The Show Must Go On... and On, and On:
Production Assistants, Overtime Pay Exemptions, and the
Fair Labor Standards Act

The first person on set. The last one to leave. The youngest person on set. Everyone’s bitch. The production assistants – also known as PA’s or runners – are the on the lowest pay level of the feature film experience. They get the coffee. They hold the parking spaces in the rain. They lick the road clean with their tongues. And they love it. PA’s are in lust with the movie business. Their first few months on a shoot are glory days of rose-tinted on-set high-jinx. The next few months are harder as the reality that they could do everything better slowly sinks in. By the end of the PA’s lifespan, they just steal whatever they can get their filthy hands on. It’s a jungle out there.[1]

Every film, television, and video production will hire a small cadre of production assistants (“PA’s”) to provide catch-all assistance wherever it might be needed, whether on the set or in the production office. Indeed, larger productions often will hire PA’s and assign them to each separate department at work on the project. While PA’s usually do not comprise a sizeable percentage of the film or television crew hired, there is always a need for stop-gap labor – and PA’s fill those gaps. The Texas Film Commission gives an accurate job description for the various types of PA positions on a production:

Set PA’s – works on the set, and may assist Security with crowd control; escort actors to and from their trailers; runs errands; deliver film to the airport or processing lab; and help load and unload
equipment. Set PA’s often assist in every department.

Office PA’s - works in the production office, and may perform general office work; answer phones; make copies of scripts, contracts and other documents; run errands; and assist with scheduling and shipping.

Transportation PA - drives a rented vehicle; delivers/picks up packages all over town; takes actors and crew to and from the set; runs errands.

Art Department PA - assists with office duties; runs errands; may assist with construction of props or set dressing

Wardrobe PA - assists with costumes, organizes and labels costumes; washes/irons costumes; runs errands; assists with making costumes

Location PA - delivers contracts; puts up signs to direct workers to the set; makes and distributes maps to locations; cleans up locations after filming; runs errands.\(^2\)

While most employees in the United States are paid by the hour, with time and a half overtime pay for any work over 8 hours in a single day or over 40 hours of work in a single week,\(^1\) it is the general practice of the film and television industry to pay PA’s by the day-rate method. Usually ranging from $75 to $150 a day,\(^4\) the day-rate is comparable to salary pay, in that the dollar amount is not dependant on the number of hours the PA works on a given day. A PA who works 8 hours on a day-rate is paid the same as another who works 16 hours. Unfortunately for the hapless PA, the latter workday is more common than the former. As the Texas Film Commission warns, PA’s need a “willingness to work long hours (12-14 hour days are the norm)\(^,\)\)” and adds that the “[h]ours [are] [v]ery, very long. Sixteen hour days are common. You will not have any social life while you’re working on a film.”\(^5\)
While PA’s will always be the cannon fodder of the motion picture industry, the day-rate pay system exacerbates the problem. It is the position of this article that the day-rate pay method is the main reason why PA’s are an overworked employee class. This article demonstrates that PA day-rates are illegal pay-schemes in violation of the Fair Labor Standards Act, the federal law that governs overtime and salary compensation. Furthermore, this article shows that the Motion Picture Production Exemption, a creature of administrative rulemaking that no longer serves its original purpose, has facilitated this illegal industry use of the day-rate. In Section 1, this article gives a general overview of the purposes behind the Fair Labor Standard Act’s enactment and the salary exemptions to the Act. Section 2 examines the Motion Picture Production Exemption, its administrative history, and effect on the industry. Section 3 examines the applicability of the Fair Labor Standards Act exemptions and the Motion Picture Production Exemption to PA employment and show that the day-rate pay scheme is illegal. Finally, Section 4 discusses enforcement problems unique to the PA’s position in the industry, and possible solutions to the unfair pay schemes being utilized by that industry.

Section 1 - Fair Labor Standards Act Overview

The Fair Labor Standards Act (“FLSA”) was enacted by congress in 1939 as a cornerstone of the New Deal. The Act
provides for hourly rate payment at a minimum wage, child labor regulation, and overtime compensation for hours worked in excess of 40 hours a week. While the hourly/overtime pay method is generally mandated by the FLSA, there are salary exceptions to this rule for certain industries and classes of employment. Furthermore, the salary exceptions may have specialized exemptions of their own such as, most notably for the purposes of this article, the Motion Picture Production Exemption ("MPEE"). The FLSA itself broadly defines its purpose as “improving labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” Immediately after the passage of the FLSA, scholars cited to numerous social and economic purposes for the legislation, most notably as an “attempt to wipe out the sweatshop and increase the nation’s purchasing power.”

“The . . . theory of the act is . . . revealed in the assertion that the payment of low wages creates conditions detrimental to the well-being of employees, and that such conditions lead to labor disputes burdening and obstructing commerce.” Integral to these goals are the overtime provisions of the FLSA. The intent of the provisions is to penalize companies who work employees more than 40 hours per week. This legislative intent has not been forgotten since the FLSA’s enactment in 1939. As recently as 1989, Sen. Kennedy stated:
We believed in the development of the Act that if you are going to provide some kind of requirement beyond the 40 hours there ought to be at least some additional compensation for that kind of work and denial of that employee to be with his or her family and be able to enjoy a normal kind of existence. And we have recognized if you going to have to do it, you have to pay a premium for it.\footnote{13}

Overtime pay is an imposed cost on the employer that encourages the employer restriction of employee hours. The benefits of these reduced hours are not limited to the employee directly affected. The imposition of overtime compensation requirements encourages the hiring of more workers by companies. When the labor supply is reduced, wages are increased and unemployment is decreased.\footnote{15} Indeed, scholarship contemporaneous with the 1939 enactment stated that the maximum hours provision was “to provide further assurance of the payment of high wages, and probably to spread employment.”\footnote{16} Furthermore, when employees work fewer hours, job fatigue is reduced, thus increasing worker efficiency.\footnote{17} This view of the statute goes in hand in hand with the view that the FLSA overtime provisions also served as a public health measure, where “scientific opinion is practically unanimous to the effect that an eight-hour day is an important health-conserving device...”\footnote{18}

When the FLSA was enacted, however, some specific industries were excluded from the Act,\footnote{19} and some general categories of workers were exempted from the overtime and wage provisions. The exempted general categories of Executive, Administrative, and Professional employee “were premised on the
belief that [those workers] typically earned salaries well above
the minimum wage, and . . . were presumed to enjoy other
compensatory privileges, such as . . . fringe benefits . . . job
security, . . . and better opportunities for advancement.”[20] In
March of 2003, the Wage and Hour Division of the Department of
Labor proposed changes in these general categories.[21] On April
20, 2004, the notice of the final rule was published in the
Federal Register, to take effect August 23, 2004.[22] This
article shows, however, that PA’s do not meet the regulatory
requirements to qualify as hourly wage and overtime exempt under
either the current or proposed rules.

**General Salary Exemptions Overview**

The FLSA exempts all employees who work in a “bona fide
executive, administrative, or professional capacity”[23] from
hourly and overtime compensation. Pursuant to the FLSA, in
order for these bona fide categories of employees to be exempt,
they must be paid on a “salary basis.”[24] The salary basis test
ensures that employers cannot make partial deductions to pay
based on the quantity or quality of work, the hours worked, or
for disciplinary reasons.[25] The salaries must also meet certain
minimum levels per week in order to qualify, depending on the
classification of the employee.[26] If the pay practices do not
meet the guaranteed salary basis requirements, then the
“exemption is declared to be inapplicable . . . for [the] entire
class[] of employees.”[27] Under the current final rule, this
minimum salary requirement level is set at $455 a week.[28]
One of the first regulations the Wage and Hour promulgated upon the passage of the FLSA was to define “executive” and “administrative” employees as those who direct the work of others. Professional employees, on the other hand, were defined as those whose work requires “educational training in a specially organized body of knowledge.” In 1940, the definition of the “professional employee” was expanded to include artists. So, in addition to the salary level requirements, in order for an employee to be considered exempt from the wage and overtime provisions, the type of work the employee performs must fit within an exemption category.

SECTION 2 - THE MOTION PICTURE PRODUCTION EXEMPTION

Under the Motion Picture Production Exemption ("MPEE"), “[t]he ‘salary basis’ requirement in the [executive, administrative, and professional] exemptions . . . does not apply to an employee in the motion picture industry when the employer compensates the employee at a base rate of at least $250 per week.” This rate is based on a week of no more than six days. The employee remains exempt even if he or she fails to work a full workweek. An otherwise exempt employee qualifies for the exemption if he or she is employed at a daily rate under the following circumstances: (1) the employee is in a job category for which a weekly base rate is not provided and the daily base rate would yield at least $250 if the employee worked six days; or (2) the employee is in a job category having a weekly base rate of at least $250 and the daily base rate is at least 1/6 of such weekly base rate.
The MPEE, therefore, only exempts the motion picture industry from the “salary basis requirement” – that is, the paying of guaranteed salaries in weekly installments. The MPEE does not, however, allow employers to pay day-rates to employees who do not initially meet the employment requirements set forth under the general exemptions to hourly and overtime pay in the administrative regulations. This reading of the rule was explicitly confirmed in the Department of Labor’s notice of the final rule in May of 2004.

An additional commenter argues for the elimination of the ‘exemption’ for production assistants and post-production assistants. This commenter misunderstands that section 541.709 relates only to an exception from the salary basis requirements for otherwise exempt employees in the industry.\[34\]

**Notice and Comment History of the MPEE**

In May of 1953, the Association of Motion Picture Producers petitioned the Wage and Hour Division “for an [regulatory] amendment that would except certain highly paid employees” in the industry would be exempted from the general employee category salary requirements of the FLSA.\[35\] The Association claimed that the salary basis requirements were “impractical of application to the higher paid employees in [the] industry. . . .”\[36\] The Association argued that 70 percent of its employees were already under collective bargaining agreements “developed over a period of years . . . geared to the operating requirements of the studios.”\[37\] Furthermore, the Association argued, producers could not “economically employ the highly-paid
specialists on a constant basis,”[38] and instead often employed workers for partial workweeks to meet production demands.

The Association requested that employees, who were otherwise exempt under the Executive, Professional, or Administrative exemptions, and paid at a six-day week rate of $200, be exempt from the salary requirements of the FLSA. Under the proposal, motion picture production employers would be free to pay a flat salary day rate to their workers, rather than a weekly one.[39] The Administrator found the $200 weekly rate reasonable, and made the proposed regulation available for comment for 30 days.[40] 30 days later, the Wage and Hour Division reported that “[n]o comments have been received.” Without further discussion, the Division made the regulation effective.[41]

Despite the MPEE being directed at the compensation methods of “highly paid employees,” the $200 six day week rate was raised only to $250 over the course of its history - as late as 2003.[42] The final rule raises this compensation floor, but only to $650.[43] When one considers that an employee working 50 six-day weeks a year (with 16 hour days being “common”[44]) at this increased salary level would make less than $33,000 a year - it stretches human reason to categorize such an employee as “highly paid” by today’s standards.

Nonetheless, the MPEE allows the industry to pay its salaried employees by the day-rate method. PA’s., however, do not meet the initial work duty requirements to placed in an exempt category. “Exempt status [is] be limited to those
situations that plainly and unmistakably come within the terms and spirit of 29 U.S.C. § 213.”[45] “Although [the] Fair Labor Standards Act is remedial in nature and [the] obligation upon courts is to construe it liberally, this does not apply to exemptions which deny benefits of the Act to certain employees, and these exemptions must be strictly construed.”[46] After analyzing the requirements of these exemptions and comparing them to the duties of the average PA, it is clear that PA’s do not meet the general salary exemption requirements of the FLSA, and are therefore entitled to a minimum wage with overtime pay.

SECTION 3 – PA’s and the Salary Exemptions of the FLSA

A. Executive & Administrative Exemptions

“[The] term ’executive’ is limited to persons whose duties include some form of managerial authority, and [the] term ‘administrative’ is applied to persons performing a variety of miscellaneous but important functions in business.”[47] The Executive exemption has historically applied to business owners or managers who “regularly direct two or more other employees.”[48] The new standard would further delineate this definition, requiring an executive employee to: 1) have a primary duty of management 2) regularly direct two employees; and 3) have the authority to hire and fire employees.[49]

“To fit within [the] administrative exemption, [the] employee’s day-to-day work must primarily involve or affect significant management responsibilities, must involve nonmanual,
intellectual or specialized duties, and must demand frequent exercise of discretion and independent judgment."[50] Under the existing regulations, categorization as an administrative employee requires: 1) a $250 weekly salary; 2) a primary duty of performing office or non-manual work directly related to management policies or general business operations; and 3) a regular exercise of independent judgment or the regular and direct assistance to another exempt employee and devote no more than 20 percent of work hours in a week to activities that are not directly and closely related to the performance of exempt work. The proposed regulation 541.200 would “retain the requirement that exempt administrative employees have a ‘primary duty’ or ‘performing office or non-manual work related to the management or general business operations of the employer... [and] hold ‘a position of responsibility with the employer.’ The position of responsibility requirement requires that the employee must either “perform work of substantial importance or employ a high level of skill or training."

PA’s do not meet the requirements listed in either the Executive or Administrative category. Consider the Texas Film Commission’s assessment of the qualifications needed to work as a PA: None. “Previous experience is not necessary (you will be told what to do and how to do it.)”[51] PA’s are always under the direction of a superior, either the head of a department they work for, or a producer or line producer. Furthermore, the Department of Labor defines the duties of a PA as a person who “run[s] errands, move[s] things, and help[s] with
props.” These duties could hardly be categorized as the “nonmanual, intellectual or specialized” ones that are required to be considered an administrative employee. This leaves the Professional, or Creative employee category as the final possibility for PA’s to be considered exempt.

B. Professional Exemption

The professional employees exemption reaches four categories: artistic professionals, learned professionals, teachers and computer professionals. As PA’s do contribute to the creative process of producing films, television shows, and commercials, it might seem that the artistic professional exemption might be applicable to this particular employment situation. "[The] test, [however] in determining applicability of the Fair Labor Standards Act is what [the] employee does, not for what corporate entity he does work, where no claim is made that the identity of employer brings case within one of the exemptions provided in 29 U.S.C. § 213." For creative professionals, “the primary duty must consist of work that is original and creative in character in a recognized field of artistic endeavor . . . and the result of which depends primarily on the invention, imagination, or talent of the employee." The Wage and Hour Division proposed test remains virtually unchanged.

While a PA is employed as part of the creative process of producing a motion picture, the results of a PA’s work do not require creativity or talent. Getting coffee or holding parking spaces in the rain for those whose creative talents do impact
the product is not enough to categorize PA’s as creative professionals. To hold otherwise would be to eliminate any distinctions in any industry where creativity is used. A construction worker who works on an architect’s building is an analogous example. These delineations have been made, to some extent, in the news industry. In Reich v. Newspapers of New England,[58] for example, employees who performed routine fact gathering and reporting in a standard format were “deemed not to be artistic professional employees.” If differentiations can be made within one medium, it becomes difficult to argue that the same categorization of employees cannot be done in the motion picture industry.

This writer cannot find any empirical evidence that determines the numbers of employers in the motion picture production industry who pay PA’s by the day-rate method. This writer can assert, however, from personal experience, that this is the common and prevalent industry practice.[59] If these blatant violations of the FLSA exist on an industry-wide basis in the film industry, the question must be asked why the federal law has not been enforced to this date. The answer is the same reason that PA’s accepted daily rates and 16 hour days in the first place – lack of bargaining power.

SECTION 4 – Enforcement Problems

The lack of bargaining power becomes apparent when one sees what PA’s themselves have to say about the industry:
It is fairly common knowledge that climbing the ladder of film production requires lo [sic] or no paying work as a PA. . . . But the theory goes after a couple of these jobs you will start getting paying work and are then on your way to professional crew-dom.\[60\]

The Film Commissions also readily acknowledge the precarious position of the PA. The PA jobs are “where you pay your dues before moving up the production ladder,”\[61\] and this ladder consists of personal relationships with those who do the hiring: Job Security: None. PA’s are self employed free-lancers, so real job security does not exist. Once the job is over, it’s over. You depend on your good performance and professional reputation to bring you to the next job. . . .

Advancement Opportunities: Great! Many, many crew members started out as PAs and moved up through the ranks. Of course, once you’re known as a PA, you’re more likely to be offered PA jobs than other positions. . . . \[62\]

But the Michigan Production Alliance illustrates the catch-22, take it or leave it situation of the PA with the following statement in its handbook: “[h]ard working PA’s can move onto the next category [of employment] within a year, get paid overtime and learn a new set of skills. . . . or you can always get bitter and go back to law school.”\[63\]

The problem with a daily rate salary system is that producers exploit the employee’s desire and energy through long hours. As these fixed salaries do not “vary by hours worked, employers face no costs, and only stand to gain, by requiring long hours of work.”\[64\] In an industry where “you depend on your
professional reputation” to get the next job, the last thing the PA wants to do is to file an employment lawsuit against the production company. This writer could find no cases where a production assistant filed a lawsuit against his employer. But it is this sort of employee that needs the protection of the FLSA the most. The FLSA is considered “a shield to protect unwary workers,” created to “help the nations unprotected, lowest paid employees, or those employees without bargaining power to obtain a minimum subsistence wage.” FLSA enforcement actions may be filed by the aggrieved individual or the Secretary of Labor. With the precarious employment position PA’s hold, it is doubtful that one will step forward and file an FLSA action. In these circumstances, the Department of Labor should step forward, investigate, and file a cause of action on behalf of the those employees.

The extent of liability exposure is difficult to ascertain at this point. Indeed, the Department of Labor does not even recognize the unique employment position that PA’s have. Instead, the Department appears to make no distinctions between PA’s and other positions that are not similarly situated. The only reference to PA’s in the Department of Labor’s public information description of the motion picture industry is that: “[m]any individuals get their start in the industry by running errands, moving things, and helping with props. Production Assistants and grips (stage hands) are often used in this way.” In reality, “grips” have union representation in the motion picture industry (through IATSE),
and employees tend to view those positions as careers.³⁰⁰ PA employment, as described above, is the means of achieving a true career in the industry. PA’s either move up or out in the industry, making it a transient job position that workers do not stay at for long periods of time.

Proponents of the day-rate pay scheme for PA’s may argue that a system of internships would replace any hourly/overtime pay system mandated by the FLSA. It appears that this is already happening in the industry:

“I have been turned down for un-paying, un-credited jobs because of lack of experience. I have seen listings for internships that require previous inter[n] experience.”³¹¹ Furthermore, the classification of employees as interns or trainees does not provide a safe harbor from FLSA regulations for the employer: The Department recognizes that there may be formalized, bona fide executive or management training programs that involve employees ‘‘actually performing’’ exempt work, but other training programs can involve performance of significant nonexempt work. For example, an employee in a management training program of a restaurant who spends the first month of the program washing dishes and the second month of the program cooking does not have a primary duty of management. Accordingly, it is not appropriate to adopt a blanket exemption for all ‘trainees.’³²²

An examination of the day-rate pay practices by the Motion Picture Industry may uncover similar practices in other employment areas. Craft service (catering), location scouts, and post-production assistants are also often paid by the day-rate method. The extent of industry FLSA liability could be
staggering. Motion picture production is a unique industry that has different labor requirements from most other sectors of the economy. While the MPEE began as a very limited exemption from the FLSA salary requirements to accommodate for the needs of the industry, it has morphed into the general pattern of pay schemes. Eventually, the credits must roll and signal an end to this illegal practice.


[4] See e.g. Georgia Film Commission, <http://www.ozonline.tv/Georgia/Oz/Oz6-4/leftbrainerchart.shtml> (accessed November, 2003), where the PA day-rate is listed at $100 to $200 per day. The $200 estimate seems high, however, when compared to company rates of $200 per day that supply PA labor. See e.g. www.troppoasia.com/ourRates.htm and www.bba.com/prices.html. (accessed November, 2003). These price quotes do not inform us as to the profit margin of the companies, but it seems doubtful that the PA’s themselves take home the full $200 day-rate.


Federal Wages and Hours Act, 52 Harv. L. Rev at 646 (1939) (citing congressional hearings).


Cooper, supra note 12 at 31.

DeChiara, supra note 15 at 144.

Cooper, supra note 12 at 46, citing to defendant’s brief in Bunting v. Oregon, 243 U.S. 426, (1917). Cooper notes that “medical testimony might be developed to the effect that an extra four hours of work each week was [not] detrimental to employee health.” Id. at 47.

The reasons for the legislative exemptions of certain industries in the FLSA itself are beyond the scope of this article. See e.g. 29 U.S.C. § 213(a)(3-17). Furthermore, this discussion is not relevant to the MPPE, as the MPPE was an administrative rule passed through the notice and comment process of the Wage and Hour Division of the Department of Labor - not congressional deliberation. See e.g. Marc Linder, Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal, 65 Tex. L. Rev., 1335 (1987) for a discussion of farm labor - an industry that one would think would be the most in need of wage and hour regulation, yet was exempted from the FLSA in the legislative process.


See Id. at 15560.


29 C.F.R. 541.118.

See 68 Fed. Reg. 61, 15562.

See e.g. Id. at 15569-70.

Id. at 15562.

69 Fed Reg. 79, 22122.


Id.

29 C.F.R. § 541.119(a) (1992). DeChiara provides numerous examples of jobs that fall within these three employment categories. Executives can extend from president of a large corporation to the foreman of a minor department. Administrative employees include “bank teller[s], insurance adjuster[s], . . . [tugboat dispatchers], postal inspector[s], salesperson[s], [and] editorial assistant[s] . . . .[While professionals include] game wardens, airline pilots, pharmacists, . . . nurses, paralegals, and even student research assistants.” DeChiara, supra note 15 at 149-50. (citations omitted).

29 C.F.R. § 541.708. (emphasis added). This minimum salary level is raised to $650 per week in the final rule. 69 Fed. Reg. 79, 22190.

29 C.F.R. § 541.601. The proviso is for “employers making motion pictures, not those who show motion pictures.” 1 Wage and Hour Law § 5:36.


29 CFR 541 (May 1953).

Id.

Id.

Id.

Id.
Compare this one month window for comment with the one year period in the internet age between the notice of proposed rulemaking and the scheduled final disposition of 68 Fed. Reg. 61 (2003).


29 C.F.R. 541(a) (2003).


See Texas Film Commission, supra note 2.


Armstrong Co. v. Walling, (1947), CA 1 Mass) 161 F2d 515.

Stanger v. Glenn L. Martin Co., (1944, DC Md) 56 F. Supp 163

68 Fed. Reg. 61, 15561.

Id.


Texas Film Commission, supra note 2 (emphasis added).

SIC 781, 782 DOL.

68 Fed. Reg. 61, 15567.


68 Fed. Reg. 61, 15567

Id. at 15566.

See Hollywood PA, supra note 1.

44 F.3d 1060 (1st Cir. 1995).

While I would like to have statistical evidence, I could find none. One reason for the lack of data is the lack of recognition of the employment category by the Department of Labor. See infra, note 66 and 67.


Michigan Production Alliance, supra note 5 at 12.

Texas Film Commission, supra note 2.

Michigan Production Alliance, supra note 5 at 28.


This writer did find a case filed by the Department of Labor on behalf of set location security guards. See Chao v. Casting, Acting, and Security Talent, Inc., No. 00-03481-RSWL (D. Cent. Cal.).


FLSA §§16 and §§17.

SIC 781, 782 DOL

Id.

See e.g. the IATSE Local 489 union web site, http://www.iatse489.org/areastd.htm, (accessed May 15, 2004), where ‘Grips’ are, and PA’s are not listed as a represented classification. See also SIC 78 Motion Pictures and SIC 781 Motion Picture Production and Allied Services, 2001 National Industry – Specific Occupational Employment and Wage Estimates. Dept. of Labor, Bureau of Labor Statistics.

Blog, supra note 59.


See e.g. 69 Fed. Reg. 79, 22190.