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# Report for Congress

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## **Modifying Minimum Wage and Overtime Pay Coverage for Certain Sales Employees Under the Fair Labor Standards Act**

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# Modifying Minimum Wage and Overtime Pay Coverage for Certain Sales Employees Under the Fair Labor Standards Act

## Summary

On June 6, 2001, Representative Tiberi (R-OH) introduced H.R. 2070, the “Sales Incentive Compensation Act.” In general, the proposed legislation would, subject to specified conditions, exempt employers of certain “inside sales” workers from the overtime pay and minimum wage requirements of the Fair Labor Standards Act (FLSA). The bill was referred to the Committee on Education and the Workforce. On June 27, 2001, it was marked-up by the Subcommittee on Workforce Protections and forwarded to the full Committee.

The FLSA of 1938 is the primary federal statute dealing with minimum wages, overtime pay, and related issues. The original statute provided an exemption from the Act’s minimum wage and overtime pay requirements for those employed “in the capacity of outside salesman” (now Section 13(a)(1) of the Act). Such persons, working beyond their employers’ base of operations, were difficult to monitor in terms of hours worked. Thus, exemption was deemed necessary. Subsequently, special treatment was afforded certain retail and service workers paid on a commission basis and meeting other qualifications (Section 7(i)). By the early 1990s, concern was voiced with respect to the relative competitive positions of wholesale and retail firms and of “inside” and “outside” sales staff — treated differently under the statute. Change, however, was not effected nor were subsequent proposals to that end approved.

In the 105<sup>th</sup> Congress, legislation addressing the “inside sales” issue, cosponsored by Representatives Fawell (R-IL) and Andrews (D-NJ), was passed by the House but died in the Senate. The issue re-emerged in the 106<sup>th</sup> Congress, first as free-standing legislation proposed by Representative Boehner (R-OH) and then as part of a composite tax/minimum wage bill introduced by Representative Lazio (R-NY). The Lazio bill with the “inside sales” component was approved by the House but, once again, died in the Senate.

In the 107<sup>th</sup> Congress, the issue was re-introduced by Representative Tiberi as H.R. 2070 on June 6, 2001. On June 7, a hearing on the issue was held by the House Subcommittee on Workforce Protections. On June 27, 2001, the bill was marked-up and voted to be reported to the full Committee on Education and the Workforce — 8 yeas, 6 nays — the Democrats in opposition. No further action was taken.

Generally, the “inside sales” exemption has been endorsed by employers (and by some workers as individuals) who suggest that it will provide employees with greater career opportunity and/or provide both workers and their employers with enhanced profits. The legislation has been opposed by organized labor and some policy analysts as a breach of the protections afforded to workers under the FLSA. They argue that it would leave workers without wage/hour safeguards while providing them with no off-setting advantages. In addition, some have questioned the administrative implications of the legislation.

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# Modifying Minimum Wage and Overtime Pay Coverage for Certain Sales Employees Under the Fair Labor Standards Act

## Most Recent Developments

In one form or another, legislation dealing with *inside sales* workers has been before the Congress at least since the 103<sup>rd</sup> Congress. On June 6, 2001, Representatives Tiberi (R-OH) and Andrews (D-NJ) introduced H.R. 2070, the “Sales Incentive Compensation Act,” and the following day (June 7) a hearing on the bill was conducted by the Subcommittee on Workforce Protections. On June 27, 2001, the Subcommittee marked-up the bill, approved it (8 yeas to 6 nays, along party lines with Democrats in opposition), and voted to forward the measure to the full Committee on Education and the Workforce.<sup>1</sup>

## Introduction and Background

The FLSA is the primary federal statute dealing with minimum wages, overtime pay, child labor, and related issues. Enacted in 1938 (P.L. 75-718), the FLSA has frequently been amended to alter its scope and to modify its implementation.<sup>2</sup>

## Evolution of the Statute

The FLSA is the result of a century of negotiation over labor standards. Speaking generally, worker-oriented groups have sought to expand the scope of labor protections and to enhance their enforcement. Conversely, many industry groups, critical of labor standards regulation, have sought to diminish such requirements and, where repeal has not been an option, to define coverage so as to reduce the employer burden. Through 60 years, the FLSA has been subject to such amendment, sometimes pro-worker and on other occasions pro-employer but usually argued — by both sides — in the name of the workers.

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<sup>1</sup> Bureau of National Affairs. *Daily Labor Report*, June 28, 2001, p. AA1.

<sup>2</sup> The Act has undergone general amendment, usually associated with changes in the minimum wage rate, on eight separate occasions: in 1949, 1955, 1961, 1966, 1974, 1977, 1989, and 1996. Less extensive changes in the Act have been frequent. Concerning the evolution and philosophy of the Act, see: Nordlund, Willis J. *The Quest for a Living Wage: The History of the Federal Minimum Wage Program*. Westport, Conn., Greenwood Press, 1997; and Paulsen, George E. *A Living Wage for the Forgotten Man: The Quest for Fair Labor Standards, 1933-1941*. Selinsgrove, Pa., Susquehanna University Press, 1996.

The Act, both through amendment and through regulatory action, has frequently been updated to meet the evolving requirements of the 20<sup>th</sup>-century workplace. Evolution of the FLSA can be divided into two broad periods. From 1938 to the early 1970s, amendment of the Act tended to expand coverage. Since the 1977 FLSA amendments, however, changes in the Act, often narrowly focused and incremental, have tended to constrict coverage and, some may argue, to reduce worker protections.

The early FLSA was reasonably simple and direct. It required that covered workers be paid at least a minimum wage and, when asked to work unusually long hours, that they receive overtime pay. It also limited child labor. Through the years, the statute has become increasingly complex. Responding to the specific interests of constituencies, pro and con, a body of exemptions has been added to the Act. These statutory changes have resulted in development by the Department of Labor (DOL) of technical implementing regulations, together with “opinion letters” to guide application of the law to individual workplaces.

The various “inside sales” proposals would, generally, modify the minimum wage and overtime pay obligations of employers with respect to “any employee employed in a sales position” where certain qualifying conditions are met. Defining those *qualifying conditions* would seem to be one of the core issues of the continuing debate.

## **Section 13(a)(1) of the FLSA**

In 1938, Congress excluded certain workers from FLSA coverage — and, similarly, exempted their employers from the Act’s minimum wage and overtime pay requirements. Among those exempted were persons employed “in the capacity of outside salesman,” a concept to be “defined and delimited” by DOL. Since outside sales personnel were engaged beyond supervisory purview and, thus, an employer was unable to monitor the hours they worked and relate such hours to minimum hourly wage requirements, the exemption may have been less a positive statement of policy than, simply, logical and necessary. This provision (Section 13(a)(1)) remains in the Act.<sup>3</sup>

## **Diverse Treatment of Sales Personnel**

During the 1960s and early 1970s, FLSA coverage was significantly expanded, bringing additional sales personnel under the Act’s wage and hour provisions. These newly covered sales workers were treated somewhat differently from the “outside salesman” of the original statute. This treatment reflected the conditions under which they worked: i.e., “inside” an establishment or, at least, on the premises and under the direct supervision of an employer. Variations were allowed in the application of wage/hour coverage to different categories of covered sales workers, but the distinction between “inside” and “outside” sales personnel was retained.

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<sup>3</sup> For details concerning implementation of Section 13(a)(1), see: 29 C.F.R. 541, especially Subparts 541.500 to 541.508. This exemption, like much of the rest of the FLSA, was drawn from experience with the National Industrial Recovery Act of 1933.

Sales work varies from one industry to another. Some firms, whether retail or wholesale, have a stable market throughout the year; others, are highly seasonal. Some sales workers wait for customers to appear; for others, *outreach* may be necessary: i.e., calling clients, setting up sales meetings, consulting. Some sales workers have a fixed shift; others may require greater flexibility, modifying their workhours to suit client needs. There may also be variations in the mode of payment: some workers, on a straight hourly wage; others, under a commission arrangement.

## Flexibility Within the FLSA

Congress has built into the FLSA a large measure of flexibility. While the Act requires payment of overtime (1½ times one's regular rate of pay) for hours worked in excess of forty in a single workweek, *flexible* and *compressed* scheduling is permitted with employer approval. Here, *employer discretion* is key. The employer can set a straight 40-hour workweek (5 days of 8 hours each), but he can also allow a somewhat wider latitude and institute flexibility.

Under current law, a sales worker (*with employer agreement*) can arrange his or her workhours to accommodate client needs. The only restraining factor (other than employer approval) is that hours worked per week, when in excess of 40, must be compensated on a time-and-a-half basis. Should the employer determine that business interests (e.g., increased sales or profitability) justify having an employee work more than 40 hours per week, extending the hours of work is a management option.

## The Impetus for Change

During consideration of the wage/hour legislation of 1937-1938, there was intense debate over coverage patterns. Immediately after the FLSA was adopted, its amendment was sought. In each Congress since that time, there have been proposals to modify the Act: some to expand coverage, many others to grant either total exemption or specialized treatment under the law to one employer group or another.

Through the years, employer spokespersons have argued that the Act's modification has been (and remains) necessary in order to correct technical deficiencies, to deal with administrative ambiguities, to restore the original intent of the Congress, or simply to modernize a 1938 statute. With time, employer efforts to modify the FLSA have coalesced. By the 1990s, the Labor Policy Association (LPA), a "pro-business" interest group,<sup>4</sup> had begun "to consider proposals to reengineer the ... Act to meet the workplace needs of the 21<sup>st</sup> century."<sup>5</sup> This

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<sup>4</sup> *The Wall Street Journal*, January 28, 1997. p. A18. The Washington-based Labor Policy Association (LPA) "is a public policy advocacy organization of the senior human resource executives of America's major corporations." See the LPA home page on the Internet: [<http://www.lpa.org/-lpa/about.html>], January 22, 1997.

<sup>5</sup> U.S. Congress. House. Subcommittee on Workforce Protections, Committee on Economic and Educational Opportunities. *Hearings on the Fair Labor Standards Act*. Hearings, 104<sup>th</sup> (continued...)

initiative led to creation of a related entity, the Flexible Employment Compensation and Scheduling Coalition (FLECS), a group that was generally representative of industry and employer interests — and that included the LPA.<sup>6</sup> Also active was the Coalition for Fair Labor Standards Act Reform, identified by spokesman William Kilberg, as “a group of employers and associations” from diverse fields. The common concern of coalition members, Kilberg explained, was “the so-called ‘white collar’ exemption” under the FLSA: i.e., Section 13(a)(1) of the Act.<sup>7</sup>

FLSA critics have developed several levels of argument against the Act,<sup>8</sup> each has been met with counter arguments from the statute’s defenders. *First*. Critics call the Act a Depression Era relic, no longer relevant to the modern workplace. Emphasizing its age, they suggest that it needs *modernization*, if not repeal. Others, recalling the conditions that wage/hour legislation was designed to redress, regard the Act as a vital workplace protection, as important now as when first enacted. *Second*. FLSA implementation has been effected through detailed regulations. Critics call for simplification, *common sense* reform, both of the statute and of the regulations, and urge that exemptions be more numerous. Supporters of the Act assert that “[e]ach of the provisions under challenge” by those urging modernization “was originally placed in the FLSA regulatory scheme in response to specific employer

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<sup>5</sup> (...continued)

Cong., 1<sup>st</sup> Sess., March 30, June 8, October 25, and November 1, 1995. Washington, U.S. Govt. Print. Off., 1995. p. 18. (Hereafter cited as House Subcommittee on Workforce Protections, *Hearings on the Fair Labor Standards Act*.)

<sup>6</sup> House Subcommittee on Workforce Protections, *Hearings on the Fair Labor Standards Act*, p. 185. Among groups associated with the FLECS Coalition were the Associated Builders & Contractors, College and University Personnel Association, National Association of Manufacturers, National Association of Wholesale Grocers, National Association of Wholesaler-Distributors, the National Federation of Independent Business, the Society for Human Resource Management, and the U.S. Chamber of Commerce. A number of firms were individually associated with the Coalition: for example, The Boeing Company, Kaiser Permanente, and Motorola. The FLECS Coalition provided support for the flexible and compressed work schedules legislation during the 104<sup>th</sup> and 105<sup>th</sup> Congresses. See: CRS Report 96-570, *Federal Regulation of Working Hours: An Overview*; and CRS Report 97-532, *Federal Regulation of Working Hours: Consideration of the Issues*, both by William G. Whittaker.

<sup>7</sup> House Subcommittee on Workforce Protections, *Hearings on the Fair Labor Standards Act*, p. 63. Kilberg had served as Solicitor of the Department of Labor from 1973-1976.

<sup>8</sup> For example, see: Potter, Edward E., and Judith A. Youngman. *Keeping America Competitive: Employment Policy for the Twenty-First Century*. Lakewood, CO. Glenbridge Publishing Ltd, 1995. p. 19-20. Potter and Youngman, writing for the Employment Policy Foundation, the “[e]ducational arm of the Labor Policy Association,” note that these laws “governing workplace compensation and work scheduling were developed in the 1930s and 1940s” and assert that they “create arbitrary distinctions between workers that do not fit the workplaces and work forces of the 1990s and the twenty-first century.” Concerning the Foundation, see: Fischer, Carolyn A., and Carol A. Schwartz, eds., *Encyclopedia of Associations: 1996*. Detroit, Gale Research Inc., 1995. p. 1473.

tactics” for evasion of the Act’s provisions.<sup>9</sup> *Third*. Requirements that some view as protecting workers from exploitation and abuse (especially in the absence of a collective bargaining agreement), others regard as an infringement upon the rights both of workers and employers. Some contend that workers and employers should be free, “without government intervention or restrictions,” to negotiate “mutually acceptable” terms and conditions of work.<sup>10</sup>

Calls for FLSA modification have resulted in dozens of legislative proposals during recent years. “We are embarking on a course of chipping away at the Fair Labor Standards Act instead of doing a thorough analysis of it,” remarked Representative Owens (D-NY), the ranking Minority Member of the Subcommittee on Workforce Protections during the spring of 1997. He suggested he “would welcome a comprehensive piece of legislation” that would thoroughly examine the FLSA and “set it within the context of what is happening in labor today.”<sup>11</sup> But, in the absence of a broad review, Chairman Ballenger (R-NC) declared that the Subcommittee would “look at obstacles in the law which prevent employers and employees from working out arrangements which benefit both parties” and “which need to be updated to reflect the issues confronting today’s workplace.”<sup>12</sup>

## Congressional Oversight: Phase One

Three broad sections of the FLSA are at issue with respect to overtime pay for sales personnel. **Section 6** deals with the federal minimum wage; **Section 7**, with overtime pay. **Section 13** contains the body of exemptions and is, in turn, divided into sub-parts: Section 13(a), exemptions *both* from the minimum wage and from overtime pay; Section 13(b), exemptions *only* from the overtime pay requirements of the Act. Thus, the siting of a proposed amendment is of some importance.<sup>13</sup>

Recently, the focus has been primarily (though not exclusively) upon overtime pay. At issue are two current FLSA provisions: *first*, Section 7(i), which deals with certain retail and service workers; and, *second*, Section 13(a)(1), which deals with

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<sup>9</sup> House Subcommittee on Workforce Protections, *Hearings on the Fair Labor Standards Act*, p. 214.

<sup>10</sup> *Ibid.*, p. 61.

<sup>11</sup> See U.S. Congress. House. Subcommittee on Workforce Protections, Committee on Education and the Workforce. *Hearing on the Treatment of Inside Sales Personnel and Public Sector Volunteers Under the Fair Labor Standards Act*. Hearings. 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., May 13, 1997. Washington, U.S. Govt. Print. Off., 1997. p. 2. (Hereafter cited as Subcommittee on Workforce Protections, *Hearing on the Treatment of Inside Sales Personnel*)

<sup>12</sup> *Ibid.*, p. 1.

<sup>13</sup> In the Code, these sections are listed as Sections 206, 207 and 203, respectively. Here, we use the more abbreviated form.



“outside” salespersons. In addition, there is a *proposed* Section 13(a)(18)<sup>14</sup> that concerns certain “inside sales” workers. In recent initiatives dealing with overtime pay for sales personnel, two patterns have emerged. *In the 103<sup>rd</sup> and 104<sup>th</sup> Congresses*, legislation was proposed (but not adopted) to alter coverage under Section 7(i) with respect to retail and service employees. *In the 105<sup>th</sup> Congress*, both legislative language and debate shifted. The legislation of the 105<sup>th</sup> Congress (H.R. 2888, approved by the House in June 1998) would have added a new sub-section to Section 13(a). The latter focus has continued through *the 106<sup>th</sup> and the 107<sup>th</sup> Congresses*.

## The 103<sup>rd</sup> Congress

In March 1994, then-Representative Murphy (D-PA) explained that *outside sales personnel* and *inside commission sales personnel* were governed by two separate FLSA sections: Section 13(a)(1), the exemption for outside sales workers, and Section 7(i), an exemption for certain retail and service sales workers. The latter was governed by two conditions: (1) these workers must earn in excess of 1½ times the standard minimum wage, and (2), at least half of the worker’s total compensation must be made up of commissions. Representative Murphy then introduced legislation to amend Section 7(i) “by striking ‘a retail or service establishment’ and inserting ‘an establishment’.”<sup>15</sup> The Murphy bill would have made all qualifying “establishments” exempt from FLSA overtime pay requirements: qualifying workers in such establishments would have lost overtime pay protection.

Representative Murphy focused on the distinction between *retail* and *wholesale* salespersons and the business practices of industry: i.e., the impact of Section 7(i) for the competition between wholesalers and retailers “who often compete head to head.” In the past, he stated, wholesalers “frequently had outside sales representatives who visited commercial customers on the road.” Now, he continued, “conditions in various industries have changed” to the disadvantage of wholesalers. Retail giants “generate a large volume of business through multiple retail warehouse sales outlets dispersed over wide geographic areas” and “... they are large enough to purchase directly from manufacturers and either operate their own distribution network or have factory shipment directly to their retail locations.” He explained that wholesale and retail inside sales personnel “engage in identical business activity,”

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<sup>14</sup> In the proposals, the new language is variously Section 13(a)(17) or Section 13(a)(18), depending upon its relationship to other pending amendments.

<sup>15</sup> Co-sponsors for the Murphy bill (H.R. 4150, of the 103<sup>rd</sup> Congress) were Representatives Andrews, Fawell, and Petri (R-WI). Section 7(i) (29 U.S.C. 207(i)) read (and still provides): “No employer shall be deemed to have violated subsection (a) of this section [the overtime pay requirements of the FLSA] by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bone fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.”

noting: “These wholesale sales personnel also receive compensation in the form of commissions on sales, yet their employers are excluded from making use of the inside commission sales exemption.” As a result, he stated, “The exemption tends to competitively favor massive corporate retailers over local or regional wholesale distributors.” For these reasons, he said, “I am introducing legislation to apply the 7(i) inside commission sales exemption to employees of wholesale suppliers.”<sup>16</sup>

Representative Murphy did not focus upon labor standards protections. Rather, his concern was the competitive positions of wholesale and retail firms where distinctions between the two seemed gradually to be blurring. Referred to the Subcommittee on Labor Standards, the Murphy bill died at the close of the 103<sup>rd</sup> Congress. No action had been taken.

## The 104<sup>th</sup> Congress

In mid-March 1995 (the 104<sup>th</sup> Congress), Representative Fawell reintroduced the Murphy bill. “This legislation,” he explained, “is necessary to repair the inequity that presently exists between retail and wholesale establishments.” Under current law, he stated, “a wholesaler’s inside salesperson must be paid time-and-one-half” for hours worked in excess of 40 per week “while the identical job at a retail establishment” does not involve that requirement. He pointed to the “considerable” overtime costs required of employers and suggested that the wholesale/retail distinction, in this area, was no longer useful.<sup>17</sup>

When, early in 1995, the House Subcommittee on Workforce Protections commenced oversight on aspects of the FLSA, a sharp cleavage developed with respect to the Fawell bill. Industry/employer witnesses favored the measure; employee spokespersons opposed it.

Michael Leibig, Georgetown University law professor, recalled that the purpose of the FLSA overtime provisions was “to discourage employers from working people over 40 hours a week at all.” Where employers make a practice of scheduling workhours in excess of 40 per week, he stated, “they reap the cost of doing that.”<sup>18</sup> Leibig urged caution, arguing that pending reform proposals “would seriously jeopardize any possibility of realistically enforcing the basic forty hour work week.”<sup>19</sup> Similarly critical, Deborah Dietrick of the Service Employees’ International Union

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<sup>16</sup> *Congressional Record*, March 24, 1994. p. E564.

<sup>17</sup> *Congressional Record*, March 14, 1995. p. E594-E595. Representative Petri served as a co-sponsor of H.R. 1226, the Fawell bill in the 104<sup>th</sup> Congress. Companion legislation (S. 2026) was introduced by Senator Faircloth, with others. The *Daily Labor Report*, August 6, 1996. p. A16 stated that these proposals were “backed by the American Supply Association, the American Hotel and Motel Association, Food Distributors International, the National Association of Wholesaler-Distributors, the National Beer Wholesalers Association, and the Society of American Florists.”

<sup>18</sup> House Subcommittee on Workforce Protections, *Hearings on the Fair Labor Standards Act*, p. 473.

<sup>19</sup> *Ibid.*, p. 213.

(SEIU) stated that the Fawell proposal would encourage an employer “to pay employees on a commission basis” by instituting overtime-exempt status for such workers. Asserting that long workhours are detrimental to “workers’ health, safety, and family relationships,” she noted that “employers in the name of their workers are pressing to extend current overtime exemptions.”<sup>20</sup>

Employer witnesses suggested a varied rationale for broadening the FLSA overtime pay exemptions. The National-American Wholesale Grocers’ Association and the International Foodservice Distributors Association pointed to “the incomprehensible distinction that the statute makes between inside sales personnel of retailers and [on the other hand, of] wholesalers.”<sup>21</sup> The issue, then, was extension of the retail exemption to wholesalers. Kevin Priest, a florist from Cleveland, Ohio, explained: “When retail establishments can stay open longer hours without incurring the financial liability of paying their sales personnel overtime, they have an unfair advantage over wholesale establishments.” When a retailer “can stay open extra hours without the added costs of time and a half,” concurred Chris Lute of Lute Plumbing Supply, Portsmouth, Ohio, “this becomes an inequity that burdens a wholesaler’s ability to compete.”<sup>22</sup> Consistently, employer witnesses argued that the FLSA retail/wholesale distinction was no longer valid. Mr. Priest urged Congress to “see the necessity of keeping all types of United States businesses prosperous.”<sup>23</sup>

During Subcommittee discussion, Representative Mink (D-HI) called for clarification, questioning what wholesale and retail employees do differently that would justify different treatment under the FLSA.

Mr. PRIEST. My response would be that there’s no difference anymore. Maybe back in 1938 or in 1950—

Mrs. MINK. Well, what was it in 1938 ...?

Mr. PRIEST. I couldn’t tell you. I’m not sure. All I know is that today the function of an inside salesperson in our facility, in our type of industry, is exactly the same as an inside salesperson in a retail facility. They call customers. They make the sale. They help invoice the product or they take it through the cash register area. And they serve the customer.

And that’s exactly what we do. Only we sell at wholesale prices.

Mrs. MINK. Well, if the two are the same, the retailer and the wholesaler, is it possible that the solution would be to repeal the exemption altogether so that both entities would have to pay overtime for work over 40 hours?

Mr. PRIEST. I would hope not.

In Mrs. Mink’s suggestion for leveling the competitive playing field, workers in both retail and wholesale would be covered by FLSA overtime pay requirements. Mr.

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<sup>20</sup> *Ibid.*, p. 354.

<sup>21</sup> *Ibid.*, p. 366 and 367.

<sup>22</sup> *Ibid.*, p. 331-332.

<sup>23</sup> *Ibid.*, p. 334-335. The firm represented by Mr. Priest, Plant and Flower Company, had branch operations located through the Midwest and Eastern United States.

Priest thought the suggestion “counterproductive.” Representative Mink responded: “... if the retail inside commission and the wholesale inside commission are identical, I think we ought to really look at the possibility of just wiping out the exemption altogether.” Mr. Priest demurred. “And the impact of that would be to cause people to make less money. That’s the bottom line.”<sup>24</sup>

The FLSA and its implementing regulations, Representative Fawell stated, “are very confusing” and appear to be “... the result of various amendments over the years.”<sup>25</sup> Similarly, employer witnesses pointed to the “somewhat intricate and confused pattern of exemptions ... amplified by [DOL] regulations” and interpreted by the courts.<sup>26</sup> They complained of time “spent trying to interpret the law” and the difficulty of complying with “technical requirements of a complicated statute.”<sup>27</sup>

Given the complexities of the Act and the regulations, Representative Owens (D-NY) urged that DOL — given its primary responsibility for interpretation of the statute and for its enforcement — be represented at the hearings.<sup>28</sup> Representative Mink concurred, stating: “I find it difficult to deal with the testimony without hearing at least what the department has to say in each instance.” She urged that DOL be given an opportunity “to come in and respond” and that the Subcommittee “have an opportunity to question the Department of Labor.” Chairman Ballenger (R-NC) agreed that it “is our intent to have the Department of Labor testify.”<sup>29</sup>

Although DOL did not appear before the Subcommittee on this issue during the 104<sup>th</sup> Congress, Assistant Secretary for Employment Standards Bernard Anderson, in a letter to Representative Owens, affirmed that the basis for the wholesale/retail (inside/outside) overtime pay distinction rested on the employer’s ability to monitor outside work. To amend the Act as proposed by the Fawell bill, Anderson argued, and deny overtime protection to long-covered employees, “would seriously erode one of the most basic principles of the FLSA — to limit excessive hours of work” while providing “just compensation” for work in excess of 40 hours per week. DOL, he concluded, “strongly opposed” the Fawell bill.<sup>30</sup>

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<sup>24</sup> *Ibid.*, p. 340. Mr. Priest seemed to suggest that if overtime rates were required, then overtime hours would not be scheduled. In the absence of an overtime pay requirement, there arguably would be no market disincentive against scheduling hours of work in excess of 40 per week.

<sup>25</sup> *Congressional Record*, March 14, 1995. p. E595.

<sup>26</sup> House Subcommittee on Workplace Protections, *Hearing on the Fair Labor Standards Act*, 367.

<sup>27</sup> *Ibid.*, p. 332.

<sup>28</sup> *Ibid.*, p. 445.

<sup>29</sup> *Ibid.*, p. 339.

<sup>30</sup> Bernard E. Anderson, Assistant Secretary of Labor for Employment Standards, to Representative Owens, June 9, 1997.

## Congressional Oversight: Phase Two

In the wake of the 104<sup>th</sup> Congress, a change of approach occurred. No longer was the focus upon the overtime provisions of Section 7(i). Subsequent legislation proposed that a subsection be added to Section 13(a) which would involve both overtime pay and minimum wage. Further, the debate shifted *from* the costs to employers *to* opportunities for workers: a more *family friendly* workplace. And, beyond that, renewed emphasis was placed upon the age of the statute and its perceived inflexibility.

### The 105<sup>th</sup> Congress

On May 13, 1997, the Workforce Protections Subcommittee conducted a general oversight hearing on FLSA-related issues. One panel dealt with overtime pay for sales personnel, though no legislation in this area had yet been introduced. Three panelists spoke (two workers and a human resources specialist), each supportive of modification of the statute, and each stressing the need for *flexibility* and a more *family friendly* workplace.

**Defending Worker Opportunity.** Anthony Williams, “an inside sales associate” with a Baltimore wholesale plumbing distributor,<sup>31</sup> identified himself as “a professional salesman.” Williams stressed that the FLSA was “antiquated” and “does not reflect employee needs as we approach the 21<sup>st</sup> century.” He urged greater workhours flexibility and complained of the burden of coordinating with managers and outside sales personnel (“who incidentally are all salaried”) while he remained an hourly paid employee required to “punch a clock to account for my time.” Pointing to the new world of “faxes, e-mail, [and] electronic data interchange,” he found it “unbelievable that Congress would still allow a law from 1938 ... to govern my job.”<sup>32</sup>

Leronda Lucky, an “inside sales associate” from Dayton, Ohio, urged that commissioned inside sales personnel be overtime pay exempt. Like Williams, she stressed her training, independent judgment and need for flexibility — and her dissatisfaction with the FLSA.<sup>33</sup> “Unless I have prior approval,” she explained, “I am restricted to working 40 hours per week due to a law passed in 1938.” She argued that her clients “do not necessarily have 9 to 5 work hours” and affirmed: “I need the flexibility to determine when I need to meet with the customers on their hours.” Like

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<sup>31</sup> Mr. Williams was employed by Ferguson Enterprises. “Ferguson has over 4,700 associates, of which 1,061 are inside sales people,” he explained. See House Subcommittee on Workforce Protections, *Hearing on the Treatment of Inside Sales Personnel*, p. 18.

<sup>32</sup> *Ibid.*, p. 18-20.

<sup>33</sup> Ms. Lucky noted: “I am a telephone sales representative and sell Yellow Page advertising in the north central Ohio area.” House Subcommittee on Workforce Protections, *Hearings*, 1997. p. 21.

Williams, she described herself as a “highly motivated, professional salesperson” who “would like to work as many hours as possible *at my discretion*.”<sup>34</sup>

Debra Siday, Vice President for Human Resources of Atlantic Food Services, a D.C. area firm, was the final panelist.<sup>35</sup> Under current law, she stated, inside sales staff of Atlantic Food Services “must be paid overtime for all hours worked over 40 in 1 week,” which she argued was not in the interests of workers: “... it merely serves to reduce their actual earnings potential.” Given her company’s relatively low “pretax profit margin of only 2.2 percent,” she stated, “we are often forced to limit the compensation level of our inside sales associates or the hours of overtime that they are eligible to work.” An overtime pay exemption would allow the company “to place these individuals on a commission or bonus-based compensation plan. This gives them the freedom to use their own abilities to earn even greater rewards.” Inside sales people “are truly professionals” and able “to utilize the new communications technologies.” Like Williams and Lucky, she argued that Atlantic Food Services should not be bound by a 1938 statute as we stand on “the brink of the 21<sup>st</sup> century.”<sup>36</sup>

The specific circumstances set forth by the witnesses may not be entirely clear. While they held the FLSA responsible for workplace inflexibility, others would argue that the blame was misplaced. Scheduling of work, traditionally, has been an employer function: flexibility, a management decision. Flexible scheduling options are allowable under the FLSA and such arrangements could be utilized were employers disposed to use them. That more employers have not established flexible work schedules may result from a variety of managerial perceptions, but there would seem little to suggest that the infrequent use of such options is rooted in the FLSA.

It may be that, allowed to work longer hours at no extra expense to the employer, workers would be able to produce more earnings for themselves and more profits for management. But, some would argue that such practices are inconsistent with the intent of Congress when it crafted the overtime pay provisions of the FLSA: that is, to reduce the length of the workweek and to spread available work opportunities. Others might argue that, with the passage of time, the original policy (intent) of Congress is now outmoded, counterproductive, diminishes profits, and is in need of reexamination.<sup>37</sup>

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<sup>34</sup> House Subcommittee on Workforce Protections, *Hearing on the Treatment of Inside Sales Personnel*, p. 20-22. Italics added.

<sup>35</sup> Ms. Siday noted that Atlantic Food Services is “a privately owned distributor of food services products ... and a member of Food Distributors International ... with revenues of over \$150 million and employing over 300 associates.” House Subcommittee on Workforce Protections, *Hearing on the Treatment of Inside Sales Personnel*, p. 22.

<sup>36</sup> *Ibid.*, p. 22-23.

<sup>37</sup> In a statement submitted for the hearing record, the Society of American Florists stated: “Due to the restrictions of the FLSA, employees’ earning power is greatly impaired because they are limited to 40 hours of work during their busiest and most profitable seasons. Inside salespeople could take home a much bigger paycheck and increase sales for the company if they could work more than 40 hours.” Currently, under the FLSA, they are permitted to  
(continued...)

**New Legislation Proposed.** On November 9, 1997, Representative Fawell (with Representative Andrews) introduced H.R. 2888: the “Sales Incentive Compensation Act.”<sup>38</sup> It proposed a new exemption, Section 13(a)(18), which involved both overtime pay and minimum wage issues and set a series of standards through which an employee might be deemed exempt. First, “the employee’s position” must require “specialized or technical knowledge” of the products or services being sold. Second, the employee’s sales “must be predominantly to persons or entities to whom the employee has made previous sales or the employee’s position does not involve initiating sales contacts.” It also provided a wage/commission earnings test for salespersons to qualify for the exemption.

In an introductory statement, Representative Fawell suggested that “1938-era workplace laws do not necessarily fit the workers or the workplace of the 1990s,”<sup>39</sup> adding that “[s]uch antiquated laws end up hurting the very workers they were intended to help.” With new technologies, Mr. Fawell suggested:

These inside salespeople can work at one location — at an office, or even at home. Communications, paying for goods, and other transactions can be done electronically. The once outside sales force is today a more efficient, effective and profitable inside sales force.

Without “the 1938 law” and its overtime pay requirements, he concluded, “these inside salespeople could earn wages that greatly exceed the amounts that are otherwise available through hourly pay rates plus overtime.”<sup>40</sup>

Representative Andrews concurred. “Salespeople who can substantially increase their salary by earning more commissions ought to be allowed to work longer hours .... Unfortunately,” he opined, “current law keeps them from earning as much as they could.” “This common-sense legislation,” he added, would provide “greater flexibility ... by allowing salespeople to choose to work harder in order to earn higher commissions.” He added that “businesses and salespeople will share in the increased profit and productivity” if the proposal were to become law.<sup>41</sup>

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<sup>37</sup> (...continued)

work more than 40 hours a week when the occasion may arise; but, they must be compensated for their work at *time-and-a-half* rates. “Employees should ask their employers why they are not permitted to work over 40 hours a week,” suggests Professor Lonnie Golden of Pennsylvania State University, “if indeed that extra work would generate sales revenues sufficient to cover the premium cost of their overtime work. It is specific firms’ personnel policy of denying overtime, rather than the FLSA, which ought to be altered.” See House Subcommittee on Workforce Protections, *Hearing on the Treatment of Inside Sales Personnel*, p. 51 and 136.

<sup>38</sup> A similar bill (S. 2144) was introduced by Senator Coverdell, June 9, 1998.

<sup>39</sup> The Labor Policy Association was more blunt. “In the archives of federal law laws, the FLSA holds a position nearly comparable to that of the Dead Sea Scrolls ....” House Subcommittee on Workforce Protections, *Hearings on the Fair Labor Standards Act*, p. 30.

<sup>40</sup> *Congressional Record*, November 9, 1997. p. E2273.

<sup>41</sup> *Congressional Record*, November 9, 1997. p. E2273. Deborah Dietrick of the SEIU (continued...)

**Subcommittee Mark-Up.** On March 5, 1998, the Workforce Protections Subcommittee met to mark-up H.R. 2888. How the legislation might be applied in specific employment situations and what impact it might have for individual workers provoked questions.

Representative Owens opposed the bill which, he stated, “transfers income from workers to employers.” He charged that “it is impossible to tell who is exempted from overtime by this legislation.” Mr. Owens explained:

To be exempted, an employee must have specialized or technical knowledge related to the products or services being sold. Generally, a sales person is expected to know something about what they are selling. How much specialized or technical knowledge is required to fall within the exemption from overtime? How many sales people would typically possess this kind of knowledge — a few, some, most, or all?

The bill exempts employees who are “in a sales position.” The bill goes on to retain overtime coverage for those whose duties predominantly involve initiating sales contacts while specifically exempting from overtime those who are predominantly employed to service existing sales contracts.

How is “predominantly” to be measured — by the amount of time an employee spends in a given activity, or the percentage of income an employee produces in a given activity, or by some other means? Does “predominantly” mean more than 50% of one’s activities, or 75%, or something else? What is a sales position in the first instance? If I am primarily employed to service copier machines, but sell enough of those machines that the commissions equal 40% of my annual income, does this legislation exempt me from overtime?

One should ask, he stated, “how many employees will lose the protection afforded by overtime if this legislation is enacted.” And, he inquired, “Can anyone tell me how many workers would be affected if this legislation is enacted?”<sup>42</sup>

H.R. 2888, Representative Owens argued, was “primarily aimed at inside sales personnel, though the bill applies to any employee in a sales position.”<sup>43</sup> “Unlike

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<sup>41</sup> (...continued)

observed that “workers willing to work abnormally long hours would be the pacesetters” in the absence of overtime constraints and that “a 40-hour workweek would be a thing of the past.” House Subcommittee on Workplace Protections, *Hearings on the Fair Labor Standards Act*, p. 354.

<sup>42</sup> The Employment Policy Foundation, educational arm of the LPA, stated that “less than 11 percent of all people classified as sales employees would be eligible for the inside sales exemption, and far fewer could actually be exempt.” This analysis suggests that H.R. 2888 was “a narrow FLSA exemption that would exempt a limited number of inside sales employees, at most 540,000 sales workers, or 7.7 percent.” See Press Release, Employment Policy Foundation, May 1, 1998. On the other hand, DOL reportedly estimated “that nearly 1.5 million workers would be denied overtime if the bill were enacted.” *Daily Labor Report*, May 6, 1998. p. A2.

<sup>43</sup> During consideration of H.R. 2888, reference was variously made to *retail* and *wholesale* (continued...)



outside sales persons,” he observed, “an inside sales person is directly employed in making and processing sales for their entire time at work.” So, he queried: “why shouldn’t the employer be required to pay overtime when the employee is required to work more than forty hours in a week?” Since H.R. 2888 would alter both overtime pay and minimum wage protection, he urged adoption of an earnings qualifier higher than proposed in the legislation (\$22,495).<sup>44</sup> Relatively low wage workers, he suggested, could be expected to work virtually unlimited hours in excess of 40 per week, without pay, to qualify for the exemption.

If an employee is paid 1.5 times the minimum wage, ... this legislation seems to provide that the employee need not be paid anything for hours worked in excess of 40 hours a week, since all compensation for such time would be strictly dependent upon commissions. In other words, this bill does not simply repeal the requirement that employees be paid 1.5 times their regular rate of pay for overtime work, it repeals the requirement that an employer provide any wage or salary for hours worked in excess of 40 hours a week.

Thus, Representative Owens stated: “The effect of this legislation ... is to permit employers to either require those workers to work longer hours or to pay them less per hour worked or both. Far from enhancing the earning opportunities of workers,” he concluded, “the primary effect of this legislation is to increase the income of employers at the expense of workers.”<sup>45</sup>

DOL, which had not testified on the issue, expressed concern that the measure would establish a minimum wage and overtime exemption for “all sales people who meet certain criteria” and “deny FLSA protection for significant numbers of often low-paid workers who have long received such protection.” Labor Secretary Alexis Herman objected that the bill “clearly shifts business risk from employers to employees.” She questioned its “specialized or technical knowledge” provision which she viewed as “so vague and subject to differences in understanding and application that there will undoubtedly be an increase in the already high levels of private litigation involving sales employment.” Ms. Herman, in opposing the bill, argued that “this complicated, multi-test exemption” will be difficult to interpret and apply, leading to “misunderstandings, disputes and litigation.”<sup>46</sup>

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<sup>43</sup> (...continued)

and to *inside* and to *outside* sales workers. These terms were not used in the bill as introduced; rather, “any employee employed in a sales position if —.”

<sup>44</sup> The formula for exemption under the proposed Section 13(a)(18) would require wage earnings of 1½ times the minimum wage (currently, \$5.15 per hour) through a year of 2,080 hours (\$16,068) plus commission earnings of not less than 40% of the wage earnings (\$6,427), or \$22,495 per year.

<sup>45</sup> Statement of Representative Major R. Owens, March 5, 1998.

<sup>46</sup> Alexis M. Herman, Secretary of Labor, to Representative Cass Ballenger, Chairman, Subcommittee on Workforce Protections, March 4, 1998.

At the close of the hearing, the Subcommittee reported H.R. 2888 (with amendments) to the full Committee. Representative Fawell, in contrast to critics of the measure, affirmed that the bill would clarify the FLSA.<sup>47</sup>

**Approved by Committee and Passed by the House.** The legislation remained contentious and, at the full Committee level, sponsors offered refinements to meet critics' objections. Representative Andrews proposed language to define more precisely the body of workers the bill would exempt. Representative McCarthy (D-NY) addressed the issue of route sales drivers with language intended to assure they would not be adversely affected.<sup>48</sup> The Committee then voted to report the bill to the House though some may still have found the legislation ambiguous.<sup>49</sup>

Disagreement persisted. Under *additional views*, Representative Andrews (with others) stated that the bill would "bring practical and significant improvements to workers and employers alike," benefitting inside salespeople while it would not "disturb the important protections and philosophy of the FLSA." It leaves no doubt "about the type of employees" covered while "expanding worker opportunity," he affirmed.<sup>50</sup> But, a minority in dissent, argued for the *status quo* and stressed that workers need "sufficient time off to care for themselves and their families." Challenging the *worker friendly* arguments of proponents of the legislation, they argued that nothing in the bill "changes the fact that it is the employer, not the employee, who controls when and how long a worker may be required to work."<sup>51</sup> The minority stated that the exemption would require "substantial, almost impossible, burdens" with respect to employer record keeping and would prove "a litigator's dream."<sup>52</sup>

Floor debate commenced on June 10, 1998, argument falling into now well-defined patterns. Representative Hastings (R-WA) opined that inside sales personnel are being "discriminated against" by a "distinction, written into law in 1938, [which]

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<sup>47</sup> Press Release, Committee on Education and the Workforce, March 5, 1998. See also *Daily Labor Report*, March 6, 1998. p. AA1-AA2.

<sup>48</sup> *Daily Labor Report*, April 2, 1998. p. A6-A7. The Teamsters, relieved the bill had been amended to "stop big business from taking away overtime pay from Teamsters sales drivers," argued that it "still undermines overtime protections for a wide range of other sales workers." *International Teamster*, June 1998. p. 1.

<sup>49</sup> See U.S. Congress. House. Committee on Education and the Workforce. *Sales Incentive Compensation Act. Report together with Minority and Additional Views To Accompany H.R. 2888*. H.Rept. 105-558, 105<sup>th</sup> Cong., 2d Sess. Washington, U.S. Govt. Print. Off., 1998. p. 1-10. (Hereafter cited as House Committee on Education and the Workforce, *Sales Incentive Compensation Act*)

<sup>50</sup> House Committee on Education and the Workforce, *Sales Incentive Compensation Act*, p. 15.

<sup>51</sup> *Ibid.*, p. 16-17. "H.R. 2888," the minority stated, "creates a very powerful economic incentive for an employer to require an employee to work as many hours as possible, and thus diminishes rather than enhances workers' flexibility."

<sup>52</sup> House Committee on Education and the Workforce, *Sales Incentive Compensation Act*, p. 20.

no longer makes sense in 1998.”<sup>53</sup> The bill, Representative Moakley (D-MA) stated, “says that employers can require people to work overtime but they no longer have to pay them time and a half” — a “win-win situation” for employers. “If the worker makes big sales, the employer does well. If the worker does not make big sales, the employer still does well because he does not have to pay his worker overtime.”<sup>54</sup> The problem, Representative Goodling (R-PA) argued, is that of “fitting these 21<sup>st</sup> century sales persons into a 60-year-old law.”<sup>55</sup>

How H.R. 2888 is viewed “depends on how we look at legislation like this,” Representative Fawell stated, “whether we see opportunities, as I see, or whether we see a lot of limitations ....”<sup>56</sup> Representative Andrews was also positive. “This bill ... is not a bill that divests people of overtime. I believe,” he affirmed, “it is a bill that appropriately invests a carefully selected number of people with an opportunity to better themselves.”<sup>57</sup> Workers, however, may have been more concerned with negative perceptions. “No wonder,” observed Representative Woolsey (D-CA), that “... we have heard from employers all over the country telling us how employees benefit from this bill” while, she added, “... I have not heard yet from one worker that this is what they would prefer.”<sup>58</sup>

As floor debate progressed, Representative Owens urged addition of language to make work in excess of 8 hours a day or 40 hours a week voluntary with the employee. The Owens amendment was defeated, 181 ayes to 246 noes.<sup>59</sup> Technical amendments, refining the language of the reported bill, were proposed by Representatives Fawell and Andrews and, without objection, approved. On final passage, H.R. 2888, as amended, was approved by a vote of 261 ayes to 165 noes.<sup>60</sup> The bill died in the Senate.

## The 106<sup>th</sup> Congress

The inside sales exemption (“Sales Incentive Compensation Act”) reemerged as an issue early in the 106<sup>th</sup> Congress. On March 25, 1999, Representative Boehner (with Representative Andrews) introduced H.R. 1302, a bill parallel to the version of H.R. 2888 that had passed the House during the 105<sup>th</sup> Congress. It was referred to the Subcommittee on Workforce Protections but no further action followed.

Gradually, as the 106<sup>th</sup> Congress progressed, attention came increasingly to focus upon an increase in the federal minimum wage. On October 14, 1999,

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<sup>53</sup> *Congressional Record*, June 10, 1998. p. H4466.

<sup>54</sup> *Ibid.* p. H4466.

<sup>55</sup> *Ibid.*, p. H4467.

<sup>56</sup> *Ibid.*, p. H4469.

<sup>57</sup> *Ibid.*, p. H4470.

<sup>58</sup> *Ibid.*, p. H4469.

<sup>59</sup> *Ibid.*, p. H4474-H4475; and *Congressional Record*, June 11, 1998. p. H4488-H4489.

<sup>60</sup> *Congressional Record*, June 11, 1998. p. H4490-H4491.

Representative Lazio introduced H.R. 3081, a composite bill dealing mainly with tax and other non-FLSA issues. However, as part of a short package of FLSA amendments, Representative Lazio incorporated within H.R. 3081 the substance of H.R. 1302.<sup>61</sup> The Lazio bill was referred jointly to the Committee on Ways and Means and to the Committee on Education and the Workforce. On November 11, 1999, the Committee on Ways and Means reported H.R. 3081;<sup>62</sup> the Committee on Education and the Workforce, however, took no action. Finally, on January 28, 2000, the latter body was discharged from further consideration of the proposal and, on March 8 and 9, 2000, the Lazio bill (with the inside sales provision) was approved by the House on a vote of 282 yeas to 143 nays.<sup>63</sup> No action was taken by the Senate and the bill died at the close of the 106<sup>th</sup> Congress.

## The 107<sup>th</sup> Congress

On June 6, 2001, Representative Tiberi (R-OH), with Representative Andrews, introduced H.R. 2070, the “Sales Incentive Compensation Act” of the 107<sup>th</sup> Congress. He described it as “a very narrow, technical amendment” intended “to clarify the treatment of certain types of sales employees under the federal minimum wage and overtime requirements.” By eliminating minimum wage and overtime pay requirements of the law, he noted, inside sales employees “would have the opportunity to increase their wages.” The overtime pay requirement of the Act, he stated, “has the unintended effect” of placing a ceiling on the income of such inside sales workers “because they do not have the flexibility or the choice to work additional hours in order to generate more sales and earn more commissions.”<sup>64</sup>

**Subcommittee Hearings.** On June 7, the Subcommittee on Workforce Protections conducted a hearing on the inside sales issue. Chairman Norwood (R-GA), in an opening statement, posed the problem as “fitting 21<sup>st</sup> century salespeople into a law crafted for a 1938 workforce ... a law that was intended to protect workers [but] now has the effect of denying them the opportunity to maximize their sales and income.” Like other proponents of an inside sales exemption, Representative Norwood emphasized the need for “increasing flexibility for workers” — “allowing them to schedule their work hours in such a way as to maximize sales and increase their own earnings.”<sup>65</sup> Meanwhile in dissent Representative Owens revisited a theme he had espoused during earlier hearings. “If the [inside sales] employee earns no

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<sup>61</sup> H.R. 3081, *inter alia*, proposed to: (a) increase the minimum wage, in steps, to \$6.15 after April 1, 2002; (b) alter the minimum wage and overtime pay treatment of certain computer services personnel; and (c) exempt from minimum wage and overtime pay “any employee employed as a licensed funeral director or a licensed embalmer.”

<sup>62</sup> U.S. Congress. House. Committee on Ways and Means. *Wage and Employment Growth Act of 1999. Report Together with Dissenting Views to Accompany H.R. 3081*. H.Rept. 106-467, Part 1, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. Washington, U.S. Govt. Print. Off., November 11, 1999. 201 p.

<sup>63</sup> *Congressional Record*, March 9, 2000. p. H879-H902. See also H.R. 3846.

<sup>64</sup> *Congressional Record*, June 6, 2001. p. E1036.

<sup>65</sup> Statement by Honorable Charlie Norwood, Chairman, Subcommittee on Workforce Protections, June 7, 2001.

commissions, the employer is not required to pay the employee anything, not even a base wage, for the overtime hours the employee worked.” He charged: “The sole effect of this bill is to require workers to work longer hours for less money.”<sup>66</sup>

J. Randall MacDonald, vice president for human resources at IBM, was the lead industry witness. *First*, he emphasized that the FLSA is an old law. There have been “dramatic changes” in the workplace during the “60+ years since the enactment” of the FLSA, he stated. When the Act was passed “in 1938, the work place was vastly different than it is today.” While agreeing “with the original intent of the FLSA,” he opined that “certain provisions” of the Act “need to be modernized to accommodate the workplace changes that have occurred over the last six decades since its enactment.” He noted that there are “limited exceptions” under the FLSA but averred that they “were written many years ago, without today’s professional salesperson in mind.” *Second*, in that same spirit, he emphasized the technical change that had come to the world of sales. IBM’s inside sales force, he noted, “uses the Internet and the telephone to sell products to our customers.” It is now the age of “e-business,” the “**ibm.com** business,” and “the emerging networked economy.” *Third*, he stressed the need for flexibility. The 21<sup>st</sup> century, he affirmed, “demands flexibility ... flexible enough for employees to have balance in their lives and encourage them to take responsibility for their career direction.” “The constraints of the FLSA are counterproductive to the requirements of knowledge workers in the new economy,” he stated. The “talented IBM workforce cannot thrive and may not survive under the old economy model of rigid supervisory structures, inflexible concepts of time and place, and a lack of challenging career opportunities.” For all of these reasons, MacDonald urged that employers of inside sales workers no longer be bound by the minimum wage and overtime pay requirements of the Fair Labor Standards Act.

As noted elsewhere, the Act does not preclude work beyond 40 hours in a single workweek — so long as overtime rates (time-and-a-half) are paid for those hours worked in excess of 40. “It is logical to ask,” MacDonald agreed, “why IBM does not simply accept the increased cost of overtime payment and enable the employees to work longer hours to drive higher performance.” His response: “The fundamental business model of **ibm.com** does not support increased costs that are derived simply from more hours worked rather than increased sales.”

Flexible scheduling (even flexiplace employment) is allowed under the FLSA. New technology has widened the options for such alternative work patterns.<sup>67</sup> In that

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<sup>66</sup> Bureau of National Affairs. *Daily Labor Review*, June 8, 2001. p AA-1.

<sup>67</sup> For over 3 decades, concern with structuring *alternative work patterns* has been a continuing focus with human resources professionals and, indeed, flexible work hours have become widely used in the private sector as well as in government. See, for example: Nollen, Stanley D. *New Work Schedules in Practice: Managing Time in a Changing Society*. New York, Van Nostrand Reinhold Company, 1982; Olmsted, Barney, and Suzanne Smith. *Creating a Flexible Workplace: How to Select and Manage Alternative Work Options*. New York, American Management Association, 1989; and Ronen, Simcha. *Flexible Working Hours: An Innovation in the Quality of Work Life*. New York, McGraw- (continued...)

context, MacDonald raised a second issue. He pointed out that IBM's "flexibility options have seen a steady progression of enhancements — such as telecommuting — to meet employee needs." Then, he added: "... telecommuting is not an option for our 'inside sales' employees since it is difficult to accurately tract time away from the office in order to comply with the FLSA overtime requirements ..." IBM, he suggested (perhaps without appreciating the implications), is unable to develop a method for tracking off-site but technology-based employees: workers "responsible for designing and handling complex high-tech, solution-based transactions for our customers" and who "are generating several billion dollars in annual revenue for the company."<sup>68</sup>

A later industry witness, Randy Schenauer, President of Delaware Valley Wholesale Florist, Inc.,<sup>69</sup> raised the same issues addressed by MacDonald: that the FLSA is "antiquated," that the workplace has changed through the use of "phone, fax, computer and e-mail," and that his employees are "highly motivated" and "highly skilled professionals" in need of enhanced "flexibility" in order "to maximize their earnings." Schenauer affirmed that his employees "would much prefer to be allowed to work flexible hours" but argued that the FLSA prevents such scheduling flexibility. The remedy, he affirmed, would be to eliminate minimum wage and overtime pay requirements for his inside sales workers. Both industry witnesses concurred in objections to the FLSA enunciated by the Labor Policy Association.<sup>70</sup>

The final witness was Christine Owens, deputy director, AFL-CIO Public Policy Department. Ms. Owens had a somewhat different perspective concerning H.R. 2070 — which organized labor opposes. She explained that the proposed legislation would eliminate minimum wage and overtime pay protection for certain sales workers "without providing any new protections or safeguards." Once workers met the qualifying wage and duties tests set forth in the bill, there would be "no guarantee of added pay, regardless of the number of overtime hours they work" and "employers would be free to require as much overtime as they desire, without incurring any

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<sup>67</sup> (...continued)

Hill Book Company, 1981. One of the standard benefits reportedly associated with flexible scheduling is the reduction in overtime pay costs.

<sup>68</sup> Statement of J. Randall MacDonald, Senior Vice President, Human Resources, IBM, June 7, 2001. MacDonald introduced IBM employee Mary Enenmoh of Dallas to the Subcommittee. Ms. Enenmoh, "a sales professional" (an "inside sales" representative), explained that her job "is to engage and manage resources to develop and close sales. The entire process is done with the use of the telephone, Internet, fax machine, mailings and outside IBM personnel or business partners." Her current annual sales quota is \$6,000,000. While her outside "teammate [has] the option to work from home when she needs to rearrange her work schedule to accommodate her family life and/or travel," Ms. Enenmoh affirmed, "As a nonexempt professional, I do not have that option." While Ms. Enenmoh viewed the FLSA as the restraining factor, it was not clear why her position would not be suited to flexible hours and flexiplace employment.

<sup>69</sup> Delaware Valley Wholesale Florist, Inc., is described as "one of the largest wholesale floral supply companies in the United States with over 480 employees."

<sup>70</sup> Statement by Randy Schenauer, Delaware Valley Wholesale Florist, Inc., and The Society of American Florists, June 7, 2001.

additional *mandatory* wage payment obligations.” Ms. Owens termed the legislation “one-sided” and “a complete win for employers” while “conferring no new rights on employees.” It would allow employers, she argued, “to lengthen workers’ hours, cut workers’ pay, and avoid any risks associated with sales.”

Employers, Ms. Owens suggested, “would lose nothing” by passage of H.R. 2070. She stated that for qualifying workers (somewhere between an estimated 1.5 and 2.5 million), an employer could assign a fixed schedule 40 hour workweek. Then, with no minimum wage or overtime pay requirements, the employer could simply mandate additional hours of work without any additional pay at all. “In short,” she affirmed, “they would be working for free.” And, she added: “... workers have **no** protected right to refuse to work whenever their employers want them to, or for any number of hours their employers require.”<sup>71</sup> *Potentially*, she suggested, employers could “manipulate sales workers’ job duties and/or pay levels in order to take advantage of the new exemption.”<sup>72</sup>

**Mark-up and Report.** On June 27, 2001, over Democratic objections, the Workforce Protections Subcommittee voted to report H.R. 2070 to the full Committee on Education and the Workforce: 8 yeas to 6 nays.

One’s position with respect to the legislation would seem to depend, in some measure, upon whether one views the inside sales exemption as a gain or a loss for workers. That split was reflected in votes on two amendments to H.R. 2070, offered during mark-up.

First, Representative Owens, an opponent of the legislation, proposed that the pay threshold for employee exemption be increased. “They say we should treat these workers like professionals,” Representative Owens stated, “Fine. Let them be paid like professionals.”<sup>73</sup> Proponents of the legislation objected. Representative Isakson (R-GA) argued that a higher qualifying wage requirement would discriminate against low-wage entry-level workers. The Owens amendment was rejected on a party-line vote: 5 in favor and 7 opposed — Democrats in favor and Republicans opposed.

When introducing H.R. 2070, Representative Tiberi had stated that current law does not allow inside sales workers “the flexibility or the choice to work additional hours” even were they disposed to do so.<sup>74</sup> During mark-up, Representative Woolsey urged that the legislation be amended to “prohibit employers from requiring inside sales workers to work overtime without time-and-a-half payment unless those employees voluntarily consent to do so.” If proponents “insist” on eliminating overtime pay protections for inside sales workers, she said, “the very least we can do is be sure the overtime is voluntary.” The Woolsey amendment was rejected by a

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<sup>71</sup> Where workers are covered by a collective bargaining agreement, the situation may be different because they would have union protection. Ms. Owens noted, “Most workers, however, would have no such protection.”

<sup>72</sup> Statement by Christine Owens, AFL-CIO Public Policy Department, June 7, 2001.

<sup>73</sup> Bureau of National Affairs. *Daily Labor Report*, June 28, 2001, p. AA1.

<sup>74</sup> *Congressional Record*, June 6, 2001. p. E1036.

vote of 6 in favor and 7 opposed — Democrats in favor and Republicans in opposition.<sup>75</sup>

Following Subcommittee approval of the Tiberi/Andrews bill (again, along party lines), Representative Boehner affirmed that the bill “makes it easier for working Americans to participate fully in the opportunities of the 21<sup>st</sup> century economy.” He deemed the Subcommittee action, he stated, “a positive step forward for American employees.”<sup>76</sup>

No further action was taken on the measure. The bill died at the close of the 107<sup>th</sup> Congress.

## Questions and Implications

The movement to *update* the Fair Labor Standards Act, articulated by the industry-oriented Labor Policy Association, has won support from a range of employer groups. Although a new exemption from the FLSA with respect to inside sales employees is but a small part of a projected *modernization* package, it could affect a significant body of workers. The proposal, in one form or another, has been before the Congress at least since the 103<sup>rd</sup> Congress — and has re-emerged in the 107<sup>th</sup> Congress as H.R. 2070, proposed by Representative Tiberi with Representative Andrews. In June 2001, the House Subcommittee on Workforce Protections voted to report the measure to the full Committee on Education and the Workforce.

The hearings and debates thus far have presented a series of unresolved questions, some of which are touched upon below.

### Flexibility

The need for flexibility has been one of the main arguments in favor of H.R. 2070, i.e., that inside sales workers (like a great many other workers) would like to have more options with respect to their hours of work. The argument is made that sales work does not necessarily conform to an 8-hour day or to a 40-hour workweek. Some have suggested that workers need to be free to adjust their work hours to those of their clients — perhaps opting for a split shift, compressed work schedules, or flexiplace employment. Proponents of H.R. 2070 argue that current overtime pay requirements of the FLSA preclude such flexibility.

The FLSA (with several less stringent exceptions built into the Act) requires that time-and-a-half be paid for hours worked in excess of 40 in any single workweek.<sup>77</sup>

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<sup>75</sup> Bureau of National Affairs, *Daily Labor Report*, June 28, 2001. p. AA1.

<sup>76</sup> Press release, June 27, 2001, from the Committee on Education and the Workforce.

<sup>77</sup> Under the FLSA, the normal pre-overtime pay standard is the 40-hour workweek. An 8-hour daily work limitation (prior to the requirement that overtime be paid) was written into some of the industry codes under National Industrial Recovery Act (adopted in 1933 and (continued...))



Where low-wage workers are concerned, the cost of requiring them to work hours in excess of 40 per week may not be an effective deterrent to the practice.<sup>78</sup> Where workers are more highly paid, it can be a significant factor. That was the stated intent of Congress when it adopted the FLSA, i.e., to reduce in a systemic way, both for humane and for economic considerations, the hours that employees customarily worked.

Traditionally, it is the employer who schedules the hours that his employees will work. The pattern can be a traditional 9 to 5 arrangement. Or, the employer can establish a system of alternative work structures: flexitime, compressed work hours, split shifts, etc. Where there is a need, for example, for a worker to remain at the office on assignment through several extra hours on one day, a shorter work period can be scheduled for later in the week — or earlier in the week, if the need is anticipated. Should an inside sales worker need to take a telephone call sometime late in the evening *at home*, that can be arranged — *with employer approval* — and without violating the FLSA so long as work hours are compensated for in the normal way.<sup>79</sup> Within the context of 40 hours, any configuration of worktime is permitted: 5 days of 8 hours, 4 days of 10 hours, 2 days of 20 hours, etc. The choice rests with the employer. However, if the total of hours worked within a single work week exceeds 40, then *those hours worked in excess of 40* must be paid for on a time-and-a-half basis. If an employer opts for flexible work scheduling, there is nothing in the Fair Labor Standards Act to prevent such a policy.

## **An Antique Statute?**

The FLSA was enacted in 1938 in response to decades of labor-management conflict over conditions of work. Through that period (prior to 1938 and since), there has been socioeconomic evolution. New technologies have come into use.<sup>80</sup> There

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<sup>77</sup> (...continued)

declared unconstitutional in 1935). The provision was not incorporated within the FLSA.

<sup>78</sup> Among other factors, an employer must balance the cost of short, intermittent periods of overtime pay against the cost of hiring additional employees: recruitment, processing, training, non-wage compensation, etc. Where the regular rate of pay is relatively low, it may be more cost-efficient simply to pay the overtime penalty. Where overtime is a regular practice and may involve significant periods of work time, then the cost may induce an employer to hire additional help.

<sup>79</sup> Were an hourly-paid employee permitted to work at home (off the clock) and then expected to work at the office on the clock, that could pose problems; but concern with such practices was why Congress structured the requirements of the FLSA in the way that it did.

<sup>80</sup> Throughout consideration of the inside sales exemption, proponents have stressed the technological changes that have taken place in the world-of-work: faxes, e-mail, computers, etc. That a technology revolution has taken place seems clear. The debate, however, is whether this justifies creating a minimum wage and overtime pay exemption for inside sales workers.

Under Minority Views in H.Rept. 105-558, p. 16-17, for example, it is observed: “Technology has enabled employers to ensure that a sales person’s entire time at work is (continued...) ”

have been fluctuations in workforce demographics: of gender, of ethnicity, of age, of educational level. Society has changed and continues to evolve. During the period, the percentage of the workforce that was unionized rose — and, then, receded. But, through it all, the basic motivating elements of the labor-management relationship appear to have changed really very little.

Over the years, the FLSA has been anything but static. Some might even suggest it has been remarkably fluid. There have been eight rounds of general amendment of the statute: expansions (or contractions) of coverage, modification of existing provisions, and increases in the minimum wage rate. There have also been numerous precise single-issue amendments to the Act. Further, the Secretary of Labor has developed an extensive body of administrative rules and opinion letters through which to make the statute conform to the realities of the contemporary workplace. And during almost every session of Congress since 1938, there have been hearings on some aspect of the Act — often, multiple hearings. Thus, generic charges that the Act is *antique* or on a par with *the Dead Sea Scrolls* are highly contentious.

Arguments that the Act is in need of updating persist. Some provisions, it might be urged, are no longer used and could safely be eliminated. One might reconsider examination of the entire Section 13, for example, item by item, to ascertain if each of the exemptions from the provisions of the Act is still justifiable. Internal thresholds (for the small business exemption, for the *tip credit*, for exemption of executive, administrative and professional workers, etc.), some may argue, could be a focus of oversight. Such issues were extensively explored by the Minimum Wage Study Commission (1978-1981), its *Report* laying the foundation for a future congressional oversight of the Act.<sup>81</sup> As with most any statute, systematic review may be appropriate both for equity and for efficiency of administration.

## The Putative Beneficiaries

During the 1995 hearings on the inside sales legislation, it was observed that “employers in the name of their workers” were urging expansion of exemption from

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<sup>80</sup> (...continued)

spent directly in productive activity and thereby has enhanced an employer’s ability to earn a profit. That same technology cannot and should not serve as a basis for diminishing a worker’s income or requiring workers to work even longer hours .... The fact that more sales persons are now able to work inside and fewer must work outside is not a justification of eliminating overtime.”

There are some variations in language between H.R. 2888 and H.R. 2070 of the 105<sup>th</sup> and 107<sup>th</sup> Congresses, respectively. The most recent Committee report on this issue was H.Rept. 105-558. Since most of the concerns, pro and con, are of a general sort, reference is made here to the discussion contained in H.Rept. 105-558.

<sup>81</sup> See *Report of the Minimum Wage Study Commission*. Washington, U.S. Govt. Print. Office, 1981, in seven volumes. Volume IV deals specifically with exemptions.

the FLSA.<sup>82</sup> On this issue, the initiative appears to have been taken by industry. Although individual employees have appeared at hearings (speaking as individuals) *organized* workers have consistently appeared in opposition. Under H.R. 2070, *it is the employer who would be exempt* from having to pay minimum wages and overtime pay where his employees meet certain qualifying standards. However, advocates of changing the law often speak in terms of providing “flexibility” so that workers can “balance both their work/family needs and their ability to increase their earnings.” Opponents of changing the law, on the other hand, often argue that these changes would deprive workers of essential protections and real flexibility for family and personal development.

The case for enactment of H.R. 2070 is often made in terms of the benefits that it will provide to the inside sales workers — though it is also presented as a “win-win” situation: more profit for management and increased *opportunity* for the workers to earn more and to advance professionally. If one assumes that the workers will be able to make significant sales during those hours worked in excess of 40 per week (that is, sales that they could not have made within a 40 hour work period), then there may be benefits for those workers. Conversely, had management instituted a program of flexible and/or compressed scheduling (as the law now permits), might those sales have been made within a standard (flexible) 40 hour work week?

Although proponents of H.R. 2070 stress the need for enhanced flexibility *for workers*, scheduling remains a management prerogative. Were H.R. 2070 to be enacted, the exemption that it provides need not be utilized unless management deems it appropriate. The option rests with the employer.<sup>83</sup> Were the wage and hour constraints of the FLSA removed, the employer would have the right to direct employees to work extra hours (without pay and without overtime compensation) even where that might be inconvenient for the worker or in conflict with the worker’s non-work-related responsibilities: e.g., child or eldercare, university classes, etc.

The issue of worker “choice” was raised during Subcommittee mark-up (June 2001); and an amendment was offered to H.R. 2070 that would have guaranteed that extended hours of work would be permitted only with the *voluntary consent* of the worker. The amendment was voted down (6 yeas to 7 nays) with the proponents of H.R. 2070 standing in opposition.<sup>84</sup>

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<sup>82</sup> House Subcommittee on Workforce Protections, *Hearings on the Fair Labor Standards Act*, p. 473.

<sup>83</sup> H.Rept. 105-558, p. 9, dealing with H.R. 2888 of the 105<sup>th</sup> Congress, a similar proposal, explains: “Of course, the exemption is not mandatory and an employer may choose not to make employees eligible for the exemption.” Under Minority Views, p. 17, that same assurance is voiced in dissent: “... it is the employer, not the employee, who controls when and how long a worker may be required to work. Other than overtime pay provisions [of current law], nothing limits the hours an employee may be required to work.”

<sup>84</sup> A roughly parallel issue of recent Congresses (and now before the 107<sup>th</sup> Congress as H.R. 1982) has been the “comp time” legislation. As that measure developed, a core issue was insuring that acceptance of comp time *instead of overtime pay* would be voluntary — a question that has not been wholly resolved.

## A Need for Clarification?

As the inside sales legislation was being marked-up during the 105<sup>th</sup> Congress, Representative Owens queried: “Can anyone tell me how many workers would be affected if this legislation is enacted?”<sup>85</sup> Some may argue that the question remains to be answered with respect to H.R. 2070 of the 107<sup>th</sup> Congress.

The targeted body of workers would be “any employee employed in a sales position *if*” certain specified qualifying duty and wage-related conditions were met.<sup>86</sup> Keeping in mind that the Department of Labor would likely need to develop regulations through which to implement H.R. 2070 (were it to become law), it may be useful to review some of those qualifying conditions. For example, amplifying “if” would be:

“(A) the employee has *specialized or technical knowledge related to products or services being sold*;<sup>87</sup>

“(B) the employee’s sales are *predominantly made to persons—*

“(i) to whom *any employee occupying the sales position* has made previous sales; or

“(ii) without the employee having initiated the sales contact;

“(C) the employee has *a detailed understanding of the needs of those to whom the employee is selling*;

“(D) the employee *exercises discretion in offering a variety of products and services*; ...<sup>88</sup> (Italics added.)

Each of the phrases italicized here would likely need to be defined by the Department of Labor for administrative purposes. While the qualifying factors may be entirely appropriate, what do they mean? How might they be interpreted by a small businessperson, for example, in Boise — simply trying to understand and to comply

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<sup>84</sup> (...continued)

Under Minority Views, H.Rept. 105-558, p. 18, it is affirmed: “H.R. 2888 [of the 105<sup>th</sup> Congress] creates a very powerful economic incentive for an employer to require an employee to work as many hours as possible and thus diminishes rather than enhances workers’ flexibility. If the intent of this legislation is to benefit workers, then the choice to work overtime must belong to the worker.”

<sup>85</sup> Statement of Representative Owens, March 5, 1998. See also H.Rept. 105-558, p. 15.

<sup>86</sup> Italics have been added here for clarity of reference.

<sup>87</sup> H.Rept. 105-558, p. 7, dealing with H.R. 2888 of the 105<sup>th</sup> Congress, a similar proposal, explains: “The exemption is not intended for employees who merely take orders over the telephone or utilize a prepared script, such as, telemarketing sales employees. This type of an employee would not meet the requirement for possessing specialized or technical knowledge about the products or services being sold.”

Still, under Minority Views, p. 20, it is charged: “... H.R. 2888 provides no basis for assessing or determining what constitutes specialized or technical knowledge. Nor are the terms sufficiently clear as to lend themselves to a common understanding.”

<sup>88</sup> The need for further clarification of this language is discussed in the Minority Views in H.Rept. 105-558, p. 20.

with the law? Or, for that matter, what might the provisions mean to a worker attempting to determine his or her rights under the statute? And, as important, how would the Department define their meaning? Some have argued that these provisions lend themselves, almost of necessity, to litigation.<sup>89</sup>

Beyond interpretation of H.R. 2070's provisions *per se*, substantive questions may arise as consideration proceeds. For example, since it is stated that the legislation targets a group of highly professional salespeople engaged in sophisticated work, why should they not be able to take the initiative in making sales contacts? Are they expected to await a potential client's call? While waiting, what other work might they be expected (or allowed) to perform — while in an unpaid status?<sup>90</sup> What are the implications of limiting such high quality sales professionals to making sales, “predominantly,” to repeat customers?

The pay standard for exemption may present similar questions. Again, H.R. 2070 defines an exempt worker as “any employee employed in a sales position *if—*”

“(E) the employee receives—

“(i) base compensation, determined without regard to the number of hours worked by the employee, of not less than an amount equal to one and one-half times the minimum wage in effect under Section 6(a)(1) [the federal minimum wage] multiplied by 2,080; and

“(ii) additional compensation that is based upon each sale attributable to the employee;

“(F) the employee's additional compensation based upon sales attributed to the employee is not less than 40 percent of the amount described in subparagraph (E)(i);

“(G) the employee receives a rate of compensation based upon each sale attributable to the employee which is beyond sales required to reach the compensation required by subparagraph (F) which rate is not less than the rate on which the compensation required by subparagraph (F) is determined; and

“(H) the rate of base compensation described in subparagraph (E)(i) for any employee who did not work for an employer for an entire calendar year is prorated to reflect annual compensation which would have been earned if the employee had been compensated at the same rate for the entire calendar year; ...”

Could an average employer, attempting to utilize the exemption provided by H.R. 2070, feel confident that he was within the law?<sup>91</sup> Would the average worker

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<sup>89</sup> Under Minority Views in H.Rept. 105-558, p. 20, the opponents of H.R. 2888 [of the 105<sup>th</sup> Congress] state: “The more prosaic issues raised by the legislation are a litigator's dream.”

<sup>90</sup> Here, again, we are dealing with hours that are worked in excess of 40 per week and, therefore, for which the employee would only be compensated through commissions on sales.

<sup>91</sup> Under Minority Views in H.Rept. 105-558, p. 20, it is argued: “Even after the initial (continued...) ”

understand, sufficiently, whether or not his or her rights were being respected under these provisions?<sup>92</sup> What new complexities might H.R. 2070 add to the burden of the Department of Labor in its responsibility for enforcing compliance with the Fair Labor Standards Act? Some may believe that these issues could be effectively resolved through the process of promulgating regulations by the Department of Labor. Others believe they would invite litigation.

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<sup>91</sup> (...continued)

round of litigation, the obligation of maintaining records sufficient to demonstrate that employer was justified in withholding overtime pay would seem substantial and the issue of just what records would be sufficient to meet that burden is likely to remain murky.”

<sup>92</sup> The targeted group of workers would seem to be non-union employees. Where a union was involved, these matters would presumably be addressed in a collectively bargained agreement; but, in the absence of collective bargaining (and trade union representation), such interpretation would be left to the employer and the individual workers – with the Department of Labor somewhere in the background.