, *Updating the “Whiter-Collar” Employee Exemptions to the Fair Labor Standards Act*, 7 EMPL. RTS. § EMPLOY. POL’Y 51, 56-57 (2003). Moreover, one inquiry necessarily must be whether or not professionals would be inspired to work beyond forty hours to secure time and a half wages.

<sup>58</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional,

Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22122, 22124 (April 23, 2004) (to be codified at 29 C.F.R. pt. 541).

<sup>59</sup> 29 U.S.C. § 213(a)(1) (2012). Sections 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. 29 C.F.R. §§ 541.400 - 541.402 (2012). The definition of *outside sales employees* is refined further in the regulations. *Id.* §§ 541.500 - 541.504 (2012). The DOL’s reinterpretation of those regulations was recently questioned by the Supreme Court. In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 (2012) the Court concluded that the employees who obtained a nonbinding commitment from a physician to prescribe one of the employer’s drugs in fact made sales for purposes of the FLSA and therefore were exempt outside salesmen.

<sup>60</sup> *Walling v. General Industries Co.*, 330 U.S. 545, 548 (1947); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 393 (1960); *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 206 (1966); *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974).

<sup>61</sup> *Pugh v. Lindsay*, 206 F.2d 43, 46 (4<sup>th</sup> Cir. 1953); *Johnson v. City of Columbia*, 949 F.2d 127, 130 (4<sup>th</sup> Cir. 1986). *See also* *Martin v. Malcolm Pirmie, Inc.*, 949 F. 2d 611, 614 (2d Cir. 1991) (noting that exemptions such as the “bona fide executive” exemption are to be narrowly construed) (citations omitted).

<sup>62</sup> 29 C.F.R. §541.601 (2012).

<sup>63</sup> The threshold salary was increased from \$155 to \$455 and the duties test was revised, although neither change substantially altered the landscape. For a discussion of the revisions see Jay P. Lechner, *The New FLSA White-Collar Regulations-Analysis of Changes*, FLA. B. J., Feb. 2005, at 20; Scott D. Miller, *Atrophied Rights: Maximum Hours Labor Standards under the FLSA and Illinois Law*, 28 N. ILL. U. L. REV. 261, 303-34 (2008); Kevin White, *Who’s Exempt from Overtime Pay? Understanding the Revised White Collar Exemptions*, HOUS. LAW., Jan./Feb. 2006, at 10.



of the enterprise as their primary duty, 3) customarily and regularly direct the work of two or more other employees, and 4) possess the authority to hire or fire other employees.<sup>64</sup> To qualify for the *administrative* exemption, employees must 1) be compensated on a salary or fee basis at a rate of not less than \$455 per week, 2) have as their primary duty the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) exercise of discretion and independent judgment with respect to matters of significance in the performance of their primary duty.<sup>65</sup>

There are two general types of exempt *professional* employees under the regulations: *learned professionals* and *creative professionals*,<sup>66</sup> although the statute does not use these express terms.<sup>67</sup> The 1938 regulations only referenced the term *employee employed in a bona fide professional capacity*, defining it as:

any employee (a) who is customarily and regularly engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work, and (ii) requiring the consistent exercise of discretion and judgment both as to the manner and time of performance, as opposed to work subject to active direction and supervision, and (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and (iv) based upon educational training in a specially organized body of knowledge as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, mechanical or physical processes in accordance with a previously indicated or standardized formula, plan or procedure, and (b) who does no substantial amount of work of the same nature as that performed by non-exempt employees of the employer.<sup>68</sup>

The terms *learned and creative professionals* were not used in the regulations until 1962.<sup>69</sup> With that revision, the regulations stated that the exemption includes those professions which have a

<sup>64</sup> 29 C.F.R. § 541.100 (2012). The phrase *customarily and regularly* means “a frequency that must be greater than occasional but which, of course, may be less than constant.” *Id.* § 541.703.

<sup>65</sup> *Id.* § 541.200.

<sup>66</sup> For an overview of this exemption see *Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA)* (Revised July 2008) Wage and Hour Division, U.S. Department of Labor, available at [http://www.dol.gov/whd/regs/compliance/fairpay/fs17d\\_professional.htm](http://www.dol.gov/whd/regs/compliance/fairpay/fs17d_professional.htm) (hereinafter, *Fact Sheet*).

<sup>67</sup> For a history of the Labor Department’s efforts to define and delimit the administrative, executive and professional exemption see William G. Whittaker, *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, CRS REPORT FOR CONGRESS (May 9, 2005), available at [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1240&context=key\\_workplace&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dkantor%2520report%2520overtime%2520flsa%26source%3Dweb%26cd%3D2%26ved%3D0CFEQFjAB%26url%3Dhttp%253A%252F%252Fdigitalcommons.ilr.cornell.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1240%2526context%253Dkey\\_workplace%26ei%3DI7C\\_T9HAIYGg8gSKu9GwCw%26usg%3DAFQjCNF0Hebca3AHme\\_0pQGcmlaLVXCOuA#search=%22kantor%20report%20overtime%20flsa%22](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1240&context=key_workplace&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dkantor%2520report%2520overtime%2520flsa%26source%3Dweb%26cd%3D2%26ved%3D0CFEQFjAB%26url%3Dhttp%253A%252F%252Fdigitalcommons.ilr.cornell.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1240%2526context%253Dkey_workplace%26ei%3DI7C_T9HAIYGg8gSKu9GwCw%26usg%3DAFQjCNF0Hebca3AHme_0pQGcmlaLVXCOuA#search=%22kantor%20report%20overtime%20flsa%22).

<sup>68</sup> 9 C.F.R. § 541.2 (1938 Supp. 1940).

<sup>69</sup> 29 C.F.R. § 541.302 (1962).

recognized status and which are based on the acquirement of professional knowledge through prolonged study as well as artistic professions, such as acting or music. The regulations stated that “[s]ince the test of the bona fide professional capacity of such employment is different in character from the test for persons in the learned professions, an alternative test for such employees is contained in the regulations, in addition to the requirements common to both.”<sup>70</sup> As a result, the regulations separated the definitions of learned professions from artistic professions and defined *learned profession* as 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. (b) The first element in the requirement is that the knowledge be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the high-school level. (c) Second, it must be knowledge in a field of science or learning. This serves to distinguish the professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning. (d) The requisite knowledge, in the third place, must be customarily acquired by a prolonged course of specialized intellectual instruction and study.<sup>71</sup>

As subsequently modified, current regulations provide that, in order to qualify for the professional employee exemption, the employee must be compensated on a salary or fee basis at a rate not less than \$455 per week and the employee’s *primary duty* must be the performance of work requiring advanced knowledge.<sup>72</sup> *Advanced knowledge* is customarily acquired by a prolonged course of specialized intellectual instruction, is predominantly intellectual in character, and requires the consistent exercise of discretion and judgment.<sup>73</sup> Note that the salary rate of \$455/week for the exemption annualizes to a salary of \$23,660, or just under \$12/hour, not a substantial wage threshold for learned professionals, considering that very few occupations have median earnings falling below that figure.<sup>74</sup>

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession, usually evidenced by a degree.<sup>75</sup> The regulations provide that “an employee’s primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily

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<sup>70</sup> *Id.*

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

<sup>72</sup> 29 C.F.R. §§ 541.300 (1) & (2) (2012).

<sup>73</sup> 29 C.F.R. §541.300 (2)(i) (2012). For professionals in creative fields, *advance knowledge* requires “invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.” *Id.* at § 541.300 (2) (ii).

<sup>74</sup> Ashley M. Rothe, Comment, *Blackberrys and the Fair Labor Standards Act; Does a Wireless Ball and Chain Entitle White-Collar Workers to Overtime Compensation?*, 54 ST. LOUIS L.J. 709, 718 (2010).

<sup>75</sup> *Fact Sheet*, *supra* note 66. Nevertheless, exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. *Id.*

acquired by a prolonged course of specialized intellectual instruction.”<sup>76</sup> The regulations assert that accountancy is such a field of learning traditionally recognized as having professional status.<sup>77</sup>

Specifically for learned professions, the *primary duty* test requires three elements (1) the employee must perform work requiring advanced knowledge; (2) the advanced knowledge must be in a field of science or learning; and (3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.<sup>78</sup> Thus, this exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.<sup>79</sup> The regulations further define “work requiring advanced knowledge” as “work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work.”<sup>80</sup>

The regulations expressly provide that a “job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part.”<sup>81</sup> For bona fide executive, administrative, and professional exempt employees, *primary duty* means the principal, main, major or most important duty that the employee performs, with the amount of time spent on the exempt work being a significant consideration.<sup>82</sup> Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.<sup>83</sup>

Work that is *directly and closely related* to the performance of exempt work is also considered exempt work.<sup>84</sup> The phrase *directly and closely related* means “tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work.”<sup>85</sup> Such work may include menial tasks that arise out of exempt duties, such as recordkeeping.<sup>86</sup> Registered or certified medical technologists, registered nurses, certified dental hygienists, certified physician

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<sup>76</sup> 29 C.F.R. § 541.301(a) (2012).

<sup>77</sup> *Id.* § 301(c).

<sup>78</sup> *Id.*

<sup>79</sup> *Fact Sheet, supra* note 66.

<sup>80</sup> 29 C.F.R. § 541.301(b) (2012). “An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.” *Id.*

<sup>81</sup> *Id.* § 541.2.

<sup>82</sup> *Id.* § 541.700. “Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.” *Id.* § 541.700(a).

<sup>83</sup> *Fact Sheet, supra* note 66.

<sup>84</sup> 29 C.F.R. §541.703 (a) (2012).

<sup>85</sup> *Id.*

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

assistants, certified athletic trainers, along with licensed funeral directors and embalmers generally will meet the duties requirements for the learned professional exemption.<sup>87</sup>

Federal regulations provide that “certified public accountants generally meet the duties requirements for the learned professional exemption. In addition, many other accountants who are not certified public accountants but perform similar job duties *may* qualify as exempt learned professionals. However, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.”<sup>88</sup> The exercise of discretion and independent judgment by accountants is key, not the skillfulness of the manner in which they perform their tasks. Such observations also were noted when the 1962 regulations separated learned professions from artistic professions.<sup>89</sup>

As a result, persons who enter the field of accountancy will not qualify for an exemption automatically,<sup>90</sup> and employers may be unable to justify macro classifications of workers as being exempt. For example, KPMG’s corporate policy unilaterally classified all Audit Associates as FLSA exempt.<sup>91</sup> In ruling on a discovery issue in FLSA litigation seeking unpaid overtime, the district court judge noted that “KPMG cannot possibly defend its admitted corporate policy of classifying all Audit Associates as exempt from their date of hire without being able to make the argument that Audit Associates as a class fall within one of the exempt categories — regardless of any individual variations in their job duties from location to location, or audit to audit, or time to time.”<sup>92</sup> This job duties inquiry is necessarily a fact-driven exercise

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<sup>87</sup> § 541.301(e). Executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, and paralegals, who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties, also generally will be exempt.

<sup>88</sup> 29 C.F.R. § 541.301(e)(5) (2012) (emphasis added). *See* *Otis v. Mattila*, 160 N.W.2d 691, 695 (Minn. 1968) (suggesting that an accountant’s work as a “bookkeeper” may not require the requisite exercise of discretion and judgment or be sufficiently intellectual and varied to be considered professional).

<sup>89</sup> The 1962 regulations provide:

Many accountants are exempt as professional employees (regardless of whether they are employed by public accounting firms or by other types of enterprises). However, exemption of accountants, as in the case of other occupational groups... must be determined on the basis of the individual employee's duties and the other criteria in the regulations. It has been the Divisions' experience that certified public accountants who meet the salary requirement of the regulations will, except in unusual cases, meet the requirements of the professional exemption since they meet the tests... Similarly, accountants who are not certified public accountants may also be exempt as professional employees if they actually perform work which requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed in the definition of "professional" employee. Accounting clerks, junior accountants, and other accountants, on the other hand, normally perform a great deal of routine work which is not an essential part of and necessarily incident to any professional work which they may do. Where these facts are found such accountants are not exempt. The title "Junior Accountant," however, is not determinative of failure to qualify for exemption any more than the title "Senior Accountant" would necessarily imply that the employee is exempt.

29 C.F.R. § 541.302(e) (1963).

<sup>90</sup> 29 C.F.R. § 541.301(f) (2012).

<sup>91</sup> *Pippins et al v. KPMG*, No. 11 Civ. 0377 (CM) (JLC), 2012 U.S. Dist. LEXIS 949 (S.D. N.Y. Jan. 3, 2012).

<sup>92</sup> *Id.* at \*44.

that is conducted on a case by case basis,<sup>93</sup> and as such, is inclined to generate litigation over the issue, particularly when the factual issues are as evasive as defining work which is predominantly intellectual in character and which requires the exercise of discretion and judgment.

## B. Application to Accountancy

At a minimum, the practice of a certified professional accountant is not synonymous with the occupation of a bookkeeper, whose primary duties may involve creating checklists (or spreadsheets), tabulating numbers according to a prescribed process or checking the computations of reports and as opposed to applying advanced accounting knowledge using independent judgment.<sup>94</sup> In contrast, a college-educated, licensed certified public accountant, who represents clients before the IRS, gives clients professional advice regarding tax and accounting matters, prepares tax returns, and conducts audits, *would be* considered an exempt learned professional under the FLSA.<sup>95</sup>

Between these two extremes, frequently it is not easy to discern where the exemption line should be drawn based on the facts of each case, or exactly what on balance tilts the decision in favor of finding an exempt status, when the statutory presumption does not favor such a finding.<sup>96</sup> For example, *Hendricks v. J.P. Morgan Chase Bank*,<sup>97</sup> involved two plaintiffs who alleged that they were owed overtime pay under the FLSA, and were not categorized properly as exempt professionals. Neither of the plaintiffs were CPAs. Plaintiff Hendricks, who had a bachelor's degree in accounting, was one of seven *Fund Accounting Specialists* in the Financial Reporting group, which was part of defendant JPMorgan's Hedge Fund Services.<sup>98</sup> In this capacity he helped to prepare drafts of certain components of financial statements, including balance sheets, income statements, and financial footnotes, reviewed financial statements for potential inaccuracies, reviewed financial footnotes for both substantive correctness and typographical errors, and prepared responses to questions about financial statements posed by outside auditors, all in accordance with established checklists.<sup>99</sup> Plaintiff Minzie, who had an associate's degree in finance and banking, worked as a *Fund Accounting Analyst*. He was responsible for generating various reports for hedge fund clients, such as daily profit and loss

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<sup>93</sup> *Walling v. General Industries Co.*, 330 U.S. 545, 549-50 (1947).

<sup>94</sup> *Brock v. Nat'l Health Corp.*, 667 F. Supp. 557, 566 (M.D. Tenn. 1987); *McComb v. New York & New Brunswick Auto Exp. Co.*, 95 F. Supp. 636, 642 (D. N.J. 1950).

<sup>95</sup> *Galasso v. Eisman, Zucker, Klein & Ruttenberg*, 310 F. Supp. 2d 569, 575 (S.D.N.Y. 2004).

<sup>96</sup> *See Lemmon v. Ayers*, No. 3:09-CV-361, 2012 U.S. Dist LEXIS 35578 (S.D. Ohio Mar. 16, 2012). In *Lemmon*, the court held that the employee in question was exempt, but made no explicit findings concerning what in fact made her a learned professional, notwithstanding that the inquiry should be factually driven. The court instead only enumerated plaintiff's duties related to accountancy. *Id.* at \*58.

<sup>97</sup> 677 F. Supp. 2d 544 (D. Conn. 2009).

<sup>98</sup> *Id.* at 548. In this capacity earned an annual salary of \$68,000 and was eligible for bonuses. *Id.*

<sup>99</sup> *Id.* He had no contact with clients and his work was subject to review. *Id.* at 549.



statements and monthly net asset value statements, responding to ad hoc client requests, and investigating certain changes in the prices of securities held by hedge fund clients.<sup>100</sup>

The district court characterized the issue as being a question of whether or not plaintiffs primarily perform similar job duties to those of a CPA, or instead performed the routine work of *internet-age bookkeepers* who operated computer programs which did not require the application of advanced knowledge.<sup>101</sup> While acknowledging that the classification ultimately was a question of law, the court determined that the legal issue could not be resolved at the summary judgment stage, and denied defendant's motion. In denying the motion for summary judgment, the court suggested, however, that plaintiffs would not be exempt if a substantial portion of their time was allocated to the operation of a computer program which did not require the use of accounting knowledge.<sup>102</sup> The court also noted that while the plaintiffs had some advance knowledge of accounting as well as accounting experience, it was unclear whether or not that training was necessary to perform their primary duties.<sup>103</sup>

In addition to the FLSA, states also have laws which regulate minimum wage and overtime compensation.<sup>104</sup> If the state law which regulates overtime pay is more favorable to the employee than the FLSA, it will apply.<sup>105</sup> However, state laws often mirror the federal provisions, in which cases the treatment of exempt professionals in state courts is instructive. For example, in *Campbell v. PricewaterhouseCoopers, LLP*<sup>106</sup> over two thousand unlicensed junior accountants brought suit against their employer, arguing that they were misclassified as exempt under the state's FLSA, and were therefore owed additional compensation for overtime hours worked. The district court agreed, and held that *unlicensed* accountants could categorically never qualify under California's professional or administrative exemptions.<sup>107</sup> The Ninth Circuit Court of Appeals reversed and remanded, holding that the exemption classification status under state law (like its federal counterpart) "is intensely factual and is one for the jury ...."<sup>108</sup> Warning of the potentially extreme implications of excluding an entire class of employees from being exempt, the Appeals Court concluded that each employee's duties and responsibilities must be measured against California's exemption requirements to determine whether or not any exemption applies.

Similar to the exemptions of the FLSA, the California Industrial Wage Commission established exemptions from the overtime requirements for executive, administrative, and professional employees, "provided that the employee is primarily engaged in the duties that meet

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 552.

<sup>102</sup> *Id.* at 554.

<sup>103</sup> *Id.* at 555.

<sup>104</sup> For example, some states establish a higher minimum wage than the federal rate. See Stephen Miller & Joey Long, *State Minimum Wage Laws in the Pacific Northwest and their Effect on Unemployment Rates*, 46 GONZAGA L. REV. 661, 668-69 (2011) (listing current rates of states exceeding federal rate).

<sup>105</sup> Rothe, *supra* note 74, at 736; Miller, *supra* note 63, at 344-46.

<sup>106</sup> 642 F.3d 820 (9th Cir. 2011).

<sup>107</sup> 602 F. Supp.2d 1163 (E.D. Cal. 2009). Analyzing the professional exemption first, the district court held that these employees were ineligible for the exemption as a matter of law because they were not licensed Certified Public Accountants. *Id.* at 1181.

<sup>108</sup> *Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d 820, 833 (9th Cir. 2011).

the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.”<sup>109</sup> Wage Order No. 4–2001 specifies that its provisions governing minimum wages, overtimes wages, and other employment conditions do not apply to employees falling within exemptions for persons employed in administrative, executive, or professional capacities.<sup>110</sup> The wage order further defines the professional exemption, as being applicable to an employee:

“(3)(a) Who is *licensed or certified* by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or (b) Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession.”<sup>111</sup>

The Ninth Circuit interpreted the two subsections of the state statute as an either/or option, allowing for an employee without a license under subsection (a) to still meet the exemption if s/he met the various requirements for a “learned or artistic” professional under subsection (b). Subsection (b) states that an individual who is primarily engaged in an occupation commonly recognized as a learned or artistic profession is exempt. Because unlicensed accountants may perform duties that could be considered those of a “learned or artistic” professional, these accountants could not be excluded from exempt status altogether.<sup>112</sup> The Appeals Court also disagreed with the lower court’s conclusion that unlicensed accountants could never meet the state’s administrative exemption because a licensed accountant was required to supervise their work.<sup>113</sup> In reversing, the Ninth Circuit explained that, “[w]hile we recognize Plaintiffs are on the low end of PwC’s hierarchy, we see no authority that would bar their audit work from meeting this test as a matter of law.”<sup>114</sup> The Appeals Court again stressed the importance of a factual inquiry, holding that the requisite analysis must examine the employees’ actual job duties and weigh conflicting testimony about those responsibilities, resulting in the inappropriateness of a categorical exclusion from exempt status.<sup>115</sup> A California state court reached a similar result with respect to the state statute and unlicensed attorneys.<sup>116</sup>

<sup>109</sup> Cal. Lab. Code § 515 (a) (2012).

<sup>110</sup> Cal.Code Regs. tit. 8, § 11040 (2012).

<sup>111</sup> *Id.* §11040, subd. (1)(A)(3) (emphasis added). The exemption provided in subdivision (a) is sometimes described as the enumerated professions exemption and the exemption in subdivision (b) as the learned professions exemption.

<sup>112</sup> The district court interpreted the state’s professional exemption, which requires that the individual possess a license or certification from the State of California, to render subsection (b) superfluous. *Campbell v. PricewaterhouseCoopers, LLP*, 602 F. Supp.2d 1163, 1179-80 (E.D. Cal. 2009).

<sup>113</sup> *Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d 820, 832 (9th Cir. 2011).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 830. On remand, the jury was instructed to consider whether or not the audit work performed by the junior accountants could be classified as work of “substantial importance” to the management of the clients’ operations. *Id.* at 832.

<sup>116</sup> *Zelasko-Barrett v. Brayton-Purcell, LLP*, 198 Cal.App.4th 582 (2011). Plaintiff was classified by the firm as a Law Clerk II, as contrasted with the firm’s Law Clerk I, a law student who had not yet graduated from law school.

Problematically, class action litigation like the *Campbell* case is complicated because of the need for similarly situated plaintiffs in order to form a class, juxtaposed against a quintessentially fact-intensive inquiry.<sup>117</sup> Rule 23 for class action lawsuits in federal court requires commonality, numerosity, typicality, and adequacy of representation.<sup>118</sup> As interpreted by the Supreme Court, the rule requires that claims “depend upon a common contention...[that is of] such a nature that it is capable of class-wide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”<sup>119</sup> As such, a district court has refused to certify class action litigation even when auditors used a common audit program because of variations in duties and responsibilities.<sup>120</sup>

In addition to Rule 23, the FLSA permits plaintiffs who are “similarly situated” with respect to job duties and requirements to pursue claims collectively.<sup>121</sup> Such collective actions under the FLSA differ from Rule 23 class actions in that a collective action requires class members to opt into the case, rather than to opt out of the case, and a party seeking conditional certification of a collective action need not demonstrate the requirements of numerosity, commonality, typicality, and adequacy of representation.<sup>122</sup> Recently collective actions under the FLSA have been conditionally certified, and cases now are pending against *all* of the *Big Four* accounting firms concerning alleged unpaid overtime to employees working as accountants.<sup>123</sup>

Nevertheless, the test for whether or not someone is exempt under the professional exemption under both state and federal law is predominately a factually intense inquiry. As such, it is frequently not suitable either for class action status or for summary disposition. The likelihood of expensive, protracted litigation necessarily discourages the assertion of rights by individual plaintiffs and undermines the intent of this remedial legislation. A clearer articulation

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The court held that he was nonetheless “a law school graduate and performed duties that brought him within an exemption for those engaged in a learned profession.” *Id.* at 584.

<sup>117</sup> Class action certification for fund accountants with common job and salary codes was denied in the J.P. Morgan Chase litigation because the record indicated that the differences among the proposed class members outweighed the similarities. *Hendricks v. J.P. Morgan Chase Bank, N.A.*, 263 F.R.D. 78 (D. Conn. 2009).

<sup>118</sup> FED. R. CIV. P. 23(a)(2).

<sup>119</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

<sup>120</sup> *Brady v. Deloitte & Touche, LLP*, No. C 08-177 SI, 2012 U.S. Dist. LEXIS 42118 (N.D. Ca. March 27, 2012). *But see Ho v. Ernst & Young*, No. 5:05-CV-04867-JF, 2011 U.S. Dist. LEXIS 106658 (N.D. Ca. Sept. 20, 2012) (certifying a smaller class of tax accountants).

<sup>121</sup> 29 U.S.C.S. § 216(b) (2012).

<sup>122</sup> *Jenkins v. TJX Cos.*, No. 10-CV-3753, 2012 U.S. Dist. LEXIS 46394, at \*5 (E.D.N.Y. Mar. 31, 2012) (citations omitted).

<sup>123</sup> *Kress v. PricewaterhouseCoopers, LLP*, 263 F.R.D. 623 (E.D. Cal. 2009); *In re Deloitte & Touche Overtime Litigation*, No. 11 Civ. 2461 (RMB) 2011 U.S. Dist. LEXIS 144977 (S.D.N.Y. Dec. 16, 2011); *Pippins v. KPMG LLP*, No. 11 Civ. 0377 (CM), 2011 U.S. Dist. LEXIS 30678 (S.D.N.Y. Mar. 21, 2011). *See also Ho v. Ernst & Young*, No. 5:05-CV-04867-JF 2011 U.S. Dist. LEXIS 106658 (N.D. Ca. Sept. 20, 2012) (Rule 23 class action). For an overview of pending collective and class actions against accounting firms for unpaid overtime compensations see Outten & Golden Blog, *UPDATE: Auditor Wage & Hour Litigation Against Big Four Accounting Firms*, available at <http://www.employmentlawblog.info/2012/01/update-auditor-wage-hour-litigation-against-big-four-accounting-firms.shtml>

of the distinction between exempt and non-exempt professionals is needed for both employers and employees.

### III. POLICY CONSIDERATIONS AND THE NEED FOR REFORM

#### A. The Need for a Change in the Application of the Exemption

Before the FLSA, officials associated with the National Recovery Administration debated the proper parameters for some sort of *white color* exemption to statutory overtime provisions.<sup>124</sup> Even then, employers attempted to game the system; for example, when a salary threshold was a specific criterion, employers would increase the wages of the employee by the necessary dollar or two in order to re-classify the employee as *professional*.<sup>125</sup> Under the FLSA defendants also tweaked employee status seemingly to avoid liability for overtime wages.<sup>126</sup> That same type of subtle frustration of purpose is now seen with the application of exempt status to an ever-broadening class of employees, when instead the FLSA intended for the exemptions to be narrowly construed against the employer.<sup>127</sup> As the Supreme Court noted in 1945 in reference to the FLSA, “[T]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.”<sup>128</sup>

The incentive to re-classify workers in order to dodge the applicability of statutory protection is evident in the current interpretation of the term *supervisor* in the National Labor Relations Act (“NLRA”).<sup>129</sup> Under the NLRA, workers have the right to organize and to engage in concerted activities for their mutual aid and assistance.<sup>130</sup> Supervisors, however, are excluded

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<sup>124</sup> See Deborah C. Malamud, *Engineering the Middle Classes: Class-Line Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212 (1998) (discussing the prehistory and early development of these so-called “white-collar exemptions”).

<sup>125</sup> *Id.* at 2265-66.

<sup>126</sup> For example, at a time at which the regulations provided that employees were exempt if they were compensated at a rate of not less than \$200 per month, a plaintiff bookkeeper/accountant salary was increased from \$190 to \$210 after the action was instituted, rendering the case moot. *McComb v. Farmers Reservoir & Irrigation Co.*, 167 F.2d 911, 916 (10th Cir. 1948).

<sup>127</sup> Hebert, *supra* note 57, at 128.

<sup>128</sup> *A. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

<sup>129</sup> See John H. Hensley & Debra D. Burke, *The Changing Nature of Supervision: Implications for Labor-Management Relations in the Twenty-first Century*, 33 SETON HALL LEGIS. J. 397 (2009) (arguing that the National Labor Relations Board interpretation of the term supervisor in the NLRA is over-inclusive and in need of a statutory re-definition).

<sup>130</sup> “[E]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection...” 29 U.S.C. § 157 (2004). The Act defines a labor organization as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” *Id.* § 152(5).

from the protection of these *Section 7* rights.<sup>131</sup> The National Labor Relations Board is guided by three standards for determining whether or not someone is a supervisor: *assignment* (place, time, duty); *responsibility* (accountable for the actions of those being assigned) and *independence of judgment* (the discretion to make judgments free of outside influences).<sup>132</sup> Under NLRB precedent, employees may be considered a supervisor if only ten percent of their time is spent supervising other workers.<sup>133</sup> Because modern work environment involves team work, fluidity of decision-making, innovation and creative solutions, and the exercise of judgment by employees, more than an accurate number of workers are classified as supervisors and denied the right to organize.<sup>134</sup> That same work environment complicates the definition of *bona fide executive, administrative and professional* under the FLSA as well.

If everyone is a supervisor under the NLRA, and everyone is exempt under the FLSA, then what has happened to the protections afforded employees last century? The executive administrative and professional exemption as interpreted currently embraces workers with different characteristics than originally intended, necessitating a re-evaluation of the requirements for exempt status in order to comport with the original vision of the FLSA.<sup>135</sup> For example, managers of fast food chains and other retail establishments, who make slightly more than the minimum wage rate, have been deemed exempt if management is their primary duty.<sup>136</sup> Yet, originally, the exemption was limited to an insular and discreet group of workers who had careers of promising perquisites and remuneration, characteristics most white collar workers classified as exempt today do not enjoy; nor do currently exempt workers enjoy the bargaining power that justified the original omission from minimum wage laws. If today's exempt workers had bargaining power, arguably they would not be putting in the excessive hours they do.<sup>137</sup>

Indeed, as more workers are categorized as being exempt, the legislation has the opposite effect than that intended; instead of reducing the hours worked per week, the work week is extended for a greater number of employees. American workers suffer from what is referred to as *time-squeeze*, that is, a situation in which leisure and family time are supplanted by work, and that sacrifice necessarily raises quality of life issues.<sup>138</sup> Notably, the United States is the only

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<sup>131</sup> “[T]he term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” *Id.* §152 (11).

<sup>132</sup> See, e.g., *Oakwood Healthcare*, 348 NLRB No. 37 (Sept. 29, 2006), available at [http://www.nlr.gov/shared\\_files/Board Decisions/348/348-37.pdf](http://www.nlr.gov/shared_files/Board%20Decisions/348/348-37.pdf); *Golden Crest Healthcare Center*, 348 N.L.R.B. No. 39 (Sept. 29, 2006), available at [http://www.nlr.gov/shared\\_files/Board%20Decisions/348/348-39.pdf](http://www.nlr.gov/shared_files/Board%20Decisions/348/348-39.pdf); *Croft Metals*, 348 N.L.R.B. No. 38 (Sept. 29, 2006), available at [http://www.nlr.gov/shared\\_files/Board Decisions/348/348-38.pdf](http://www.nlr.gov/shared_files/Board Decisions/348/348-38.pdf).

<sup>133</sup> *Oakwood Healthcare*, 348 NLRB, at 694.

<sup>134</sup> Hensley, *supra* note 129, at 426-28.

<sup>135</sup> Hebert, *supra* note 57, at 118-119.

<sup>136</sup> For a discussion of retail managers and the white collar exemption as applied to them see Drew Frederick, Comment, *Exempt Executives? Dollar General Store Managers' Embattled Quest for Overtime Pay under the Fair Labor Standards Act*, 160 U. PA. L. REV. 277 (2011).

<sup>137</sup> Rothe, *supra* note 74, at 728-32.

<sup>138</sup> Miller, *supra* note 8, at 46-77.



industrialized nation which does not legislate vacation time, and predictably millions of workers receive no paid holidays,<sup>139</sup> and there is no recognized right to refuse overtime for non-exempt workers.<sup>140</sup> Everyone is working more hours, but fewer and fewer workers are being compensated for their overtime efforts. Smart phones allow employees to check email and continue to work from home after hours, on weekends and during vacation, resulting in a 24/7 work force with no overtime compensation.<sup>141</sup> This reality effects exempt workers as well, because of the difficulty in delineating the 40 hour-work week in cyberspace.<sup>142</sup>

Furthermore, the desire to spread available work among more workers that existed when the FLSA was passed<sup>143</sup> is just as relevant today when the country is facing high unemployment rates.<sup>144</sup> In economic downturns, employers tend to trim the workforce and shift work to existing exempt employees.<sup>145</sup> When the FLSA was enacted in 1938 few employees qualified for an executive, administrative or professional exemption; in contrast, on the cusp of the twenty-first century, close to one-third of employees were considered to be administrative or professional.<sup>146</sup> The white collar ranks have swelled as the distinctions among workers concurrently have blurred.<sup>147</sup>

One commentator suggested that “no good reason exists to maintain the FLSA’s managerial-professional exemption.”<sup>148</sup> He argues that “the notion that managerial and professional employees have no need for such regulation rests on a pair of misconceptions: first, that managers and professionals have sufficient bargaining power to limit their hours; and second, that their relatively high pay and superior benefits make more time away from the job unnecessary.”<sup>149</sup> A preferable legislative alternative would be to require employers “to provide time off to their managerial and professional employees for hours worked beyond a statutorily

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<sup>139</sup> Scott D. Miller, *The Fair Labor Standards Act Work/Life Balance and the White Collar Employee under the FLSA*, 7 EMPL. RTS. EMPLOY. POL’Y J. 5, 34 (2003).

<sup>140</sup> Shirley Lung, *Overwork and Overtime*, 39 IND. L. REV. 51, 59 (2005).

<sup>141</sup> See Rothe, *supra* note 74 (discussing the Blackberry enslavement of exempt workers).

<sup>142</sup> See Jana M. Luttenegger, Note, *Smartphones: Increasing Productivity, Creating Overtime Liability*, 36 IOWA J. CORP. L. 259 (2010) (discussing the need for clarification of what activities related to work are covered by the overtime provisions).

<sup>143</sup> Malamud, *supra* note 124, at 2223.

<sup>144</sup> Although the economy is slowly rebounding, the unemployment rate hovers around 8.3 percent in the first quarter of 2012. Shaila Dewan, *U.S. Extends Its Run of Strong Jobs Growth Another Month*, N.Y. TIMES, Mar. 9, 2012, available at <http://www.nytimes.com/2012/03/10/business/economy/us-added-227000-jobs-last-month-rate-at-8-3.html>.

<sup>145</sup> Gretchen Agena, Comment, *What’s So “Fair” About It?: The Need to Amend the Fair Labor Standards Act*, 39 HOUS. L. REV. 1119, 1127 (2002). However, professional employees are not necessarily fungible, and replacement workers may not be readily available. *Id.* at 1137.

<sup>146</sup> *Id.* at 1126-27. A 2001 Department of Labor report confirmed that 48.3 million workers are excluded from the maximum hour protection provision of the FLSA under the white collar exemption. Miller, *supra* note 139, at 7.

<sup>147</sup> Miller, *supra* note 8, at 32.

<sup>148</sup> Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139, 189 (1993).

<sup>149</sup> *Id.*

defined standard workweek.”<sup>150</sup> Another commentator asserts that the exemption should be eliminated because of the diminishing differences between white and blue-collar workers, workplace changes since the passage of the FLSA, and the difficulties in administering the white-collar exemption.<sup>151</sup> To be sure, white and blue collar workers are becoming more homogenous, both with respect to income and life style.<sup>152</sup>

Another observer suggests that the exemption for executive, administrative and professional should be replaced with only one exemption for upper-level workers, analogous to the key employee exemption under the Family Medical Leave Act.<sup>153</sup> Still another critic of the current exemption, with its fact-intensive inquiry, proposes a bright-line test for exempt status based upon compensation.<sup>154</sup> Indeed, a bright line test is meritorious as it would inject more predictability into the exemption status for employers and employees, and permit workers to assert their rights collectively; currently, the feasibility of class action suits is diminished because of the factual nature of the definition of professional.<sup>155</sup> One such bright line test is a demarcation based upon certification, be it certification for paralegals,<sup>156</sup> nurses,<sup>157</sup> or the designation of CPA for accountants.

Labor Department Regulations speculate on the exempt status of some professionals, such as accountants or licensed medical practitioners,<sup>158</sup> but specifically address that status for attorneys and physicians, who are members of the classic *learned professions*.<sup>159</sup> The term “employee employed in a bona fide professional capacity” expressly encompasses “(1) Any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof; and (2) Any employee who is the holder of the requisite academic degree for the general practice of medicine

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<sup>150</sup> *Id.*

<sup>151</sup> Cicala, *supra* note 52, at 141.

<sup>152</sup> Miller, *supra* note 139, at 18-19.

<sup>153</sup> *Id.* at 49-50. Key employees under the FMLA may not be entitled to the restoration of their original job upon their return to work. 29 U.S.C. § 2614(b) (2012). A key employee is defined under the regulations as a “salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite.” 29 C.F.R. § 825.217 (a) (2012).

<sup>154</sup> Agena, *supra* note 145, at 1153-1156 (proposing a three-tier test based upon salary). *See also* Krueger, *supra* note 3, at 1120-1123 (arguing that the uncertainty of classification under the current scheme necessitates a clear rule, such as an exemption based on annual earnings).

<sup>155</sup> *See* Hendricks v. J. P. Morgan Chase Bank, 263 F.R.D. 78 (2009) (denying class certification for plaintiff fund accountants because resolution of the factual questions cannot be achieved through generalized proof); Forney v. TTX Co, No.: 05 C 6257, 2006 U.S. Dist. LEXIS 30092 (N.D. Ill. Apr. 17, 2006) (denying collective actions because determination would be fact-intensive and individualized). *But see* Kress v. Price Waterhouse Coopers, 263 F.R.D. 623 (E.D. Cal. 2009) (holding that standards were sufficiently uniform to demonstrate that duties were similar in pertinent aspects).

<sup>156</sup> *See* Engel, *supra* note 55 (arguing that the American Bar Association should develop standards for certifying paralegals so as to classify them as exempt professionals).

<sup>157</sup> *See* Richardson v. Genesee Cty Comm. Mental Health Services, 45 Supp. 2d 610, 615 (E.D. Mich. 1999) (stating that “plaintiffs clearly come within the definition of professional status because they are licensed, registered nurses.”).

<sup>158</sup> 29 C.F.R. § 541.301(e) (2012).

<sup>159</sup> *See supra* notes 19-51, and accompanying text.

and is engaged in an internship or resident program pursuant to the practice of the profession.”<sup>160</sup> That same express classification as exempt should apply to Certified Public Accountants as well. Commensurately, those practitioners who are *not* CPAs should be covered by the FLSA’s overtime provisions, unless otherwise qualified under the executive or administrative prongs of the exemption and the specific requirements for those employees under the regulations.<sup>161</sup> Currently, state and federal regulations as interpreted view the practice of public accountancy as being merely subset of the learned profession of accounting.<sup>162</sup>

## B. The Public Accounting Profession-- a *Learned* Profession

The modern public accounting profession originated in Great Britain during the latter half of the nineteenth century, and in 1887 the American Association of Public Accountants (“AAPA”) was formed to raise the professional standards of accountants through examination and licensing.<sup>163</sup> In 1896 the New York state legislature passed the first law creating the title, *certified public accountant*, thereby setting the pattern for state government regulation of the public accounting profession in the United States.<sup>164</sup> Prompted by concerns that state accounting societies failed to delineate proper boundaries for the profession, the AICPA emerged from the AAPA to revise the pattern of professional governance through the administration of a new certifying examination, partnerships with educational institutions, and a stronger code of professional ethics.<sup>165</sup> The AICPA first offered a national level competency exam in 1917 and by 1921 thirty-six states had adopted that exam as their own certifying examination.<sup>166</sup>

Subsequently, the Securities Acts of 1933 and 1934, which were passed after the stock market crash of 1929, required audits of publicly traded companies by independent CPAs, which prompted licensure requirements and entrenched the auditor as *public watchdog* with an ethical calling.<sup>167</sup> As a self-regulated profession, public accountancy establishes both the standards of practice (that is, Generally Accepted Accounting Principles (“GAAP”) and Generally Accepted Auditing Standards (“GAAS”)) as promulgated by the Financial Accounting Standards Board

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<sup>160</sup> 29 C.F.R. § 541.304 (2012).

<sup>161</sup> See *supra* notes 59-65, and accompanying text.

<sup>162</sup> *Mekhitarian v. Deloitte & Touche (ICS), LLC, et al.*, No. CV 07-412 DSF, 2009 U.S. Dist. LEXIS 131754, at 8-9 (D. Cen. Ca. Nov. 3, 2009) (interpreting state law and denying Rule 23 class certification).

<sup>163</sup> Conrad S. Ciccotello, C. Terry Grant & Mark Dickie, *Will Consult for Food! Rethinking Barriers to Professional Entry in the Information Age*, 40 AM. BUS. L.J. 905, 912 (2003). Today the AICPA serves as an advocate before legislative bodies, public interest groups and other professional organizations, develops standards for audits of private companies and other services by CPAs, provides educational guidance materials to its members, develops and grades the Uniform CPA Examination, and monitors and enforces compliance with the profession’s technical and ethical standards. *AICPA Mission and History*, AICPA, available at <http://www.aicpa.org/ABOUT/MISSIONANDHISTORY/Pages/MissionHistory.aspx>.

<sup>164</sup> Rebecca Roiphe, *The Most Dangerous Profession*, 39 CONN. L. REV. 603, 630 (2006 ) (providing an excellent historical analysis of public accountancy as a profession).

<sup>165</sup> PAUL J. MIRANTI, JR., ACCOUNTANCY COMES OF AGE: THE DEVELOPMENT OF AN AMERICAN PROFESSION 1886-1940 111-116 (1990).

<sup>166</sup> *Id.* at 121.

<sup>167</sup> Ciccotello, Grant & Dickie, *supra* note 157, at 912-13.

(“FASB”).<sup>168</sup> In addition to promulgating standards, the public accountancy profession regulates the competency of its practitioners as well, and state boards of accountancy also police practitioners for violations of the established professional norms.<sup>169</sup>

### 1. Regulation of Competency in the Public Interest

Because of the need for accurate and reliable financial reports in the field of public accounting, professional competency is essential. Therefore, each state regulates the licensing of accountants within its jurisdiction, similar to the regulatory scheme for attorneys and physicians. While the AICPA does not have jurisdictional power over the governing state boards of accountancy, all state boards of accountancy are members of National Association of State Boards of Accountancy (“NASBA”), and that association influences state governance models for public accountancy.<sup>170</sup> In an attempt to provide greater uniformity across jurisdictions and to guide state boards as they adopt or modify existing state laws which govern the practice of accountancy, the AICPA and NASBA jointly proposed the Uniform Accountancy Act (“UAA”), a model bill designed to regulate the practice of public accountancy and promote high professional standards.<sup>171</sup>

Primarily, statutory regulation of CPAs, as of any other profession or occupation, is justified by consideration of the public interest. Because the expression of formal professional opinions upon financial statements require great skill and invite the highest degree of reliance by the widest segment of the public, the UAA prohibits unlicensed persons from issuing reports on audits, reviews, and compilations of financial statement.<sup>172</sup> The need to assure the public of reasonable competence supports the requirement that all licensees demonstrate and maintain professional competence in their area of responsibility.<sup>173</sup> The UAA also contemplates that state boards of accountancy will promulgate rules that govern the conduct of licensees, implement the Act, and assume principal responsibility for disciplinary enforcement and prevention of the unauthorized practice.<sup>174</sup>

Since there is no national licensing board for accountants, the AICPA and the National Association of State Boards of Accountancy (“NASBA”) initiated an effort, the *CPA Mobility Project*, to enable CPAs to practice across state boundaries if they met a competency standard in their state of certification.<sup>175</sup> This *Substantial Equivalency* standard is administered by the

<sup>168</sup> Matthew A. Melone, *United States Accounting Standards - Rules or Principles? The Devil Is Not in the Details*, 58 U. MIAMI L. REV. 1161, 1165-74 (2004). See also Omar Ochoa, Note, *Accounting for FASB: Why Administrative Law Should Apply to the Financial Accounting Standards Board*, 15 TEX. REV. LAW & POL. 489 (2011) (discussing the functions of FASB).

<sup>169</sup> See *infra* notes 170-188, and accompanying text.

<sup>170</sup> Email from Thomas Kenny, Director of Communications, NASBA, to N.L. Kauffman, Associate Professor of Accounting (May 30, 2012, 09:48 EST) (on file with authors).

<sup>171</sup> UNIF. ACCOUNTANCY ACT (6<sup>th</sup> ed. 2011), available at <http://www.aicpa.org/Advocacy/State/DownloadableDocuments/UASixthEdition.pdf>

<sup>172</sup> *Id.* § 14(a).

<sup>173</sup> *Id.* §§ 6 & 7.

<sup>174</sup> *Id.* §§ 4, 10-17.

<sup>175</sup> *History of CPA Mobility*, AICPA, available at <http://www.aicpa.org/Advocacy/State/Pages/SubstantialEquivalencyandPracticeMobility.aspx>. Since 2006, 48

NASBA and is used to evaluate whether or not a state's CPA qualification requirements are substantially equivalent to the UAA as they relate to good character, the completion of the 150-hour education requirement, the passage of the Uniform CPA Examination and compliance with a one-year general experience requirement.<sup>176</sup> In sum, it is clear that the profession makes significant efforts to impose a uniform professional standard of care in the practice of public accountancy.

## 2. *Adherence to an Enforced Code of Ethics*

Certified Public Accountants are regulated by a variety of state laws and professional bodies.<sup>177</sup> State boards hear disciplinary cases brought against a state's licensees for substandard practice as well as for violations of the state's code of ethics, and can sanction members through the imposition of fines and the license forfeiture.<sup>178</sup> The provisions of many state accounting societies codes of conduct are identical with, or similar to, the provisions of the AICPA Code of Professional Conduct, and most CPAs are members of both the AICPA and one or more of the state societies.<sup>179</sup>

The AICPA Code of Professional Conduct recognizes that certified public accountants perform an essential role in society.<sup>180</sup> "Consistent with that role, members of the American Institute of Certified Public Accountants have responsibilities to all those who use their professional services. Members also have a continuing responsibility to cooperate with each other to improve the art of accounting, maintain the public's confidence, and carry out the profession's special responsibilities for self-governance."<sup>181</sup> Recognizing that "clients, credit grantors, governments, employers, investors, the business and financial community, and others"

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states have adopted CPA Mobility language that is currently effective and one jurisdiction has adopted language which contains a future effective date. *Summary of State Activity on CPA Mobility*, AICPA, available at [http://www.aicpa.org/Advocacy/State/DownloadableDocuments/SumCPAMobility\\_032812.pdf](http://www.aicpa.org/Advocacy/State/DownloadableDocuments/SumCPAMobility_032812.pdf).

<sup>176</sup> *Substantial Equivalency*, NASBA, available at <http://www.nasba.org/licensure/substantialequivalency/> (listing "Substantially Equivalent States"). See also UNIF. ACCOUNTANCY ACT § 23 (6<sup>th</sup> ed. 2011) (establishing the equivalency requirement).

<sup>177</sup> Robert Prentice, *The Case for Educating Legally Aware Accountants*, 38 AM. BUS. L.J. 597, 609-10 (2001).

<sup>178</sup> *Purpose and Role of State Boards of Accountancy*, NASBA, available at <http://www.nasba.org/features/the-purpose-and-role-of-state-boards-of-accountancy>. The AICPA publishes results of the disciplinary activity and actions maintained against members. *Disciplinary Actions*, AICPA, available at <http://www.aicpa.org/ForThePublic/DisciplinaryActions/Pages/default.aspx> Additionally, many state boards of accountancy publish results of disciplinary actions. E.g., *Disciplinary Actions*, Ark. St. Bd. of Pub. Accountancy, available at <http://www.arkansas.gov/asbpa/Disciplinary.html>.

<sup>179</sup> Joint Ethics Enforcement Program (JEEP) Manual of Procedures, AICPA, available at <http://www.aicpa.org/InterestAreas/ProfessionalEthics/Resources/EthicsEnforcement/Pages/jointenforceprocedures.aspx>. As a result, most the state societies jointly created the Joint Ethics Enforcement Program ("JEEP"), along with a manual of enforcement procedures. *Joint Ethics Enforcement Program (JEEP) Manual of Procedures* (Dec. 2006), AICPA, available at [http://www.aicpa.org/InterestAreas/ProfessionalEthics/Resources/EthicsEnforcement/DownloadableDocuments/Dec\\_2006\\_JEEP\\_Manual.pdf](http://www.aicpa.org/InterestAreas/ProfessionalEthics/Resources/EthicsEnforcement/DownloadableDocuments/Dec_2006_JEEP_Manual.pdf).

<sup>180</sup> AICPA CODE OF PROF. CONDUCT, ET § 52, art. 1 (2011).

<sup>181</sup> *Id.* §53, art. II.



rely on the objectivity and integrity of certified public accountants to maintain the orderly functioning of commerce, the Code accepts the profession's "obligation to act in a way that will serve the public interest, honor the public trust, and demonstrate commitment to the profession."<sup>182</sup> The Code further provides that in discharging professional responsibilities CPAs maintain integrity and not subordinate their position of public trust to personal gain, remain objective and independent, free from conflicts of interest, and exercise due care to provide services with competence and diligence.<sup>183</sup>

The Code of Professional Conduct also recognizes an obligation to maintain confidentiality with respect to communications with clients.<sup>184</sup> As noted previously, some state courts recognize a testimonial privilege.<sup>185</sup> Additionally, the Internal Revenue Code makes tax advice in noncriminal matters privileged in IRS proceedings and noncriminal cases in federal court,<sup>186</sup> and accountants who provide support to attorneys cannot be excluded from the expectation of confidentiality in communications with the attorneys on behalf of clients.<sup>187</sup> However, this duty of confidentiality does not always translate into a privileged communication in court proceedings.<sup>188</sup> There is no privilege under the common law, and a client who discloses information to an accountant cannot claim a Fifth Amendment privilege against disclosure.<sup>189</sup> Nevertheless, the CPA's ethical command of confidentiality, even without a commensurate testimonial privilege, is a hallmark trait of the learned professions, and buttresses the conclusion that public accountants, who are licensed based upon competency and regulated by a Code of Professional Conduct, are members of a learned profession.

### C. The Case for Limiting the Accounting Professional Exemption to CPAs

Against this backdrop it is clear that public accounting has emerged as a properly classified *learned profession*, and its licensed practitioners are *learned professionals*. By the same token, other employees who may perform accounting services, but who are not subject to the same licensing and ethical dictates should *not* be considered *learned professionals*. Key differences exist between unlicensed accountants and CPAs. For example, there are aspects of the practice of accounting that can only be performed by CPAs, such as the certification of financial statements to protect the interests of the investing public;<sup>190</sup> similarly, auditing

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<sup>182</sup> *Id.* "In return for the faith that the public reposes in them, members should seek continually to demonstrate their dedication to professional excellence." *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* § 300, Rule 301.01 (2011). *See also* UNIF. ACCOUNTANCY ACT §§ 18 & 19 (6<sup>th</sup> ed. 2011).

<sup>185</sup> *See supra* notes 40-43, and accompanying text.

<sup>186</sup> 26 U.S.C. § 7525 (2012).

<sup>187</sup> *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). For a discussion of the privilege in tax matters see Jennifer L. Chapman, *Should I Retain and Attorney or a CPA?: The Role of the Evidentiary Privileges in Tax Litigation*, 20 So. L.J. 69 (2010).

<sup>188</sup> *See supra* notes 40-43, and accompanying text.

<sup>189</sup> *Couch v. United States*, 409 U.S. 322 (1973).

<sup>190</sup> *Campbell v. PricewaterhouseCoopers, LLP*, 602 F. Supp.2d 1163, 1177 (E.D. Cal. 2009). Under Sarbanes-Oxley only a registered accounting firm can attest to, and report on, the assessment on the effectiveness of the internal

standards establish that non-certified individuals must work under the supervision and control of a certified public accountant.<sup>191</sup> In fact, the importance of the distinction between and CPA and an unlicensed accountant is clearly evidenced by the fact that advertising the designation of CPA without being properly licensed is “misleading, to the public's detriment.”<sup>192</sup> Additionally, when professional malpractice lawsuits against accountants are discussed, such litigation centers on licensed professionals as being the practitioners owing a standard of care.<sup>193</sup>

But the primary distinctions that differentiate an accountant from a CPA are inextricably tied to the definition of a learned profession. Certified public accountants, like other learned professions, are characterized by minimum education requirements, licensure by a governmental board or body, and adherence to an enforceable code of professional conduct.<sup>194</sup> Unlicensed are not subject to those standards and penalties for non-compliance, nor should they be considered exempt under the FLSA. Arguably, being *exempt* means working in a job that has high social status;<sup>195</sup> it follows then, that no longer be categorized as exempt could result in the employee's perception of a loss in status.<sup>196</sup> But the perpetuation of some illusion of status should not be a surrogate for fair and just compensation systems. Apparently thousands of unlicensed accountants agree, and have filed suit against the Big Four accounting firms (i.e., Ernst & Young, KPMG, PricewaterhouseCoopers, & Deloitte Touche Tohmatsu) seeking relief from exploitation and the request to work uncompensated over forty hours a week without any statutory protection for refusing.<sup>197</sup>

The FLSA's professional exemption was penned at a time when only 36 percent of persons aged 25 to 34 years were high school graduates, and a scant *six percent* had bachelor's degrees.<sup>198</sup> Current regulations expressly acknowledge that the advanced knowledge required for

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control structure and procedures for financial reporting as published in the annual reports required concerning the scope and adequacy of the internal control structure and procedures for financial reporting. 15 U.S.C. § 7262 (2012).

<sup>191</sup> Statements on Auditing Standards No. 108 (2011), AICPA, *available at* <http://www.aicpa.org/research/standards/auditattest/downloadabledocuments/au-00311.pdf>.

<sup>192</sup> *Moore v. Cal. St. Bd. Accountancy*, 831 P.2d 798, 813 (Cal. 1992) (granting a permanent injunction for using the term falsely in violation of state law).

<sup>193</sup> For an overview of accountant and specifically auditor malpractice liability see Willis W. Hagen, II, *Accountants' Common Law Negligence Liability to Third Parties*, 1988 COLUM. BUS. L. REV. 181; Travis Morgan Dodd, Note, *Accounting Malpractice and Contributory Negligence: Justifying Disparate Treatment Based Upon the Auditor's Unique Role*, 80 GEO. L.J. 909 (1992).

<sup>194</sup> Steven Wechsler, *2000-2001 Survey of New York Law: Professional Responsibility*, 52 SYRACUSE L. REV. 563, 583 (2002) (discussing multi-disciplinary practice rules).

<sup>195</sup> See Engel, *supra* note 55, at 274-75 (asserting that the exemption of paralegals “would grant greater standing and legitimacy to non-lawyers by recognizing them as executives, administrators or professionals who possess the discretion and authority to work on legal matters.”).

<sup>196</sup> Malamud, *supra* note 119, at 2316-17.

<sup>197</sup> See *supra* notes 91-118, and accompanying text. See also *Call to White-Collar Workers: Make Sure You Are Not Being Misclassified as Exempt*, NY Empl. Law. Blog, Villanueva & Sanchala (Jan.12, 2012), *available at* <http://www.new-york-employment-lawyer-blog.com/2012/01/call-to-white-collar-workers-m.html>.

<sup>198</sup> *Census Questionnaire Content, 1990 CQC-13*, Bureau of the Census, *available at* <http://www.census.gov/apsd/cqc/cqc13.pdf> (referencing 1940 census data).

a learned profession cannot be attained at the high school level,<sup>199</sup> so clearly the professional exemption applied to a narrow class of workers, and that reality was known to Congress when the exemption was penned. As written, the term *learned profession* was not used specifically, but the professional exemption clearly embraced a unique class of employees given the educational attainment of citizens in the 1930s. Therefore, it is the profession that should be classified as being learned or not being learned, not each individual practitioner of a trade or business based on personal factors such as the exercise of discretion and independent judgment.

The definition of the term *learned professions* in the regulations should return to that distinction, and should not embrace an inexplicable expansion of that class unrelated to the historical definition of the term. Admittedly, the regulations must be dynamic in order to respond and adapt to a changing workforce. That responsiveness should be in recognizing new groups of professionals who attain the learned distinction by sharing the historical traits referenced in the use of that term, such as licensed public accountants.<sup>200</sup> It should not include groups of unlicensed individuals within the practice of the new occupation.<sup>201</sup> The term professional can be defined by a multitude of traits, such as market share and monopoly power.<sup>202</sup> But the term *learned profession* is not centered on such distinction, but rather a public calling higher than that of the market place, which is pursued by licensed practitioners who adhere to an enforced ethical code.<sup>203</sup> As such, only licensed CPAs who retain their credentials should be considered exempt professionals under the FLSA.<sup>204</sup>

The Ninth Circuit in *Campbell*<sup>205</sup> feared such an interpretation of the exemption would require employers to pay mandatory overtime to a recent medical-school graduate working as a resident at a hospital, or to an associate at a law firm who has taken the bar exam but not yet received his results, and that somehow that situation would be an unfair result.<sup>206</sup> But how can paying overtime to trainees who are likely making a wage that reflects their unlicensed status be against legislative intent? The employer can chose to hire licensed professionals instead or to employ more unlicensed practitioners forty hours a week in order to avoid overtime pay, the latter result being a specific strategic policy intended by the FLSA. In fact, in the 1980s the then *Big Eight* accounting firms paid overtime wages, allowing employees to supplement their income 10-15% by working more hours, so the possibility of recognizing that obligation is not a remote one.<sup>207</sup>

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<sup>199</sup> 29 C.F.R. § 541.301(b) (2012).

<sup>200</sup> See *supra* notes 157-183, and accompanying text.

<sup>201</sup> *Campbell v. PricewaterhouseCoopers, LLP*, 602 F. Supp.2d 1163, 1177 (E.D. Cal. 2009).

<sup>202</sup> See Alan J. Richardson, *Social Closure in Dynamic Markets: the Incomplete Professional Project in Accountancy*, 8 CRITICAL PERSP. ACCT. 635, (1997) (opining that the achievement of professional status requires, inter alia, market closure and an exercise of professional power).

<sup>203</sup> Edward D. Re, *The Profession of Law*, 15 ST. JOHN'S J.L. COMM. 109, 110-12 (2000).

<sup>204</sup> *But see* *Tavassol v. Hewitt-Washington & Assocs., NO. 97-3278 SECTION "C" (5)*, 1998 U.S. Dist. LEXIS 17028 (E.D. La. Oct. 23, 1998) at \*6 (recognizing that under current interpretations “[N]either the statute nor the regulations require that a professional be licensed.”).

<sup>205</sup> See *supra* notes 101-115, and accompanying text.

<sup>206</sup> *Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d 820, 833 (9th Cir. 2011).

<sup>207</sup> Eric N. Berg, *Salaries Begin to Rise For New Accountants*, N.Y. TIMES, Oct. 12, 1987, at 1.

The term *learned profession* is not without a specific meaning. However, its use in 1962 to distinguish types of professionals, particularly to distinguish creative professionals from another class of professionals, deviated from the classic definition of a learned profession. The definition maintained the need for specialized knowledge characteristic of learned professions, while simultaneously maintaining the 1938 version's requirement of "consistent exercise of discretion and judgment" instead of the need for an enforced code of ethics, including a responsibility of maintaining confidences, which is a characteristic of the classic definition of a learned profession. While it is highly probable that learned professionals exercise discretion and independent judgment, those terms are inherently vague and also may describe workers who are not professional. While the original use of the term learned profession in the regulations was inaccurate, achieving legislative intent would counsel against deleting the term, but rather in favor of maintaining the term and aligning its true definition with its use. Once a profession is classified a learned one under the classic meaning, then its members by definition become learned professionals, and that determination likely can be made as a matter of law.

The Court has directed that the exemption is to be construed in a light favor of the employee.<sup>208</sup> Unfortunately, however, the parameters of the definition have been perverted, the legislative presumption abandoned, and the possibility of being able to determine exempt status efficiently has been completely frustrated by a factually intense inquiry, all of which factors subvert the legislative intent of the FLSA. Even employers are frustrated by the ambiguous meaning and application of the terms designed to characterize a professional under the FLSA regulations. In testifying before a House Subcommittee, the Senior Vice President of Human Resources at IBM noted that "[o]ften, as new graduates start their first jobs, they exercise very little discretion or judgment. Instead, they follow the highly complicated rules and principles of the profession and/or directions from those to whom they report, until they acquire sufficient experience on the job. The quandary faced by employers is determining at what point new employees with sophisticated skills cross the threshold into the blurry FLSA definition of a professional."<sup>209</sup>

To legitimately infuse the meaning of *bona fide* into the professional exemption and protect the twenty-first century worker, a clearer line should be drawn at the licensure of learned professionals. Certainly accountants who are not licensed could be considered exempt as an administrator or an executive if they satisfied those separate tests for exempt status.<sup>210</sup> However, the regulatory definition of the learned profession exemption should be reserved for licensed practitioners, Certified Public Accountants. While this paper has focused on the accounting profession, this bright line would service other learned professions well, such as law.

#### IV. CONCLUSION

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<sup>208</sup> See cases cited *supra* notes 18 & 61.

<sup>209</sup> *The Fair Labor Standards Act: Is It Meeting the Needs of the Twenty-First Century Workplace?: Hearing Before the Subcomm. on Workforce Protections of the House Comm. on Education and the Workforce*, 112<sup>th</sup> Cong. 1<sup>st</sup> Sess. 16 (2011) (testimony of J. Randall MacDonald, Senior Vice President, Human Resources, IBM Corporation).

<sup>210</sup> See *Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527, 538-43 (7th Cir. 1999) (holding that the administrative exemption applied to an accounting firm manager).

The list of learned professions has expanded beyond the original fields of law, medicine and theology; however, the critical distinction which is their hallmark remains—a policed code of ethics, responsibility to the public, and substantial specialized education. Federal regulations have distorted the professional distinction by retaining an educational mandate, but replacing the code of ethics and the higher calling to public service prongs with an elusive standard that attempts to evaluate in part the consistent exercise of discretion and judgment, a desirable trait that nevertheless could apply universally to a multitude of employees. However, that trait does not set apart professionals from other talented, responsible workers, nor does it limit sufficiently the class of exempt workers in light of the statute’s admonition that the exemption be construed narrowly to effectuate its remedial goals. This paper advocates a return to the historic definition of learned profession in order to establish a bright line for exempt status for those professionals who in fact are subject to an enforceable code of ethics, shoulder responsibility to the public, and acquire substantial specialized education.



