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Ernest N. Votaw

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## THE PROFESSIONAL EXEMPTION IN THE FAIR LABOR STANDARDS ACT

ERNEST N. VOTAW\*

### INTRODUCTION

One might suppose that the provisions of an act and the regulations promulgated pursuant thereto would be established beyond equivocation after thirty-three years of existence. This does not, however, appear to be the case with respect to the Fair Labor Standards Act.<sup>1</sup> Precisely, the question remains: who may be considered as a *professional employee* exempt from the wage requirements of the Fair Labor Standards Act?

The writer's scope of analysis of the above question is best delineated by elimination. Therefore, it is not within the purpose of this article to deal with each of the elements necessary to qualify for the professional exemption. Discussion of "artistic"<sup>2</sup> and "education"<sup>3</sup> professionals is omitted. Similarly omitted is a discussion of percentages of work that may be devoted to non-professional activity<sup>4</sup> and of salary qualifications for the professional.<sup>5</sup> The necessary exercise of "discretion and judgment"<sup>6</sup> is only discussed as an incident to the standard applied to the "learned" professional.

It is not clear that the question initially posed admits a simple answer. It is clear, however, that the vague and ambiguous efforts thus far are largely due to the Secretary's criteria<sup>7</sup> regarding the training which is necessary to qualify for the professional exemption. It is submitted that they are no longer relevant. Application of the Secretary's present regulations produces inconsistent results and occasional injustices. Therefore, it is suggested that the Department of Labor issue new regulations which reflect the nature of present jobs, job duties and the general academic level of modern work forces.

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\* Member of the Pennsylvania Bar.

1. 29 U.S.C. §§ 203 et seq. (Supp. IV, 1968), *amending* 29 U.S.C. §§ 201 et seq. (1964).

2. 29 C.F.R. § 541.3(a)(2) (1970).

3. *Id.* § 541.3(a)(3).

4. *Id.* § 541.3(d).

5. 35 Fed. Reg. 885 (1970).

6. 29 C.F.R. § 541.3(b) (1970).

7. *Id.* § 541.3(a)(1) (1970).

## THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act of 1938 requires for applicable employees the payment of not less than specified hourly wages,<sup>8</sup> premium payment for hours in excess of stated maximums per week,<sup>9</sup> the keeping of certain records<sup>10</sup> and equal pay for men and women performing substantially equivalent work.<sup>11</sup> The application of the Act was originally restricted to employees "engaged in commerce"<sup>12</sup> or "engaged in the production of goods for commerce."<sup>13</sup> Beginning in 1961, however, its application was extended to all employees of "an enterprise engaged in commerce or in the production of goods for commerce" whether or not the particular employee was so engaged.<sup>14</sup> In the jargon of the Wage Hour Division of the United States Department of Labor, which is responsible for investigating and verifying compliance with the Act, those to whom the Act is applicable are described as "covered" employees.<sup>15</sup>

Quite distinct from the question of basic "coverage" are provisions of the Act which allow *exemption* from specified requirements of the Act. These provisions may provide exemptions from premium payments for overtime,<sup>16</sup> minimum wages,<sup>17</sup> equal pay for men and women<sup>18</sup> or record keeping.<sup>19</sup> They may apply to individual employees or to particular occupations, establishments or industries which meet definite specifications.<sup>20</sup> Such employees are called "exempt" employees.

Confusion may, and often does, arise from a tendency to speak of those employees who fall within an exemption yet are undoubtedly engaged in commerce or production for commerce as "non-covered." This could be avoided if "coverage" is likened to a rainstorm and "exemption" to an umbrella which keeps the rain from striking a person. It is then easier to understand that until one finds an employee to be "covered" it is unnecessary to consider an exemption. Therefore,

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8. 29 U.S.C. § 206 (Supp. IV, 1968), *amending* 29 U.S.C. § 206 (1964).

9. 29 U.S.C. § 207 (Supp. IV, 1968), *amending* 29 U.S.C. § 207 (1964).

10. 29 U.S.C. § 211 (1964).

11. 29 U.S.C. § 206(d) (1964).

12. Act of June 25, 1938, ch. 676, § 6, 52 Stat. 1060, 1062.

13. Act of June 25, 1938, ch. 676, § 7, 52 Stat. 1060, 1063.

14. 29 U.S.C. § 206 (Supp. IV, 1968), *amending* 29 U.S.C. § 206 (1964).

15. *See* 29 C.F.R. §§ 776.0 et seq. (1970).

16. 29 U.S.C. § 213(a) (b) (Supp. IV, 1968), *amending* 29 U.S.C. § 213(a) (b) (1964).

17. 29 U.S.C. § 213(a) (Supp. IV, 1968), *amending* 29 U.S.C. § 213(a) (1964).

18. *Id.*

19. 29 C.F.R. §§ 516 et seq. (1970).

20. *See generally* 29 U.S.C. § 213 (Supp. IV, 1968), *amending* 29 U.S.C. § 213 (1964).

if an employee is not engaged in commerce or in the production of goods for commerce, a determination of a bona fide professional exemption would be unnecessary.<sup>21</sup> One need not raise the umbrella until the rain starts falling.

Provision for the exemption of professional employees is made in section 13(a)(1) of the Fair Labor Standards Act:

The provisions of sections 206 and 207 of this title shall not apply with respect to—

- (1) any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary . . . ).<sup>22</sup>

Pursuant to the terms of the statute, the Secretary of Labor has issued regulations defining the "professional employee" as follows:

The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the Act [29 U.S.C. § 213] shall mean any employee:

- (a) Whose primary duty consists of the performance of:
  - (1) *Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or*
  - (2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends primarily on the invention, imagination, or talent of the employee, or
  - (3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher certified or recognized as such in the school system or educational establishment or institution by which he is employed; and

21. *Krill v. Arma Corp.*, 76 F. Supp. 14 (E.D.N.Y. 1948). The "coverage" conclusion in this case is no longer valid.

22. 29 U.S.C. § 213(a)(1) (Supp. IV, 1968), amending 29 U.S.C. § 213 (1964) (emphasis added).

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the works described in paragraphs (a) through (c) of this section; and

(e) Who (except as otherwise provided in § 541.5b) is compensated for his services on a salary or fee basis at a rate of not less than \$140 per week (or \$125 per week, if employed in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actively engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a) (3) of this section: and *Provided further*, That an employee who (except as otherwise provided in § 541.5b) is compensated on a salary or fee basis at a rate of not less than \$200 per week (or \$150 per week, if employed in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities and whose primary duty consists of the performance either of work described in paragraph (a) (1) or (3) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section.<sup>23</sup>

The definition set forth above, along with those for executives, administrative employees and outside salesmen, are described and dis-

23. 29 C.F.R. § 541.3 (1970); 35 Fed. Reg. 885 (1970).

cussed in the "interpretations" of the Secretary of Labor which accompany the regulations.<sup>24</sup> The predecessors of these present regulations have been considered by the courts as a proper delegation of authority to the Secretary of Labor and as valid definitions of the terms.<sup>25</sup>

#### THE PRESENT REGULATIONS

##### *"Knowledge of an Advanced Type in a Field of Science or Learning"*

"Knowledge of an advanced type" clearly contemplates more knowledge than can usually be acquired in high school.<sup>26</sup> The indefiniteness begins in determining what is "a field of science or learning." The Secretary has recognized a number of such fields including law, medicine, nursing, accountancy, actuarial computation, engineering, architecture, teaching, and various types of physical, chemical and biological sciences including pharmacy.<sup>27</sup> To this list court decisions have added machine design,<sup>28</sup> filter designing<sup>29</sup> and radio technology.<sup>30</sup> Courses in all of these subjects could be found in the catalogues of colleges and universities in the 1930's. As the Secretary states, "[t]he typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced academic degree is a standard (if not absolutely universal) prerequisite."<sup>31</sup> However, the Secretary's definition requires the knowledge and not the degree, and the knowledge may often be obtained from correspondence or trade schools or even from self-study and work experience. While the knowledge that the employee's work requires is the criterion, the possession of an academic degree, particularly one mentioned in the employer's application form, is a help in establishing the professional status.

##### *"Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction and Study"*

The word "customarily" was inserted in the definition to permit the qualification of the few lawyers who pass the examinations for

24. 29 C.F.R. §§ 541.300 et seq. (1970).

25. Sun Publishing Co. v. Walling, 140 F.2d 445 (6th Cir. 1949); Aulen v. Triumph Explosive, Inc., 58 F. Supp. 4 (D. Md. 1944).

26. 29 C.F.R. § 541.302(b) (1970).

27. *Id.* § 541.302(e).

28. Aulen v. Triumph Explosive, Inc., 58 F. Supp. 4 (D. Md. 1944).

29. McComb v. Eimco Corp., 83 F. Supp. 635 (D. Utah 1949).

30. Mitchell v. Transcontinental Gas Pipe Line Corp., 16 Wage & Hour Cas. 89 (S.D. Tex. 1963).

31. 29 C.F.R. § 541.302(e) (1970).

admission to the bar after "reading law" in a lawyer's office without attending a law school.<sup>32</sup> However, it also admits within the exemption other professionals who have acquired the requisite knowledge without attending college and obtaining a degree. "Prolonged" has no arithmetical equivalent. The time required to complete the courses required for a degree in the professions named in the preceding paragraph ranges from eight or ten years for doctors and surgeons to two years for nurses or accountants.<sup>33</sup>

In practice, this criterion can lead to inconsistencies. For example, if an actuary for an insurance company majored and took graduate courses in mathematics and received an M.A. degree, he would require the knowledge of the advanced mathematics which he acquired in college to properly perform his work. He would undoubtedly qualify as employed in a professional capacity. If he retired and an assistant who had never attended college but had taken correspondence courses and had read text books on the subject was promoted to the position, the result would be different. While in mathematics he may be the equal of his predecessor, he has never studied college English, history, literature or other courses which were part of his predecessor's college curriculum, albeit irrelevant to his job. Because the promoted man had none of the "prolonged courses of specialized intellectual instruction and study," it is likely that a Wage-Hour compliance officer would consider him non-exempt. The result would be incorrect since his job required the described knowledge. Suppose the second man retires and the applicant for the position had been elected to Phi Beta Kappa, holds B.A., M.A. and Ph.D. degrees from a renowned university and states that his doctoral thesis was on a mathematical subject. Because of his education he is hired for the job. When his work is found unsatisfactory, it is discovered that at college he took Greek, Latin and romance languages and that his thesis was on the mathematics of Archimedes, the information for which he obtained by translating ancient Greek texts. Nevertheless, while on the job, he would have been employed in a professional capacity because his work required the knowledge which could be acquired by the prolonged college courses of instruction.<sup>34</sup>

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32. *Id.* § 541.302(d).

33. *Id.* § 541.302(e).

34. In the discussion it will be assumed that the other items of the professional exemption are met. These include that the work be predominantly intellectual and varied in character, *id.* § 541.3(c), and requires consistent exercise of discretion and judgment, *id.* § 541.3(b), that the output produced or result accomplished cannot be standardized in relation to any given period of time, *id.* § 541.3(c), that the allowed percentage of non-exempt work is not exceeded, *id.* § 541.3(d), and that the salary qualification is met. 35 Fed. Reg. 885 (1970).

If the employee can be fitted into one of the "professions" recognized by the Secretary<sup>35</sup> and has a college degree, the determination of exempt status is simpler and may be limited to consideration of the salary and amount of non-exempt work criteria. More complex questions are involved where the Secretary has labeled an occupation, such as journalism, as a "quasiprofession" and has denied the exemption.<sup>36</sup> The Secretary has support for his position in *Sun Publishing Co. v. Walling*:

It was, however, shown, and it is, perhaps, common knowledge that few newspaper employees are graduates of specialized schools of journalism, and there are editors of long experience and trained judgment who, agreeing that "the proper study of mankind is man," likewise believe that the only practical school of journalism is the newspaper office.<sup>37</sup>

Assuming that a journalist is employed to cover scientific affairs, he must understand physics, mathematics, biology and other sciences in order to cover his assignment properly. All of these sciences are customarily taught in colleges, and the journalist must have a knowledge of them beyond the high school level. His work "requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study."<sup>38</sup> It is predominantly intellectual and "requires consistent exercise of discretion and judgment"<sup>39</sup> in determining what to write, where emphasis should be placed, what is of interest to the public and the extent and nature of explanation needed in a news article. Such a journalist should clearly be eligible for the professional exemption and it would be erroneous to rigidly apply the Secretary's blanket regulation defining journalism as "quasiprofessional."<sup>40</sup>

The Secretary's Interpretative Bulletin rather grudgingly admits that a journalist dealing in a highly technical field may qualify as a professional employee of the "learned" type<sup>41</sup> but concludes that generally a journalist must qualify, if at all, for the "artistic" type of professional exemption.<sup>42</sup>

35. See notes 27-29 *supra* and accompanying text.

36. 29 C.F.R. § 541.302(d) (1970).

37. *Sun Publishing Co. v. Walling*, 140 F.2d 445, 449 (6th Cir. 1944). Cf. *Mitchell v. Kickapoo Prairie Broadcasting Co.*, 182 F. Supp. 578 (W.D. Mo. 1960), *rev'd on other grounds sub nom. Goldberg v. Kickapoo Prairie Broadcasting Co.*, 288 F.2d 778 (8th Cir. 1961).

38. 29 C.F.R. § 541.3(a)(1) (1970).

39. *Id.* § 541.3(b).

40. *Id.* § 540.302(d).

41. "The field of journalism also employs many exempt as well as many nonexempt employees under the same or similar job titles." *Id.* § 541.303(f).

42. See *id.* § 541.3(c).



His writings must be "predominantly original and creative in character;"<sup>43</sup> *i.e.*, analytical, interpretative or highly individualized. Such heights are usually attained only by "editorial writers, columnists, critics, and 'top-flight' writers of analytical and interpretative articles."<sup>44</sup>

It would appear, however, that there has been a distinct change since the *Sun Publishing Co.* case in the manner in which journalists acquire the knowledge required for their work. Journalism is a recognized discipline in higher education. For example, the catalogue of Lehigh University states that "the major program in journalism is designed for those who wish to acquire the useful skill of gathering information, organizing it quickly into effective forms and communicating it clearly, accurately and with disciplined objectivity."<sup>45</sup> The students, aside from practical experience in reporting and editing, attend professional courses in journalism taught by men trained in actual newspaper work. Its graduate school also offers sixteen courses in journalism.<sup>46</sup>

The University of Illinois, for those who have completed two years of college work, offers an additional two years of professional education in the College of Journalism leading to the degree of Bachelor of Science in three different programs: news-editorial, advertising and radio-television.<sup>47</sup> Its graduate school offers a choice of twenty courses leading to a degree of Master of Science in Journalism.<sup>48</sup> Temple University's graduate school offers sixteen courses in journalism.<sup>49</sup> The knowledge required by the work of a journalist may thus be acquired by a "prolonged course of specialized intellectual instruction and study." No doubt there are still many proficient and active journalists who did not acquire their knowledge in this manner. Therefore, such knowledge may not be said to be acquired "customarily." This fact, however, should not mean that it is not "knowledge of an advanced type in a field of science or learning" and that its use does not attain the dignity of a profession. Clearly, there is nothing in the definition of the Secretary of Labor to require this conclusion or to limit professional journalists to those who are "artistic" professionals.

A somewhat similar problem arises in connection with some of the

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43. *Id.* § 541.303(f)(1).

44. *Id.* "Newspaper writers, with possible rare exceptions in certain highly technical fields, do not meet the requirements of § 541.3(a)(1) for exemptions as professional employees of the 'learned' type." *Id.*

45. LEHIGH UNIVERSITY UNDERGRADUATE ANNOUNCEMENT AND CAREER GUIDE 94 (1965).

46. *Id.*

47. UNIVERSITY OF ILLINOIS, GRADUATE COLLEGE 237 (1970).

48. *Id.* at 236.

49. TEMPLE UNIVERSITY, THE GRADUATE SCHOOL 298 (1969).

occupations created by advances in technology. While the Massachusetts Institute of Technology and such universities as Temple, Cornell, Penn State, Illinois, Yale and Ohio State offer undergraduate and graduate courses in such subjects as computer science, aerospace engineering, rocket propulsion and electronics, there are many more in industry today who obtained their knowledge in these subjects from two-year community colleges, technical schools, correspondence courses or military training courses. One frequently finds a tendency on the part of Wage and Hour Enforcement Officers to take the position that knowledge so obtained is not the kind contemplated by the regulations defining the professional exemption. Nothing in the definition, however, compels this conclusion. If a position requires the knowledge that would be acquired by two years of military electronics courses which are quite complex and go far beyond instruction in operating a particular piece of radar equipment or learning to solder or make routine tests, it is difficult to contend that this is insufficient training. This is particularly untenable when the Secretary of Labor is willing to accept as professionals registered nurses after two years of training or accountants after two years of schooling.<sup>50</sup>

The requirement that the knowledge required by the position be distinct from "a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes"<sup>51</sup> and that the "work is predominantly intellectual and varied in character"<sup>52</sup> would appear sufficient to eliminate most blue collar workers from claiming the professional exemption. On the other hand, it does appear unfair to say that a position requiring two years of solid work in programming is not professional, but that the job requiring a four-year college course with a major in programming is exempt when both courses may have had the identical content in programming sciences.

While electronics had not generally been considered by Wage and Hour Enforcement Officers as a learned profession, upon demonstrating that the employee in question must develop specific circuits or crystal cuttings for each customer's needs, it would seem that such work is creative and hence employment is in a professional capacity. Nowhere in the regulations or the interpretative bulletins with respect to the "learned professions" is there mention of work "original and creative in character." That criterion is used only in connection with the artistic

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50. 29 C.F.R. § 541.302(e) (1970).

51. *Id.* § 541.3(a) (1).

52. *Id.* § 541.3(c).

type of professional work.<sup>53</sup> Certainly devising an electronic instrument suitable for a specific purpose should be considered professional work, but it is difficult to see how it can meet the Secretary of Labor's definition unless knowledge of electronics is in a field of science or learning acquired by prolonged instruction and study.

The announcement by the Administrator of the Wage and Hour Division of a hearing to consider whether data processing employees should have professional status demonstrates that there is considerable question whether the Secretary's regulations are adequate for the present state of educational and business development.<sup>54</sup> Employees are identified by a multitude of titles including program operator, programmer and systems analyst. They have varied experience and training and perform a variety of tasks which are difficult to measure in terms of their significance and importance to management. Additionally, the Wage and Hour Division is considering whether the term "professional" should properly be limited to the learned and artistic professions or whether it should include certain highly paid occupations, *i.e.*, highly skilled technicians in the electronics and aerospace industries who are not in a field of science or learning or who are educated primarily through extensive experience and on-the-job training rather than through a "prolonged course of specialized intellectual instruction and study."<sup>55</sup>

At the hearing, opposition to the application of the term "professional" to electronic and data processing technicians was expressed by representatives of the International Union of Electrical Workers and the American Federation of Technical Engineers.<sup>56</sup> Although the preceding discussion would indicate that their conclusion is incorrect, both unions apparently assume that electronics and data processing are purely mechanical trades and not fields of science or learning and do not require specialized intellectual instruction and study. They object to coverage since considering employees so engaged as professionals would remove them from the bargaining unit and deprive the union of their dues and votes in elections to determine union representation.<sup>57</sup> They also point out that employers freed from the obligation to pay time and one-half for overtime might yield to the temptation or be forced by the exigencies

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53. *See id.*

54. 35 Fed. Reg. 14268, 17116 (1970) ; 36 Fed. Reg. 1273 (1971).

55. 35 Fed. Reg. 14268 (1970).

56. 76 LAB. REL. REP. 123 (Feb. 15, 1971).

57. Abe Morganstern, Director of Research for the Electrical Workers, states: "Employers use phony job titles and job descriptions to remove work outside the bargaining unit that is normally and traditionally assigned to our membership." *Id.*

of business to lay off union members and work the professionals longer hours at less pay.<sup>58</sup>

*“Essential Part of and Necessary Incident to Professional Work”*

The Secretary of Labor recognizes work as exempt if it is an “essential part of and necessary to” exempt professional work.<sup>59</sup>

For example, a chemist performing important and original experiments frequently finds it necessary to perform himself some of the most menial tasks in connection with the operation of his experiments, even though at times these menial tasks can be conveniently or properly assigned to laboratory assistants.<sup>60</sup>

The concept of menial work qualifying as professional work when it is an integral part of the professional work is an area where there can be considerable controversy. An obvious example of menial yet professional work is the attorney researching a point of law. Many hours are spent locating and reading relevant cases. Merely taking books from the shelves occupies time, and making notes on a particular case can require 20 to 30 percent of a lawyer's time. Obviously, the lawyer could sit in his office and call for books to be brought to him by his secretary. Similarly, he could dictate all of his comments and have them typed. As a practical matter, however, few lawyers do this and fewer legal secretaries let them get away with it. It is clear that all of the time spent in these described activities is “professional” worktime. The reading is professional in that it requires educational background to understand and evaluate the cases read. Pulling books from the shelves is a natural incident of the research. Another could do it, but when the lawyer himself does it he may read the headnotes of the case and immediately return the book to the shelf because the case is not in point. Note taking is exempt work as a necessary incident to reading and researching the law. A thought that one can jot down in a moment may have slipped away by the time a secretary is summoned or a tape recorder is available.

Reading of advance sheets by the lawyer is also professional work. The lawyer is employed because he knows the law. Since the law is in a constant state of flux, the lawyer who stops studying it becomes less and less valuable as time goes by. Reviewing the recent statutes and decisions is essential to the advice giving nature of the lawyer's duties.

It is interesting that the same reasoning which applies to a lawyer

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58. *Id.* at 124.

59. *See* 29 C.F.R. § 541.3(d) (1970).

60. *Id.* § 541.307(a).

might also apply to an engineer. In the space program a "script" describes the purpose of the mission, the data to be obtained, the expected program of events and the direction for equipment configuration and modifications of equipment that is accomplished in anticipation of the mission. This "script" is transmitted to the various tracking stations that will participate in the mission. Before one can understand this script he must have a basic understanding of mathematics, physics, electronics and the related sciences involved in the aerospace industry. The manual is constantly supplemented by correspondence directing deviations in the plan. Tracking station personnel are required to read these directives and file them in the appropriate docket. The work of the tracking station staff is not a passive exercise. Problems not anticipated by the originating staff located thousands of miles away from the tracking station must be detected and transmitted to mission control headquarters, preferably with recommendations for correction.

Drawing a parallel to the lawyer, this reading of "script" deviations would seem very similar to reading of advance sheets but of even greater concern to the employer. Nevertheless, there have been instances where Wage-Hour Enforcement Officers regard such work as "filing" and non-exempt in nature.<sup>61</sup> This conclusion was based on the fact that the correspondence was read in order to file it; it was possible for a clerk with minimal technical training to read the correspondence and generally place it in the correct docket. What was ignored was the necessity for trained personnel to read, analyze and understand changes made in the mission and mission equipment and then to file documents in dockets where other documents were compared and from which they were readily retrievable at the critical mission time.

It is absolutely necessary, therefore, to review the work being done by the presumed professional before declaring any part of his work as non-professional. In the examples it was demonstrated that "reading time" and "filing time," at first blush non-exempt work, could easily be professional, exempt work. There is no magic in a Wage-Hour Enforcement Officer's determination that certain work is non-exempt. Admittedly, these gentlemen are familiar with the regulations and interpretations of the Secretary of Labor, but in the few hours that they devote to determining duties of professional employees there can be many misunderstandings of the purpose and relationship of these duties to overall job performance.

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61. See *id.* § 541.308.

## CONCLUSION

Although the regulations have been amended several times,<sup>62</sup> it appears that current interpretations of the Secretary of Labor's definition of an employee engaged in a bona fide professional capacity and his Interpretative Bulletin 541 are firmly planted in the 1930's and 1940's. Jobs, job duties, the general academic level of the work force and industry itself have changed considerably since the early days of the Fair Labor Standards Act. Attorneys for employers and employees are confronted with the problem of matching these new jobs to the regulations. The task is complicated by the discovery of policy decisions of the Wage and Hour Division of the Department of Labor which seem to conflict with the plain language of the regulations containing the definition of such terms as "professional." Hopefully, with the Administrator's consideration of possible changes in the regulations and the aid of testimony adduced at hearings called for that purpose, any inconsistencies in the interpretations of the regulations will be corrected.

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62. The current regulations were promulgated on August 30, 1963. 28 Fed. Reg. 9505 (1963). The principal amendment came in 1967. 32 Fed. Reg. 7823 (1967).