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Minimum Wage and Related Issues Before the 106th Congress: A Status Report

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Summary

In each Congress since 1938, when the Fair Labor Standards Act (FLSA) was enacted, proposals have been introduced that would, in some manner, have amended the statute. The 106th Congress was no exception.

Bills introduced in the 106th Congress dealt with minimum wage, overtime pay and related issues. Three general proposals to raise the federal minimum wage (and to make other adjustments in the Act) moved forward in the legislative process. H.R. 3081, a tax bill to which a package of FLSA provisions was added, was passed by the House on March 9, 2000. H.R. 833, bankruptcy legislation, was passed by the House but then, in the Senate, was amended to include certain additional tax and FLSA provisions — prior to its adoption by the Senate on February 2, 2000. Merging of the two bills was rendered difficult because of their somewhat different content.

Both H.R. 3081 and H.R. 833 proposed to raise the minimum wage from $5.15 per hour to $6.15 per hour: the first through 2 years; the latter, over 3 years. Each had other labor-related provisions as well. **H.R. 3081** would have (a) exempted licensed funeral directors and embalmers from minimum wage and overtime pay protection, (b) altered and expanded the current exemption of certain computer services workers from such protections, and (c) created a new minimum wage/overtime pay exemption for certain inside sales workers. **H.R. 833** would have altered the definition of "regular rate" for calculation of overtime pay (1½ times a worker's *regular rate* of pay). In late October, a 2-year increase in the minimum wage (with no other FLSA provisions) was added to the conference report on **H.R. 2614**, general small business and tax legislation, and passed by the House on October 26, 2000. No immediate action followed: a veto had been threatened.

Several elements, often associated with changes in the minimum wage, were addressed *neither* in H.R. 3081 *nor* in H.R. 833. ***First***, the threshold for exemption of computer services personnel, originally fixed at 6½ times the minimum wage, was converted in 1996 to a flat dollar amount: i.e., $27.63 an hour. If unchanged in the context of a rate increase to $6.15 per hour, the threshold would have-been reduced to 4½ times the minimum wage. ***Second***, the cash wage employers must pay to *regularly tipped employees* (previously a percentage of the federal minimum wage), was set in 1996 at $2.13 an hour — assuming the worker earns at least the minimum wage in combined tips and cash wages. The $2.13 threshold remains unchanged until Congress alters it. ***Third***, a sub-minimum wage for youth (certain persons under 20 years of age) was set at $4.25 per hour in 1996. Unless changed by the Congress, such youth workers will not be affected by an increase in the federal minimum wage. ***Fourth***, it has been proposed to allow states, under various arrangements, to opt out of the federal minimum wage structure. A part of neither bill, the "state flexibility" option has the support of certain industry and/or conservative groups.

Ultimately, none of these FLSA-related proposals was approved. Should the 107th Congress take up the FLSA/minimum wage issue, it will do so with a fresh starting point.

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Most Recent Developments

On February 2, 2000, the Senate approved H.R. 833 (amended by substituting the text of S. 625, the Bankruptcy Reform Act of 1999) which contains language that would have raised the federal minimum wage by $1.00 over a 3-year period and make certain other changes in the Fair Labor Standards Act (FLSA). No comparable language was contained in the House version of the legislation. On March 9, 2000, the House passed H.R. 3081, a very different bill that includes language raising the minimum wage by $1.00 over a 2-year period, making other changes in the FLSA, and dealing broadly with taxes and other non-FLSA issues. Through the spring and into the fall of 2000, efforts to effect a compromise continued.

Subsequently, on October 26, 2000, the House added language to the conference report on H.R. 2614, a broad legislative measure dealing with small business, taxes and other issues, that would have raised the minimum wage, in two steps, to $6.15 per hour. The Senate commenced consideration of the conference report in late October. (For this initiative, see the concluding segment of this report.)

Ultimately, as legislation was restructured at the close of the 106th Congress, the minimum wage proposals and the other projected changes in the FLSA, discussed here, were laid aside. Should the 107th Congress decide to resume consideration of these issues, it will be starting fresh. This report explains the immediate foundation upon which any new initiatives may rest.

Introduction

During the 106th Congress, several proposals related to the FLSA appeared to be moving through Congress. Ultimately, of course, Congress did not approve any of these wage/hour initiatives. This report has two purposes. ***First***, it notes the issues that were part of pending bills that received sustained consideration by the 106th Congress. ***Second***, it discusses issues that, although they were not included in the bills that remained in contention through the closing weeks of the 106th Congress, may be impacted by any legislation that may come to be adopted that affects federal wage/hour policy.[1]

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[1]Two packages of FLSA-related legislation (including changes in the minimum wage) were adopted, one by the House and one by the Senate — ultimately, neither was approved by both.

(continued...)

Under the Fair Labor Standards Act of 1938 (as amended), Congress established the basic minimum wage that must be paid to workers covered under the Act. The Act also sets a basic workweek (generally, 40 hours) and mandates payment of overtime rates (1½ times a workers' *regular rate* of pay) for hours worked in excess of that weekly standard. And, it regulates the employment of children. The wage/hour and child labor provisions are the core of the Act. Through the years, other provisions have been added that have affected both the scope and administration of FLSA requirements.[2]

Through at least 70 years, the minimum wage (alone or with other wage/hour issues) has sparked partisan comment and assertion.[3] The issue has not just been *whether* there is an appropriate federal role in wage/hour regulation (that continues to be debated), but *what that role ought to be*. At what level should the minimum wage be set? Should it be indexed? How broad should minimum wage coverage be; and, if there are exemptions (which there are), upon what foundation should they rest? Broadly, how should the overtime pay requirements of the Act be structured? Are such requirements sufficiently flexible? What elements of income should be included in calculation of a worker's *regular rate* for overtime pay calculation?

Beginning in 1938, coverage under the minimum wage provisions of the FLSA was largely limited to industrial workers engaged in interstate commerce; retail, service and agricultural workers, generally, were not protected. On eight separate occasions through the years (see **Table 1**), the Act has undergone general amendment which normally included language dealing with overtime pay and/or child labor as well as with the wage floor. On numerous occasions, the FLSA has been the subject to more narrowly focused single purpose amendment.

Through the years, amendment of the FLSA has resulted in a broadening of coverage: often conditioned jointly by economic considerations and by political compromise.[4] At the same time, the Department of Labor (DOL) has interpreted exemptions conservatively, assuming coverage unless a clear case could be made, rooted in the legislative history or the statutory language, for limiting the protection

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[1](...continued)
Other bills, of substantive importance but that did not advance through the legislative process, are treated here in a more peripheral manner.

[2]Two considerations should be kept in mind. *First*, many states have state mandated minimum wage, overtime pay, and related standards. These may be roughly parallel to the federal FLSA, but they need not be and often are not. *Second*, not all workers are covered under the FLSA — or, for that matter, state wage/hour standards. These coverage patterns (including patterns of exemption) need to be taken into account when considering the potential impact of changes in wage/hour law.

[3]For example, in his Convention speech (August 14, 2000), President Clinton affirmed that, were the Democratic Party "in the majority" in the 106th Congress, "America would already have ... a minimum wage increase." See *New York Times*, August 15, 2000, p. A17.

[4]See *Congressional Record*, July 30, 1937, p. 7876. More generally, see CRS Report 89-568, *The Fair Labor Standards Act: Analysis of Economic Issues in the Debates of 1937-1939*, by William G. Whittaker.

afforded by the Act. Speaking generally, expansion of coverage has been opposed by employers and supported by workers.[5]

Table 1. Federal Minimum Wage Rates, 1938-2000

Public Law	Effective date	Rate
P.L. 75-718 (Enacted June 25,1938)	October 1938 October 1939 October 1945	$.25 .30 .40
P.L. 81 (Enacted October 26,1949)	January 1950	.75
P.L. 84-381 (Enacted August 12, 1955)	March 1956	1.00
P.L. 87-30 (Enacted May 5, 1961)	September 1961 September 1963	1.15 1.25
P.L. 89-601 (Enacted September 23, 1966)	February 1967 February 1968	1.40 1.60
P.L. 93-259 (Enacted April 8, 1974)	May 1974 January 1975 January 1976	2.00 2.10 2.30
P.L. 95-151 (Enacted November 1, 1977)	January 1978 January 1979 January 1980 January 1981	2.65 2.90 3.10 3.35
P.L. 101-157 (Enacted November 17, 1989)	April 1990 April 1991	3.80 4.25
P.L. 104-188 (Enacted August 20, 1996)	October 1996 September 1997	4.75 5.15

Because the basic requirements of the FLSA are statutory, substantial change in the Act usually requires direct congressional action.[6] The last general FLSA amendments were adopted in 1996, at which time the federal minimum wage was set, in two steps, at its current level: $5.15 per hour. Subsequently, other proposals to raise the minimum wage have been introduced but they have not been adopted.

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[5]FLSA coverage was significantly extended in the 1960s and 1970s. Since 1977, change has been restricted *largely* to increases in the basic wage rate and to modification of existing FLSA provisions. See Willis J. Nordlund. *The Quest for a Living Wage: The History of the Federal Minimum Wage Program*. Westport, Conn., Greenwood Press, 1997.

[6]Though basic FLSA requirements are set in statute (19 U.S.C. 201 ff), significant administrative discretion has been given to the Secretary of Labor. Thus, there has been developed a body of federal regulations (29 C.F.R. 510 ff.), often supplemented by DOL "opinion letters," that apply the Act's more general provisions to individual workplaces.

Wage/Hour Initiatives Contained in H.R. 3081 and H.R. 833

Two very different bills dealing with wage/hour issues received floor consideration during the 106th Congress. Each has passed one house; neither passed both. And, neither bill was predominantly a wage/hour measure.

The "Small Business Tax Fairness Act of 2000" (**H.R. 3081**) was essentially a tax measure to which wage/hour provisions (a small portion of the overall bill) were added. As passed by the House, March 9, 2000, it would have raised the minimum wage in two steps to $6.15 per hour after April 1, 2001.[7] The bill also would have: **(a)** exempted from overtime pay certain computer services workers, **(b)** exempted from minimum wage and overtime pay a person employed as a licensed funeral director or embalmer, and **(c)** altered the treatment of certain inside sales workers for wage/hour purposes.

The "Bankruptcy Reform Act of 2000" (**H.R. 833**) was approved by the House on May 5, 1999, and subsequently dispatched to the Senate. Meanwhile, the Senate had under consideration S. 625, also a bankruptcy reform bill. On November 9, 1999, the Senate approved an amendment offered by Senator Domenici that added minimum wage and related FLSA amendments to S. 625. On February 2, 2000, the Senate voted to substitute the language of S. 625 for that of H.R. 833 and then, voted to approve H.R. 833 as amended.

Through the early spring and summer of 2000, negotiations among Members of Congress and between the chambers continued in an informal effort to reach an accommodation that would allow one or both of the measures to be adopted. (See **Table 2** for a quick summary of major minimum wage/FLSA proposals of the 106th Congress.) Were a conference between the House and Senate to be required in order to resolve variations in the pending bills, it was thought, the process might be rendered more than ordinarily complex because of issues associated with the initiation of tax measures, a House prerogative. H.R. 833 would have raised the minimum wage in three steps: to $6.15 per hour after March 1, 2002. It would also have altered the definition of "regular rate" for purposes of calculation of overtime pay under the FLSA. H.R. 3081 would have raised the minimum wage in two steps: to $6.15 per hour after April 1, 2001. But, it would also have altered the minimum wage and overtime pay requirements of the Act as they apply to certain computer services workers and "inside sales" personnel, and would have eliminated such protections where licensed funeral directors and embalmers are concerned.

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[7]If passed, the effective date would need to be altered to take into account the passage of time since the legislation was introduced: the initial projected effective dates already having been passed.

Table 2. Select Minimum Wage/FLSA Legislation of the 106th Congress

Bill number	Minimum wage provision[a]	Current status	Other FLSA provisions
H.R. 3081	Raise minimum wage to $5.65 after April 1, 2000; and to $6.15 after April 1, 2001.	Passed House, March 9, 2000.	Exempts certain computer services workers from minimum wage and overtime pay coverage; exempts licensed funeral directors and embalmers from minimum wage and overtime pay coverage; and alters treatment of certain inside sales workers for wage/hour purposes.[b]
H.R. 833 (with S. 625)	Raise minimum wage to $5.50 after March 1, 2000, to $5.85 after March 1, 2001; and to $6.15 after March 1, 2002.	Passed Senate, February 2, 2000.	Alters definition of "regular" rate of pay for overtime pay calculation purposes.[b]
H.R. 325 (also, S. 192 and S. 8)[c]	Raise the minimum wage to $5.65 after September 1, 1999; and to $6.15 after September 1, 2000.	Referred to Committee	Extends FLSA minimum wage protection to workers in the Commonwealth of Northern Mariana Islands (US).
H.R. 627	Raise the minimum wage to $6.50 after December 30, 1999.	Referred to Committee	Would index the minimum wage for future automatic adjustment.
H.R. 964	Raise the minimum wage to $5.55 after September 1, 1999; to $5.85 after September 1, 2000; and to $6.15 after September 1, 2001.	Referred to Committee	Would index the minimum wage for future automatic adjustment.

[a] Ordinarily, where the projected implementation date has been passed by the time the legislation is adopted, a new implementation schedule will be substituted.
[b] The great bulk of the bill deals with tax and other non-FLSA matters.
[c] Other updated versions of the legislation have been introduced: *inter alia*: S. 1832 and S. 2284. S. 8 also deals with non-FLSA matters.

The phase-in period appeared to be a critical issue where the projected increase in the minimum wage was concerned. Some argued for 2 years; others, for 3. Since the original 106th Congress legislation was introduced in January 1999, some might suggest that the issue was economically moot as the 106th Congress drew to a close. By December 2000, a projected 2-year phase-in (with transition time allowed for

employer adjustment) would have resulted in a *de facto* 4-year phase-in period — starting from January 1999. Thus, the reality would have exceeded by 1-year the phase-in period urged by 3-year advocates. On that point, the issue would seem already to have been decided through attrition.

On the General Issue of the Federal Minimum Wage

Should the minimum wage be raised; if so, to what level? There seemed to be substantial agreement both that it should be raised and that it should be raised to $6.15 per hour. **However**, beyond that, there were differences of opinion. **(a)** Some argued that the increase to $6.15 per hour should take place over 2 years; others, through a 3-year period. **(b)** Some, supportive of an increase, seemed to disagree with respect to the collateral content of the FLSA package: i.e., to changes in overtime pay and basic coverage under the Act. **(c)** Both in the House and in the Senate, the minimum wage/FLSA package was appended to a body of tax-related legislation (and, in the Senate, bankruptcy reform) about which there was further disagreement. **(d)** Finally, the measures that were passed the House and Senate, respectively H.R. 3081 and H.R. 833, were substantively quite different pieces of legislation. This seemed to suggest that merging the proposals could prove difficult.

Setting a Minimal Standard. Initial federal consideration of minimum wage legislation took place through the period from the spring of 1937 through the early summer of 1938. As debate progressed, the early projections of what would constitute a reasonable minimum wage were reduced from 40 cents to 25 cents per hour. This lower rate, in some respects, was an accommodation to demands for a regional sub-minimum wage standard: the legislated rate (25 cents) being lower than most wage rates in the north — and, thus, perhaps, of little effect. Still, it was high enough to be of concern to some southern employers — though the practical effect of the wage floor, some might argue, was offset by the relatively narrow pattern of coverage under the 1938 enactment. Although a wage floor was finally legislated, the 25 cent rate was essentially innocuous — a wage with which employers, generally, even within the context of the Great Depression, could live.

Stabilizing the Wage Rate — and Its Impact. The federal minimum wage rate is set in statute. Although Congress often mandates a series of step increases, when it does so, they are written into the statute: they are not discretionary with the Secretary of Labor. Congress is under no obligation to revisit the federal minimum wage: i.e., there is no statutory trigger that compels the Congress to act. Thus, the intervals between legislative enactments vary; and, in the interim, the relative value of the minimum wage is often eroded by inflation. For that reason, critics of the minimum wage (or proponents of a low minimum rate) may defer new legislation as long as possible and then urge a phasing-in of increases through a period of years. Pro-minimum wage forces can be expected to urge a shorter phase-in period. Delaying full implementation of upward adjustments in the wage floor reduces any negative impact for employers: they can pay workers a lower wage through a longer period. It also reduces the benefit of such adjustments for workers.

Over time, the value of the minimum wage has fluctuated with the general condition of the economy and with adjustment by the Congress. Its highest value was

reached in 1968. Had the rate been adjusted to allow it to retain its 1968 value, the present minimum would be about $7.72 per hour[8] — as opposed to the current $5.15 per hour. H.R. 3081 and H.R. 833 (again, quite different bills) would have increased the minimum wage to $6.15 per hour — and only to that level through a 2- or 3-year period, respectively, following enactment. Usually, legislation to raise the minimum wage includes a transitional period to allow employers to adjust their payrolls. The transition period (usually weeks or months) can be as long or short as Congress deems appropriate; but, the transition period adds to the length of the overall phase-in schedule, allowing for further erosion through attrition.[9]

Another way to measure the continuing value of the federal minimum wage is comparison with an independent economic variable: for example, the average hourly earnings of production workers in manufacturing (AHE-M). The minimum wage as a percentage of AHE-M reached its lowest level in 1949 (29.9%); its highest level in 1968 (55.6%). In 1997, when the minimum wage was raised to its current level of $5.15 per hour, it was equal to 41.4% of AHE-M. By the end of 1999, it had fallen back to 39.1%.[10]

Exemption for the Funeral Industry?

H.R. 3081, as passed by the House, contained language that would exempt employers of persons "employed as" a "licensed funeral director or a licensed embalmer" from having to pay the federal minimum wage and from the overtime pay requirements of the FLSA. There was no comparable provision in the Senate-passed legislation (H.R. 833).

Continuing an earlier legislative initiative,[11] two bills dealing with wages and hours in the funeral industry were introduced in the House in 1999 (the 106th Congress). H.R. 793 was free standing legislation, dealing only with a projected funeral industry exemption; its substance was incorporated in H.R. 3081, the composite tax and wage/hour legislation passed by the House on March 9, 2000. Had the measure been enacted, there would be no federal minimum wage and no federal overtime pay protection for persons employed as licensed funeral directors or licensed embalmers.[12]

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[8]For the constant value of the federal minimum wage, see CRS Report RS20040, *Inflation and the Real Minimum Wage: Fact Sheet*, by Brian W. Cashell. "Since 1968," Cashell notes, "despite a number of legislated adjustments, the minimum wage has not risen as fast as have overall prices."

[9]Some contend that the potential rate of $6.15 per hour should *not* compared with $7.72 an hour: the current constant value of the 1968 rate. Rather, they believe it should be compared with the value the 1968 minimum wage *would have reached* by whatever time a new rate schedule is phased-in. This would likely be somewhat higher than $7.72 per hour.

[10]See CRS Report 98-960, *The Federal Minimum Wage and Average Hourly Earnings of Manufacturing Production Workers*, by William G. Whittaker.

[11]See S. 2405 (Faircloth) and H.R. 4540 (Graham), both of the 105th Congress.

[12]Sometimes the positions of funeral director and embalmer are combined; at other times, they

(continued...)

As noted above, there is a long history of efforts to secure exemption from one aspect or another of the FLSA. Section 13(a)(1) of the Act exempts employers of persons employed in a *bona fide* "professional capacity" from the minimum wage and overtime pay requirements of the statute. Because a Section 13(a)(1) exemption would leave affected workers completely without federal wage and hour protection, the Department has been cautious in approving such exemptions and has set relatively high standards for qualification.[13] DOL requires that such workers possess the education of a professional, actually perform the work of a professional through about 80% of their working hours, and receive a professional level of compensation. Though the work of a funeral director and/or embalmer can be technical and demanding, it does not require the level of education and discretion that DOL has normally regarded as *professional* for Section 13(a)(1) purposes. Funeral directors and embalmers appear, often, to be low-wage entry-level workers.

To exempt these employers from the minimum wage and overtime pay requirements of the Act (and to circumvent the need for *professional* status designation), legislation (H.R. 793 (Graham)) was proposed that would add a new Section 13(a)(18) — or Section 13(a)(19) in H.R. 3081 — which would simply have defined the targeted workers as exempt. Although the bill was referred to the Committee on Education and the Workforce, no immediate action was taken. Subsequently, the substance of H.R. 793 (with other FLSA-related proposals including an increase in the minimum wage) was added to H.R. 3081, a tax bill to be reported from the Committee on Ways and Means. On January 28, 2000, the Committee on Education and the Workforce, not having conducted hearings on the issues involved, was discharged from further responsibility for the labor provisions of the umbrella measure. On March 9, 2000, with the proposed funeral industry exemption included, H.R. 3081 was passed by the House and, subsequently, dispatched to the Senate.

There are several potential factors that may be advanced as a rationale for the funeral industry exemption. When a similar proposal was offered in the 105th Congress by then-Senator Lauch Faircloth (R-N.C.), reference was made to "the economic hardship" and "financial strain" that paying minimum wages and overtime compensation impose upon funeral industry employers. The argument has also been made that employers need greater scheduling flexibility since the industry is marked by irregular hours.[14] It is not clear that the funeral industry is necessarily unique in either of these respects. Other employers could profit if allowed to have sub-minimum wage workers and to engage them through irregular and unlimited hours without concern for overtime rates. Opponents of the exemption, however, argue that the Act already contains provision for flexible and compressed scheduling, split

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[12](...continued)
are separate jobs. This seems to depend upon employer preference and state licensing requirements.

[13]Under Section 13(a)(1), similar exemptions are possible where workers are employed an executive or administrative capacity; but, it appears, the administrative and legislative issue has focused upon the professional exemption where funeral services workers are concerned.

[14]*Congressional Record*, July 31, 1998, p. S9562.

shifts, etc. Within the context of a 40-hour workweek, any workhours arrangement is permissible. Only after 40 hours in a single workweek must a premium rate be paid. That any benefit would accrue to the targeted workers from the proposed legislation is unclear.

Modifying An Exemption for the Computer Services Industry

H.R. 3081, as passed by the House, contained language that would have restructured the current exemption from minimum wage and overtime pay for employers of certain computer industry employees.[15] No comparable provision appeared in the Senate-passed FLSA legislation, H.R. 833.

During consideration of the 1989 FLSA amendments, language was proposed that would have allowed exemption *as professionals* of certain computer services workers.[16] The initial minimum wage legislation (to which the computer industry exemption had been appended) was vetoed by President Bush and, when a subsequent measure was passed and signed, the computer industry exemption had been dropped. The following year, however, the exempting language was added on the floor to legislation concerning wage practices in American Samoa: it was passed and signed into law (P.L. 101-583).[17] The exemption was structured as part of the Section 13(a)(1), the provision dealing with *professionals*. The amendment included a requirement, for this group of workers only, that conditioned exemption upon payment of an hourly wage equal to "at least 6½ times" the applicable minimum wage under the FLSA.

In 1996, new FLSA/minimum wage amendments were taken up as a floor amendment to tax legislation reported from the Committee on Ways and Means. There had been no hearings on the computer services exemption and the provision provoked little floor discussion. The restructured exemption (P.L. 104-188) added a new paragraph (17) to Section 13(a), circumventing the Section 13(a)(1) *professional* criteria and establishing a categorical exemption for the specified computer service workers. The "6½ times" formula earnings test was abandoned and replaced with an equivalent flat rate of $27.63 an hour: i.e., 6½ times the applicable minimum wage *at that time*. The 1996 language also defined which workers (by job description) were to be eligible for exemption.

In the 106th Congress, legislation (H.R. 3038 (Andrews)) was introduced that would, once again, have redefined which workers would be excluded from minimum wage and overtime pay protection as computer services *professionals*. No immediate

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[15]The exemption, under Section 13(a), is technically both from minimum wages and overtime pay. In practice, however, since the legislation includes a pay standard, it would be an overtime pay exemption. For a more extended discussion, see CRS Report RL30537, *Computer Services Personnel: Overtime Pay under the Fair Labor Standards Act*, by William G. Whittaker.

[16]*Congressional Record*, April 12, 1989, p. S3741.

[17]*Congressional Record*, October 18, 1990, p. H10563-H10565, and October 27, 1990, S17679.

action was taken on H.R. 3038. However, the substance of the Andrews bill (H.R. 3038) was incorporated into H.R. 3081 (Lazio), the umbrella tax/minimum wage measure. The composite legislation was adopted by the House on March 9, 2000 and, subsequently, dispatched to the Senate.

As passed by the House, the computer services exemption would effectively have by-passed the *professional* criteria established by DOL under Section 13(a)(1). It was structured as a categorical exemption — Section 13(a)(17). The proposed legislation retained the earnings threshold for exemption: i.e., $27.63 per hour; but, given the increase in the federal minimum wage proposed in the same legislation (H.R. 3081), that threshold would have been set at only *4½ times* the applicable minimum wage, not the original "6½ times" formula from the 1990 enactment. The bill also contained a listing of the types of work (job descriptions) that would have been eligible for exemption.[18] How the targeted computer services workers would have benefitted from the proposed exemption may not be immediately clear.

Exempting Certain Inside Sales Workers

H.R. 3081, as passed by the House, contained language that would have exempted from the minimum wage and overtime pay requirements of the FLSA employers of certain "inside sales" workers. There is no comparable provision in the Senate-passed FLSA legislation, H.R. 833.[19]

In 1938, Congress provided an exemption from the FLSA minimum wage and overtime pay requirements with respect to certain persons employed "in the capacity of outside salesman" (now Section 13(a)(1) of the Act). Such persons, working beyond their employer's base of operations, were difficult to monitor in terms of hours worked while a precise ratio of hours to wages for minimum wage calculation was almost impossible to achieve. Thus, an exemption was deemed necessary. Subsequently, special treatment was afforded certain retail and service workers paid on a commission basis and meeting other qualifications (Section 7(i)).

At least by the early 1990s, concern was voiced with respect to the relative competitive positions of wholesale and retail firms (treated differently under the Act) and of "inside" and "outside" sales staff. Outside sales personnel, proponents of change argued, had greater flexibility in that they could visit physically with clients during hours that made sense to the latter; whereas, inside sales people were desk or counter bound and worked on more or less fixed schedules. It would be an expansion of *opportunity*, it was argued, to free "inside" sales staff from the restrictions of the FLSA, allowing them to work longer hours (without an overtime pay constraint) and, thereby, to earn more. Thus, it was proposed that distinctions between "inside" and

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[18]With the rapid fluctuations within the computer services industry as technology and processes advance, one might anticipate a need for redefinition of the types of tasks that would be among those identified in the statute as exempt. Since the inventory of exemptions is broad; it might be easier to identify those who are ***not*** eligible than those who are.

[19]For an extended discussion of this issue, see CRS Report RL30003, *Modifying Minimum Wage and Overtime Pay Coverage for Certain Sales Employees Under the Fair Labor Standards Act*, by William G. Whittaker.

"outside" sales staff be modified. The change would make the law more equitable, proponents argued.

Critics of the proposal suggested that the projected amendment was unjustified: that it would leave without FLSA minimum wage and overtime pay protection workers who were previously covered inside sales personnel. These employees, it was argued, might or might not be advantaged in their work by the presumed flexibility of a new "inside sales" exemption. It was not clear, they noted, that elimination of wage/hour protection would make inside sales personnel any more efficient or expand their capacity to sell. Rather, they contended, the measure may merely provide an opportunity for employers to circumvent the minimum wage and overtime pay requirements of current law while shifting any additional costs of selling (time and effort) from the employer to the worker.

The initiative received attention during the 103rd, 104th, and 105th Congresses. H.R. 1302 (Boehner) of the 106th Congress, a free-standing bill, would, potentially, have removed the minimum wage and overtime pay requirements of current law as they affect certain inside sales workers. Although the issue had been the subject of prior hearings by the Committee on Education and the Workforce, no immediate action was taken on the Boehner bill. However, the substance of H.R. 1302 was incorporated within H.R. 3081 (Lazio), the umbrella tax/FLSA package, passed by the House on March 9, 2000, and subsequently referred to the Senate.

Clarifying the Concept of "Regular Rate"

H.R. 833, as passed by the Senate, contained language clarifying the concept of "regular rate" for purposes of calculating overtime pay under the FLSA. There was no comparable provision in H.R. 3081.

Under the FLSA, a covered worker engaged through more than 40 hours in a single workweek, must be compensated for those hours in excess of 40 "at a rate of not less than one and one-half times the regular rate" at which he is paid: i.e., *time-and-a-half*. Although it is specified in Section 7(e) of the Act, questions continue to arise with respect to what elements of compensation should be included within the concept of "regular rate." For example, under Section 7(e), the *regular rate* "shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee." But there follows seven paragraphs enumerating what the *regular rate* "*shall not be deemed to include*." (Italics added.) These include, but are not limited to, such things as "sums paid as gifts," "payments made for occasional periods when no work is performed due to vacation, holiday, illness," etc. The inventory is extensive but still leaves open an option for confusion with respect to specific definition.[20]

Under H.R. 1381 (Ballenger), the list would have been somewhat expanded. Added to the Section 7(e)(3) listing — elements not to be included within the concept of "regular rate" — would have been payments made to an employee or

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[20]Concerning a closely related issue, see CRS Report RL30542, *Stock Options and Overtime Pay Calculation Under the Fair Labor Standards Act*, by William G. Whittaker.

group of employees for "meeting or exceeding" certain levels of "productivity, quality, efficiency," etc. The conditions governing such payment are specified. Hearings were conducted by the Subcommittee on Workforce Protections (May 19, 1999) and, after consideration by the full Committee on Education and the Workforce (June 23, 1999), the bill was reported (H.Rept. 106-358) and placed on the Union Calendar (October 1, 1999). Companion legislation (S. 1878) was introduced by Senator Kay Bailey Hutchison. No further action was taken on H.R. 1381; no action was taken on S. 1878. However, the substance of the Ballenger/Hutchison proposals was added to H.R. 833 as it moved through the Senate, being passed by the Senate on February 2, 2000.[21]

Relevant Issues Not Addressed in H.R. 833 or H.R. 3081

In addition to the immediate provisions of H.R. 833 and H.R. 3081, there were several other issues that, *although not directly a part of either of those bills*, could have been impacted by adoption of new minimum wage legislation — or could have impinged upon that legislation. Among these were: ***first***, the "tip credit" provision of the FLSA; ***second***, the youth sub-minimum (or youth "opportunity") wage; and, ***third***, the question of regional sub-minima or "state flexibility."

The "Tip Credit" Provision

The treatment of tips under the FLSA (the "tip credit") has been a source of controversy through several decades. The "credit" would not have been altered under the minimum wage legislation (H.R. 833 and H.R. 3081) considered by the 106th Congress. For that reason, a new mandated increase in the federal minimum wage *might not have affected* tipped employees.

Concept and Purpose. Under the 1966 FLSA amendments, the minimum wage and overtime pay requirements of the Act were extended to workers in restaurants, hotels and motels, and certain other retail and service industries. Some employers were unenthusiastic about being brought under federal wage/hour regulation. But, as then-Senator A. Willis Robertson (D-VA) noted, Congress added

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[21]The language added by the Senate to H.R. 833 lists elements not to be deemed part of the *regular rate* as payment that:

> ... are made to reward an employee or group of employees for meeting or exceeding the productivity, quality, efficiency, or sales goals as specified in a gainsharing, incentive, bonus, commission, or performance contingent bonus plan;
> ...

It then went on to qualify the "plan" noted above by requiring that it "shall be in writing and made available to employees, provide that the amount of the payments to be made under the plan be based upon a formula that is stated in the plan, and be established and maintained in good faith for the purpose of distributing to employees additional remuneration over and above the wages and salaries that are not dependent upon the existence of such plan or payments made pursuant to such plan."

"some softening provisions," among them the provision for a tip credit.[22] "To ease the impact" of the new coverage for employers, "Congress permitted a tip credit system under which employers in the affected industries would pay 50% of the minimum wage to those employees who customarily and regularly received $20 per month in tips."[23] In some states (under state law), the tip credit is not permitted, the standard more favorable to workers (i.e., no tip credit for employers) taking precedence.[24]

Speaking generally, organized labor would have preferred that no minimum wage credit be allowed to employers from tip income, maintaining that workers ought to be paid at least the basic minimum wage **by their employers**. Tips, labor argued, are gratuities: they are irregular, often demeaning, and represent, in effect, a side arrangement between the server (or service worker of whatever sort) and the customer. Again, speaking generally, industry would have preferred a 100% tip credit, suggesting that if workers earn at least as much through tips as the applicable federal minimum wage, then the employer ought to be free from any wage obligation. While tips may technically be *voluntary*, they argued, they are customary. Further, employers argued, industry provides the context in which tips are offered: the ambience, the quality of food or lodging or entertainment, the location, etc., thus facilitating the receipt of tip income by employees. At root may be a broader question: As a matter of public policy, should tipping be encouraged?[25]

How the "Credit" Works. The option set forth in the 1966 amendments has remained in place with periodic technical amendments. For the option to have effect, several factors must be taken into account. **First.** The employee must be regularly tipped: i.e., since 1977, he or she must receive at least $30 dollars a month in tips on a regular basis. **Second.** The employee must be paid, in a combination of tips and direct wages from his employer, not less that the otherwise applicable minimum wage under the FLSA. **Third.** The employer may count tips which the employee actually receives for up to a specified portion of his (the employer's) minimum wage obligation. *Taken together, direct wages and tips, the total must provide the worker with at least the otherwise applicable minimum wage*.

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[22]*Congressional Record*, August 26, 1966, p. 20793.

[23]U.S. Congress. House of Representatives. Committee on Education and Labor. *The Fair Labor Standards Amendments of 1977. Report to Accompany H.R. 3744*. H.Rept. 95-521, 95th Cong., 1st Sess. Washington, U.S. Govt. Print. Off., 1977. p. 31.

[24]Jurisdictions that do not permit utilization of the FLSA tip credit include Alaska, California, Guam, Nevada, Oregon and Washington. Other jurisdictions, where the issue has been addressed in state law, have dealt with the matter in a variety of ways: for example, distinguishing between small and large employers, treating separate types of employment differently, etc. For a current listing of state "tip credit" standards, contact the Wage and Hour Division, U.S. Department of Labor.

[25]A collateral issue complicating the tip credit option is the manner in which tip income is to be treated for tax and Social Security purposes. Here again, the issue is disputed between workers and employers — with the federal government also involved.

The operative question is how much is paid by the employer, directly, and how much is earned through tips. At least two scenarios may apply — always assuming that the worker, covered under the FLSA, must receive not less than the statutory minimum wage. **Scenario one:** The worker earns precisely the minimum wage in combined tips and direct wages. An increase in the federal minimum wage is mandated. Unless additional tip income is forthcoming, the difference (deficiency) between the existing wage and the mandated wage will need to be made up through an employer contribution. **Scenario two:** The worker receives income both in the form of direct wages and tips which exceed the amount of a new (higher) minimum wage mandated by statute. Since the worker is already receiving, in combination, at least the full mandated minimum rate, no change will be necessary. That is to say, the employer will pay no more under an increased minimum wage than he would have been required to pay had there been no mandated increase.

How many tipped employees might directly benefit from an increase in the statutory minimum wage? It's difficult to say. If their earnings (from direct wages and tips, in combination) exceed a new higher mandated statutory minimum rate, the increase would have no direct effect upon the employer of tipped employees. Where the earnings of a worker (the combined direct wage and tips) do not reach the new statutory minimum, an employer would be required to increase his contribution through a wage increase.

Amendments and Policy Concerns. The actual formula for calculation of the tip credit has changed through a series of legislative enactments. **First.** In the 1977 FLSA amendments, the dollar test for a "tipped employee" was raised from $20 received in tips per month to $30 — the current requirement. **Second.** In the 1996 FLSA amendments, Congress changed the employer credit from a percentage of the federal minimum wage to a flat amount: i.e., not less than $2.13 per hour. (See **Table 3**)[26]

In the 1996 FLSA amendments, Congress restructured the tip credit provision. The percentage formula ("50 percent of the applicable minimum wage rate") was replaced with the following language:

> In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—
>
> (1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on the date of the enactment of this paragraph; and
> (2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under Section 6(a)(1).

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[26]The original language of the statute had set the "tip credit" that an employer could claim at a percentage of the otherwise applicable federal minimum wage. Through the years, that percentage had changed, upward and lower, with changing perspectives within the Congress.

The language is precise. By removing the percentage basis of prior law, Congress converted the credit from a sliding scale to a fixed amount. The cash amount of the credit, then, was to be the cash wage required to be paid to the employee under the then-existing tip credit option "on the date of the enactment of this paragraph." On the "date of the enactment" of the new provision, the federal minimum wage under Section 6(a)(1) was $4.25 per hour. Working from that base, the tip credit had been (at 50%) $2.13 per hour. Then, having established the dollar floor for the tip credit, Congress raised the minimum wage to $5.15 per hour. The result was that employers of tipped employees could pay a cash wage as low at $2.13 per hour so long as the difference between that amount ($2.13) and $5.15 was accounted for in tips. Because the credit floor is now set at a fixed statutory level (rather than a percentage of the minimum wage), it will remain at $2.13 per hour unless or until modified by the Congress.

Thus, even were Congress to raise the federal minimum wage, employers of regularly tipped employees will be able to continue to pay $2.13 per hour — as long as tips, actually received, account for the difference between the employer floor ($2.13 per hour) and a new statutory minimum wage. The minimum wage/FLSA legislation proposed during the 106th Congress (H.R. 833 and H.R. 3081) would have made no change with respect to the tip credit.

Table 3. Tip Credit, Cash Wages and Employee Earnings Under Various Scenarios with the Current Structure Under the Fair Labor Standards Act

Scenario	Employer must pay at least	Minimum tip income (employee contribution)[a]	Total employee earnings	Additional income, tips
Minimum wage at $5.15 per hour[b]	$2.13	$3.02	$5.15	Open
Minimum Wage at $6.15 per hour[c]	$2.13	$4.02	$6.15	Open
Minimum Wage at $7.72 per hour[d]	$2.13	$5.59	$7.72	Open

[a] Whether "tip income" is an indirect employer contribution or a separate arrangement between the worker and the tip giver is a matter of definition and concept. It is not a direct employer contribution, however, and it not directly affected by a change in the federal minimum wage rate.
[b] Federal minimum wage rate under existing statute.
[c] Federal minimum wage rate as proposed under H.R. 3081 and H.R. 833.
[d] Federal minimum wage rate had it been increased to conform to the 1968 standard. Whatever level the rate may subsequently be raised, the direct employer contribution ($2.13 per hour) will remain unchanged unless Congress takes specific action to alter it.

There are, however, a number of options available to the Congress in this area. It could find the current situation satisfactory and maintain it. It could abolish the tip credit altogether, leaving the basic minimum wage as the floor — an option that could encounter significant employer opposition. It could return to a percentage formula,

reestablishing a ratio between the tip credit and the minimum wage. Or, it could raise the qualifying dollar volume of tips necessary for an employee to qualify as a *regularly tipped* employee: for example, from the current $30 per month in tips (i.e., about $1.35 a day in tips which some may regard as too inclusive) to a more substantial amount.

Representative Bilbray raised a related issue which he addressed in free-standing legislation (H.R. 1921): whether the states can preclude or restrict, as some do now, the exercise of the tip credit option. H.R. 1921, which was referred jointly to the Committees on Ways and Means and Education and the Workforce, provided that the tip credit could not be preempted by state law. No action was taken on the Bilbray proposal.

The Youth Sub-Minimum Wage

Under the 1996 FLSA amendments, a general (but limited) sub-minimum wage for persons under 20 years of age was established. It set the minimum wage for such workers at $4.25 per hour. The option will remain in effect until specifically altered by Congress.

Emergence of a Sub-Standard Wage Concept. In the National Recovery Administration (NRA, 1933-1935), provision was made for sub-minimum wage rates for persons with disabilities, trainees, and certain others. The arrangement was perceived as a means through which to offset the *alleged* reduced productivity of these workers. That such workers actually were sub-standard (of reduced productivity for the types of work for which they were hired) was not always demonstrated. Some employers, it was alleged, simply defined segments of their workforce as of reduced productivity in order to avail themselves of the sub-minimum wage option and, thereby, to enhance their profits. Similar provisions were written into the FLSA in 1938: special rates for learners, apprentices, messengers, and the "handicapped."[27] Thus, for employers to pay lower (sub-minimum) wages became something of a public virtue since, it was alleged, it assisted the disadvantaged in their quest for work.

During the 1960s, Congress extended minimum wage coverage to workers in the retail and service industries and in agriculture — areas in which there had, traditionally, been high concentrations of low-wage workers. These were also industries in which large numbers of youth workers were employed: by some estimates, about 30% of the workforce in food services. In these types of employment, little training was normally required — and little appears to have been given. Turnover rates were often high; employment, frequently, seasonal. In part to soften the immediate impact of FLSA coverage for employers, retail and service establishments were allowed, under a program of DOL certification, to employ certain

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[27]A discussion of this issue appears in Wolters, Raymond. *Negroes and the Great Depression: The Problem of Economic Recovery*. Westport, Conn.: Greenwood Publishing Corporation, 1970. See also Schoenfeld, Margaret H. Analysis of the Labor Provisions of N.R.A. Codes, *Monthly Labor Review*, March 1935, p. 547-603.

full-time students, working part-time, at a sub-minimum wage. With subsequent modifications, this option remains a part of the statute.[28]

As the requirements of the new FLSA coverage began to be felt, industry pressed for a broader option — a general sub-minimum wage for youth.[29] Several themes were central to industry's argument. **First**, employers could not afford to pay the higher wages: i.e., the minimum legally allowable under the FLSA. **Second**, young persons (especially minority youth) suffered from high rates of unemployment. If employers could pay these persons a lower wage they would hire more of them. **Third**, if employers could pay their younger workers at a lower rate, they would be willing to provide them with more training.[30]

Opponents of the youth sub-minimum wage have argued that there was little evidence that youth workers actually were less productive than older workers (for the types of work for which they were hired). Nor, they argued, was there evidence that reducing the wage rate would actually result in the employment of any significant number of additional workers. Firms seeking to hire youth workers at reduced wages (at sub-minimum rates) were not required to demonstrate their inability to pay the ordinary minimum wage.

In the 1970s, industry pressed for a general youth ***sub-minimum wage***; but, after extended debate, Congress rejected the proposal. In the early 1980s, the focus shifted to a youth ***opportunity wage***: i.e., if paid less, young persons would have an increased opportunity for employment. Again, after extended and heated debate, Congress refused to accept the proposed lower wage initiative. With the 1989 FLSA amendments, at the urging of then-President Bush, Congress approved a ***training wage*** provision under the FLSA. It permitted employment of youth workers (persons under 20 years of age) through the first 90 days of employment *without conditions* and through a second 90-day period *if training were provided*. The training wage option was allowed to *sunset* on April 1, 1993. It did so, having been little used and, according to the *Wall Street Journal*, drawing "Few Mourners."[31]

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[28]Section 14(b) of the FLSA.

[29]The concept of "youth" was variously defined: all workers under 18 years of age, under 21, or under 24 years of age depending upon the proposed legislation. Some urged establishment of a sub-minimum wage for new hires, regardless of age or experience; others, for "older" workers.

[30]Some analysts question what training employers would provide to youth workers under a sub-minimum wage option that they would not, routinely, provide to any workers in their employ. They note that the sub-minimum was, in effect, projected as an offset for the cost of routine training and for the alleged lower productivity of youth workers. See CRS Report 84-699, *The Youth Sub-Minimum Wage: An Overview of Recent Consideration*, by William G. Whittaker, available from the author.

[31]Salwen, Kevin G. Subminimum Wage of $3.62 an Hour is on Deathbed but Draws Few Mourners, *The Wall Street Journal*, March 12, 1993. p. A 4. See also, United States Department of Labor, Employment Standards Administration. *Report to the Congress on the Training Wage Provisions of the Fair Labor Standards Act Amendments of 1989 from the Secretary of Labor*, April 21, 1993 (mimeographed). 24 p.

The inference might be drawn that the 1989 experiment had been a failure. Why it had failed (if one accepts that assessment) may be subject to dispute. However, there appears to have been little further public advocacy of a youth sub-minimum wage after 1993.

The minimum wage, *per se*, had eroded during the 1980s; its value had not been fully restored by the 1989 amendments. After April 1991, when the final step increase (to $4.25 per hour) took effect, attention shifted to a further round of general minimum wage increases. Rather than follow the routine hearings/mark-up/report format, the 1996 FLSA amendments came to the floor as an amendment to tax legislation.[32] In that manner, the new FLSA language (containing a new ***opportunity wage*** provision) was called up, passed, and signed by President Clinton (P.L. 104-188). Although it had been a major focus of contention through prior decades, the youth sub-minimum seemed to attract little notice in 1996. No hearings were held on the provision; only modest debate was sparked.

The "*Opportunity Wage*" of 1996. Under the 1996 FLSA amendments, an employer may pay "an employee who has not attained the age of 20 years" a sub-minimum wage of not less than $4.25 per hour "during the first 90 consecutive calendar days after such employee *is initially employed by such employer*." (Italics added.)

Unlike the 1989 experimental youth sub-minimum, the 1996 version contains no training component and has no DOL certification constraint. It allows employers, at their discretion and through the specified time period, to pay the targeted workers at a lower rate. No special review or oversight was mandated by the 1996 amendments (as had been under the 1989 training wage program). No impact assessment would be required.

The provision, titled an "opportunity wage" seemed structured to meet the requirements of hospitality industry employers. First, the 90 consecutive calendar day limitation could coincide with peak seasonal manpower utilization in hotel/restaurant and agricultural employment — and with student summer vacation periods. Second, the phase "initially employed by such employer" seemed to make cyclical employment at a sub-minimum wage feasible. For example, a student might work through a 90-day (3 month) period at the sub-minimum rate, return to school, and find summer employment with a different employer the following summer — again at the sub-minimum wage, continuing through several summers (or other work periods) until he (or she) reached 20 years of age.[33]

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[32] Although hearings had been conducted on minimum wage theory and on certain more narrow aspects of the FLSA, the sub-minimum wage option had not (in the context of the 1996 legislation) been a part of that process.

[33] Arguably, for unskilled or low-skilled seasonal work at low wages, there would be an incentive for employers not to rehire youth workers for a second 90-day work period. The only constraint the provision imposes upon employers is that they may take no action "to displace employees" in order to hire cheaper workers at a sub-minimum rate. In seasonal employment, however, that issue would seem moot. Some question whether such anti-

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Having set the youth sub-minimum wage in statute at $4.25, Congress then raised the general minimum wage to $5.15 per hour. Even were Congress to raise the general minimum wage — as is now proposed — to $6.15 per hour, the youth sub-minimum wage would remain unchanged at $4.24 per hour. *A change in the latter requires specific action by the Congress*.

> *For 1999, about 30.1% of workers, paid hourly, at or below the federal minimum wage rate, were in the 16-19 year old age bracket.* (**Source:** U.S. Bureau of Labor Statistics.)

Because so many young persons (due to time constraints imposed by their academic work) are concentrated in seasonal and/or low-wage industries and move in and out of employment, the existence of the sub-minimum wage can be significant. It diminishes the protections ordinarily provided by the general minimum wage under the FLSA. Proponents affirm that it allows for the employment of more youth workers by paying them at lower rates. Opponents see it as undercutting the bargaining power of young persons, rarely unionized, as they enter the world of work. Others are concerned that it may place sub-minimum wage youth workers in direct competition with unskilled adult workers — particularly as substitutes for women reentering the workforce and for minorities.

Restoring *Equity* or Maintaining *Opportunity*? Whether a sub-minimum wage can be defined as an *opportunity* wage *for youth* is open to debate. Advocates of the option have argued that it is just that: an opportunity to grasp *the bottom rung on the ladder of upward mobility*. Conversely, critics have argued that it presents employers an opportunity to enhance their profits by reducing labor costs: i.e., hiring workers whom they need and would have hired, in the absence of a reduced wage option, but whom they would be able to hire, under the *opportunity* wage, at lower rates. Proponents of the option, pointing to the employment problems of urban minority youth, contend that this economically disadvantaged group needs a boost — and they would provide that extra help by reducing the entry-level wage rate for all qualifying youth workers. Further, some would argue, with a seasonal or intermittent workforce, employers can avoid the need for certain fringe benefits that may be regarded as routine in industries where employment is more stable.

Equity, at least for the workers involved, may be a more contentious matter. Short term employment may suit, precisely, the personal requirements of the low-wage workforce. And, if the wage is low, the employment may be transitional: a job held through a short period, likely at entry-level. However, according to the Bureau of Labor Statistics, almost 70% of the workforce, paid on an hourly basis and earning at or below the federal minimum wage, is composed of older workers (those over 20 years of age). These older workers, nearly 64% of whom are women, may not be moving quickly into more remunerative employment — and may be engaged in less glamorous forms of low-wage work. They may find themselves in competition with younger, cheaper, sub-minimum wage workers employed under the *opportunity wage* option.

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[33](...continued)
displacement provisions can be enforced.

With respect to the youth sub-minimum wage, several options would seem to be open to the Congress, among them, the following. ***First.*** Congress could affirm that the provision is operating as intended and that no change is needed: that is, that it intends that $4.25 per hour should remain the wage floor for workers who are not yet 20 years of age, and that the $4.25 per hour rate should not be altered when (if) Congress raises the otherwise applicable minimum to $6.15 per hour or to some higher amount. ***Second.*** If Congress finds that a youth sub-minimum wage is appropriate but that the rate should be changed, it could set a new fixed statutory level. Or, conversely, it might establish a sub-minimum rate at a proportion of the general minimum: for example, 85% of the otherwise applicable minimum wage or, perhaps, 50 cents an hour less than the general statutory minimum. ***Third.*** Congress could retain the youth sub-minimum wage option but make internal changes in the provision. For example, it might eliminate the potential for cyclical utilization of the option (and make it apply, literally, to new labor market entrants) by limiting its use to one 90-day period per employee — not repeatable. It could require that some documentable training be provided to the youth workers where employers avail themselves of the reduced wage option. ***Fourth.*** Congress might mandate a new impact analysis of the youth sub-minimum wage option (and, possibly, of other sub-minima under the FLSA) so that it would have a more extensive informational base from which to assess the program(s). ***Fifth.*** Congress could conclude that the option is inappropriate and that it should be terminated.

State Flexibility/State's Option

During the first session of the 106th Congress, Representative DeMint introduced legislation (H.R. 2928) that would have allowed *state flexibility* in setting minimum wage standards — including the option of setting a standard lower than the otherwise applicable federal wage floor. Legislation generally of similar content (S. 1887) was introduced in the Senate by Mr. Enzi.[34] The bills were referred to committee; no action was immediately taken — though the concept received attention from industry-oriented groups. During House consideration of minimum wage legislation in March 2000, state flexibility was considered — but, then, set aside for later consideration. In July 2000, Representative DeMint introduced a revised version of H.R. 2928: now, H.R. 5026. It would have *permitted* states to set minimum wages at $5.15 per hour — and, thereafter, would have allowed industries operating in those states to be exempt from FLSA minimum wage rate requirements. While the 106th Congress did not approve *state flexibility* with respect to the federal minimum wage, the concept remains under active consideration in public policy circles.

Early Debate on Regional Standards. Through nearly half a century prior to enactment of the FLSA in 1937-1938, various levels of government below the federal had wrestled with regulation of labor standards: minimum wages, hours of

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[34]Though the purposes of H.R. 2928 and S. 1887 appeared to be similar, the wording of the two measures was somewhat different. *Inter alia,* S. 1887 would have extended the minimum wage provisions of the FLSA to "the territories and possessions of the United States (including the Commonwealth of the Northern Mariana Islands) in the same manner as such provisions apply to the States." This would have ended, among other things, the current exception in the FLSA with respect to American Samoa.

work, child labor, and related issues. But, the resulting regulation was irregular which allowed firms, particularly in highly mobile industries where wages were low, to play one jurisdiction against another, migrating (or threatening to migrate) to less restrictive environments. Thus, concern with local/regional economic stability and growth argued against higher labor standards. Further, some industries (and regions) chose to compete on the basis of low labor costs — which, some argued, meant depressed living standards for their citizen/workers.

In June 1937, as Congress took up the legislation that would evolve into the FLSA,[35] it began with the assumption that not less than 40 cents an hour would provide a reasonable minimum wage rate for Depression-era America. As the legislation moved through the Congress, it was variously modified. Witnesses pointed to regional differences in living costs, degree of mechanization, freight rates and availability of transportation, "efficiency" and culture, potential for industrial migration, and other competitive factors. Should there be regional differentials; and, if so, on what basis? Into how many regions should the country be divided? What about intra-state divisions: i.e., urban vs. rural? How long might such differentials remain in place? Overall, would regional standards facilitate or injure local development and growth? Should all industries within a region be similarly treated? And, which workers? Who should set the standards (and measure the criteria) for special wage treatment?[36]

The concept of regional standards/local flexibility was not new; and, indeed, it was a part of the consciousness of many Members of Congress in 1937-1938. It had been tried earlier in the decade with the National Recovery Administration (NRA) in which labor standards protections were structured along regional lines. The result, it has been argued, was manipulation of wage standards so that certain groups of workers (notably, black workers in the South — but others as well) were excluded from protection.[37] There were various minimum wage "differentials under the codes — differentials by industries, by regions, by size of community within a region, and, in a few instances, by sex," observes historian Arthur Raper. "In every code where a regional minimum wage differential is mentioned, the wage in the South is the lowest in the nation."[38]

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[35]See Chambers, John W. The Big Switch: Justice Roberts and the Minimum-Wage Cases, *Labor History* (1969), p. 44-73.

[36]See *Congressional Record*, November 9, 1999. p. S14409-S14410.

[37]See testimony of John P. Davis, National Negro Congress, in U.S. Congress. Senate. Committee on Education and Labor; House. Committee on Labor. *Fair Labor Standards Act of 1937*. Joint Hearings, 75th Cong., 1st Sess., Part 1-3, June 2-22, 1937. p. 571-575. (Hereafter cited as Joint Hearings, *Fair Labor Standards Act of 1937*) Simon, Bryant. *Fabric of Defeat: The Politics of South Carolina Millhands, 1910-1948* (Chapel Hill, University of North Carolina Press, 1998), p. 92, reports: "Some mills reclassified veteran employees as learners, and others simply paid spinners [for the most part, female] as little as they could get away with."

[38]Raper, Arthur F. The Southern Negro and the NRA, *The Georgia Historical Quarterly*, summer 1980, p. 129-131.

The NRA differentials produced a range of problems. Representative Glenn Griswold (D-IN) stated that a line had been drawn across the country "roughly on a level with Wheeling, W. Virginia." South of that line, "they had a differential in wages of a dollar [a week] less than north of the line." Were a similar policy adopted with respect to the FLSA, Representative Griswold argued, business would "automatically ... avail itself of that differential in pay, just as the garment industry did under the N.R.A."[39] John Edgerton of the Southern States Industrial Council, a proponent of regional flexibility, admitted that he had heard of entreaties to manufacturers to move south to enjoy the advantage of "cheap and docile labor." He thought, however, that such appeals were unusual. Still, he acknowledged that "living costs are lower in rural communities"[40] and that the South has the advantage "of climate, longer working hours, and the rural areas where ... [firms] ... can put their plants, and where their employees can have their gardens and where living costs are less, and so forth." While denying that the South was trying to encourage industrial migration, he affirmed that it was seeking "to attract investment."[41]

Gradually, a consensus had developed — though it did not represent total agreement. As Lucy Randolph Mason of the National Consumers' League summed it up: "No State and no area is self-contained and self-sufficient, for the industrial and commercial life of all the States and all the regions of the Nation is interdependent."[42]

After a year of debate, Congress opted for a single *national* minimum standard, reflective of a *national* economy. Rather than institute a high minimum wage standard (40 cents an hour), Congress set the *floor* at 25 cents per hour — to increase in steps to 40 cents an hour by October 1945. In addition to a lower wage standard and a 7-year phase-in period, the original FLSA included significant exemptions: notably, for agriculture, retail and service industries, and for much intra-state commerce. From this base, the states could enact higher standards (as many would) but they could not fall below the federally mandated level.[43] (See **Table 4**)

A Continuing Concern. Skepticism with respect to the efficacy of a federal minimum wage continued after enactment of the FLSA in 1938.[44] Almost

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[39] Joint Hearings, *Fair Labor Standards Act of 1937,* p. 40-41.

[40] *Ibid*., p. 766.

[41] *Ibid*., p. 786-788. See also: Hodges, James A. *New Deal Labor Policy and the Southern Cotton Textile Industry, 1933-1941* (Knoxville, The University of Tennessee Press, 1986), p. 13, argues: "The favorable wage differential was undoubtedly the largest single reason for the flight of spindles from North to South."

[42] Joint Hearings, *Fair Labor Standards Act of 1937,* p. 406.

[43] Where economic or other considerations have, in the judgment of the Congress, warranted, exemptions have been built into the Act. Adjustment of the application of the statute commenced almost immediately, a gradual expansion of coverage continuing through the 1977 FLSA amendments. Since 1977, the trend has been toward refinement of existing requirements and, in the late 1980s and through the 1990s, expansion of exemptions.

[44] In the original enactment, Congress had established a national minimum wage for covered employment: i.e., 25 cents per hour. At the same time, it established a system of industry

(continued...)

immediately, employer interests in Puerto Rico urged that a special insular minimum wage be allowed, arguing that conditions in the Commonwealth were markedly different from those of the mainland and that "failure to secure relief [from FLSA wage/hour requirements] means the total collapse of industries vital to our economic structure" with adverse results for the "thousands of wage earners dependent thereon."[45] Congress concurred and in June 1940, the Act was amended to provide a sub-minimum wage structure for Puerto Rico and the Virgin Islands — an arrangement phased-out with the 1989 FLSA amendments. In 1956, at the urging of spokespersons for the tuna industry, special provision was made for an insular sub-minimum wage for American Samoa — an interim measure to allow the Samoan economy time to adjust to national standards. The special rate option remains in effect.[46] During the mid-1970s, as the United States finalized its relationship with the Northern Mariana Islands, local control over the minimum wage was established as part of the status agreement (the Covenant of Association).[47]

With respect to the insular territories, separation from the mainland made plausible the argument for special treatment; but, Congress showed no disposition to institute a similar arrangement (regional sub-minima) for the states or for Hawaii and Alaska. The concept, however, did not entirely disappear. During hearings in 1995, Senator Kassebaum, then-chair of the Committee on Labor and Human Resources, questioned whether it might be appropriate "to let the State[s] decide" what the minimum wage should be: i.e., "to let each State decide to either opt in or opt out, because States do differ." Responding, Labor Secretary Robert Reich suggested that such an arrangement could pit the states against each other in a downward wage spiral. "We do not want to place any single State at a competitive disadvantage." Later, he added: "... in 1938, when there was far less interstate commerce than there is today, the Nation decided to set a minimally decent floor, because we were a Nation, and ... commerce was national commerce."[48] The issue was not then pursued.

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[44](...continued)
committees through which, administratively, a rate in excess of 25 cents but less than 40 cents an hour could be fixed on an industry-by-industry basis. Employers were free to pay higher wage rates at their discretion.

[45]Appendix to the *Congressional Record*, May 2, 1940, p. 2632-2633; and Section 3, Public Resolution No. 88, June 26, 1940.

[46]See P.L. 84-1023, August 8, 1956.

[47]For a more extended discussion, see CRS Report RL30235, *Minimum Wage in the Territories and Possessions of the United States: Application of the Fair Labor Standards Act*, by William G. Whittaker.

[48]U.S. Congress. Senate. Committee on Labor and Human Resources. *Fair Labor Standards Act: The Minimum Wage. Hearing on Examining Proposed Legislation To Increase the Federal Minimum Wage*. 104th Cong., 1st Sess., December 15, 1995. Washington, U.S. Govt. Print. Off., 1996. p. 17 and 26.

Table 4. Status of Local/State Minimum Wage Rates[a]

Jurisdictions with minimum wage rates *higher than* the federal FLSA		
Alaska	District of Columbia	Rhode Island
California	Hawaii	Vermont
Connecticut	Massachusetts	Washington
Delaware	Oregon	
Jurisdictions with minimum wage rates *at the same level as* the federal FLSA		
Arkansas	Michigan	North Dakota
Colorado	Minnesota	Oklahoma
Guam	Missouri	Pennsylvania
Idaho	Montana	South Dakota
Illinois	Nebraska	Utah
Indiana	Nevada	Virginia
Iowa	New Hampshire	West Virginia
Kentucky	New Jersey	Wisconsin
Maine	New York	
Maryland	North Carolina	
Jurisdictions with minimum wage rates *less than* the federal FLSA		
American Samoa	New Mexico	Texas
Georgia	Ohio	Virgin Islands
Kansas	Puerto Rico	Wyoming
Jurisdictions with *no* minimum wage requirement		
Alabama	Louisiana	Tennessee
Arizona	Mississippi	
Florida	South Carolina	

Source: U.S. Department of Labor, Wage and Hour Division, Employment Standards Administration, August 1, 2000.

[a] Coverage patterns vary from one jurisdiction to another. Some jurisdictions have a structured minimum wage system: i.e., different rates for various industries, sizes of firms, etc. The table refers to the highest standard applicable under the law of the jurisdiction. In some jurisdictions, the rate (but not necessarily the pattern of coverage) is linked to the federal FLSA. Some states, though with a minimum wage statute in place, have a standards so low that the standards may be largely irrelevant.

The New "Flexibility" Proposals. Through the 1990s, the question continued to be raised by groups generally dubious about a national minimum wage and, specifically, about the impact of increases in the minimum rate. With changes in welfare law and the new responsibilities of the states in effecting welfare-to-work transition, some argued that the states ought to have enhanced flexibility with respect to the minimum wage: in effect, the option of creating separate state sub-minima below the national FLSA standard. As with the youth sub-minimum wage, it was argued that welfare recipients would find it easier to secure employment if firms were allowed to pay them at a lower rate.[49]

The industry-oriented Employment Policies Institute pointed out that "areas with record low unemployment are absorbing higher entry-level wage rates without regard to mandated wage levels." It observed, however, that the economy was not equally strong throughout the nation with "pockets of slow growth." Given such economic disparities, it stated, "the one-size-fits-all approach of a federal minimum wage does not make sense." It argued, "Governors should be given the opportunity to act as they see fit with regard to local labor markets, without the burden of a federal mandate that ignores all local labor market conditions." Further, "By tying the minimum wage to local conditions, its negative effect on reducing education and training opportunities for low-income adults can be minimized."[50]

From The Heritage Foundation, Mark Wilson has called for state flexibility to deal with welfare-to-work transition. Wilson pointed to the "enormous flexibility" that the states have been given in dealing with welfare issues and urged: "Congress should adopt a similar perspective with regard to federal mandates on entry-level wages." He asserted that "a one-size-fits-all federal minimum wage would undermine state efforts to move Americans from welfare to work" and affirmed that "governors and state legislators are in a better position than are Members of Congress" to set "appropriate entry-level wage levels for their own areas."[51]

It appears that pending *state flexibility* legislation would, potentially, exempt all industries within a state from federal minimum wage requirements, not just those that were economically stressed. Similarly, all workers could be denied minimum wage protection, not just those making the transition from welfare to competitive employment. Thus, opponents of the legislation are concerned that the implications are far broader than references to welfare reform might suggest. Further, some believe that if the states were given the right to opt in or opt of federal law at their individual discretion, the federal requirement would be emasculated. With time, they argue, the national standard could collapse into a maze of diverse and often conflicting state standards: confusing to employers and to workers alike.

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[49]See CRS Report 97-1038, *Welfare Recipients and Workforce Laws*, by Vee Burke.

[50]See *State Flexibility*. Employment Policy Institute, July 1999. Downloaded from: [epionline.org], October 25, 1999. The relationship between a minimum wage requirement and training given to or withheld from minimum wage workers is at best ambiguous. That *non-essential* training is provided to low-wage and, often, short-term employees, is not clear.

[51]Wilson, Mark D. *Successful Welfare Reform Requires State Flexibility on the Minimum Wage*. The Heritage Foundation Executive Memorandum No. 625, September 20, 1999. Downloaded from: [epionline.org], August 22, 2000.

From the inception of the FLSA, Congress has established a general wage floor. Currently, there is upward flexibility where the states are concerned: they are free to set higher minima than those required under the FLSA and more comprehensive coverage standards. They may not set a lower standard.

On the other hand, proponents of change argue that minimum wage and, by inference, other labor standards are more appropriately left to local authorities. Senator Enzi has affirmed that "the number of dollars a worker gets paid has a drastically different impact from one state to another and even from one county to another." The "cost of living in New York or Boston, or Los Angeles is drastically higher than it is in rural towns."[52] Thus, he suggests, "a wage level increase across the board" may be ill-advised in economic terms. "If there is a minimum wage disparity for workers in those states with higher costs of living, then why are we raising the minimum wage in every state just to compensate for those states where it costs more to live?" Senator Enzi asks. "Why are we endangering the economic stability of rural states and counties by not considering this reality?"[53]

A New Initiative as the 106th Congress Neared Adjournment: H.R. 2614

As the 106th Congress drew to a close, there remained a number of appropriations measures and other matters to be dealt with. Time constraints complicated consideration of minimum wage and related legislation. Eventually, time would run out. The federal minimum wage, with other aspects of the FLSA, would remain unchanged.

On October 25, 2000, Representative Traficant introduced H.R. 5538, a free-standing bill to raise the federal minimum wage to $6.15 per hour over a 2-year period. It proposed no other changes in the FLSA. By reference, the Traficant bill was immediately incorporated within the conference report to accompany H.R. 2614, the "Certified Development Company Program Improvements Act of 1999" — an umbrella measure dealing with small business, taxes, healthcare, and other issues. The advanced legislative status of H.R. 2614 made it an attractive vehicle for a series of policy initiatives. However, the diversity of the bill also made it a likely target for a Presidential veto were it approved by Congress.

On October 26, 2000, by a vote of 207 yeas to 200 noes (26 not voting), the House adopted H.Res. 652, making in order consideration of the conference report on H.R. 2614.[54] Critics of the legislation argued that the bill, "a 960-page document," had been developed hurriedly and had just been presented to the Members. Some

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[52]In New York, the state minimum wage is $5.15 per hour; in California, it is $5.75; in Massachusetts, $6.00 (to increase to $6.75 on January 1, 2001). The state minimum wage in Wyoming is $1.60 per hour.

[53]*Congressional Record*, November 9, 1999. p. S14409-S14410.

[54]*Congressional Record*, October 26, 2000. p. H11209-H11230.

charged that "[n]o one knows what is in it."[55] Proponents, conversely, offered reassurance that the bill contains a "long list of good things" and should be supported.[56] Further, they suggested, the majority of the provisions of the package had been considered by Congress in other contexts and, thus, were not entirely new. Although a number of Members noted the inclusion of the minimum wage provision within the legislation, the policy implications of the issue were not pursued during floor debate. On a final vote, the conference report was approved in the House by 237 yeas to 174 noes with 21 not voting and one Member voting present.[57]

A drafting error was subsequently detected in the minimum wage provision of H.R. 2614: the House approved H.Con.Res. 439 directing the Clerk of the House to make a technical correction so that the provision, as corrected, would raise the minimum wage to $5.65 per hour on January 1, 2001, and to $6.15 per hour on January 1, 2002.[58]

The Senate commenced consideration of the conference report on H.R. 2614 on October 26, 2000, with discussion continuing through October 31, 2000. Before it could take final action on the matter, the Senate recessed for the November federal elections.[59] Then, in mid-December 2000, Congress moved on to consideration of the "Consolidated Appropriations Act 2001." The minimum wage/FLSA package would be left for consideration by the 107th Congress

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[55]*Congressional Record*, October 26, 2000. p. H11216.

[56]*Congressional Record*, October 26, 2000. p. H11214.

[57]Congressional Record, October 26, 2000. p. H11243-H11264.

[58]Congressional Record, October 30, 2000. p. H11552 and H11555.

[59]See *Congressional Record*, October 26, 2000. p. S11097-S11100, S11104, S11107-S11111, and October 31, 2000. p. S11416-S11417.