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Federal Regulation of Working Hours: An Overview Through the 105th Congress

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ABSTRACT

Through nearly two centuries, American workers and their employers have been concerned with the structure and regulation of workhours. Early *humane* concerns gave way, during the 1920s and 1930s, to economic factors: i.e., spreading available work to the jobless. Since the 1960s, attention has focused upon *alternative work patterns*: an effort to balance work with family responsibilities and other concerns. This report presents a brief introduction to the workhours issue and, then, traces the legislative history of this question through the 104th and 105th Congresses. It will not be updated further.

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Summary

Through much of the 19th century and well into the 20th, reformers sought to reduce the length of the workday and workweek to relieve workers from excessively long hours of toil. Such extended hours of work were deemed hazardous to an employee's physical and moral health, depriving him (or her) of opportunity for education, rearing of children, and participation in the democratic process. And, during periods of economic decline, there was concern that work be shared among those seeking it. For these reasons, it was held that hours of work should be reduced.

Through the years, local, state and federal government had attempted to regulate hours of work. The Walsh-Healey Act (1936) provided an 8-hour day and a 40-hour workweek in certain federal contract procurement. In 1938, the federal Fair Labor Standards Act (FLSA) was adopted, ultimately establishing a 40-hour workweek with overtime pay for hours worked in excess of 40 per week. Then, the quest for workhours reduction gradually came to a halt.

By mid-century, a new generation that lacked personal experience with the conditions that had sparked the earlier wage/hour legislation was entering the workforce. In the 1960s, a drive commenced for *alternative work scheduling*. In 1978, Congress passed the Federal Employees Flexible and Compressed Work Schedules Act, modifying the structure of workhours for employees of the federal government. In the mid-1980s, the 8-hour provision of Walsh-Healey was repealed and, during that same period, a compensatory (comp) time option was provided under the FLSA for employees of state and local governments.

By the 1990s, interest was being shown in extending alternative scheduling in the private sector. In the 104th Congress, hearings on this issue were conducted the House and Senate. Presidential interest was expressed concerning the issue. During mid-1996, the House passed H.R. 2391 (Ballenger), extending the public sector comp time option to the private sector. New legislation has been introduced in the 105th Congress: H.R. 1 (Ballenger), dealing specifically with comp time and, S. 4 (Ashcroft), providing a broader restructuring of overtime and workhours regulation. Hearings were conducted in the House and Senate during February. On March 5, the House Committee on Education and the Workforce voted to report H.R. 1; on March 19, 1997, the bill passed the House in amended form. On March 18, the Senate Committee on Labor and Human Resources voted to report S. 4. Debate commenced in the Senate on May 1. Cloture votes on May 15 and June 4 failed: the legislation died at the close of the 105th Congress.

Some changes in overtime regulation could lead to a more family friendly workplace, but others might lead to an unfriendly working environment and further complicate efforts to balance work with family responsibilities. A key issue is the extent of worker choice with respect to flexible work hours decisions and with respect to the use of compensatory or flexible hours once they have been earned.

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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/her regular rate of pay (*time-and-a-half*) for hours worked in excess of 40 per week. Within a 40-hour workweek, there is complete 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.* By the early 1990s, just over 76 million nonsupervisory employees were covered by the overtime pay provisions of the Act.[1]

Workhours legislation received committee and floor consideration during 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

During the 104th Congress, interest developed in altering the role of the federal government in the regulation of hours of work. This resurgence of interest in the structure of work hours may have a number of origins. Some are concerned with deregulation of labor standards, i.e., to allow the operation of the *free market* with minimal interference from government. This is sometimes expressed in terms of a generalized desire to let managers manage. There has also been a desire, most vigorously expressed during the 1960s and 1970s, for creation of a "family friendly" working environment with various forms of alternative or flexible scheduling and work arrangements. Proposals for change in labor standards, however, usually come under close scrutiny by labor interests and others who are concerned with possibly diluting hard-won protections for workers.

In its 1990s context, change in work hours regulation is most frequently urged on behalf of enhanced opportunity for workers: flexibility in balancing family and workplace requirements — childcare, eldercare, education, etc. Others, however, have suggested narrower modification of overtime pay constraints: for example, to allow workers wider options to volunteer for uncompensated work, to serve in uniquely structured positions such as houseparents in residential childcare facilities,

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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.

to combine different types of work for a single employer (teaching and non-teaching work for a community college) when the total hours worked exceed 40, and for other specialized arrangements.

It may not be entirely clear, however, how the putative beneficiaries of such changes in work scheduling regard the various proposals. For some firms, flexible scheduling may work well, increasing efficiency and satisfying employees. For others, it may inhibit productivity, frustrate effective management, and result in burdensome recordkeeping. Some workers may find a new freedom in flexible and compressed workhours; but others, especially those with family responsibilities, may find it difficult to mesh workplace flexibility with inflexible non-work-related schedules — for example, meeting the closing deadline at a childcare center. Alternative scheduling **may** result in a family friendly workplace; but, that may not necessarily be the result.

The campaign for a shorter workday and workweek has been, both in purpose and constituency, different from that for flexible and compressed scheduling.[2] Reducing workhours has generally been a goal of workers, of many social reformers, and, institutionally, of organized labor. Where there has been public regulation of the length of the workday or workweek, it has generally included an overtime pay provision. The original purpose of such a penalty *was not to enrich workers* (though workers have come to view it as income enhancement) but, rather, to discourage employers from scheduling hours deemed by policymakers to be excessive and, conversely, to encourage the spreading of work as a means for increasing employment.[3]

The movement for flexible and compressed work hours, speaking generally, does not address the number of hours worked but, rather, attempts to reconfigure worktime in a manner that is more convenient for workers who may have outside/non-work-related responsibilities. Or, some workers may prefer alternative working hours in order to have larger blocks of leisure time (a 3-day weekend, for example). Although some trade unions (notably in the public sector) and some employers have endorsed the concept of *alternative work patterns*, the initiative in this area seems generally to have come from organizations concerned with the needs of working women. There has also been support from workers with special needs: students, the handicapped, long-distance commuters, and the like. Ordinarily, the

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[2] Under the concept of *compressed scheduling*, total daily hours of work are rearranged to allow for longer workdays compressed into fewer days of work per 40 hour workweek. Thus, a worker might have a 4-day weekly schedule of work with 3 days off duty while still not exceeding a 40-hour workweek. This is allowed under current law. In the federal sector, such compression can extend through an 80-hour biweekly period: e.g., 60 hours of work in one week and 20 hours of work the second.

[3] For a discussion of the motivating philosophy of the shorter workhours movement, see: *The Shorter Work Week: Papers Delivered at the Conference on Shorter Hours of Work Sponsored by the American Federation of Labor and Congress of Industrial Organizations.* Washington, Public Affairs Press, 1957. 96 p. A slightly different perspective is presented in Sar A. Levitan and Richard S. Belous, *Shorter Hours, Shorter Weeks: Spreading the Work to Reduce Unemployment.* Baltimore, The Johns Hopkins University Press, 1977. 94 p.

decision to institute an alternative scheduling arrangement rests with the employer. While these systems may produce a more family friendly work environment, they may also satisfy a business/production need of the employer.

As one reviews the evolution of workhours regulation through the 20th century, it may be useful to keep a number of questions in mind. If long hours of work are considered harmful when they result from business necessity, should they be considered any less harmful when urged by workers as *compressed scheduling*? Should work hours be flexible or *compressible* only when it is convenient for workers or in the interest of workers? Conversely, should employers have a parallel option of flexibility: to change daily and weekly hours of work when it meets their production needs? And, should either party have a protected right to abstain from flexibility?

Here, the evolution of the reduced worktime and flexible hours movements is sketched: the motivation of workers, the development of public policy, and pressures through the past several decades for modification of that policy. Finally, there is a brief review of certain overtime-related legislation that was considered by the 104th and 105th Congresses.

The Shaping of Federal Policy

The length of the workday and workweek has been a matter of contention at least since the early 19th century. Federal policy with respect to hours of work and overtime pay requirements falls into a series of general periods — but with considerable overlap from one to another.

First. During the 19th and early 20th centuries, various worker/trade union/reform groups campaigned first for the 10-hour workday and then for an 8-hour workday.[4] These demands were voiced largely (though by no means exclusively) in humane terms: to provide an opportunity for the worker to develop physically, intellectually and spiritually; to share in the good things his talents and energies had produced; to nurture and to educate his children; to participate in the democratic process; and to shoulder, responsibly, the obligations of citizenship in a free society. Long hours of work in factory, mine and field were regarded as often physically, mentally and psychologically debilitating, leaving workers broken in health and spirit — and, by extension, similarly affecting succeeding generations.[5]

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[4] "American labor, organized and unorganized," wrote Marion C. Cahill in his study, *Shorter Hours: A Study of the Movement Since the Civil War* (New York, Columbia University Press, 1932, p. 137), "has had two primary objectives: higher wages and shorter hours. While to the individual laborer the order of importance is that given, the leaders of the labor movement have stressed hours." He explains: "The individual laborer has been influenced by a very natural but short-run point of view. The emphasis of labor leaders on hours has been the result of their ability to view the question more broadly..."

[5] Organized labor's approach to work hours reduction is set forth in McNeill, George E. *The Eight Hour Primer: The Fact, Theory and the Argument*. Washington, American Federation of Labor, 1899); and in Gompers, Samuel. *The Eight-Hour Workday: Its*

(continued...)

Second. Following World War I and, increasingly, during the Great Depression, the impetus for hours reduction seems to have shifted. While social and humane considerations continued to be motivating elements for trade unionists and reformers, economic considerations took on greater weight. High levels of Depression-era unemployment made some measure of work sharing, achieved through restraints upon the hours of work (e.g., overtime pay requirements), seem more desirable to many.[6]

During the early 1930s, Congress had under active consideration legislation to establish by statute a 30-hour workweek, an initiative associated with Senator Hugo Black.[7] In 1933, the 30-hour bill was set aside and the New Deal's National Industrial Recovery Act (NIRA) was passed instead. Under the NIRA, codes of fair competition (with fair labor standards) were adopted for individual industries. These normally included restraints upon the number of hours to be worked each day or week. In 1935, the NIRA was declared unconstitutional and replaced, in the labor standards area, by two new laws: the Walsh-Healey Public Contracts Act (1936) and the Fair Labor Standards Act (FLSA, 1938). Walsh-Healey, dealing with the contract purchase of goods by the federal government, set an 8-hour day and a 40-hour workweek for such contract work.[8] In the FLSA, Congress dropped the concept of daily hours restraints and opted, instead, for what would become a 40-hour standard workweek with overtime pay for hours worked by covered workers in excess of 40 per week.[9]

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[5](...continued)
Inauguration, Enforcement and Influences. 9 p. Washington, American Federation of Labor, undated, published in pamphlet form at the turn-of-the-century. See also: Kelly, Matthew A. Early Federal Regulation of Hours of Labor in the United States. *Industrial and Labor Relations Review*, April 1950. P. 362-374; and Fine, Sidney. The Eight-Hour Day Movement in the United States, 1888-1891. *The Mississippi Valley Historical Review*, December 1953. pp. 441-462.

[6] See Brandeis, Elizabeth and Irma Hockstein. An Eight Hour Law in Every State. *The Painter and Decorator*, March 1931. pp. 8-13.

[7] In reporting the 30-hour bill early in 1933, the House Committee on Labor affirmed: "...either we must provide, through some governmental agency, for the maintenance of several millions of American industrial workers who are unable and will continue to be unable to secure profitable employment or we must by legislation so restrict the hours of labor that all American industrial workers will be provided with opportunities of employment." See U.S. Congress. House. Committee on Labor. *Prevent Interstate Commerce in Industrial Activities in Which Persons Are Employed More than Five Days per Week or Six Hours per Day. Report to Accompany H.R. 14518.* House Report No. 72-1999, 72nd Cong., 2nd Sess. Washington, U.S. Govt. Print Off., 1933. p. 1.

[8] In P.L. 99-145 (1985), the 8-hour provision of Walsh-Healey was deleted, leaving only the 40-hour weekly standard.

[9] Elizabeth Brandeis summarizes the New Deal experience in her essay, Organized Labor and Protective Labor Legislation, in Derber, Milton and Edwin Young (eds.). *Labor and the New Deal* (Madison, The University of Wisconsin Press, 1961). pp. 193-237. Two more recent studies review the evolution of work hours to the end of the New Deal. See: Hunnicutt, Benjamin Kline. *Work Without End: Abandoning Shorter Hours for the Right to Work.* Philadelphia, Temple University Press, 1988. 404 p., and Roediger, David R. and (continued...)

Third. The 40-hour workweek seems to have become the standard in the wake of World War II. Periodically, organized labor has suggested that "working hours should be reduced gradually, with no reduction in take-home pay, as technological change accelerates and productivity rises."[10] In the late 1970s, Representative John Conyers proposed legislation to reduce the workweek and to provide double-time for hours worked in excess of a new statutory limit (ultimately, ca. 32 hours). Although hearings were conducted in 1979 on the Conyers proposals, no new hours legislation was adopted.[11] Since then, despite some academic interest in the issue, legislation to reduce the statutory workweek has largely disappeared from the public policy agenda.[12]

The thrust of the overtime pay provisions of the various federal statutes had not been to enrich workers. Rather, the imposition of overtime rates (time-and-a-half) was viewed as a penalty imposed upon employers who engaged workers through what was viewed by many as excessively long hours with a deleterious impact for worker health and well-being. But, as a parallel consideration (and strongly so during periods of economic downturn), there was concern, both by workers and by the public policy community, to reduce hours to spread employment.

By the late 1960s, a new consideration had developed. Even where work hours may not have been excessively long, a desire developed for shorter hours for more personal reasons: to cope with family responsibilities, to pursue education or, perhaps, just to permit enjoyment of a more fulfilling lifestyle. For employers, there was concern with rationalization of the work process.

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[9](...continued)
Philip S. Foner Our Own Time: A History of American Labor and the Working Day. Westport, Conn., Greenwood Press, 1989. 380 p.

[10] Fink, Gary (ed.). *AFL-CIO Executive Council Statements and Reports, 1956-1975*. Westport, Conn., Greenwood Press, 1977, v. 2. P. 768. See also pp. 986-988. On the productivity impact of workhours, see: U.S. Department of Labor, Bureau of Labor Statistics. *Hours of Work and Output*. Bulletin No. 917. Washington, May 21, 1947. 160 p.

[11] The Conyers proposals were introduced in various forms through several years. See McGaughey, Jr., William. *A Shorter Workweek in the 1980s.* White Bear Lake, Minn.: Thistlerose Publications, 1981. 308 p. The economic issues raised by the Conyers proposals are discussed in Ehrenberg, Ronald G. and Paul L. Schumann. *Longer Hours or More Jobs? An Investigation of Amending Hours Legislation To Create Employment*. Ithaca, New York State School of Industrial and Labor Relations, 1982. 177 p.

[12] More recently, concern with respect to hours of work and related employment issues has been voiced in Schor, Juliet B. *The Overworked American: The Unexpected Decline of Leisure*. New York, Basic Books, 1991. 247 p.; and Rifkin, Jeremy. *The End of Work: The Decline of the Global Labor Force and the Dawn of the Post-Market Era*. New York: G. P. Putnam's Sons, 1995. 350 p.

Alternative Work Scheduling: The 1970s and Beyond

At least by the late 1960s, a campaign had begun for an alternative approach to the world of work. Some writers have suggested that the student activism of the 1960s and attitudes engendered by the anti-war protests of that era had, in some measure, spread to the workplace.[13] Women were entering the workplace in growing numbers, while at the same time maintaining their role as the primary caregiver at home. Most of these new entrants to the workforce had not experienced the struggles of the pre-World War II decades for basic labor standards; therefore, they may have been more willing to trade them for other options that they perceived as beneficial. And, there persisted within the business community a certain anti-regulatory disposition which inspired a move for repeal of certain New Deal enactments.

Riva Poor and Walsh-Healey

In 1970, Riva Poor, a Cambridge, MA, management consultant, published a collection of essays, *4 Days, 40 Hours*,[14] and initiated a public relations campaign that called for a restructuring of work schedules: notably, creation of a *compressed workweek*. Poor suggested the potential virtues of an altered pattern of worktime: longer weekends, happier workers and, for industry, a more efficient ordering of production processes.

A "groundswell" of support for the concept developed, touting the benefits of new ways to work. Some, however, questioned the depth of that support, how informed it was, and what had motivated it. At whose initiative, they asked, would compressed scheduling be instituted? Would workers who found the arrangement inconvenient have an effective option for dissent without damage to their careers? Was the system suitable for all (or most) workplaces? What impact would longer daily hours of work have for persons with childcare responsibilities? For students? For the handicapped? What were the implications for households in which both husband and wife worked outside the home? Would workers really want to work longer daily hours without overtime pay in exchange for longer periods of time away from work? And, would the longer workdays exact a toll? Would workers embrace compressed scheduling week after week, through summer and winter alike? The answers to such questions were not immediately apparent.

Two separate but interrelated efforts in behalf of the compressed workweek (each anchored in the work of Riva Poor) commenced during the summer of 1971. **First**, legislation was introduced in the Congress to amend the Walsh-Healey Act (and

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[13] For example, see: Sheppard, Harold L. and Neal Q. Herrick. *Where Have All the Robots Gone? Worker Dissatisfaction in the '70s.* New York, The Free Press, 1972. 222 p. A frequently cited example from the period was the case of the Vega plant at Lordstown, Ohio, where worker discontent led to a disruption of work processes.

[14] Poor, Riva. *4 Days, 40 Hours: Reporting a Revolution in Work and Leisure.* Cambridge, Bursk and Poor Publishing, 1970. 175 p.

related statutes) in order to permit experimentation with compressed scheduling.[15] While the several bills died at the close of the 92nd Congress, similar legislation would be reintroduced as the decade progressed. **Second**, a series of hearings, conducted by the Department of Labor (DOL), reviewed the wisdom of setting aside the 8-hour provisions of the Walsh-Healey Act. In time, the two efforts overlapped.

On September 7, 1971, DOL (under Secretary James Hodgson of the Nixon Administration) opened 3 days of hearings devoted, essentially, to issues raised in the then-pending legislation. In an opening statement, a DOL spokesperson noted that the primary reason for the hearing was "the problem facing Government contractors who want to adopt a four-day, 40-hour work week and still avoid the payment of overtime after eight hours."[16] Ms. Poor, a witness, suggested that compressed scheduling might improve productivity and noted that "... it strikes me that the main issue is, does the government want to encourage innovation or not at this very critical time in the development of our economy."[17]

Industry, long critical of restrictive labor standards legislation, tended to support the compressed workweek initiative — though its views were mixed. Organized labor, voicing its traditional opposition to relaxing labor standards, argued that "more than eight hours of work per day is harmful to the moral, social and intellectual development of the worker." Observing that the compressed workweek was being advanced by non-worker elements as a pro-worker option, a trade union spokesperson stated: "Long ago, we ... learned to be suspicious of management's sudden interest in the well-being of the workers."[18] The only labor witness not taking this perspective was a local officer of the American Federation of Government Employees, a public employee union representing, in this instance, federal employees.[19]

With the hearings complete, the Secretary took no further action. By 1973, DOL interest in amendment of the Walsh-Healey Act seemed, at least for the time, to have waned.

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[15] Through the years, various federal statutes had dealt with overtime pay and safety standards. In 1969, several of these statutes were merged into the Contract Work Hours and Safety Standards Act (CWHSSA). Efforts to amend the overtime pay provisions of Walsh-Healey have normally been accompanied by an attempt to modify, similarly, the CWHSSA.

[16] U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division. *In the Matter of: Proposed Adoption of a Four-Day, Forty-Hour Workweek, Without Payment of Time and One-Half Overtime Compensation for Work Days Exceeding Eight Hours, Official Transcript of Proceedings.* Hearings. September 7, 8, and 9, 1971. pp. 5-6. (Hereafter cited as DOL/WH Hearings.)

[17] *DOL/WH Hearings,* pp. 16-18.

[18] *DOL/WH Hearings,* pp. 106-109.

[19] *DOL/WH Hearings,* pp. 269-272.

Alternative Work Patterns for Federal Employees

In the 93rd Congress (1973-1974), concern with hours of work shifted away from work hours reduction to more flexible approaches to work: *alternative work patterns* or *new ways to work* — i.e., compressed workweek, flexible hours, "flexiplace" employment and/or telecommuting, job sharing, etc. The initial thrust of the movement for alternative work arrangements appears to have come very largely from consultants and academicians associated, broadly, with the women's movement.[20] The initial constituency for alternative work scheduling (AWS) appears to have been professional women in search of a way to juggle family and workplace responsibilities. With time, that constituency appears to have broadened substantially.

Legislation to allow greater work hours flexibility for federal employees was introduced by Senator John Tunney in June 1973. Although the measure died at the close of the 93rd Congress, it was reintroduced in a variety of forms through the next several Congresses with support from Representatives Bella Abzug, Yvonne Burke, Patricia Schroeder, Stephen Solarz, and Senator Gaylord Nelson, among many others.

While the movement concerned itself both with public and private employment, the immediate legislative focus was upon federal employees. The various legislative proposals dealt with direct federal workers, but they constituted an important precedent. **First**, the proposals would set aside the various federal statutes that might conflict with establishment of compressed work hours for federal employees. **Second**, and far more significant, they signaled a willingness of some organized workers and reform groups to abandon the principle of the 8-hour workday and 40-hour workweek and to accept a 10-hour or 12-hour workday when it seemed to be in their immediate interests to do so.

As suggested in the DOL hearings of 1971, a division developed within the trade union community with respect to compressed work schedules. Some, with an eye to history, were skeptical about any breach of the 8-hour/40-hour standard. Others looked forward to the potential flexibility of "comp days" and long weekends.

Among public employee unions, some supported the concept; others did not. J. Gene Raymond, speaking for the National Federation of Federal Employees, argued that a compressed work schedule (the 4-day week) would "allow the government to serve the public during evening hours when most taxpayers are off work." He pointed to energy savings, improved employee efficiency and morale, reduced cost for transportation and services, etc.[21] Spokespersons for the Public Employee Department, AFL-CIO, and for the federation at large were sharply critical. George Poulin of the International Association of Machinists, having explored such

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[20] During the 1970s, advocacy for the restructuring of work centered in Washington, D.C., in a non-profit interest group, The National Council for Alternative Work Patterns, Inc. A group of similar thrust, New Ways To Work, was formed in California. Others followed producing numerous books, articles, newsletters, networks, etc.

[21] U.S. Congress. Senate. Committee on Governmental Affairs. *Flexitime and Part-Time Legislation*. Hearings, 95th Cong., 2nd Sess., June 29, 1978. Washington, U.S. Govt. Print. Off., 1978. p. 64.

arrangements in Europe, pointed out: "A protracted schedule consisting of week after week of ten-hour days left many members, especially those who were older, increasingly fatigued." The long-term reaction to compressed scheduling, he suggested, was "less idyllic" than its proponents suggested. And, he noted further, the arrangement is probably "not applicable to most blue collar occupations."[22]

Refined and modified, the Federal Employees' Flexible and Compressed Work Schedules Act was passed by the Congress and, on September 30, 1978, signed into law by President Jimmy Carter (P.L. 95-390). It set aside the 40-hour workweek to the extent that it allowed for flexible compression of work hours on any daily configuration within an 80-hour biweekly period.[23] Initially, the Act was experimental: to expire after 3 years unless extended by the Congress. In December 1985, after slight modification, the Act was made permanent (P.L. 99-196).[24]

Yet Another Look at Walsh-Healey

With federal employees' compressed scheduling legislation moving toward approval (1977-1978), Representative William Armstrong, Senator Henry Bellmon, and others renewed efforts to amend Walsh-Healey. Senator Bellmon declared himself mindful "of the lengthy struggle which organized labor undertook to establish the 8-hour day" but argued that "circumstances change, and this country is no longer faced with the inhuman daily hours of work it once had." He added: "It does not seem likely that a very strong argument can be made against the 4-day workweek on the basis of endangering workers' health and safety."[25] The arguments raised against the work hours restrictions of Walsh-Healey closely paralleled those made in behalf of the federal employees' measure.

Walsh-Healey legislation was introduced in the 95th and 96th Congresses, with no action being taken. In the 97th Congress (1981), then-Senator Armstrong reintroduced Walsh-Healey legislation, and Senator Don Nickles, chairman of the

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[22] U.S. Congress. House. Subcommittee on Employee Ethics and Utilization, Committee on Post Office and Civil Service. *Part-Time Employment and Flexible Work Hours.* Hearings, 95th Cong., 1st Sess., May 24, 26, June 29, July 8, and October 4, 1977. Washington, U.S. Govt. Print. Off., 1977. pp. 95-97.

[23] P.L. 95-390 read in part: "(1) the term `compressed schedule' means — (A) in the case of a full-time employee, an 80-hour biweekly basic work requirement which is scheduled for less than 10 workdays, and (B) in the case of a part-time employee, a biweekly basic work requirement of less than 80 hours which is scheduled for less than 10 workdays; and (2) the term `overtime hours' means any hours in excess of those specified hours which constitute the compressed schedule." See Title II, Section 201, of the Act.

[24] While the experiment progressed, impact analysis were to have been conducted; but, in practice, little official analysis seems to have taken place. How widely such systems can usefully be implemented, their contribution to efficiency and productivity, the toll upon or benefit to workers engaged through extended hours, etc., seems, at least within the context of the federal program, to remain a subject for exploration.

[25] *Congressional Record*, February 24, 1977, p. S2956. Conversely, others believed that workers were no longer "faced with inhuman daily hours of work" because statutes such as Walsh-Healey and the FLSA were in place.

Senate Subcommittee on Labor, arranged a hearing on the proposal. "This bill is needed to bring the laws governing federal contractors into conformity with current overtime provisions and flexibility in work schedules provided for private sector employees [under the Fair Labor Standards Act] and, ironically," Senator Armstrong added, "to federal employees themselves."[26]

The hearing revealed a clear division between labor and industry. With the public employee unions absent, AFL-CIO staff economist John Zalusky testified against compressed scheduling, pointed to a potentially negative impact upon productivity in the long-term, noted that problems of health and safety could be expected to arise, and suggested that it could have an adverse impact upon home and family life. Further, he noted that compressed scheduling would be optional for employers but not necessarily so for employees. Zalusky questioned surveys purporting to demonstrate widespread employee support for compressed scheduling as more reflective of employer persuasiveness than of worker choice. "It seems like the boss comes out and says, 'how do you like your job?' and the fellow says, 'I love it.'"[27]

Industry and employer witnesses tended to endorse the concept. The Armstrong bill allowed compression only up to 10 hours a day. Robert Thompson, speaking for the U.S. Chamber of Commerce, affirmed that the bill was "a good start" but urged the Subcommittee to improve it by striking any daily pre-overtime hours restriction. When Senator Nickles suggested that such a proposal might lead to abuse, Thompson responded that fatigue and personnel problems would largely prevent establishment of working hours longer than workers could (or would) stand and still maintain their productivity. "I am convinced," Thompson argued, "that there are very, very few employers, if any, left around who are just going out of their way to abuse workers these days."[28]

When the Armstrong bill died at the close of the 97th Congress, the issue was reintroduced in the 98th Congress (1983-1984) by the Senator and, in the House, by Representative John Erlenborn. Invoking the spirit of the federal employees' legislation, Representative Erlenborn noted that flexible hours had "proven highly popular with federal employees, particularly women," and argued that "... it makes no sense, on the one hand, to recognize the benefits of innovative scheduling for women in the federal work force while, on the other hand, acquiescing to outdated federal contracting rules that deny those benefits for women in the private work force."[29]

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[26] U.S. Congress. Senate. Subcommittee on Labor, Committee on Labor and Human Resources. *Walsh-Healey Act/Contract Work Hours Standards Act Amendments, 1981*. Hearings, 97th Cong., 1st Sess., March 10, 1981. pp. 10-19. Under the FLSA, overtime pay is required for hours worked by covered employees in excess of 40 hours per week but, within the 40-hour workweek, there is total flexibility.

[27] Senate Labor Subcommittee, Hearings, 1981. pp. 56-60.

[28] Senate Labor Subcommittee, Hearings, 1981. pp. 60-65.

[29] *Congressional Record*, April 27, 1983. pp. E1895-E1896.

Senator Armstrong emphasized consistency: "... it is only fair for federal contractors to have the same advantages that private sector and government employees do."[30]

The legislation died at the close of the 98th Congress; but, in the 99th Congress, new Walsh-Healey legislation was introduced by Representatives James Quillen) and Thomas Kindness. While presented as being in the interest of workers, the trade unions opposed it. In contrast, the concept had "strong support" from "the Business Roundtable, U.S. Chamber of Commerce, National Association of Manufacturers, Associated General Contractors of America [AGC], and Associated Builders and Contractors."[31] The AGC *National Newsletter* noted approvingly that if the legislation were to pass, "[c]ontractors could implement flexible work schedules on federal projects without paying overtime to their construction workers."[32] *The Laborer*, a trade union journal, noted that the Walsh-Healey Act "is recognized by many labor leaders as the main protection against unreasonably long workdays that workers had to endure until the last few decades."[33]

On May 6, 1985, during consideration of a budget resolution (S.Con.Res. 32, 99th Congress), Senator Nickles offered an amendment providing that it was "the sense of Congress" that the overtime pay requirements of Walsh-Healey and the Contract Work Hours and Safety Standards Act (CWHSSA) should be made to conform with those of the FLSA "and it is further assumed that the resulting outlay reductions shall be utilized to achieve the previously agreed-upon program and outlay savings." Based upon CBO estimates, Senator Nickles pointed to significant savings to be achieved from these changes. "The effect of this is to say that you can do work for the federal government under the same rules that you can do work in the private sector; and, as a result, you can save a lot of money."[34] In support, Senator Armstrong observed that such action would "not only save money, but ... make life more interesting and better for employees, make it possible for employees throughout the country to be more productive."[35] Senator Edward Kennedy questioned the extent of any putative savings but agreed to work with Senator Nickles in the Committee on Labor and Human Resources to develop appropriate legislation.[36] Two

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[30] *Congressional Record*, March 21, 1983. pp. S3525-S3526.

[31] Bureau of National Affairs. Legislation Introduced To Amend Daily Overtime Payments by Federal Contractors. *Daily Labor Report*. April 4, 1985. p. A11.

[32] National Newsletter, Addendum, Associated General Contractors, April 4, 1985. The CWHSSA, which applies primarily to Federal construction work and related projects, is separate from the Walsh-Healey Act. See Kalet, Joseph E. *Primer on FLSA & Other Wage & Hour Laws*. Washington, Bureau of National Affairs, 1994. p. 143-151.

[33] *The Laborer*, May-June 1985. P. 8.

[34] *Congressional Record*, May 6, 1985. pp. S5450-S-5451.

[35] *Congressional Record*, May 6, 1985. p. S5451.

[36] *Congressional Record*, May 6, 1985. p. S5452.

days later, Senator Armstrong again introduced the Walsh-Healey measure[37] and Senator Nickles promptly scheduled hearings.[38]

At this point, however, the focus fell upon another vehicle. On April 3, 1985, Senator Phil Gramm had introduced legislation (the "Department of Defense Efficiency and Economy Act of 1985"), which modified the manner in which Walsh-Healey, the CWHSSA and the Davis-Bacon Act applied to Defense Department procurement.[39] Referred to the Committee on Armed Services, a modified form of the Gramm proposal was added to the National Defense Authorization Act for FY1986.[40] When taken up on the floor, debate seems to have focused upon the Davis-Bacon provision rather than on the CWHSSA or Walsh-Healey. As approved by the Senate, the Gramm/Committee package applied *only* to Department of Defense (DOD) procurement.[41]

The conference report on the DOD Authorization deleted the Davis-Bacon language (leaving that statute in place) but broadened the language dealing with Walsh-Healey and the CWHSSA: dropping all reference to daily overtime pay requirements and leaving only the 40-hour workweek, a standard basically the same as that of the FLSA.[42] And, further, the conference report applied this change to all federal procurement, not just to DOD purchases. The *Daily Labor Report* summarized the issue in the following manner.

> Jay Power, a lobbyist for the AFL-CIO, said that the Gramm amendment would have exempted 95% of military contracts from the prevailing wage requirement. As negotiations among the conferees continued, Power said, it "simply became clear" that the only way to defeat the Davis-Bacon amendment was to compromise on the Walsh-Healey issue. "While we didn't seek the deal, we felt we did not have any choice."[43]

Thus, a compromise was reached in which the 8-hour provisions of Walsh-Healey and the CWHSSA were dropped apparently to protect the Davis-Bacon Act.

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[37] *Congressional Record*, May 8, 1985. pp. S5682-S5683. Senator Armstrong noted that the bill would allow "contractors the option of alternative work schedules" and mean "less government interference in the private sector."

[38] *Congressional Record*, May 9, 1985. p. S5976.

[39] *Congressional Record*, April 3, 1985. p. S4018.

[40] Bureau of National Affairs. Davis-Bacon, Walsh-Healey Should Not Apply to Defense Contracts, Senate Panel Decides. *Daily Labor Report*, April 8, 1985. pp. A12-A13.

[41] *Congressional Record*, June 4, 1985, pp. S7313-S7325 and June 5, 1985, pp. S7523 and S7538-S7540.

[42] *Congressional Record*, July 29, 1985, pp. H6653-H6654, and July 30, 1985, p. S10338. See also, Bureau of National Affairs. House-Senate Conferees Drop Davis-Bacon, Add Walsh-Healey Amendments to Defense Bill. *Daily Labor Report*, July 29, 1985. pp. A10-A11.

[43] Bureau of National Affairs. House-Senate Conferees Drop Davis-Bacon, Add Walsh-Healey Amendments to Defense Bill. *Daily Labor Report*, July 29, 1985. p. A10. See also *Congressional Record*, November 7, 1985. pp. S15000-S15002.

The conference report having been approved, the DOD Authorization was signed by President Reagan on November 8, 1985 (P.L. 99-145). The separate Walsh-Healey/CWHSSA overtime pay standard gave way to the overtime pay requirement of the FLSA: the 40-hour workweek. At almost the same time, Congress passed and President Reagan signed (December 23, 1985) a permanent extension of the Federal Employees Flexible and Compressed Work Schedules Act (P.L. 99-196).

Comp Time for State and Local Government Employees

The original Fair Labor Standards Act of 1938, crafted through legislative compromise, had left large numbers of workers uncovered: among them persons employed by state and local governments. Gradually, the scope of the Act was widened to extend coverage to this large body of workers.

In 1966, the concept of "enterprise" (for defining coverage) was broadened to include certain hospitals, schools, transportation systems, etc. — enterprises that were also state and local governmental entities. In *Maryland* v. *Wirtz* [392 U.S. 183 (1968)], the Supreme Court upheld this extension of coverage. In 1974, Congress extended the Act to most other employees of state and local governments. Again, litigation followed and, in *National League of Cities* v. *Usery* [426 U.S. 833 (1976), the Court overturned *Wirtz*, holding that both the 1966 and 1974 FLSA amendments "were unconstitutional to the extent that they interfered with the integral or traditional governmental functions of states and their political subdivisions." Schools, hospitals, fire protection, sanitation, etc., were viewed as traditional functions of states and local governments and, thus, exempt. The distinction between traditional (exempt) and non-traditional (non-exempt) proved difficult to sustain in practice. In *Garcia* v. *San Antonio Metropolitan Transit Authority* [469 U.S. 528 (1985)], the Court overruled *National League of Cities* and brought the body of state and local government employees under the Act.[44]

The *Garcia* decision sparked concern on the part of the state and local governments (employers) that compliance with basic labor standards already in effect in the private sector would be unduly costly. Although a variety of issues emerged during hearings on a possible legislative response, it seems clear that it was the issue of the potential costs (for which local officials were accountable to taxpayers), rather than any social concern, which appears to have motivated the local governmental employers. Appeals to Congress for relief were followed by extensive negotiations with interested parties, public hearings, and enactment of the 1985 FLSA amendments. The latter (P.L. 99-150) established the terms under which the FLSA would be applied to state and local governments.[45]

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[44] Expansion of FLSA coverage to state and local government entities is summarized in U.S. Congress. House. *Fair Labor Standards Amendments of 1985. Report to Accompany H.R. 3530*. House Report No. 99-331, 99th Cong., 1st Sess. Washington, U.S. Govt. Print. Off., 1985. pp. 5-8.

[45] Responsibility for labor standards protections has, traditionally, rested both with state and local governments and with the federal government. Each is free to act, with the higher standard (that most protective of the worker) normally taking precedent. Thus, higher state

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Congress Provides a Compromise. In P.L. 99-150, Congress added a new Section 7(o) to the FLSA.[46] It provides that employees "of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency" may receive compensatory time off (comp time) in lieu of regular overtime compensation. However, Congress did not intend by this new section that the overtime pay provisions of the FLSA simply be set aside. Thus, Congress carefully delimited the comp time provisions of law and the option was not to be free of costs to the employing agency.

Institution of a comp time arrangement under Section 7(o) must be in conformity with a collective bargaining agreement (where such is in effect) or, where there is not a collective bargaining agreement, through an "understanding" between the employee and employer arrived at "before the performance of work."

Comp time actually worked is to be calculated "*at a rate not less than one and one-half hours* for each hour of employment for which overtime compensation is required." (Emphasis added.) Allowance is made for the banking of comp time (accrual of *credit hours*) but within strict limits. For employees engaged in "a public safety activity, an emergency response activity, or a seasonal activity," not more then 480 hours may be accrued. For employees engaged in other types of work, no more than 240 hours may be accrued.[47] Once the accrual limits for credit hours have been reached, extra hours worked must be compensated on a paid time (time-and-a-half) basis. There is *a cash out requirement*. If a worker ceases his employment, he is to be compensated for accrued comp time "at a rate of compensation not less than (A) the average regular rate received by such employee during the last 3 years of the employee's employment, or (B) the final regular rate received by such employee, whichever is higher."

The agency is expected to make a reasonable effort to allow the employee to utilize comp time at his or her convenience and desire: i.e., "within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." Comp time is not *free time* for the employing agency. For the convenience of having a worker engaged through extra hours (more than 40 per week), the agency must allow 90 minutes of paid leave for each 60 minutes of overtime worked.[48]

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[45](...continued)
and local standards may supersede the requirements of the FLSA.

[46] The provisions of P.L. 99-150 [the new Section 7(o) of the FLSA] are discussed here at some length because they provide a policy foundation for subsequent proposals for extension of the Act's comp time provisions to workers in the private sector.

[47] The caps upon the accrual of comp time are not annual limits but, rather, limits upon the number of credit hours an employee can have in the "bank" at any given time. As comp time is drawn down, the account can be credited with new credit hours. Within the cap, one is still speaking of 6 and 12 weeks, respectively, of comp time or overtime work each year.

[48] This is a summary of the provisions of Section 7(o). For a precise explanation of the operation of these provisions, one should consult the statute and the appropriate administrative
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Concerns and Reservations. The use of comp time, it was argued while the 1985 FLSA amendments were under consideration, could be an effective means through which to reduce taxpayer costs. And, it could facilitate efforts of state and local governments in dealing with various unexpected or seasonal crises: a public safety emergency, for example, or another seasonal activity of a short duration for which employment of extra staff would not be reasonable.

But, in amending a basic worker protective statute, Congress sought to anticipate areas of possible adverse effect or abuse and to build into the new provisions a system of safeguards. Even with these safeguards in place (and recognizing that public agencies do not go out of business, operate under legislated or administrative regulations, and are subject to general public supervision), concerns were raised about the Section 7(o) option.

A fundamental purpose of the overtime provisions of the FLSA was protection of workers from excessively long hours of work. There was concern that *some* employers (even public employers) can be inconsiderate and abusive; public work can be as enervating and hazardous as private sector work. There was also concern that if long hours of toil in the private sector carry negative implications for workers and for the public, so may those in the public sector.

A secondary element of the overtime provisions of the FLSA had been to encourage, reasonably, a sharing of available work. Some argued that the use of comp time might frustrate this essential purpose. Overtime pay was designed to encourage employers, precisely because of the cost involved, to reduce excess hours of work and to employ more people where the volume of work supported it. To allow "the widespread use of non-premium compensatory time" on the plea that to do otherwise was too costly, some argued, would remove the employment incentive and frustrate the purpose of the Act.

One justification for institution of a comp time arrangement (which includes some measure of flexible and compressed scheduling) has been that it provides employees with flexibility and creates a family friendly workplace. But, critics worried that, in the absence of precise conditions, flexible scheduling would not necessarily be family friendly and may, depending upon the manner in which it is administered, be decidedly *unfriendly*. Overtime hours (even offset by comp time) could constitute a significant burden for persons who, outside of the workplace, operate on a fixed schedule: i.e., employees who have family and child care responsibilities, who are enrolled in educational programs, or who may have a second job (including self-employment as in a family farm situation).[49]

Prior employee concurrence through a collective bargaining agreement or an "understanding arrived at between the employer and employee" is necessary before

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[48](...continued)
regulations. See 29 U.S.C. 207(o) and 29 C.F.R. 553.

[49] House Report 99-331, *op. cit*. p. 21, notes that the intent of the comp time provision is "the preservation of regular past practices that have proved mutually beneficial to employees and employers."

a comp time arrangement can be entered into under Section 7(o). But, some question whether the employee is effectively free to decline to extra hours. Acceptance of the comp time option, for example, might become a prior condition for employment. Misused, such an "understanding" between a public employer and a public employee could become a factor in promotions and a measure of a worker's cooperation and seriousness about his work.

The statute directs that the employee will be permitted to utilize accrued comp time "within a *reasonable* period" and "if the use of compensatory time does not *unduly disrupt* the operations of the public agency." (Emphasis added.) While the Department of Labor, through regulations, has attempted to define these concepts, there is still significant latitude for subjective interpretation. Considerable legislative attention was devoted to the limits placed upon comp time accumulation: in Section 7(o), 480 hours for a public safety activity and 240 hours for those engaged in other unspecified work. Was this too restrictive or too generous?[50]

The statute does not require that comp time be cashed-out until employment is terminated. Thus, an agency could carry up to 12 weeks (3 months) of employee earnings for an indefinite period. Where one employee is involved, the total of such deferred earnings may be inconsequential. Where several hundred (or several thousand) workers are involved, the amount of forgone interest to the employees could be substantial, which has led to several questions. What happens to the return on these deferred earnings or credit hours ultimately converted to cash? Further, might a staff shortage be created if a number of workers chose to "cash out" at one time?

The emphases upon *seasonality* in Section 7(o), it could be argued, had less to do with managing emergency services that were unanticipated than with reducing the cost of employing public workers to perform routine functions, both seasonal and of a nonseasonal nature. This concern was raised in the report of the Committee on

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[50] House Report 99-331, *op. cit.*, p. 21, explains: The concern for abuse was noted by the committee when it stated, pp. 21-22: "The Committee does not expect to find that after the enactment of these amendments local government employees are suddenly reclassified with additional designations as emergency personnel. Similarly, the Committee assumes that local government administrators will resist the temptation to assign their clerical employees or their support staff to an afternoon of shoveling snow on the courthouse steps or a day with the ambulance crew simply to bump the compensatory time cap to the higher level."

Education and Labor.[51] Further, the definition of seasonality provides the basis for determining the cap on comp time accrual.

In reporting the 1985 FLSA amendments, the House Committee on Education and Labor affirmed that "compensatory time is not envisioned as a means to avoid overtime compensation."[52] However, as noted above, reducing the cost of providing public services was a central issue while the 1985 FLSA amendments were before the Congress. Inevitably, some might argue, that would lead to having public employees work extended hours, perhaps with some regularity, without having to pay them time-and-a-half as would ordinarily be required in the private sector.

Expanding Compressed Scheduling and *Comp Time* to the Private Sector: an Early Initiative

By the end of 1985, three different arrangements were in effect for dealing with extended hours of work.[53] For covered employment in the private sector, the 40-hour workweek, prior to payment of overtime, was largely the norm. But, within a 40-hour workweek, any configuration of workhours was permitted without the payment of overtime.[54] In addition, as discussed above, special overtime structures were allowed for employees of state and local governments under the 1985 FLSA amendments [Section 7(o)]. And, under the federal employees flexible and compressed work schedules legislation, alternative work schedules beyond the 40-hour workweek were permitted for certain federal employees.

With these latter exemptions in place, under the FLSA, the question arose: Should these options, comp time and compressed scheduling, be extended to the private sector?

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[51] House Report 99-331, *op. cit.*, p. 22, notes: "Seasonal activity is not limited strictly to those operations that are very susceptible to changes in the weather. Obviously, parks and recreation activity in general are primarily seasonal since they experience peak demand during fair weather seasons or other sport seasons and largely dormant periods at other times. Road crews, while not necessarily seasonal workers, may nevertheless have significant periods of peak demand, for instance during the snow plowing or road construction season. In such an instance the snow plow operator/road crew employee would be able to accrue compensatory time to the higher cap, while other employees of the same department who do not have lengthy periods of peak seasonal demand would remain under the lower cap.... Mere periods of short but intense activity do not make an employee's job seasonal in nature; therefore, clerical employees working increased hours for several weeks on a city budget or processing insurance forms or tax notices would not need the higher compensatory time cap since the limited periods of increased activity could be accommodated within the lower limit."

[52] House Report 99-331, *op. cit.*, p. 23.

[53] In additional to the various federal overtime pay requirements, many of the states have introduced their own workhours standards. Conversely, some workers are protected by none of these arrangements, neither federal nor state.

[54] As variously noted, exceptions to the 40-hour workweek formula have been built into the FLSA. Thus, the system is not as rigid as it might appear at first glance. See, for example 29 U.S.C. 213.

The Wallop Proposal Introduced. In March 1985 (the 99th Congress), while Congress still had under consideration the federal employees' compressed work schedules legislation and the Walsh-Healey and CWHSSA modifications, Senator Malcolm Wallop proposed legislation that would have allowed the 40-hour FLSA standard to be set aside in order to replace it with a comp time option. Under the Wallop proposal, persons employed more than 40 hours a week would have been allowed to bank hours (defer earnings) on a straight-time basis. The banked hours/comp time would then have been used by employees during slack employment periods, as the Senator explained it, with payment being made at the time the banked hours were used.[55]

Senator Wallop reintroduced the legislation in the 100th and 101st Congresses (S. 2196 and S. 515, respectively) without action being taken. In an introductory statement in March 1989, the Senator explained that the Wyoming firm that had inspired the legislation was normally beset with "strong seasonal fluctuations." He observed: "During the peaks, the employees would work well over the normal 40-hour work week, but in the troughs, their hours were well below that standard." The Senator suggested that both workers and management viewed the arrangement as "one solution to ensuring steady wages throughout the year." The Senator pointed out that the option might be especially helpful to working women with children who might use the comp time during school vacations.[56]

Essentially, this proposal would have set aside Section 7 of the FLSA without actually repealing it. While the legislation was viewed by its sponsor (and those advocating its introduction) as family friendly and "a sensible solution" for dealing with irregular time demands,[57] some believed that it clashed with the purposes of the FLSA. The proposed legislation, however, seems to have sparked little public discussion, either pro nor con. Yet, as an early initiative in the area of private sector comp time arrangements, the legislation warrants examination.

Concerns and Implications. If enacted, the Wallop bill (S. 515) would have allowed employers to engage employees for an unlimited number of hours per week without payment of overtime rates. By mutual agreement between a worker and his employer, the two would have been allowed to set aside the overtime pay requirements of the FLSA and to operate, basically, without any overtime pay constraints on a simple one-for-one comp time arrangement. With comp time calculated on a *straight-time* basis, the employer would have saved 50% of his wage costs for each overtime hour worked, but these savings would have been realized at the expense of employee take-home pay.

Institution of the comp time system was to have been allowed "pursuant to a contract made between the employer and the employee individually or an agreement

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[55] *Congressional Record* (permanent edition), March 28, 1985. p. 6691. See S. 798, referred to the Committee on Labor and Human Resources.

[56] *Congressional Record* (permanent edition), March 6, 1989. pp. 3526-3527. See also *Congressional Record* (permanent edition), March 18, 1988. p. 4439.

[57] *Congressional Record* (permanent edition), March 18, 1988. p. 4439.

made as a result of collective bargaining." Where a collectively bargained agreement permitted the arrangement, workers could be expected to have some protection and a voice in structuring the system. Otherwise, there was no specific requirement that an agreement between an individual worker and his/her employer be voluntary or that it not be a condition for securing employment or remaining employed. Control of the comp time accrued by employees was left in the hands of the employer. Thus, the system was flexible for the employer but not necessarily so for the worker.[58]

As was discussed above, one purpose of the overtime provisions of the FLSA is to deter employers from engaging their employees through excessively long hours and, instead, to hire additional workers. With the overtime pay penalty set aside, the disincentive with respect to overtime work (and, conversely, the incentive to create additional employment opportunities) would have been removed. Job creation, however, was not the only concern that sparked enactment of the overtime section of the FLSA. A collateral purpose was to provide a shield for workers against potentially negative impacts of long hours of toil and, as well, from any accompanying costs in terms of health and safety hazards, fatigue, or inconvenience. Many observers thought that shield might have disappeared under the proposal.

As introduced,[59] the comp time option would have applied to any employer: public or private, large or small, stable or newly established. Under the FLSA, labor standards are applied differently to different work environments, in part because public and private sector employers operate in different cultures and under different

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[58] On April 12, 1989, Senator Wallop proposed the substance of S. 515 as an amendment to then-pending legislation, noting: "...all we are doing is permitting *voluntary* agreements between labor and management to utilize a flexible comp time program." (Emphasis added.) The assumption was that the arrangement would be voluntary for each of the parties. Senator Kennedy took exception to that assumption, observing:

> What the Senator from Wyoming is basically saying is when that person comes in and gets that employment, he indicates that they sign a contract to permit this kind of compensatory time off.
>
> The problem with that, as we all know, is that the bargaining position between an employer and a single employee at the time when they come on in to work is not one of great equity.
>
> We know very well that any employee when they go to the job the employer may well say `You've got the job; just sign here,' which says we do not have to compensate you [with overtime pay] for any time over 40 hours a week.

See *Congressional Record* (permanent edition), April 12, 1989, p. 6154. The issue related to *the effective right* of an employee to decline to enter into an agreement to allow comp time use when to decline is clearly contrary to the wishes of his current or prospective employer.

[59] Senator Wallop later affirmed that the issue was one that he had "pushed for most of this decade." With S. 515 resting in committee, he "redrafted" its substance as an amendment to the general 1989 FLSA amendments. His proposal, tabled by a vote of 66 to 33, sparked a floor debate between Senators Wallop, Kennedy, Metzenbaum, and Mitchell that summarized the issues, pro and con, concerning private sector use of comp time for hours worked in excess of 40 per week. See *Congressional Record* (permanent edition), April 5, 1989, pp. 5604-5605, and April 12, 1989, pp. 6153-6158.

rules. The public employer normally is an ongoing concern governed by established and uniform personnel regulations and under general public supervision. Private sector firms are diverse in their labor-management relationships and have greater freedom to merge or, simply, to go out of business. In some sectors of the private economy, instability is common: for example, in the garment industry and in some segments of construction. Responsible firms, of course, would honor their obligations for payment of deferred earnings (the cash-out value of comp time). Less responsible firms might not. Where a bankruptcy proceeding was involved, workers might secure their back pay where there were assets to be attached; but, that could involve litigation beyond the resources of many workers — especially those in the low-income group. Even for a firm with the best of intentions, an employer could fall upon hard times and end-up in default. In some cases, a closing might be more informal, leaving workers without recourse.

Payment of comp time earnings (accrued on a straight-time basis) would have been deferred until the workweek in which the comp time was actually used. No cap was to have been imposed upon the number of hours accruable under the system and no date was set by which such deferred earnings would have needed to be paid to the workers: just "in a subsequent workweek."[60] The employer, under S. 515, would have had control over (and use of) the deferred wages through an indefinite interim period. No provision was made for payment of interest on what some, arguably, may have viewed as an interest-free loan from the workers to their employer.

Enforcement of wage/hour standards, even under current law, is difficult. In a firm with a significant number of employees, working through different time periods and degrees of flexibility and hours compression, and accruing deferred income through comp time, the task could be very complex. What level of compliance machinery would be necessary to determine that comp time was accurately awarded, to insure that an employer would be able to make payment when called upon to do so, and to secure payment of these back wages were an employer either unable or unwilling, voluntarily, to pay them?

Overtime Pay and *Comp Time* Concerns in the 104th Congress

The FLSA, in 1938, was a product of legislative compromise. While it set general minimum wage and overtime pay standards, exceptions were built into the statute. Through the years, the pattern of exceptions has become increasingly complex as Congress, in response to appeals from various interests, has sought to expand the coverage of the statute or to define certain categories of workers (or industries) as outside the Act's requirements. Most such legislative adjustments have

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[60] Reference, here, is to S. 515. However, see also comments by Senator Wallop, April 12, 1989, *Congressional Record* (permanent edition), April 12, 1989, pp. 6156-1657. As part of the Senator's remarks, there is a letter from James A. Helzer, Unicover Corp., Cheyenne, Wyoming, explaining his firm's experiment with a comp time option (subsequently found to have been in conflict with the FLSA).

been followed by complex and, normally, more detailed and technical regulations developed by DOL in an effort to apply the changes mandated by Congress.

In the 104th Congress, more than two dozen bills were introduced urging amendment of the FLSA.[61] Several of those proposals dealt specifically with the 40-hour workweek, flexible and compressed scheduling, and overtime pay: S. 1129 (Ashcroft), with a similar measure in the House, H.R. 2723 (Doolittle); and H.R. 2391 (Ballenger).

The Ashcroft Proposal

On August 7, 1995, declaring that America's "workplace laws reflect the needs of a bygone era" and are "[h]opelessly outdated," Senator Ashcroft introduced S. 1129, the "Work and Family Integration Act."[62] "It is incomprehensible," Senator Ashcroft suggested, "that workplace law in this country is predominated by a workplace statute that was passed almost 60 years ago." Suggesting the need for adjustment of the 40-hour workweek principle, the Senator stated that such "rigid and inflexible provisions 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."[63] Senator Ashcroft urged greater overtime pay flexibility as a family friendly issue.

S. 1129, adding a new subsection to Section 13 (exemptions) of the FLSA, was both simple and complex. **First**, it would have allowed an employer 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."[64] **Second**, within the 4-week (160-hour) period or as a separate flexible scheduling arrangement, an employer would have been allowed the option of

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

[62] S. 1129 was referred to the Senate Committee on Labor and Human Resources. On February 27, 1996, a general hearing was conducted on issues raised by the proposed legislation. On December 6, 1995, companion legislation (H.R. 2723) was introduced in the House by Representative Doolittle and referred to the Committee on Economic and Educational Opportunities.

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

[64] The initiative for instituting a flexible or compressed workhours program under S. 1129 rested with the employer. Once that initial decision had been made, the employer would have been allowed to invite his employees to participate in the program. His employees would have had the choice of participating or not. If they agreed to participate, the employer would then have been free to schedule them for more than 40 hours in a workweek without paying overtime rates. If the employee chose not to participate, then the employer would have been required to pay him *time-and-a-half* for hours worked in excess of 40 in a single workweek.

restructuring workhours: that is, any configuration of hours so long as the total for the 4-week period did not exceed 160 workhours. Within the 4-week/160-hour period, no overtime pay would be required. **Third**, if an employer found it appropriate to schedule in excess of 160 hours in a 4-week period, then each employee could have worked up to 48 hours more than the regular 160 hours — carrying over the excess 48 hours "to a succeeding 4-week" period as "credit hours."[65] **Fourth**, hours worked in excess of 160 in a 4-week period (credit hours) would have been credited to the employee at a straight-time rate. "Section 7 and any other provision of law that relates to premium pay for overtime work shall not apply to the hours that constitute such a compressed schedule." It appears that time-and-a-half pay would not have been required until an employee had worked 208 hours in a 4-week period (i.e., 160 regular work hours plus 48 credit hours).[66] **Fifth**, an employer would have been allowed to initiate a program of flexible schedules within the new 160-hour workmonth and invite the participation of his employees. Such a flexible schedule could include "designated hours and days during which an employee on such a schedule must be present for work" and other specified conditions.[67] **Sixth**, no employee would have been "required to participate" in the flexible and compressed scheduling program and any threat, intimidation or coercion on the part of the employer was prohibited.[68]

Under this proposal, workers and workplaces would have been divided into two separate groups. First, there are those covered by a collective bargaining agreement (union workers), in which case that agreement would govern implementation of the flexible and compressed workhours arrangement. Second, there are those workers not covered by a collective bargaining agreement (for the most part, non-union workers), in which case the program drawn up by (or authorized by) management would be controlling.[69]

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[65] There may have been some ambiguity about the wording of the credit hour provision of S. 1129. Only 48 credit hours could be accumulated during a single 4-week period and only 48 credit hours could be drawn down by the employee in "a succeeding 4-week period for credit to the basic work requirement for such period." However, *as introduced*, the legislation did not appear to impose a cap, per se, upon the number of credit hours that a worker could accumulate while he or she participated in the flexible scheduling program.

[66] As introduced, S. 1129 provided for (a) a compressed scheduling option (i.e., flexibility within a 160-hour work/4-week workperiod), (b) flexible workhours within a workperiod, however defined, and (c) a "credit hours" option. While the compressed and flexible scheduling arrangements may be free-standing, it would appear that they might also have been used jointly as flexible and compressed schedules with a "credit hours" option. Structuring these arrangements as part of a single program appeared to allow a maximum scheduling flexibility.

[67] Under the Federal Employees Flexible and Compressed Work Schedules Act, periods are usually set aside during which employees must be present ("core time") in order to permit scheduling of meetings or other activities involving a full working group.

[68] The bill specifically prohibited coercion of employees in order to get them to participate in a program of flexible and/or compressed scheduling.

[69] In addition to its general flexible and compressed work scheduling provisions, S. 1129 (continued...)

The 40-Hour Workweek. S. 1129, according to an explanation released by the Senator's office, "does not change the 40-hour work week standard" but, rather, "simply adds an additional provision to the Fair Labor Standards Act ... which creates an exception to the 40-hour workweek."[70] But, the Senator pointed out: "... the bill would alter the FLSA's rigid 40-hour maximum workweek provision."[71]

Under the proposal, the 40-hour workweek could have been replaced with two other patterns taking its place: first, the 160-hour 4-week work period; and, second, the 48 credit hour balance. Overtime pay would have been triggered after 208 hours had been worked: 160 regular workhours with up to 48 credit hours. Assuming a cap at 48 on the number of credit hours that could be accumulated, then no further credit hours could be earned until some part of the 48 banked hours had been drawn down. In many operations, this combination of scheduling options arguably might have eliminated the need for overtime pay in the traditional sense that the term is used under the FLSA. While the 40-hour workweek would not have been repealed, the more flexible scheduling option could have become the norm.

A New Workplace Flexibility? "This legislation," Senator Ashcroft affirmed in his statement introducing S. 1129, "will put work schedule decision making back in the hands of employees." Later, he pointed out that "employees would be able to request — and employers could provide" compensatory time off instead of being paid overtime rates for overtime hours worked.[72]

S. 1129 provided that an "employer may establish" programs of flexible and compressed work schedules. All scheduling arrangements under such programs — arrangement of hours and days of work, the degree of the compression, designation of core time (when an employee must be present for work), etc. — appear to have rested with the employer except where there is a collective bargaining agreement.[73] Production processes and business necessity likely would have been major factors an employer would have taken into account when determining whether (and when) to grant an employee's request for compensatory time off, hours

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[69](...continued)
dealt with other issues. It allowed for the priority rehiring of former employees, under certain conditions, without incurring penalties of law: i.e., civil rights, discrimination, seniority, pension requirements, etc. It would have 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. And, it would have brought the Federal Employees Flexible and Compressed Work Schedules Act into conformity with the 160-hour 4-week formula.

[70] Senator Ashcroft's office has prepared a fact sheet, undated, concerning S. 1129, from which this report draws.

[71] *Congressional Record*, August 7, 1995. p. S11789.

[72] *Congressional Record*, August 7, 1995, pp. S11788-S11789. There would appear to have been some uncertainty about the computation of overtime/comp time rates, giving the wording of the proposed legislation and some of the related documentation.

[73] Normally, it is the employer's option to establish the sequence of workhours: starting times, shift structures, etc. Flexibility in scheduling, both under current practice and as projected under S. 1129, is essentially an employer decision.

flexibility, and the like. The bill did not contain language comparable to the "within a reasonable period" and "if the use of compensatory time does not unduly disrupt the operations" of the establishment as is a part of Section 7(o) that deals with comp time utilization in the public sector.[74]

Section 7(o) of the FLSA, as it relates to comp time for state and local government employees, requires (in the absence of a collective bargaining agreement) that participation in a comp time program be preceded by "an agreement or understanding arrived at between the employer and employee before the performance of the work."[75] S. 1129 provided:

> ... the employer may, *on request of the employee*, grant the employee compensatory time off in lieu of payment for such overtime hours, whether or not irregular or occasional in nature and notwithstanding Section 7 [the overtime pay provisions of the FLSA] or any other provision of law ... (Emphasis added.)

There was no requirement that such a request be written and, thus, were it not required by the implementing regulations, it would appear that a "request of the employee" could have been either oral or written. If the request had been oral, worker agreement or refusal might have been difficult to document were litigation to follow; and, indeed, many employers might have sought protection by securing an employee's agreement in written form.

This, however, may have raised other concerns since the several workhours options were to be initiated and, in the absence of a collective bargaining agreement, structured at the discretion of the employer. The form, format and timing of an employee request to participate in such programs were left to be defined in regulations, if at all.

Assuming that an employee request to participate in an alternative workhours program under S. 1129 would be written, then content and timing could be important. For example, could a prospective worker be handed a request form when applying for employment? If so, would an applicant be free to decline to sign without endangering his likelihood of being hired? While H.R. 2391, as reported, included a provision that a private sector employee may only be provided compensatory time off "if such agreement or understanding was not a condition of employment," S. 1129 did not. While S. 1129 would have prohibited an attempt by an employer "directly or indirectly" to "intimidate, threaten, or coerce," it was not specified how this would be implemented.

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[74] Some might argue that control of such programs could hardly rest with anyone other than the employer, especially where work processes are closely integrated with one employee dependent upon another or where there are tight production deadlines.

[75] See 29 U.S.C. 207(o)(2)(A)(ii). This provision also appeared in H.R. 2391 (the Ballenger proposal of the 104th Congress, discussed below), as reported by the Committee on Economic and Educational Opportunities. H.R. 2391 also required that such an agreement or understanding be "entered into knowingly and voluntarily by such employee" and, in the case of private sector employees, that it be "a written or otherwise verifiable statement."

Some were concerned that flexibility for the employer, under pressure to meet production deadlines, could result in an employee being required to work a compressed schedule that would be inconsistent with his or her non-work responsibilities (childcare, school or other training program, etc.). That could occur under current law; but, at the end of 40 hours in a single week, any additional hours of work would trigger an overtime pay penalty of time-and-a-half. Under S. 1129, employer flexibility could have extended to 208 overtime free hours in a single month, arranged to meet the requirements of the employer and of the production process.

In the absence of a general request from an employee to participate in alternative scheduling, it is not clear that a separate request would have been required on each occasion in which weekly hours of work extended beyond 40.[76] Would a consistent refusal by a worker to work a compressed schedule (160 hours structured through 4 weeks) and/or to accept straight-time pay for overtime (credit hours) rather than insisting upon time-and-a-half have affected that employee's status and opportunities? The proposed legislation would have applied equally to workplaces that are comfortable and collegial, and to those that are characterized by a high-pressure production-oriented culture. Whether S. 1129 would have assured that flexibility was a two-way street was not immediately clear.

Compliance and Administration. The Federal Employees Flexible and Compressed Work Schedules Act applies only to employers that are more or less permanent: that is, to federal agencies. And, the implementation of the option is carefully scrutinized by the Office of Personnel Management and, more distantly, by the Congress. The 1985 FLSA amendments created a comp time option for employees of state and local governments. There, the employers are ongoing entities operating under public supervision. S. 1129 proposed extension of the flexible and compressed workhours option to "an employer" — that is, to any employer covered under the overtime pay provisions of the FLSA, public or private, large or small, without limitation.

Under current law for covered employees, the general requirement is that any hours worked in excess of 40 per week require payment at the rate of time-and-a-half: a straight forward standard. S. 1129 would have authorized a variety of new workhours arrangements. Some workers might remain on straight time; others, on alternative scheduling with credit hours. Some workers might move in and out of the system allowed by S. 1129, depending upon their non-work responsibilities.

S. 1129 imposed no cash-out deadline for credit hours so long as one remained in the program. Carrying credit hours on the books through an extended period would add some complexity to the compliance burden. For some small firms, the alternative scheduling option could prove difficult to administer. However, any initiative which expanded comp time and related options would likely engender such difficulty in some measure.

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[76] Questions arose as to how much flexibility an employer would have been allowed in designing an alternative scheduling program.

During consideration of the legislation providing flexible and compressed scheduling for federal employees (a process that spanned more than a decade), many of these same issues were raised. Even allowing for the differences between public and private sector employment, enforcement and/or compliance problems suggested by S. 1129 would not necessarily be overwhelming, but would add complexity beyond the current program.

Alternative Scheduling and the Family Friendly Workplace. Alternative work scheduling, through the past several decades, has often been considered a positive step in the creation of a family friendly workplace. The growing trend of both husband and wife working outside the home has made more difficult the juggling of work and family responsibilities. Flexible hours with time off to care for family matters could, proponents say, make workers happier, less stressed, and more productive.

When S. 1129, "Work and Family Integration Act," was introduced, it was pointed out that a worker, wishing "to work 45 hours one week in exchange for working only 35 the following week so he or she can attend their child's baseball game, parent-teacher conference, or doctor's appointment, must first have an employer willing to pay him or her five hours of overtime pay for the 45-hour week." S. 1129 is "an effort to make the Fair Labor Standards Act conform to the realities of the current workplace."[77]

A central issue, here, may be the matter of control. When flexible and compressed scheduling is utilized to enhance the quality of worklife and where workers are able to match flexible schedules to their family needs, the system should work well — at least for the employee. But, that flexibility and match may not always exist.[78]

Clearly, flexible and compressed scheduling is not an option for all employers — nor for all employees. For an establishment with a cooperative labor-management relationship and where the work processes allow it, flexible scheduling may be a *win-win* situation. But, where production depends upon workforce stability (as in a factory setting), where customer hours need to be maintained, or where employees work closely as a team, an absence of an employee could be damaging. And, though the individual workers may feel less stressed, productivity may suffer. That flexible scheduling results in increased efficiency and productivity does not appear to have been demonstrated conclusively. Under some circumstances, flexible and compressed

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[77] *Congressional Record*, August 7, 1995, p. S11788. Under current law, if an employee works a flexible schedule within the 40-hour week, takes the 5 hours off and works an additional 5 hours, there would be no need for overtime pay. Under the FLSA, flexibility is allowable within a single workweek. If, however, a need for time off arose on the final workday of the week, that option would not be available; he would have to use vacation time, personal days, family leave days, etc.

[78] If one assumes, as appears to be normally true, that the employer establishes the schedule of workhours, then the issue becomes primarily one of the mode of payment: i.e., overtime pay in cash on a *time-and-a-half* basis or credit hours drawn down on a *straight-time* basis. In either case, control over workhours would appear to rest with the employer.

schedules *may* benefit both the employer and employee; but, under different circumstances, they may not *necessarily* benefit either.

The Ballenger Proposal

During the early months of the 104th Congress, the House Subcommittee on Workforce Protection, chaired by Representative Ballenger, conducted oversight on certain aspects of the FLSA — among them, the issues of comp time and compressed scheduling. On September 21, 1995, Mr. Ballenger introduced the "Compensatory Time for All Workers Act of 1995" (H.R. 2391). Following further hearings and mark-up, the bill was sent back to the full Committee on Economic and Educational Opportunities.

On July 11, 1996, the full Committee reported the legislation by a vote of 20 yeas to 16 nays: Republicans supporting the bill; Democrats, in opposition. On July 30, 1996, the measure was called up in the House and passed (225 yeas to 195 nays). No further action was taken on the legislation during the 104th Congress.

In general, the Ballenger bill would have allowed employers to offer compensatory time off to their employees in place of the more traditional overtime pay in cash. The choice of whether to offer the option was left to the employer. Where there was a collective bargaining agreement, implementation of the option would have been subject to negotiation. Where no such agreement (or worker representation) was involved, an arrangement was to have been worked out between each employee and his or her employer.

Once management had determined to offer comp time and had developed a program for its implementation, the worker would have been given the option of participating in the program or remaining on a traditional cash overtime pay basis. An agreement or understanding "in a written or otherwise verifiable" form would then have been entered into between the parties. A ceiling of 240 hours of comp time was to have been set (or, less, depending upon the individual program), with a mandatory cash-out of accrued hours at least once each year.

Proponents of the legislation have affirmed that workers would be free to choose with respect to participation — free from coercion on the part of their employers. Further, once a worker had become a participant, he still had the option of opting out of the program with appropriate notice to his employer. Conversely, the employer would be free to terminate the program with appropriate notice to his employees. The legislation called for sanctions and penalties in case of violations of law.

Concern about the legislation was voiced from several perspectives. Some argued that extended (and, in their view, excessive) hours of work might be as hazardous and debilitating for workers in the 1990s as they had been in the 1930s: i.e., that a 40-hour workweek was long enough and that overtime work should be discouraged. The substitution of comp time for regular cash overtime would involve

a trade of some cash earnings by the employee for time off at a later date.[79] Further, comp time would be the equivalent of wages; but, these wages (accrued hours) would be deferred income, held and used by the employer on an interim basis.

A significant concern appears to have been the issue of *effective choice* on the part of the worker. Some questioned whether a worker really would be free to decline to participate in the comp time program if he or she knew that the arrangement was preferred by his or her employer? If a job applicant were offered the option of comp time in place of cash overtime, could that become an *implicit* condition of employment, even were the employer carefully to refrain from making it an *explicit* condition? Could an employer assign overtime work only (or largely) to employees who agreed to accept comp time rather than cash?

Finally, there was the matter of effective worker choice in the use of comp time already earned. The employee could request the use of his or her comp time and the employer could approve that request "within a reasonable period" and when the absence of the employee "does not unduly disrupt" the operation of the firm. Definition of "a reasonable period" and "unduly disrupt" would be left either to implementing regulations or to the discretion of the employer. While the employer could approve an employee request, it could also deny the request. Under this bill, the employer would have been allowed to buy back the accrued hours at his (the employer's) discretion, compensating the worker in cash. Thus, accrued comp time (banked hours) might not be available to a worker when a need for workhours flexibility arose.

The Ballenger bill was characterized as family friendly legislation and as an aide to workers (especially, to working women) in their effort to balance work with family concerns. In general, H.R. 2391 was supported by industry and by employer or business-oriented groups (the Labor Policy Association, the National Federation of Independent Business, etc.) and opposed by the trade union movement and certain

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[79] If an employee who is regularly employed throughout the year works overtime hours and is paid in cash, he receives his regular wage, augmented by his overtime pay for the extra hours worked. If that employee were, instead, to take comp time, he would be permitted to take paid leave (90 minutes of leave for 60 minutes worked overtime) at a later point. At year's end, the annual earnings for the worker who took the cash would combine his regular wage plus his overtime pay. The worker who took comp time would have given up some amount of overtime pay — but he would have had some extra hours of free time during the year. There would be a trade-off of cash for free time.

women's organizations.[80] The final vote on H.R. 2391 was 225 yeas to 195 nays. No action on the measure occurred in the Senate.[81]

The Clinton Proposal

By June 1996, comp time legislation had been under active legislative consideration for more than a year. Marked-up and reported by the Workforce Protections Subcommittee in mid-December 1995, a full Committee mark-up had been scheduled for June 26, 1996. In the interim, backers of the legislation had discussed alternative language which might offer further protection and assurances to workers.

The Clinton Administration also had the issue of flexibility under consideration. During the summer and fall of 1996, it began to shape a package of proposals. Although they were never considered in legislative form, they provided additional options for legislators and became an element in the workhours debate both in the House and Senate into the 105th Congress.

President Clinton Enters the Fray. On June 21, the President directed a memorandum to the heads of executive departments and agencies urging implementation of federal family friendly work arrangements. "The federal government must continue to set the pace in transforming the culture of the American workplace so that it supports employees who are devoted to their families." He directed the agency and department heads to "develop a plan of action to utilize the flexible policies already in place and, to the extent feasible," to expand these programs. Among the President's areas of concern was:

> ... flexible hours that will enable employees to schedule their work and meet the needs of their families. This includes encouragement to parents to attend school functions and events essential to their children; ...

He called for an initial report from the departments and agencies within 120 days that would include "an assessment of progress made toward specific goals and include innovative approaches and detailed success stories."[82]

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[80] A variety of individuals, both from management and from the general workforce, spoke in their own behalf with respect to the legislation. The division among women's groups over comp time became more apparent during the 105th Congress. Diana Furchtgott-Roth, a resident fellow at the American Enterprise Institute and associated with the conservative Independent Women's Forum, testified in support of the concept. Helen Norton of the Women's Legal Defense Fund spoke against it, as did Karen Nussbaum, formerly head of the Women's Bureau, DOL, and now director of the Working Women's Department, AFL-CIO.

[81] See: U.S. Congress. Committee on Economic and Educational Opportunities. *Working Families Flexibility Act of 1936. Report to Accompany H.R. 2391*. House Report 104-670, 104th Cong., 2nd Sess. Washington, U.S. Govt. Print Off., 1996; *Congressional Record*, July 26, 1996, pp. H8563-H8573; and *Congressional Record*, July 30, 1996, pp. H8776-H8790.

[82] Clinton, William J. "Memorandum on Family Friendly Work Arrangements," June 21, (continued...)

The Nashville Statement (June 1996). On June 24, 1996, during his campaign for reelection, President Clinton addressed the Family Re-Union V Conference in Nashville, discussing a series of family-related issues. The President spoke about the issue of time: an increased opportunity for parents, aside from their work responsibilities, to address the needs of their children. He concluded by observing that "there are two more changes we can make that would help the American economy, not hurt business, and strengthen families." **First**, he noted, would be an expansion of the Family and Medical Leave Act, adopted by the 104th Congress. He urged: "... we should pass a family leave II that would allow employees to take up to 24 hours a year — that's not a lot of time — for parent-teacher conferences or for routine medical care for a child, a spouse, or a parent." **Second**, "... we need to make the workplace more family-friendly, especially where a lot of overtime is concerned, and give people more flextime in taking overtime either in income or in time with their families." He proposed to "redefine compensation in a way that reflects the value of family and community."

While urging greater workhours flexibility, the President emphasized: "It's important that this be a choice for employees." He acknowledged employer interest in the proposal, but stressed that, in his opinion, "the employee has to make the decision" and that "we have to write strong protections into the law." At the same time, he took note of existing abuses with respect to minimum wages and overtime pay, adding that without appropriate safeguards, "it could simply open the door wide for abuse of the overtime laws."[83]

An Initial Response. The President's message enjoyed a mixed reception. Although the President had "avoided use of the term 'comp time,' which has negative connotations for unions, and substituted the term 'flextime,'"[84] AFL-CIO President John Sweeney commented: "Opening up overtime laws to potential abuse is not the solution to families' needs."[85] Christina Martin, deputy press secretary to Republican Presidential Candidate Robert Dole, referred to the initiative as "stolen rhetoric."[86] Some reporters termed the proposal "an election-year appeal to Americans juggling job and family;"[87] others suggested that the President's proposal "marked another instance in which he has co-opted a Republican idea, but not the actual Republican legislation."[88]

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[82](...continued)
1996. *Weekly Compilation of Presidential Documents*, Vol. 32, No. 26. p. 1119.

[83] Clinton, William J. "Remarks to the Family Re-Union V Conference in Nashville, Tennessee," June 24, 1969. *Weekly Compilation of Presidential Documents*, Vol. 32, No. 26. pp. 115-1127.

[84] *Daily Labor Report*, June 25, 1996. pp. AA1-AA2.

[85] *USA Today*, June 25, 1996. p. A4.

[86] *The New York Times*, June 25, 1996. Section A, p. 19.

[87] *St. Louis Post Dispatch*, June 25, 1996. News Section, p. 5A.

[88] *The New York Times*, June 25, 1996. Section A, p. 19.

There was a similarly mixed reaction on the part of advocates of the Ballenger bill — or of similar modification of the FLSA. Sandra Boyd of the Labor Policy Association (and, later, chair of FLECS), stated: "Suddenly the administration decides that it's time to jump on the bandwagon," adding: "I'd be very surprised to see them pushing this proposal very far."[89] While expressing concern about certain potential provisions of the Presidential package, Daniel V. Yager, then-chair of FLECS, seemed to welcome the President's interest in the issue: "We are especially pleased that President Clinton has endorsed the concept of providing compensatory time as payment for overtime," he wrote to Chairman Goodling of the Committee on Economic and Educational Opportunities.[90] Optimism was expressed in Representative Goodling's opening remarks during full Committee mark-up of the comp time legislation. "I'm pleased that the President, just a few days ago, agreed that the Congress should pass legislation giving employees this option," he observed.[91]

Some, however, viewed the President's position as ambiguous. In May 1996, the White House Chief of Staff had indicated that were comp time language added to the then-pending minimum wage legislation, it would be viewed as "a poison pill" that could result in a veto.[92] Still, in the wake of the President's Nashville statement, Presidential adviser Gene Sperling reaffirmed that Mr. Clinton "strongly opposes" the bill.[93] The National Federation of Independent Business (NFIB), a supporter of H.R. 2391, affirmed that comp time had not been a part of the minimum wage package "because the White House shot it down." Jack Faris, NFIB President, observed: "The president's flex-time proposal is a step in the right direction, but it's a little late in coming ..."[94] In a similar statement, the National Association of Manufacturers (NAM) noted that "[t]he business community has endorsed" the comp time legislation. "We urge the President to stand by his belief," affirmed Paul Huard, NAM senior vice president. "President Clinton must not let election year politics cause him to turn his back on a proposal that even he has admitted would help American

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[89] *USA Today*, June 25, 1996. p. 4A. Ms. Boyd would subsequently serve as chair of FLECS (the Flexible Employment Compensation and Scheduling Coalition). See also, Maggi Coil and Sandra J. Boyd, "Key Issues in Reforming the Fair Labor Standards Act," in *ACA Journal*, winter 1996, p. 37-38. Ms. Coil had testified for Motorola and for the Labor Policy Association at the March 30, 1995, hearing before the House Subcommittee on Workforce Protections, discussed above.

[90] Daniel V. Yager, Chair, FLECS, to Chairman William Goodling, Committee on Economic and Educational Opportunities, June 26, 1996. Yager, who had formerly served as minority counsel (Republican) to the House Committee on Education and Labor, was identified early in 1996, as general counsel for the Labor Policy Association. See *The Detroit News*, February 7, 1996.

[91] Statement, Chairman Bill Goodling, Full Committee Mark-up, The Working Families Flexibility Act, June 26, 1996. p. 1-2.

[92] *Congress Daily*, May 14, 1996. p. 1.

[93] *The New York Times*, June 25, 1996. Section A, p. 19.

[94] NFIB Small Business News, press release of June 26, 1996.

families."[95] On June 26, two days after the Nashville statement (and coinciding with full Committee mark-up), 10 Republican congresswomen urged the President to "put aside partisan differences" and support the Ballenger bill.[96]

The Clinton proposals remained under discussion through the summer of 1996. In his acceptance speech at the Democratic convention, the President said: "We should pass a flextime law that allows employees to take their overtime pay in money or in time off, depending on what's better for their family."[97] But, the White House still indicated that a veto awaited the Ballenger bill. *The Washington Post* reported in early September:

> The veto promise comes at the strong urging of organized labor, which fears that there are not enough protections in the proposal to prevent employers from coercing workers into taking time off in lieu of overtime payments ...
> Labor appears equally leery of the White House proposal, but union officials this week did not seem prepared to make a public fuss about it during the election campaign ...[98]

Karen Nussbaum, director of the Working Women's Department, AFL-CIO, stated the view that workers need the money earned through overtime pay and that they have little confidence that they would actually have a choice between cash and time off, even were the FLSA amended. She pointed out that with about 800 DOL Wage and Hour inspectors responsible for compliance in some 6 million workplaces, ensuring "full and free choice" might be difficult.[99]

Conversely, Dan Yager of the Labor Policy Association contended that "the vast majority of employers" would not abuse the option. Sandra Boyd of FLECS (and the LPA) argued that "there is clearly a disconnect between union members and union leadership" on the comp time issue.[100] While acknowledging that "organized labor is

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[95] NAM: National Association of Manufacturers, News Alert. June 26, 1996. pp. 1-2.

[96] *Daily Labor Report*, July 1, 1996. P. A12. Signers of the letter to President Clinton included Representatives Greene, Dunn, Pryce, Myrick, Fowler, Cubin, Johnson (Conn.), Meyers, Vucanovich, and Molinari.

[97] Clinton, William J. "Remarks Accepting the Presidential Nomination at the Democratic National Convention in Chicago," August 29, 1996. *Weekly Compilation of Presidential Documents.* Vol. 32, No. 26. p. 1577.

[98] *The Washington Post*, September 7, 1997. p. A9.

[99] *Daily Labor Report*, October 15, 1996. p. A7. Nussbaum pointed to a recent poll, conducted by the AFL-CIO, and suggested that those who seemed inclined to opt for time-off rather than paid overtime were already exempt employees: not subject to FLSA overtime pay requirements and often more highly paid. Those who were less well paid (and covered under the FLSA overtime pay requirements) seemed more likely to prefer cash overtime pay. Ms. Nussbaum was formerly head of The Women's Bureau at DOL.

[100] Swoboda, Frank, and Kirstin Downey Grimsley. "Clinton to Offer Legislation on Compensatory Time, Expanded Family Leave." *The Washington Post*, September 7, 1996. p. A9.

dead-set against it," LPA President Jeffrey McGuiness asserted that "[m]ost workers want some sort of workplace flexibility."[101]

What President Clinton Proposed. Under date of September 27, 1996, President Clinton transmitted to Congress a draft for his "Family-Friendly Workplace Act of 1996." The proposal was essentially divided into two parts: section one, dealing with comp time; and section two, expanding the Family and Medical Leave Act.

A Comp Time Option. The President proposed adding a new subsection (r) to Section 7 of the FLSA.[102] Although the initiative was not acted upon during the 104th Congress and was not a subject of hearings, its provisions, summarized below, became an element in legislative discussion of the issue and therefore is part of the background for the current debate.

First. The concept of "employee" for purposes of the comp time option was defined to exclude "a part-time, temporary, or seasonal" worker, an employee of a public agency, an employee "of an employer in the garment industry," and others ("vulnerable employees") excluded through regulations to be issued by the Secretary of Labor.[103]

Second. Comp time would be calculated on a basis of 1-and-1/2-hours of paid leave for each hour of overtime worked. In case of bankruptcy, comp time would be treated as unpaid wages.

Third. The decision whether to offer comp time would rest initially with the employer. If the employer decides to offer comp time, then he may do so pursuant to a collective bargaining agreement, "memorandum of understanding or any other written agreement between the employer and representative of such employees." Where no collective bargaining agreement exists and there is no representative of the employees, then the option may be arranged through:

> "... a plan adopted by the employer and provided in writing to its employees which provides employees with a voluntary option to receive compensatory time off for overtime work where there is an express, voluntary written request by the individual employee for compensatory time off in lieu of overtime pay ..."

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[101] Transcript, Morning Edition, National Public Radio, October 24, 1996. p. 7.

[102] The text of the President's proposal, with explanatory information, appeared in the *Daily Labor Report,* October 15, 1996. pp. E1-E7.

[103] Employees of state and local governments, of course, would continue to be covered under Section 7(o) of the Act. Under Section 3(D) of the Clinton proposal, the Secretary would be allowed to "issue regulations" defining classes of employees who would be excluded from the comp time option, to limit the number of compensatory hours that participating employees may accrue to less than otherwise applicable in the new subsection (r), and to "require employers to provide such employees with monetary compensation for earned compensatory time at more frequent intervals" than otherwise applicable under the new subsection (r).

The request must be submitted "prior to the performance of any overtime assignment" and may not be "required as a condition of employment."

Fourth. The comp time option must be available "to similarly-situated employees on an equal basis."

Fifth. The employee "may not earn more than a total of 80 hours of compensatory time in any year or alternative 12-month period ..."[104] The employee would be "regularly" advised if the number of hours of comp time earned and of the total accumulated (earned but unused).

Sixth. At the end of any 12-month period, the employer would be required to cash out any comp time earned but unused at 1-and-1/2- times the rate of pay earned by the employer when the overtime was worked or the rate at the time the hours were cashed out, whichever is higher. "[W]ithin 15 days following the request" of an employee, the employer would be required to make cash payment for comp time earned.[105] A monetary cash-out is also required where an employee either voluntarily or involuntarily terminates his employment.

Seventh. The use of comp time by a terminated employee may not be counted to diminish eligibility for unemployment compensation.[106] In addition, payment for comp time "shall be treated as compensation for hours worked for purposes of calculation of entitlement to employment benefits."

Eighth. The employee may utilize banked comp time with two weeks prior notice to an employer unless such use "will cause substantial and grievous injury to the employer's operations" or, perhaps, within the two week period "unless use of the compensatory time at that time will unduly disrupt the operations of the employer."

Ninth. The employer may not require that an employee use accrued comp time. However, the employer "may modify or terminate a compensatory time plan upon not less than 60 days notice to employees."

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[104] The wording, "*may earn not more* than a total of 80 hours" in a 12-month period would be a firm annual limit: not merely a limit to the number of hours of compensatory leave that one might have on the books at any time (a ceiling). (Italics added.) With a ceiling, an employee could work far more than 80 hours of overtime/comp time each year so long as no more than 80 hours were accrued.

[105] Subsection (r)(3)(C) provides: "An employee may voluntarily, at the employee's own initiative, request in writing that such end-of-year payment of monetary compensation for earned compensatory time be delayed for a period not to exceed three months." Extending the cash-out payment "shall have no effect on the limit on earned compensatory time" for the following 12-month period.

[106] Subsection (r)(4) provides: "A terminated employee's receipt of or eligibility to receive monetary compensation for earned compensatory time shall not be used (A) by the employer to oppose an employee's application for unemployment compensation, or (B) by a state to deny unemployment compensation or diminish an employee's entitlement to unemployment compensation benefits."

Tenth. The employer may not substitute earned compensatory time "for any other paid or unpaid leave or time off to which the employee otherwise is or would be entitled or has or would earn, nor satisfy any legal obligation of the employer to the employee pursuant to any law or contract."[107]

Eleventh. Various employee safeguards were included. For example, the following were defined as unlawful acts of discrimination by an employer.

> "(A) to discharge or in any other manner penalize, discriminate against or interfere with any employee because such employee may refuse or has refused to request or accept compensatory time off in lieu of overtime pay, or because such employee may request to use or has used compensatory time off in lieu of overtime pay; or
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> "(B) to request, directly or indirectly, that an employee accept compensatory time off in lieu of overtime pay, to require an employee to request such compensatory time as a condition of employment or as a condition of employment rights or benefits, or to qualify the availability of work for which overtime compensation is required uponan employee's request for or acceptance of compensatory time off in lieu of overtime compensation; or
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> "(C) to deny an employee the right to use or force an employee to use earned compensatory time in violation of this subsection."

Twelfth. A system of penalties for violation of the provisions of the comp time option were provided, including the award of penalties, attorney's fees, and other sanctions.

Certain qualifications were built into the Clinton proposal. Among them were: **(a)** It would define a part-time employee as anyone who worked less than 35 hours per week: such person would not be eligible to participate in the program. **(b)** Similarly, for purposes of exemption from the program, a seasonal person is defined as one employed "for a season or other term of less than twelve months or is otherwise treated by the employer as not a permanent employee of the employer." **(c)** Further, the excluded class was defined to include "an employee in the construction industry, in agricultural employment ... or in any other industry which the Secretary by regulation has determined is a seasonal industry." **(d)** Finally, the Secretary of Labor was directed, "as necessary and appropriate," to develop regulations "implementing record keeping requirements and prescribing the content of plans and employee notification."

The comp time program under the Clinton initiative, presented as an experiment, was to expire ("sunset") 4 years after enactment of the measure.

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[107] The concern, here, appears to be that employers might diminish sick leave or annual leave ordinarily granted to employees, since employees could use comp time for vacation and certain other activities. Since vacation time and sick leave are not mandated by the FLSA, it is not clear how such substitution could be prevented.

Other Provisions of the Clinton Plan. The Clinton proposal included additional initiatives, largely independent from the comp time option, *per se*, each of which would likely have raised additional areas of concern for interested parties.

A Commission on Workplace Flexibility. Assuming that the basic comp time option were written into law, the Clinton initiative called for creation of a "Commission on Workplace Flexibility." The Commission would have been charged with the conduct of:

> ... a comprehensive study of the impact of compensatory time on public and private sector employees including, but not limited to, the impact of the law on average earnings, hours of work, work schedules, and flexibility of scheduling work to accommodate family needs, and on the ability of vulnerable employees or other employees to obtain the compensation to which they are entitled.

The report, to be concluded within a 4-year period, was to be submitted to the Secretary of Labor and to the appropriate committees of the Congress. It was to have made recommendations as to whether the comp time option was to be modified or extended "including a recommendation as to whether particular classes of employees or industries should be exempted or otherwise given special treatment, and whether additional protections should be given, including to employees of public agencies."

Expanding the Family and Medical Leave Act. The Clinton proposal would have expanded the Family and Medical Leave Act of 1993 (FMLA) to provide to an eligible employee 24 hours of *unpaid leave* within a 12-month period.[108] This time away from work was to be used to:

> (i) participate in school activities directly related to the educational advancement of a son or daughter of the employee, such as parent-teacher conferences or interviewing for a new school;
> (ii) accompany the son or daughter of the employee to routine medical or dental appointments, such as check-ups or vaccinations; and,
> (iii) accompany an elderly relative of the employee to routine medical or dental appointments or appointments for other professional services related to the elder's care, such as interviewing at nursing or group homes.

Options provided through changes in the FMLA would be outside the scope of comp time legislation. While potentially utilized as a supplement to other alternative work schedules, flexibility under the FMLA would be administered somewhat differently.

Leave for Civil Service Employees. The proposal would have added a new Section 6383(f) to the United States Code, allowing public employees to enjoy 24 hours of unpaid annual leave for school, medical and eldercare purposes. This would follow the pattern, noted above, for the private sector workforce.

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[108] Concerning the Family and Medical Leave Act, see CRS Report 94-388, *Family and Medical Leave*, by Leslie W. Gladstone, and CRS Issue Brief 97017, *The Family and Medical Leave Act: Proposed Amendments*, by Leslie W. Gladstone.

Some Additional Aspects. A FACT SHEET accompanying the Clinton proposal explained its implications. Emphasized are such concepts as flexibility, employee choice and worker protection.[109]

The FACT SHEET appears to use the term "flex-time" when it would seem to have meant comp time: the concepts are not necessarily inter-changeable.[110] However, in dealing with the need for workplace flexibility, neither the FACT SHEET nor the President in his transmittal statement takes note of the flexibility already a part of the FLSA.

The Administration documents proclaim: "Under the President's proposal, employees choose: ..." But, in practice, the Clinton proposal, like H.R. 2391, puts initial decisions about comp time with the employer. It takes note of the distinction between workers employed under a collective bargaining agreement and those in a non-union work setting — as does H.R. 2391 — and requires that requests for participation in a comp time program be voluntary. Though structured somewhat differently, the Clinton proposal assures worker freedom from abuse (pressure to participate, to draw down accrued time, etc.) as would the amended Ballenger proposal of the 104th Congress (and, later, of the 105th Congress). However, the Clinton proposal explicitly assigns to DOL regulatory responsibility and other options (i.e., designating vulnerable classes) to a degree exceeding that of H.R. 2391.

Finally, the Clinton proposal incorporates language that assures the worker the right to utilize his banked comp time (already earned) unless it will "cause substantial and grievous injury to the employer's operations" or "unduly disrupt the operations of the employer." Again, as in H.R. 2391, the concepts of "substantial" and "unduly disrupt" are left to the Secretary of Labor to define through the regulatory process.

Overtime Pay and *Comp Time* Concerns in 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, explained Tim 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 [flexibility] not only good for employers," observed Sandra Boyd of the industry-oriented 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

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[109] *Daily Labor Report*, October 10, 1996. pp. E 1-E6. In addition to the text of the Clinton proposal, the statement from President Clinton in transmitting the package, a section-by-section analysis and a FACT SHEET were reprinted.

[110] Such concepts are still evolving and their precise definitions may not yet be entirely set. However, in general, flextime refers to scheduling of work within a set period: normally, the 40-hour workweek. This could include such matters as arrival and departure times, core hours for work, etc. Comp time, the concept that seems to apply here, deals with the substitution of time-off for overtime pay outside of a traditional 40-hour workweek.

gut the 40-hour week and make workers vulnerable to pressures from employers to take time off instead of overtime pay."[111]

Representative Goodling, chair of the full Committee on Education and the Workforce, circulated a "Dear Colleague" letter dated December 17, 1996, 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."[112] A roughly parallel letter was dispatched on January 2, 1997, by Representatives Shays and Myrick.[113] 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.[114] By late January, *The Wall Street Journal* was anticipating 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.[115]

In the House, the issue reappeared as H.R. 1 (Ballenger); in the Senate, as S. 4 (Ashcroft). Meanwhile, the Administration was considering alternative approaches to workhours flexibility — generally within the context of the Family and Medical Leave Act, adopted early in the 104th Congress.

The New Ballenger Bill

On January 7, 1997, Representative Ballenger introduced a new comp time bill, the "Working Families Flexibility Act" (H.R. 1).[116] The measure was referred to the Subcommittee on Workforce Protections. On February 5, with Mr. Ballenger as chair, the Subcommittee conducted hearings on the proposal. On March 5, the Subcommittee was discharged from further responsibility for the legislation and the full Committee on Education and the Workforce proceeded with mark-up. On a split of 23 to 17 (Republicans in favor, Democrats opposed), the Committee voted to report the Ballenger bill.[117]

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

[112] Dear Colleague Letter, Representative William Goodling, December 17, 1996. The legislation, when introduced, would be structurally different from H.R. 2391 but substantively quite similar.

[113] Dear Colleague Letter, Representatives Christopher Shays and Sue Myrick, January 2, 1997.

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

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

[116] *Congressional* Record, January 7, 1997. pp. H66, E42-E43.

[117] The *Daily Labor Report* for March 6, 1997, p. AA1, noted: "The vote was along party lines and reflected the differences between the two parties over the GOP-sponsored legislation that is backed by business groups and opposed by organized labor."

H.R. 1 as Reported. Under date of March 12, 1997, House Report 105-21 was filed. H.R. 1, as reported, differed in some respects from H.R. 2391 of the 104th Congress. The earlier legislation had proposed restructuring Section 7(o) of the Act (which now deals 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 of the 105th Congress, Section 7(o) was left unchanged and a new Section 7(r) was added to FLSA that dealt specifically with private sector workplaces.

The wording of the new bill varied somewhat from (though was largely the same and roughly parallel to) that of H.R. 2391. The new bill, like its predecessor, would allow employers to provide, at their initiative, the option of comp time in lieu of monetary overtime compensation, at the rate of 1-and-1/2-hours of comp time for each hour of overtime worked.[118] Where a collective bargaining agreement was in place or where a representative of the workers had been formally recognized, an employer would have had to work within that context in shaping a comp time program. Where there was no negotiated contract (and no recognized worker representative), the employer and the individual employee would e allowed to enter into "an agreement or understanding" with respect to comp time. The bill would have required that such agreement (a) be arrived at "before the performance of the work," (b) that it be entered into "knowingly and voluntarily by such employee," and (c) that it is "not a condition of employment." The agreement was also to have been affirmed by "a written or otherwise verifiable" record.[119] The employer would not allowed, "directly or indirectly [, to] intimidate, threaten, or coerce or attempt to intimidate, threaten, or coerce" any employee with respect to the comp time option.[120]

Employees would not have been allowed to accrue more than 240 hours of comp time. If unused, such hours would need to be cashed-out at the end of a designated 12-month period. An employer would have been permitted, upon 30 days notice to the employee, cash-out all hours banked in excess of 80. An employer could also have discontinued the comp time option after giving 30 days notice to the employee; the employee could have rescinded his agreement to participate in the comp time program, giving a written notice, at any time. Within 30 days thereafter, the employee would have been given monetary compensation for his banked hours. H.R. 1 made clear that an employee who terminated his employment, "voluntarily or involuntarily," would have been paid for unused comp time.

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[118] The worker would not have a right to comp time unless a program, under the new Section 7(r), is instituted by the employer. Nor, in the absence of a collectively bargained agreement, would the worker have a right to be consulted concerning the structure of the option, its scope, and the restraints imposed upon its utilization.

[119] The verifiability of the agreement could be as much in the interest of an employer as that of a worker, where liability and litigation are possible. Where industries are thinly capitalized or where business failures are frequent, a written policy and a written agreement could be of special value to the worker.

[120] The definition of coercion, *etc.*, within the context of public sector employment where there are civil service and other regulations, may not be a problem. Its definition in the private sector where economic pressure (the need for employment) could be a subtle form of coercion, may be more difficult.

Comp time, under H.R. 1, was to be used, upon request by a worker, "within a reasonable period after making the request" when it "does not unduly disrupt the operations of the employer" — language carried over from the House-passed bill of the 104th Congress. H.R. 1, as reported, had language dealing with penalties and posting requirements.

House Report 105-21 noted that the comp time agreement had to be "mutual" between the employer and employee. "If either ... does not so agree, then the overtime pay must be in the form of cash compensation."[121] Further, it explained: "H.R. 1 does not require that the same agreement be entered with every employee, or that the employer agree to offer compensatory time to all employees."[122]

The Report took note of concerns voiced by critics of the legislation, including the assertion that *low wage* workers might be especially vulnerable to exploitation were a private sector comp time option instituted. It suggested that the definition of "low wage" might be somewhat ambiguous and that many workers who might be classified as low wage workers might be benefitted from the comp time option ("...some of the most forceful and compelling testimony ... in support of allowing workers the option of paid compensatory time was given by a 'low wage worker,'"). Therefore, the Report noted: "The Committee sees no reason to deny certain employees the option of compensatory time, based solely upon their level of income or their occupation."[123]

The Report explained as the Committee's intent that "an employee who has accrued compensatory time may generally use the time whenever he or she so desires. The only limitations which the bill puts on the use of compensatory time," it stated, "is that the employee's request to use compensatory time be made a reasonable time in advance of using it, and that the employer may deny the employee's request if the employee's use of the compensatory time would `unduly disrupt'" the employer's operations. The Report emphasized that interpretation of "unduly disrupt" should follow the standard set forth by the Department of Labor and litigated through the courts for state and local government workers. It concluded: "The employer's right to deny compensatory time off under H.R. 1 is very limited. But the employer must have some ability to maintain the operations of the business." It added: "If that is not recognized in the law, then no employer will ever offer compensatory time as an option..."[124]

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[121] U.S. Congress. House. Committee on Education and the Workforce. *Working Families Flexibility Act of 1997. Report to Accompany H. R. 1.* House Report No. 105-21, 105th Cong., 1st Sess. Washington, U.S. Govt. Print. Off., 1997. p. 9. (Hereafter cited as House Report No. 105-21.)

[122] House Report No. 105-21. p. 10.

[123] House Report No. 105-21. p. 11. See the Clinton Administration proposals, discussed above.

[124] House Report No. 105-21. p. 14-15.

The changes made to the FLSA through H.R. 1 (i.e., the comp time option), the Report affirmed, "apply to the legislative branch" in conformity with the Congressional Accountability Act (CAA).[125]

The vote to report H.R. 1 followed party lines; the Democratic Members filed a dissenting report. "In our view," they began, "the inevitable consequence of enactment of H.R. 1 would be to require employees to work longer hours for less pay." They charged that the legislation, though presented as family friendly, has been "deceptively titled" and actually "diminishes the flexibility of working families." They added: "This is a bill about employer flexibility and power, plain and simple." And, they pointed out that the legislation was opposed by organized labor and by women's groups such as the Women's Legal Defense Fund, the American Nurses Association, and Business and Professional Women, U.S.A.

Though they did not suggest "that all, or even a majority of employers" would violate the rights of workers under H.R. 1, they argued: "...Federal labor law must protect employees, indeed even law-abiding employers, from the illegal and ill-begotten gain of unconscionable employers. In the real world," they stated, "most employees lack the bargaining position, wherewithal, and nerve to insist that their employers respect employee needs and rights."[126] Where the Majority stressed the need for "mutual agreement" with respect to comp time, the Minority stated that "many employees are reluctant or fearful to buck their employer's wishes regarding their terms and conditions of employment. This is especially true," they added, "for some 85% of the workforce who do not have the protections of collective bargaining agreements." The Minority argued that the legislation "gives the employer complete discretion over whether to offer overtime at all, the option of offering or denying it to any group or groups of employees, and the authority to withdraw the comp time plan at any time."[127]

The Minority suggested that there are major workplace differences between the public and private sectors and that, in effect, a statute tailored to the needs of state and local government workers could not, arbitrarily, be applied to the private sector.

> The Majority cites various cases and regulations applicable to the public sector standard for taking leave time. These precedents and regulations will not be controlling to the comp time provisions of the bill. Further, public sector employers operate in a substantially different setting than private sector employers. Public sector employers don't face the business cycles and competitive economic pressure of private sector employers. Further, public sector employees are generally organized and have substantial procedural protections to protect against arbitrary and capricious employer actions.[128]

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[125] House Report No. 105-21. p. 21.

[126] House Report No. 105-21. p. 35-36.

[127] House Report No. 105-21. p. 36-37.

[128] House Report No. 105-21. p. 38.

The Department of Labor would need to develop implementing regulations, requirements for record retention, reporting, etc.; these would be expected to vary from those governing the public sector.

The Minority argued that the worker protections built into the legislation were inadequate: that even under current law, wage and hour standards were difficult to enforce and violations were frequent. "H.R. 1 will engender more overtime violations." The proposed legislation, the Minority held, "increases the need for resources" for enforcement and compliance on the part of the Department of Labor. During Committee mark-up, the Minority had offered a series of proposals that would, putatively, have strengthened worker protection under H.R. 1 and a more extensive body of remedies with respect to violations. They were rejected on a series of largely party-line votes.[129]

Finally, the Minority raised a series of objections with respect to manipulation of the workweek to the detriment of the employee, the treatment of potentially vulnerable employees under the proposed legislation, the practical relationship of comp time to other paid leave, the status of comp time under a bankruptcy or informal cessation of business, and other concerns. They also noted concerns voiced by the Clinton Administration with respect to H. R. 1.[130]

Floor Debate and House Passage. The comp time legislation (H.R. 1) was called up in the House on March 19, 1997. The arguments, pro and con, in general terms, followed those of the 104th Congress. Representative Pryce, for example, opened by charging that opponents of the legislation "have chosen to put politics above sound policy" and argued that "it is time we stopped automatically thinking of employer/employee relations in such adversarial terms." With H.R. 1, she affirmed, labor and management "can work together to meet each other's needs ... at least the choice will be theirs, not Washington's." [131] Conversely, Representative Moakley argued that the legislation "helps the big people, but it does not do much for the ordinary worker." He asserted that the legislation would leave workers vulnerable and often without protection. "In the real world, if your boss tells you to take time off instead of getting extra pay, you either do what you are told or you start packing your gear."[132]

Proponents of the legislation spoke in terms of an option for flexibility: of more freedom for workers. Critics saw little option for workers and viewed the legislation, rather, "as yet another attack on America's workers."[133] Disagreement was voiced about the provisions of the legislation, the motivation behind them, and the impact they would have in the real world of the workplace.

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[129] House Report No. 105-21. p. 39-40, 25-30.

[130] House Report No. 105-21. p. 40-45.

[131] *Congressional Record*, March 19, 1997. p. H1116.

[132] *Congressional Record*, March 19, 1997. p. H1116-H1117.

[133] *Congressional Record*, March 19, 1997. p. H1118.

The rule, allowing consideration of H.R. 1, was approved by a vote of 229 ayes to 195 nays.[134] It provided for a series of floor amendments.

The Goodling Amendments. As soon as the House commenced consideration of the bill, Representative Goodling, chair of the full Committee, offered two amendments *en bloc*. The **first** Goodling amendment read as follows:

> No employee may receive or agree to receive compensatory time off under this subsection unless the employee has worked at least 1000 hours for the employee's employer during a period of continuous employment with the employer in the 12 month period before the date of agreement or receipt of compensatory time off.

The **second** Goodling amendment reduced the number of hours of comp time that an employee could accrue from 240 hours to 160 hours.[135]

Representative Clay, the Ranking Minority Member of the full Committee, while speaking against H.R. 1 *per se*, agreed to accept the Goodling amendment (*en bloc*) "because it provides very minor improvements in the underlying bill."[136] Representative Petri pointed to the "long debate" with respect to "[c]onstruction workers and other seasonal employees" and their coverage under H.R. 1. With the Goodling amendments, he noted, "it is unlikely these workers will ever be able to use comptime" but, he observed: "Making comptime an option in industries where the relationship between the employer and the employee is transitory may in fact make it easier for unscrupulous employers to avoid paying overtime wages." The amendments, he suggested, strengthened the worker protections afforded by the legislation by assuring "that an employee has a substantial relationship with an employer before the option of earning paid compensatory time in lieu of overtime."[137]

The concepts raised in the Goodling amendments did not appear to have been dealt with during hearings on the legislation. The impact they might have upon compliance activity on the part of the Department of Labor was not addressed; nor was the potential complexity of requirements that DOL would need to devise for implementation. The Goodling amendments were approved on a vote of 408 ayes to 19 nays.[138]

The Boyd Amendment. A third amendment was offered by Representative Boyd. It provided that the "Working Families Flexibility Act of 1997" (H.R. 1) would automatically terminate 5 years after the date of the enactment. "By putting in place a 5-year sunset provision, the amendment ensures future congressional review of this act," Mr. Boyd affirmed. Several Members endorsed the amendment as a reasonable method through which to try out the option and then assess its impact. Representative Clay voiced continuing concern: "...sunsetting this bill is not the

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[134] *Congressional Record*, March 19, 1997. pp. H1123-H1124.

[135] *Congressional Record*, March 19, 1997. p. H1138.

[136] *Congressional Record*, March 19, 1997. p. H1139.

[137] *Congressional Record*, March 19, 1997. p. H1139.

[138] *Congressional Record*, March 19, 1997. p. H1139-H1140.

problem or the answer. Enacting H.R. 1 would be a terrible mistake." Although he continued to oppose the legislation, Mr. Clay agreed that he would accept the amendment.[139]

Unlike the Clinton Administration proposal, discussed above, the Boyd amendment made no provision for a specific report to the Congress by the Secretary on the utilization and impact of comp time. The House approved the Boyd amendment by a vote of 390 ayes to 36 nays.[140]

The Owens Amendment. Concerns had been raised as to whether low wage workers, generally nonunion, would have true freedom of choice with respect to the proposed comp time option. Representative Owens, therefore, proposed exempting from the option workers who earn less that 2.5 times the minimum wage. "We can have a bill which allows the upper middle class people who want this to have it, and [at] the same time let[s] us exempt three-quarters of the work force who earn $10 or less, ..." He noted that with adoption of the Boyd amendment, Congress would need to return to the issue in 5 years and, at that time, could expand the option if it is found to work satisfactorily.[141]

Representative Ballenger objected that the Owens amendment would exempt everyone who made less than about $23,000 from the option. He questioned why such workers should "be barred by the law from making this choice?" Mr. Ballenger added: "The Owens amendment is premised on the argument that lower income workers are inevitably at the mercy of their employers and so cannot make a free and voluntary choice about compensatory time." Representative Mink, in support of the exclusion, argued that the Owens amendment was trying "to make it possible for the low wage worker not to be put under this pressure of having to work overtime for no compensation at all, for that promise of time off sometime in the future." Mrs. Mink argued: "There is absolutely nothing in H.R. 1 which gives the employee the choice, the free choice, or the decision to take this time when they need it." Meanwhile, Representative Greenwood termed the Owens amendment "insulting, patronizing, and discriminating" — a view generally concurred in by Representative Goodling.[142] After further debate, the Owens amendment was defeated by a vote of 182 ayes to 237 nays.[143]

The Miller (Calif.) Amendment. A final amendment to H.R. 1 was offered by Representative Miller of California. The Miller amendment provided a substitute for H.R. 1, striking all after the enacting clause and inserting a wholly new text. Its provisions were quite different from the Ballenger proposal. It set a limit of 80 hours of comp time that could be earned through any 12 month period. It provided a variety of technical internal safeguards, more specific reporting, a stronger explicit

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[139] *Congressional Record,* March 19, 1997. p. H1140-H1141.

[140] *Congressional Record,* March 19, 1997. p. H1141.

[141] *Congressional Record,* March 19, 1997. p. H1141.

[142] *Congressional Record,* March 19, 1997. p. H1141-H1143.

[143] *Congressional Record,* March 19, 1997. p. H1144.

role for the Secretary of Labor, exemption of certain categories of workers (the vulnerable and/or low paid, seasonal, etc.) from participation in the option, a sunset requirement after 4 years, creation of a Commission on Workplace Flexibility charged with assessing the impact of comp time, and other provisions.

The Miller amendment sparked another round of discussion about H.R. 1 and what it would or would not do — and added to that a similar discussion of the implications of the Miller amendment itself. The issues, however, pro and con, remained largely the same. After some debate, the Miller amendment was defeated on a vote of 193 ayes to 237 nays.[144]

On passage of the bill as amended, the vote was 222 ayes to 210 nays. The measure, having been approved, was forwarded to the Senate and referred to the Committee on Labor and Human Resources.[145]

The New Ashcroft Bill

On January 21, 1997, Senator Ashcroft introduced S. 4, the "Family Friendly Workplace Act."[146] The measure was referred to the Subcommittee on Employment and Training chaired by Senator DeWine, a co-sponsor of the legislation. On February 4 and 13, the Subcommittee conducted general oversight hearings on the FLSA, focusing upon the Ashcroft proposal.

During committee consideration, a general technical amendment offered by Senator DeWine was accepted.[147] A series of amendments that would have altered the substance of S. 4, offered by Democratic Senators, were rejected; the votes split along party lines. On March 18, 1997, the Committee voted to report the legislation. That vote was also along party lines: Democrats in opposition, Republicans in favor. See Senate Report No. 105-11 (April 2, 1997).

Provisions of the Ashcroft Bill. S. 4 was comprehensive, covering 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.[148]

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.

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[144] *Congressional Record,* March 19, 1997. pp. H1154-H1155.

[145] *Congressional Record,* March 19, 1997. pp. H1155-H1156.

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

[147] The DeWine amendment altered the technical structure of the measure, providing a more consistent application of standards and implementation requirements.

[148] The text of S. 4 appears in the *Congressional Record,* January 21, 1997. pp. S222-S224.

Biweekly Work Programs. Under S. 4, an employer, at his/her initiative, would have been 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. The employer would not have been required to pay overtime rates (time-and-a-half) until 80 hours had been worked in 2 calendar weeks. For hours worked in excess of 80 in a 2-week period, a worker would have been compensated either in cash or in paid comp time — each at not less than a time-and-a-half basis.

Flexible Credit Hour Program. An employer would have been to establish, at his initiative (but in conformity with a collective bargaining agreement, where there is a trade union presence), a "flexible credit hour program." Once the program had been established, the employee would then have been allowed to elect 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[149] 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. And, when an employee "is no longer subject to such a program," he would have been paid for his accumulated credit hours (up to 50) at a straight time rate. In any event, accumulated credit hours would have been cashed-out "[n]ot later than" at the end of each 12-month period. This could have allowed a worker a significantly increased measure of workhours flexibility. But, it arguably could have been subject to abuse, particularly if, by prior mutual consent, *overtime hours* were to have been renamed *flexible credit hours* and compensated for at a straight time rate rather than at time-and-a-half.

The bill stated that no employee "may be required to participate" in the flexible credit hour program and, as in the comp time section, employers "may not directly or indirectly intimidate, threaten, or coerce" employees with respect to the credit hours option. Where there was "a valid collective bargaining agreement," an employee "may only be required to participate in such a program in accordance with the agreement."

Since the flexible credit hours initiative broke new ground and, had it been adopted, it would have made the option available in hundreds of thousands of very different work situations, implementation issues would likely have arisen.

The employer would have been allowed to establish the credit hours program and, under the provisions of the legislation, would seem to have been allowed to establish its operational procedures. It would have been a program under which "the employer and the employee jointly designate hours" to be worked for credit. In

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[149] It appears that the "basic work requirement" (one's pre-overtime work period) would be 40 hours or, if participating in a biweekly work program, 80 hours; there would appear to be no reason why it could not be the latter.

practice, might a designation (consent form) have been provided to a worker when hired; or, would such designation have been a recurring procedure, being renewed each time flexible credit hours were to be worked? In S. 4, as introduced, there had been no requirement for a written agreement between the worker and his employer with respect to credit hours; in the bill as reported, provision for a written "or otherwise verifiable statement that is made, kept and preserved" had been added — the result of the DeWine amendment in committee.

The definition of "jointly designate" could have been significant. It could, potentially, mean different things depending upon the culture of specific workplaces. Would such designation operate on an *ad hoc* basis each time a need arose with a specific number of hours specified. Or, could a worker and his employer jointly designate a willingness to have the employee work overtime hours ("flexible credit hours") at the discretion of the employer whenever business necessity might require — such hours to be compensated for on a straight time basis?

Under the comp time proposal, it was provided that a worker or an employer could terminate the program at will: at any time, when a worker requested it; with 30 days notice when terminated by an employer. While no comparable provision appeared to apply to the credit hours program of S. 4 as introduced, the DeWine committee amendment made clear that the two programs, in that respect, would have been basically subject to the same standard. There was an annual cash-out requirement for the credit hours program. It is not clear that monetary compensation for banked hours would necessarily have been paid at any time before the close of a 12-month period — though credit hours, for leave purposes, would have been utilized in accordance with the agreement between employer and employee. Were an employee to withdraw from the program and request in writing the conversion of his banked credit hours to payment in cash, the employer would have been obligated to provide monetary compensatory to the employee within 30 days. Flexibility was the expressed intent of the legislative package.

While credit hours were to be cashed-out "[n]ot later than" at the end of each 12-month period, there would appear to have been no restriction against a more frequent cashing-out of credit hours should it suit the interests of the parties.[150] Under

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[150] By removing the overtime pay requirement for flexible credit hours, the arrangement would seem to favor the employer by reducing employment costs. The employee might be affected in several ways. Where a worker has a significant and continuing need for workhours flexibility (where an employer may have no overtime work that would allow for accrual of comp time), trading work and hours off on a one-for-one basis could be in the interest of the worker, allowing the worker to deal with family responsibilities without sacrificing earnings.

But the system could also have problematic aspects. Even where opting for credit hours might not seem to be in a worker's immediate interest (i.e., where credit hours might become a surrogate for regular overtime), circumstances might lead a worker to accept that arrangement. First, the worker may not fully understand the terms of the option or the alternatives — especially so were he a new labor market entrant or unschooled in labor-management practice. Second, where there is a high level of competition for available employment, a worker might agree to the designation of overtime hours as credit hours out of

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the flexible credit hours option, a worker could move in and out of the program with some regularity. Thus, for example, a worker could enter the credit hours program at the beginning of each pay period (or at intermittent periods), accumulate up to 50 credit hours (actually, overtime hours) at straight time, and then leave the program. If he were paid for his accrued credit hours at the close of each period of participation, it appeared that he could reenter the program and begin accruing new credit hours, continuing the process in cyclical fashion.

As S. 4 moved through the legislative process, most attention seemed to focus upon the question of comp time whereas the flexible credit hours component of the measure could have been, in practice, of equal significance. Especially in a small establishment, with a collegial culture and in the absence of abuse, it could have provided for worker flexibility and employer flexibility at the same time. But, the use of flexible credit hours could have substantially expanded the traditional 40-hour workweek (or 80-hour biweekly work period) and could have done so at a straight time wage. An employer, with the employee's consent, might effectively have circumvented the overtime pay requirements of the FLSA, paying straight time (flexible credit hours) for what previously were classified as *overtime hours*.

In the comp time legislation, both H.R. 1 and S. 4, it was provided that an employee might accrue not more than 240 hours of compensatory time. While the concept of "accrue" might mean that not more than 240 hours of comp time could be earned during the course of a 12-month period, it could also be a ceiling or restraint against there being more than 240 hours of comp time in a worker's account at any given moment.[151] With respect to "flexible credit hours," the term used in S. 4 was "accumulate." Since there appeared to be no prohibition against an employee participating in more than one program at a time, it appeared that an employer (were the employee to agree to it) could have scheduled an 80-hour biweekly work period at straight time, adding to that credit hours at straight time, offer a comp time option in addition — and then cash-out the accumulated hours. The result couldhave been a rolling work period that could, in its effect, largely have abridged the overtime pay requirements imposed by the FLSA. This issue might have been addressed in implementing regulations.

If the 40-hour workweek still is considered to be a socially and economically desirable norm, the use of comp time and flexible credit hours could cause a worker's annual work time far to exceed that standard.

Salary Practices Relating to Exempt Employees. As currently administered, the pay of a salaried worker may not be diminished (docked) when he or she is absent from work for a partial day. If such docking takes place, Senator Jeffords explained

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[150](...continued)
fear of offending the employer: i.e., in order to secure or to retain employment. Third, it appears that an employer could make overtime work available solely on a credit hour basis so that, where a worker needed the income, he might view the straight time wage of credit hours as better than no overtime work at all.

[151] The Department of Labor advises that the latter interpretation applies where state and local governments are concerned under Section 7(o) of the Act.

in a statement supportive of S. 4, "all the salaried employees [of the firm or agency] may lose their exempt status under the FLSA. Thus," he stated, "a policy that allows for a partial day of unpaid leave can convert an exempt worker to a nonexempt one who is then owed overtime, even if the worker has a six-figure income and is employed at the highest levels of the company."[152]

This issue relates only to salaried/exempt workers.[153] Since they are executive, administrative, or professional, they may be called upon to work extra hours beyond a fixed schedule to complete a project — or, if not called upon to do so, may simply decide to do so because they are responsible and professional. When a salaried employee works extra hours, the employer (public or private) accepts that as the normal course for a salaried employee: the work must be completed. However, should that same employee need a few hours away from his work at some point, his employer may see no injustice in docking the worker's pay.

But, there is an obvious question of equity involved. It is hard to argue in both directions at the same time: i.e., that the employee is overtime pay exempt as salaried when he works extra hours, but an hourly (and dockable) employee when he absents himself for a brief period. On the other hand, some employers point out that salaried workers are normally highly paid and have argued that they don't need the protection of the overtime pay requirements of the FLSA. The issue has been variously before the courts for a number of years and legislation dealing with this matter has been introduced in several Congresses.[154]

By adding to the FLSA a new Section 13(m), S. 4 would have redefined the conditions for overtime pay exemption as salaried workers under Section 13(a)(1) of the Act. S. 4 read:

> ... the fact that the employee is subject to deductions in compensation for —
> (i) absences of the employee from employment of less than a full workday; or
> (ii) absences of the employee from employment of less than a full pay period, shall not be considered in making such determination [exempt status].

The bill added other clarifying language, apparently intended to meet current objections and to eliminate the need for further litigation.

Committee Action on S. 4. Introduced on January 21, 1997, S. 4 was referred to the Subcommittee on Employment and Training, chaired by Senator DeWine. Hearings on the bill were held on February 4 and on February 13.[155] Full Committee

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

[153] Section 13(a)(1) of the FLSA exempts both from the minimum wage and overtime pay provisions of the Act "any employee employed in a bona fide executive, administrative, or professional capacity..."

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

[155] A summary of the hearings appears in CRS Report 97-532, *Federal Regulation of* (continued...)

mark-up followed. Senator DeWine proposed an amendment restructuring the measure without, it would seem, altering its content. The DeWine amendment was approved on a straight party-line vote: Republicans, in favor; Democrats, in opposition. The Democrats then proposed seven amendments to the legislation, each defeated on straight party-line votes.[156] The Committee subsequently voted to report S. 4. Once again, the vote followed party lines: Republicans, in support; Democrats, in opposition.

In Senate Report No. 105-11, filed on April 2, 1997, opinion was sharply divided. The Republican majority emphasized the need for workhours flexibility in order to meet the needs of the workforce of the 1990s. "S. 4 provides men and women working in the private sector the opportunity to voluntarily choose compensatory time off in lieu of overtime pay, as well as to voluntarily participate in biweekly and flexible credit hour programs," the report commenced, adding: "This legislation will enable Americans to participate in flexible work schedules so that they can better cope with the challenges of the 21st century."[157] The majority report noted that "many of today's work force view certain of the FLSA's provisions as harmful rather than helpful" and observed: "Flexible work schedules would give employees more control over their lives by giving them a better tool to balance their family and work obligations."[158]

An extended dissenting comment reviewed the various reservations that critics of the comp time/flexible workhours legislation had voiced through two Congresses. There is "[n]o real employee choice," it argued, and "[n]o guarantee that comp time will be voluntary".[159] Further, the minority statement contended that there was "[n]o right to use comp time when employees need it."[160] It pointed to the flexibility of current law, noting: "If employers want to provide family-friendly work schedules,

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[155](...continued)
Working Hours: Consideration of the Issues, by William G. Whittaker. pp. 42-45 and 49-53.

[156] Amendments proposed by Democratic Senators, in brief, included language in the following areas: to link the comp time legislation with the Family and Medical Leave Act; to expand coverage of the Family and Medical Leave Act; to mandate unpaid leave for parental involvement in their children's school activities; "to exclude part-time, seasonal, and temporary employees and to exempt employers in the garment business" from participation in the S. 4 options; to prohibit discrimination in the assignment of overtime work where employees prefer cash wages to comp time; and to deal with related concerns.

[157] U.S. Congress. Committee on Labor and Human Resources. Family Friendly Workplace Act. Report together with Additional and Minority Views to Accompany S. 4. Senate Report No. 105-11, 105th Cong., 1st Sess., Washington, U.S. Govt. Print. Off., 1997. p. 2.

[158] Senate Report No. 105-11. p. 11.

[159] Senate Report No. 105-11. pp. 37 and 43.

[160] Senate Report No. 105-11. p. 45.

they can do so today."[161] It reviewed, item by item, the concerns that had been voiced about the legislation, explained the rationale for the various amendments that Democratic Senators had offered during mark-up, and urged that the Senate oppose S. 4. Appended to the minority views was a letter from Acting Secretary of Labor Cynthia A. Metzler addressed to Committee Chairman Jeffords, outlining the position of the Clinton Administration and threatening a veto of S. 4, if passed, unless substantially modified. "Any comp time legislation," Acting Secretary Metzler affirmed, "must effectively and satisfactorily address three fundamental principles: real choice for employees; real protection against employee abuse; and preservation of basic worker rights, including the 40-hour workweek."[162]

Floor Action in the Senate. Senate floor debate on S. 4 commenced on May 1, 1997, continuing intermittently into June as other issues were called up. The arguments, pro and con, largely followed those presented during hearings and, where comp time was concerned, in the floor debates in the House.

Debating the Issues. Senator Jeffords, Chair of the full Committee, commenced discussion of S. 4 by suggesting that there is a need for workplace flexibility, affirming that the legislation would give "employees the opportunity to choose" paid time off instead of "cash compensation for overtime" hours worked, and noting that employees would be free "to work out more flexible schedules with their employers if it suits their needs." The Senator noted that the legislation had early "met with opposition" which he suggested "stems from the political positions of big labor unions rather than the needs of working men and women." He dismissed concerns voiced by opponents of S. 4 as "misplaced." Although the legislation had been being opposed by a number of women's organizations (some of whom were represented at the various hearings), Senator Jeffords viewed the measure as a woman's issue, noting the increased participation of women in the workforce during recent years. He concluded that S. 4 represented "true flexibility for workers and not the heavy hand of the employer."[163]

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[161] Senate Report No. 105-11. p. 40.

[162] Senate Report No. 105-11. pp. 55-56. Acting Secretary Metzler's letter was dated February 26, 1997.

[163] *Congressional Record*, May 1, 1997. p. S3881-S3882. During hearings in early 1997 by the House Subcommittee on Workforce Protections and the Senate Subcommittee on Employment and Training, representatives of several women's groups testified concerning the various workhours bills. Among them, Karen Nussbaum, Director, Working Women's Department, AFL-CIO, testified against the workhours legislation, as did Helen Norton and Donna Lenhoff, both of the Women's Legal Defense Fund. Testifying in support of workhours legislation was Diana Furchtgott-Roth, a member of the Independent Women's Forum. Their testimony is summarized in CRS Report 97-532, cited above. See also a letter to Senator Lott, May 30, 1997, in opposition to S. 4, from the following organizations: 9 to 5: National Association of Working Women; American Nurses Association; Business and Professional Women; National Council of Jewish Women; National Women's Law Center; and the Women's Legal Defense Fund. The letter appears in the *Congressional Record*, June 2, 1997. p. S5164p

Conversely, Senator Kennedy argued that S. 4 was fatally flawed. "The bill," he noted, "eliminates the guarantee of pay for overtime work for 65 million employees" and responds to an appeal from the National Federation of Independent Business that "[s]mall businesses can't afford to pay overtime." Further, he argued, it would have the effect of abolishing the 40-hour workweek as a national standard. "Employers could require employees to work up to 80 hours in a week without receiving overtime pay." The bill, he contended, "provides no employee choice" since "[t]he employer chooses who works overtime and when an employee can use comptime." He pointed to a potential for discrimination in that the "employer can assign all overtime work to employees who will accept comptime instead of overtime pay." Ultimately, he observed, "the employer is free to deny the request" of an employee for use of comptime. Worker choice, he suggested, is not the motivation behind the proposal. "Instead, it is designed to help employers cut workers' wages."[164]

Senator Wellstone, pointing to the flexibility of current law, disputed the need for comp time legislation. He stated:

> Right now, employers can give their employees this flexibility if they so desire. The problem is, a lot of employers do not do that. But it has nothing to do with the basic principle of the 40-hour week, and the principle that if an employee works overtime, he or she should get time and a half pay. This legislation undercuts that.

Senator Wellstone contended that "most people in the country will be opposed to it [S. 4] when they learn all the provisions in the legislation." And, he concluded, the issue with S. 4 was neither choice nor flexibility: "...what really is at issue here is you essentially overturn portions of the Fair Labor Standards Act, you overturn the 40-hour week..."[165]

Floor debate was sharply divided. Senator DeWine acknowledged that the issues raised by critics of S. 4 "are going to be points of contention as this debate continues over the next few weeks," but he dismissed them as irrelevant to "the bill I thought we passed out of committee." Senator DeWine stressed comp time as a woman's issue. He emphasized worker choice, flexibility and the need to bring labor standards laws into conformity with the world of work of the 21st century. Referring to existing wage/hour legislation as "antiquated," he affirmed: "This is what this bill does. It sweeps away some of these old laws that prohibit workers from doing what they want to do." He argued that the measure "would reduce some of the stress on America's working families by making the American workplace more family friendly."[166] Senator Hutchison of Texas reiterated arguments in support of S. 4, concluding: "My only surprise is that we did not update this antiquated labor law earlier."[167]

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[164] *Congressional Record*, May 1, 1997. pp. S3885-S3886.

[165] *Congressional Record*, May 1, 1997. pp. S3886-S3887.

[166] *Congressional Record*, May 1, 1997. p. S3887-S3888.

[167] *Congressional Record*, May 1, 1997. p. S3888. See also statements by Senator Ashcroft, pp. S3882-S3885, and S3894-S3895.

Senator Ashcroft made a brief presentation concerning S. 4 on May 12;[168] more extended debate commenced on May 13. Supporters of the legislation, each day, reaffirmed their commitment to family friendliness; those critical of the legislation did also. "But," Senator Kennedy stated, "the concern that many of us have is that it really gives the whip hand, so to speak, to the employers..." He added: "...it does appear to many of us that this is really a subterfuge to permit employers to avoid paying overtime." He recalled that amendments had been offered in Committee that would have provided for worker choice but that the amendments were rejected "along straight party lines." The "real issue" with respect to comp time, the Senator suggested, "is who is going to make the decision."[169]

Senator Ashcroft presented a different perspective. He found it "outrageous" that Congress, through wage/hour legislation, should have deprived "the private sector, hourly workers" of this country of the right "to cooperate with your [their] employer[s] to make decisions about time off and about flexible working arrangements."[170] And, he declared himself "stunned when those organizations, which purport to be helping American workers, began running television ads against this legislation." "These ads are a lie," Senator Ashcroft affirmed. "I think it is shameful that the AFL-CIO would seek to impair the ability of hourly workers in this country to have the benefit." His constituents, he noted, "resented the fact that the labor lobby in Washington had abandoned their traditional promoting of workers' interests."[171] Once again, the Senator reviewed the provisions of the proposed legislation, affirming that the interests of workers are adequately protected therein. Recalling that salaried employees and public sector employees are able to avail themselves of flexible work scheduling (where workers and employers concur), he concluded: "Flexible working arrangements would make it possible for people to meet the needs of their families without taking a pay cut."[172]

The debate continued at length. Senator Harkin presented an analysis of what he suggested was the need for increased worker safeguards in the legislation, reviewing amending language proposed by Democratic Senators during Committee mark-up and explaining the workplace implications of the various provisions of S.

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[168] *Congressional Record*, May 12, 1997. pp. S4291-S4293.

[169] *Congressional Record*, May 13, 1997. p. S4335.

[170] *Congressional* Record, May 13, 1997. p. S4339.

[171] *Congressional Record*, May 13, 1997. pp. 39-40. Senator Ashcroft read into the Record the text of one anti-S.4 ad. "'Big business is moving to gut a law protecting our right to overtime pay. If they win, employers could pay workers with time off instead of money.'" He declared this language to be "simply false" and pointed out that the employer would not have "a unilateral right" in scheduling workhours under S. 4; that "it takes a request by the employee in order for that to happen." As the debate progressed, Senator Wellstone took note of the stated concern about the AFL-CIO ads. "This is the first time I heard what those ads have to say," he stated, reading their text into the record as the Senator from Missouri had done. But Senator Wellstone reached a different conclusion: of the statement in the ads, he declared, "That is true. That is absolutely true." *Ibid.*, p. S4345.

[172] *Congressional Record*, May 13, 1997. p. S4342.

4.[173] Senator Harkin took note of Senator Ashcroft's concern that certain interests "are ganging up" to defeat S. 4. He read into the *Record* a list of organizations he identified as opposed to measure, stating: "The fact remains, Mr. President, that every group that represents low-income workers is opposed to this bill ... those who understand what real life is about and who understand what these low-income workers have to go through, they are opposed to this bill." With respect to "the bottom line," he observed that "[T]his proposal before us appears to be neither worker friendly nor family friendly, and the result of this enactment would require employees to work longer hours for less pay."[174] Senator Harkin argued that S. 4 "is another one of the very bad ideas that periodically come up through the Senate. It sounds good. What's it called? The Family Friendly Workplace Act? Ridiculous ... Nothing could be farther from the truth."[175]

Senator Wellstone suggested that two elements were essential for making the legislation what its proponents have argued that it is: family friendly. "First, it must be truly voluntary; second, employees must really get to use their accumulated comptime when they want and need to use it." S. 4, he stated, "fails both tests."[176] He added:

> S. 4 as written is family-unfriendly. It is a thinly disguised effort to reduce pay and to help employers avoid paying overtime. That is not just rhetoric. That is the bill. I wonder how many families will consider this bill to represent a friendly gesture when we strip it of its happy-face packaging and expose it for what it is: an effort to reduce pay and to help employers avoid paying overtime?

He continued: "Plenty of employers do try to avoid paying overtime already under current law. And far too many succeed..." With respect to S. 4, he concluded: "We don't need to provide encouragement to cut more pay and avoid paying more overtime."[177]

Senator Cochran protested that "[t]oday's work rules are too inflexible and this legislation [S. 4] changes that to meet the needs of today's working families." He urged support for "giving working families the opportunity to balance their work and family obligations by supporting this legislation."[178] Senator Hutchison of Texas concurred. With S. 4, she argued, "we are trying to bring our labor laws into the 21st century to reflect the changing face of working America and to meet the growing

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[173] *Congressional Record*, May 13, 1997. pp. S4342-S4344.

[174] *Congressional Record*, May 13, 1997. p. S4344. Senator Harkin identified the following groups as being among those opposed to S. 4: The League of Women Voters, American Association of University Women, National Council of Senior Citizens, the NAACP, the National Council of La Raza, the Disability Rights Education and Defense Fund, the Union of American Hebrew Congregations, the Southern Christian Leadership Conference, and the National Council of Churches.

[175] *Congressional Record*, May 13, 1997. p. S4345.

[176] *Congressional Record*, May 13, 1997. p. S4347.

[177] *Congressional Record*, May 13, 1996. pp. S4347-S4348.

[178] *Congressional Record*, May 13, 1997. p. S4345.

demands of work and family." Like other proponents of S. 4, she stressed its potential impact for women. "We realize that two-thirds of the working women in this country have school-age children, and that what they need most is a little relief from the stress caused by being both the provider at work and the caretaker at home."[179]

Concerning the issue of choice, Senator Hutchison illustrated both sides of the issue. Pointing to the case of a working mother who would not be able to attend a special school event "`because Federal law won't allow me to do it,'" she affirmed that this restraint would be changed by S. 4.[180] But, under S. 4, Senator Hutchison pointed out, workers would have no absolute right of choice with respect to workhours flexibility. She observed:

> ...neither the employee or the employer has the ability to dictate whether the other chooses to participate in a comptime or flextime option. Either side can say, "No thank you." If the employer says on Friday, "I need you to work 2 extra hours today," the employee then has the right to say, "That's fine, and I will take that in overtime pay," or "That's fine, and I would like to bank that at a time-and-a-half rate to take later on as free time." Likewise, if an employee goes to the employer and says, "I would like to work 2 overtime hours this Friday and take those off with pay next Monday," the employer has the right to say, "I'm sorry, but it doesn't work into the schedule this week."

Thus, under S. 4, the *soccer mom* unexpectedly confronted with the need to attend a child's Friday afternoon game (or to use a few banked hours for other purposes) could have, potentially, an inflexible situation. Senator Hutchison emphasized that, even under S. 4, the employee could not simply walk into an employer's office and demand the right to draw down comp time that afternoon, noting the qualification of a "reasonable notice to the employer" and that an absence "does not unduly disrupt the operations of the business." She explained:

> If the standard were otherwise, Mr. President, scant few employers would even want to offer comptime or flextime, for fear that it might shut down their business if too many employees left at some critical time.... For my colleagues on the other side of the aisle to argue that employees should have the absolute, unfettered right to take time off whenever they choose for other than serious health or family needs is disingenuous. They know that doing so is unreasonable and would prevent workers from having any flexibility because most employers would not be able to offer a comptime or flextime program.[181]

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[179] *Congressional Record*, May 13, 1997. p. S4348.

[180] *Congressional Record*, May 13, 1997. p. S4348.

[181] *Congressional Record*, May 13, 1997. pp. S4348-S4349. Later, as discussion of employee choice continued, Senator Hutchison affirmed: "...of course the employer is running the business. Many times it is the small business man or woman that has gone out and borrowed the money, that works 80 hours a week trying to make it go, to contribute to our economy. It is not easy being in business in America with all of the taxes and regulations and litigation that a person in business must face. So, of course, they are running the operation." *Congressional Record*, May 15, 1997. p. S4508.

However necessary the "reasonable notice" and "does not unduly disrupt" provisions may have been, some might argue that they would not necessarily have helped the working mother in all situations: i.e., the freedom of a worker, on a Friday afternoon, to use comptime for an unexpected or unplanned-for event.[182] Senator Hutchison, however, was not especially concerned as to "whether the employer or the employee have the upper hand legally speaking" but, rather, that they work together. She affirmed:

> The only reason an employee would want to take comptime or flextime is so that they can restore some measure of control and sanity to their workweek. The only reason an employer would want to offer comptime or flextime is so that his or her employees will be more engaged, fulfilled, and ultimately more productive at their jobs.

The Senator observed: "This bill truly will create millions of win-win arrangements throughout this country, where both employer and employee walk away happy."[183]

Altering the Reported Legislation. Debate on S. 4 would continue, intermittently, into early June with arguments, pro and con, being reiterated: sometimes, as *ad hominem* statements; on other occasions, by way of rebuttal to the assertions of other speakers.[184] Through the weeks during which the measure was before the Senate, numerous refinements were proposed with respect to the legislation.

On May 13, at the close of the first full debate on S. 4, Senator DeWine rose to explain certain modifications under a Committee substitute. Among them were the following. *First*. The concept of union recognition was expanded to include "all employees who are members of unions" and, thus, to allow them to secure flexibility through their collective bargaining agreements. *Second.* Critics of the legislation had suggested that certain groups of workers (e.g., part-time, seasonal, and temporary workers, those in the garment industry, and those in certain other industries that the Secretary of Labor might determine to be especially vulnerable to exploitation) should be excluded from participation in the options of S. 4. Senator DeWine, in the

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[182] "We hear, What if you want Friday off?," Senator Kennedy observed. He then proceeded to explain the various flexible options already a part of the FLSA, noting that, according to BLS statistics, "... only 10 percent of hourly employees use the flexible schedules." And, he explained: "The current law offers a host of family friendly flexible schedules today, yet ... few employers provide them."

Senator Kennedy concluded: "A working mother may want a particular day off so that she can accompany her child to a school event or a doctor's appointment. Nothing in this legislation requires the employer to give her the day off she requests. The employer decides when it is convenient for her to use her accrued comptime. There is no freedom of choice for workers." *Congressional Record*, May 13, 1997. p. S4337-S4338.

[183] *Congressional Record*, May 13, 1997. p. S4349.

[184] See *Congressional Record*, May 15, 1997. P. S4508-S4515; May 16, 1997. pp. S4628-S4633; S4645-S4647, S4649-S4652, S4656-S4657; May 19, 1997. P. S4665-S4667; June 2, 1997. P. S5158-S5172; June 3, 1997. P. S5218-S5348, S5265-S5268; and June 4, 1997. P. S5377-S5291.

Committee substitute, now proposed a different solution: "...before an employee is eligible for a flexible work option, or before an employer can offer a flexible work option, the employee must work for the employer for 12 months and 1,250 hours within 1 year — ensuring that a stable relationship exists between the employer and the employee."[185] *Third*. Senator DeWine proposed strengthening of the penalty structure with respect to the S. 4 options. *Fourth*. The substitute would "require the Department of Labor to revise its Fair Labor Standards Act posting requirements so employees are on notice of their rights and remedies under the biweekly and flextime options as well as the comptime option."[186]

In addition, numerous other potential amendments were filed. These dealt with amendment of the Family and Medical Leave Act, the definition of "unduly disrupt," the treatment of accrued hours within the context of a bankruptcy proceeding, application of flexible scheduling to the legislative branch under the Congressional Accountability Act, the liability and penalty structure of the proposed legislation, creation of a Commission on Workplace Flexibility, and more comprehensive substitute language.[187] A vote on these amendments, as on the legislation *per se*, was blocked by parliamentary processes.

Voting on Cloture and the Immediate Aftermath. Debate on flexible workhours legislation had been intermittent, other issues being called up so that only a part of the Senate's daily work schedule was devoted to the issue. On May 13, after just over 2 hours of debate on the issue,[188] Senator Lott introduced a cloture motion, providing for a vote to end debate.[189] The first cloture vote was taken on May 15 and failed; the vote was 53 for cloture and 47 against, an insufficient majority. Two Republicans joined the Democrats in opposition to cloture.[190]

On June 2, Senator Lott again announced the filing of a cloture motion.[191] While Senator Hutchison charged that the legislation was "being filibustered on the other side," Senator Kennedy noted that the Senate had conducted "no more than 4 or 6 hours of debate" on the issue.[192] Recalling the first cloture vote, Senate Kennedy

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[185] Some may view this requirement as safeguarding workers against exploitation, but it would also add a further complication to be dealt with the DOL in its compliance effort, together with additional recordkeeping and certification burdens.

[186] *Congressional Record*, May 13, 1997. pp. S4353-S4354.

[187] The number of potential amendments is extensive and they are technical in nature. They can be found in the Congressional Record, however, beginning from May 13, 1997.

[188] *Congressional Record*, May 16, 1997. p. S4656. Senator Kennedy protested: "This bill would fundamentally alter the Fair Labor Standards Act, a law that has been on the books for almost 60 years. Three hours of debate simply is not enough time for adequate discussion of changes in so basic a protection for the Nation's workers."

[189] *Congressional Record*, May 13, 1997. p. S4350.

[190] *Congressional Record*, May 15, 1997. p. S4514.

[191] *Congressional Record*, June 2, 1997. p. S5157.

[192] *Congressional Record*, June 2, 1997. p. S5161.

noted that it had failed "badly."[193] Two days later, June 4, the second cloture vote was taken. Again, it failed to secure a sufficient majority. The vote was 51 yeas, 47 nays; three Republicans joined the Democrats in opposition.[194]

A post-mortem discussion of the legislation occurred on June 9, 1997. Senator Thomas argued that the reluctance of the White House to endorse the legislation "was largely as a result of the labor unions to which the White House is so sensitive." Recalling the experience of a Wyoming firm that had, for many years, sought to circumvent the overtime pay requirements of the FLSA and citing various polls, Senator Thomas concluded that concerns about S. 4 are "simply a political opposition brought on by the opposition of the labor unions."[195]

Senator Coverdell, affirming that alteration of the 40-hour workweek and the overtime pay requirements of the FLSA were really in the interest of workers, declared himself "absolutely baffled" by the opposition to the measure.[196] "...I do not understand why the Democrats and labor unions are standing in the way of bringing choice and flexibility to the American workplace," declared Senator Domenici. He charged those opposing S. 4 with "misleading the people about this bill," adding: "The Democrats, and for some reason the labor unions, falsely claim that this bill will end the 40-hour workweek."[197]

After the second cloture vote on June 4, further consideration of S. 4 largely ceased. The bill died at the close of the 105th Congress.

Related Initiatives of the 105th Congress. As discussion of workhours legislation had evolved, there had been interest in adding language to expand the Family and Medical Leave Act of 1993. As discussed above, such a linkage was urged by President Clinton late in the 104th Congress.

Senator Dodd, on January 22, 1997, introduced S. 183.[198] The Dodd bill would have reduced the threshold for coverage under the Family and Medical Leave Act from firms with 50 employees (as under current law) to include firms with as few as 25 employees. The bill was referred to the Committee on Labor and Human Resources.

Senator Murray, on February 5, 1997, introduced S. 280.[199] The Murray bill, to be cited as the "Time for Schools Act of 1997," would have expanded expand the Family and Medical Leave Act by adding:

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[193] *Congressional Record*, June 2, 1997. p. S5162.

[194] *Congressional Record*, June 4, 1997. p. S5291.

[195] *Congressional Record*, June 9, 1997. pp. S5406-S5407.

[196] *Congressional Record*, June 9, 1997. pp. S5406 and S5408.

[197] *Congressional Record*, June 9, 1997. pp. S5408-S5409.

[198] *Congressional Record*, January 22, 1997. pp. S641-S642.

[199] *Congressional Record*, February 5, 1997. p. S1027.

> ... an eligible employee shall be entitled to a total of 24 hours of leave during any 12-month period to participate in an activity of a school of a son or daughter of the employee, such as a parent-teacher conference or an interview for a school, of to participate in literacy training under a family literacy program.

The bill, which was referred to the Committee on Labor and Human Resources, defined the conditions under which such leave would have been be granted and the types of activities that would have justified such leave.

In the House, Representative Clay proposed legislation (H.R. 109) to amend the Family and Medical Leave Act. The Clay bill would have reduced the number of employees that would trigger coverage under the Act to 25: coverage is now required for firms with 50 employees or more. An eligible employee would have been entitled to 24 hours of leave during any 12-month period (beyond current requirements of the Act) for certain education-related and eldercare purposes.[200]

Conclusion

Through the years, employee perspectives toward hours of work have changed —depending upon the experience of individual workers, general economic conditions, and distance from the adverse conditions that obtained late in the 19th century and through the Depression years. Some have pointed to positive developments in the area of labor standards and labor-management relations during the middle 20th century and have suggested that it may be anachronistic for the rules governing the workplace to be rooted in 1930s' experience and enactments.[201] Conversely, others believe that the basic protections and safeguards provided by laws such as the Davis-Bacon and Walsh-Healey Acts, the National Labor Relations Act and the Fair Labor Standards Act are the bases of these post-Depression era workplace improvements and that, without them, conditions would likely regress.

The Federal Employees' Flexible and Compressed Work Schedules Act (1978) was promoted and shaped by a generation not directly affected by labor conditions of the late 19th and early 20th centuries. The constituency for flexible and compressed work hours appears to have been younger and largely in the public sector. Among organized workers within the trade union movement, there appears to have been a difference of opinion: public employee unions, for the most part, coming to favor the legislation; the more traditional private sector unions, expressing doubts and outright opposition.[202] Since its enactment, flexible and compressed scheduling in the federal sector appears to have gained support elsewhere in the public sector as well as in the private sector.

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[200] *Congressional Record*, January 9, 1997. p. H142.

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

[202] To the extent that public and private sector trade unionists held different views with respect to alternative work scheduling, this may have been in some measure a reflection of the differing workplace cultures of the private and public sectors.

The alternative scheduling option may have eroded support for the traditional 40-hour workweek. Further erosion of the principle of federal workhours regulation may have occurred with amendment of the Walsh-Healey Act and the CWHSSA in the mid-1980s. With the 1985 FLSA amendments and establishment of a comp time option for state and local government employment, the traditional approach to working hours regulation was again altered.

Given the use of flexible and compressed scheduling in the public sector, it is increasingly being considered as an option for the private sector. Some argue, however, that public employment is different from private sector employment: in terms of purposes, management, workplace culture, and public oversight and control. It has also been argued that labor standards compliance activity could be substantially more complicated were each employer free, in effect, to establish his own rules with respect to overtime, deferral of income, comp time, etc. But, the precedent set in the public sector (and the presentation of working hours deregulation as a step toward a family friendly workplace), with the apparent popularity of alternative work scheduling among public employees, may make it increasingly difficult to object to the establishment of similar policies for private employment.

As Congress considers options for alternative workhours scheduling and comp time for the private sector, a number of questions are likely to be raised. For example, are alternative work schedules and modification of overtime pay standards in the interest of workers? Or, are they an effort, *effectively*, to set aside the 40-hour workweek and, thus, to nullify the overtime pay provisions of the FLSA? "I really think this flexibility argument is about money," suggested Maria Echaveste, then administrator of DOL's Wage and Hour Division, speaking generally about the issue. "It's about employers wanting to schedule people in such a way so as to minimize their overtime."[203] Senator Ashcroft presented the issue from a totally different perspective. "Today, parents face severe time shortages attempting to fit all work and family responsibilities into an inflexible and demanding workweek," he observed, adding that concerns voiced about a private sector comp time option "are nothing more than scare-mongering."[204]

Alternative work scheduling may not be an option for all employers, nor for all workers. Questions remain as to whether the pending legislation would create a more worker friendly workplace. Labor is concerned that the initiative "would hurt working families" and that "the real beneficiaries" will be "employers who will get more work for less money."[205] Others believe that this approach will assist in establishing a more family friendly workplace and represents a new and more efficient way of working: better for workers and better for employers as well.

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[203] Bureau of National Affairs. Republican Lawmakers Weighing Proposals to Change Overtime Law. *Daily Labor Report*, August 8, 1995. p. C1.

[204] Op-Ed column by Senator John Ashcroft, Relief for American Families, in *The Washington Times*, May 6, 1996, p. A21.

[205] Say Good Bye to the 40-Hour Work Week and Overtime. *AFL-CIO Legislative Fact Sheet*, November 28, 1995. p. 1.