

Overworked and Underpaid: Why States Should Require Overtime Pay for Nurses

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ABSTRACT

Nurses have long been lauded as some of the hardest working members of our society, yet they are nonetheless largely prohibited from earning overtime pay. The reason for this harkens back to Franklin D. Roosevelt's New Deal, when the Fair Labor Standards Act of 1938 established protections for many workers, while excluding others, like registered nurses. In the face of a nationwide shortage of qualified nurses and a worrying trend of burnout and turnover within the profession, however, something must be done to protect and encourage nurses. Because nurses have been almost entirely unsuccessful in seeking overtime compensation through the courts, this Note proposes that state legislatures take it upon themselves to protect nurses directly—as one state has already done. This Note provides several policy reasons in support of this action.

INTRODUCTION

Twenty-seven hours. That's the amount of unpaid overtime Tonia Powell worked each week as a Wellness Associate at the American Red Cross national headquarters in Washington, D.C.¹ At first, she monitored and updated the medical records of Red Cross personnel who were to be deployed overseas.² She communicated with them about their health before, during, and after their deployment.³ Meanwhile, her other tasks included providing first aid, conducting health education and counseling, filing worker's comp claims, and a variety of administrative tasks around the headquarters.⁴ So far, so good.

But then, the other Wellness Associate in her unit resigned.⁵ Two months later, so did her supervisor, leaving Tonia alone in the unit.⁶ When the Red Cross declined to fill their positions, Tonia had to pick up the slack, expanding her workload and including more supervisory tasks.⁷

Ultimately, she worked about 27 hours of overtime per week, for which she received no extra compensation.⁸ When her unit was terminated later that year, she sought payment for this overtime work.⁹ First, her employer, and then the District Court for the District of Columbia, denied her claim.¹⁰ And why? Simple: she was a registered nurse.¹¹

The Court's decision was based on the distinction between federally protected and unprotected employees.¹² This distinction

¹ Powell v. Am. Red Cross, 518 F. Supp. 2d 24, 29 (D.D.C. 2007).

² *Id.* at 27–28.

³ *Id.* at 28.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 29.

⁹ *Id.* at 31.

¹⁰ *Id.* at 44–45.

¹¹ *Id.* at 39.

¹² *Id.* at 43.

is described in the Fair Labor Standards Act, part of Franklin Roosevelt's New Deal, which sought to protect the "ordinary workingman" from unfair labor conditions like low pay and long hours.¹³ Roosevelt's vision was to ensure all "able-bodied working men and women a fair day's pay for a fair day's work."¹⁴

Early on, however, registered nurses were deemed to fall outside the Act's protection because of the intellectual nature of their work.¹⁵ After all, they were not on a factory line or in an industrial plant.¹⁶

In practice, though, many registered nurses are a lot like the overworked factory hands who first benefited from the Act. They spend long hours on their feet.¹⁷ They experience stress both from working with patients and from organizational challenges.¹⁸ They are recognized as some of the hardest-working members of our society.¹⁹ Yet nurses rarely get federal guarantees for overtime pay, while blue-collar workers under similar conditions do.²⁰ To correct this injustice, state legislatures should require overtime pay for registered nurses due to the nature and significance of their work. After all, shouldn't nurses also receive a "fair day's pay for a fair day's work"?

¹³ *Wirtz v. Patelos Door Corp.*, 280 F. Supp. 212, 216 (E.D.N.C. 1968).

¹⁴ Franklin D. Roosevelt, U.S. President, *Message to Congress on Establishing Minimum Wages and Maximum Hours* (May 24, 1937), (transcript at <https://www.presidency.ucsb.edu/documents/message-congress-establishing-minimum-wages-and-maximum-hours>).

¹⁵ *See Principe v. Arturo Lluberas Y Sobrinos*, 71 F. Supp. 145, 146 (D.P.R. 1943).

¹⁶ *See id.*

¹⁷ *See, e.g.*, Stephanie Sargent, *Gratitude for a Near Miss with Burnout*, SE HEALTHCARE (July 21, 2021), <https://www.sehealthcaresolutions.com/2021/07/21/gratitude-for-a-near-miss-with-burnout/>.

¹⁸ *See* Amy W. Stimpfel et al., *Work Organization Factors Associated with Nurses' Stress, Sleep, and Performance: A Pre-pandemic Analysis*, 13 J. NURSING REGUL., 4 (Oct. 2022), [https://doi.org/10.1016/S2155-8256\(22\)00085-0](https://doi.org/10.1016/S2155-8256(22)00085-0).

¹⁹ *See, e.g.*, *Examples of the Most Stressful Jobs (with Reasons Why)*, INDEED (last updated May 28, 2024), <https://ca.indeed.com/career-advice/finding-a-job/most-stressful-jobs>; Joanna Zambas, *The 40 Hardest Jobs in the World (and What They Pay)*, CAREERADDICT (July 21, 2023), <https://www.careeraddict.com/5-most-difficult-jobs-in-the-world>.

²⁰ *See* 29 C.F.R. § 541.3 (2024).

This article will explore the history, purpose, and scope of the Fair Labor Standards Act with a special focus on overtime exemptions. It will discuss the nature of registered nurses' work, what is demanded of them, and why they have almost uniformly been denied overtime pay. The article will also explore some of the challenges that nurses and the healthcare industry—indeed, America itself—face now and will continue to face in the future. It will describe the inability of the courts to provide relief. Finally, it will present the legislative solution that one state has adopted to help nurses and explain why the other 49 states should follow suit.

THE FAIR LABOR STANDARDS ACT

History

When the Fair Labor Standards Act was passed in 1938, President Franklin D. Roosevelt was in the second year of his second term in office.²¹ Germany had not yet invaded Poland, sparking the Second World War.²² Child labor was federally legal.²³ Farming and industry dominated the workforce.²⁴ And the U.S. was still in the throes of the Great Depression.²⁵

Before the Act's passage and in an effort to pull the U.S. out of the Depression, President Roosevelt had launched his famous "New Deal," promising action and social reform.²⁶ For example,

²¹ See *Franklin D. Roosevelt*, WHITE HOUSE HIST. ASS'N, <https://www.whitehousehistory.org/bios/franklin-roosevelt> (last visited Sept. 25, 2025).

²² See Thomas A. Hughes et al., *World War II*, BRITANNICA (last updated Aug. 6, 2024), <https://www.britannica.com/event/World-War-II>.

²³ See Michael Schuman, *History of Child Labor in the United States—Part 2: The Reform Movement*, U.S. BUREAU LAB. STAT. (Jan. 2017), <https://doi.org/10.21916/mlr.2017.2>.

²⁴ See Roosevelt, *supra* note 14.

²⁵ See Christina D. Romer, et al., *Great Depression*, BRITANNICA (last updated July 2, 2024), <https://www.britannica.com/event/Great-Depression>.

²⁶ See *New Deal*, BRITANNICA (last updated July 30, 2024), <https://www.britannica.com/event/New-Deal>.

agencies like the Works Progress Administration and the Civilian Conservatory Corps were established to provide jobs for the many unemployed workers.²⁷

One of his New Deal goals was to reform labor by putting “a floor under wages and a ceiling over hours of work.”²⁸ He declared that “[a] self-supporting and self-respecting democracy can plead no . . . economic reason for chiseling workers’ wages or stretching workers’ hours.”²⁹ He seemed to find early success with the National Industrial Recovery Act of 1933 and accompanying measures that established a minimum wage and maximum work-week for signatory businesses.³⁰ Roosevelt was elated about the act’s passage.³¹ But soon after, these efforts were stymied by the conservative Supreme Court, which struck down that act and other labor laws as unconstitutional.³²

Roosevelt and his advisors waited for years until the time was ripe to introduce labor reform again.³³ When the Supreme Court began to show more acceptance for his policies, he seized the opportunity and sent a general fair labor standards bill in 1937 to Congress.³⁴ There, the proposed law again met opposition, and it was vigorously trimmed and tailored to satisfy the competing interests of various groups.³⁵

More than a year after President Roosevelt first sent the bill to

²⁷ *Id.*

²⁸ Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP’T LAB., <https://www.dol.gov/general/aboutdol/history/flsa1938> (last visited Aug. 6, 2024).

²⁹ Roosevelt, *supra* note 14.

³⁰ Grossman, *supra* note 28.

³¹ See Franklin D. Roosevelt, U.S. President, Statement on Signing the National Industrial Recovery Act (June 16, 1933), (transcript available at <https://www.presidency.ucsb.edu/documents/statement-signing-the-national-industrial-recovery-act>) (calling the act “the most important and far-reaching legislation ever enacted by the American Congress”).

³² Grossman, *supra* note 28.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

Congress, he signed the Fair Labor Standards Act on June 25, 1938.³⁶ It was the result of extensive compromise and 72 amendments that sought “exemptions, narrowed coverage, lowered standards, weakened administration,” and other ways to dilute the bill.³⁷ Finally, Roosevelt’s vision of a “fair day’s pay for a fair day’s work” had been realized—at least for some.³⁸

The Terms of the Act

The Act establishes requirements and prohibitions for employers³⁹, protecting “all covered workers from substandard wages and oppressive working hours.”⁴⁰ It sets a federal minimum wage and a maximum workweek beyond which overtime pay is required while abolishing “oppressive child labor.”⁴¹ The catch: There are a host of positions that are exempt from the minimum wage and maximum hour requirements.⁴²

Among the employees not protected by the Act are camp counselors, commercial fishermen, and border patrol agents.⁴³ Also excluded are those in an “executive, administrative, or professional” role⁴⁴—the so-called “white collar” exemption.⁴⁵ And it is this last exemption that prevents most registered nurses from receiving overtime pay.

Exemptions Explained

Why exempt anyone at all? The rationale behind an overtime

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *Wages and the Fair Labor Standards Act*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/whd/flsa> (last visited Aug. 6, 2024).

⁴⁰ *Williams v. Genex Services, LLC*, 809 F.3d 103, 104 (4th Cir. 2015) (quoting *Barrentine v. Arkansas–Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981)).

⁴¹ 29 U.S.C.A. § 212(c) (West).

⁴² 29 U.S.C.A. § 213 (West).

⁴³ *Id.* § 213(a)(3), (5), (18).

⁴⁴ *Id.* § 213(a)(1).

⁴⁵ *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22122, 22122 (Apr. 23, 2004).

exemption is that certain employees, particularly those in a managerial or similar position, are less likely to be exploited than uneducated “rank and file” laborers.⁴⁶ They probably enjoy higher pay, better working conditions, and more control over their time and duties.⁴⁷

To be exempt under the Act (and thus ineligible for overtime pay), an employee must satisfy three tests: the salary basis test, the salary level test, and the duties test.⁴⁸ The salary basis test requires that an employee be paid a “predetermined and fixed salary,” regardless of the amount or quality of work performed.⁴⁹ The salary level test requires that the employee be paid at or above the minimum threshold⁵⁰ (at the time of writing, \$844 per week or about \$44,000 per year).⁵¹

The duties test varies based on the relevant exemption category.⁵² There are two categories of professionals recognized as exempt from overtime: the learned professional and the creative professional.⁵³ The learned professional exemption (the one relevant to this article) applies to employees who satisfy a three-prong duties test: first, the employee must “perform work requiring advanced knowledge”; second, the advanced knowledge must be in a “field of science or learning”; and third, the advanced knowledge must be “customarily acquired by a prolonged course

⁴⁶ See *Marshall v. W. Union Tel. Co.*, 621 F.2d 1246, 1251 (3d Cir. 1980).

⁴⁷ See *id.*; see also *Rigney v. Wilson & Co.*, 61 F. Supp. 801, 802 (S.D. W. Va. 1945) (“the purpose of the Fair Labor Standards Act in relation to overtime pay for non-exempt employees is to grant the right to overtime pay to that class of employees who come within the commonly understood designation of workers as distinguished from managers, superintendents, foremen or bosses.”).

⁴⁸ *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. at 51230, 51230.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Amount of Salary Required, 29 C.F.R. § 541.600(a) (2025).

⁵² See *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. at 51230, 51230.

⁵³ GENERAL RULE FOR PROFESSIONAL EMPLOYEES, 29 C.F.R. § 541.300(a)(2)(i)–(ii) (2024).

of specialized intellectual instruction.”⁵⁴

Federal regulations clarify that the type of work that qualifies as exempt for learned professionals is intellectual, requiring the exercise of “discretion and judgment,” rather than routinely “mental, manual, mechanical, or physical.”⁵⁵

Finally, the performance of this work must be the “principal, main, major or most important duty that the employee performs.”⁵⁶ The determination of an employee’s primary duty is a “fact-intensive inquiry” based on the nature of his or her position “as a whole.”⁵⁷ What matters are the position’s actual characteristics and duties, not the job description.⁵⁸ The employee’s job title also carries little weight.⁵⁹

And yet, seemingly contradicting this fact-intensive inquiry, the Code of Federal Regulations states that registered nurses “generally meet the duties requirements for the learned professional exemption.”⁶⁰ In other words, they rarely qualify for overtime pay when they meet the salary basis and salary level tests. The next section will explore what nurses do and why they are almost always excluded from overtime pay.

REGISTERED NURSES

What Do Nurses Do?

What does a registered nurse do? Put simply, he or she provides

⁵⁴ LEARNED PROFESSIONALS, 29 C.F.R. § 541.301(a) (2024).

⁵⁵ *Id.* § 541.301(b).

⁵⁶ *Rieve v. Coventry Health Care, Inc.*, 870 F. Supp. 2d 856, 862 (C.D. Cal. 2012) (quoting 29 C.F.R. § 541.700(a)).

⁵⁷ *Roshon v. Eagle Research Group, Inc.*, 314 F. Supp. 3d 852, 864 (S.D. Ohio 2018) (quoting 29 C.F.R. § 541.700(a)).

⁵⁸ *Indergit v. Rite Aid Corp.*, 293 F.R.D. 632, 638 (S.D.N.Y. 2013), abrogated on other grounds by *Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502 (2d Cir. 2020).

⁵⁹ *Harrison v. Tyler Techs., Inc.*, 638 F. Supp. 3d 694, 704 (E.D. Tex. 2022).

⁶⁰ 29 C.F.R. § 541.301(e)(2).

“nursing care to patients across the lifespan.”⁶¹ This may include “administering medication and treatment, assessing patients, maintaining medical records, and educating patients and their families.”⁶² Nurses may work in traditional healthcare settings like hospitals, clinics, and nursing homes, or in patients’ homes, within federal agencies, or for insurance companies.⁶³

To become a registered nurse, one must receive a bachelor's degree, associate's degree, or diploma from an approved program before passing a national licensing exam.⁶⁴ Typically, these programs take between two and four years to complete.⁶⁵

On-the-job qualities for registered nurses highlighted by the Bureau of Labor Statistics include being able to think critically, communicate effectively with patients and other health professionals, and juggle a wide variety of patients and treatment plans simultaneously.⁶⁶ They must also be caring, empathetic, precise, and both physically and emotionally resilient.⁶⁷ And they must do so for 10- to 12-hour shifts.⁶⁸ Many registered nurses also work night shifts or during weekends and holidays, and they may be required to be on call (meaning they must be “available to work on short notice”).⁶⁹ In sum, as one author said, “It would not be possible to praise nurses too highly.”⁷⁰

⁶¹ Gayle Morris, *How to Become a Registered Nurse*, NURSE J., <https://nursejournal.org/registered-nursing/how-to-become-a-rn/> (last updated Oct. 8, 2024).

⁶² *Id.*

⁶³ Janice Monti, *Where Do Nurses Work? A Breakdown of the Various Job Settings for Nurses*, NURSE J., <https://nursejournal.org/resources/work-settings-for-nurses/> (last updated Nov. 4, 2024).

⁶⁴ U.S. Bureau of Lab. Stat., Occupational Outlook Handbook, Registered Nurses, How to Become a Registered Nurse, <https://www.bls.gov/ooh/healthcare/registered-nurses.htm> (last modified Aug. 29, 2024)..

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Morris, *supra* note 62.

⁶⁹ U.S. Bureau of Lab. Stat., *supra* note 65.

⁷⁰ Aspen Univ., *Quotes for Nurses: 172 Words of Wisdom for All Nurses*, (Dec. 8, 2022), <https://www.aspen.edu/altitude/nursing-quotes/>.

The Realities of Nursing

In the midst of the COVID-19 pandemic, a young registered nurse worked in the Intensive Care Unit at a hospital, caring for a patient critically ill with the disease.⁷¹ Adjustments had to be made frequently based on the patient's condition.⁷² It took eight people to carefully flip him onto his stomach to improve his breathing, and the nurse and her colleagues closely monitored and treated the patient for four days—but to their despair, he died anyway.⁷³ And before they could process what happened, the next patient was “rolling in the door.”⁷⁴

Another woman, working as a travel nurse (a short-term assignment at a hospital), described running through the halls all shift long due to a too-high patient-to-nurse ratio.⁷⁵ There was barely time to “eat, sit down, or use the bathroom.”⁷⁶ Other nurses tell of items being thrown at them,⁷⁷ of verbal abuse from patients,⁷⁸ and of coping with sudden deaths.⁷⁹

Considering the intensity of their work, it is perhaps unsurprising that more than half of nurses reported symptoms of burnout in one study.⁸⁰ Even more experienced a “great deal of

⁷¹ Samantha Ellis, *The COVID-19 Journey: One Nurse's Story*, AM. NURSE (May 7, 2021), <https://www.myamericannurse.com/the-covid19-journey-one-nurses-story/>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Sargent, *supra* note 17.

⁷⁶ *Id.*

⁷⁷ @kynjalco, *The Expectation to Be Invincible*, REDDIT (Jan. 26, 2022, 1:23 AM), https://www.reddit.com/r/nursing/comments/sczb1p/the_expectation_to_be_invincible/.

⁷⁸ Debra Lefebvre (@DebraLefebvre), Twitter (Jan. 22, 2022, 10:14 AM), <https://x.com/DebraLefebvre/status/1484907317808312324>.

⁷⁹ Miranda Kay, *Healthcare Stories Shed Light on Being a Nurse*, NURSA (Jan. 24, 2022), <https://nursa.com/blog/healthcare-stories-scary-moments-nursing-challenges>.

⁸⁰ Gretchen Berlin et al., *Understanding and Prioritizing Nurses' Mental Health and Well-Being*, McKinsey & Co. (Nov. 6, 2023),

stress” from their jobs.⁸¹

Why Are Registered Nurses Exempt?

So why, considering the huge responsibility they bear and the challenges of their job, do most registered nurses fall outside the Fair Labor Standards Act’s protections? Simply put, they fit neatly into the learned professional exemption’s duties test.⁸² Work as a registered nurse always requires specialized instruction in a field of science or knowledge⁸³ and almost always involves the exercise of discretion and judgment.⁸⁴ Both case law⁸⁵ and personal narratives⁸⁶ make that clear.

There are other types of nurses besides registered nurses. For example, licensed practical nurses provide “basic medical care” to patients (for example, “changing bandages and helping with bathing and dressing”).⁸⁷ Licensed practical nurses usually work under the supervision of registered nurses or doctors.⁸⁸ Their license requires one year of study, compared to at least two years for a registered nurse license.⁸⁹ And they usually have less responsibility than registered nurses.⁹⁰ Therefore, they generally do not fit within the learned professional exemption, unlike

<https://www.mckinsey.com/industries/healthcare/our-insights/understanding-and-prioritizing-nurses-mental-health-and-well-being>.

⁸¹ *Id.*

⁸² *See Rowe v. Reynolds*, 624 F. Supp. 3d 1036, 1042–43 (S.D. Iowa 2022).

⁸³ *Rieve.*, 870 F. Supp. 2d at 862 (quoting 29 C.F.R. § 541.700(a)).

⁸⁴ *See, e.g., Rowe*, 624 F. Supp. 3d at 1042; *see also Williams v. Genex Services, LLC*, 809 F.3d 103, 111 (4th Cir. 2015) (finding that the record “makes clear” that registered nurse’s responsibilities “involve the consistent exercise of discretion and judgment as well as the use of her advanced nursing knowledge.”).

⁸⁵ *See, e.g., Rowe*, 624 F. Supp. 3d at 1042–43.

⁸⁶ *See, e.g., Ellis, supra* note 72.

⁸⁷ Bureau of Labor Statistics, *What Licensed Practical and Licensed Vocational Nurses Do*, U.S. DEPT. LAB. (last modified Aug. 29, 2024), <https://www.bls.gov/ooh/healthcare/licensed-practical-and-licensed-vocational-nurses.htm#tab-2>.

⁸⁸ *Id.*

⁸⁹ *Rowe*, 624 F. Supp. 3d 1036, at 1038.

⁹⁰ *Id.* at 1043 (citing *Mudgett v. Univ. of Pittsburg Med. Ctr.*, No. CIV.A.09-254, 2010 WL 1838413, at *7 (W.D. Pa. May 6, 2010)).

registered nurses, and usually receive overtime pay.⁹¹ For registered nurses, this disparate treatment is frustrating.⁹²

The following section describes the systemic challenges facing the healthcare industry due to a lack of qualified registered nurses and shows how nurses seeking just compensation for their overtime efforts have failed again and again.

THE PROBLEM WITH EXEMPTING REGISTERED NURSES

The Nursing Shortage

Considering the demanding and stressful nature of their work, it may be no wonder that the United States is experiencing a shortage of available nurses. Between 2020 and 2021, during the height of the COVID-19 pandemic, 100,000 registered nurses left the workforce.⁹³ Nurse managers are reporting increased numbers of open positions and higher registered nurse turnover⁹⁴—a recent study found that “more than half of nurses leave their job within the first two years.”⁹⁵ And recruiting has gotten more difficult.⁹⁶

Some of the concerns voiced by nurses include “lingering pandemic burnout, demanding work environments, a sense of being undervalued, and concerns related to compensation.”⁹⁷ A 2022 study revealed that more than half of registered nurses and licensed practical nurses felt depleted, emotionally exhausted,

⁹¹ Learned Professions, 29 C.F.R. § 541.301(e)(2) (2025).

⁹² See Rowe, 624 F. Supp. 3d at 1038–39.

⁹³ Makinzi Hoover et al., *Data Deep Dive: A National Nursing Crisis*, U.S. Chamber Com. (Jan. 29, 2024), <https://www.uschamber.com/workforce/nursing-workforce-data-center-a-national-nursing-crisis>.

⁹⁴ David J. Gilmartin & Cynthia Saver, *2023 Nursing Trends and Salary Survey Results*, Am. Nurse (Dec. 29, 2023), <https://www.myamericannurse.com/2023-nursing-trends-and-salary-survey-results/>.

⁹⁵ Hoover et al., *supra* note 94 (The median tenure across all industries is four years.).

⁹⁶ Gilmartin & Saver, *supra* note 95.

⁹⁷ Hoover et al., *supra* note 94.

fatigued, or burned out *at least a few times a week*.⁹⁸

When there are not enough nurses, the result is more errors and deaths—and greater “burnout and dissatisfaction among nurses.”⁹⁹ This problem will only be exacerbated in the next few years as more baby boomers age and require healthcare services.¹⁰⁰ Not to mention that the nursing workforce is aging as well, so retirements will create many openings in the coming years.¹⁰¹

The U.S. Chamber of Commerce projects more than 190,000 job openings for registered nurses per year between 2022 and 2032.¹⁰² But only about 177,000 additional nurses are expected to enter the workforce during that time—less than the projected openings for *one year*.¹⁰³ And the fewer nurses there are to cover the necessary shifts, the more pressure there is on those remaining.¹⁰⁴ This, in turn, can produce more burnout and lead to more nurses leaving the profession—a vicious cycle that leaves all Americans in dire straits.¹⁰⁵ But what can nurses do?

Attempted Challenges

Many registered nurses seek relief from the courts, arguing that they should receive compensation for the overtime they work. To circumvent the clear exemption described by the Fair Labor Standards Act, nurses have made a variety of creative legal arguments in court.

⁹⁸Brendan Martin et al., *Examining the Impact of the COVID-19 Pandemic on Burnout and Stress Among U.S. Nurses*, 14 J. NURSING REGUL., at 4 (Apr. 2023).

⁹⁹ Hoover et al., *supra* note 94.

¹⁰⁰ Lisa Haddad et al., *Nursing Shortage*, STATPEARLS PUBL'G (last updated Feb. 13, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK493175/>.

¹⁰¹ *Id.*

¹⁰² Hoover et al., *supra*, note 94.

¹⁰³ *Id.*

¹⁰⁴ *Nurse Staffing: Addressing the Nursing Shortage in Healthcare Facilities*, PROLINK (July 12, 2024), <https://prolinkworks.com/perspectives/nurse-staffing-addressing-nursing-shortage-in-healthcare-facilities-0>.

¹⁰⁵ *Id.*

Some have argued that they are not salaried employees under the Act.¹⁰⁶ Some pin their hopes on claiming that their work is essentially the same as that of a licensed practical nurse.¹⁰⁷ Others argue that their work does not involve the exercise of judgment and discretion.¹⁰⁸ Or that the work is “more routine mental work than predominantly intellectual in character.”¹⁰⁹ Or that most of their time is spent on non-exempt tasks.¹¹⁰ All these efforts failed.

In Tonia Powell’s case, the court was “unaware of any case in which a registered nurse has been found not to satisfy the primary duty test.”¹¹¹ So it would seem that nurses are out of luck—but there is an alternative.

THE PROPOSED SOLUTION

The Case for State Action

The courts have made it clear that trying to find a way around the Fair Labor Standards Act is probably futile. A registered nurse seeking remuneration for his or her overtime labor will find it difficult to successfully argue their case for non-exemption under the federal standard. But there is a promising solution in

¹⁰⁶ E.g., *Clark v. Brantell*, No. 15AP–597, 2016 WL 764427, at *3 (Ohio Ct. App. Feb. 25, 2016); *Crowe v. Examworks, Inc.*, 136 F. Supp. 3d 16, 28 (D. Mass. 2015).

¹⁰⁷ *Rowe v. Reynolds*, 624 F. Supp. 3d 1036, 1039 (S.D. Iowa 2022) (claiming that up to 95% of her time is spent on tasks that could be performed by a licensed practical nurse or other staff member).

¹⁰⁸ *Powell v. Am. Red Cross*, 518 F. Supp. 2d 24, 40 (D.D.C. 2007); see also *Rieve v. Coventry Health Care, Inc.*, 870 F. Supp. 2d 856, 863 (C.D. Cal. 2012) (arguing that she performed “sub-professional, routine work” that was “highly standardized and closely controlled” by guidelines); *Williams v. Genex Services, LLC*, 809 F.3d 103, 109–110 (4th Cir. 2015) (arguing that “her duties consist of nothing more than clerical, nondiscretionary, and routine work”).

¹⁰⁹ *Isett v. Aetna Life Ins. Co.*, 947 F.3d 122, 129 (2d Cir. 2020).

¹¹⁰ *Powell*, 518 F. Supp. 2d at 42.

¹¹¹ *Id.* at 39; see also *Rieve*, 870 F. Supp. 2d at 864 (“This Court is not aware of any case...in which a case manager or a registered nurse in any position has not been deemed a professional exempt from FLSA coverage.”).

state legislation.

In his message to Congress when introducing the Fair Labor Standards bill, Roosevelt conceded that “there are many purely local pursuits and services which no federal legislation can effectively cover.”¹¹² Yet he remarked that “[n]o state is justified in sitting idly by and expecting the federal government to meet state responsibility for those labor conditions with which the state may effectively deal The proposed federal legislation should be a stimulus and not a hindrance to state action.”¹¹³ State legislatures have the power to realize their vision by passing laws to protect employees in fields like nursing.¹¹⁴

The Constitution itself declares that any powers not granted to the federal government or withheld from the states “are reserved to the States . . . or to the people.”¹¹⁵ Even when there are federal regulations in place, courts will uphold state coverage that is more expansive than federal law requires when the legislature signals a clear policy choice.¹¹⁶ And in the case of nursing, one state has done just that.

California’s Approach

In California, registered nurses have been designated non-exempt by the legislature for over twenty years.¹¹⁷ The state’s labor code declares that “a registered nurse employed to engage in the practice of nursing *shall not be exempted* from [overtime] coverage...unless he or she individually meets the criteria for [the executive or administrative exemptions].”¹¹⁸

¹¹² Roosevelt, *supra*, note 14.

¹¹³ *Id.*

¹¹⁴ *State and Local Government*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/state-local-government/> (last visited Aug. 6, 2024).

¹¹⁵ U.S. CONST. amend. X.

¹¹⁶ *Rieve*, 870 F. Supp. 2d at 867.

¹¹⁷ Eight–Hour–Day Restoration and Workplace Flexibility Act, A.B.-60, (1999).

¹¹⁸ Cal. Lab. Code Ann. § 515(f)(1) (West) (emphasis added) (showing that a few categories of nurses with additional, advanced degrees may be exempt).

California acknowledges that registered nurses would “normally fall within the purview of the learned professional classification if the federal guidelines were the only criteria.”¹¹⁹ And the state does not deny that “all nurses exercise discretion and independent judgment.”¹²⁰ But that is not the only determining factor.¹²¹ Instead, California has found that despite the federal guidelines, nurses still need overtime protection.¹²²

Thus, California nurses are presumed non-exempt, instead of presumed exempt as they are under the federal regime.¹²³ So most California nurses are entitled to overtime pay—a benefit that the courts have been unable to provide.¹²⁴

Expanding State Action

California’s example makes it clear that the federal standard is the minimum protection required and not the maximum. When the courts and the federal government are unable or unwilling to make necessary changes, it is up to the people—and their representatives, the legislature—to do so.

One 2023 survey found that 88% of Americans think that nurses have a positive impact on society.¹²⁵ 59% think nurses are underpaid.¹²⁶ This suggests that there would be popular support for the other 49 state governments to introduce a law like California’s and improve the standard of living for millions of registered nurses.

¹¹⁹ Letter from Thomas Cadell, Jr., Chief Couns., Div. of Lab. Standards Enft, to Jeffrey A. Berman, Proskauer, Rose, Goetz & Mendelsohn, Exemption from IWC Orders Minimum Wage and Overtime Requirements for Physicians Assistants and Nurse Practitioners (Mar. 10, 1997), <https://www.dir.ca.gov/dlse/opinions/1997-03-10.pdf>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Rieve*, 870 F. Supp. 2d at 867–68.

¹²³ *Id.* at 867.

¹²⁴ *Id.*

¹²⁵ Eli McKown-Dawson, *Americans’ Rankings of 30 Occupations*, YOUGov (July 20, 2023, 3:52 PM GMT-4), <https://today.yougov.com/economy/articles/45927-americans-rank-30-occupations-pay-happiness-impact>.

¹²⁶ *Id.*

Better pay is not a panacea for the healthcare industry, whose problems also emanate from a lack of nurse educators, among other things.¹²⁷ But it is a start. Paying nurses for their overtime hours is only fair, considering that they work as hard as many blue-collar workers. And it would begin to remedy nurses' sense of being undervalued and under compensated, encouraging them to stay in the profession and reducing the high turnover that has typified nursing.

In addition, the introduction of overtime pay would give licensed practical nurses a greater incentive to become registered nurses since they would get an additional benefit beyond the salary increase and other perks. Healthcare companies would be incentivized to facilitate the education of registered nurses (for example, by financially supporting more nursing education programs) so they could hire more nurses at a base salary instead of paying time-and-a-half to fewer nurses. And the more nurses there are, the more evenly the workload is spread, making the healthcare industry more sustainable in the long run.

For these reasons, state legislatures across the country should adopt a rule like California's and declare registered nurses non-exempt from overtime pay requirements. Healthcare providers should not be able to run nurses into the ground without fear of monetary or legal repercussions. The well-being of our patients, our healthcare workers, and our communities demands it.

CONCLUSION

Registered nurses impact the lives of all Americans. Indeed, it is difficult to imagine a world without them. They are there to deliver a newborn baby, to aid a sick child, and to ease the passing of a parent. They care for us during the many small and great events that take place throughout our lives.

Franklin Roosevelt's vision for the Fair Labor Standards Act was

¹²⁷ Hoover et al., *supra*, note 94.

to establish fair working conditions for all of America's "able-bodied working men and women."¹²⁸ However, registered nurses have almost never been afforded full protection under the Act, even though they are some of the hardest workers in America.

So they need the states' help—just as the states need them. Faced with a present and growing shortage of qualified nurses, legislatures must act to protect nurses and, in turn, the communities they serve. One small step towards achieving this is to grant nurses the right to overtime pay. Then, nurses like Tonia Powell will finally have a just reward for their toil.

¹²⁸ Roosevelt, *supra*, note 14.