97-532 E

Federal Regulation of Working Hours: Consideration of the Issues Through the 105th Congress

Updated May 24, 1999

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ABSTRACT

Legislation to modify the overtime pay requirements of the Fair Labor Standards Act to permit more flexible work scheduling for private sector workplaces has been under consideration through the 104th and 105th Congresses. This report summarizes hearings, floor debates and related documents produced *during those two congresses*. It will not be updated further.

Federal Regulation of Working Hours: Consideration of the Issues Through the 105th Congress

Summary

The 104th and 105th Congresses actively considered legislation to alter the 40-hour workweek under the Fair Labor Standards Act (FLSA) and to modify the Act's overtime pay requirements. These initiatives proposed alternative work scheduling options for the private sector, such as *compensatory time off*, *compressed scheduling*, and *flexible credit hours*.

In the 104th Congress, hearings on workhours regulation were conducted in the House of Representatives and in the Senate respectively on H.R. 2391 (Ballenger) and S. 1129 (Ashcroft). On July 30, 1996, the House passed H.R. 2391 (comp time); the measure was not considered by the Senate. In mid-1996, President Clinton proposed flexible workhours legislation, going beyond the FLSA by urging expansion of the Family and Medical Leave Act (1993). Sent to Congress in the fall of 1996, the Clinton proposal was not acted upon.

Modification of the 40-hour workweek standard was urged by the industry-oriented Labor Policy Association and the Flexible Employment Compensation and Scheduling Coalition (FLECS), among other groups and individuals. It was opposed by the AFL-CIO, by certain women's advocacy groups, with other individuals. The initiative died at the close of the 104th Congress but it sparked considerable interest within Congress and a spirited public debate.

Early in the 105th Congress, alternative work scheduling legislation was again introduced: S. 4 (Ashcroft) and H.R. 1 (Ballenger). The bills were almost immediately the subject of hearings in the Senate and the House. On March 5, 1997, the Committee on Education and the Workforce reported H.R. 1; on March 19, 1997, it was passed by the House. In early April, 1997, the Senate Committee on Labor and Human Resources voted to report S. 4; but, when floor consideration was attempted, the measure was blocked when a series of cloture votes failed. The legislation died at the close of the 105th Congress.

These proposals were technical and contentious. Hearings, continuing intermittently through two Congresses (March 1995 to early 1997), produced sharply differing opinions. Was such legislation needed? If so, what form should it take? And, would the proposed measures have the effect of setting aside the 40-hour pre-overtime pay standards of the FLSA and, in the process, vitiate worker protections? Central to the debate was *worker choice*. Would participation in an alternative workhours program and use of earned comp time or credit hours, etc., be at the discretion of the worker or at the direction of the employer? Conversely, how much worker protection (with regulatory and reporting requirements) could be built into the legislation without rendering it unattractive to employers?

Evolution of these proposals through the 104th and into the 105th Congresses is dealt with in CRS Report 96-570, *Federal Regulation of Working Hours: An Overview*. This report focuses upon comp time and related issues through the close of the 105th Congress.

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Federal Regulation of Working Hours: Consideration of the Issues Through the 105th Congress

During the 104th and into the 105th Congress, there was an initiative to permit modification of the 40-hour workweek standard under the Fair Labor Standards Act and the Act's overtime pay requirements. This report examines workhours issues raised in recent congressional hearings, floor debates, and related documents. To the extent feasible, it uses the actual language of proponents and critics of alternative scheduling concepts. It is intended to serve as a supplement to CRS Report 96-570, *Federal Regulation of Working Hours: An Overview*, which traces the evolution of federal workhours regulation with the legislative history of the several bills.

Workhours legislation received committee and floor consideration during both the 104th and 105th Congresses. For the most current information about pending legislation, please consult the Legislative Information System (LIS) at [http://www.congress.gov].

Introductory Comment

Speaking generally, the Fair Labor Standards Act (FLSA) of 1938, as amended through the years, requires that a worker receive not less than one-and-one-half times his (or her) regular rate of pay (*time-and-a-half*) for hours worked in excess of 40 per week. Within a 40-hour workweek (taking into account the terms of any collective bargaining agreement that might be in place), the employer is allowed reasonable flexibility. *Any configuration of hours is permitted within the 40-hour weekly pattern* (e.g., 5 days of 8 hours, 4 days of 10 hours, 2 days of 20 hours) *so long as the total hours worked do not exceed 40 in a single week*. Within that context, flexible hours of work, compressed scheduling and comp time are permitted. By the early 1990s, just over 76 million nonsupervisory employees were covered by the overtime pay provisions of the Act.[1]

Beginning in the late 1960s, various initiatives were proposed that would have altered workhours regulation with respect to federal employees, permitting wider flexibility: i.e., alternative work scheduling. In 1978, Congress adopted legislation setting in motion a period of experimentation with flexible and compressed work scheduling for federal employees — an initiative that became permanent after 1985. That same year, the U.S. Supreme Court ruled that employees of state and local

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[1] U.S. Department of Labor. Employment Standards Administration. *Minimum Wage and Maximum Hours Standards under the Fair Labor Standards Act (Section 4(d)(1) Report).* Washington, 1993. p. 25. For the Fair Labor Standards Act, see 29 U.S.C. 201 ff.

governments were protected by the Fair Labor Standards Act. Following public discussion and hearings, Congress amended the FLSA to allow state and local government employers to offer compensatory time off instead of cash overtime pay to their workers. Given these public sector precedents, some suggested a similar arrangement for private sector employers.

In March of 1985 (and for a number of years thereafter), Senator Malcolm Wallop (R-Wyo.) proposed legislation setting aside the 40-hour workweek requirement of the FLSA to allow employers, with worker consent, to trade overtime hours worked for subsequent paid time-off (comp time). The workers would have accrued comp time on a straight time basis: one hour of overtime worked (i.e., hours worked in excess of 40 per week) for one hour of paid comp time. This would have freed employers from the overtime pay (time-and-a-half) requirements of the FLSA, thus reducing their labor costs. The workers would have lost the added cash value of overtime pay (time-and-a-half) while the income earned through working extra hours (in excess of 40 per week) would have been deferred: that is, taken as paid time off when it would not disrupt the employer's business. The legislation was not enacted, but interest in changing the FLSA 40-hour workweek standard for the private sector remained. By the mid-1990s, such legislation was again under active consideration.

In the 104th Congress, Senator Ashcroft introduced S. 1129 providing, *inter alia*, for comp time, compressed scheduling, and flexible credit hours. H.R. 2391 was introduced by Representative Ballenger: a more limited proposal that would have extended the comp time option, available to state and local government employers, to those of the private sector. The House Subcommittee on Workforce Protections conducted a series of hearings dealing with a broad spectrum of workhours issues (March, June, October and November, 1995). H.R. 2391 was passed by the House on July 30, 1996. A hearing on S. 1129 was conducted by the Committee on Labor and Human Resources (February 1996).

In the 105th Congress, Senator Ashcroft introduced S. 4, a somewhat modified version of his earlier proposal. Representative Ballenger introduced H.R. 1, a bill similar to that approved by the prior Congress. In February 1997, hearings were conducted both in the House and Senate.

The language of these proposals evolved as the bills have moved through the legislative process; their purpose, however, seems to have remained constant. Here, after a brief introduction, we follow, sequentially, consideration of alternative scheduling through the hearings of the 104th and 105th Congresses, the concepts set forth in the House report on H.R. 2391 (1996), and the House floor debates of the 104th Congress. Some arguments appear to have remained unchanged throughout the period; others were modified.

Overtime Pay and *Comp Time*: The 104th Congress

In the 104th Congress, more than two dozen bills urged amendment of the FLSA.[2] Several dealt specifically with alternative workhours structures: notably, S. 1129 (Ashcroft), with a similar measure in the House, H.R. 2723 (Doolittle); and H.R. 2391 (Ballenger).

The Ballenger Proposal

Early in the 104th Congress, the House Subcommittee on Workforce Protections, chaired by Representative Ballenger, conducted oversight hearings on aspects of the FLSA including comp time and compressed scheduling. On September 21, 1995, Mr. Ballenger introduced H.R. 2391, the "Compensatory Time for All Workers Act of 1995."

The Early House Hearings of 1995. The House hearings were divided into two sets: March and June, 1995, prior to introduction of H.R. 2391; and November, 1995, when H.R. 2391 was before the Subcommittee. The early hearings addressed general issues of overtime and workhours flexibility. The November hearing focused more nearly upon H.R. 2391: to refine its concepts and add worker protections.[3]

March 30, 1995. The central issues emerged early. Chairman Ballenger began: "The FLSA was developed for a manufacturing-based economy composed of a largely male workforce. Since them," he stated, "the functions of the workplace and the demographics of the workforce have changed dramatically." "In order to remain competitive," Mr. Ballenger said, "every U.S. firm is looking for ways to increase flexibility and productivity." Meanwhile, "[e]mployees are looking for ways to juggle work, family and personal needs. All too often, the FLSA serves as an impediment to these goals."[4] Conversely, Representative Owens, the Subcommittee's ranking minority member, affirmed that the FLSA "already allows flexible work schedules,"

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[2] Early in the 104th Congress, the FLSA was extended to legislative branch employees (P.L. 104-1, signed January 23, 1995). Later, Congress: exempted state and local official court reporters, under certain conditions, from the overtime pay provisions of the Act (P.L. 104-26, signed September 6, 1995); modified child labor practice under the Act with respect to certain hazardous types of work (P.L. 104-174, signed August 6, 1996); and approved general FLSA amendments dealing with the federal minimum wage and related issues (P.L. 104-188, signed August 20, 1996).

[3] S. 1129 (Ashcroft) was introduced on August 7, 1995, but no hearings were held until February 1996. The House Subcommittee on Workforce Protections conducted a hearing on overtime pay issues, generally unrelated to H.R. 2391, on October 25, 1995.

[4] U.S. Congress. House. Subcommittee on Workforce Protection, Committee on Economic and Educational Opportunities. *Hearings on the Fair Labor Standards Act*. Hearings, 104th Cong., 1st Sess., March 30, June 8, October 25, and November 1, 1995. Washington, U.S. Govt. Print. Off., 1995. p. 1-2.

adding: "...the real issue is not flexibility, the real issue is fairness and paying Americans for the work they do."[5]

Consideration of flexible hours options began with testimony from the industry-oriented Labor Policy Association (LPA).[6] An LPA report, *Reinventing the Fair Labor Standards Act To Support the Reengineered Workplace* (October 7, 1994), part of the hearings record, seemed largely to set the tone for what would follow. The LPA analysis argued that the FLSA (with its workforce protections) was old and out-of-date: in the realm of labor laws, holding "a position nearly comparable to that of the Dead Sea Scrolls." The FLSA, it charged, discourages "progressive employment practices" such as "allowing employees to deviate from the standard 40-hour workweek" and "`paying' employees for overtime with time-and-a-half compensatory time" rather than cash.[7]

Industry demand for employee time, the LPA noted, may be somewhat unpredictable: "...one week may involve considerably less than 40 hours and the next week may involve considerable more." And, thus, "an employee who works 50 hours one week must be paid overtime even if he or she only works 30 the next." An alternative had occurred to the LPA.

> If the Act were to operate with a monthly or quarterly focus, this wouldn't occur. Thus, an employer could allow an employee to only work 10 hours one week and then make up for that time later in the month by, for example, working three 50-hour weeks.

In addition to this concept (compressed scheduling), the LPA urged a comp time option — presented as worker friendly. It observed: "The lack of flexibility imposed by the FLSA when compensating employees for overtime work adds to the employer's burden by making it difficult to keep costs down" — a factor, it noted, in establishment of a comp time option for local government employees. "To assume that businesses struggling to compete in today's global marketplace do not also bear 'substantial financial responsibilities' makes no sense."[8]

Maggi Coil, testifying both for Motorola, Inc. (where she was Compensation Director), and for the Labor Policy Association, asserted that the FLSA was dated. She served, she noted, on the LPA's FLSA Reform Task Force searching for "ways to bring a more than 50-year-old piece of labor law into the 20th century." The Act,

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[5] House Subcommittee on Workforce Protections, Hearings, 1995. P. 2.

[6] The Washington-based Labor Policy Association "is a public policy advocacy organization of the senior human resource executives of American's major corporations whose purpose is to ensure that U.S. employment policy supports the competitive goals of its member companies and their employees." See LPA homepage on the Internet: [http://www.lpa.org/-lpa/about.html], January 22, 1997. LPA member companies "are typically represented in LPA by their principal employee relations executive." See *LPA Annual Report 1988.* Washington, 1988. p. 1.

[7] House Subcommittee on Workplace Protections, Hearings, 1995. p. 30-31.

[8] House Subcommittee on Workforce Protections, Hearings, 1995. p. 33-35.

she suggested, was crafted during an "employer's market" (the Great Depression). "Jobs today," she pointed out, "are significantly different than they were in 1938..." and the FLSA "as currently written is one of the things that has outlived its usefulness and demands renovation."[9]

With a similar focus, J. Thomas Higginbotham of the American Institute of Certified Public Accountants had written to Chairman Goodling of the full committee, urging enactment of comp time legislation.

> ... employees would be able to receive one and one-half hours of compensatory time off in lieu of overtime pay. We believe that employees should have this option. To ensure that there is mutual acceptance on the part of both employer and employee, there should be an agreement between the employer and employee prior to the performance of the work.

Higginbotham urged that comp time "should be used by the employee within one year, in order to prevent excessive accumulation" of such hours.[10]

June 8, 1995. Chairman Ballenger opened the June hearing by affirming that flexible schedules are "high on the list of issues of major concern to most employees" and that the FLSA "in its current form, works against flexibility in the workplace." The Act, he said, "stands in the way of companies who attempt to utilize flexible human resource strategies in order to allow workers to pursue more fulfilling combinations of work, family life and other interests."[11]

Representative Owens viewed the issue differently. "Today we begin a full press attack on the 40 hour work week and overtime." He queried, "what is the motive for attacking the 40 hour week, and for attacking overtime? We can only conclude that it is monstrous employer greed." "Tell me, Mr. Chairman," Mr. Owens asked rhetorically, "how will we justify ... giving employers sole custody over the employee's work schedule by allowing them greater flexibility beyond the 40 hour work week? We cannot justify any of these actions," he argued, "for they are a blatant exploitation of the American worker." Mr. Owens explained:

> Overtime provisions are under attack, and we will be told that it is too much to ask employers to pay employees one and a half times their hourly rate for overtime. We will be told that private sector workers want to receive compensatory time off, rather than money for their overtime. The questions are, will the employees be given an opportunity to choose? Will they have discretion as to when they take the time? And, who will ensure that the employees in the private sector receive the compensatory time they are entitled to if the company goes out of business?

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[9] House Subcommittee on Workforce Protections, Hearings, 1995. pp. 16-19. Ms. Coil explained that the LPA's Task Force "included more than 50 LPA member companies."

[10] House Subcommittee on Workforce Protections, hearings, 1995. p. 160. The American Institute of Certified Public Accountants is identified as a member of the FLECS (Flexible Employment Compensation and Scheduling) Coalition, a group largely of industry members including the Labor Policy Association. See, *ibid*, p. 185.

[11] House Subcommittee on Workforce Protections, Hearings, 1995. p. 169-170.

These issues, the focus of the hearings, Mr. Owens asserted, "all add up to an unprecedented assault on the income and the quality of life of working Americans."[12]

Witnesses, Generally Supportive of Amending the FLSA. The lead witness was Arlyce Robinson, Administrative Support Coordinator for Computer Sciences Corporation of Falls Church, Virginia. Ms. Robinson urged increased workhours flexibility. The FLSA, she noted, "was intended to protect us, maybe 50 years ago it did," but in the modern workplace, it prevents flexibility.[13]

Kathleen M. Fairall, Senior Human Resource Representative, The Timken Company (manufacturer of roller bearings and specialty alloy steel), expressed similar views. She spoke for the Society for Human Resource Management (SHRM) and for the Flexible Employment, Compensation and Scheduling Coalition (FLECS), the latter "a group of businesses and organizations representing a wide variety of industries which are here seeking to bring the FLSA into the 1990s."[14] She observed:

> The Fair Labor Standards Act is a depression-era legislation created in the 1930s to protect American workers from uncaring employers — but times have changed and the Act has not. Ironically, many of the provisions of the Act now serve as ... an obstruction rather than a protection of employee interests.
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> Comp time, she suggested, was an option obstructed by the FLSA. "My experience has been," Ms. Fairall observed, "that most people would prefer to have the time off with pay rather than receiving the overtime check. For many people, the time spent with family, or friends, or outside interests is more important than the cash."[15]

Others expressed similar views. Robert J. Niedzielski, Director of Human Resources Development for Tighe Industries, Inc., of York, Pennsylvania, like Ms. Fairall, spoke for SHRM. He argued that the FLSA had "become convoluted and arcane as the work force and employee needs have changed." "Too often," he concluded, "the Act now serves as an impediment rather than an instrument for employee protection."[16] A statement submitted for the National Federation of Independent Business (NFIB), echoing the report of the LPA (cited above), pointed to the Depression-era origins of the Act and noted: "The Great Depression has long since vanished and the widespread rates of high unemployment are an afterthought." Paraphrasing the LPA report, the NFIB statement argued that small businesses, "struggling to survive in today's volatile marketplace," deserve relief from the rigidities of overtime pay requirements as much as do state and local governmental

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[12] House Subcommittee on Workforce Protections, Hearings, 1995. p. 170-171.

[13] House Subcommittee on Workforce Protections, Hearings, 1995. p. 178-181.

[14] House Subcommittee on Workforce Protections, Hearings, 1995. p. 182 and 185. SHRM, composed of "human resource, personnel, and industrial relations professionals and executives," was also a member of FLECS.

[15] House Subcommittee on Workforce Protections, Hearings, 1995. p. 182.

[16] House Subcommittee on Workforce Protections, Hearings, 1995. p. 199-201.

employers.[17] A statement by the National Society of Professional Engineers also affirmed that the FLSA "impedes, rather than protects, the rights of American workers."[18]

Some Witnesses, Generally Skeptical of FLSA Amendment. Two witnesses at the June hearing expressed concern about the alleged family friendliness of the projected comp time/compressed workhours initiative. Edith Rasell, an economist with the Economic Policy Institute,[19] a Washington-based research and policy group, argued that employers already have "incredible flexibility" (i.e., flexibility within a 40 hour workweek) and, in excess of 40 hours per week if they pay time-and-a-half. She added that imposing long hours of work "is a hardship on employees," a hardship that the FLSA was intended to reduce. In her prepared statement, Ms. Rasell noted:

> ...if the overtime pay requirement is relaxed, variability in scheduling is likely to become more common. At their employer's discretion, some hourly workers may gain greater flexibility in taking time off from work, but at the cost of losing the regularity and predictability of their work schedules.

Ms. Rasell presented survey data which, she observed, indicated that putative worker support for a comp time/compressed work hours option (in place of traditional overtime pay) might be overstated.[20]

Michael Leibig,[21] an attorney specializing in FLSA-related cases, argued that many of the complaints of inflexible workhours requirements have resulted from "a lack of understanding of the provisions of the Act." It may also result, he suggested, from a desire of flexible hours advocates to circumvent the essential purposes of the FLSA.

"Some of the witnesses," Leibig noted, "have talked about problems of women and families, and men and families, parents and families, and said that if they could use compensatory time they could spend more time with their family..." But, he

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[17] House Subcommittee on Workforce Protections, Hearings, 1995. pp. 236-238 and 30-35. The National Federation of Independent Business, like the Labor Policy Association, is part of the FLECS Coalition. The NFIB statement also urged modification of the FLSA to exempt small businesses from payment of the federal minimum wage.

[18] House Subcommittee on Workforce Protections, Hearings, 1995. p. 238-239.

[19] The Economic Policy Institute (EPI) describes itself as a "nonprofit, nonpartisan think tank that seeks to broaden the public debate about strategies to achieve a prosperous and fair economy." Again: "EPI is supported by grants from foundations, corporations, labor unions, and individuals." See the EPI home page (January 23, 1997) at [htt://epinet.org/#about]. EPI has also been described as close to the trade union movement. See, for example, *The Wall Street Journal*, March 12, 1993. p. A4.

[20] House Subcommittee on Workforce Protections, Hearings, 1995. pp. 201-207.

[21] Leibig, with the Washington firm of Zwerdling, Paul, Leibig, Kahn, Thompson & Wolly, teaches at the Georgetown University Law Center and "regularly litigate[s]" FLSA-related cases. He has had an extensive involvement, as an attorney, with public employee groups and as a lecturer on employment-related issues. See, *ibid*, p. 219-220..

maintained, the "real problem" is that Americans "are working more than 40 hours a week and, therefore, don't have time to spend with their families. The goal of family-oriented people ... should be to get the work week back under control so that people have sufficient time." In his opinion, "[w]eakening the requirement that the work week stay short is not likely to cause more time off."[22] In his prepared text, he affirmed: "A constant pressure for increasing hours of work is damaging and disruptive — it ought to be, and is, against the law of the federal Fair Labor Standards Act."[23]

Leibig pointed out that the FLSA "has, since its inception, disallowed payment in comp time in lieu of cash,"[24] arguing that institution of a comp time option would fundamentally undercut the Act.

> A system which allows work to be paid for by the adjustment of hours obviously undermines the forty hours of work standard of the Act. It allows the individual employer to make an arrangement with an individual employee which results in avoidance of the cash overtime rights of all other employees. Were comp time to be allowed without very clear restrictions on it the forty hours of work standard of the Act would become a dead letter.

When, in 1985, the comp time option was legislated for state and local government employers, he recalled, "it was recognized that extension of the comp time rule *to the private sector* would make enforcement of the hours of work standard next to impossible."[25] (Italics added.)

Aside from matters of compliance, Leibig expressed concern about extending to private sector employees the concept of deferred compensation, allowed in a comp time format for state and local government employees.

> The main reason that compensatory time can work in the public sector but not in the private sector, however, is that every year thousands of private sector companies go out of business, and if you allow compensatory time they will have an additional liability for the compensatory time banks that are built up for their employees. If you allow compensatory time, you are undermining the provisions of the Fair Labor Standards Act in the private sector that require that pay be done on a timely basis. You are basically allowing the postponement of pay, you are not reducing the cost of employment at all, you are just allowing it to be postponed, and in the private sector that raises particular problems.[26]

But, Leibig suggested, weakening of the FLSA might be the point of the comp time/compressed scheduling campaign. He charged:

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[22] House Subcommittee on Workforce Protections, Hearings, 1995. p. 208-209.

[23] House Subcommittee on Workforce Protections, Hearings, 1995. p. 213.

[24] Comp time is allowed within a 40-hour workweek; but, this could be considered flexibility rather than comp time within the meaning of the proposed legislation.

[25] House Subcommittee on Workforce Protections, Hearings, 1995, p. 215.

[26] House Subcommittee on Workforce Protections, Hearings, 1995. p. 209-210.

> The strategy is one which has selected key provisions of the FLSA, without which general enforcement would be difficult, attacked each of those provisions in isolation, attempted to establish the irrationality of the provision taken in isolation, and, thereby, gain a series of amendments to the Act which taken together would gut enforcement and effectively undermine the forty hour work week.
>
> Each of the provisions under challenge was originally placed in the FLSA regulatory scheme in response to specific employer tactics by which the basic overtime provisions of the Act might overwise be easily avoided.

Moving on, Leibig contended: "A number of American employers — the flexible work coalition — are engaged in mounting argument favoring five reforms to the FLSA to make the Act `more flexible' and `more modern.' In fact," he concluded, "those reforms reflect exactly the strategies which employers, seeking to avoid the forty hour work week standard, have used since the 1930s ... These reforms would so weaken the national hours of work standard as to make it unenforceable."[27]

Questioning from the Subcommittee. Questioning of the witnesses was deferred till all had testified. Since a number of FLSA-related issues were before the Subcommittee, questioning moved in different directions.

Representative Ballenger addressed several questions to Ms. Rasell concerning the quality of the polling data she had presented and which suggested that flexible scheduling may not be a priority (or even, popular) issue for workers. But, the dialogue turned away from polling techniques to choice and to control.

> Ms. RASELL. ...the question I think would be, if there was an option who would exercise the option? If I —
>
> Chairman BALLENGER. I think you'd have to have an agreement between the employer and employee.
>
> Ms. RASELL. Exactly, exactly.
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> Chairman BALLENGER. I think that's the way we intend to talk about the law.
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> Ms. RASELL. But, if the employer wanted me to take compensatory time instead of overtime pay, just because I wanted overtime pay I might not get it. And so—
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> Chairman BALLENGER. But ... it's got to be an agreement between the employer and the employee, otherwise you are going to end up with a plant that's not going to work...
>
> Ms. RASELL. Sure. I think the feeling was that the employers have more power than the employees do, and the choice would be more likely to be their's than the employees.[28]

Representative Fawell, directing his comment to Mr. Leibig and speaking "as a lawyer," declared the Act "arcane." Though "someone who may specialize in it, and

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[27] House Subcommittee on Workforce Protections, Hearings, 1995. p. 213-218.

[28] House Subcommittee on Workforce Protections, Hearings, 1995, p. 222-223.

teach it, and live it" may find the FLSA "relatively simple," he asserted that "the average hardworking administrator and workers are really befuddled by it and confused." There is, he stated "an awful lot of confusion out there."[29] Representative Miller of California interjected: "Not being familiar with the law should not be a reason to repeal the law."[30]

Representative Woolsey raised a number of technical issues that seemed to suggest that the comp time option might not to entirely attractive to employers. In her experience as a human resources professional, she stated, "it was way more costly to have people take time off rather than pay them for their time and a half, because they took an hour and a half for every hour they worked, and we needed that productive work force." She noted, the use of comp time "made scheduling very difficult."[31]

Advocates of flexibility had consistently urged the shift of policy in terms of *choice*. But, choice for whom, Ms. Woolsey queried.

> We have to look at the choices for the employees to make it work for them, and if we give them those choices I'm going to question whether it will work for the employer at all, because if we give the employee the choice of cash or banking their time, and banking time and not knowing when they are going to use it ... you have no control over your scheduling, who has the final say on when that compensatory time can be taken?

Beyond choice *per se*, Representative Woolsey found that "the biggest challenge that my employees had was notice of overtime. They didn't mind working overtime, but they needed [prior] notice of overtime." She explained:

> ... the employer is going to have to be responsible for notifying so people can have their child care ... if they are students they can know when they get to go to school, so there's a lot that's going to fall on the employer's shoulders that I don't think anybody that's recommending this is even thinking about. It is not going to be simple.

She acknowledged that the option "could work for the employees just fine, it could work for the employer," but she expected that it would be "complicated."[32]

Here, Mr. Romero-Barcelo of Puerto Rico turned to Ms. Fairall of The Timken Company and the FLECS Coalition. He reviewed the concept of *banked hours* (i.e., working up front and deferring leave and pay until later) and asked if the employer would be expected to pay interest on these deferred earnings.

> Ms. FAIRALL. I don't know, I'll have to defer that question to—

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[29] House Subcommittee on Workforce Protections, Hearings, 1995. P. 225-226.

[30] House Subcommittee on Workforce Protections, Hearings, 1995. p. 226-230. Representative Ballenger indicated that repeal of the law was not his intent.

[31] House Subcommittee on Workforce Protections, Hearings, 1995. p. 231.

[32] House Subcommittee on Workforce Protections, Hearings, 1995. p. 231-232.

> Mr. ROMERO-BARCELO. It hasn't been considered, has it?
>
> Ms. FAIRALL. [continuing] I don't know, sir.
>
> Mr. ROMERO-BARCELO. Because, if they don't pay interest for that half of an hour—
>
> Mr. LEIBIG. In the public sector they don't.
>
> Mr. ROMERO-BARCELO. ... When they are talking about compensatory time, they are not talking about paying interest to the workers on the compensatory time, I haven't heard about it.
>
> So, immediately, the employer is already making some money out of the compensatory time that it wasn't making before.[33]

Still engaged with Ms. Fairall, Mr. Romero-Barcelo raised the issue of choice. Was it her contention, he asked, that the employee would have the right to use accrued comp time "when he wants it, or is it [that] the employer would have something to say about when" the comp time is used.

> Ms. FAIRALL. Sir, I think they would have to — it would be a mutually agreeable scheduling. I mean, they couldn't come up tomorrow and say I want to take tomorrow off as my compensatory time, but on a mutually agreeable time I think that there would be an agreeable time. The employer and the employee together would agree.
>
> Mr. ROMERO-BARCELO. When he gets paid the time and a half does the employer have anything to say about when he should spend this money?
>
> Ms. FAIRALL. ... No, sir.
>
> Mr. ROMERO-BARCELO. So, in other words, that's another limitation to the employee, where he has something that belongs to him but he cannot dispose of it, somebody else has to agree with how he's going to dispose of it. So, he's got another limitation. It's like a mortgage on his time.[34]

At that juncture, Mr. Romero-Barcelo returned to an issue raised in testimony by Mr. Leibig.

> Mr. ROMERO-BARCELO. ... supposing the employer closes shop and liquidates, he says, oh, he's lost money, or he's just skimmed off the profits but he just says he lost money, he even files for bankruptcy, that happens very often, what happens then to that compensatory time? Who pays for it?
>
> Ms. FAIRALL. I'm going to have to refer to the Coalition counsel, sir, I don't know.
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> Chairman BALLENGER. Mr. Leibig,[35] I'm sure, knows, Mr. Leibig, let me ask you the question, is that part of, in the bankruptcy case, is that one of the first claims on this or not?

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[33] House Subcommittee on Workforce Protections, Hearings, 1995. p. 232-233.

[34] House Subcommittee on Workforce Protections, Hearings, 1995. p. 233.

[35] Mr. Leibig, an attorney, was not associated with the Coalition.

> Mr. ROMERO-BARCELO. Oh, yes, it is, I can answer that, it is one of the first.
>
> Mr. LEIBIG. Salary is first.
>
> Chairman BALLENGER. Well, I'm not sure, I was just going to ask.

But, Mr. Romero-Barcelo observed, "sometimes ... there's not even money for wages ... very often that happens. So there's another danger for the employees."[36]

Harkening back to the opening observations of Representative Ballenger about what workers want (i.e., flexibility) and to the polling data from Ms. Rasell, Mr. Romero-Barcelo summed up: "... when you talk about many employees prefer[ring] that option, they don't always know all of the economic effects of what they are saying or what they are accepting." He continued:

> ... for the employee, it's better to have that time and a half pay. He can be cajoled and fooled into believing it's better for him, but it's not better for him. And, this is something that we should realize, we are not doing a favor to the employees.[37]

The Ballenger Bill (H.R. 2391) as Introduced. On September 21, 1995, Representative Ballenger introduced H.R. 2391, the "Compensatory Time for All Workers Act of 1995." Section 7 of the FLSA deals with overtime pay; Section 7(o), with the application of overtime pay standards to employees of state and local governments. H.R. 2391, as introduced, would have broadened Section 7(o) of the FLSA to make its comp time option available, with some technical modification, to the entire workforce.

H.R. 2391 would permit the substitution of compensatory time off "at a rate not less than 1 1/2 hours for each hour of employment for which overtime compensation normally required — i.e., time-and-a-half. Private sector employees could not accrue more than 240 hours of compensatory time.[38] Comp time, under H.R. 2391, could not be carried over from one 12-month period (not necessarily a calendar year) to another; but rather, if unused, had to be cashed-out: paid for by the employer at a time-and-a-half rate. Such cash payment must be made for unused compensatory leave "no later than 31 days after the end of" the 12-month period.

H.R. 2391 required the employer to allow the employee to draw down compensatory hours "within a reasonable period after making the request" to do so "if the use of the compensatory time does not unduly disrupt the operations of the employer." The bill did not define "reasonable period" nor did it offer guidance for defining "unduly disrupt."

Under current DOL implementing regulations designed for state and local government employment, "a reasonable period" rests largely upon "the customary

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[36] House Subcommittee on Workforce Protections, Hearings, 1995. p. 233-234.

[37] House Subcommittee on Workplace Protections, Hearings, 1995. p. 234.

[38] H.R. 2391 would continue the 1985 FLSA amendments' cap on accumulation of comp time for state and local government workers at 480 hours for persons employed in emergency services and 240 for other public employees.

work practices within the agency based on the facts and circumstances in each case."[39] The regulations note of "unduly disrupt" that "[m]ere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off." Such denial "should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services."[40] These regulations, however, relate to the particular circumstances and culture of public sector employment.[41]

The Hearings Resume. During the fall of 1995, the hearings on FLSA overtime issues resumed. A hearing on October 25 focused primarily on issues not addressed in the Ballenger bill. On November 1, the Subcommittee returned to the issue of comp time with a final hearing on H.R. 2391. This time, the Members were working with specific legislation before them. Further, the Ashcroft bill had been introduced in the Senate; and, although S. 1129 was quite different from H.R. 2391, the Senate bill provided the Subcommittee with additional options.

In an opening statement for the record, Chairman Ballenger acknowledged: "There are some who will say that changes to the law which give employees greater flexibility are really an effort to take protections away from employees." But, he stated, employees want flexibility. "I believe that we should allow employers and employees to work out these types of issues themselves — recognizing that there must be protections in the law against coercion."[42]

The lead witness at the November hearings was Pete Peterson, Senior Vice President for Personnel with the Hewlett-Packard Company, speaking for the FLECS Coalition. He described the Coalition as "an industry group that strongly supports H.R. 2391 as a valuable first step in reshaping [the] FLSA to fit today's workplace needs."[43]

The Ballenger bill, Peterson began, "would permit employers to offer employees the option" of comp time. He noted: "The significant point is that no employer would be required to offer compensatory time and, likewise, no employee would be required to take it."[44] Peterson, a member of the Board of Directors of the Labor

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[39] 29 C.F.R. 553.25(c)(1). "Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff."

[40] 29 C.F.R. 553.25(d).

[41] While questioning Leibig, Mr. Ballenger referred to the 6 million corporations in America, noting the difficulties that might result were each to go to DOL for guidance with respect to the FLSA. House Subcommittee on Workforce Protections, Hearings, 1995. p. 221.

[42] House Subcommittee on Workforce Protections, Hearings, 1995. p. 404.

[43] House Subcommittee on Workforce Protections, Hearings, 1995. p. 406.

[44] House Subcommittee on Workforce Protections, Hearings, 1995. p. 406. H.R. 2391, as introduced, would have established two categories of employees: organized workers (those

(continued...)

Policy Association, expressed enthusiastic support for compressed scheduling (part of the Ashcroft bill but not of H.R. 2391), affirming: "This kind of flexibility would help employees juggle their job, child care, and other responsibilities, along with community and leisure activities." He cited a poll conducted for the Employment Policy Foundation which found that "three quarters of the respondents said they would favor a proposal that allows hourly employees to choose to take their time-and-a-half overtime compensation in the form of paid time off."[45] In closing, he reiterated the FLECS/Labor Policy Association position: "The provisions [of the FLSA] made sense probably when the Act was passed originally in 1938, but it is time to take a look again at how the FLSA can help the needs in the nineties and beyond."[46]

Representative Owens raised the issue of choice: whether the comp time option would truly be voluntary for the employee. Many employees feel, he noted, that choice would rest with the employer and not with the worker.

> It is really the employer because no employee is going to do anything which displeases his employer. If the message is communicated from the employer, I really want you to take compensatory time and not opt to take overtime pay, that's the way employees are going to proceed.

Turning to Peterson of Hewlett-Packard, Mr. Owens asked: "What measures do you feel we can take to ensure that employee's choice of compensatory time is truly voluntary?" Would employers "be willing to give a written statement to the employee that it is your choice, and I will accept either choice that you make?" Peterson responded, calling the option a "win/win" situation. He added:

> ... I think that it would have to be clear that it is a voluntary program on both sides. It's voluntary on the part of the employer to offer it.
>
> In some cases, offering of compensatory time is just not going to be able to fit with the needs of the business. So I think it needs to be voluntary in that regard. It also needs to be very clear that it's voluntary on the part of employees as to whether or not they take the overtime in pay or compensatory time.
>
> So whether or not there is a requirement that employers put something in writing of that nature, I'm not sure it's required.

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[44](...continued)
working under a collective bargaining agreement) and the unorganized or non-union workforce. For organized workers, implementation of comp time would be a matter of negotiation between their union and the employer. Unorganized workers would be allowed to bargain individually with their employers.

[45] The Employment Policy Foundation is identified as the "[e]ducational arm of the Labor Policy Association and Equal Employment Advisory Council." See: Fischer, Carolyn A., and Carol A. Schwartz, eds. *Encyclopedia of Associations: 1996.* Detroit, Gale Research Inc., 1995. p. 1473.

[46] House Subcommittee on Workforce Protections, Hearings, 1995. pp. 406-408.

While he was willing to consider the possibility of a written agreement, Peterson saw no more reason to have a written statement from the company concerning comp time than with respect to any other provisions of the FLSA.[47]

Mr. Owens then turned to the issue of control. Will workers, he asked, "be able to take compensatory time off at a time when it's to their advantage, it meets their family needs, et cetera? Or will they also have to take it off at the convenience of the company...?" He characterized the problem that he saw workers facing as: "...the employer has the upper hand in terms of demanding that workers do it in a way which is more profitable for the company, ... they can't, despite the seeming voluntary situation, have an equal role in the decision-making." Peterson thought "that type of thing is something that could be worked out;" he also expressed concern about business realities: "...we do have to make sure that a business['s] needs here are brought into the picture."[48] In response to Representative Woolsey, Peterson affirmed: "... it can't be just the employee saying, I want to take it [comp time] right now, no matter what.... There are some business need situations that would make that difficult."[49]

Attorney Leibig, returning as the closing witness on the comp time issue, noted that DOL regulations governing comp time for the public sector had been "more confused than first might appear" and had led to litigation. After explaining some of the problem areas, he urged that if the comp time option were to be made available to the private sector, "it should be done carefully and more carefully than it was done in the public sector."

Leibig suggested a number of possible changes in H.R. 2391 as introduced. He urged that "it should be clear that compensatory time not be able to be required as a condition of employment." He explained:

> One of the things that some employers in the public sector have done is said [sic.] an agreement can be implied, you agree to work with me, I offer compensatory time, therefore I have an agreement with you. And that has happened regularly in the public sector, there has been a great deal of litigation about it.

He pointed to potential confusion with respect to the bill's provision allowing the comp time issue to be dealt with either under a collective bargaining agreement or, in the absence of such an agreement, by direct agreement between management and workers. He noted a technical distinction between having a collective bargaining agreement in place or merely having a representative, pointing out that "if you have a certified representative under collective bargaining, you can't have a direct agreement with employees." He suggested that the matter was ambiguous and needed clarifying language.

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[47] House Subcommittee on Workforce Protections, Hearings, 1995. pp. 445-446.

[48] House Subcommittee on Workplace Protections, Hearings, 1995. p. 446.

[49] House Subcommittee on Workforce Protections, Hearings, 1995. p. 451.

The legislation, as introduced, provided for cashing out of a worker's comp time bank (banked hours) "upon termination of employment." Leibig noted that, in the courts, "termination" has often been equated with being discharged, but that the term would not necessarily cover retirement or voluntary separation. He urged that the term "cessation" be substituted.

There may arise questions as to when comp time may (or must) be used and at whose discretion. The provision allowing use of comp time where it "does not unduly disrupt the operations of the employer" is fine, he suggested, as far as it goes. But that leaves other questions. If an employee has accumulated a substantial amount of comp time, can the employer insist that it be used and, if so, at a time designated by the employer? If the employee is consciously building up comp time for a particular purpose (e.g., hunting season), he may not have the right to utilize that comp time if the employer finds it inconvenient or disruptive — or if the employer mandates a prior use of hours during a slack period. Leibig noted a major difference between comp time and money:

> ... if you got money, you take it and put it in your pocket or put it in the bank and spend it. If you have compensatory time, you have a record in the employers' [sic.] books, it is important that the employer can't force you to spend that compensatory time by making you take one hour off or two hours off.

He suggested language assuring that where "the employee has compensatory time, [he] shall not be required by the employer to use up his compensatory time absent his agreement." He thought the putative desire of employees for comp time might diminish if they were made to understand that it would be used at the employer's discretion and not their's.

Leibig turned to the issue of banked hours and bankruptcy. "In the private sector, bankruptcy is a regular thing. Every year thousands of companies go out of business. It is important," he suggested, "that the legislation make clear that this banked compensatory time is a debt owed by the employer to the employee that has the same preference in bankruptcy that wages would have had."[50]

He voiced other concerns. "The Committee," he thought, "should be mindful of the tax loss of the change made and of the potential for tax avoidance."[51] Some employers might be deceived by the fiscal implications of comp time use.

> ... compensatory time banks will show on the employers' balance sheet if they have it accounted as a liability. So at the end of the period on the employers' balance sheet, it will show a liability in the cash equivalent of this compensatory time. Many public employers didn't realize that and even in three cases had their bond ratings jeopardized by the large level of liability.[52]

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[50] House Subcommittee on Workforce Protections, Hearings, 1995. pp. 455-459.

[51] House Subcommittee on Workforce Protections, Hearings, 1995. p. 463.

[52] House Subcommittee on Workforce Protections, Hearings, 1995. p. 459.

He concluded on a cautionary note. The "main purpose for overtime pay, time and a half," he stated, "is to discourage employers from working people over 40 hours a week at all." Overtime is the primary mechanism through which the national "hours of work" standard is enforced. "... when you weaken the 40-hour workweek, you have to be very careful about how you do it or it will be eroded altogether..."[53]

An Overview of the 1995 House Hearings. Both witnesses and Subcommittee members seemed to concur that oversight of the FLSA was needed. Whether the statute was "crying out to be fixed" as the Labor Policy Association affirmed,[54] or needed more minor adjustment "undertaken only with the greatest care and on the basis of careful attention" as urged by attorney Leibig,[55] might be debated.

The Subcommittee hearings of spring and fall, 1995, on comp time and related FLSA issues were technical.[56] Many of the issues under Subcommittee review involved interpretation of the FLSA by DOL or had been raised in response to regulations and "opinion letters" issued by the Department. Late in the hearings, Mr. Owens referred to "a request that the Department have representatives testify, or the Secretary himself, because I think it's important that we start these hearings with an understanding of where the policies are at this particular point."[57] At several points, witnesses disputed among themselves as to what the Act required and what was permitted under it. Yet, no one appeared to speak for DOL or to explain the Department's policies.

Extension of the comp time option to the private sector was being urged as *pro-worker* and *family friendly*. When opening the first hearing in March, Chairman Ballenger observed that "[e]mployees are looking for ways to juggle work, family and personal needs."[58] As the final hearing commenced, he reaffirmed: "...changes to the law are necessary in order to give employees the kind of flexibility that they want."[59] Industry spokespersons similarly alluded to the plight of employees "working full time schedules ... [while] juggling work with the responsibility of caring for children or older parents." The LPA argued: "Allowing them the choice of taking overtime pay

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[53] House Subcommittee on Workforce Protections, Hearings, 1995. pp. 462 and 473.

[54] House Subcommittee on Workforce Protections, Hearings, 1995. p. 30.

[55] House Subcommittee on Workforce Protections, Hearings, 1995. p. 462.

[56] While comp time for the private sector was one of the issues before the Subcommittee, there were others as well: revision of the "portal-to-portal" pay act [H.R. 1227 (Fawell); H.R. 1273 (Andrews)]; overtime pay for firefighters and rescue squad workers [H.R. 94 (Bateman)]; overtime pay treatment of inside sales personnel [H.R. 1226 (Fawell)]; uncompensated use of "volunteers" [H.R. 1589 (Knollenberg)]; minimum wage and overtime pay treatment of certain "houseparents" employed in facilities for troubled children [H.R. 2531 (Hutchinson)]; and consideration of gainsharing, incentive bonuses, etc., in the calculation of the "regular rate" for overtime pay purposes [H.R. 3087 (Ballenger)].

[57] House Subcommittee on Workforce Protections, Hearings, 1995. p. 445.

[58] House Subcommittee on Workforce Protections, Hearings, 1995. p. 2.

[59] House Subcommittee on Workforce Protections, Hearings, 1995. p. 404.

or compensatory time off can help employees ease those burdens."[60] Peterson of Hewlett-Packard declared that employees "increasingly value work time flexibility" and that they "want more creative ways to handle their various responsibilities."[61]

Through the course of the hearings, spokespersons for workers were few. While several individuals spoke in their own behalf (and would later be quoted extensively in the majority's report on the legislation), no one appears to have spoken for the trade union movement[62] nor, for that matter, for other bodies of workers.[63] Representatives of women's groups — the legislation was presented as *pro-woman* — did not testify at this point.[64] Though frequent comment was made about worker demand for increased flexibility, the primary statistical measure of such demand utilized in the context of the hearings appears to have been a poll conducted for the Employment Policy Foundation by Penn and Schoen Associates. The Foundation is sometimes identified as the educational arm of the Labor Policy Association.[65]

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[60] House Subcommittee on Workforce Protections, Hearings, 1995. p. 43.

[61] House Subcommittee on Workforce Protections, Hearings, 1995. p. 406-407.

[62] The trade union press was decidedly hostile to the comp time initiative. See, for example: "40-Hour Week on GOP's Hit List," *The Dispatcher*, February 10, 1995. p. 4; Lee, Marion A. "Our Most Sacred Labor Laws Are Under Attack," *UA Journal*, March 1995. pp. 4-5; "Is the 40-Hour Workweek a Thing of the Past?" (Focusing on S. 1129), *The Laborer*, May/June 1996. p. 7; Lee, "Threat to 40-Hour Work Week Is a Threat to Labor's Legacy," *UA Journal*, June 1995. pp. 4-5; "Capitol Digest," *AFL-CIO News*, August 5, 1996. p. 3; and "Comp Time Instead of OT? Bad deal for workers," *The Guild Reporter*, December 13, 1996. p. 7; "Proposals in Washington Threaten Worker Rights, Income," *IUE News*, January-February 1997. p. 4; "Family Comes First (Stop the Attack on Overtime Pay)," *The Teamster*, March-April 1997. pp. 12-13; and, "Designed To Deceive: Bills Now Before Congress Are Wolves in Sheep's Clothing," *UA Journal*, April 1997. pp. 2-3. Further trade union perspectives on the comp time issue are presented by George Becker, President United Steelworkers of America, and by Jay Mazur, President, Union of Needletrades, Industrial and Textile Employees, in separate letters to *The Wall Street Journal*, March 31, 1997. p. A22. Each is critical of the proposal. See also Peggy Taylor, Director, Department of Legislation, AFL-CIO, to Representative William F. Goodling, Chairman, Committee on Economic and Education Opportunities, June 25, 1996. Ms. Taylor protests, in addition to a general critique of H.R. 2391, that the bill "will not give workers increased control over their working lives."

[63] Attorney Leibig has worked with various trade unions and has public employee unions as clients, but he was not a witness for organized labor. Ms. Sandie Moneypenny, "a Process Technician in the assembly area at The Timken Company" presented an endorsement of the comp time option immediately following that of Timken's Senior Human Resource Representative, Kathleen M. Fairall. Several other workers spoke as individuals, and The American Network of Community Options and Resources (ANCOR) presented for the record several handwritten letters from its employees.

[64] A circular from the Women's Legal Defense Fund, "The Ballenger 'Comp Time' Bill: Will It really Help Working Families?" (Undated), declared H.R. 2391 to be "a sham" and argued that "under this legislation, an employer can require an employee to work 50, 60, or more hours a week when the workload is heavy, and then pressure her to use 'comp time' when the workload eases."

[65] House Subcommittee on Workforce Protection, Hearings, 1995. P. 409; and Fischer, (continued...)

A wide range of issues, many of them technical, were raised during the hearings and many of them pointed toward refinements that might be considered with respect to the proposed legislation. As he drew the final session to a close, Representative Ballenger observed to attorney Leibig: "I would like to say that some of your suggestions are right interesting to me. We would love to look into them before we go further."[66]

H.R. 2391 Reported from Committee, July 1996. On July 11, 1996, H.R. 2391 was reported by the Committee on Economic and Educational Opportunities by a vote of 20 yeas to 16 nays. The vote split along party lines: Republicans supporting the bill; Democrats, in opposition.

Modifications in the Bill as Reported. As reported, H.R. 2391 seems to have reflected much of the caution and concern for protection of worker interests suggested by the hearings. It contained expanded language dealing with participation of non-union workers (those without a collective bargaining agreement) in the comp time program, provided that such workers must enter the program "knowingly and voluntarily," and mandated that the comp time agreement between employers and workers must be "a written or otherwise verifiable statement" that can be preserved. Entering into the agreement may not be "a condition of employment." Language was also added to require that an employer, neither "directly or indirectly" "intimidate, threaten, or coerce" an employee into participation in the comp time program nor with respect to the utilization of banked hours.

New cash-out provisions were added, allowing an employer or an employee to convert the banked hours to cash: in the case of the employer, at any time; in that of the employee, within 30 days after a written request. A cash-out of remaining banked hours was required upon a worker's "voluntary or involuntary termination of employment." A penalty structure was added.

No special definition of the concepts "threaten," "coerce," or "intimidate" was provided in either version of the legislation. Nor were the concepts of "reasonable period" (for being able to draw down banked comp time hours) or "unduly disrupt the operations of the employer" elaborated upon.

Comments from the Majority. Noting the experience of state and local governments with comp time, the Committee's report affirmed that the arrangement authorized in H.R. 2391 "can provide 'mutually satisfactory solutions' in the private

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[65](...continued)
Carolyn A., and Carol A. Schwartz, eds., *Encyclopedia of Associations, 1996.* Detroit, Gale Research Inc., 1995. p. 1473. The other source of statistical data that appears in the comp time hearings, was presented by Edith Rasell of the Economic Policy Institute (a body sometimes regarded as having a union/worker perspective); but Rasell's data, developed by Lake Research, presented a somewhat different perspective — and one in conflict with the Employment Policy Foundation's poll. See Hearings, *ibid*, p. 201-207.

[66] House Subcommittee on Workforce Protections, Hearings, 1995. p. 474.

sector no less than is the case in the public sector."[67] It quoted the testimony from three working women at the 1995 hearings, asserting that there is "ample support for concluding that ... [they] are not alone in wanting the option of being able to earn compensatory time off, rather than cash wages."[68]

The report stated that H.R. 2391 "would not change the employer's obligation to pay overtime" at time-and-a-half where an employee worked more than 40 hours during a 7-day period. The legislation was permissive: it would allow the comp time alternative "only if the employee and employer agree on that form of overtime compensation." It affirmed that the Committee "does not intend," through the reported legislation, "to alter current public sector [state and local governmental] use of compensatory time in any way." Rather, it would "extend the option" to the private sector.[69]

Included in the legislation were "a number of provisions for employees in the private sector which are not provided in current law for public sector employees." These, the report stated, "have been added in response to concerns which have been raised about the possible misuse of" the comp time option.[70] It explained the form of the agreement,[71] noting that it should be "written or otherwise verifiable" and affirmed: "The Committee does not intend that an agreement to take compensatory time could be purely oral with no contemporaneous record kept." And it voiced "the Committee's intent that the employee be able to withdraw from such an agreement at any time."[72]

The report emphasized "voluntary choice" for the employee and prohibition against intimidation, threats and coercion. It noted that "a new remedy" had been created where employers "willfully violate" the bill's the anti-coercion language.

> ... if the employer fails to pay overtime (either in cash wage or compensatory time), he or she would be liable under Section 16(b) of the FLSA. Similarly, any repeated or willful violations of the "anti-coercion" provision would subject the

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[67] U.S. Congress. Committee on Economic and Educational Opportunities. *Working Families Flexibility Act of 1996. Report to Accompany H.R. 2391*. House Report No. 104-670, 104th Cong., 2nd Sess. Washington, U.S. Govt. Print. Off., 1996. pp. 4-5. (Hereafter cited as House Report No. 96-670).

[68] Quoted were: Ms. Arlyce Robinson, Administrative Support Coordinator, Computer Services Corporation; Ms. Sandie Moneypenny, a process technician, The Timken Company; and Ms. Deborah McKay, Administrative Specialist, PRC, Inc. To support its contention, the report cited the 1995 poll conducted by Penn & Schoen Associated, Inc., conducted for the Employment Policy Foundation. House Report No. 104-670. pp. 3-7.

[69] House Report No. 104-670. p. 7.

[70] House Report No. 104-670. p. 7.

[71] The report explains: "The agreement may be specific as to each hour of overtime, or it may be a blanket agreement covering overtime worked within a set period of time." This would suggest some flexibility in program design and in the agreement, itself. House Report No. 104-670. p. 8.

[72] House Report No. 104-670. p. 8-9.

> employer to liability for civil penalties under section 16(e). In addition, if a cause of action is brought by an employee, the employer may be required to pay the employee's attorney's fees and costs.

It added that the legislation "does not require employers to offer their employees the option of taking overtime pay in the form of compensatory time, but it allows employers to do so." But, "[w]here employers choose to offer compensatory time, the bill provides that the decision is then left to the employee" whether or not to request to participate in that option.[73]

An employee with accrued comp time "may generally use the time whenever he or she so desires." He "must request to use compensatory time a reasonable time in advance of using it" and its use should not "`unduly disrupt' the operations of the employer." Through public sector experience, the *unduly disrupt standard* has become narrowly defined "and does not allow the employer to control the employee's use of compensatory time." The report stated:

> The Committee believes that the law must be written to allow the employer some ability to maintain the operations of the business. If that is not recognized in the law, then no employer will ever offer compensatory time ... Furthermore, providing a right to an employee to use compensatory time without any regard to workload or business demands, is simply unfair to co-workers, who in many cases would have to handle the workload of the absent employee.[74]

Accrual of comp time by private sector employees would be limited to 240 hours. "Employees and employers may ... agree to limit accrual of compensatory time to less than 240 hours per year." Accrued comp time "would be treated as unpaid employee wages in the event of the employer's bankruptcy" and "would be a priority claim on the employer's assets."[75]

Comments from the Minority. "The bill, as reported, grants rights to employers, not to employees," the minority report stated. "This legislation encourages employers to hire fewer employees and to work them longer hours by freeing ... [employers] from having to pay cash for overtime, potentially reducing both workers' incomes and employer labor costs..."[76] The Minority observed that this was contrary to the spirit and purpose of the FLSA, adopted "to prevent employers from competing on a basis of undermining living standards, a destructive race to the bottom that impoverishes workers and harms the overall economy."[77]

The minority noted an essential premise underlying the FLSA: "that is, a worker cannot agree to give up his or her right to the minimum wage or overtime pay." It explained:

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[73] House Report No. 104-670. p. 9-10.

[74] House Report No. 104-670. pp. 10-11.

[75] House Report No. 104-670. pp. 11-12.

[76] House Report No. 104-670. p. 27.

[77] House Report No. 104-670. p. 25.

> This fundamental principle of the Act is grounded in the reality that individuals will virtually always feel compelled to accede to their employer's demands because of the inherently greater and more pressing need for the worker for an income ... than the employer's need for the services of an individual worker.

This economic pressure, the immediate interests of individual workers aside, the report argued, was inherent in the private sector work environment.

> The waiver of statutory rights by even a few workers places all workers at risk. It will usually be in the "economic self-interest" of some employees to compromise their statutory rights, whether in the hope of greater rewards tomorrow or merely to hold onto as much as possible today. But even if only a few workers in a workplace "voluntary" waive their rights, the rest of the employees will come under severe pressure to follow suit in order to keep their jobs. Moreover, allowing individuals to waive their right to a living wage or overtime pay erodes the broad social purpose of spreading available work among all workers.

The Minority affirmed: "The original principles which underlie the FLSA are as relevant today as they were in 1938."[78]

DOL's wage/hour investigative staff "has declined by 15% since 1990" and "[n]o one realistically forecasts a change in that trend." This shortage of staff, the report suggested, makes labor standards enforcement precarious.

> Against these present-day realities, the Republican-led Congress is pushing legislation that fundamentally changes the overtime law. The Republican Majority proposes to do so in a manner that significantly weakens workers' understanding of their rights, encourages further violations of the overtime law, and weakens the ability of workers to enforce their rights when the law is violated.

Even with verifiable agreements and penalties for violators, it said, workhours flexibility could exacerbate compliance problems. "Given the remaining deficiencies in the bill," the report states, "this 'protection' is meaningless."[79]

The Minority pointed to "real and substantial differences" between employment in the public and private sectors. "Employers in the private sector have a direct self-interest in reducing labor costs at the expense of workers that does not typically exist in the public sector." Worker protections, generally, are more extensive in the public than in the private sector: "more than 40% of the public sector work force is organized" while less than 15% of the private sector workforce belongs to a union. Further, "even where public sector workers are not organized, they are typically protected by civil service laws." In the public sector, employees are normally disciplined or terminated on a "just cause" basis; in the private sector, in the absence of a union, employees may be terminated by the employer on an "at will" basis — e.g., at the will of the employer, with or without cause. Finally, the report notes, "public employers rarely go out of business, and if they do, are unlikely to be judgment-proof.

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[78] House Report No. 104-670. pp. 25-26.

[79] House Report No. 104-670. pp. 25-27.

Private employers regularly go out of business and are often judgment-proof when they so do."[80]

Under H.R. 2391, those who willfully violate the law by engaging in intimidation, threats or coercion of workers are subject to penalties; but, the report explains: "...to be entitled to any remedy an employee must produce a smoking gun that proves that the employer engaged in coercive activity for the express purpose of interfering with the employee's rights. It is a burden most employees are unlikely to be able to meet..."[81]

Employee rights, the report contends, may be few. Whether to offer comp time is an employer decision. Thus, the flexibility option is not entrusted to workers. Nor is the design of the option, itself, entrusted to workers.

No employee "has a legal right to work overtime." That option (which some workers may value because it adds to their income) is left to the employer. "The bill does not prohibit employers from assigning overtime on the basis of whether the employee has chosen compensatory time in lieu of overtime pay." Thus, an employer might reward cooperative employees (those accepting comp time) through assignment of extra work — without being guilty of threats, intimidation or coercion. An employer may offer a comp time option on a selective basis; there is no requirement that all employees be permitted to enjoy flexibility. "...the employer may arbitrarily deny compensatory time to an employee on some occasions, while offering it to the employee on others."[82] The Minority concluded: "Rather than increasing an employee's control over his or her own life, H.R. 2391 actually increases the employer's control over the worker's life."[83]

The Minority argued that even a worker with banked hours of comp time has no secure right to use that time under H.R. 2391. The employer "can simply deny the leave on the basis that it will unduly disrupt the employer's business." Or, the employer "can unilaterally buy back the compensatory time from the employee, thereby wiping out the employee's compensatory time bank."[84] An employee, requesting the use of comp time, may use it "within a reasonable period after making the request" but the employer decides what constitutes "a reasonable period."[85]

The FLSA has no requirement for employer-provided sick leave or vacation time. If workers can routinely accrue up to six weeks of comp time, "[t]he question then becomes, why should an employer give away paid leave when that employer can

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[80] House Report No. 104-670. pp. 27-28.

[81] House Report No. 104-670. p. 28.

[82] House Report No. 104-670. p. 29.

[83] House Report No. 104-670. p. 29.

[84] House Report No. 104-670. p. 29. Under the proposed legislation, the employer had the right to buy back (cash-out) an employee's banked comp time; conversely, an employee could convert his comp time to cash at will.

[85] House Report No. 104-670. pp. 29-30.

require employees to work overtime to order to earn paid leave instead?" The report queries: "...how voluntary is compensatory time if the only way employees can earn paid leave is to take their overtime compensation in the form of compensatory time instead of being paid for overtime?"[86]

The minority report argues that institution of comp time would create substantial enforcement/compliance problems, especially in industries where such problems already persist: i.e., low-wage industries. There would be no obligation for an employer, under H.R. 2391, it states, to post an explanation of the option, its terms, or alternatives thereto.

H.R. 2391 Called Up in the House, July 1996. On July 26, the House prepared for consideration first of the rule and then of H.R. 2391 *per se*. As the session commenced, prior to calling up either, a series of one-minute speeches anticipated the opposition that would later be voiced against H.R. 2391. Representative Green (of Texas) observed: "We have a bill today on the calendar that will change 60 years of 40-hour week laws."[87] Representative Bonior opined: "...this comp time bill is not about compensation, and it is not about flexibility, and it certainly is not about helping working families. It is about ending the 40-hour workweek." Mr. Bonior added, "It is about changing the laws so employers no longer have to pay overtime wages for overtime work."[88]

In opposition to the bill, Representative Schroeder stated that "America's working families are under tremendous stress." And so, she argued, the sponsors of the comp time legislation "have come up with this new warm fuzzy. It sounds wonderful." But, she added: "This is not what we need." An advocate of flexible and compressed work scheduling for federal employees during the 1970s and 1980s, Ms. Schroeder argued that the issue was different and that the legislation was misnamed. "It is wrong to try and trick America's families, who are under such stress, that you are trying to be so sympathetic toward them, when all you are really doing is giving their employers even more money and even more authority over the time and the hours that they work." Ms. Schroeder concluded: "This is wrong. It should be defeated."[89]

Consideration of the Rule. Debate commenced with Representative Greene of Utah. "As part of the House's new crop of working mothers, I am proud to be a cosponsor of this legislation," she said. It is "commonsense legislation to give working families a much-needed option in balancing their work and family schedules." In 1938, "most women worked at home. Today, most women work both in their homes and outside of the home, and struggle to balance the time demands of work and family — particularly those of children." She termed the FLSA overtime

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[86] House Report No. 104-670. p. 32.

[87] *Congressional Record*, June 26, 1996. p. H8561.

[88] *Congressional Record*, July 26, 1996. p. H8562.

[89] *Congressional Record*, July 26, 1996. p. H8561. There were no counterpart speeches in behalf of H.R. 2391 just then, but extensive pro-comp time comments followed during consideration of the rule and of the legislation.

provisions (the 40-hour week) "anachronistic" as "hampering America's new generation of working families."[90]

The argument in favor of comp time legislation stressed that it would be family-oriented, would expand worker choice and flexibility, and meet the needs of working women. Ms. Greene affirmed:

> Things have changed since 1938 — we have more working parents, more single parents, more divorces. ... We also have more seniors living longer, needing the care and love of their children and grandchildren. ... [H.R. 2391] will permit working parents to bank comp time, so that they can have time available to tend to a sick child, to go to a special event for that child, like a baseball game or dance recital, or to care for a fragile parent. If some of those workers prefer extra cash wages for overtime, they can still choose that.

Focusing upon choice, Ms. Greene concluded: "...this is a chance to help working families get a little more control over their lives by giving them greater choices and more flexibility. Let's let them choose." And, she noted: "The point is that, under this legislation, the choice will be theirs, not Washington's."[91]

Representative Moakley dissented, saying that the legislation "basically means that employees can be forced to take paid time off rather than overtime pay." It allows the employer to stop paying overtime and to say to employees: "'Sorry, I can't pay you overtime, but in return for your long hours, you can take a vacation when it's convenient for me, if I'm still in business.'" He stated: the legislation "not only enables the employers to decide whether or not to offer comp time but also provides no protections for when and how a worker can use their comp time..." His office, he noted, had "not been deluged with letters and calls or telegrams from employees clamoring for comp time."[92]

The heated debate exposed deeply held, and diametrically opposed, views of this legislation. Critics, Chairman Goodling charged, "totally distort the facts."[93] Representative Ballenger referred to "balderdash sprinkled with horse feathers" and to "[d]istortions, prevarications, and untruths."[94] Representative Schroeder agreed that there had been distortion — but, from the other side. She urged Congress to "strip off the name 'family friendly'" — that the legislation be renamed the "'employer reward' bill."[95] Representative DeLauro concurred that the bill would "repeal the 40-hour workweek" and was "a reward to the rich special interests."[96]

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[90] *Congressional Record*, July 26, 1996. p. H8563

[91] *Congressional Record*, July 26, 1996. p. H8563.

[92] *Congressional Record*, July 26, 1996. p. H8563.

[93] *Congressional Record*, July 26, 1996. p. H8564.

[94] *Congressional Record*, July 26, 1996. p. H8565.

[95] *Congressional Record*, July 26, 1996. p. H8565.

[96] *Congressional Record*, July 26, 1996. p. H8567.

Much of the debate focused upon employee safeguards. Arguments, pro and con, seemed to reflect each speaker's vision of workers, of employers, and of their interrelationship within the competitive *free market* system.

Representative Meyers denied "that all employers are bad people who are looking for ways to cheat their employees," affirming that "most employers have a deep and genuine concern about the people who work for them, and they want to do everything they can to satisfy their employees' needs."[97] Conversely, Representative Wynn observed: "The reality of the workplace is that most employees want to keep their jobs and therefore go along with the employer. That means," he added, "that when the employer suggests comp time, they are going to take it."[98]

Mr. Ballenger contended that the workers protections of the bill were adequate. "They [the workers] can go to court on their own or they could go to the Secretary of Labor [Mr. Reich], who is not a friend of business, and he will do it for them to enforce that law."[99] Representative Hefner, on the other hand, questioned "how many people would have on their own the resources to go to court and how many people of their own would know where to go." Mr. Hefner suggested "that 90 percent of the people in our district in North Carolina do not have any idea who Mr. Reich is."[100] Mr. Wynn concurred. "I do not want to hear that oh, well, they can go to court and we lowered the legal standard. The fact of the matter is minimum wage workers are not going into anybody's court. They are not going down the street to see Robert Reich to talk about a labor violation. Those remedies," he concluded, "are not practicable."[101] Representative Meek seemed similarly dubious: "Many employers will find a way to force employees to accept compensatory time instead of cash because they know the employees don't have the resources to fight this coercion."[102]

Ms. Greene of Utah pursued the issue of worker choice. The bill, she argued, "gives workers the flexibility that they need to be able to balance those competing considerations of work and family." It gives workers "more control over their lives... to be able to choose for themselves, in the circumstances for each of their families..." Ms. Greene urged: "Let us give workers that choice ... Let us respect their ability to choose for themselves what is best and not dictate it from Washington as we have for the past 60 years."[103]

Again, there was dissent. Mr. Owens charged that "the bill is flawed at its center." Central to the legislation, he argued, was the assumption of "mutual consent" between the parties: "in a relationship where all the power is on one side

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[97] *Congressional Record*, July 26, 1996. p. H8567.

[98] *Congressional Record*, July 26, 1996. pp. H8569-H8570.

[99] *Congressional Record*, July 26, 1996. p. H8565.

[100] *Congressional Record*, July 26, 1996. p. H8565.

[101] *Congressional Record*, July 26, 1996. p. H8569.

[102] Congressional Record, July 26, 1996. p. H8572.

[103] *Congressional Record*, July 26, 1996. p. H8571.

and the other person is powerless," mutual consent was not possible.[104] Representative Collins of Illinois concurred: the concept of a "truly voluntary agreement" was a "hoax." The bill "clearly attempts to gut the protection of the Fair Labor Standards Act and undermines living standards to the detriment of workers."[105] Unlike traditional overtime pay, stated Representative McKinney, "workers can only use their comp time when it is convenient for their employers, not their families. So much for family friendly legislation."[106]

The vote on the rule was 228 yeas to 175 nays.[107]

Floor Consideration of the Bill. On July 30, 1996, the House commenced debate on H.R. 2391 itself. Representative Goodling, chairman of the reporting committee, explained that 20 changes had been made in the legislation since it was introduced, "all supporting the employee," with further changes to be added on the floor. He then set about "to correct the misinformation and the disinformation that was distributed Friday." Mr. Goodling reaffirmed that "[t]he choice to take overtime compensation in the form of paid time off must be voluntary and must be requested by the employee" and pointed to prohibitions against threats, intimidation, etc., of workers by their employers where the comp time option is concerned. Chairman Goodling stressed safeguards, remedies and protections in his defense of the legislation. Representative Clay, however, branded the legislation "flimflam flextime" and asserted that it will provide "an excuse to undermine the living standards of working families."[108]

The ensuing debate followed well-established lines. H.R. 2391 "is pro-family, pro-worker, pro-women" and provides "relief to the hard-working men and women across our Nation who struggle daily to support their families," Representative Myrick observed.

> Dads could use the accrued time to make sure they are behind the dugout for that critical Little League game, and mom and dad could use their time to visit their child's school for the parent-teacher conferences, enabling and encouraging parents to participate in their child's education.

Ms. Myrick added: "Even the President and Vice President endorse giving workers the option to spend more time with families."[109]

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[104] *Congressional Record*, July 26, 1996. p. H8571.

[105] *Congressional Record*, July 26, 1996. p. H8571-H8572.

[106] *Congressional Record*, July 26, 1996. p. H8572.

[107] *Congressional Record*, July 26, 1996. pp. H8572-H8573.

[108] *Congressional Record*, July 30, 1996. pp. H8776-H8777.

[109] *Congressional Record*, July 30, 1996. p. H877. The Administration "threatened a veto, saying the measure would undermine employee rights and allow employers to coerce workers into taking time off instead of money." *Congressional Quarterly*, January 25, 1997. P. 222. Representative Clay observed that the President has a proposal of his own, but does not support "the bill that we are debating now. The President thinks this bill is a disaster."

(continued...)

Representative Andrews, with a 3-year-old daughter, could appreciate Ms. Myrick's concern. Yet, he opposed the bill and questioned whether the comp time option was "truly voluntary" with workers and, were abuse to occur, stated that the worker "has no meaningful or realistic remedy." Mr. Andrews had raised this issue during committee consideration. "I think the employee has a burden of proof that would be almost impossible to sustain. I think there are some legitimate question[s] as to under which specific circumstances that employee could, in fact, recover her ... or his attorney fees." And, further: "... I think an employee who exercises his or her right to choose cash rather than comp time would not be able to achieve an effective remedy if the employer wanted to punish him or her for making that choice." He distinguished between the workplace environment of public and private sector employment. If public sector workers are singled out for unfair treatment, "there is a set body of law that provides for both substantive remedies and meaningful procedures in order to enforce their rights. That does not exist in the private sector." Noting various other concerns, he affirmed: "I oppose the bill; I urge its defeat."[110]

Conversely, Subcommittee Chairman Ballenger argued that the comp time measure was "commonsense legislation" and affirmed that "employees want it." He declared: "American workers want and deserve flexibility in the workplace to better deal with the challenges of balancing work and family obligations." In contrast to Representative Andrews, Mr. Ballenger concluded: "I urge my colleagues to support this legislation which will allow American men and women to make the choice for themselves between extra money or paid time off."[111]

With strong industry support, H.R. 2391 was being urged as family friendly and pro-worker. Representative McKinney queried: "Does anyone believe for 1 minute that workers were consulted on this bill?"[112] For the absence of labor support, Representative Shays suggested one answer: that it was "really a debate between union leaders and rank-and-file members."[113]

Proponents and opponents divided on whether comp time would actually be voluntary. Representative Riggs assured his colleague that the bill, "... [in] explicit language ... prohibits an employer from compelling an employee to take compensatory time, or time off, in lieu of overtime compensation. So no employee in any

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[109](...continued)
Congressional Record, July 30, 1996. p. H8779.

[110] *Congressional Record*, July 30, 1996. pp. H8777-H8778.

[111] Congressional Record, July 30, 1996. p. H8778.

[112] *Congressional Record*, July 30, 1996. p. H8783.

[113] *Congressional Record*, July 30, 1996. p. H8783. It was possible that the proponents of H.R. 2391 had a better understanding of the concerns of workers than did the trade union leadership. It was also possible that the comp time bill was simply industry-oriented legislation: "skillfully titled" (the "Working Families Flexibility Act"), suggested Representative Pomeroy. "Perhaps it is unintentional, but unfortunately this bill represents yet another proposal put forth by the majority which will increase the strain on working families and jeopardize our nation's basic workplace protections." See, *ibid*, p. H8786.

occupation in any industry can be compelled to take compensatory time off..."[114] Ms. Schroeder viewed things differently.

> We hear people saying, 'oh, employers will not compel employees to say they would rather have time off than pay, time-and-a-half pay.' Oh, yeah? Show me the employer that would rather give you money than time off. Employers are going to say, "You want to work here, this is a voluntary decision. If you voluntarily decide you want to work here, then you better bloody well volunteer to sign this thing saying if there is any overtime you will take time off rather than get money."

Ms. Schroeder added: "Let us be real clear about this. When people are working at those kinds of levels of jobs, they cannot negotiate with their employer ... Either they will never get overtime, or they will not get hired at all."[115]

What was really needed, Ms. Schroeder argued, was "predictability." "We need to be able to predict when we have to work and predict when we are going to have time off so that we can tell the school we can be there to help with the kids..." "If my child is going on a field trip," he explained, "that is when I need to have the time off, not 3 weeks later when it is a convenience for the employer. That is why this bill is a joke..."[116]

As debate drew to a close, Representatives Goodling and Ballenger proposed a series of amendments dealing, primarily, with employee protections (discussed below). Representative Clay, opposing the measure, argued that the bill "should not have been reported out of committee without basic employee protections in the first place" though he applauded his colleagues for "belatedly recognizing that their bill has many flaws." The supplemental amendments, he maintained, though numerous, were insufficient "to rescue a bill that is fatally flawed."[117] Similarly, Representative Becerra asked how a good bill ("and that is what we were told [it was] when it left the committee") should suddenly need "more than 20 changes being made now at the last moment now that it is on the floor to try to correct all these problems in the bill."[118]

The amendments to H.R. 2391 were approved. On passage of the amended bill, the vote was 225 yeas to 195 nays.

Amended Version Passed by the House. In the amended bill, choice (and, thus, flexibility) continued to rest in the first instance with the employer. "An employer" may offer compensatory time off to an employee. If the employer declines to make that offer, that ends the matter. If the employer agrees to initiate a program, the

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[114] *Congressional Record*, July 30, 1996. p. H8783.

[115] *Congressional Record*, July 30, 1996. p. H8784.

[116] *Congressional Record*, July 30, 1996. p. H8785.

[117] *Congressional Record*, July 30, 1996. p. H8788-H8789.

[118] *Congressional Record*, July 30, 1996. p. H8790. The proposed changes in the legislation were being offered by supporters of the measure.

design of the program (how many hours to be offered, which of his employees may participate in the program, on what terms banked hours may be drawn down, etc.) remained with the employer. Where there was a union presence, employees may have a right to bargain with respect to the option. Where there was no collective bargaining agreement and no official employee representative, individual workers would negotiate with their employers.

The issue of the use of accrued hours remained: i.e., definition of "within a reasonable period" and "does not unduly disrupt the operations of the employer." Both concepts would need to be defined in regulation or would be left to the discretion of the employer. The scheduling of hours of work in excess of 40 per week (from which the comp time flows) is an employer prerogative.

As approved by the House, the bill would allow private sector employees to accrue up to 240 hours of comp time; but, under the floor amendments, all time "in excess of 80 hours" may be cashed-out by the employer with "at least 30 days notice" to the worker. Further, an employer could unilaterally discontinue the program "upon giving employees 30 days notice."[119] A private sector employee, in the absence of a collective bargaining agreement, etc., would be able to terminate his individual agreement to accept comp time "at any time."[120]

Employee remedies for violation of a worker's rights were broadened by the floor amendments. As reported, an employee had to prove that his employer had "willfully" violated the admonition not to "directly or indirectly intimidate, threaten, or coerce," etc., with respect to participation in or utilization of the comp time option. The word "willfully" was dropped from the legislation as passed. The Secretary of Labor was directed, within 30 days after enactment, to develop language that employers could post notifying workers of the comp time option and of their rights were such a program to be developed by an employer.

H.R. 2391 was essentially enabling legislation: it waived FLSA overtime pay requirements, where necessary, to allow employers to develop comp time programs. Though critics expressed concern for protection of worker rights, further worker rights protections could have made the legislation administratively top-heavy, preventing achievement of the goals of the bill's sponsors.[121]

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[119] It may not be entirely clear what would become of accrued comp time under the 80-hour limit, were an employer to terminate the program. The legislation may permit a cash-out at the termination of the program; but, it is also possible that the comp time below 80 hours would continue to be drawable by employees until used or until the end of the program year. Where a comp time program has become part of the collectively bargained agreement (or of another agreement with an official representative of the workers), it may not be clear the extent to which an employer could terminate the program at will.

[120] Because the language of the legislation, as approved by the House, grants a right of termination of the comp time agreement only to workers covered under paragraph (2)(A)(ii), it may not be clear whether a worker, covered by a collective agreement, may similarly withdraw from the program — either at all or at his or her own individual choice.

[121] When legislation of this sort is signed into law, it is passed along to the administering

(continued...)

The Ashcroft Proposal

On August 7, 1995, Senator Ashcroft introduced S. 1129, the "Work and Family Integration Act."[122] He stated that the "rigid and inflexible" overtime pay provisions of the FLSA have paralyzed those it was meant to help. "The FLSA," he continued, "now deprives employees of the right to order their daily lives on and off the job to meet the responsibilities of work and home."[123]

General Provisions of S. 1129. S. 1129 would have added a new subsection to Section 13 of the FLSA (exemptions). **First.** It would have allowed employers to set aside the standard 40-hour workweek and replace it with a 160-hour basic work requirement: i.e., 160 workhours "over a 4-week period, that is scheduled for less than 20 workdays." **Second.** Within the 160-hour period, employers would have been allowed flexibility in arranging work schedules: that is, any arrangement of hours so long as the total for the 4-week period did not exceed 160. Within the 4-week/160-hour period, no overtime pay would have been required. **Third.** If it were deemed appropriate to schedule more than 160 workhours in a 4-week period, then those employees participating in a *flexible credit hour* program (under the legislation) could have worked up to 48 hours beyond their regular 160 hours — carrying over the excess 48 hours "to a succeeding 4-week" period as "credit hours." **Fourth.** Hours worked in excess of 160 (credit hours) would have been credited to the employee *at a straight-time rate*. Thus, it appears, time-and-a-half would not be required until an employee had worked 208 hours in a single 4-week period (i.e., 160 regular workhours plus 48 credit hours). **Fifth.** The employer would have been allowed to establish a program of flexible scheduling that would have stood alone, within the existing 40 hour workweek, or have been combined with the 160-hour work period for greater flexibility. **Sixth.** No employee could have been "required to participate" in the flexible and compressed scheduling program: any threat, intimidation or coercion on the part of the employer would have been prohibited. Were an employee to decline to participate in the compressed or flexible workhours program, he or she could still have been required to work in excess of 40 hours a week; but, in that case, the overtime pay provisions of current law would have applied.[124]

The proposal would have divided workers and workplaces into two groups. *First*, there were those covered by a collective bargaining agreement (union workers) which would govern implementation of the scheduling arrangements. *Second*, there

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[121](...continued)
agency (here, DOL) which, then, develops implementing regulations. While such regulations may resolve any remaining ambiguities of the legislative language, they may also add to the burdens of employers in the utilization of the option.

[122] S. 1129 was referred to the Senate Committee on Labor and Human Resources. On December 6, 1995, companion legislation (H.R. 2723), introduced by Representative Doolittle, was referred to the Committee on Economic and Educational Opportunities.

[123] *Congressional Record*, August 7, 1995. p. S11788.

[124] How such concepts as threat, intimidation and coercion might have been interpreted in the various working environments seems unclear.

were those not covered by a collective bargaining agreement (for the most part, non-union workers), in which case the program drawn up or authorized by management would have been controlling.

In addition, S. 1129 dealt with a series of other issues. It allowed for the priority rehiring of former employees, under certain conditions, without incurring penalties of law: e.g., civil rights, discrimination, seniority, pension requirements, etc. It modified Section 13(a)(1) of the FLSA with respect to leave and overtime pay policies for salaried workers — an issue that has been in contention for several years.[125] And, it brought the Federal Employees Flexible and Compressed Work Schedules Act into conformity with the 160-hour 4-week formula of the Ashcroft legislation.[126]

The Senate Hearing, February 1996. In the original FLSA of 1938, "it was fairly simple to determine which employees were entitled to overtime pay and which were not," Labor and Human Resources Committee Chair Kassebaum noted in opening the February 27, 1996, hearing on overtime work. Through the years, Congress has amended the statute and DOL has developed regulations to implement those amendments. Thus, Senator Kassebaum noted, "what was once a simple process has given rise to a confusing maze of rules and regulations about how the law should be applied in each workplace."[127]

Comments by Senator Ashcroft. Through the past half century, observed Senator Ashcroft, the lead witness, the demographics of the workforce have changed: from a primarily male workforce to one in which "75% of the mothers with school-age children work." Thus, he proposed to allow employers (with agreement by their employees) to modify the FLSA overtime pay requirements in the name of greater flexibility.

> There is a real need for workers to be able to devote more time to their families ... Flexible work schedules would give employees more control over their lives by allowing them to balance family and work obligations better. In addition,

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[125] Salaried workers are generally overtime pay exempt under Section 13(a)(1) of the FLSA and are normally more highly paid executive, administrative or professional workers. When such employees work extended hours (beyond 40 hours in a week), they are not paid overtime because they are on a straight salary and, as professionals, etc., are expected to do what is required of them. However, when a salaried worker, having worked overtime without extra pay, needs to be absent from work for an hour or two for personal reasons, some employers have chosen to "dock" the pay of the employee for that absence. The Department of Labor has ruled that such "docking" may convert the exempt employee into a *nonexempt* employee and subject the employer to the payment of overtime wages where hours are worked in excess of 40 per week.

[126] Federal employees, covered by the Federal Employees Flexible and Compressed Work Schedules Act (1978, as extended), may work compressed schedules of 80 hours, however structured, within a 2-week period without the employer being subject to overtime pay requirements.

[127] U.S. Congress. Senate. Committee on Labor and Human Resources. *Oversight of the Fair Labor Standards Act.* Hearings, 104th Cong., 2nd Sess., February 27, 1996. Washington, U.S. Govt. Print. Off., 1996. p. 1. (Hereafter cited as Senate Hearings, 1996).

> employees may attend to family needs without using limited sick leave allowances. And under compressed schedules, day care expenses could be reduced by as much as 20%.[128]

The Senator observed that overtime pay and the 40-hour workweek could prevent a parent from attending child/family related activities scheduled for a Friday afternoon.[129] He pointed to the popularity of flexible and compressed scheduling for the Federal sector, cited President Clinton's endorsement of workhours flexibility, noted that "balancing work and family obligations" was the number one concern of working women, and concluded: "...to combat the rigidity of the Fair Labor Standards Act, I have introduced the Work and Family Integration Act" (S. 1129).[130]

General Testimony. The remainder of the hearing was conducted in a seminar format with Senator Ashcroft joining the other panelists. Participants in the seminar included: Maggi Coil, Motorola, Inc.; Michael Leibig, an attorney in private practice; Arlyce Robinson, Computer Sciences Corporation; Douglas Knight, the Boeing Company; John Shamley, deputy director of personnel, Government of the District

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[128] Senate Hearings, 1996. pp. 2-3.

[129] This argument, *the soccer mom thesis* (the inability of a worker to be off on a Friday afternoon child-related function, such as a soccer game), would frequently be reasserted through debate on this issue. When introducing S. 4 in the 105th Congress (discussed below), Senator Ashcroft stated: "...it is against the law for an employer to agree with his employee that the employee can take time off on Friday afternoon to see his daughter get an award at the local high school and to make up that same time on Monday. The strict laws about hours and overtime," he emphasized, "make it difficult for that to happen, make it impossible, make it illegal." *Congressional Record*, January 21, 1997. p. S221.

Under current law, a parent wishing to take time off on a Friday afternoon, would be permitted, were the employer agreeable, to work extra time on the prior Monday, Tuesday, Wednesday, etc., or even on Friday morning, to offset the time away from work on Friday afternoon. This, of course, would require some measure of planning — as would utilization of the comp time option. An employee, with the agreement of the employer, could also take leave without pay or annual leave. If the need were a medical emergency, the Family and Medical Leave Act could, in some cases, provide an option.

Various witnesses did comment on the question of the need for anticipatory scheduling of comp time use. For example, Pete Peterson of Hewlett-Packard, testifying for the FLECS Coalition in support of H.R. 2391, observed with respect to the use of the comp time option: "...it can't be just the employee saying, I want to take it [comp time] right now, no matter what." See House Subcommittee on Workforce Protections, Hearings, 1995. p. 446. The same position was taken by Kathleen Fairall of The Timken Company, speaking for SHRM and for the FLECS Coalition. When asked by Mr. Romero-Barcelo concerning comp time utilization, she responded: "...I think they would have to — it would be a mutually agreeable scheduling. I mean, they couldn't come up tomorrow and say I want to take tomorrow off as my compensatory time..." See House Subcommittee on Workforce Protections, Hearings, 1995. p. 233.

[130] Senate Hearing, 1996. pp. 2-4.

of Columbia; Phyllis G. Diosey, Malcolm Pirnie, Inc.; and E. Glenn Baker, John Alden Life Insurance Company.[131]

Pay Docking. Initially, discussion focused upon *pay docking*, one of the issues dealt with in the Ashcroft bill.[132] The Ashcroft bill (S. 1129) would modify Section 13(a)(1) of the FLSA so that an "executive, administrative, [or] professional" employee would be *both* overtime pay exempt and subject to having his or her pay docked should the employer choose to do so.

In an exchange between Senator Ashcroft and attorney Leibig, the Senator suggested that, under the present system, one had flexibility to allow employees to take short term leave if one were willing to "pay people for not showing up." Leibig countered: "They have the flexibility now to pay people salary or hourly."[133] If workers are paid on an hourly basis and they absent themselves for a few hours, the employer can dock their pay under current law; however, if they are salaried employees, the employer cannot dock their salary for short absences without risking their conversion of nonexempt status. The choice rests with the employer.

> Senator ASHCROFT. So your view is that it should be a rigid 40-hour week, and if a person wants to take 2 hours off on Friday afternoon to attend to a sick child, he or she should not be allowed the flexibility of volunteering to make that up the next week without some sort of penalty ... Is that your view?
>
> Mr. LEIBIG. No ... It is my feeling that there should be a national standard for a 40-hour work week, but that it should be flexible in areas where it is necessary.
>
> For instance, today, under the Family Leave Act, if people need to take time off to take care of a sick child and so forth, there is flexibility already.

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[131] Several of the witnesses had appeared at prior hearings on overtime issues. Diosey, Leibig, Robinson and Coil testified before the House Subcommittee on Workforce Protections in 1995. See: U.S. Congress. House. Committee on Education and Labor, Subcommittee on Labor Standards, Occupational Health and Safety. *Hearing on the Fair Labor Standards Act*. Hearings, 103rd Cong., 1st Sess., July 1, 1993. p. 32; and, U.S. Congress. House. Committee on Economic and Educational Opportunities, Subcommittee on Workforce Protections. *Hearings on the Fair Labor Standards Act.* Hearings, 104th Cong., 1st Sess., March 30, June 8, October 25, and November 1, 1995. pp. 16, 54, 63, 208, and 456. In 1995, Ms. Coil had testified both for Motorola and the Labor Policy Association.

[132] Speaking generally, this issue involves two classifications of employees. Salaried workers, normally more highly paid administrative, executive and professional employees, may be exempt from the overtime pay requirements of the FLSA. When, as professionals, etc., they work a few hours beyond 40 in a week, their salary is unchanged. But, then, neither are they docked if they need to absent themselves from the workplace for a brief period. *Hourly workers*, often earning substantially less, are nonexempt and are paid overtime for hours worked in excess of 40 per week, but their hourly wages are docked when they absent themselves from the workplace for brief periods.

[133] Senate Hearings, 1996. pp. 14-15.

> The CHAIRMAN [Senator Kassebaum]. But Mr. Leibig, isn't that only for employers of 50 employees or more?
>
> Mr. LEIBIG. Sure. Small employers are not covered by the other rules, either, and if it is a question of whether the Family Leave Act should be expanded to employers of less than 50, if that is the debate, I guess I would favor expanding it...

Leibig added: it is one thing for workers to have comp time available for certain needs, "especially ... at their own choice. But it is another thing to say we should abandon a basic 40-hour work standard and allow the work week to get longer and longer."[134]

The Worker's Choice? Throughout, a central issue related to whether flexibility could be secured *at the worker's choice* or *at the employer's convenience*.

Senator Ashcroft affirmed: "The proposed change to the statute is to give the employee the option, not to give the employer the option, and I think those are different questions." Mr. Leibig concurred that choice was the issue, but disagreed on the substance of S. 1129 at it stood.

> Mr. LEIBIG. ... If there is a provision that the employee has absolute access to get comp time, and, for instance, after the comp time is in the bank, the employee has the right of when to take it off and when to use it...
>
> Senator ASHCROFT. I think that is the nature of the proposal...
>
> Mr. LEIBIG. The bills that have been introduced in the House and your own bill do not have that. S. 1129 — you may intend to put it in [employee choice], and I think that should be encouraged, but it is not in there now.
>
> Senator ASHCROFT. Well, it certainly is at the employee's option, not at the employer's choice.
>
> Mr. LEIBIG. It is the employee's option to take the comp time,[135] but once he has it, it is not at his or her option whether to use it or have access to it; it is controlled by the employer — or, at least it is allowed to be controlled by the employer under the way the bills are.[136]

Discussion then moved on to other aspects of the Act, the various witnesses joining in the discourse with prepared statements and responding to questions.

An Overview of the Hearing. Although the focus of the hearing was S. 1129 (the compressed schedule, comp time and pay docking), the seminar portion of the

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[134] Senate Hearings, 1996. p. 16.

[135] As the legislation was introduced, the first option would have been the employer's: whether or not to institute a comp time program. Then, if the employer offered such a program, the employee would have had the option of participation — assuming that he or she was part of the covered group of workers. The use of comp time (the timing of the drawing down of banked hours) would then be left to the discretion of the employer.

[136] Senate Hearings, 1996. pp. 17-18.

session was more wide-ranging. Also discussed was the wage/hour treatment of "bona fide executive, administrative, or professional" employees and those employed "in the capacity of outside salesman." Questions were raised concerning "waiting time," "on-call" status, "break time," "sleeping time," "training time," "travel time" (including commuting in company vehicles), "unauthorized work" (the concept of "to suffer or permit to work"), calculation of the "regular rate" for overtime pay purposes, what to do about "supplementary earnings such as commissions, bonus, shift premiums, etc." and the distinction between "discretionary bonuses" and "nondiscretionary bonuses" for wage/hour compliance. Each of the issues involved technical and complex interpretation of the statute and of its implementing regulations.

Chairman Kassebaum, at various points, observed that the regulations were "convoluted"[137] and that the Act and its implementation was "enormously complicated" and with "enormously burdensome requirements." That, she noted, "is why we are trying to understand and sort through this to see where we can perhaps address it in some constructive way."[138] Through the course of the hearings, there was some disagreement as to how the statute was applied, what the courts and the Department of Labor held, and what options for flexibility existed under current law. No one from DOL was present to explain that agency's interpretation of the Act or its procedures for enforcing it.[139]

Toward the end of the session, Leibig noted "that all of the witnesses who are here today, except the ones who are lawyers, are people who did not benefit or say they did not benefit from the Fair Labor Standards Act." He suggested that "many Americans do benefit" from the Act and that "there are employers who will take advantage of workers." "It would be a good idea at some point," Leibig suggested, "for the committee to hear some of the workers who do feel they need the protection of the Act. I think it is unusual that none were invited or are here." Chairman Kassebaum responded: "Well, Mr. Leibig, I would guess that everyone here would agree with you, that they would not want an employer to abuse the Fair Labor Standards Act."[140]

Overtime Pay and *Comp Time*: The 105th Congress

As preparations began for the 105th Congress, changes in overtime pay law remained an issue. Receiving "top priority" among emerging labor issues, stated Tim

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[137] Senate Hearings, 1996. p. 28.

[138] Senate Hearings, 1996. p. 43.

[139] Leibig, an attorney in private practice, functioned during the hearing as a wage/hour technician, but his views were not necessarily concurred in by other panel members. Maggi Coil of Motorola and John Shamley from the District of Columbia Government were introduced as "two distinguished wage and hour experts who have taught seminars on FLSA ... through the American Compensation Association" of which Coil was then president. Neither, of course, was able to speak for the Department of Labor.

[140] Senate Hearings, 1996. p. 34.

Shorrock of the *Journal of Commerce*, "is a Republican bill designed to make the U.S. workplace more flexible" through the use of comp time. "That's not only good for employees," observed Sandra Boyd of the Labor Policy Association, "it's good for the bottom line." Peggy Taylor of the AFL-CIO was less enthusiastic, suggesting (in Shorrock's summary) that the initiatives "could gut the 40-hour week and make workers vulnerable to pressures from employers to take time off instead of overtime pay."[141]

Under date of December 17, 1996, Representative Goodling, chair of the full Committee on Education and the Workforce, circulated a "Dear Colleague" letter inviting Members to become co-sponsors of new comp time legislation that will be "the same as H.R. 2391, as passed by the House on July 30, 1996."[142] A roughly parallel letter was dispatched on January 2, 1997, by Representatives Shays and Myrick.[143] On January 8, 1997, a "group of House Republican women ... endorsed what they called `family friendly' legislation" to allow the use of comp time in place of overtime pay. Meanwhile similar interest was rising in the Senate.[144] By late January, *The Wall Street Journal* reported that "Republicans and business groups will be taking their fight directly to the public" which, a survey by "the pro-business Labor Policy Association" suggests, supports the concept of flexibility overwhelmingly.[145]

Workhours Legislation Reintroduced

On January 7, 1997, Representative Ballenger introduced a new comp time bill (H.R. 1), the "Working Families Flexibility Act."[146] The bill was referred to the Subcommittee on Workforce Protections which Mr. Ballenger chaired. On January 21, 1997, Senator Ashcroft introduced S. 4, the "Family Friendly Workplace Act"[147] which was referred to the Subcommittee on Employment and Training chaired by Senator DeWine, a co-sponsor of the legislation.

The New Ballenger Bill (H.R. 1). H.R. 1 differed in some respects from H.R. 2391 of the 104th Congress. In the earlier legislation, Mr. Ballenger had proposed a restructuring of Section 7(o) of the Act, dealing only with wage/hour coverage for state and local government workers, to expand its provisions in a modified form to the private sector workforce. In H.R. 1, Mr. Ballenger proposed adding a new Section 7(r) to the Act that would deal only with private sector workplaces.

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[141] Shorrock, Tim. "US Firms Prepare To Square Off with Labor on Work Laws." *Journal of Commerce*. December 26, 1996. pp. A1 and A5.

[142] Dear Colleague Letter, Representative William Goodling, December 17, 1996.

[143] Dear Colleague Letter, Representatives Christopher Shays and Sue Myrick, January 2, 1996.

[144] *Daily Labor Report*, January 9, 1997. pp. A1-A2. Those issuing the endorsement included Representatives Molinari, Fowler, Dunn, Myrick, and Granger.

[145] *The Wall Street Journal*, January 28, 1997. p. A18.

[146] *Congressional Record*, January 7, 1997. p. H66, E42-E43.

[147] *Congressional Record*, January 21, 1997. p. S158.

Like its predecessor, H.R. 1 based the comp time option on a time-and-a-half formula, distinguished between workers with a collective bargaining or other representational agreement and nonunion workers, and left the early initiative to the employer, [148] but provided most of the worker protection that had been built into the prior legislation through amendment. Employers and employees would enter into "an agreement or understanding" with respect to comp time. H.R. 1 required that the agreement (a) be arrived at "before the performance of the work," (b) that it be entered into "knowingly and voluntarily by such employee," (c) that it was "not a condition of employment,"[149] and (d) that it must be "a written or otherwise verifiable statement." The employer could not "directly or indirectly intimidate, threaten, or coerce or attempt to intimidate, threaten, or coerce" any employee with respect to the option.

Employees could accrue a maximum 240 hours of comp time, and unused hours would have to be cashed out at the end of a 12-month period. However, an employer could cash-out all hours banked in excess of 80 at any time upon 30 days notice to the employee. The employer would be allowed to discontinue the comp time option upon a 30 days notice to the employee; the employee, to rescind his agreement to participate, giving a written notice, at any time. Within 30 days thereafter, the employee would be given monetary compensation for his banked hours. H.R. 1 made clear that an employee who terminated his employment, "voluntarily or involuntarily," would be paid for unused comp time. H.R. 1 retained the language providing for the use of comp time "within a reasonable period of time" when it "does not unduly disrupt the operations of the employer." Penalty and posting requirements also appeared in H.R. 1.

The New Ashcroft Bill (S. 4). S. 4 was comprehensive and covered areas not dealt with in H.R. 1. It set forth several workhours options. And, in addition, the bill dealt with certain other aspects of existing law.[150] Among its provisions were the following.

Compensatory Time Off. Like H.R. 1, S. 4 began by adding a new Subsection (r) to Section 7 of the FLSA. Its provisions were similar to those of H.R. 1, establishing the same general options and requirements.

Biweekly Work Programs. Under S. 4, an employer would be allowed to establish a 2-week 80-hour work period during which, without incurring an overtime penalty, an employer could schedule work in any manner: 2 weeks of 40 hours each, 60 hours in one week and 20 hours in the other, etc. He would not have been required to pay overtime rates (time-and-a-half) until after 80 hours had been worked

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[148] As in the earlier legislation, the employer would determine the structure or scope of the option or the restraints imposed upon its utilization.

[149] The concepts, "knowingly and voluntarily," were not defined, potentially a significant matter were the worker unaccustomed to American labor-management practices, uncertain of his legal rights, or not fluent in English, or with respect to the requirement that the agreement not be "a condition of employment."

[150] The text of S. 4 appears in the *Congressional Record*, January 21, 1997, pp. S222-S224, and is available on Thomas.

in 2 calendar weeks. For hours worked in excess of 80 in a 2-week period, a worker could be compensated either in cash or in paid comp time — each at not less than a time-and-a-half basis. A worker would have been allowed to participate in this biweekly compressed scheduling with the option, set forth in the legislation, of declining.

Flexible Credit Hour Program. An employer, at his initiative (but in conformity with a collective bargaining agreement, where there is a trade union presence), was to be allowed to establish a "flexible credit hour program." Once the program had been established, the employee would then have been allowed to elect whether to participate. Where a worker chose to participate in a "flexible credit hour program," he and his employer would then "jointly designate hours for the employee to work that are in excess of the basic work requirement[151] of the employee so that the employee can accumulate flexible credit hours to reduce the hours worked in a week or a day subsequent to the day on which the flexible credit hours are worked."

Compensation for "flexible credit hours" would have been *on a straight time basis*. An employee would not have been allowed to "accumulate" more than 50 flexible credit hours at any one time. There were cash-out provisions. An employee, as in the comp time program, could not have been forced to participate in the credit hours option.

An employee would have been permitted to work through a 40-hour workweek (or an 80-hour biweekly work period). Then, in agreement with his employer, in lieu of the overtime pay requirements of the FLSA, up to another 50 hours to be worked on a straight time basis and designated at credit hours.

Salary Practices Relating to Exempt Employees. As currently administered, the pay of a salaried worker (one deemed a "bona fide executive, administrative, or professional" employee) may not be "docked" for brief absences from his or her workplace (an hour or two) since, as noted above, he may be called upon to work overtime hours *without pay* because of his or her status as a professional, etc. If the pay of such a salaried worker is docked, he may be converted from overtime pay exempt to nonexempt — causing the employer to pay extra for overtime hours worked.[152]

S. 4 would have amended the FLSA by adding a new Section 13(m). It would have permitted a salaried worker's pay to be docked for short absences from his workplace.[153]

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[151] It appears that the "basic work requirement" (one's pre-overtime work period) would be 40 hours or, if participating in a bi-weekly work program, 80 hours.

[152] *Congressional Record*, January 21, 1997. p. S225.

[153] CRS Report 92-761, *The Overtime Pay Exemption for Salaried Employees: The Salary Basis Test Issue*, by Charles Ciccone.

Hearings of the 105th Congress

Hearings on comp time and related issues commenced early in the 105th Congress, moving between the Senate and the House — and between S. 4 and H.R. 1. The arguments, pro and con, largely resembled those of 1995 and 1996; little appeared to have changed.

The Senate: Opening Hearing. On February 4, 1997, the Senate Subcommittee on Employment and Training, chaired by Senator DeWine, conducted a general hearing on overtime pay issues under the FLSA. Senator Hutchison of Texas, the lead witness and a cosponsor of S. 4, presented an appeal for flexibility. She noted that the FLSA had been crafted "in the wake of the Great Depression to protect workers from abusive conditions," but suggested that such protection was no longer necessary. "Now, employers are much more attuned to the needs and preferences of their employees." Senator Hutchison declared S. 4 "a win-win situation for both workers and their employers."[154]

Sandra Boyd, speaking both as Chair of FLECS and as Assistant General Counsel of the Labor Policy Association, noted that "many companies have implemented creative workplace programs" but that "they are limited in what they can provide" because of the overtime pay requirements of the FLSA. "The employers I represent know that providing flexibility in the workplace is a win-win," she affirmed. Boyd explained the various provisions of S. 4 and concluded that "finding solutions to the needs of employers and employees seeking to increase workplace flexibility won't be easy" but "[l]ifting the current roadblocks in the FLSA ... is a critical first step."[155]

Several pro-flexibility speakers followed. Michael Losey, president of the Society for Human Resource Management (SHRM), branded the FLSA as "outdated and, in some cases, even unfriendly to our nation's businesses and their employees." He observed that "employers find themselves constrained by the FLSA when attempting to offer workers greater flexibility." SHRM also endorsed the extended work period (80 hours over 2 weeks) as provided in S. 4.[156] Mark Wilson, speaking for The Heritage Foundation, expressed similar views. The FLSA, he stated, "was enacted to protect unskilled, low-pay workers. But in today's economy, where both parents are likely to be working, its rigid and inflexible provisions hurt more than they help." Wilson opined: "The FLSA deprives workers of the right to order their daily lives, both on and off the job, to meet the responsibilities of work and home." He found it "disturbing" that "only 15.3 percent of all *private* full-time employees were

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[154] *Daily Labor Report*, February 5, 1996. pp. E5-E6.

[155] Statement of Sandra J. Boyd, February 4, 1997.

[156] Statement of Michael R. Losey, February 4, 1997. A summary of SHRM's broader attitude toward the FLSA, attached to Losey's statement, indicates opposition to an increase in the minimum wage, support for a 160 hour pre-overtime monthly work period, support for wider employment of unpaid volunteers, support for pay docking, etc.

working on flexible schedules."[157] William Kilberg, Solicitor of Labor during the Ford Administration, a frequent witness on FLSA issues, protested that "the FLSA's 60-year-old structure far too often works against the interests and desires of the employees it purports to protect." He, too, called for "flexibility."[158]

"One of the biggest backers for amending the overtime law is TRW Inc.," according to *The Wall Street Journal*. As the Senate hearing approached, *The Journal* conducted a number of interviews with persons interested in changing the overtime pay requirements of the FLSA: among them, Christine Korzendorfer, an executive assistant with TRW. Korzendorfer noted that she had "lost 'hundreds and hundreds of dollars' during her last pregnancy after her doctor ordered her to stay in bed for a month. If she had been allowed to accumulate comp time," Korzendorfer argued, "she could have traded in those hours and not lost pay for the days she missed." *The Journal* concluded: "Now pregnant again, she worries about a repeat."[159] Accompanied by Sallie Larsen, TRW Vice President for Human Resources and Communications, Korzendorfer also testified before the Subcommittee on Employment and Training.[160]

A different perspective was presented by Karen Nussbaum, Director of the Working Women's Department, AFL-CIO. "For the past 25 years," Ms. Nussbaum began, "I have been an advocate for working families and particularly working women." She noted the number of women now in the workforce and argued that "the vast majority of working families — the bottom 80% — are seeing their incomes stagnate or fall behind." She asserted:

... there's a gap in work and family policies, as well. Despite the fact that low-income families need family-friendly workplaces even more than do high-income earners — because their lower pay limits their ability to purchase flexible dependent care and

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[157] Statement of Mark Wilson, February 4, 1997. In contrast to Wilson's contention is the testimony of a later witness, Edith Rasell of the Economic Policy Institute who stated:

> "...under current law employers can allow employees to vary their arrival and departure time and take time off during the day, even while requiring a specified number of hours to be worked each week. Under current law, employers can offer workers a compressed work week such as four ten-hour days per week, permitting one additional day off per week. Employers can reduce the length of the usual work week. Job sharing can be encouraged. All this and more is possible. However, while many companies say they support such policies, they are actually used in very few firms and by very few people. A survey of 121 private companies found that just 14% routinely made available a flextime program. Moreover, 92% of those without a flexitime program said it was unlikely they would adopt such a program in the future.... Only 10% of full-time hourly workers have flexible work schedules..."

[158] Statement of William Kilberg, February 4, 1997. Kilberg, represented the Coalition for Fair Labor Standards Act Reform, "a group of employers and associations," associated with FLECS.

[159] *The Wall Street Journal*, January 28, 1997. p. A18.

[160] Statement of Christine Korzendorfer, February 4, 1997.

take unpaid leave — it is higher-income employees who are more likely to have company-supported child care, job sharing, and paid leave.

Nussbaum, who previously served as Director of the Women's Bureau at DOL, acknowledged that flexibility was a primary concern for working women. "But the more important issue here is *control* over working hours. Women around the country have explained to me," she recalled, "that 'flextime' that provides flexibility to the employer — but that wreaks havoc on a[n] employee's schedule — is no solution." She presented a number of examples:

> ... the bank executive who was expected to work late with no notice; the waitress at a diner, who was changed to the night shift, despite the fact that she had no child care for evening hours: and the nurse, scheduled to work a second shift shortly before her first shift ended. When you ask these workers, and many like them, if changing the 40-hour work week helps them, they respond with a resounding 'no.'"

She continued: "When low-income workers choose to work overtime, they do it for the money." She urged that the Family and Medical Leave Act be expanded, that "higher standards for fair pay" be set, and that "paid leave" be assured "for basic needs."[161]

Nussbaum affirmed "the AFL-CIO's adamant opposition to S. 4" and charged: "We see nothing family-friendly in taking away from employees the right to overtime pay and substituting a system of compensatory time off that is riddled with loopholes and limitations." And, further: "...we certainly see nothing family-friendly about expanding the class of employees who are exempt from the Fair Labor Standards Act and who thus will have no right to either overtime pay or compensatory time off." She branded the several proposals "large steps backwards" that would mean "more control to employers — and less money for workers."[162]

The House: Opening Hearing. The following morning, February 5, Representative Ballenger convened the Subcommittee on Workforce Protection for consideration of H.R. 1. Mr. Ballenger observed that "American workers want more flexibility and choices in the workplace to better deal with the challenges of balancing work and family obligations."[163] Representative Owens, the Ranking Minority Member of the Subcommittee, countered that the bill would give employers "complete discretion to determine if they will offer comp time, when they will offer comp time, and to whom they will offer comp time."[164]

In his opening remarks, Mr. Ballenger distinguished between the House and Senate bills. S. 4 "goes beyond offering comp time and into other issues. There are those who will attempt to confuse the bills, as a way to try to defeat comp time," he remarked. "They do no service to American workers." He pointed to the work that

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[161] *Daily Labor Report*, February 5, 1997. p. E8.

[162] *Daily Labor Report*, February 5, 1997. pp. E8-E9.

[163] *Daily Labor Report*, February 6, 1997. p. E1.

[164] *Daily Labor Report*, February 6, 1997. p. A5-A6.

had gone into shaping the legislation of the 104th Congress, noted the interest of President Clinton is flexible hours legislation, and expressed optimism that H.R. 1 could be passed.[165]

The first panel was a group of Republican House Members: Representatives Fowler, Granger and Myrick. Representative Dunn, had been scheduled to testify but was unable to appear. Each, in turn, reiterated the need for workplace flexibility, citing their own experiences by way of emphasis. "Today, a significant portion of employers want to give their employees more flexibility," Ms. Fowler observed, adding: "In an ironic twist of fate, however, they are prevented from doing so by the Fair Labor Standards Act, a law which was passed before many of us were even born."[166]

Other panels followed. Two witnesses associated with TRW, Inc., who had testified the prior day at the Senate hearing (Ms. Korzendorfer and Ms. Larsen), and a spokesperson for the Society of Human Resource Management (SHRM) appealed for workplace flexibility. Each (TRW and SHRM) was associated with FLECS. Several individuals, in their own behalf, urged that H.R. 1 be promptly enacted. Bob Weisman, a management attorney from Columbus, Ohio, argued that H.R. 1 should be considered "as a piece of win-win legislation" and was "baffled by organized labor's present objection" to the proposal.[167]

The women's perspective was addressed, pro and con, by two of the panelists. Speaking first was Diana Furchtgott-Roth, a resident fellow at the American Enterprise Institute and a member of the National Advisory Board of the Independent Women's Forum. She was followed by Helen Norton, Director, Equal Opportunity Programs, for the Women's Legal Defense Fund.

Ms. Furchtgott-Roth[168] began with the affirmation that H.R. 1, "if enacted ... could improve the welfare of all Americans and will be of especial benefit to working American women." Ms. Furchtgott-Roth began: "Under current law, employers are required to offer to hourly workers only monetary compensation in return for overtime." The legislation, she asserted, would be beneficial. It would provide workers with "a choice" with respect to compensation (time or money). It would "extend to middle-income Americans those privileges already enjoyed by salaried" workers. It would "make it easier for women to combine work and family." It

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[165] *Daily Labor Report*, February 6, 1997. p. E1.

[166] News Release, Representative Tillie K. Fowler, February 5, 1995. p. 1.

[167] Statement of Bob Weisman, House Subcommittee on Workforce Protections, February 5, 1997.

[168] The Independent Women's Forum (IWF), based in Arlington, Virginia, has been described as "a group of conservative women activists," "most of them well-educated, well-connected white professionals." See, respectively, *Human Events*, April 14, 1995. p. 11; *The Wall Street Journal*, October 13, 1995. p. A16; and *The Washington Post*, November 30, 1995, p. D1. Ms. Furchtgott-Roth had been associated with Domestic Policy Council and the Office of Policy Planning of the Bush White House and, before that, with the American Petroleum Institute.

"increases the efficiency of the economy by making labor markets more flexible." The bill "represents a prudent use of government authority to enhance the welfare of American workers." Ms. Furchtgott-Roth did not address the options, even to private sector workers under current law, for flexitime, compressed scheduling and even for comp time within a 40-hour workweek context.

As she proceeded with her prepared statement, Ms. Furchtgott-Roth emphasized the notion of "choice" for workers, stating the premise: "... giving individuals a greater number of attractive choices makes them better off." Further, she affirmed, the legislation "gives employees, not employers, the power to choose what is in their best interests, either more time or more money."[169] She stated that the FLSA was "a well-intentioned law, fashioned in 1938 ... by clever people" who "might never have imagined comp time as we know it today." She asserted: "... choice simply is not available to these employees ["millions of average American hourly workers"] under current Federal labor law." She pointed to the increased numbers of women in the modern workforce, their desire to spend more time with their children even at the cost of income, and noted that it is "common sense" that "working women ... stand to benefit the most from H.R. 1, from the additional flexibility in the workplace and additional opportunities to have more flexible hours."

Ms. Furchtgott-Roth expressed her belief that many women, not already in the workforce, might be encouraged to seek employment if a comp time option were available. She conceded that government might, legitimately, concern itself with workplace safety and child labor. "But where," she queried, "is the public interest in denying employees the choice of comp time?" Then, returning to the FLSA, she affirmed: "Overtime is simply hours taken away from the life of employees. And yet, current law denies those employees the opportunity to regain that lost time." She conceded that there was concern in some quarters that H.R. 1 "would lead to exploitation of workers, since employers would pressure employees into accepting comp time instead of overtime pay. However," she concluded, "history has shown that, when workers are given choices, these choices are used fruitfully."[170]

Ms. Norton of the Women's Legal Defense Fund disagreed.[171] The Fund "develops and fights for policies that help women meet the dual demands of work and family and achieve economic security for themselves and their families." H.R. 1, she contended, "is *not* about the real flexibility that working women need ... Instead, it

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[169] H.R. 1 allows employers the option of establishing a comp time program. Where there is a union contract, the structure and scope of that option could be subject to negotiation; where there is no collectively bargained agreement, the structure and scope of the option would be left to the choice of the employer. The employee has the choice of agreeing to participate or of refusing to participate.

[170] Statement, Diana Furchtgott-Roth before the Subcommittee on Workforce Protections, February 5, 1997.

[171] Based in Washington, D.C., the Women's Legal Defense Fund, founded in 1971, seeks "to secure equal rights for women through advocacy and monitoring, and public educations." It was an active advocate of the Family and Medical League Act. See Fischer, Carolyn A., and Carol A. Schwartz, eds. *Encyclopedia of Associations, 1996.* Detroit, Gale Research Inc., 1995. p. 2084. Ms. Norton is Director, Equal Opportunity Programs, for the Fund.

gives employees *less* control over both their time and their paychecks, creating new risks and problems."

Suggesting a different view of the world from that of Ms. Furchtgott-Roth, Ms. Norton argued that H.R. 1 "does not give employees a true choice." She observed:

> ... in the real world, employers will have the last word. The bill gives unscrupulous employers a substantial new opportunity to coerce employees into taking time off even when they need or prefer to have money in their paychecks instead.
>
> Most hourly workers have little bargaining power in the workplace as it is. And they are also the most likely to rely on overtime pay just to make ends meet. If they insist on getting money instead of time, they run a very real risk. If an employer would rather keep the money in the bank, employees who do not accept comp time could find that they just are not getting the hours they have counted on, or are getting assigned to bad shifts, or have otherwise put their jobs and livelihoods at risk.
>
> For those who need overtime pay the most, comp time is not a real option, but it may be one they are directly or indirectly forced to accept. Under this bill, if an employee is coerced into taking comp time against her wishes, she has just two choices: accept it, or sue her employer in court. Bringing suit would put her job at risk and require resources — both time and money — that few hourly workers really have.

In practice, she suggested, H.R. 1 is not oriented toward the more highly paid salaried workers but, rather, toward lower-income workers paid on an hourly basis.

Ms. Norton went on to outline what she perceived to be additional hazards. "Someone who is pressured into taking comp time when she really wants or needs overtime pay is taking an involuntary pay cut, pure and simple." Since the employer controls when the comp time may actually be used, the worker is "essentially being asked to gamble on the chance that they will be able to take time when it is as valuable to them as overtime pay." Under the FLSA, she explained, "when employees work overtime, they are compensated for it in the week that they worked." But, under H.R. 1, a worker who accepts comp time "could wait weeks or months before she can use the hours she's earned." She added:

> Meanwhile, the overtime pay that she would have received can be invested by her employer. If the employee decides that she is better off with the cash than waiting any longer, the employer can take up to 30 more days before putting the money in her paycheck. The employee has lost money, while her employer has had the opportunity to make money, on the extra hours she worked.

Further, she pointed to the risk that firms, paying their workers on an hourly basis ("such as the garment, construction, and janitorial service industries") may simply "close up shop without paying employees for their work." For firms that have a low capitalization, the banking of comp time (with its cash-out value), she suggests, may provide an added stimulus for such employer behavior. "The more comp time workers accumulate, and the longer employers can wait in fulfilling requests for compensation in time or money," she noted, "the greater the risk to employees if employers 'disappear' without ever paying for all the hours worked."

In Ms. Norton's view, "H.R. 1 gives the employer — not the employee — the 'flexibility' to decide *when* and even *whether* an employee can use her earned comp time." Should an employee turn to an employer with a request to draw down a few hours of comp time, the employer "can essentially say, 'I'll get back to you,' and keep her waiting for an as yet undefined 'reasonable period' of time before responding regardless of her needs. And when the employer does eventually respond, the answer could as easily be 'no' as 'yes.'" Further, she asserted: "H.R. 1 provides *no* resource for employees whose requests to use their comp time are arbitrarily or unfairly denied. ... there is nothing she can do. This," she stated, "is not flexibility from any working woman's perspective."

Ms. Norton observed that mandatory overtime is legal under current law and that "H.R. 1 will not change that. Employers can still require employees to work up to 50, 60, or more hours in a week, without advance notice or regard to employees' other obligations. Employees in this situation can hardly be said to have flexibility or choice about the time they spend at work or at home." Under H.R. 1, however, those overtime hours could be paid for in subsequent time off, rather than in cash. Finally, Ms. Norton suggested that enforcement of federal wage/hour law could, potentially, be rendered more complex were H.R. 1 enacted. "However," she stated, "the bill contains no money for the increased education or enforcement efforts that its changes will require."[172]

Karen Nussbaum of the AFL-CIO also appeared before the Subcommittee on Worker Protections, reiterating the points that she had made before the Senate Subcommittee the previous day. (See discussion above.) Although not a part of the hearing agenda, a statement from the Associated Builders and Contractors, Inc., supportive of H.R. 1, was circulated.

The Senate: A Second Hearing. On February 13, 1997, the Senate Subcommittee on Employment and Training met a second time for consideration of S. 4. Following a brief review of the legislation, Chairman De Wine variously quoted statements by President Clinton who appeared to have endorsed flexibility — though not the specific Ashcroft proposal — and concluded: "I think we have a consensus here — and that we are very well positioned to make a good faith effort to pass this legislation in a bipartisan way."[173]

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[172] Statement of Helen L. Norton, Women's Legal Defense Fund, before the Subcommittee on Workforce Protections, February 5, 1997.

[173] Statement by Senator Michael DeWine, Subcommittee on Employment and Training, February 13, 1997. President Clinton's statement in his State of the Union Address was a broad endorsement of flextime. The President stated:

> With new pressures on people in the way they work and live, I believe we must expand family leave so that workers can take time off for teacher conferences and a child's medical checkup. We should pass flex-time, so workers can choose to be paid for overtime in income or trade it in for time off to be with their families.

See: Clinton, William J. "Address Before a Joint Session of the Congress on the State of the (continued...)

The session opened with Senator Ashcroft as the first witness. He was followed by Paul Jadin, Mayor of Green Bay, Wisconsin, who focused primarily upon the treatment of salaried employees (the salary basis test) under the FLSA. Similar issues were addressed by Marilyn Richter, Assistant Corporation Counsel of the City of New York.[174]

Support for S. 4 was provided by the employer community. William A. Stone, president of Louisville Plate Glass Company and speaking for the U.S. Chamber of Commerce ("the world's largest business federation"), forecast that "almost all, if not all, of our employees" will ask to participate in the comp time program if S. 4 is passed. But, he quickly added: "Of course, it would be not only unwise but essentially unworkable to allow employees with accrued comp time to use that accrued time whenever they pleased." And, further, with the comp time provisions of S. 4, "there would [be] little or no need for most of the provisions of the Family and Medical Leave Act (FMLA)."[175]

Ms. Kathleen Fairall of The Timken Company returned as a witness for the Society for Human Resource Management (SHRM), being accompanied by Ms. Sandie Moneypenny, a technician for The Timken Company. Each had testified before the House Subcommittee on Workforce Protections in 1995.[176] Like other industry witnesses, Mr. Fairall argued that flexibility "is not permitted under the FLSA" though she acknowledged that "we can be flexible anytime within the seven-day work week."[177] A further appeal for S. 4 was presented by James Willms, associated with the Unicover Corporation of Cheyenne, Wyoming.[178] Willms explained that Unicover employees, back in 1981, had sought a comp time option on a "one-for-one" basis instead of time-and-a-half in the form of overtime pay. "They said they wanted more freedom to work most when the Company really needed it, and

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[173](...continued)
Union," February 4, 1997. *Weekly Compilation of Presidential Documents*. Vol. 33, No. 6. p. 140. In summarizing the Senate Subcommittee hearing, the *Daily Labor Report*, February 14, 1997, p. AA1, noted: "The Clinton administration has not endorsed the Ashcroft bill."

[174] The statements of Mayor Jadin and of Assistant Corporation Counsel Richter are lengthy and detailed but address issues only tangential to this report and, therefore, are merely noted.

[175] Statement, William A. Stone, for the U.S. Chamber of Commerce. February 13, 1997.

[176] At the June 8, 1995, hearing before the House Subcommittee on Workforce Protections, Ms. Fairall had spoken both for SHRM and for the FLECS Coalition. Both in 1995 and here before the Senate Subcommittee, Ms. Moneypenny spoke as an individual, through her testimony appeared in each case on Timken letterhead and had the support of The Timken Company.

[177] Statement by Ms. Kathleen Fairall, Subcommittee on Employment and Training. February 13, 1997.

[178] It was an appeal from the Unicover Corporation which had inspired Senator Wallop to introduce comp time legislation during the mid-1980s. The Cheyenne-based firm markets "fine collectibles throughout North America and ... to about 30 countries from Europe to the Pacific Rim." It has about 160 employees.

less when demand was down," Willms explained. The Department of Labor would not permit the arrangement and, therefore, Willms urged that the law be changed.[179]

The final employer witness was Susan M. Eckerly, speaking for the National Federation of Independent Business (NFIB).[180] "For years," she commenced, "small business owners have been seeking less regulation in the workplace and more flexibility regarding how they treat their employees." Eckerly explained: "..the burden created by federal regulation falls predominantly and disproportionately on the very people who we rely upon to create jobs, small business owners." And, from this perspective, she stated, the FLSA "has become part of this burden that the federal government has dumped on the back of small business." S. 4, she suggested, would be "more small business friendly." As with many earlier witnesses, Eckerly pointed to the age of the statute and noted that times have changed since its enactment. "The Great Depression has long since vanished and the widespread rates of high unemployment are an afterthought," she noted. "The Fair Labor Standards Act is in desperate need of reform."[181]

During discussion following her formal statement, Eckerly emphasized the financial hardship (and narrow margin of profit) facing small businesses. Some small employers, she suggested, "can't afford to pay their employees overtime. This [flextime] is something they can offer in exchange" that gives workers a benefit.

> Say you're a building contractor. Because of the seasonal nature of building contractors, you want to have your employees work 30 hours one week and 50 hours the next. You don't want to have to pay in that second week 10 hours of additional overtime to your employees ... The reason why a small contractor can't on that second week have [employees] work for 50 hours is because they can't afford to pay the additional overtime for that 10 additional hours.

Senator Wellstone responded: "We want to make sure that a large or small business now does not say to an employee, 'Listen, we have no other choice. We need the 50 hours of work done, and that's the option we're presenting to you.' Then," the Senator observed, "people worry they're going to lose their job if they don't take it."[182]

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[179] Statement of James Willms, Subcommittee on Employment and Training. February 13, 1997.

[180] Ms. Eckerly explained that the NFIB "is the nation's largest small business advocacy organization representing 600,000 small business owners in all 50 states and the District of Columbia."

[181] Statement of Susan M. Eckerly, Subcommittee on Employment and Training. February 13, 1997.

[182] *Congress Daily*, February 19, 1997. <cngdaily@njdc.com>. Following the hearing, Senator Ashcroft wrote to NFIB President Jack Faris to protest what he argued was a "mischaracterization" of S. 4. Ms. Eckerly, *Congress Daily* observed, had "implied the bill would allow company managers — not employees — to set an employee's 80-hour schedule over two weeks, and would help small businesses that cannot afford to pay overtime." Senator Ashcroft termed the Eckerly statement "unfortunately misleading and inaccurate."

(continued...)

As in prior hearings, the Women's Legal Defense Fund opposed S. 4 and similar amendment of the FLSA. Donna Lenhoff, general counsel for the Fund, declared that S. 4 was "*not* about the real flexibility that working women need. ... Instead, it gives employees *less* control over their time and their paychecks, creating new risks and problems." It "does not give employees a true *choice* between extra time off and overtime pay."[183]

David M. Silberman, a labor lawyer but speaking only on his own behalf, similarly raised objections to S. 4 — but presented them in a somewhat different manner. Quickly summarizing the requirements of the Act (overtime after 40 hours of work per week), he noted:

> Within this limitation the Act leaves employers and employees complete leeway to work out mutually satisfactory work schedules. And there is absolutely nothing in the FLSA which in any way constrains the ability of employers to accommodate employees who need time off by granting such employees paid, or unpaid, leave.

S. 4, he suggested, would be "a sharp break with this long-settled system of overtime compensation" and the 40-hour week would "no longer necessarily be the benchmark for determining an employee's entitlement to overtime pay." The pre-overtime workweek, under S. 4, he argued, could be "50, 60, or even 70 hours ... so long as over two weeks the employee did not work more than 80 hours." And, if hours in excess of 80 were worked, they could be compensated for with comp time or with "flexible credit hours."

Silberman, acknowledging the "stated purpose of these provisions" of S. 4, affirmed: "... important questions have been raised as to whether, in practice, in the run of private sector workplaces, it is possible to create new and voluntary scheduling options for employees, as the bill's statement of purposes declares." The argument came down to perspective: i.e., how one might view the relative power position of workers and their employers.

> Regardless of what the law says, will employees — and especially the large number of low-wage and contingent workers who are in most need of the law's protections — in fact feel free to insist on overtime pay after working 40 hours if their employer makes plain his preference to use a biweekly work schedule or to provide comp. time for flexible credit hours instead?

Further, Silberman asked:

> Will an employee who has earned comp. time or a flexible credit hour feel constrained to use the time off when it is convenient for the employer for her to miss work, or will the employee actually feel free to use that time when it suits her family's needs? And will an employee whose rights are violated feel able to stand up to her employer?

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[182](...continued)
Congress Daily, February 21, 1997. <cngdaily@njdc.com>.

[183] Statement, Donna R. Lenhoff, Subcommittee on Employment and Training, February 13, 1997.

Silberman noted that, under S. 4 and H.R. 1, an employee might be allowed to receive comp time in place of overtime. Were that to happen, as provided for in the legislation, "the employee will end up in essentially the same position as if she had been paid for the overtime hours and then took unpaid leave to meet her family's needs. That, of course," he pointed out, "is lawful today."

Like Ms. Lenhoff of the Women's Legal Defense Fund, Silberman argued that the legislation would not actually provide workers with free choice. He said that the entire program was structured to provide choice to the employer. Nothing in the legislation, he affirmed, would "assure that employees who prefer premium pay are not disfavored by the employer when it comes to awarding overtime assignments." And in the absence of such assurance, comp time could be the only option, he suggested, because regular overtime could quickly become unavailable. He observed: "An employer could, without violating the law, hire only those applicants willing to work overtime without premium pay, and/or award overtime only to those employees willing to accept an IOU for time off in return."[184]

Concluding Comment

Allowing for variations among individuals (and between historical periods), workers have tended to favor legislated labor standards requirements (minimum wages, overtime pay, restraints upon child labor, workplace safety, etc.). Conversely, employers have tended to favor a system less restrained by public enactments. That division, in some measure, was reflected in the debate about H.R. 1 and S. 4.

Labor standards regulation, whether by the federal government or by the states, speaking generally, has not been welcomed by employers. Some have viewed such regulation as a violation of the spirit of the *free market*; others, as a restraint upon the ability of employers to manage their own businesses. However justified in terms of worker protection, some have argued that the establishment of high labor standards within the United States may impair industry's ability to compete in a global marketplace. Still others, especially from the small business community, contend that many employers cannot afford to pay minimum wages and overtime rates and still make a profit.

Employee perspectives toward labor standards have varied through the years — depending upon the experience of individual workers, general economic conditions, and distance from the adverse conditions that caused such standards to be legislated. Some workers are anxious to work overtime hours (with overtime pay). Others, for their own reasons, would prefer to have more free time away from work, even with a slight loss of income.

Over the years, memories may have dimmed with respect to the conditions under which workers toiled late in the 19th century and through the early decades of the 20th century. As the Great Depression has become part of *historical* memory (as opposed

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[184] Statement of David M. Silberman, Subcommittee on Employment and Training. February 13, 1997.

to personal memory), attitudes have tended to change. Some point to positive developments in the area of labor standards and labor-management relations during recent decades and suggest that it is anachronistic for the rules governing the workplace to be rooted in 1930s experience and enactments.[185] Conversely, others argue that the basic protections and safeguards provided by New Deal era labor laws (including the Fair Labor Standards Act) are the bases of these post-Depression workplace improvements and that, without them, conditions would likely regress.

Changing workforce demographics may have brought new perspectives about work and labor-management relations. They may also have produced new lifestyle realities for workers: how they live, what they value, what they need, what is required of them.

In a June 1996 directive to the federal executive departments and agencies, President Clinton expressed his belief that establishment of a family friendly environment (including flexible work arrangements) results in "greater cost efficiency, increased worker commitment and productivity, [and] better customer service..."[186] Journalist Tim Shorrock pointed to similar beliefs in a recent *Journal of Commerce* article. "Many U.S. manufacturing and transportation companies believe the [family friendly workplace] proposals could boost their productivity and improve the nation's competitive position in global trade."[187]

Congress will face a number of questions as it considers modification of the 40-hour workweek and relaxation, through a series of devices, of the overtime pay requirements of the FLSA. Workhours regulation (shorter workdays and weeks) was appropriate early in the century, Congress believed, on grounds of worker health and safety, accident prevention, unemployment reduction, and diverse humane

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[185] *Congressional Record*, August 7, 1995. p. S11788.

[186] Clinton, William J. "Memorandum on Family Friendly Work Arrangements," June 21 1996. *Weekly Compilation of Presidential Documents*, Vol. 32, No. 26. p. 1119.

[187] Shorrock, Tim. "US Firms Prepare To Square Off with Labor on Work Laws," *Journal of Commerce*, December 24, 1996. p. 1A.

The extent to which such policies would actually enhance productivity or competitiveness has not been fully demonstrated and likely would vary from one workplace to another. Ellen C. Bankert and Bradley K. Googins, in an article, "Family-Friendly: Says Who?" *Across The Board*, July-August 1996, p. 49, conclude:

> "Succumbing to the temptation for the quick fix has resulted in a loosely defined and narrowly conceived set of benefits that have become a new corporate darling in this age of family values. However useful they are to some, if these benefits become frozen into a simplistic response to very complex problems, they will not only miss the mark of enhancing employee effectiveness at work, they will miss an even greater opportunity for improving the overall quality of life at home and at work."

See also: Rainey, Glenn W., Jr., and Lawrence Wolf. "Flex-Time: Short-Term Benefits; Long-Term...?" *Public Administration Review*, January-February 1981. p. 52-63; and, Palmer, Barbara. "The 10-to-3 Ethic: Why There's No Labor at the Department of Labor." *The Washington Monthly*, January 1981. p. 35-42.

considerations — as well as providing encouragement for sharing the available work. Some argue that new workplace realities have reenforced that need for such regulation. Workplace hazards remain, though their nature may have changed. New processes and advanced technology may even have exaggerated the risks. There is still competition for work, especially among hourly-paid workers most directly affected by the protections afforded by the FLSA.

Conversely, the workforce itself has changed through the years. Women are more represented throughout the workforce and professions than may have been the case early in the century. While some women always worked outside the home even after marriage and the birth of children, that practice is now more the norm. To that extent, the tensions between domestic life and employment may have escalated. As a result, some have projected a need for increased *flexibility* in hours of work, both for women and men. For others, it may be *predictability* that is needed.

Meanwhile, U.S. businesses, especially smaller businesses, may feel more competition today than in recent history, especially from foreign firms and in the new global marketplace. From their vantage point, securing relief from some requirements of the FLSA holds the possibility, if not the promise, of higher productivity at lower costs. Thus, an easing of workhours regulation, in their view, presents a win-win situation: rationalization of production in a manner so that overtime would not be necessary, reducing costs and, at the same time, providing an option for workers more effectively to manage the dual responsibilities of work and family.[188]

While S. 4 and H.R. 1 (and related legislation) have been presented as worker and family friendly, the hearings on this legislation revealed strong worker concerns about proposals to change the 40-hour workweek and modify overtime pay requirements. A large part of this dichotomy relates to choice. Initiation of the comp time/flexible scheduling options would rest with employers — as would the determination as to when banked hours could be used without unreasonably disrupting work processes. These essential flexible workhours choices rest with employers as, some would argue, they must if a business is to be run with efficiency and be profitable. However, those concerned mainly with protection for workers fear that the current proposals provide flexibility for employers but only uncertainty or unpredictability for employees. Thus, they suggest, the position of the individual worker may be rendered more difficult: diminishing, not increasing, his or her ability to deal with family concerns while reducing the family income through elimination of overtime pay.

Industry-oriented witnesses, arguing for more worker flexibility and choice, have pointed to the putative inflexibility of the overtime requirements of the FLSA. Worker-oriented witnesses, conversely, have affirmed that existing law provides adequate flexibility but with statutory safeguards against employer abuse. Flexible scheduling, even where now permitted, appears to have developed slowly in American workplaces. Mark Wilson of The Heritage Foundation, for example, testified: "...it is disturbing that after nearly 20 years since flex-time was first introduced in the U.S.,

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[188] Ashcroft, John. "Time or Money vs. Time and Money: A Prescription for Worker Relief," *Common Sense*. Summer 1996. p. 115-128.

only 15.3 percent of all *private* full-time employees" are working on flexible schedules.[189]

As wage/hour standards under the FLSA are currently structured, they are complex and difficult to enforce, given the relatively small staff of DOL's Wage and Hour Division. Even so, the 40-hour workweek is, by and large, a relatively straight-forward concept and not too difficult to understand. Some have voiced concern about the affect of the proposed legislation on compliance. The more variations there are from a rigid norm, they suggest, the greater the flexibility is likely to be; but, at the same time, such variations may well increase the burden of compliance and enforcement, both for Department of Labor and for employers.[190]

Proponents of the alternative work scheduling legislation, however, suggest that a restructured system would create no larger problems for enforcement than exist under current law. And, at the same time, the benefits both for employers and for workers may outweigh any added administrative problems

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[189] Statement, Mark Wilson, Subcommittee on Employment and Training, February 4, 1997. See interview with Suzanne Seiden, acting deputy administrator, Wage and Hour Division, Department of Labor, in *Daily Labor Report*, March 5, 1997. P. A8-A9.

[190] Each variation from a standard, each element of worker or employer protection, will require regulations from the Secretary of Labor for implementation and enforcement. It is not clear how cumbersome these regulations might be. In some settings, the burden may not be great; in others (and, perhaps, especially for small businesses), it could be substantial.