

ORAL ARGUMENT NOT YET SCHEDULED**No. 12-5246****IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MORTGAGE BANKERS ASSOCIATION,

Appellant,

JEROME NICKOLS, *et al.*,

Intervenors-Appellees,

v.

HILDA L. SOLIS, in her official capacity,
Secretary of United States Department of Labor, *et al.*,Appellees.

Appeal from the United States District Court for the District of Columbia,
No. 11-73, Judge Reggie B. Walton

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B. Rulings Under Review

The ruling under review in this appeal is the District Court's June 6, 2012 Order (by Judge Reggie B. Walton) granting in part Defendant's Cross Motion to Dismiss or, in the Alternative, for Summary Judgment and denying

Plaintiff's Motion for Summary Judgment. *Mortg. Bankers Assoc. v. Solis*, 864 F. Supp. 2d 193 (D.D.C. 2012).

C. Related Cases

This case has not previously been on review in this Court or any other court. Counsel knows of no "other related cases" in "any other court" as defined under Circuit Rule 28.1(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for MBA state the following:

MBA, headquartered in Washington, D.C., is a national association (with over 2,200 members) representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. MBA has no parent corporation and does not issue stock.

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GLOSSARY

<u>Term</u>	<u>Abbreviation</u>
Administrator Interpretation No. 2010-1	AI or AI 2010-1
Administrative Procedure Act	APA
United States Department of Labor; Hilda L. Solis, in her official capacity as Secretary of Labor; and Nancy Leppink, in her official capacity as Deputy Administrator of the Department of Labor's Wage and Hour Division	DOL
Environmental Protection Agency	EPA
Federal Aviation Administration	FAA
Fair Labor Standards Act	FLSA
Department of Health and Human Services	HHS
Mortgage Bankers Association	MBA
Occupational Safety and Health Administration	OSHA

JURISDICTIONAL STATEMENT

The Mortgage Bankers Association (“MBA”) filed this action contending that the United States Department of Labor, Hilda L. Solis, in her official capacity as Secretary of Labor; and Nancy Leppink, in her official capacity as Deputy Administrator of the Department of Labor’s Wage and Hour Division (collectively, “DOL”) violated the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (“APA”), in issuing Administrator Interpretation No. 2010-1 (the “AI” or “AI 2010-1”)¹ without the required notice and comment. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) over MBA’s cause of action under the APA. 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

The district court entered final judgment on June 6, 2012, granting DOL’s motion for summary judgment. MBA filed a timely notice of appeal on August 2, 2012. This Court has jurisdiction over MBA’s appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the

¹DOL, Wage & Hour Div. (Mar. 24, 2010), http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.pdf.

process of notice and comment rulemaking.” *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

In 2006, the Department of Labor issued a definitive and authoritative interpretation of its own 2004 regulations stating that mortgage loan officers qualify for the administrative exemption from the overtime pay requirements of the Fair Labor Standards Act (“FLSA”). *See* Dep’t of Labor Op. Letter, FLSA 2006-31, 2006 DOLWH LEXIS 42, at *1 (Sept. 8, 2006) (“2006 Administrator Opinion Letter”). Relying in good faith on this interpretation, many members of MBA have treated their mortgage loan officers as exempt. Thus, across the real estate industry, mortgage loan officers generally are not paid hourly or overtime wages, but are well-compensated by other means.

In 2010, without any prior notice, DOL expressly overruled and withdrew its 2006 definitive interpretation and declared that employees who perform the typical job duties of a mortgage loan officer—the very same job duties identified in 2006—are not exempt under the FLSA. *See* Administrator Interpretation No. 2010-1 (the “AI” or “AI 2010-1”).

On January 12, 2011, MBA filed suit under the APA against DOL. MBA moved for summary judgment on the same date. DOL cross-moved for summary judgment shortly thereafter. On May 16, 2011, a group of former mortgage loan

officers seeking to be paid overtime compensation in collective action lawsuits filed in other federal district courts successfully moved to intervene as a defendant.

On June 6, 2012, the District Court granted DOL's motion for summary judgment and denied MBA's motion. MBA timely appealed.

STATEMENT OF FACTS

A. The Fair Labor Standards Act And DOL.

This case involves the Fair Labor Standards Act ("FLSA"), *see* 29 U.S.C. §§ 201-219, and its implementation and enforcement in the financial service industry.² Under the FLSA, covered employers must pay overtime wages to an employee who works more than 40 hours per week, unless the employee is exempted from the overtime requirements. 29 U.S.C. § 207(a)(1). The FLSA expressly exempts from its overtime pay requirements "any employee employed in a bona fide executive, administrative, or professional capacity[,] ... or in the capacity of outside salesman," as those terms are "defined and delimited from time to time by regulations of the Secretary [of Labor], subject to the provisions of [the Administrative Procedure Act, 5 U.S.C. §§ 551-559]." 29 U.S.C. § 213(a)(1).

DOL is charged with administering and enforcing the FLSA and its regulations. For decades, DOL communicated its interpretation of the FLSA and its regulations by publicly issuing written responses to private parties' questions about

²The pertinent portions of the FLSA and DOL's regulations are provided in the attached addendum (A-1 through A-18).

the application of the FLSA via “Opinion Letters.” *See, e.g.*, 2006 Administrator Opinion Letter (finding mortgage loan officers administratively exempt. These Opinion Letters were widely disseminated via legal research tools and are posted on DOL’s website under the heading “Interpretive Guidance.” *See* DOL, WAGE & HOUR DIV., <http://www.dol.gov/whd/foremployers.htm> (last visited Dec. 4, 2012). There, the public may access various DOL “Rulings and Interpretations,” including Opinion Letters from 2001 to 2009. *See* DOL, WAGE & HOUR DIV., *Rulings & Interpretations*, <http://www.dol.gov/whd/opinion/opinion.htm> (last visited Dec. 4, 2012); DOL, WAGE & HOUR DIV., *Opinion Letters—Fair Labor Standards Act*, <http://www.dol.gov/whd/opinion/flsa.htm> (last visited Dec. 4, 2012).

DOL Opinion Letters issued by the Administrator of the Wage and Hour Division constitute final agency action subject to judicial review. *See Nat’l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 701-02 (D.C. Cir. 1971) (finding an opinion letter constituted final agency action where DOL intended the letter to be a “deliberative determination of the agency’s position at the highest available level on a question of importance” that affected an entire industry group).

Beginning on March 24, 2010, with the interpretation challenged herein, DOL dramatically changed its practice. DOL no longer issues Opinion Letters. Instead, it now issues *sua sponte* “Administrator Interpretations.” *See, e.g.*,

<http://www.dol.gov/whd/opinion/adminIntrprtnFLSA.htm> (last visited Dec. 4, 2012). DOL explains that:

In order to provide meaningful and comprehensive guidance and compliance assistance to the broadest number of employers and employees, the Wage and Hour Administrator will issue Administrator Interpretations when determined, in the Administrator's discretion, that further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate. Administrator Interpretations will set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue. Guidance in this form will be useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees.

DOL, WAGE & HOUR DIV., *Administrator Interpretations*, <http://www.dol.gov/whd/opinion/opinion.htm> (last visited Dec. 4, 2012). DOL apparently changed its practice because:

The Administrator believes that this will be a much more efficient and productive use of resources than attempting to provide *definitive* opinion letters in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the assumed facts may result in a different outcome. Requests for opinion letters generally will be responded to by providing references to statutes, regulations, interpretations, and cases that are relevant to the specific request but without an analysis of the specific facts presented. In addition, requests for opinion letters will be retained for purposes of the Administrator's ongoing assessment of what issues might need further interpretive guidance.

Id. (emphasis added).

The Portal-to-Portal Pay Act, which amended the FLSA, provides a “safe harbor” for employers who act in reliance on written interpretations of the Wage and Hour Administrator. The Act provides that:

no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay ... overtime compensation under the [FLSA], if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the [Administrator of the Wage and Hour Division of the Department of Labor].

29 U.S.C. § 259(a).

B. DOL’s Initial Efforts, Starting In 1938, To Define And Delimit The Administrative Exemption.

DOL promulgated its first set of regulations interpreting the FLSA in 1938. *See* 3 Fed. Reg. 2518 (1938). At that time, DOL defined the “administrative” exemption in conjunction with the “executive” exemption, and the definition bore little resemblance to today’s administrative exemption.*Id.*

Just two years later, in 1940, DOL promulgated the regulation that is the predecessor of the current regulation defining and delimiting the administrative exemption. *See* 5 Fed. Reg. 4077 (1940). DOL defined the term “employee employed in a bona fide [] administrative [] capacity” as an employee who met various requirements, including the requirement that he or she perform work “directly

related to management policies or general business operations.” 5 Fed. Reg. at 4077.

In 1949, DOL further revised this requirement to provide that an administratively exempt employee is one “[w]hose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer’s customers.” 14 Fed. Reg. 7705, 7706 (1949).

Thereafter, from time to time, DOL amended its regulations defining and delimiting the FLSA’s overtime exemptions, but the regulations defining and delimiting the administrative exemption were amended only with respect to the salary required to meet the exemption. Thus, DOL’s delineation of the job duties required to qualify for the administrative exemption remained unchanged for many years.

C. DOL’s 2004 Final Regulations Defining And Delimiting The Administrative Exemption.

Effective August 23, 2004, after engaging in notice and comment rulemaking, DOL promulgated revised regulations interpreting the FLSA. For the first time since 1949, DOL redefined and delimited the job duties required for an employee to qualify for the administrative exemption. The revised regulations retained the requirement that an “employee employed in a bona fide administrative capacity” has a “primary duty [that] is the performance of office or non-manual work directly related to the management or general business operations of the em-

employer or the employer's customers." 29 C.F.R. § 541.200(a)(2) (2005).³ DOL also added to the regulations a list of "Administrative exemption examples," one subsection of which was devoted entirely to "Employees in the financial services industry." 29 C.F.R. § 541.203(b) (2005). That subsection provides:

Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

Id.

In the Preamble to the 2004 Regulations, DOL repeatedly clarified that the same duties that the AI now states are non-administrative-exempt "sales" duties are exempt *administrative* duties, even though they are performed by employees that do some selling to consumers. See *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*,

³To fall within the meaning of an "employee employed in a bona fide administrative capacity", an employee must also be paid at least \$455 per week on a salary or fee basis and their primary duty must "include[] the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200 (2005). These other requirements are not at issue in this case as they were not addressed in AI 2010-1.

69 Fed. Reg. 22,122, 22,146 (2004) (the “Preamble”). In its Preamble, DOL also cited favorably cases where “federal courts have found employees who represent the employer with the public, negotiate on behalf of the company, and engage in sales promotion to be exempt administrative employees, *even though the employees also engaged in some inside sales activities.*” *Id.* at 22,145 (emphasis added) (citing *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997); *Hogan v. Allstate Ins. Co.*, 361 F.3d 621 (11th Cir. 2004); and *Wilshin v. Allstate Ins. Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002)). DOL also noted that the *Hogan* court found the plaintiff insurance agents to be properly classified as exempt “even though they also *sold insurance products directly to existing and new customers.*” *Id.* (citing *Hogan*, 361 F.3d at 624) (emphasis added). DOL further explained that the *Wilshin* court found “that selling financial products to an individual, ultimate consumer—as opposed to an agent, broker or company—was not enough of a distinction to negate his exempt status.” *Id.* (citing *Wilshin*, 212 F. Supp. 2d at 1377-79).⁴

⁴The DOL described *Wilshin* as

[holding] that a neighborhood insurance agent met the requirements for the administrative exemption when his responsibilities included such activities as recommending products and providing claims help to different customers, *as well as using his own personal sales techniques to promote and close transactions.* He also was required to represent his employer in the market, and be knowledgeable about the market and the needs of actual and potential customers.

Ultimately, in the Preamble DOL concluded that:

as found by the *John Alden*, *Hogan* and *Wilshin* courts, many financial services employees qualify as exempt administrative employees, *even if they are involved in some selling to consumers*. Servicing existing customers, promoting the employer's financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general business operations of their employer or their employer's customers, and which require the exercise of discretion and independent judgment.

Id. at 22,146 (emphasis added).⁵

D. DOL's 2006 Administrator Opinion Letter Definitively Interpreted The Regulations, Confirming The Exempt Status Of The Typical Job Duties Of A Mortgage Loan Officer.

On September 8, 2006, DOL issued an Administrator Opinion Letter to Plaintiff MBA in response to its inquiry regarding the status of mortgage loan officers. 2006 Administrator Opinion Letter.⁶ The 2006 Administrator Opinion Let-

69 Fed. Reg at 22,145 (emphasis added).

⁵The DOL Preamble also cited *Casas v. Conseco Financial Corp.*, No. Civ. 00-1512, 2002 WL 507059, at *1 (D. Minn. Mar. 31, 2002). *See* 69 Fed. Reg. at 22,145. The 2004 Preamble makes clear that *Casas* involved loan originators working in a call-center environment where the employees cold-called, prospecting for potential customers. As DOL itself explained in the Preamble, the Conseco employees "called potential customers from a list provided to them by the employer and, using the employer's guidelines and standard operating procedures, obtained information such as income level, home ownership history, credit history and property value; ran credit reports; forwarded the application to an underwriter; and attempted to match the customer with one of Conseco's loan products." *Id.* Moreover, the employees in *Casas* "followed strict guidelines and operating procedures." *Id.* at 22,146.

⁶Although DOL publicly issues copies of opinion letters with the recipient redact-

ter was signed by the Administrator of the Wage and Hour Division, published on the Department of Labor's website, and held out to employers as the DOL's definitive interpretation of its regulation.

In the 2006 Administrator Opinion Letter, DOL found that mortgage loan officers performed administratively exempt duties. *See id.* The 2006 Administrator Opinion Letter described the duties of the mortgage loan officers at issue as follows:

work with the employer's customers to assist them in identifying and securing a mortgage loan that is appropriate for their individual financial circumstances[,] ... respond to and follow up on customer inquiries (sometimes referred to as 'leads') that come from several sources[,] ... collect and analyze the customer's financial information and assess the customer's financial circumstances to determine whether the customer and the property qualify for a particular loan[, and] ... advise the customer about the risks and benefits of the loan alternatives.

2006 DOLWH LEXIS, at *4.

In examining whether these duties met the administrative exemption, DOL noted that "[s]ection 541.203 includes specific examples of occupations that would generally meet the administrative duties test, including in paragraph (b) '[e]mployees in the financial services industry.'" *Id.* at *9 (second alteration in

ed, MBA was the recipient of 2006-31. *See, e.g., Henry v. Quicken Loans, Inc.*, No. 2:04-cv-40346, 2009 WL 3199788, at *12 (E.D. Mich. Sept. 30, 2009) (noting the 2006 Administrator Opinion Letter was issued to MBA).

original). DOL further noted that the Preamble to the 2004 regulations reviewed pertinent case law drawn from the financial services industry and concluded that “many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to customers.” *Id.* at *10 (quoting 69 Fed. Reg. at 22,146) (emphasis added). DOL ultimately found that the “description of the duties of these mortgage loan officers *suggests that they have a primary duty other than sales*, as their work includes collecting and analyzing a customer’s financial information, advising the customer about the risks and benefits of various mortgage loan alternatives in light of their individual financial circumstances, and advising the customer about avenues to obtain a more advantageous loan program.” *Id.* at *12-13 (emphasis added).⁷

DOL concluded that the “mortgage loan officers also satisfy the traditional duties requirements of the administrative exemption by performing office or non-manual work directly related to the management or general business operations of the employer.” *Id.* at *13.⁸ DOL reasoned that “[s]imilar to the employees dis-

⁷The 2006 Administrator Opinion Letter specifically noted that “employees who spend the majority of their time inside the office prospecting for potential customers who have not previously expressed an interest in obtaining information about a mortgage loan (e.g., employees in a call center environment primarily selling financial products as ‘outbound telemarketers’) are outside the scope of your request.” 2006 DOLWH LEXIS, at *3.

⁸DOL also concluded that loan officers met the other requirements for the administrative exemption, including that they exercise discretion and independent judgment with respect to matters of significance. 2006 DOLWH LEXIS, at *14-19.

cussed in the 2004 preamble in the *John Alden*, *Hogan*, and *Wilshin* cases—all of whom were found to satisfy the duties requirements of the administrative exemption—the employees here service their employer’s financial services business by marketing, servicing, and promoting the employer’s financial products.” *Id.* at *13-14 (citations omitted).⁹

E. Relying On DOL’s Definitive Interpretation, MBA’s Members Classify Their Mortgage Loan Officers As Exempt.

Relying on DOL’s definitive interpretation in the 2006 Administrator Opinion Letter, as well as the express text of the regulation and the Preamble to the 2004 regulations, MBA-member financial services industry employers have classified mortgage loan officers who perform the above-described job duties as exempt. Thus, mortgage loan officers are well-compensated by means other than overtime pay, such as salary, commission-based payments, and bonuses, but their work hours generally are not tracked for purposes of paying them hourly or overtime

⁹On February 16, 2001, DOL had issued an Opinion Letter—which was not signed by the Administrator but was issued by a subordinate officer—specifically considering the exempt status of loan officers under the administrative exemption regulation in effect at that time (promulgated in 1949). *See* Dep’t of Labor Op. Letter, 2001 DOLWH LEXIS 5, at *1 (Feb. 16, 2001) (“2001 Non-administrator Letter”). The subordinate officer, reconsidering an earlier contrary determination by another subordinate official, 1999 DOLWH LEXIS 54, at *1 (May 17, 1999), concluded “that the primary duty of the loan officer consists of the performance of office or nonmanual work directly related to the management policies or general business operations of the employer or the employer’s customers.” 2001 Non-administrator Letter *1-2. Nevertheless, the subordinate officer determined that the particular loan officers were non-exempt because, in his view, they lacked the requisite discretion and independent judgment. *Id.* at *2-3.

wages. See Bureau of Labor Statistics, *Occupational Outlook Handbook, 2010-11 Edition, Loan Officers*, <http://www.bls.gov/ooh/Business-and-Financial/Loan-officers.htm#tab-5> (noting that loan officer compensation varies, but may include salary, bonus, and commission based pay—not hourly or overtime pay). Many mortgage loan officers earn one hundred thousand dollars or more per year. See Bureau of Labor Statistics, Occupational Employment Statistics, *Occupational Employment And Wages, Loan Officers* (May 2011), <http://www.bls.gov/oes/current/oes132072.htm> .

F. DOL’s March 24, 2010 AI Purports To Reverse Its Definitive Interpretation And Find That The Same Job Duties Previously Declared Exempt Administrative Duties Are Now *Non-Exempt* Sales Duties.

On March 24, 2010, in the first of its new “Administrator Interpretations,” DOL *sua sponte* issued an interpretation regarding the exempt status of mortgage loan officers *which expressly overruled and withdrew* its 2006 Administrator Opinion Letter (as well as the 2001 Non-administrator Letter). See AI at 1. In the AI, DOL dramatically changed its interpretation and declared that “employees who perform the typical job duties of a mortgage loan officer ... *do not qualify* as bona fide administrative employees exempt under [the FLSA].” *Id.* at 1 (emphasis added).

DOL issued the March 2010 AI without any prior public notice of its intent to reverse its definitive interpretation of the FLSA; without providing any prior

opportunity for MBA or other interested parties to comment on the new interpretation; without conducting, or offering to conduct, any prior public hearings; and without providing MBA's members any time to alter its established pay systems based on DOL's Administrator Opinion Letter.

In the AI, just like the 2006 Administrator Opinion Letter and the 2001 Non-administrator Letter, the DOL "appli[ed]" the administrative exemption to what it described as hypothetical "typical" mortgage loan officers. *Id.* at 1. And in the AI, just like in the prior letters, those hypothetical job duties were to

receive internal leads and contact potential customers or receive contacts from customers generated by direct mail or other marketing activity ... collect required financial information from customers they contact or who contact them, ... assess the loan products identified and discuss with the customers the terms and conditions of particular loans, trying to match the customers' needs with one of the company's loan products.

Id. at 1-2. But in the AI, *unlike* in its previous interpretations, DOL found that these job duties did *not* constitute work "directly related to the management or general business operations of their employer or their employer's customers." *Id.* at 8. Rather, without addressing any of the case law cited favorably in the Preamble to its 2004 regulations or relied on in its 2006 Administrator Opinion Letter, DOL found that the "primary duty [of mortgage loan officers] is making sales." *Id.* at 6. In a complete reversal of its prior definitive interpretation as stated in its Regulations, 2004 Preamble, and 2006 Administrative Opinion Letter, DOL found that:

Work such as collecting financial information from customers, ... and explaining the terms of the available options and the pros and cons of each option, so that a sale can be made, constitutes the production work of an employer engaged in selling or brokering mortgage loan products. Such duties do not relate to the internal management or general business operations of the company.

Id. at 6.¹⁰

To reach the new conclusion that mortgage loan officers are engaged in non-administrative-exempt selling, DOL applied regulations defining and delimiting the “outside sales” exemption—as opposed to the administrative exemption *actually* at issue. Using that different exemption’s language, DOL reasoned that the job duties specifically listed in 29 C.F.R. § 541.203(b) and considered in the 2006 Administrator Opinion Letter as administratively exempt work is, when performed by mortgage loan officers, non-exempt sales work because the duties are “performed incidental to and in conjunction with the employee’s own sales or solicitations.” *Id.* at 5 n.3. For this reason, in the AI, “the Administrator reject[ed] the September 8, 2006 Wage and Hour Opinion Letter FLSA2006-31’s inappropriately narrow definition of sales as including only ‘customer-specific persuasive sales activity.’” *Id.*

Further acknowledging its complete reversal of position, DOL wrote that:

¹⁰DOL did not address the other parts of the administrative-exemption test in the AI.

Because of its misleading assumption and selective and narrow analysis, Opinion Letter FLSA2006-31 *does not comport with this interpretive guidance and is withdrawn*. Similarly, an Opinion Letter dated February 16, 2001, ... also is *withdrawn as inconsistent with this analysis*.

Id. at 8 (emphases added).

In addition to the language of the AI itself, DOL recently acknowledged in an amicus brief what the AI itself makes clear—“AI 2010-1 represents a *substantial* change in the Department’s interpretation.” *Henry v. Quicken Loans, Inc.*, No. 04-40346, Brief of the Secretary of Labor as Amicus Curiae 26, Dec. 9, 2010, ECF No. 609 (E.D. Mich.) (“DOL’s Amicus Brief in *Quicken*”) (emphasis added). Further, DOL explained that, “AI 2010-1 *unambiguously represents a substantive change in the Department’s interpretation of its administrative exemption regulations* in determining whether mortgage loan officers are exempt administrative employees.” *Id.* at 27-28 (emphasis added). According to DOL, AI 2010-1 is *not* “merely a clarification of a regulation rather than a substantive change.” *Id.* at 27. And, DOL frankly acknowledged that the AI does *not* merely “restate[] what the law according to the agency is and has always been.” *Id.* at 28 n.11 (quoting *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993)).

G. The District Court Acknowledged The *Paralyzed Veterans* Doctrine, But Concluded That A “Substantial Reliance Exception” Existed And Applied, Thus Allowing DOL To Alter Its Definitive Interpretation Without Notice And Comment.

Before the district court, DOL raised two contentions: (i) that *Paralyzed Veterans* had been implicitly overturned and (ii) that alleged exceptions applied. The district court correctly rejected DOL’s assertion that the *Paralyzed Veterans* doctrine is no longer binding: “[The District] Court is ‘obligated to follow controlling [C]ircuit precedent until either [the Circuit], sitting en banc, or the Supreme Court, overrule it.’” *Mortg. Bankers Assoc.*, 864 F. Supp. 2d at 204 (quoting *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997)).

As MBA argued and the district court explained, DOL’s argument that two Supreme Court cases have “overruled” *Paralyzed Veterans* is not persuasive. The first case, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), was decided two decades before *Paralyzed Veterans*: “[H]aving been decided nearly twenty years before *Paralyzed Veterans*, the District of Columbia Circuit was presumably aware of the existence of *Vermont Yankee* when it authored its opinion in *Paralyzed Veterans*. And this Court is not prepared to find that the Circuit disregarded Supreme Court precedent when it decided *Paralyzed Veterans*.” *Mortg. Bankers Assoc.*, 864 F. Supp. 2d at 204.

The second case, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), addressed a completely different issue from the APA’s notice-and-comment re-

quirements: “[T]he defendants are seeking to ... have this Court expand the reach of *Fox Television* beyond the question the Supreme Court actually addressed. That, this Court, cannot do, as the *Fox Television* decision has no bearing on whether an agency must employ the notice and comment process before changing its policies.” *Mortg. Bankers Assoc.*, 864 F. Supp. 2d at 205.

Notwithstanding these holdings, the District Court nevertheless concluded that this Court’s decision in *MetWest Inc. v. Secretary of Labor*, 560 F.3d 506 (D.C. Cir. 2009), “alleviates the requirement of utilizing notice and comment when a party did not ‘substantially and justifiably’ rely upon an earlier agency interpretation.” *Mortg. Bankers Assoc.*, 864 F. Supp. 2d at 206, 208.

MBA timely appealed the district court’s decision.

SUMMARY OF ARGUMENT

DOL impermissibly reversed its definitive interpretation of its regulation without utilizing notice and comment rulemaking as required by the APA and this Circuit’s *Paralyzed Veterans* line of cases. The District Court correctly acknowledged this Court’s *Paralyzed Veterans* doctrine, but erred in concluding that a “Substantial Reliance Exception” to the doctrine exists and releases DOL from the procedural rulemaking requirements under the APA.

In *MetWest* (as in *Alaska Professional Hunters Association, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999)), this Court did not establish a distinct “reliance com-

ponent” of the *Paralyzed Veterans* doctrine. Rather, the issue in *MetWest* was whether a definitive interpretation had been established by “substantial and justifiable reliance” on informal advice and guidance from the Occupational Safety and Health Administration (“OSHA”). In other words, the issue in *MetWest* was whether *Paralyzed Veterans* applied, not whether there was an exception. In the present case, there is—and can be—no dispute that the 2006 Administrator Opinion Letter constitutes a definitive interpretation, and thus there is no question that the *Paralyzed Veterans* doctrine applies. It would indeed be an odd rule—and one contrary to the APA—that requires a regulated entity to establish via a lawsuit that it substantially and detrimentally relied on a definitive interpretation in order to obtain the benefits of the APA’s notice and comment requirements; requirements that are designed so that agencies can assess and respond to the impact proposed changes will have on those regulated entities.

This Court’s decision in *MetWest* is clearly distinguishable from the present case, but even if there were a “substantial reliance” requirement to the *Paralyzed Veterans* doctrine, it has been satisfied in the present case by employers’ substantial and justifiable reliance on the 2006 Administrator Opinion Letter in structuring their compensation systems to handsomely reward loan officers in ways other than by hourly and overtime wages. The district court’s application of the alleged exception, therefore, was in error. There are no applicable exceptions to *Paralyzed*

Veterans that alleviate DOL's notice and comment requirement under the APA in the present case. This Court should therefore reverse the district court's entry of summary judgment for DOL and set aside the AI as violative of the APA.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews “a grant of summary judgment *de novo* applying the same standards as those that govern the district court's determination.” *Troy Corp. v. Browner*, 120 F.3d 277, 281 (D.C. Cir. 1997). Furthermore, ““in a case like the instant one, in which the District Court reviewed an agency action under the APA, [this Court] review[s] the administrative action directly, according no particular deference to the judgment of the District Court.”” *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 440-41 (D.C. Cir. 2012) (quoting *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 814 (D.C. Cir. 2002)) (internal quotation marks and original alteration omitted); *see also, e.g., Gas Appliance Mfrs. Assoc., Inc. v. Dep't of Energy*, 998 F.2d 1041, 1045 (D.C. Cir. 1993) (“We do not accord any particular deference to the decision of the District Court where, as here, the District Court and this court are both reviewing an administrative record.” (Citation and internal quotation marks omitted)).

II. DOL WAS REQUIRED TO ENGAGE IN NOTICE AND COMMENT RULEMAKING TO CHANGE ITS DEFINITIVE INTERPRETATION OF ITS REGULATION

A. Under The APA And This Court's Precedent, Notice And Comment Rulemaking Was Required For DOL To Change Its Definitive Interpretation.

“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.” *Paralyzed Veterans*, 117 F.3d at 586; *see also, e.g., Transp. Workers Union of Am., AFL-CIO v. Transp. Sec. Admin.*, 492 F.3d 471, 475 (D.C. Cir. 2007); *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 997 (D.C. Cir. 2005); *Montefiore Med. Ctr. v. Leavitt*, 578 F. Supp. 2d 129, 133 (D.D.C. 2008). Other circuits also require notice and comment rulemaking to change a definitive interpretation. *See Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 682 (6th Cir. 2005) (“It is true that once an agency gives a *regulation* an interpretation, notice and comment will often be required before the interpretation of that regulation can be changed.”); *SBC Inc. v. FCC*, 414 F.3d 486, 498 (3d Cir. 2005) (“[I]f an agency’s present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment requirements of the APA.”); *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 628-30 (5th Cir. 2001) (finding Interior Department’s change in interpretation of an ambiguous regulation was invalid

because Interior Department failed to comply with APA notice and comment provisions).

This Court (and these other circuits) have reached this decision because otherwise an agency could unfairly circumvent the APA, and avoid notice and comment, by modifying its regulations through varying interpretations. As this Court explained in *Alaska Professional Hunters*:

[In *Paralyzed Veterans*, we] explained why an agency has less leeway in its choice of method of changing its interpretation of its regulations than in altering its construction of a statute. “Rule making,” as defined in the APA, includes not only the agency’s process of formulating a rule, but also the agency’s process of modifying a rule. 5 U.S.C. § 551(5). *See Paralyzed Veterans*, 117 F.3d at 586. When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.

177 F.3d at 1034; *see also Dismas Charities*, 401 F.3d at 682 (“[O]nce an agency has promulgated its own regulation, a change in the interpretation of that regulation is likely to reflect the agency’s reassessment of wise policy rather than a reassessment of what the agency itself originally meant. The determination of wise policy ... is the kind of determination for which notice and comment procedures are particularly appropriate.”); *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (“[A]n interpretive rule ... constru[ing] an agency’s substantive regula-

tion ... is, in a sense, even more binding on the agency because its modification ... will likely require notice and comment procedure.”).

DOL contended below that § 553(b)(A), which provides an exception to notice and comment for, *inter alia*, interpretative rules, allowed it to reverse its definitive interpretation without notice and comment. Section 553(b)(A), however, must be read in the context of the overall structure and purpose of the APA. *See, e.g., Comm’r v. Clark*, 489 U.S. 726, 739 (1989) (“In construing provisions ... in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.”). Under the *Paralyzed Veterans* doctrine, this Court has interpreted the exception under section 553(b)(A) in a way to prevent it from swallowing the rule under section 551(5): “To allow an agency to make fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine [Section 551(5)] APA requirements.” *Paralyzed Veterans*, 117 F.3d at 586; *see also Alaska Prof’l Hunters*, 177 F.3d at 1034 (“When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”); *cf. Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) (“To defer to the agency’s position [when a regulation is not

ambiguous] would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.”).

In other words, without the *Paralyzed Veterans* doctrine, an agency could avoid notice and comment by effectively amending its regulation under the guise of changing its existing *interpretation*. Cf. *Talk Am., Inc. v. Mich. Bell Tele. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (“[D]eferring to an agency’s interpretation of its own rule encourages the agency to enact vague rules This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.”); quoted in *Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012). So the *Paralyzed Veterans* doctrine is a valid and reasoned interpretation of the APA.

Moreover, this result is not only dictated by the text, structure and purpose of the APA. As this Court has repeatedly held, it also makes eminent sense. An agency is initially allowed to—and gets great deference toward—an interpretation of its ambiguous regulatory provision, because the agency has the expertise needed to clarify the ambiguity. But once clarified by a definitive interpretation, such as the 2006 Administrator Opinion Letter here, the regulation is itself no longer ambiguous as the definitive interpretation becomes part of that regulation. See, e.g., *Nat’l Family Planning & Reproductive Health Ass’n, Inc. v. Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992) (“If the courts accept the agency’s interpretation, it be-

comes a part of the statutory law without any formally legislative action on the part of the agency.’ Robert A. Anthony, “*Well, You Want the Permit Don’t You?*” *Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31, 38 (1992). Courts must therefore be wary not to accord this elevated status too easily to agency missives unless it is clear that the rule is merely interpretative and therefore already implicitly part of the statute or regulation.”). Thus, when an agency tries—as DOL did here—to reverse that definitive interpretation, it is impermissibly seeking to adopt a new position wholly inconsistent with the regulation without the requisite notice and comment under the APA. *See, e.g., Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995) (“We can agree that APA rulemaking would still be required if [Provider Reimbursement Manual] § 233 adopted a new position inconsistent with any of the Secretary’s existing regulations.”). This is why an initial interpretation that may well fall within the exception to notice and comment in § 553(b)(A) cannot be reversed without notice and comment.

1. DOL’s 2006 Administrator Opinion Letter Constituted A Definitive And Authoritative Interpretation Of DOL’s Own Regulations.

The *Paralyzed Veterans* rule, as set forth above, is clear: “When an agency has given its regulation a *definitive interpretation*, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not

accomplish without notice and comment.” *Alaska Prof'l Hunters*, 177 F.3d at 1034 (citations omitted and emphasis added).

This Court has held that the Department of Labor Opinion Letters issued by the Wage and Hour Administrator, like the 2006 Administrator Opinion Letter, constitute final agency action as they are intended to be a “deliberative determination of the agency’s position at the highest available level on a question of importance” that affects an entire industry group. *Nat’l Automatic Laundry*, 443 F.2d at 701-02. DOL thus does not—and cannot—dispute that its 2006 Administrator Opinion Letter constitutes a definitive and authoritative interpretation of its regulations.

2. The AI Undisputedly Substantially Changed DOL’s Definitive Interpretation Of Its Regulations.

An agency’s action violates the APA where it “constitutes a change” in the agency’s definitive interpretation made without notice and comment rulemaking procedures. *See, e.g., Paralyzed Veterans*, 117 F.3d at 586; *Alaska Prof'l Hunters*, 177 F.3d at 1034. DOL also does not—and cannot—dispute the fact that the AI constitutes a “change” in DOL’s definitive interpretation of the administrative exemption. That the AI represents a complete reversal of DOL’s former definitive legal interpretation is apparent from the fact that the AI expressly “withdraw[s]” DOL’s former guidance, the 2006 Administrator Opinion Letter, as well as the 2001 Non-administrator Letter interpreting prior regulations, because they “do[]

not comport with” and are “inconsistent with” the new AI. AI at 8; *see also* AI at 5 n.3 (“Because the work performed incidental to and in conjunction with the employee’s own sales or solicitations is considered exempt sales work, *the Administrator rejects the September 8, 2006 Wage and Hour Opinion Letter FLSA2006-31’s* inappropriately narrow definition of sales as including only ‘customer-specific persuasive sales activity,’ which is the time that a loan officer spends directly engaged in selling mortgage loan products to customers.” (emphasis added)).

Moreover, DOL has expressly admitted that “AI 2010-1 unambiguously represents a *substantive change in the Department’s interpretation* of its administrative exemption regulations in determining whether mortgage loan officers are exempt administrative employees.” DOL’s Amicus Brief in *Quicken* 27-28 (emphasis added). DOL has further described the change as “substantial” and explicitly stated that the position taken in the AI is *not* a mere clarification of existing rules, or a restatement of what the law according to the agency is and has always been. *Id.* at 26, 27, 28, 28 n.11. Rather, by DOL’s own admission, the AI “represents a *substantial change in the Department’s interpretation.*” *Id.* at 26 (emphasis added).

Indeed, while the 2006 Administrator Opinion Letter concluded that mortgage loan officers performed work directly related to the business operations of their employer’s customers, the AI concludes just the opposite—that mortgage

loan officers do not qualify for the administrative exemption because all of the administrative job duties that they perform are merely “incidental” to their non-administrative-exempt “sales” duties. *See supra* 10-17.

Courts in similar cases—where an agency first ruled that something was “exempt” under regulations, and then later retracted the exemption—have held that APA notice and comment rulemaking procedures were required before they could retract the exemption. For example, in *Creosote Council v. Johnson*, both a 1998 letter of an EPA official to the Chemical Manufacturers Association, and the EPA’s written instructions for submission of toxic chemical release reports *exempted* certain chemical releases from reporting. *See* 555 F. Supp. 2d 36, 38-39 (D.D.C. 2008). The EPA then promulgated a new interpretation, via a 2007 letter from an EPA director to the Treated Wood Coalition, stating that the same chemical releases *were not exempt*. *Id.* at 38. The court granted the plaintiffs’ motion for a preliminary injunction relieving them from compliance with the EPA’s new interpretation. *Id.* at 40. The court found that the prior letter and instructions gave the “exemption a definitive interpretation which was later abandoned when the Agency took the position in the [new] letter that [certain] emissions must be reported under [the regulation].” *Id.* The court reasoned that, “[t]he authoritative nature of the instruction [was] made clear by its appearance in an official agency publication informing regulated entities of the scope of their reporting obligations.”

Id. at 39. Thus, the court held, “[b]ecause the [new] letter marked a significant change in the agency’s understanding of the scope and applicability of the articles exemption, plaintiffs have made a strong showing that they are likely to prevail on their notice and comment challenge.” *Id.* at 40; *see also, e.g., Tripoli Rocketry Ass’n, Inc. v. ATF*, 337 F. Supp. 2d 1, 2, 13 (D.D.C. 2004) (granting summary judgment to plaintiff on the validity of the ATF’s pronouncement where it failed to comply with notice-and-comment rulemaking; noting that, like in *Alaska*, “an agency sought to reverse the applicability of an exemption without notice and comment”).

In its 2006 Administrator Opinion Letter, DOL definitively and authoritatively interpreted its regulations defining and delimiting the administrative exemption as *including* individuals who perform the typical job duties of a mortgage loan officer. The AI undisputedly constituted a “substantive” and “substantial” change in DOL’s definitive interpretation of the administrative exemption. DOL cannot lawfully change its 2006 definitive interpretation without first engaging in notice and comment rulemaking as required by the APA.

B. The District Court Erred In Concluding That *MetWest* Created A “Substantial Reliance Exception” To *Paralyzed Veterans* That Exists And Applies In This Case.

While the district court acknowledged that *Paralyzed Veterans* applies, it nonetheless created a huge exception when it held that an agency need not utilize

notice and comment rulemaking to change a definitive interpretation “when a party did not ‘substantially and justifiably’ rely upon an earlier agency interpretation.” *Mortg. Bankers Assoc.*, 864 F. Supp. 2d at 206 (quoting *MetWest*, 560 F.3d at 511). The district court incorrectly concluded that “*MetWest* intended to set the bar for what a plaintiff must establish to satisfy the reliance component of the *Paralyzed Veterans* doctrine.” *Id.* at 207. Neither the result nor the rationale in *MetWest* represents some new “reliance” exception to the APA and *Paralyzed Veterans*. And, even if *MetWest* had so held, MBA comfortably satisfies any such standard.

1. *MetWest* Does Not Apply Where The Prior Interpretation Is Authoritative.

In *MetWest*, the principal issue was whether OSHA’s 2003 guidance documents and enforcement policy impermissibly reversed “guidance documents and other interpretations issued during the 1990s, [which allegedly] interpreted [OSHA regulations] to permit the removal of needles from reusable blood tube holders in all situations.” 560 F.3d at 509. *MetWest*, relying on the *Paralyzed Veterans* doctrine, argued that they did. *Id.*

As an initial matter, this Court rejected *MetWest*’s argument because “OSHA has never interpreted [its regulations] to allow the use of reusable blood tube holders in all circumstances.” *Id.* In other words, this Court concluded that OSHA’s new 2003 guidance is wholly consistent with its prior guidance on the is-

sue. *Id.* at 510. The present case is starkly different. Here it is undisputed that the AI is irreconcilable with the 2006 Administrator Opinion Letter and the 2001 Non-administrator Letter (which was not a definitive interpretation because it was not signed by the administrator). AI at 8. Thus, *MetWest* is plainly inapposite on this point.

More important, this Court also noted that *even if* OSHA had changed its interpretation, the *Paralyzed Veterans* doctrine would not apply because there had been no prior *authoritative* interpretation from the agency. *MetWest*, 560 F.3d at 511. *MetWest* is again plainly distinguishable from the present case. DOL does not—and cannot—dispute that the overruled and withdrawn 2006 Administrator Opinion Letter is an “*authoritative interpretive ruling.*” *Nat’l Automatic Laundry*, 443 F.2d at 701 (emphasis added).

In *MetWest*, this Court clearly did not apply a reliance exception to *Paralyzed Veterans*. Rather, the *Paralyzed Veterans* doctrine was inapplicable because there was no prior definitive interpretation. 560 F.3d at 511. OSHA had released only informal “guidance documents and other interpretations.” *Id.* at 509. The issue related to reliance, therefore, was whether *MetWest* had justifiably relied on this informal guidance to its detriment, which may have elevated the informal guidance to a definitive interpretation. *Id.*

A similar analysis—to determine whether 30 years of substantial and justifiable reliance by the affected parties transformed an *informal* enforcement policy into an authoritative interpretation—was conducted by this Court in *Alaska Professional Hunters*. See *Alaska Prof'l Hunters*, 177 F.3d at 1035 (“It is true that when a local office gives an interpretation of a regulation or provides advice to a regulated party, this will not necessarily constitute an authoritative administrative position But the situation here is quite different FAA officials gave that advice for almost thirty years Alaskan guide pilots and lodge operators relied on the advice.”).

The way this Court analyzed the *Alaska Professional Hunters* decision in *MetWest* makes it clear that the inquiry into “substantial and justifiable reliance” was to determine whether an “informal” interpretation had been transformed into an “authoritative interpretation”:

We there held that an agency’s practice of advising affected entities—in a prior agency adjudication and the consistent advice of agency officials over a 30-year period—that a regulation did not apply to them *established* “an authoritative departmental interpretation” that could not be changed without notice and comment. 177 F.3d at 1034-35. A fundamental rationale of *Alaska Professional Hunters* was the affected parties’ substantial and justifiable reliance on a well-established agency interpretation.

MetWest, 560 F.3d at 511 (emphasis added).

Further proof that the *MetWest* court was defining when an *informal* OSHA interpretation could become a *definitive* OSHA interpretation subject to *Paralyzed Veterans* and the APA's notice and comment requirements rather than engrafting some new "exception" onto the APA and *Paralyzed Veterans*, is found in the opinion's very next paragraph, which contrasts the situation in *MetWest* with that in *Alaska Professional Hunters*: "The situation here is not comparable. OSHA never established an authoritative interpretation of its regulation on which *MetWest* justifiably relied to its detriment." *MetWest*, 560 F.3d at 511.¹¹

When an agency issues a definitive interpretation of its regulations—like DOL did here—that definitive interpretation becomes part of the regulation. *See, e.g., Alaska Prof'l Hunters*, 177 F.3d at 1034. What an agency can or cannot do under the APA is not and should not be governed by whether a regulated entity is willing and has the resources to litigate whether or not it substantially relied on that definitive interpretation. Indeed, such an exception would effectively defeat the whole point of the APA—to provide regulated entities a meaningful opportunity to explain to an agency why (or why not) the regulation should be changed.

¹¹To the same effect is *Association of American Railroads v. Department of Transportation*, 198 F.3d 944 (D.C. Cir. 1999), also relied on by DOL below: "We find nothing in these materials, individually or taken together, that comes even close to the definitive interpretation that triggered notice and comment rulemaking in *Alaska Professional Hunters*." *Ass'n of Am. R.R.s*, 198 F.3d at 948; *see also, e.g., id.* at 949 ("[W]e think it is quite clear that the FRA never adopted a definitive interpretation." (emphasis added)).

The *Paralyzed Veterans* doctrine—intended, as described above, to ensure that an agency cannot sidestep APA notice and comment requirements—is straightforward: If an agency issues a *definitive* interpretation, then that interpretation becomes part of the regulation and cannot be altered without notice and comment. Accordingly, *MetWest* is simply inapplicable when there is a definitive interpretation as there is here. The AI should be struck down because it was issued without the required notice and comment.

2. Even If *MetWest* Did Require “Detrimental Reliance,” MBA’s Members Clearly Substantially and Justifiably Relied On The 2006 Administrative Opinion Letter.

Even if this Court in *MetWest* had engrafted an additional requirement upon APA notice and comment procedures, which it clearly did not, MBA and its members quite plainly relied, substantially and justifiably so, on the 2006 Administrator Opinion Letter. The District Court, therefore, erred in concluding otherwise. *Mortg. Bankers Assoc.*, 864 F. Supp. 2d at 208.

a. The Portal-to-Portal Act Demonstrates That MBA Members’ Reliance On The 2006 Administrator Opinion Letter Was Substantial And Justified.

As an initial matter, MBA members’ substantial and justifiable reliance on the 2006 Administrator Opinion Letter is fully demonstrated by the statute itself. Under § 259 of the FLSA (unlike the statutory scheme at issue in *MetWest*), em-

employers have a complete defense to liability if they rely in good faith upon a written interpretation of the Wage and Hour Administrator:

[N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay ... overtime compensation under the [FLSA], if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the [Administrator of the Wage and Hour Division of the Department of Labor].

29 U.S.C. § 259(a).

In light of the Portal-to-Portal Act, DOL surely would not issue definitive interpretations expecting that the regulated community would simply ignore them.¹² *Cf. Nat'l Automatic Laundry*, 443 F.2d at 700 (“The significance of an authoritative interpretation by the Administrator of the Wage and Hour Division, as the head of an agency, is borne out by [§ 259], eliminating liability for the employer who establishes good faith reliance on an agency’s ‘administrative ... interpretation.’”); *see also, e.g., Frank v. McQuigg*, 950 F.2d 590, 598-99 (9th Cir. 1991) (“The Portal Act and its regulations strongly imply that an employer who relies on

¹²The District Court is thus simply incorrect that “invocation of the Portal-to-Portal Act undermines [MBA’s] position that it substantial[ly] and justifiabl[ly] relied upon the 2006 Opinion Letter.” 864 F. Supp. 2d at 208 (internal quotation marks omitted).

and conforms to an Opinion Letter which specifically addresses him and his circumstances is acting in good faith.”).¹³

In fact, there could be no other reason for MBA to seek an Administrator Opinion in the first place if its members do not intend to rely on that opinion. *Cf. McQuigg*, 950 F.2d at 599 (“The regulations and relevant precedent also indicate that any duty of inquiry owed by the employer is satisfied by an inquiry *to the Administrator*.”). Thus when MBA made the request for the benefit of its members, it listed the various job titles and described in detail the duties of the loan officers employed by its members. FLSA 2006-31, 2006 DOLWH LEXIS 42, at *1-7.

The *Quicken* case relied upon by DOL below amply demonstrates this point. Notwithstanding that court’s doubts about the 2006 Administrator Opinion Letter (*see infra* 53-55), the district court there explained that Quicken, an MBA member, “*had actually relied on the letter*” in treating its mortgage loan officers as exempt from overtime, and the court reaffirmed its earlier grant of summary judgment *for*

¹³Thus, the district court’s curious conclusion, apparently in *dicta*, that reliance on an agency interpretation is negated for purposes of the APA if the reliance can be used as a defense to liability is wrong. Indeed, under that logic, DOL would be forever free to change its definitive interpretations without ever having to use notice and comment, in violation of the APA and this Court’s and other Circuit’s precedent. *Cf. Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012) (rejecting DOL amicus brief and noting: “It would be a considerable paradox if before 2001 the plaintiffs would win because the President was a Democrat, between 2001 and 2009 the defendant would win because the President was a Republican, and in 2012 the plaintiffs would win because the President is again a Democrat. That would make a travesty of the principle of deference to interpretations of statutes by the agencies responsible for enforcing them.”).

Quicken based on Quicken's reliance on the 2006 Administrator Opinion Letter. *Quicken*, Order Denying Plas' Mtn. for Reconsideration 27, Jan. 27, 2011, ECF No. 666 (emphasis added). Indeed, it cannot be disputed that Quicken substantially and justifiably relied on the 2006 Administrator Opinion Letter—Quicken obtained a favorable judicial decision rejecting plaintiffs' claims for overtime following issuance of the opinion letter on which it relied.¹⁴ See also *Quicken*, Decl. of David Carroll ¶¶ 22-23, Oct. 5, 2007, ECF No. 436, Ex. E (establishing that

¹⁴The fact that one or more MBA members substantially and justifiably relied upon the 2006 Administrator Opinion Letter, of course, would satisfy the requirement, if there were one, for MBA. Cf., e.g., *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1265 (D.C. Cir. 2004) (a trade association has standing to vindicate its members' rights so long as one of its members has standing and the case is germane to the general purpose of the association). As noted *infra* n.16, numerous other MBA members have been sued following issuance of the AI, and many have noted their reliance on the 2006 Administrator Opinion Letter in treating loan officers as exempt and providing generous compensation that does not include hourly-based overtime pay. See, e.g., *Becton v. JPMorgan Chase & Co.*, No. 1:11-cv-00331, Def.'s Ans. to Pls.' Compl. 14-15, Mar. 10, 2011, ECF No. 32 (N.D. Ill.) (asserting good faith reliance on Administrator Opinion Letter 2006-31 as affirmative defense); *Chaplin v. Wachovia Mortg. Corp.*, No. 4:11-cv-00638, Def.'s Ans. & Aff. Defenses to Pls.' Original Compl. 8, Mar. 31, 2011, ECF No. 12 (S.D. Tex.) (setting forth affirmative defense of good faith reliance on U.S. Department of Labor interpretations); *Richardson v. Wells Fargo Bank, N.A.*, No. 4:10-cv-04949, Def.'s Ans. & Aff. Defenses to Pls.' Original Compl. 7, Jan. 27, 2011, ECF No. 11 (S.D. Tex.) (raising affirmative defense of good faith reliance on DOL interpretations); *Scola v. PrimeLending*, No. 1:10-cv-07072, Def.'s Mot. to Dismiss 5, 11-14, Dec. 7, 2010, ECF No. 18 (N.D. Ill.) (explaining that employer relied on 2006 Administrator Letter in classifying its loan officers); *Biggs v. Quicken Loans Inc.*, No. 2:10-cv-11928, Def.'s Ans. & Aff. Defenses to Pls.' Compl. 8-9, Apr. 4, 2011, ECF No. 83 (E.D. Mich.) (asserting affirmative defense of good faith reliance on 2006 Administrator Opinion Letter); *Greenberg v. Money Source, Inc.*, No. CV 10 01493, Defs.' Ans. 9, July 29, 2010), ECF No. 6 (E.D.N.Y.) (asserting good faith reliance on DOL interpretations).

Quicken as an MBA member company became aware of the 2006 Administrator Opinion Letter immediately after its issuance, closely reviewed the letter and compared the job duties described therein with those of Quicken loan officers, and relied on the Opinion letter to conclude that Quicken should maintain the administrative exempt classification of loan officers). MBA and its members were surely entitled to—and did—rely on the letter MBA sought and which has a special status under the FLSA.

b. MBA’s Members Substantially And Justifiably Relied Upon The 2006 Administrator Opinion Letter.

In its 2006 Administrator Opinion Letter, DOL definitively interpreted the FLSA’s administrative exemption to *include* individuals performing what the AI describes as the “typical” job duties of a mortgage loan officer. MBA’s members substantially and justifiably relied on this definitive and authoritative interpretation in classifying their loan officers as exempt and in structuring their compensation to reward loan offices with commissions and other bonus plans rather than hourly wages including overtime pay.

Implementing the new rule places a substantial burden on the financial service industry, which generally create yearly compensation plans that provide incentive pay for good performance, not incentives for employees to work longer hours. *See, e.g., Becton*, Decl. of loan officer Long Nguyen ¶ 14, Mar. 16, 2011, ECF No. 37, Ex. 1-N (“I do not keep track of my time worked as I am an exempt

employee and get paid based on my performance and not the number of hours I work.”); *id.*, Decl. of loan officer Ryan Abramson ¶ 15, Ex. 1-A (“When market conditions are favorable for my customers and rates are low, I prefer to put in more time each week because of the opportunity to earn more in incentive compensation. However, when market conditions are less favorable, which was the case prior to July 2009, I worked fewer hours and generally worked 40 hours per week.”); *id.*, Decl. of loan officer Bruce Brewer ¶ 12, Ex. 1-D (“I do not record my time worked as I am an exempt employee. There is no direct correlation between the number of hours I work in any given week and the number of loans I am able to close during that time.”).

The District Court’s decision also does not account for the fact that employees of MBA members, who have decided to become and remain mortgage loan officers in lieu of other employment, have become accustomed to the freedom to control their own hours and breaks, as well as the ability to earn more compensation by virtue of achievement, not hours worked.¹⁵ It is extremely difficult if not impossible for these employees and MBA members, who generally structure their

¹⁵*See, e.g., Becton*, Decl. of loan officer Sameer Gupta ¶ 11, ECF No. 37, Ex. 1-G (“I set my own schedule, and I plan my own agenda for each week based on the priorities I have set for myself. If I work on a Saturday, it is my choice to do so.”); *id.*, Decl. of loan officer Mitchell J. Haddad ¶ 16, Ex. 1-I (“I typically work five days a week How I spend my day is really at my discretion. If I want to take a break to get a cup of coffee or call my wife, I take a break.”).

annual compensation plans around incentive pay for good performance, to change their working practices and policies without notice.

Yet, under DOL's view, MBA members, who established policies and structured compensation systems in reliance on the DOL's 2006 Administrator Opinion Letter became violators of the law on March 25, 2010, unless they implemented, literally overnight, brand new policies and practices.

In addition to the increased unnecessary regulatory burden, the financial service industry now faces substantial exposure and expense from private-party litigation—such as the class actions brought by the Intervenors.¹⁶ In these cases, well-

¹⁶Since the AI was issued, class and collective action lawsuits claiming that loan officers have been misclassified as administrative exempt have been flooding court dockets. *See, e.g., Cramer v. Bank of Am., N.A.*, No. 1:12-cv-08681 (N.D. Ill. filed Oct. 30, 2012); *Lisek v. Intercontinental Capital Group, Inc.*, No. 1:12-cv-07919 (S.D.N.Y. filed Oct. 24, 2012); *Wyler-Wittenberg v. MetLife Home Loans, Inc.*, No. 2:12-cv-09036 (C.D. Cal. filed Oct. 19, 2012); *Mack v. Amerifirst Fin. Inc.*, No. 8:12-cv-01829 (C.D. Cal. filed Oct. 18, 2012); *Manning v. Fed. Sav. Bank*, No. 2:12-cv-02640 (D. Kan. filed Oct. 1, 2012); *Marzano v. Proficio Mortg. Ventures, LLC*, No. 1:12-cv-07696 (N.D. Ill. filed Sept. 26, 2012); *Cohn v. Main Street Fin., Inc.*, No. 1:12-cv-01352 (S.D. Ind. filed Sept. 21, 2012); *Hastie v. Intercontinental Cap. Group, Inc.*, No. 1:12-cv-06907 (S.D.N.Y. filed Sept. 12, 2012); *Dubeau v. Sterling Sav. Bank*, No. 1:12-cv-01602 (D. Or. filed Sept. 6, 2012); *Blades v. Intercontinental Cap. Group, Inc.*, No. 1:12-cv-06176 (S.D.N.Y. filed Aug. 13, 2012); *Hanna v. BAC Home Loans Servicing, LP*, No. 1:12-cv-11474 (D. Mass. filed Aug. 9, 2012); *Wolfram v. PHH Corp.*, No. 1:12-cv-0599 (S.D. Ohio filed Aug. 8, 2012); *Molinaro v. Intercontinental Cap. Group, Inc.*, No. 1:12-cv-06049 (S.D.N.Y. filed Aug. 8, 2012); *DeLeon v. Wells Fargo Bank, N.A.*, No. 4:12-cv-02319 (S.D. Tex. filed Aug. 2, 2012); *Chan v. Wells Fargo Home Mortg., Inc.*, No. 11-2-13424 (Wash. Sup. Ct. filed Apr. 11, 2011); *Raniere v. Citigroup, Inc.*, No. 1:11-cv-02448 (S.D.N.Y. filed Apr. 8, 2011); *Evans v. New Castle Home Loans, LLC*, No. 2011-CH-13035 (Ill. Cir. Ct. filed Apr. 6, 2011); *Corgosinno v.*

compensated mortgage loan officers, alleging that they are misclassified as exempt, seek to be paid both back overtime wages and penalties. This onslaught of cases alone would be sufficient to satisfy such a reliance requirement if it existed, which it does not.

Indeed, the DOL's sudden, 180-degree change completely upsets settled expectations and agreements between MBA-member employers and their loan officers. Most companies have individual written agreements or compensation plans acknowledged and agreed to by both the employer and the employee that provide a compensation structure for the entire year. Successful loan officers can earn hundreds of thousands of dollars and even over \$1 million per year and, under the DOL's view, they were instantly entitled to overtime. According to plaintiffs bringing overtime claims (such as the Intervenor in the case below), loan officers worked in excess of 20 hours of overtime per week in an effort to maximize their

Citimortgage, Inc., No. 11-cv-60613 (S.D. Fla. filed Mar. 22, 2011); *Chaplin v. Wachovia Mortg. Corp.*, No. 4:11-cv-00638 (S.D. Tex. filed Feb. 23, 2011); *Gokhberg v. Sovereign Bancorp, Inc.*, No. 1:11-cv-00263 (E.D.N.Y. filed Jan. 19, 2011); *Becton v. JPMorgan Chase & Co.*, No. 1:11-cv-00331 (N.D. Ill. filed Jan. 17, 2011); *Rushforth v. Bank of America N.A.*, No. 4:11-cv-00035 (S.D. Tex. filed Jan. 5, 2011); *Soli v. JPMorgan Chase & Co.*, No. 3:11-cv-00020 (N.D. Tex. filed Jan. 5, 2011); *Martinez v. JPMorgan Chase Bank, N.A.*, No. 3:10-cv-02575 (N.D. Tex. filed Dec. 17, 2010); *Richardson v. Wells Fargo Bank, N.A.*, No. 4:10-cv-04949 (S.D. Tex. filed Dec. 10, 2010); *Scola v. PrimeLending*, No. 1:10-cv-07072 (N.D. Ill. filed Nov. 2, 2010); *Biggs v. Quicken Loans Inc.*, No. 2:10-cv-11928 (E.D. Mich. filed May 12, 2010); *Leon v. Americash*, No. 2:10-cv-03570 (C.D. Cal. filed May 12, 2010); *Greenberg v. Money Source, Inc.*, No. 2:10-cv-01493 (E.D.N.Y. filed Apr. 5, 2010).

incentive compensation. *See, e.g., Quicken*, Trial Trans. 97, Feb. 17, 2011, ECF No. 721 (Ryan Henry testifying that he worked on average 70 hours per week); *id.*, Trial Trans. 9, Feb. 18, 2011, ECF No. 722 (Nicole Abate testifying she worked at least 60 hours per week); *id.*, Trial Trans 56, Feb. 18, 2011, ECF No. 722 (Hassan Bazzi testifying that he worked 11-13 hours per day, 72 hours per week); *id.*, Trial Trans. 230-31, Feb. 11, 2011, ECF No. 716 (Neil Childs testifying that he worked 65-70 hours per week); *id.*, Trial Trans. 231, Feb. 22, 2011, ECF No. 730 (Katie Ennes testifying that she worked approximately 60 hours per week). Thus, a loan officer who makes \$800,000 per year under the governing yearly incentive compensation plan or agreement would have a regular rate of pay of \$384/hour ($\$800,000/2080$ hours), an overtime rate of \$576/hour at the 1.5 times method ($1.5 \times \$384$), and would suddenly be entitled to nearly a \$600,000 windfall in overtime earnings ($\$576 \times 20(\text{hours}) \times 52(\text{weeks})$). *See generally* 29 C.F.R. § 778. This sudden change not only would drastically alter the economic model—driving some companies out of business—but could also substantially impact the cost of credit to consumers at a time when consumers could least afford it.

There can be no doubt, therefore, that members of the industry association that sought the 2006 Administrator Opinion Letter justifiably and substantially relied on that opinion letter. This abundantly satisfies any new “reliance” threshold purportedly created by *MetWest*. For all the reasons set forth above, the District

Court's decision applying the alleged "substantial reliance exception" for definitive interpretations to the *Paralyzed Veterans* doctrine should be reversed and the 2010-11 AI set aside.¹⁷

c. The APA Procedures Are Specifically Designed To Give Notice, Allow The Opportunity To Participate, And Provide Sufficient Time To Implement Any Changes Ultimately Adopted.

"Those regulated by an administrative agency are entitled to 'know the rules by which the game will be played.'" *Alaska Prof'l Hunters*, 177 F.3d at 1035 (quoting Oliver Wendell Holmes, *Holdsworth's English Law*, 25 LAW QUARTERLY REV. 412, 414 (1909)). The regulated community should also be free from unfair surprise. *Cf. Christopher*, 132 S. Ct. at 2168 ("But where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute.").

Indeed, earlier this year the Supreme Court was critical of DOL's surprise announcement (in *amicus* briefs) that pharmaceutical detailers are not exempt outside salesmen, after years of inaction in the face of an industry practice of classify-

¹⁷And, since this APA case was decided on cross-motions for summary judgment based on the administrative record, if this Court holds that a substantial reliance test applies to definitive interpretations and that MBA must present evidence beyond that available in the public record (since the administrative record is devoid of evidence in light of the DOL's failure to provide notice and request comment), this Court should remand to allow MBA to present evidence of its member's substantial reliance.

ing pharmaceutical detailers as exempt. *Id.* at 2165, 2168. In reasoning equally applicable here, the Supreme Court explained:

It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Christopher, 132 S. Ct. at 2168. In the present case, DOL's surprise was even more acute. Instead of remaining silent, DOL affirmatively declared—in a definitive and authoritative interpretation—that loan officers were exempt before its surprise announcement in 2010 that it had reversed itself. Because DOL definitively and authoritatively interpreted the administrative exemption as including the job duties typically performed by mortgage loan officers, it cannot change that interpretation to find the same job duties non-exempt without first following APA rulemaking procedures.

The whole point of notice and comment, after all, is to foster “the values of public participation, fairness, and informed agency decisionmaking.” *City of Idaho Falls v. FERC*, 629 F.3d 222, 229 (D.C. Cir. 2011) (citing *Nat'l Elec. Mfrs. Ass'n v. EPA*, 99 F.3d 1170, 1174 (D.C. Cir. 1996) (discussing the purposes of the APA's notice-and-comment requirements)); *see also, e.g., NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion) (“The rule-making pro-

visions of [the APA], which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application.”); *Dismas Charities*, 401 F.3d at 678 (“[O]ne of the central purposes of the requirement of notice and comment is to give those with interests affected by rules the chance to participate in the promulgation of the rules.”); *Nat’l Soft Drink Ass’n v. Block*, 721 F.2d 1348, 1353 (D.C. Cir. 1983) (“These procedural requirements [under Section 553 of the APA] are intended to assist judicial review and to insure fair treatment for persons to be affected by the regulations so promulgated.”).

The APA thus “mandates a dialogue” between the agency and stakeholders. J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 381 (1973-1974). It would be quite odd to read the APA as requiring notice and comment to change an admittedly definitive interpretation only where an industry can demonstrate substantial detrimental reliance over a long period of time. The whole point of requiring notice and comment is so that agencies can *assess* and *respond* to the impact *changes* will have on the regulated community.¹⁸ It would be an odd rule that to obtain the APA’s benefits of

¹⁸The district court also appears to conclude that there can be no “substantial and justifiable reliance” on an interpretation that was “only in effect for a period of four years” or that did not lead to relocations “in search of business opportunities.” *Mortg. Bankers Assoc.*, 864 F. Supp. 2d at 208. There is no basis, however, in the APA or the law of the Circuit to add these additional triggers for notice and comment rulemaking. Such additional requirements are inconsistent with the rationale of *Paralyzed Veterans*—that a definitive interpretation of a regulation in effect be-

being able to provide comments on a change to a definitive interpretation an entity has to sue the agency and demonstrate that changing that definitive interpretation would have a detrimental impact.

MBA's members who have established business models and incentive pay compensation structures based on the 2006 Administrator Opinion Letter, therefore, should have had under the APA the opportunity to weigh in and advocate for a different rule. Employees, whose pay may actually be reduced by a switch from incentive pay to hourly compensation, should also have had a chance to comment.

Moreover, had DOL followed the required procedures, in addition to commenting on the rule itself, both employers and employees would have had a chance to explain the difficulties in implementing any new rule. MBA's members would have been able to tell DOL that changing the compensation structure, especially in the middle of the year, would have been difficult because it would require employers to instantaneously manage and track the hours that employees—whose time was not being tracked—were working, instantaneously manage meal and rest periods, and instantaneously revise complex compensation systems to account for the

comes part of that regulation and thus the APA requires notice and comment. *See Paralyzed Veterans*, 117 F.3d at 586; Section II.A *supra*. Surely an agency is not free to alter its regulation without notice and comment merely because its regulation was allegedly “short lived.” Moreover, as the AI itself recognized, for nearly a decade, since the 2001 Non-administrator Letter, DOL had consistently and uniformly held that the duties performed by the typical loan officer “directly related to the management policies or general business operations of the employer.” 2001 DOLWH LEXIS 5, at *5.

payment of overtime, including factoring the substantial incentive compensation that many loan officers receive into the computation of overtime pay or instantaneously modifying those compensation plans.

If DOL had decided after the notice and comment period to nonetheless promulgate a new rule, DOL would have to have provided employers with a minimum of 30 days to implement the new interpretation. 5 U.S.C. § 553(d); *see also*, *e.g.*, *Omnipoint Corp. v. FCC*, 78 F.3d 620, 630-31 (D.C. Cir. 1996) (purpose of the 30-day waiting period is to give affected parties a reasonable time to adjust their behavior before a final rule takes effect). The APA requires a minimum of 30 days for a rule to be implemented, but employers could have advocated for more time to implement any new rule. In fact, although the final regulations promulgated by DOL in 2004 did not impose the drastic new requirements on the mortgage banking industry that AI 2010-1 seeks to impose, DOL provided employers 120 days to implement the new rules even after the lengthy notice and comment process had provided employers with an indication that possible changes were forthcoming. *See* 69 Fed. Reg. at 22,126. Here, by contrast, without any warning or notice, DOL simply issued the AI and announced that its previous interpretation, on which industry employers had relied in establishing complex practices and compensation systems, was immediately reversed and withdrawn.

C. No Other Relevant “Exception” To *Paralyzed Veterans* Exists Or Applies Here.

The District Court did not address DOL’s additional argument below that notice and comment was not required for AI 2010-1 because an alleged “invalid prior interpretation” exception applies in the present case. *Mortg. Bankers Assoc.*, 864 F. Supp. 2d at 206. This argument for an “exception” to the *Paralyzed Veterans* doctrine is also meritless.

According to DOL, *Monmouth Medical Center v. Thompson*, 257 F.3d 807 (D.C. Cir. 2001), creates an “exception” to the *Paralyzed Veterans* doctrine for cases in which the original interpretation is “invalid” and is then withdrawn by the agency. *Monmouth Medical*, however, is a highly unusual case in which the previous agency interpretation had been struck down by numerous courts of appeals *before* the agency ever sought to modify its interpretation. *Id.* at 810, 814. As this Court explained: “As four circuits have already done so, it certainly can’t have been improper for the Secretary to concede the invalidity nationally.” *Id.* at 814. Far from carving out some new “exception” to *Paralyzed Veterans*, this Court explained that the new agency interpretation was not inconsistent with anything because “the original [agency] interpretation [i]s itself invalid” and thus “is a mere nullity.” *Id.* (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965)).

Whatever the scope of *Monmouth Medical*, it plainly has no relevance to the present litigation. DOL did not, and cannot, cite a single court decision issued *be-*

fore the AI was promulgated—let alone a consistent set of four court of appeals decisions—striking down the 2006 Administrator Opinion Letter. That is because there were no such decisions. Instead, DOL simply contended in its opposition brief and cross-motion that it *now* believes that the 2006 Administrator Opinion Letter was invalid.¹⁹ However, “[a]s a general rule, it is for *the courts* to determine whether or not a regulation is invalid.” *Monmouth Med.*, 257 F.3d at 814 (emphasis added); see also, e.g., *Marbury v. Madison*, 1 Cranch 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).²⁰

¹⁹In AI 2010-1, DOL did not even expressly claim that the 2006 Administrator Opinion Letter was invalid. It merely noted its belief that the letter took what the Deputy Administrator believed was an “inappropriately narrow definition of sales,” AI at 5 n.3, and supposedly contained “misleading assumption[s],” *id.* at 8. DOL contended in its briefs below that the AI stated that “the 2006 Opinion Letter ‘d[id] not comport’ with the 2004 regulations.” *Mortg. Bankers Assoc.*, No. 1:11-cv-00073, Defs’ Opp. to Pla’s Mot. for Summary Judgment 19, Mar. 10, 2011, ECF No. 16 (D.D.C. 2011) (emphasis added). However, what the AI actually stated was that “[b]ecause of its misleading assumption and selective and narrow analysis, Opinion Letter FLSA2006-31 *does not comport with this interpretive guidance and is withdrawn.*” AI at 8 (emphasis added). Inconsistency between two definitive interpretations is obviously a far cry from “conceding the invalidity” of an earlier interpretation in the face of repeated and consistent adverse appellate court decisions. Moreover, that a subsequent interpretation contradicts an earlier definitive interpretation does not mean that either of the interpretations is inconsistent with the express text of a regulation, but it does mean under the APA and the *Paralyzed Veterans* line of cases that notice and comment are required to adopt the new definitive interpretation.

²⁰*Monmouth Medical* was also in a different procedural posture—the complaint there was that the new HHS interpretation did not apply *retroactively* to allow hospitals to seek relief from application of the prior clearly invalid interpretation. 257

Tellingly, DOL has not cited a single instance of a court's refusing to apply *Paralyzed Veterans* on the basis of an agency's *own assertion* of invalidity. And for good reason. This Court expressly rejected just such an argument in *Alaska Professional Hunters*: "The FAA's current doubts about the wisdom of the regulatory system followed in Alaska for more than thirty years does not justify disregarding the requisite procedures for changing that system." *Alaska Prof'l Hunters*, 177 F.3d at 1035; *see also Alaska Prof'l Hunters*, No. 98-1051, 1998 WL 35239576, at *15-16 (D.C. Cir. June 10, 1998) (Br. of Resp. FAA) (arguing that the FAA notice "is an interpretive rule, which is exempt from the APA's notice-and-comment requirement. It changes a local practice ... that the Alaskan Region ultimately concluded was '*illegal*'" (emphasis added)). Moreover, if an agency could simply contend—absent court decisions—that an interpretation is invalid (which DOL did not even do here), then an agency could circumvent notice and comment simply by declaring its prior definitive interpretation "invalid" before issuing a new rule, a result clearly forbidden by the APA. *See, e.g., Paralyzed Veterans*, 117 F.3d at 586 ("To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements.").²¹

F.3d at 810. All the parties in that case agreed that the prior interpretation was invalid.*Id.*

²¹Moreover, the 2006 Administrator Opinion Letter was clearly reasonable and

Hoping to bootstrap itself into a situation vaguely similar to *Monmouth Medical*, DOL below cited a single district court case decided nearly a year *after* the AI was issued. *See Mortg. Bankers Assoc. v. Solis*, No. 11-cv-00073, Def's Opp. 20 & Attach. 1, Dkt. 16 (citing and attaching *Quicken*, Order Denying Plas' Mot. for Reconsideration, Jan. 27, 2011, ECF No. 666 ("*Quicken* Order")).²² But DOL's reliance on the *Quicken* decision is misplaced for at least four independent reasons.

First, the *Quicken* ruling, which was issued *after* the AI was promulgated, relied upon and was influenced by the AI, not the other way around. Indeed, at the time the AI was issued, the *Quicken* court had previously "held in 2009 that FLSA 2006-31 was entitled to a controlling degree of deference." *Quicken* Order 16 (cit-

well-founded. Indeed, it was consistent with the plain language of 29 C.F.R. § 541.203(b) (as well as the reasoning of the 2001 Opinion Letter regarding the issue addressed in the AI). *See supra* 7-13. For example, DOL's regulation provides that "[e]mployees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information." 29 C.F.R. § 541.203(b).

The 2006 Administrator Opinion Letter is also consistent with the Preamble to the 2004 Regulations, in which the Department of Labor clarified that "many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to consumers." 69 Fed. Reg. at 22,146; *see also id.* ("Servicing existing customers, promoting the employer's financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general business operations of their employer or their employer's customers, and which require the exercise of discretion and independent judgment.").

²²The *Quicken* court expressly refused to consider MBA's arguments regarding the AI's effect on the case, denying MBA leave to file an *amicus* brief that MBA wished to submit on that issue. *Quicken*, Order Denying Trade Orgs.' Mot. for Leave to File an *Amicus Curiae* Br., Dec. 15, 2010, ECF No. 613.

ing cases). Thus, far from supporting DOL's argument, the *Quicken* rulings demonstrate just how inapplicable *Monmouth Medical* is here. Instead of DOL reversing an interpretation repeatedly rejected by the courts, here the only case relied upon by DOL actually found prior to the issuance of the AI that the 2006 Administrator Opinion Letter was *valid*.

Second, any discussion of the merits of the 2006 Administrator Opinion Letter, or of the AI, was *dicta* because the court ruled that under 29 U.S.C. § 259(a) Quicken was entitled to rely on the 2006 Administrator Opinion Letter regardless of its validity. *Quicken* Order 27. Moreover, the *Quicken* court ruled that the AI was inapplicable because it was issued after the time period at issue in that case. *Id.* at 14.

Third, the *Quicken* decision did not directly conclude that the 2006 Administrator Opinion Letter was invalid, but merely raised questions regarding the soundness of its reasoning. The *Quicken* judge reviewed the newly issued AI 2010-1, and DOL's contentions therein that the 2006 Administrator Opinion Letter: (i) took a narrow view of sales and (ii) used the financial services example as a distinct test for administrative exempt employees. *Quicken* Order 16-17. After analyzing those arguments, the court was "*not convinced* that [the 2006 Administrator Opinion Letter] embraces either of these conclusions squarely, or relies on them to reach its conclusions." *Id.* at 17 (emphasis added); *see also id.* at 22 ("AI 2010-1

stated that FLSA 2006-31 was not good authority because it improperly used the language of § 203(b) as a distinct test for determining whether or not given employees are administratively exempt. *But this claim is too broad.*” (emphasis added)).²³

Finally, the *Quicken* district court’s determination that AI 2010-1 is better reasoned (which in any case has no relevance to DOL’s *Paralyzed Veterans* argument) is simply wrong. It is also belied by the jury’s defense verdict in that case. The *Quicken* court declined to allow the 2006 Administrator Opinion Letter to be presented to the jury, in part because it was rendered after the period of the alleged violations which the jury was considering.²⁴ The *Quicken* jury was provided *only* the language of DOL regulations in the jury instructions. Nevertheless, the jury found—consistent with the 2006 Administrator Opinion Letter and inconsistent with AI 2010-1—that the plaintiff mortgage loan officers’ “primary job duty [was] the performance of office or non-manual work directly related to the management or general business operations of Quicken Loans or its customers.” *Quicken*,

²³The *Quicken* district court also ruled that “*insofar as FLSA 2006-31 makes either of the above legal claims, it is not consistent with*” the regulations. *Quicken* Order 17 (emphasis added).

²⁴The court had earlier ruled that *Quicken* had substantially relied on the 2006 Administrator Opinion Letter and was entitled to an absolute defense from liability for the period following its issuance. *See Henry v. Quicken Loans, Inc.*, No. 2:04-cv-40346, 2009 WL 3199788, at *12-13 (E.D. Mich. Sept. 30, 2009) (granting in part defendant’s motion for summary judgment on liability).

Completed Verdict Form, 1, Mar. 17, 2011, ECF No. 708; *id.*, Not. of Proposed Jury Charge & Verdict Form 19 (No. 18), Mar. 9, 2011, ECF No. 704; and *id.*, Trial Trans. 262, Final Jury Insts. (No. 17), Mar. 14, 2011, ECF No. 737.²⁵

In sum, the 2006 Administrator Opinion Letter had not been invalidated by *any* court before the AI was issued in 2010. Thus, even if *Monmouth Medical* created some sort of “exception” to the *Paralyzed Veterans* doctrine, which is far from clear, it nonetheless provides no support at all for DOL’s unlawful promulgation of AI 2010-1 without notice and comment.

CONCLUSION

In sum, the District Court correctly acknowledged the *Paralyzed Veterans* doctrine, but erred in applying an “exception.” *MetWest* does not apply where the agency has issued an *authoritative* interpretation. DOL, therefore, was not released from the procedural rulemaking requirements under the APA. Whether or not *MetWest* (and *Monmouth Medical*) created any purported “exceptions” to the *Paralyzed Veterans* doctrine, they clearly provide no support for DOL in the present case. The AI plainly overturned, and expressly withdrew, a prior definitive interpretation—one that had never been struck down by any court—and

²⁵The jury verdict was affirmed by the Sixth Circuit. *Henry v. Quicken Loans, Inc.*, 698 F.3d 897, 900 (6th Cir. 2012) (“The question is whether the evidence supported the jury’s finding that the first sentence [of 29 C.F.R. § 541.203(b)] more aptly described the mortgage bankers’ ‘primary duty’ than the second. It did.”).

one that MBA itself had sought for its members to rely upon as a definitive guidance on how to properly classify its mortgage loan officers and so its members could obtain the protection of 29 U.S.C. § 259(a). This reliance on the 2006 Administrator Opinion Letter was clearly substantial and justifiable. The APA and this Court's precedent requires no further analysis to reach the inevitable conclusion: Because DOL acted without the required notice and comment procedures, AI 2010-1 must be set aside. The District Court's entry of summary judgment in favor of DOL should be reversed and summary judgment entered in favor of MBA.

Dated: December 5, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I certify that this brief complies with the applicable type-volume word count option limitations with 13,980 words. This certificate was prepared in reliance on the word count of Microsoft Office Word used to prepare this brief.

/s/ Howard M. Radzely
Howard M. Radzely

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2012, a copy of the foregoing Brief of Appellants was filed electronically on the Court's CM/ECF system. I understand that by operation of the Court's electronic filing system notice of this filing will be sent to all registered parties. Parties may access this filing through the Court's system.

/s/ Howard M. Radzely
Howard M. Radzely

Addendum of Pertinent Statutes and Regulations

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Fair Labor Standards Act

29 U.S.C. § 207A-2

29 U.S.C. § 213A-8

Department of Labor Regulations

29 C.F.R. § 541.200A-15

29 C.F.R. § 541.203A-16

sions as par. (2), inserted reference to par. (1), and inserted provisions relating to commission of a felony.

1978—Subsec. (c)(9). Pub. L. 95-524 added cl. (9).

1973—Subsec. (c)(8). Pub. L. 93-95 added cl. (8).

1969—Subsec. (c)(7). Pub. L. 91-86 added cl. (7).

1959—Subsec. (a). Pub. L. 86-257 amended subsec. (a) generally. Prior to amendment subsec. (a) read as follows: "It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

Subsec. (b). Pub. L. 86-257 amended subsec. (b) generally. Prior to amendment subsec. (b) read as follows: "It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."

Subsec. (c). Pub. L. 86-257 substituted "in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer" for "with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer" in cl. (1), and added cl. (6).

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104-88 effective Jan. 1, 1996, see section 2 of Pub. L. 104-88, set out as an Effective Date note under section 701 of Title 49, Transportation.

APPLICABILITY TO COLLECTIVE BARGAINING AGREEMENTS

Amendment by Pub. L. 95-524 not to affect terms and conditions of any collective bargaining agreement whether in effect prior to or entered into after Oct. 27, 1978, see section 6(e) of Pub. L. 95-524, set out as an Effective Date note under section 175a of this title.

§ 187. Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or¹ any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

(June 23, 1947, ch. 120, title III, § 303, 61 Stat. 158; Pub. L. 86-257, title VII, § 704(e), Sept. 14, 1959, 73 Stat. 545.)

AMENDMENTS

1959—Subsec. (a). Pub. L. 86-257 struck out provisions which specified particular practices that were unlawful, and inserted reference to practices defined in sec-

tion 158(b)(4) of this title, which section defines the unfair labor practices formerly enumerated in this subsection.

§ 188. Repealed. Aug. 9, 1955, ch. 690, § 4(3), 69 Stat. 625

Section, act June 23, 1947, ch. 120, title III, § 305, 61 Stat. 160, forbade striking by Government employees, required discharge of striking employee and forfeiture of his civil-service status, and made him ineligible for employment for three years. See sections 3333 and 7311 of Title 5, Government Organization and Employees, and section 1918 of Title 18, Crimes and Criminal Procedure.

SUBCHAPTER V—CONGRESSIONAL JOINT COMMITTEE ON LABOR-MANAGEMENT RELATIONS

§§ 191 to 197. Omitted

CODIFICATION

Section 191, act June 23, 1947, ch. 120, title IV, § 401, 61 Stat. 160, related to establishment and composition of Joint Committee on Labor-Management Relations.

Section 192, act June 23, 1947, ch. 120, title IV, § 402, 61 Stat. 160, related to a study by committee of the entire field of labor-management relations.

Section 193, acts June 23, 1947, ch. 120, title IV, § 403, 61 Stat. 160; Aug. 10, 1948, ch. 833, 62 Stat. 1286, related to a final report to Congress to be submitted no later than March 1, 1949.

Section 194, act June 23, 1947, ch. 120, title IV, § 404, 61 Stat. 161, related to employment and compensation of experts and other personnel.

Section 195, act June 23, 1947, ch. 120, title IV, § 405, 61 Stat. 161, related to hearings, calling of witnesses, production of evidence.

Section 196, act June 23, 1947, ch. 120, title IV, § 406, 61 Stat. 161, related to reimbursement of committee members for expenses.

Section 197, act June 23, 1947, ch. 120, title IV, § 407, 61 Stat. 161, related to appropriation of funds.

CHAPTER 8—FAIR LABOR STANDARDS

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§ 201. Short title

This chapter may be cited as the "Fair Labor Standards Act of 1938".

¹ So in original. Probably should be "of".

RULES, REGULATIONS, AND ORDERS PROMULGATED WITH REGARD TO 1966 AMENDMENTS

Secretary authorized to promulgate necessary rules, regulations, or orders on and after the date of the enactment of Pub. L. 89-601, Sept. 23, 1966, with regard to the amendments made by Pub. L. 89-601, see section 602 of Pub. L. 89-601, set out as a note under section 203 of this title.

CONGRESSIONAL FINDING AND DECLARATION OF POLICY

Section 2 of Pub. L. 88-38 provided that:

“(a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

“(1) depresses wages and living standards for employees necessary for their health and efficiency;

“(2) prevents the maximum utilization of the available labor resources;

“(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

“(4) burdens commerce and the free flow of goods in commerce; and

“(5) constitutes an unfair method of competition.

“(b) It is hereby declared to be the policy of this Act [amending this section, and enacting provisions set out as notes under this section], through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.”

DEFINITION OF “ADMINISTRATOR”

The term “Administrator” as meaning the Administrator of the Wage and Hour Division, see section 204 of this title.

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) of this section or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than \$1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c), (d) Repealed. Pub. L. 93-259, § 19(e), Apr. 8, 1974, 88 Stat. 66

(e) "Regular rate" defined

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums¹ paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day of workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section,² where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement

¹ So in original. Probably should not be capitalized.

² So in original. The comma probably should be preceded by a closing parenthesis.

made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Credit toward minimum wage or overtime compensation of amounts excluded from regular rate

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) of this section shall not be creditable toward wages required under section 206 of this title or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of

this section shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged, or mentally ill

No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) of this section if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) Employment in domestic service in one or more households

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.

(m) Employment in tobacco industry

For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer—

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban, or interurban electric railway, or local trolley or motorbus carrier

In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) of this section applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such

employment, and (2) if employment in such activities is not part of such employee's regular employment.

(o) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee,

whichever is higher³

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) of this section if—

(A) such employee is paid at a per-page rate which is not less than—

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activi-

ties, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education

Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is—

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

(r) Reasonable break time for nursing mothers

(1) An employer shall provide—

(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

(B) a place, other than a bathroom, that is shielded from view and free from intrusion

³ So in original. Probably should be followed by a period.

from coworkers and the public, which may be used by an employee to express breast milk.

(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

(3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

(June 25, 1938, ch. 676, § 7, 52 Stat. 1063; Oct. 29, 1941, ch. 461, 55 Stat. 756; July 20, 1949, ch. 352, § 1, 63 Stat. 446; Oct. 26, 1949, ch. 736, § 7, 63 Stat. 912; Pub. L. 87-30, § 6, May 5, 1961, 75 Stat. 69; Pub. L. 89-601, title II, §§ 204(c), (d), 212(b), title IV, §§ 401-403, Sept. 23, 1966, 80 Stat. 835-837, 841, 842; Pub. L. 93-259, §§ 6(c)(1), 7(b)(2), 9(a), 12(b), 19, 21(a), Apr. 8, 1974, 88 Stat. 60, 62, 64, 66, 68; Pub. L. 99-150, §§ 2(a), 3(a)-(c)(1), Nov. 13, 1985, 99 Stat. 787, 789; Pub. L. 101-157, § 7, Nov. 17, 1989, 103 Stat. 944; Pub. L. 104-26, § 2, Sept. 6, 1995, 109 Stat. 264; Pub. L. 106-202, § 2(a), (b), May 18, 2000, 114 Stat. 308, 309; Pub. L. 111-148, title IV, § 4207, Mar. 23, 2010, 124 Stat. 577.)

REFERENCES IN TEXT

The Fair Labor Standards Amendments of 1966, referred to in subsec. (a)(2), is Pub. L. 89-601, Sept. 23, 1966, 80 Stat. 830. For complete classification of this Act to the Code, see Short Title of 1966 Amendment note set out under section 201 of this title and Tables.

The effective date of the Fair Labor Standards Amendments of 1966, referred to in subsec. (a)(2)(A), means the effective date of Pub. L. 89-601, which is Feb. 1, 1967 except as otherwise provided, see section 602 of Pub. L. 89-601, set out as an Effective Date of 1966 Amendment note under section 203 of this title.

Section 6(c)(3) of the Fair Labor Standards Amendments of 1974, referred to in subsec. (k)(1), is Pub. L. 93-259, § 6(c)(3), Apr. 8, 1974, 88 Stat. 61, which is set out as a note under section 213 of this title.

AMENDMENTS

- 2010—Subsec. (r). Pub. L. 111-148 added subsec. (r).
- 2000—Subsec. (e)(8). Pub. L. 106-202, § 2(a), added par. (8).
- Subsec. (h). Pub. L. 106-202, § 2(b), designated existing provisions as par. (2) and added par. (1).
- 1995—Subsec. (o)(6), (7). Pub. L. 104-26 added par. (6) and redesignated former par. (6) as (7).
- 1989—Subsec. (q). Pub. L. 101-157 added subsec. (q).
- 1985—Subsec. (o). Pub. L. 99-150, § 2(a), added subsec. (o).
- Subsec. (p). Pub. L. 99-150, § 3(a)-(c)(1), added subsec. (p).
- 1974—Subsec. (c). Pub. L. 93-259, § 19(a), (b), substituted “seven workweeks” for “ten workweeks”, “ten workweeks” for “fourteen workweeks” and “forty-eight hours” for “fifty hours” effective May 1, 1974. Pub. L. 93-259, § 19(c), substituted “five workweeks” for “seven workweeks” and “seven workweeks” for “ten workweeks” effective Jan. 1, 1975. Pub. L. 93-259, § 19(d), substituted “three workweeks” for “five workweeks” and “five workweeks” for “seven workweeks” effective Jan. 1, 1976. Pub. L. 93-259, § 19(e), repealed subsec. (c) effective Dec. 31, 1976.

Subsec. (d). Pub. L. 93-259, § 19(a), (b), substituted “seven workweeks” for “ten workweeks”, “ten workweeks” for “fourteen workweeks” and “forty-eight hours” for “fifty hours” effective May 1, 1974. Pub. L. 93-259, § 19(c), substituted “five workweeks” for “seven workweeks” and “seven workweeks” for “ten workweeks” effective Jan. 1, 1975. Pub. L. 93-259, § 19(d), substituted “three workweeks” for “five workweeks” and “five workweeks” for “seven workweeks” effective Jan. 1, 1976. Pub. L. 93-259, § 19(e), repealed subsec. (d) effective Dec. 31, 1976.

Subsec. (j). Pub. L. 93-259, § 12(b), extended provision excepting from being considered a subsec. (a) violation agreements or undertakings between employers and employees respecting consecutive work period and overtime compensation to agreements between employers engaged in operation of an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises and employees respecting consecutive work period and overtime compensation.

Subsec. (k). Pub. L. 93-259, § 6(c)(1)(D), effective Jan. 1, 1978, substituted in par. (1) “exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975” for “exceed 216 hours” and inserted in par. (2) “(or if lower, the number of hours referred to in clause (B) of paragraph (1))”.

Pub. L. 93-259, § 6(c)(1)(C), substituted “216 hours” for “232 hours”, wherever appearing, effective Jan. 1, 1977.

Pub. L. 93-259, § 6(c)(1)(B), substituted “232 hours” for “240 hours”, wherever appearing, effective Jan. 1, 1976.

Pub. L. 93-259, § 6(c)(1)(A), added subsec. (k), effective Jan. 1, 1975.

Subsec. (l). Pub. L. 93-259, § 7(b)(2), added subsec. (l).

Subsec. (m). Pub. L. 93-259, § 9(a), added subsec. (m).

Subsec. (n). Pub. L. 93-259, § 21(a), added subsec. (n).

1966—Subsec. (a). Pub. L. 89-601, § 401, retained provision for 40-hour workweek and compensation for employment in excess of 40 hours at not less than one and one-half times the regular rate of pay and substituted provisions setting out a phased timetable for the workweek in the case of employees covered by the overtime provisions for the first time under the Fair Labor Standards Amendments of 1966 beginning at 44 hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966, 42 hours during the second year from such date, and 40 hours after the expiration of the second year from such date, for provisions giving a phased timetable for workweeks in the case of employees first covered under the provisions of the Fair Labor Standards Amendments of 1961.

Subsec. (b)(3). Pub. L. 89-601, § 212(b), substituted provisions granting an overtime exemption for petroleum distribution employees if they receive compensation for the hours of employment in excess of 40 hours in any workweek at a rate not less than one and one-half times the applicable minimum wage rate and if the enterprises do an annual gross sales volume of less than \$1,000,000, if more than 75 per centum of such enterprise's annual dollar volume of sales is made within the state in which the enterprise is located, and not more than 25 per centum of the annual dollar volume is to customers who are engaged in the bulk distribution of such products for resale for provisions covering employees for a period of not more than 14 workweeks in the aggregate in any calendar year in an industry found to be of a seasonal nature.

Subsec. (c). Pub. L. 89-601, § 204(c), substituted provisions for an overtime exemption of 10 weeks in any calendar year or 14 weeks in the case of an employer not qualifying for the exemption in subsec. (d) of this section, limited to 10 hours a day and 50 hours a week, applicable to employees employed in seasonal industries which are not engaged in agricultural processing, for provisions granting a year-round unlimited exemption applicable to employees of employers engaged in first

§ 212. Child labor provisions**(a) Restrictions on shipment of goods; prosecution; conviction**

No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection: *And provided further*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) Investigations and inspections

The Secretary of Labor or any of his authorized representatives, shall make all investigations and inspections under section 211(a) of this title with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 217 of this title to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this chapter relating to oppressive child labor.

(c) Oppressive child labor

No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.

(d) Proof of age

In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age.

(June 25, 1938, ch. 676, §12, 52 Stat. 1067; 1946 Reorg. Plan No. 2, §1(b), eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Oct. 26, 1949, ch. 736, §10, 63 Stat. 917; Pub. L. 87-30, §8, May 5, 1961, 75 Stat. 70; Pub. L. 93-259, §25(a), Apr. 8, 1974, 88 Stat. 72.)

AMENDMENTS

1974—Subsec. (d). Pub. L. 93-259 added subsec. (d).

1961—Subsec. (c). Pub. L. 87-30 inserted “or in any enterprise engaged in commerce or in the production of goods for commerce”.

1949—Subsec. (a). Act Oct. 26, 1949, §10(a), struck out effective date at beginning of subsection and inserted proviso excepting good faith purchaser of goods produced by oppressive child labor.

Subsec. (c). Act Oct. 26, 1949, §10(b), added subsec. (c).

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93-259 effective May 1, 1974, see section 29(a) of Pub. L. 93-259, set out as a note under section 202 of this title.

EFFECTIVE DATE OF 1961 AMENDMENT

Amendment by Pub. L. 87-30 effective upon expiration of one hundred and twenty days after May 5, 1961, except as otherwise provided, see section 14 of Pub. L. 87-30, set out as a note under section 203 of this title.

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment by act Oct. 26, 1949, effective ninety days after Oct. 26, 1949, see section 16(a) of act Oct. 26, 1949, set out as a note under section 202 of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of Labor, with certain exceptions, to Secretary of Labor, with power to delegate, see Reorg. Plan No. 6 of 1950, §§1, 2, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to Title 5, Government Organization and Employees.

“Secretary of Labor” substituted for “Chief of the Children’s Bureau in the Department of Labor” in subsec. (b) by 1946 Reorg. Plan No. 2. See note set out under section 203 of this title.

§ 213. Exemptions**(a) Minimum wage and maximum hour requirements**

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub. L. 101-157, §3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33½ per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a

contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub. L. 101-157, §3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semi-weekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub. L. 93-259, §23(a)(1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub. L. 93-259, §10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub. L. 93-259, §§9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee em-

ployed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than \$27.63 an hour.

(b) Maximum hour requirements

The provisions of section 207 of this title shall not apply with respect to—

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49; or

(2) any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of title 49; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [45 U.S.C. 181 et seq.]; or

(4) Repealed. Pub. L. 93-259, §11(c), Apr. 8, 1974, 88 Stat. 64.

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) Repealed. Pub. L. 93-259, §21(b)(3), Apr. 8, 1974, 88 Stat. 68.

(8) Repealed. Pub. L. 95-151, §14(b), Nov. 1, 1977, 91 Stat. 1252.

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Office of Management and Budget, which has a total population in excess of one hundred thousand, or (B) in a city or

town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18), (19) Repealed. Pub. L. 93-259, §§15(c), 16(b), Apr. 8, 1974, 88 Stat. 65.

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. Pub. L. 95-151, §5, Nov. 1, 1977, 91 Stat. 1249.

(23) Repealed. Pub. L. 93-259, §10(b)(3), Apr. 8, 1974, 88 Stat. 64.

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than \$10,000; or

(25), (26) Repealed. Pub. L. 95-151, §§6(a), 7(a), Nov. 1, 1977, 91 Stat. 1249, 1250.

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(30) a criminal investigator who is paid availability pay under section 5545a of title 5.

(c) Child labor requirements

(1) Except as provided in paragraph (2) or (4), the provisions of section 212 of this title relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—

(A) is less than twelve years of age and (i) is employed by his parent, or by a person stand-

ing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of subsection (a)(6)(A) of this section) required to be paid at the wage rate prescribed by section 206(a)(5)¹ of this title.

(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of section 212 of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) The provisions of section 212 of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4)(A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 212 of this title to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that—

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 212 of this title would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that—

(i) the individuals employed under such waiver be employed outside of school hours for

the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(5)(A) In the administration and enforcement of the child labor provisions of this chapter, employees who are 16 and 17 years of age shall be permitted to load materials into, but not operate or unload materials from, scrap paper balers and paper box compactors—

(i) that are safe for 16- and 17-year-old employees loading the scrap paper balers or paper box compactors; and

(ii) that cannot be operated while being loaded.

(B) For purposes of subparagraph (A), scrap paper balers and paper box compactors shall be considered safe for 16- or 17-year-old employees to load only if—

(i)(I) the scrap paper balers and paper box compactors meet the American National Standards Institute's Standard ANSI Z245.5-1990 for scrap paper balers and Standard ANSI Z245.2-1992 for paper box compactors; or

(II) the scrap paper balers and paper box compactors meet an applicable standard that is adopted by the American National Standards Institute after August 6, 1996, and that is certified by the Secretary to be at least as protective of the safety of minors as the standard described in subclause (I);

(ii) the scrap paper balers and paper box compactors include an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;

(iii) the on-off switch of the scrap paper balers and paper box compactors is maintained in an off position when the scrap paper balers and paper box compactors are not in operation; and

(iv) the employer of 16- and 17-year-old employees provides notice, and posts a notice, on the scrap paper balers and paper box compactors stating that—

(I) the scrap paper balers and paper box compactors meet the applicable standard described in clause (i);

(II) 16- and 17-year-old employees may only load the scrap paper balers and paper box compactors; and

(III) any employee under the age of 18 may not operate or unload the scrap paper balers and paper box compactors.

The Secretary shall publish in the Federal Register a standard that is adopted by the American National Standards Institute for scrap paper balers or paper box compactors and certified by the Secretary to be protective of the safety of minors under clause (i)(II).

(C)(i) Employers shall prepare and submit to the Secretary reports—

¹ See References in Text note below.

(I) on any injury to an employee under the age of 18 that requires medical treatment (other than first aid) resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor; and

(II) on any fatality of an employee under the age of 18 resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor.

(ii) The reports described in clause (i) shall be used by the Secretary to determine whether or not the implementation of subparagraph (A) has had any effect on the safety of children.

(iii) The reports described in clause (i) shall provide—

(I) the name, telephone number, and address of the employer and the address of the place of employment where the incident occurred;

(II) the name, telephone number, and address of the employee who suffered an injury or death as a result of the incident;

(III) the date of the incident;

(IV) a description of the injury and a narrative describing how the incident occurred; and

(V) the name of the manufacturer and the model number of the scrap paper baler or paper box compactor involved in the incident.

(iv) The reports described in clause (i) shall be submitted to the Secretary promptly, but not later than 10 days after the date on which an incident relating to an injury or death occurred.

(v) The Secretary may not rely solely on the reports described in clause (i) as the basis for making a determination that any of the employers described in clause (i) has violated a provision of section 212 of this title relating to oppressive child labor or a regulation or order issued pursuant to section 212 of this title. The Secretary shall, prior to making such a determination, conduct an investigation and inspection in accordance with section 212(b) of this title.

(vi) The reporting requirements of this subparagraph shall expire 2 years after August 6, 1996.

(6) In the administration and enforcement of the child labor provisions of this chapter, employees who are under 17 years of age may not drive automobiles or trucks on public roadways. Employees who are 17 years of age may drive automobiles or trucks on public roadways only if—

(A) such driving is restricted to daylight hours;

(B) the employee holds a State license valid for the type of driving involved in the job performed and has no records of any moving violation at the time of hire;

(C) the employee has successfully completed a State approved driver education course;

(D) the automobile or truck is equipped with a seat belt for the driver and any passengers and the employee's employer has instructed the employee that the seat belts must be used when driving the automobile or truck;

(E) the automobile or truck does not exceed 6,000 pounds of gross vehicle weight;

(F) such driving does not involve—

(i) the towing of vehicles;

(ii) route deliveries or route sales;

(iii) the transportation for hire of property, goods, or passengers;

(iv) urgent, time-sensitive deliveries;

(v) more than two trips away from the primary place of employment in any single day for the purpose of delivering goods of the employee's employer to a customer (other than urgent, time-sensitive deliveries);

(vi) more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers (other than employees of the employer);

(vii) transporting more than three passengers (including employees of the employer); or

(viii) driving beyond a 30 mile radius from the employee's place of employment; and

(G) such driving is only occasional and incidental to the employee's employment.

For purposes of subparagraph (G), the term "occasional and incidental" is no more than one-third of an employee's worktime in any workday and no more than 20 percent of an employee's worktime in any workweek.

(7)(A)(i) Subject to subparagraph (B), in the administration and enforcement of the child labor provisions of this chapter, it shall not be considered oppressive child labor for a new entrant into the workforce to be employed inside or outside places of business where machinery is used to process wood products.

(ii) In this paragraph, the term "new entrant into the workforce" means an individual who—

(I) is under the age of 18 and at least the age of 14, and

(II) by statute or judicial order is exempt from compulsory school attendance beyond the eighth grade.

(B) The employment of a new entrant into the workforce under subparagraph (A) shall be permitted—

(i) if the entrant is supervised by an adult relative of the entrant or is supervised by an adult member of the same religious sect or division as the entrant;

(ii) if the entrant does not operate or assist in the operation of power-driven woodworking machines;

(iii) if the entrant is protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation; and

(iv) if the entrant is required to use personal protective equipment to prevent exposure to excessive levels of noise and saw dust.

(d) Delivery of newspapers and wreathmaking

The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homemaker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or

other forest products used in making such wreaths).

(e) Maximum hour requirements and minimum wage employees

The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 206(a)(3)¹ of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factors set forth in section 206(a)(3)¹ of this title, that economic conditions warrant such action.

(f) Employment in foreign countries and certain United States territories

The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [43 U.S.C. 1331 et seq.]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

(g) Certain employment in retail or service establishments, agriculture

The exemption from section 206 of this title provided by paragraph (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds \$10,000,000 (exclusive of excise taxes at the retail level which are separately stated).

(h) Maximum hour requirement: fourteen work-week limitation

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who—

(1) is employed by such employer—

(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

(B) exclusively to provide services necessary and incidental to the receiving, han-

dling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 207 of this title.

(i) Cotton ginning

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j) Processing of sugar beets, sugar beet molasses, or sugar cane

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(June 25, 1938, ch. 676, §13, 52 Stat. 1067; Aug. 9, 1939, ch. 605, 53 Stat. 1266; Oct. 26, 1949, ch. 736, §11, 63 Stat. 917; Aug. 8, 1956, ch. 1035, §3, 70 Stat. 1118; Pub. L. 85-231, §1(1), Aug. 30, 1957, 71 Stat. 514; Pub. L. 86-624, §21(b), July 12, 1960, 74 Stat. 417; Pub. L. 87-30, §§9, 10, May 5, 1961, 75 Stat. 71, 74; Pub. L. 89-601, title II, §§201-204(a), (b), 205-212(a), 213, 214, 215(b), (c), Sept. 23, 1966, 80 Stat. 833-838; Pub. L. 89-670, §8(e), Oct. 15, 1966, 80 Stat. 943; 1970 Reorg. Plan No. 2, §102, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085; Pub. L. 92-318, title IX, §906(b)(1), June 23, 1972, 86 Stat. 375; Pub. L. 93-259, §§6(c)(2), 7(b)(3), (4), 8, 9(b), 10, 11, 12(a), 13(a)-(d), 14-18, 20(a)-(c), 21(b), 22, 23, 25(b), Apr. 8, 1974, 88 Stat. 61-69, 72; Pub. L. 95-151, §§4-8, 9(d), 11, 14, Nov. 1, 1977, 91 Stat. 1249, 1250-1252; Pub. L. 96-70, title I, §1225(a), Sept. 27, 1979, 93 Stat. 468; Pub. L. 101-157, §3(c), Nov. 17, 1989, 103 Stat. 939; Pub. L. 103-329, title VI, §633(d), Sept. 30, 1994, 108 Stat. 2428; Pub. L. 104-88, title III, §340, Dec. 29, 1995, 109 Stat. 955; Pub. L. 104-174, §1, Aug. 6, 1996, 110 Stat. 1553; Pub. L. 104-188, [title II], §2105(a), Aug. 20, 1996, 110 Stat. 1929; Pub. L. 105-78, title I, §105, Nov. 13, 1997, 111 Stat. 1477; Pub. L. 105-334, §2(a), Oct. 31, 1998, 112 Stat. 3137; Pub. L. 108-199, div. E, title I, §108, Jan. 23, 2004, 118 Stat. 236.)

REFERENCES IN TEXT

The Railway Labor Act, referred to in subsec. (b)(3), is act May 20, 1926, ch. 347, 44 Stat. 577, as amended. Title II of the Railway Labor Act was added by act Apr. 10, 1936, ch. 166, 49 Stat. 1189, and is classified generally to subchapter II (§181 et seq.) of Title 45, Railroads. For complete classification of this Act to the Code see section 151 of Title 45 and Tables.

Section 206(a)(5) of this title, referred to in subsec. (c)(1)(A), was redesignated section 206(a)(4) of this title by Pub. L. 110-28, title VIII, §8103(c)(1)(B), May 25, 2007, 121 Stat. 189.

Section 206(a)(3) of this title, referred to in subsec. (e), was repealed and section 206(a)(4) of this title was redesignated section 206(a)(3) by Pub. L. 110-28, title VIII, §8103(c)(1)(B), May 25, 2007, 121 Stat. 189.

The Outer Continental Shelf Lands Act, referred to in subsec. (f), is act Aug. 7, 1953, ch. 345, 67 Stat. 462, as amended, which is classified generally to subchapter III (§1331 et seq.) of chapter 29 of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1331 of Title 43 and Tables.

CODIFICATION

In subsec. (a)(1), "subchapter II of chapter 5 of title 5" substituted for "the Administrative Procedure Act" on authority of Pub. L. 89-554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

In subsec. (b)(1), "section 31502 of title 49" substituted for "section 3102 of title 49" on authority of Pub. L. 103-272, §§1(c), (e), 6(b), July 5, 1994, 108 Stat. 745, 862, 1029, 1378. Previously, "section 3102 of title 49" substituted for "section 204 of the Motor Carrier Act, 1935 [49 U.S.C. 304]", on authority of Pub. L. 97-449, §6(b), Jan. 12, 1983, 96 Stat. 2443, the first section of which enacted subtitle I (§101 et seq.) and chapter 31 (§3101 et seq.) of subtitle II of Title 49, Transportation.

AMENDMENTS

2004—Subsec. (c)(7). Pub. L. 108-199 added par. (7).

1998—Subsec. (c)(6). Pub. L. 105-334 added par. (6).

1997—Subsec. (b)(12). Pub. L. 105-78 substituted "water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year" for "water for agricultural purposes".

1996—Subsec. (a)(17). Pub. L. 104-188 added par. (17).

Subsec. (c)(5). Pub. L. 104-174 added par. (5).

1995—Subsec. (b)(2). Pub. L. 104-88 substituted "rail carrier subject to part A of subtitle IV of title 49" for "common carrier by rail and subject to the provisions of part I of the Interstate Commerce Act".

1994—Subsec. (a)(16). Pub. L. 103-329, §633(d)(1), added par. (16).

Subsec. (b)(30). Pub. L. 103-329, §633(d)(2), added par. (30).

1989—Subsec. (a)(2). Pub. L. 101-157, §3(c)(1), struck out par. (2) which related to employees employed by a retail or service establishment.

Subsec. (a)(4). Pub. L. 101-157, §3(c)(1), struck out par. (4) which related to employees employed by an establishment which qualified as an exempt retail establishment under clause (2) of this subsection and was recognized as a retail establishment in the particular industry notwithstanding that such establishment made or processed at the retail establishment the goods that it sold.

Subsec. (g). Pub. L. 101-157, §3(c)(2), substituted "provided by paragraph (6) of subsection (a) of this section" for "provided by paragraphs (2) and (6) of subsection (a) of this section" and struck out before period at end "except that the exemption from section 206 of this title provided by paragraph (2) of subsection (a) of this section shall apply with respect to any establishment described in this subsection which has an annual dollar volume of sales which would permit it to qualify for the exemption provided in paragraph (2) of subsection (a) of this section if it were in an enterprise described in section 203(s) of this title".

1979—Subsec. (f). Pub. L. 96-70 struck out "and the Canal Zone" after "Johnston Island".

1977—Subsec. (a)(2). Pub. L. 95-151, §9(d), substituted "section 203(s)(5)" for "section 203(s)(4)".

Subsec. (a)(3). Pub. L. 95-151, §§4(a), 11, inserted "organized camp, or religious or non-profit educational conference center," after "recreational establishment," and inserted provisions relating to applicability of exemption from sections 206 and 207 of this title authorized by this paragraph for private employees in national parks, etc.

Subsec. (b)(8). Pub. L. 95-151, §14(a), substituted "forty-four" for "forty-six".

Pub. L. 95-151, §14(b), struck out par. (8) which related to exemption of hotel, motel, and restaurant employees, effective Jan. 1, 1979.

Subsec. (b)(22). Pub. L. 95-151, §5, struck out par. (22) which related to exemption of shade-grown tobacco employees.

Subsec. (b)(25). Pub. L. 95-151, §6(a), struck out par. (25) which related to exemption of cotton ginning employees. See subsec. (i) of this section.

Subsec. (b)(26). Pub. L. 95-151, §7(a), struck out par. (26) which related to exemption of sugar employees. See subsec. (j) of this section.

Subsec. (b)(29). Pub. L. 95-151, §4(b), added par. (29).

Subsec. (c). Pub. L. 95-151, §8, in par. (1) inserted reference to par. (4), and added par. (4).

Subsec. (i). Pub. L. 95-151, §6(b), added subsec. (i).

Subsec. (j). Pub. L. 95-151, §7(b), added subsec. (j).

1974—Subsec. (a)(2). Pub. L. 93-259, §8(a), substituted "\$225,000" for "\$250,000" effective Jan. 1, 1975, Pub. L. 93-259, §8(b), substituted "\$200,000" for "\$225,000" effective Jan. 1, 1976, Pub. L. 93-259, §8(c), struck out "or such establishment has an annual dollar volume of sales which is less than \$200,000 (exclusive of excise taxes at the retail level which are separately stated)" after "section 203(s) of this title" effective Jan. 1, 1977.

Subsec. (a)(9). Pub. L. 93-259, §23(a)(1), repealed exemption provision respecting any employee employed by an establishment which is a motion picture theater. See subsec. (b)(27) of this section.

§ 541.200

Subpart C—Administrative Employees

§ 541.200 General rule for administrative employees.

(a) The term “employee employed in a bona fide administrative capacity” in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is 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) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(b) The term “salary basis” is defined at § 541.602; “fee basis” is defined at § 541.605; “board, lodging or other facilities” is defined at § 541.606; and “primary duty” is defined at § 541.700.

§ 541.201 Directly related to management or general business operations.

(a) To qualify for the administrative exemption, an employee’s primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer’s customers. The phrase “directly related to the management or general business operations” refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

(b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; re-

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search; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee’s primary duty is the performance of work directly related to the management or general business operations of the employer’s customers. Thus, for example, employees acting as advisers or consultants to their employer’s clients or customers (as tax experts or financial consultants, for example) may be exempt.

§ 541.202 Discretion and independent judgment.

(a) To qualify for the administrative exemption, an employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term “matters of significance” refers to the level of importance or consequence of the work performed.

(b) The phrase “discretion and independent judgment” must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to operation of a particular segment of the business; whether the employee has

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authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that

many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. *See also* §541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

§ 541.203 Administrative exemption examples.

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

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value of a claim; negotiating settlements; and making recommendations regarding litigation.

(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(e) Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption. However, personnel clerks who "screen" applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the par-

ticular job or for employment by the company. The minimum standards are usually set by the exempt human resources manager or other company officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other company officials. Thus, when the interviewing and screening functions are performed by the human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.

(g) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the

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work performed to exempt work requiring the exercise of discretion and independent judgment.

(i) Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor's store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer's prices generally meets the duties requirements for the administrative exemption.

(j) Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

§ 541.204 Educational establishments.

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act also includes employees:

(1) Compensated for services on a salary or fee basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government) exclusive of board, lodging or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and

(2) Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.

(b) The term "educational establishment" means an elementary or secondary school system, an institution of higher education or other educational institution. Sections 3(v) and 3(w) of

the Act define elementary and secondary schools as those day or residential schools that provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may also include nursery school programs in elementary education and junior college curriculums in secondary education. The term "other educational establishment" includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary or higher. Factors relevant in determining whether post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. Also, for purposes of the exemption, no distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit.

(c) The phrase "performing administrative functions directly related to academic instruction or training" means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration.

(1) Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants, responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals