

# CRS Report for Congress

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## **The Fair Labor Standards Act: Overtime Pay Issues in the 108<sup>th</sup> Congress**

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William G. Whittaker  
Specialist in Labor Economics  
Domestic Social Policy Division

# The Fair Labor Standards Act: Overtime Pay Issues in the 108<sup>th</sup> Congress

## Summary

The Fair Labor Standards Act (FLSA) is the primary federal statute dealing with the issue of overtime pay. In the 108<sup>th</sup> Congress, numerous bills have been introduced that would alter the current system of overtime pay protection. Proposed administrative rulemaking in this area by the Department of Labor (DOL) has also sparked legislative initiatives. This report briefly examines the various proposals, legislative and administrative, and tracks their current status.

In general, the FLSA, enacted in 1938 and variously modified through the years, requires that employers pay workers 1½ times their regular rate of pay (time-and-a-half) for hours worked in excess of 40 per week. The act imposes no ceiling upon the number of hours an employee can be required to work but, for those hours worked in excess of 40 per week, a rate of time-and-a-half must be paid. Within a single workweek, any arrangement of workhours is permitted including flexible and compressed scheduling and shifting workhours from one day to another. No penalty is imposed *unless* the total number of hours worked exceeds 40 in a single week.

Through the years, the overtime pay requirement of the FLSA has been contentious. Some employers, seeking to keep labor costs to a minimum, have resisted payment of overtime rates (and of minimum wages, also required under the FLSA). Proposals to alter the overtime pay requirement, at least during recent years, have often been presented in terms of *flexibility*, *modernization* of an old and dated statute, and *a family friendly workplace*. Supporters of the overtime pay requirements of the act point to humane concerns (the opportunity for employees to rest, learn, rear families, and participate in the democratic process), to the hazards of long hours of work that may endanger both individual workers and the general public, and to the need to spread available work during periods of economic downturn. Workers also benefit from the higher earnings resulting from the overtime pay penalty imposed on employers.

The general requirements of the FLSA are modified by a series of exemptions. Some of these are broad: e.g., Section 13(a)(1) which exempts certain *bona fide* executive, administrative and professional workers from overtime pay and minimum wage protection. A proposal by DOL to restructure the Section 13(a)(1) exemption has produced controversy — and congressional concern. In addition, there have been numerous proposals, normally from industry, to modify the overtime pay provisions of the act with respect to certain more narrowly defined groups of workers: licensed funeral directors and embalmers, computer services workers, persons engaged in sales of fireworks and in harvesting of Christmas trees, among others.

This report examines the various legislative initiatives of the 108<sup>th</sup> Congress that deal with overtime pay, placing them within an historical and public policy context. Among bills, currently pending, that deal with overtime pay are: H.R. 1119, H.R. 1996, H.R. 2065, H.R. 2263, H.R. 2665, H.R. 4396, S. 237, S. 292, S. 317, S. 495, S. 1485, S. 1611, and S. 1637.

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# The Fair Labor Standards Act: Overtime Pay Issues in the 108<sup>th</sup> Congress

## Most Recent Developments

The overtime pay provisions of the Fair Labor Standards Act (FLSA) of 1938, as amended, have long been a subject of controversy. Numerous proposals have been introduced in the 108<sup>th</sup> Congress that would modify (or, in some cases, prevent modification of) the act's overtime pay requirements.

On March 31, 2003, the Department of Labor (DOL) proposed revision of the administrative regulations governing implementation of FLSA Section 13(a)(1): an exemption of certain *bona fide* executive, administrative, and professional employees from the act's overtime pay and minimum wage protections. On July 10, 2003, during House consideration of the Labor, Health and Human Services, and Education Appropriations bill (H.R. 2660), Representative David Obey (D-WI) offered an amendment to block DOL from moving forward with the proposed rule. The Obey amendment was defeated by a vote of 210 ayes to 213 nays. A roughly comparable amendment was offered by Senator Tom Harkin (D-IA) during Senate consideration of H.R. 2660. On September 10, 2003, the Harkin amendment was approved by a vote of 54 ayes to 45 nays. Subsequently, on October 2, 2003, Representative Obey moved to instruct the House conferees on H.R. 2660 to insist upon acceptance of the Harkin amendment — and the House concurred by a vote of 221 ayes to 203 nays. However, an omnibus appropriations bill (H.R. 2673), reported instead of H.R. 2660, was silent on the overtime pay issue. The House approved H.R. 2673 on December 8, 2003; the Senate, January 22, 2004. The measure was signed by the President on January 23, 2004 (P.L. 108-199). Since H.R. 2673/P.L. 108-199 did not contain the Harkin restriction, DOL was free to move forward with the rule.

On March 3, 2004, S. 1637 (the “Jumpstart Our Business Strength (JOBS) Act,” a tax and trade bill) was called up in the Senate. Again, Senator Harkin proposed an amendment that would, if adopted, restrict the Department from moving forward with the final rule revising the definition of *bona fide* executive, administrative, and professional employees for Section 13(a)(1) exemption purposes. After extended debate, the Harkin amendment was agreed to on May 4, 2004 (52 yeas to 47 nays<sup>1</sup>).

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<sup>1</sup> The Section 13(a)(1) exemption is governed by two essential tests: (a) a salary threshold and (b) a duties test. The Harkin amendment would allow the Secretary of Labor to raise the earnings threshold for determination of exempt status but would prevent the Secretary from redefining the concepts *executive*, *administrative*, and *professional*. At the same time, an amendment proposed by Senator Judd Gregg (R-NH), listing certain nonexempt categories of work, was adopted by a vote of 99 yeas with one Senator not voting.

Meanwhile, Senator Arlen Specter (R-PA) introduced S. 1611, legislation that provides for appointment of a blue-ribbon commission to review the overtime pay requirements of Section 13(a)(1), together with other overtime pay provisions of the FLSA. Under the Specter proposal, the Department's final rule on Section 13(a)(1) would be held in abeyance pending a report from the commission.

With no legislative restraint having been adopted, the Department of Labor issued its final rule on Section 13(a)(1) on April 23, 2004.<sup>2</sup> *Absent any action by the Congress to overturn or to suspend the final rule, it will take effect the final week in August 2004.*

On March 12, 2003, the House Subcommittee on Workforce Protections conducted a general hearing on the issue of "comp time" (substitution of leave at a later time for cash payment for overtime hours worked). On April 3, 2003, the Subcommittee marked-up and voted to report *comp time* legislation proposed by Representative Judy Biggert (R-IL.): H.R. 1119. On April 9, 2003, the full Committee on Education and the Workforce marked-up H.R. 1119 and voted to report it for floor consideration. Each vote was along party lines: Republicans in support of the *comp time* proposal and Democrats in opposition. H.R. 1119 was reported (H.Rept. 108-127) on May 22, 2003. No further action has been taken on H.R. 1119. Senator Judd Gregg (R-NH) proposed a companion measure (S. 317), but it has not been acted upon.<sup>3</sup>

## Introduction

The FLSA is an umbrella statute that deals with a series of labor standards issues. These fall, roughly, into three categories: *first*, minimum wage (Section 6 of the act), *second*, overtime pay (Section 7) and, *third*, child labor (Section 12). Section 3 of the act defines the concepts used throughout the statute and, thereby, limits or qualifies its wage/hour and child labor provisions. Section 13 provides a body of exemptions and/or special wage/hour treatment for segments of industry and/or groups of workers. While the act is often treated as an integrated unit, it can also be approached in terms of its three major components or sub-units of each.

Under the FLSA, Congress has established a basic workweek (generally, 40 hours) and has mandated payment of overtime rates (1½ times a worker's *regular rate* of pay) for hours worked in excess of 40 hours per week. For FLSA purposes, each workweek is treated as a separate self-contained unit. Within that unit, any arrangement of hours is permitted, and scheduling of hours of work is the prerogative of the employer. Workhours arrangements can be mandated unilaterally or the decision can be shared, either informally or through collective bargaining. But,

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<sup>2</sup> *Federal Register*, Apr. 23, 2004, pp. 22122-22274.

<sup>3</sup> In addition to its *comp time* provision, S. 317 has provisions dealing with (a) restructuring the workweek on an 80 hour bi-weekly basis and (b) a "flexible credit hours" program — banking of overtime hours worked.

ultimately, the decision rests with the employer — taking into consideration the requirements of the work to be performed.

Many questions have been raised with respect to overtime pay. How should the overtime pay requirements of the act be structured? Under current law, are such requirements sufficiently flexible? Should workhours regulation and overtime pay requirements be, in effect, a core labor standard associated with employment — protecting employees from overwork and abuse? And, if the overtime pay *penalty* (levied against employers) is intended to discourage overwork and abuse, should workers classified as “executive,” “administrative,” or “professional” be exempt from such protection? How ought such concepts as *executive*, *administrative* and/or *professional* be defined? To what extent should the overtime pay requirement be modified by economic considerations within particular industries? When calculating a worker’s *regular rate* for overtime pay purposes (e.g., 1½ times a worker’s *regular rate*), should only the *base rate* be taken into account? How should bonuses or incentive pay be treated for such calculations? Such issues have been the focus of recent legislative proposals.

This report deals only with overtime pay unless another aspect of the act (notably, minimum wage) is joined with the overtime pay requirement. Other components of the FLSA are described and analyzed in separate CRS products.

## Evolution of Workhours Regulation

Where workers are covered under FLSA overtime pay provisions (Section 7 of the act), an employer must pay his employee 1½ times the employee’s *regular rate* (time-and-a-half) for hours worked in excess of a weekly standard — now, 40 hours. Exceptions have been built into the act responding both to economics and to public policy concerns.

When considering the overtime pay requirements of the act, several elements ought to be kept in mind. *First*. There is no daily limitation, under the FLSA, upon the number of hours that can be worked by an employee: just a weekly standard.<sup>4</sup> *Second*. There is no legal cap on the number of hours a person can work within a week so long as the worker is paid at least time-and-a-half for those hours worked in excess of 40. *Third*. The act allows flexibility. Within the context of a 40-hour workweek, any daily arrangement of workhours is permitted: i.e., five days of 8 hours each, four days of 10 hours each, two days of 20 hours each, etc. And, if the employer allows it, a worker can make use of a “comp time” option — within the

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<sup>4</sup> In some cases, for reasons of public health and safety, shift duration limits may be imposed, but these are not part of the FLSA.

context of a 40-hour workweek.<sup>5</sup> The alternative work hours/flexibility option rests with the employer.<sup>6</sup>

In most sessions of Congress since 1938, proposals have been introduced that would have modified the FLSA's overtime pay standards. The 108<sup>th</sup> Congress has been no exception. (See **Table 1.**)

## Shifting Priorities

Through the years, movement toward a shorter workweek has passed through a series of stages with shifting motivational emphases. These shifts of policy have produced varied alignments both of workers and of employers.

During the 19<sup>th</sup> and early 20<sup>th</sup> centuries, various worker/trade union/reform groups campaigned first for the 10-hour workday and then for an 8-hour workday.<sup>7</sup> These demands were voiced largely (though by no means exclusively) in humane terms. Extended hours of work were deemed hazardous to an employee's physical and moral health, depriving him (or her) of opportunities for education, proper rearing of children, and participation in the democratic process. Excessively long hours of work in factories, mines, and fields, it was argued, left workers broken in health and spirit — and, by extension, similarly affected succeeding generations.<sup>8</sup>

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<sup>5</sup> For example, a worker (with employer permission) can take off 2 hours on Tuesday and work 2 hours extra on Friday. What the worker, normally, cannot do is move hours of work from one week to another. Flexibility is within the context of the 40-hour work week.

<sup>6</sup> State laws may (and often do) provide somewhat different standards. Normally, the higher standard (that most beneficial to the worker) takes precedence. Further, higher wage and hour (overtime pay) standards may result from collective bargaining agreements. However, the requirements of the FLSA *may not be reduced* through collective bargaining.

<sup>7</sup> For a general overview, see Marion C. Cahill, *Shorter Hours: A Study of the Movement Since the Civil War* (New York: Columbia University Press, 1932).

<sup>8</sup> The rationale for workhours regulation is discussed in "Shorter Hours for Men as a Public Welfare Measure," *Monthly Labor Review*, June 1916, pp. 23-29. Organized labor's approach to workhours reduction is explained in: George McNeill, *The Eight Hour Primer: The Fact, Theory and the Argument* (Washington: American Federation of Labor, 1899); and in Samuel Gompers, *The Eight-Hour Workday: Its Inauguration, Enforcement and Influences* (Washington: American Federation of Labor, undated but published in pamphlet form at the turn of the century).

**Table 1. Overtime Pay Proposals of the 108<sup>th</sup> Congress**

Bill no.	Sponsor	Action beyond referral	Impact	Other components
H.R. 745	Stark	—	Limits mandated overtime for nurses serving Medicare patients, with other related provisions	—
H.R. 1119	Biggert	Hearing held; reported, H.Rept. 108-127; placed on Union Calendar, No. 64 <sup>a</sup>	Provides a “comp time” option for private sector employers and their employees	—
H.R. 1996	Wilson, Joe	—	Exempts certain computer-related workers from minimum wage and overtime pay <sup>b</sup>	—
H.R. 2065	Tiberi	—	Exempts employees who are licensed funeral directors and embalmers <sup>c</sup>	—
H.R. 2263	Sessions	—	Exempts employees engaged in seasonal sale of fireworks	—
H.R. 2660	Regula	Passed House and Senate. See H.R. 2673, P.L. 108-199	Language limiting DOL option on Section 13(a)(1) overtime pay rulemaking dropped from conference report, passed by House and Senate <sup>d</sup>	Appropriations for DOL and related agencies
H.R. 2660, H.Amdt. 222	Obey	Defeated in House (July 10, 2003)	Prevents DOL from administratively expanding overtime pay exemption under the FLSA <sup>d</sup>	—
H.R. 2660, S.Amdt. 1580	Harkin	Approved by Senate (September 10, 2003), dropped in conference	Prevents the DOL from administratively expanding the overtime pay exemption under Section 13(a)(1) of the FLSA <sup>d</sup>	—
H.R. 2665	King	—	Prevents the DOL from administratively expanding overtime pay exemption under the FLSA <sup>d</sup>	—
H.R. 3174	Payne	—	Adjusts coordination of FLSA with Motor Carrier Act of 1935	—
H.R. 4396	DeMint	—	Exempts certain construction engineering and design professionals	—
S. 237	Graham (SC)	—	Exempts certain construction engineering and design professionals	Minimum wage exemption
S. 292	Graham (SC)	—	Exempts employees who are licensed funeral directors and embalmers <sup>c</sup>	Minimum wage exemption



Bill no.	Sponsor	Action beyond referral	Impact	Other components
S. 317	Gregg	—	Permits private sector employers to offer their employees <i>compensatory time off</i> and certain work hours alternatives to cash payment for overtime	—
S. 373	Kennedy	—	Limits mandated overtime for nurses serving Medicare patients, with other related provisions	—
S. 495	Graham (SC)	—	Exempts certain computer-related workers from minimum wage and overtime pay <sup>b</sup>	—
S. 991	Inouye	—	Limits mandated overtime for nurses serving Medicare patients, with other related provisions	—
S. 1485	Kennedy	—	Prevents DOL from administratively expanding the overtime pay exemption under Section 13(a)(1) of the FLSA <sup>d</sup>	—
S. 1611	Specter	—	Provides for a commission to review overtime pay policy; freezes DOL administrative action pending commission report	—
S. 1637, S.Amdt. 2881	Harkin	Offered March 22, 2004; 1 <sup>st</sup> cloture vote fails, 51 yeas to 47 nays (March 24, 2004); second cloture vote fails, 50 yeas to 47 nays (April 7, 2004). Bill recommitted with instructions (April 8, 2004).	Prevents the DOL from administratively expanding the overtime pay exemption under Section 13(a)(1) of the FLSA <sup>d</sup>	Broad legislative package dealing with tax, trade and related matters
S. 1637, S.Amdt. 3107	Harkin	Offered May 3, 2004; agreed to by Senate, May 4, 2004: 52 yeas to 47 nays.	Prevents the DOL from administratively expanding the overtime pay exemption under Section 13(a)(1) of the FLSA <sup>d</sup>	—
S. 1637, S.Amdt. 3111	Gregg	Offered May 4, 2004; agreed to by Senate, May 4, 2004: 99 yeas to ) nays.	Lists certain categories of work which could be expected to be covered by overtime pay protection notwithstanding Section 13(a)(1).	—

a. CRS Report RL31875, *Compensatory Time vs. Cash Wages: Amending the Fair Labor Standards Act*, by William Whittaker.

b. CRS Report RL30537, *Computer Services Personnel: Overtime Pay Under the Fair Labor Standards Act*, by William Whittaker.

- c. CRS Report RL30697, *Funeral Services: The Industry, Its Workforce, and Labor Standards*, by William Whittaker.
- d. CRS Report RL32088, *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, by William Whittaker. Restraints upon DOL's authority to issue a Section 13(a)(1) overtime regulation have been attempted in connection with other legislation as well — as discussed in the report. See also CRS Report RL32323, *The Fair Labor Standards Act: Defining "Professional" for Overtime Pay Purposes under Section 13(a)(1)*, by William Whittaker. (Archived; available from the author.)

Following World War I and, increasingly during the Great Depression, the impetus for reduced hours of work seemed to shift. While social and humane concerns continued to be emphasized by 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. Various legislative initiatives — daily hours restrictions, a 30-hour workweek, etc. — were urged until, in 1938, Congress adopted the Fair Labor Standards Act. Under the FLSA, Congress dropped the concept of daily hours restraints and opted, instead, for what would become a 40-hour standard workweek.<sup>9</sup> By the end of World War II, the 40-hour workweek had largely become the norm. Periodically, organized labor suggested further reduction, but no change was effected. In the late 1970s, a final campaign for a shorter workweek was initiated; but, following three days of hearings by the House Subcommittee on Labor Standards in 1979, the campaign gradually ended.<sup>10</sup>

With the passage of time, fewer persons were employed who had directly experienced the economic turmoil of the Great Depression. For younger workers, the wage/hour protections afforded by the FLSA came increasingly to be taken as *a given*: they had become standard and accepted practice. The demographics of the workforce had changed. More workers were better educated — and women had begun to have enhanced workforce attachment. By the 1960s, a new movement had been commenced for *humanization* of the world-of-work and for *flexibility*.<sup>11</sup> In legislative form, the initiative was two-fold: alternative work scheduling for federal employees and workhours flexibility for employees of state and local governments. In the private sector, a significant number of employers instituted flexible and compressed scheduling — both as a benefit for their employees and because it seemed a useful tool for structuring work.

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<sup>9</sup> Concerning this period, see Elizabeth Brandeis, "Organized Labor and Protective Labor Legislation," in Milton Derber and Edwin Young, eds., *Labor and the New Deal* (Madison: The University of Wisconsin Press, 1961), pp. 193-237.

<sup>10</sup> See Gary Fink, ed., *AFL-CIO Executive Council Statements and Reports, 1956-1975* (Westport, Conn.: Greenwood Press, 1977), pp. 768, 986-988; and Ronald G. Ehrenberg, and Paul L. Schumann, *Longer Hours or More Jobs? An Investigation of Amending Hours Legislation To Create Employment* (Ithaca: Cornell University Press, 1982).

<sup>11</sup> Among the earlier studies of workforce change in the 1960s and later were Riva Poor, *4 Days, 40 Hours: Reporting a Revolution in Work and Leisure* (Cambridge: Bursk and Poor Publishing, 1970); and Harold L. Sheppard, and Neal Q. Herrick, *Where Have All the Robots Gone? Worker Dissatisfaction in the '70s* (New York: The Free Press, 1972).

In 1978, Congress passed legislation that provided for increasing part-time work opportunities in the federal sector (an option thought to be favored by working mothers) and, separately, allowed flexible and “compressed” workhours in federal agencies. These measures permitted a wide variation in workhours structuring and flexibility — but they did so within the context of federal civil service law and under the general oversight of the Congress.<sup>12</sup>

Beginning in 1966, state and local government employees had gradually been brought under the FLSA, but these extensions of coverage had been litigated and it was not until the Supreme Court’s decision in *Garcia v. San Antonio Metropolitan Transit Authority* (469 U.S. 528 (1985)) that the issue was decided. Like some private sector employers, state and local governments had resisted coverage and had argued that if the statute were applied without modification, the public agencies (and, by extension, the public) would suffer financially. Thus, in late 1985 after the *Garcia* decision, Congress adopted special legislation allowing state and local government employers to utilize a “comp time” option. Congress also set forth detailed conditions under which the option might be implemented. As in the case of federal workers, the implementing agencies were normally permanent entities, were governed by civil service regulations, and were under general oversight of a legislative body.<sup>13</sup>

## Policy and Structure

Some viewed the movement for alternative work scheduling as an erosion of labor standards that had been developed through years of bargaining and legislative effort. Others, however, argued that the changing character of work and of the workforce had rendered the wage/hour laws of the 1930s obsolete: that the requirements of 1930s legislation should no longer be regarded as inviolate. *Flexibility* became the new by-word. And, almost immediately, the question was raised: If flexibility is appropriate for federal and state and local public employees, why not extend it to workers in the private sector?<sup>14</sup>

In the context of the FLSA, overtime pay requirements were viewed by Congress *as a penalty* that imposed a cost upon employers in order to encourage them not to schedule workhours in excess of 40 per week. They were intended to have a cost for employers. The requirement or penalty was not considered a mechanism to raise the wages of workers — though it may have had that effect where

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<sup>12</sup> P.L. 95-390 and P.L. 95-437. Legislation was necessary, in part, to set aside prior federal 8-hour daily limitations as they affected direct federal employees.

<sup>13</sup> P.L. 99-150. See also CRS Report 96-570, *Federal Regulation of Working Hours: An Overview Through the 105<sup>th</sup> Congress*, by William G. Whittaker.

<sup>14</sup> Some have argued that public and private work environments are essentially different. The former are stable, for the most part, and employees work within the context of civil service rules and under legislative oversight. In the private sector, employer/employee relations are diverse. In some cases, employment is stable, work patterns carefully structured, and trade union influence may be strong. But, in others, employee turnover may be high, employers may easily move in and out of business, and the general context may be determinedly non-union.

employers have found it opportune to pay time-and-a-half rather than to hire additional workers. For some workers who are able, conveniently, to work more than 40 hours a week, overtime pay may be economically advantageous. For others whose personal lives may be less flexible (parents with small children, persons responsible for eldercare, students with rigid academic schedules), extended hours of work, even with extra pay, may not be welcome. Some may simply value free time more highly than additional income. And, extended hours, even in modern work environments, may increase the risk of accident or work-related impairment — and endanger clients or the public.

Through the years, many employers have opposed overtime pay requirements. Cost is one obvious reason. Absent an overtime pay requirement, many employers would be able to engage workers through any number of hours at straight time wages. But, there is another side to the issue. Where fringe benefits are a large share of total compensation, payment of overtime rates may be cheaper than hiring additional workers. (This has led some to argue that an increase in the overtime rate to double time or higher may now be required if the penalty is to be effective.) Further, employers have been concerned with control of their establishments: i.e., *management's right to manage*. Work scheduling, traditionally, has been an employer prerogative and some view legislated wage/hour requirements as an intrusion upon that right.

Speaking generally (and with many exceptions), employers and employees have been split on the issue of overtime pay regulation. Workers have often urged an expansion of coverage and a strengthening of protections. Conversely, employers have often called for less public restraint upon their *right to manage* (to run their business as they deem best) — allowing them the opportunity to maximize profit.

## **Section 13(a)(1): The *Executive, Administrative and Professional* Exemption**

On March 31, 2003, the Department of Labor proposed revision of the rule governing implementation of Section 13(a)(1) of the Fair Labor Standards Act. The response was quick and voluminous: over 70,000 comments were submitted to the Department. The initiative became a cause celebre in the media, sparked legislative action both in the House and Senate, and produced discussion of a possible Presidential veto.

### **The Andrews Rule and Its Evolution**

Section 13(a)(1) provides that the minimum wage and overtime pay requirements of the FLSA will not apply to:

- (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are *defined and*

*delimited from time to time by regulations of the Secretary ....*) (Emphasis added.)

Congress had offered the Secretary little guidance. The essential concepts were not defined in the statute and were little discussed during the 1937-1938 hearings and floor debates. On October 19, 1938, Wage and Hour Administrator Elmer F. Andrews released the regulation governing the executive, administrative and professional (EAP) exemption. The regulations consisted of two columns in the *Federal Register* — including introductory and explanatory comment.<sup>15</sup>

Through the years, DOL has expanded upon the Andrews regulation and the concept of *bona fide* would come to include, essentially, two tests. *First*, was the earnings or salary threshold. Was the targeted executive, administrative or professional (EAP) employee paid at a level that one might equate with executive, administrative or professional status? *Second*, did the employee perform duties that were consistent with work one might associate with an executive, administrator or professional? And, as an adjunct question, did he or she perform such duties as his or her primary responsibility through the major part of his or her hours of work. Other refinements and/or qualifying factors were gradually added.

Up until the 1970s, the earnings threshold had been increased periodically to take into account changes in the economy. In 1975, DOL set the thresholds *on an interim basis* at \$155 per week (\$8,060 per year) for an executive or administrator; \$170 per week (\$8,840) for a professional. They have not been raised since — even though the federal minimum wage would gradually rise to an annualized figure of \$10,712. The EAP thresholds had become essentially irrelevant; but, as the value of the threshold declined, an ever increasing segment of the workforce could be classified as minimum wage and overtime pay exempt — at least insofar as the earnings threshold was concerned. Thus, the duties test became critical.

## **A New Rule by the Bush Administration**

On March 31, 2003, the Wage and Hour Administration proposed a major revision of the regulation governing implementation of Section 13(a)(1). The proposal had a double thrust. It raised the earnings thresholds and created a new upper threshold for highly compensated workers.<sup>16</sup> The latter, if they engaged in any work that could be classified as executive, administrative or professional, would be presumptively exempt. At the same time, the Administration's proposal redefined the concepts of executive, administrative and professional in terms of the duties each was expected to perform in order to be deemed exempt.

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<sup>15</sup> *Federal Register*, Oct. 20, 1938, p. 2518.

<sup>16</sup> ***Under the proposed rule***, the earnings threshold below which one would automatically be nonexempt (protected by FLSA standards) was \$425 per week (\$22,100 per year) for each of the categories. The threshold above which one might be presumptively exempt was to be set at \$65,000 annually. These threshold levels would be raised in the final rule.

Precisely how many workers would have been affected by the proposed rule was unclear; estimates rest upon one's assumptions and analytical methodology.<sup>17</sup> For employers, generally, a low compensation threshold could be viewed as preferable. It would allow employers, on that basis at least, to exempt a greater number of workers from minimum wage and overtime pay. But, others have questioned whether a low threshold would unjustifiably expand the EAP exemption — and whether it would be consistent with the purposes of the FLSA and the concepts of executive, administrative and professional?

While some argued that the definitions incorporated within the proposed rule were vague and permissive of a range of interpretations, others (primarily from the industry/employer community) lauded the Department for bringing the Section 13(a)(1) regulation into the 21<sup>st</sup> Century.<sup>18</sup> The rule touched off opposition both from the public and within the Congress. In excess of 70,000 pieces of testimony were received by the Department during the comment period on the proposed rule.

On April 23, 2004, DOL published its final rule.<sup>19</sup> The Department had made limited revisions, emphasizing that it had responded to comment. The lower threshold was raised to \$23,660. Below that level, workers were guaranteed overtime pay protection. The upper threshold, for *highly compensated* employees, was set at \$100,000 — above which workers were presumptively exempt, assuming they performed some EAP functions. It is the status of the middle group, earning between \$23,660 and \$100,000, that is, perhaps, most contentious. The three primary concepts — executive, administrative, and professional — were restructured as were the collateral provisions upon which these definitions had come to rest.

The final rule is scheduled to take effect during the last week of August 2004 — absent any restraint imposed by Congress or a policy shift on the part of the Department.

**Reaction to the Proposed Rule.** Strong feelings surfaced on each side of the issue and, almost immediately after publication of the proposed rule (March 31, 2003), Congress became actively involved.

- On July 10, 2003, during House consideration of the Department of Labor appropriations bill (H.R. 2660), an effort was made by Representative David Obey (D-WI) to block implementation of the proposed EAP rule through a funding restriction. The Obey proposal was defeated by a vote of 210 ayes to 213 nays.<sup>20</sup>

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<sup>17</sup> See U.S. Department of Labor, News Release, Mar. 27, 2003; and Ross Eisenbrey and Jared Bernstein, *Eliminating the Right to Overtime Pay*, Briefing Paper, Economic Policy Institute (Washington, D.C.: spring 2003), p. 2.

<sup>18</sup> For the proposed rule and a DOL explanation of its purposes, see *Federal Register*, Mar. 31, 2003, pp. 15560-15597.

<sup>19</sup> *Federal Register*, Apr. 23, 2004, pp. 22122-22274.

<sup>20</sup> *Congressional Record*, July 10, 2003, pp. H6568-H6571, and pp. H6579-H6580.

- On September 10, 2003, by a vote of 54 yeas to 45 nays, the Senate approved an amendment to H.R. 2660 offered by Senator Tom Harkin (D-IA) which would have restricted the ability of the Secretary to proceed with the proposed regulation.<sup>21</sup>
- On October 2, 2003, the House essentially reversed its earlier stand and approved a motion by Representative Obey to instruct the conferees on H.R. 2660 to insist on retention of the Senate (Harkin) amendment regarding overtime pay. The vote was 221 yeas to 203 nays.<sup>22</sup>

Instead of action on H.R. 2660, an omnibus appropriations bill (H.R. 2673) was reported that, *inter alia*, was silent on the overtime pay issue. Called up in the House on December 8, 2003, the omnibus measure was approved by a vote of 242 yeas to 176 nays.<sup>23</sup> Senate action was deferred until the second session of the 108<sup>th</sup> Congress; on January 22, 2004, following a heated debate focusing on the overtime question, the Senate approved the omnibus bill by a vote of 65 yeas to 28 nays — without an overtime pay provision. DOL was free to proceed with the Section 13(a)(1) regulatory changes.<sup>24</sup>

There were other patterns of reaction. On July 31, 2003, Senator Arlen Specter (R-PA) convened a hearing of the Senate Appropriations Subcommittee on Labor, Health and Human Services, and Education in an effort to reach common ground between the Department and critics of the proposed rule.<sup>25</sup> The hearing produced sharply conflicting perspectives. Ross Eisenbrey, speaking for the labor-oriented Economic Policy Institute, argued that the DOL had seriously underestimated the likely adverse impact of the rule.<sup>26</sup> Wage/Hour Administrator Tammy McCutchen conceded that some workers would be reclassified to exempt status, but argued that the impact would be slight. “We have no intention of expanding the exemptions,” she said.<sup>27</sup>

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<sup>21</sup> *Congressional Record*, Sept. 10, 2003, p. S11269. See also the Bureau of National Affairs, *Daily Labor Report*, July 25, 2003, p. A4; Sept. 4, 2003, p. A6; Sept. 8, 2003, pp. A4-A5; and Sept. 11, 2003, pp. AA1-AA2.

<sup>22</sup> *Congressional Record*, Oct. 2, 2003, p. H9166. See also CRS Report RL32088, *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, both by William G. Whittaker.

<sup>23</sup> *Congressional Record*, Dec. 8, 2003, p. H12845.

<sup>24</sup> On July 8, 2003, Representative Peter King (R-NY) had introduced H.R. 2665, legislation to restrict DOL from exempting workers from overtime protection through the rulemaking process. A companion bill, S. 1485, was introduced by Senator Kennedy (D-MA) on July 29, 2003. Neither bill was acted upon.

<sup>25</sup> Press Release, Labor-HHS Subcommittee Hearings, July 31, U.S. Senate Committee on Appropriations, July 25, 2003.

<sup>26</sup> Testimony of Ross Eisenbrey, July 31, 2003, Senate Appropriations Subcommittee on Labor, Health and Human Services, and Education.

<sup>27</sup> *DLR*, Aug. 1, 2003, p. AA1. There has been a difference of opinion both with respect to the Department’s action in issuing the final rule and to the rule’s likely impact. See, for (continued...)

On September 11, 2003, Senator Specter introduced S. 1611, a bill to create a blue-ribbon commission to review the overtime pay requirements of the FLSA. The proposal would have held implementation of the final rule in abeyance pending a report from the commission. The bill was referred to the Committee on Health, Education, Labor, and Pensions.<sup>28</sup> No action has been taken.

On January 20, 2004, as the Senate was about to conclude action on H.R. 2673 (the omnibus appropriation bill, discussed above), Senator Specter convened a second hearing on the proposed rule. Labor Secretary Elaine Chao, the lead witness, affirmed that the intentions of the Department were “to have better rules in place that will benefit more workers” — especially “low-wage workers.” And, she asserted that the Department “has ‘zero tolerance’ for employers who try to pay games with overtime laws.”<sup>29</sup> Conversely, AFL-CIO Secretary-Treasurer Richard Trumka charged that the proposed rule “would redefine 8 million workers as ineligible for federal overtime protection.” The proposal, he asserted, “would effectively gut the 40-hour workweek through administrative regulation.” The proposed rule, he concluded, was “designed for the benefit of employers, not workers.”<sup>30</sup> When pressed on technical aspects of the rule, Secretary Chao acknowledged that both the current regulation and the proposed rule were “very complicated.”<sup>31</sup>

**The Final Rule and Its Aftermath.** The final rule was published on April 23, 2004, triggering strong feelings pro and con. Almost immediately, three hearings on the issue were conducted by congressional committees.

- On April 28, an oversight hearing on the rule was conducted by the full House Committee on Education and the Workforce. Secretary Chao and Administrator McCutchen were the lead witnesses.
- On May 4, Senator Specter convened a third oversight hearing before the Appropriations Subcommittee on Labor, Health and Human Services, and Education. Administrator McCutchen was the lead witness.
- On May 20, the House Small Business Subcommittee on Workforce, Empowerment and Government Programs took up the issue. Alfred

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<sup>27</sup> (...continued)

example, in *DLR*, July 14, 2004, pp. A13-A14, discussion of report by John Fraser, Monica Gallagher and Gail Coleman, *Observations on the Department of Labor’s Final Regulations “Defining and Delimiting the [Minimum Wage and Overtime] Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,”* July 2004. 40 pp.

<sup>28</sup> *Congressional Record*, Sept. 11, 2003, pp. S11419-S11421.

<sup>29</sup> Testimony of Labor Secretary Elaine Chao, Jan. 20, 2004, Senate Appropriations Subcommittee on Labor, Health and Human Services, and Education.

<sup>30</sup> Testimony of AFL-CIO Secretary-Treasurer Richard Trumka, Jan. 20, 2004, Senate Appropriations Subcommittee on Labor, Health and Human Services, and Education.

<sup>31</sup> *DLR*, Jan. 21, 2004, p. AA2.



Robinson, Deputy Wage and Hour Administrator represented the Department.<sup>32</sup>

With each of the hearings, there appears to have been substantial recycling of testimony. Department spokespersons uniformly expressed pride in the final rule, affirmed that it would provide a new clarity to wage/hour regulation, and that it would likely reduce the need for litigation. As Members and co-witnesses posed questions, DOL spokespersons reiterated these assurances. But, critics strongly argued that DOL was underestimating the likely adverse impact of the final rule.

On May 4, 2004, during consideration of S. 1637, legislation dealing with tax and international trade issues, the Senate approved a new Harkin amendment restricting the ability of the Secretary to redefine the concepts of executive, administrative, and professional for Section 13(a)(1) purposes.<sup>33</sup> The House had under consideration legislation dealing with similar tax and international trade issues (H.R. 4520). The House bill, however, was silent on the issue of overtime pay. On June 17, H.R. 4520 was passed by the House (251 yeas to 178 nays) and sent to the Senate. On July 15, the Senate, after substituting the text of S. 1637 (with other amendments) for the text of H.R. 4520, the latter bill was passed in the Senate on a voice vote.<sup>34</sup> Subsequently, Senate conferees were named and the House was notified of the Senate's action.

## ***Comp Time vs. Cash Payment for Overtime***

Since the mid-1980s, various initiatives have been introduced that would have restructured the overtime pay requirements of the FLSA to permit (but not require) private sector employers to offer their workers a "comp time" option in lieu of overtime pay for hours worked in excess of a statutory standard. Proposals varied. Some bills called for restructuring the "workweek" into more extended units: i.e., two-week (80 hour) or four-week (160 hour) periods. Some versions of the legislation proposed a system of "flexible credit hours" and the systematic banking of overtime hours through extended periods. Other variations were also suggested, shifting from one bill (and one Congress) to another.

An argument central to debate on the issue of restructuring hours of work has been the question of FLSA flexibility. A measure of flexibility is allowed under current wage/hour law. At present, employers are permitted, with no overtime pay

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<sup>32</sup> On June 11, 2004, McCutchen returned to the private practice of law and Robinson was named Acting Administrator.

<sup>33</sup> As on other occasions, no restraint would be imposed upon increases in the earnings thresholds under Section 13(a)(1). At the same time, an amendment offered by Senator Gregg, listing a number of nonexempt categories of work, was adopted by the Senate on a vote of 99 yeas with one Senator not voting. The vote on the Harkin amendment was 52 yeas to 47 nays. — a vote largely along party lines. See *Congressional Record*, May 4, 2004, p. S4806.

<sup>34</sup> *Congressional Record*, July 15, 2004, p. S8221.

penalty, to structure *weekly workhours* in any configuration of their choice. They can allow workers flexible arrival and departure times and “comp time” in which workhours can migrate from one day to another within a single week. The workweek, itself, can be arranged as a routine period of five days of eight hours each or, at the employer’s discretion, compressed into four days of 10 hours each, two days of 20 hours each, or any other structure not exceeding 40 hours within a seven-day period.<sup>35</sup>

Flexibility, under most recent proposals, would have remained an employer option — or, where there is a collective bargaining agreement in place, the option of workers and employers jointly. Hearings on the various proposals have often been technical and contentious. Proponents, largely (but not entirely) ignoring any interest employers might have in restructuring the workweek, argued for more flexibility *for workers* — especially for “soccer moms.” They stressed that a 1930s statute (the FLSA) stood in the way of creation of a *family friendly* workplace. Critics argued that the act already contained flexibility if employers chose to utilize it. The proposed legislation, they contended would provide *employer flexibility* and not *worker flexibility*. With creative scheduling by employers, they argued, any impediment to flexibility could be eliminated.

Again, comp time proposals have varied — as has the motivation behind them.<sup>36</sup> Generally, they have provided for a trade: working extended hours when an employer was busy (with no extra pay) and taking compensatory time off *with pay* when work was slack. Some legislation proposed an even trade: an hour worked for an hour, later, of leave. Others sought to honor the time-and-a-half principle by offering 1½ hours off for each hour worked in excess of 40 per week.<sup>37</sup> Speaking generally, such proposals would have: (a) set aside (or significantly modified) the overtime pay requirements of the FLSA; (b) permitted deferred payment of wages already earned; (c) made possible reduced cash earnings of many participating workers; (d) allowed employers greater flexibility in scheduling work; and (e) allowed employees to create larger blocks of time for their own purposes — if their employers concurred.

In the 1990s, the issue resurfaced in a more organized manner. A campaign was launched by the industry-oriented Labor Policy Association (LPA), together with the Society for Human Resource Management (SHRM) and — with some overlapping membership — the Flexible Employment, Compensation and Scheduling Coalition (FLECS), with other individuals and groups.<sup>38</sup> In general, the objective of these

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<sup>35</sup> More extended workweeks are permitted, of course, but workhours in excess of 40 per week must be compensated at a time-and-a-half rate.

<sup>36</sup> Under Section 7(o) of the FLSA (29 U.S.C. 207 (o)), state and local government employers are currently permitted to institute comp time arrangements for their employees — under carefully defined circumstances and within the context of public sector personnel policies.

<sup>37</sup> See *Congressional Record*, Mar. 28, 1985, p. 6691, and Mar. 6, 1989, pp. 3526-3527.

<sup>38</sup> U.S. Congress, House Committee on Economic and Educational Opportunities, Subcommittee on Workforce Protections, *Hearings on the Fair Labor Standards Act*, (continued...)

groups, framed largely in the context of a *family friendly* workplace and argued in behalf of workers, was to *modernize* the Fair Labor Standards Act.<sup>39</sup> Also, speaking generally, these initiatives were opposed by unionized workers and by certain women's advocacy groups — and supported by segments of industry.

During the 104<sup>th</sup> Congress, bills that provided for a comp time option were introduced by Representative Cass Ballenger (R-NC) and by Senator John Ashcroft (R-MO). Following extensive hearings, the Ballenger bill (H.R. 2391), with certain modifications, was passed by the House (225 yeas to 195 nays).<sup>40</sup> The Ashcroft bill (S. 1129), far broader in its implications, was more contentious. Both bills died at the close of the 104<sup>th</sup> Congress. In varying forms, comp time legislation was considered in the 105<sup>th</sup>, 106<sup>th</sup> and 107<sup>th</sup> Congresses. The proposals were not adopted.

In the 108<sup>th</sup> Congress, *comp time* legislation has resurfaced. On February 5, 2003, Senator Judd Gregg (R-NH) introduced S. 317, the *Family Time and Workplace Flexibility Act* — an umbrella proposal that deals with several workhours-related initiatives in addition to *comp time*.<sup>41</sup> On March 6, 2003, Representative Judy Biggert (R-IL) introduced H.R. 1119, the more narrowly focused *Family Time Flexibility Act*.

The House Subcommittee on Workforce Protections, on March 12, 2003, conducted a general hearing on issues raised in the Biggert proposal. Appearing in support of *comp time* were witnesses representing the U.S. Chamber of Commerce and SHRM. In opposition was a spokesperson for “9to5” — the National Association of Working Women. On April 3, 2003, dividing along party lines (Republicans in favor and Democrats opposed), the Subcommittee voted to report the measure to the full Committee on Education and the Workforce. On April 9, 2003, once again on a party-line vote, the full Committee agreed to report the bill: 27 yeas to 22 nays. H.R. 1119 has not been called up for floor consideration.<sup>42</sup>

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<sup>38</sup> (...continued)

hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., Mar. 30, June 8, Oct. 25, and Nov. 1, 1995 (Washington: GPO, 1996), p. 185. (Hereafter cited as *House FLSA Hearings, 1995*.) The FLECS Coalition included, in the mid-1990s, both the LPA and SHRM together with firms such as Haliburton-Brown & Root, the Boeing Company, Kaiser Permanente, Motorola, Inc., and interest groups such as the National Federation of Independent Business, the National Restaurant Association, and the Associated Builders and Contractors.

<sup>39</sup> See the report by the Labor Policy Association, *Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace*, Oct. 7, 1994, reprinted in *House FLSA Hearings, 1995*, pp. 26-53.

<sup>40</sup> *Congressional Record*, July 30, 1996, pp. H8561-H8573, and pp. H8776-H8790.

<sup>41</sup> S. 317 has provisions dealing with (a) comp time, (b) restructuring the workweek on an 80-hour bi-weekly basis, and (c) a “flexible credit hours” program — banking of overtime hours worked. Only the comp time component is considered here.

<sup>42</sup> On May 22, 2003, the bill was placed on the Union Calendar as Calendar No. 64. See U.S. Congress, House Committee on Education and the Workforce, *Family Time Flexibility Act*, report to accompany H.R. 1119, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., H.Rept. 108-127 (Washington, GPO, 2003), 35 p. See CRS Report RL31875, *Compensatory Time vs. Cash Wages: Amending the Fair Labor Standards Act?*, by William G. Whittaker.

As reflected in the hearings and debates through several Congresses, the issue of comp time seems to come down to three questions — with argument pro and con. *First.* Are these proposals actually concerned with workhours flexibility *for workers* or are they simply an attempt by some employers to weaken existing labor standards? *Second.* Assuming that the concern with flexibility for workers is genuine, were sufficient safeguards included within the proposals so that flexibility would not be abused? *Third.* Would implementation of the flexibility proposals present any special problems for DOL (or for employers) in terms of enforcement and compliance — or in terms of equity? The lines pro and con seem to have been sharply drawn: some employer interests support the legislation while labor (speaking generally) is strongly opposed. Individuals have argued on each side of the issue.<sup>43</sup>

## Other Overtime Proposals of the 108<sup>th</sup> Congress

Since the initial consideration of the federal wage/hour legislation in 1937 (enacted in 1938), there has been an ongoing contest between worker groups and employer groups to strengthen or to weaken (to more narrowly define) overtime pay protections under the act. Often, particular campaigns for change (or for *reform* or *modernization*) have followed in the wake of an administrative ruling from DOL or of a judicial ruling perceived by one of the parties at interest as adverse. That pattern, with sharp dissents pro and con, has continued into the 108<sup>th</sup> Congress.

In considering changes in the overtime requirements of the FLSA, one may need to take into account the implications of the Department of Labor's proposed rule governing implementation of Section 13(a)(1), discussed above. What form a final rule may take, how its provisions will be applied by the Department in particular cases and disciplines, and how employers may react in utilizing the options that the proposed rule offers, are not entirely clear.

## Exemption for the Funeral Industry

The FLSA, under Section 13(a)(1), allows for an exemption of employers of *bona fide* executive, administrative and/or professional employees from the act's minimum wage and overtime pay requirements. Through a number of years, the funeral industry has sought such exemption with respect to licensed funeral directors and licensed embalmers as *professional* workers. The Department has demurred.

Although the act provides a general exemption for employers of bona fide professionals, Congress left the definition of "bona fide" and "professional" up to the Secretary. To qualify as a *professional*, an employee must have "knowledge of an advance[d] type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education," or from an apprenticeship, or "from training in the

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<sup>43</sup> For background purposes, see CRS Report 96-570, *Federal Regulation of Working Hours: An Overview Through the 105<sup>th</sup> Congress*, and CRS Report 97-532, *Federal Regulation of Working Hours: Consideration of the Issues Through the 105<sup>th</sup> Congress*, both by William G. Whittaker. The first is an historical overview; the latter, a summation of hearings and debates.

performance of routine mental, manual, or physical processes.” DOL has emphasized the “original and creative character” of such work and the “exercise of discretion and judgment” in its performance. The employee must be engaged predominantly in such professional work and must be paid at a rate appropriate for a professional.<sup>44</sup>

After an evaluation, the Department determined that funeral directors and embalmers did not qualify for exemption. The former, except where they also served as embalmers, were often engaged in performing a business/sales function but not in doing professional work. Embalmers were regarded by the Department as skilled technicians but, again, not as professionals in the context of Section 13(a)(1). Where they are not also mortuary owners, their pay was found often to be relatively low.

In July 1998 (the 105<sup>th</sup> Congress), Senator Lauch Faircloth (R-NC) introduced legislation that would have provided a categorical exemption, under the FLSA, from minimum wage and overtime pay provisions with respect to “any employee employed as a licensed funeral director.” The Senator, in reference to the funeral industry, pointed to “the economic hardship” and “financial strain” such requirements (paying at least the minimum wage and overtime pay for hours worked in excess of 40 per week) place on small business owners who have “to allocate revenues for that purpose.”<sup>45</sup> Companion legislation was introduced by Representative Lindsey Graham (R-SC).<sup>46</sup> No action was taken on either bill.

In the 106<sup>th</sup> Congress, Representative Graham offered a new bill expanding the proposed exemption to include both licensed funeral directors and embalmers.<sup>47</sup> Although no action was taken directly on the Graham bill, its substance was included in an umbrella proposal dealing with taxes and a group of other issues introduced by Representative Rick Lazio (R-NY). On January 28, 2000, the Committee on Education and the Workforce was discharged from further responsibility for the measure. No hearing had been held on the Graham (now, Lazio) funeral industry provision. On March 9, 2000, the Lazio bill was passed by the House and, subsequently, dispatched to the Senate. But when the 106<sup>th</sup> Congress came to an end, neither bill had been approved.<sup>48</sup>

In the 107<sup>th</sup> Congress, Representative Graham reintroduced a free-standing bill with respect to funeral directors and embalmers. Again, no action was taken directly on the Graham bill; but, again, its substance was incorporated within a broader legislative proposal dealing with taxes and other matters and introduced by

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<sup>44</sup> See 29 CFR 541.3(a) forward.

<sup>45</sup> *Congressional Record* (daily edition), July 31, 1998, p. S9562.

<sup>46</sup> See S. 2405 and H.R. 4540, both of the 105<sup>th</sup> Congress. The bills would have by-passed the Section 13(a)(1) option where established criteria were involved, simply defining a “licensed funeral director” as exempt.

<sup>47</sup> See H.R. 793 of the 106<sup>th</sup> Congress.

<sup>48</sup> See H.R. 3081 of the 106<sup>th</sup> Congress.

Representative Jack Quinn (R-NY). Both bills died at the close of the 107<sup>th</sup> Congress.<sup>49</sup>

In the 108<sup>th</sup> Congress, now-Senator Graham reintroduced free standing legislation (S. 292) that would, by excluding licensed funeral directors and licensed embalmers from the minimum wage and overtime pay protections of the FLSA, exempt their employers from the minimum wage and overtime pay requirements of the act. Companion legislation (H.R. 2065) was introduced by Representative Patrick Tiberi (R-OH).<sup>50</sup>

Interestingly, DOL has moved to deal with the issue administratively. In the final rule implementing the executive, administrative, and professional exemption under Section 13(a)(1), the Department appears, in some measure, to have reversed its position on funeral directors and embalmers. It included in the final rule the following language:

Licensed funeral directors and embalmers who are licensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education, generally meet the duties requirements for the learned professional exemption.<sup>51</sup>

As set forth, the educational requirement is restrictive. However, another section of the final rule may dilute that restriction. Subsection 541.301(d) states that an exemption:

... is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.<sup>52</sup>

## Exemption of Certain Computer Services Workers

During the 1980s, the computer industry sought to classify certain of its employees as *professionals* under Section 13(a)(1) of the FLSA — eliminating their regular minimum wage and overtime pay protections. As in the case of the funeral industry, the definition of *professional* presented a problem. In the rapidly evolving computer technology field, marked by fluctuating educational standards and responsibilities often only obliquely associated with specific job titles, the Department found it difficult to determine who was a *professional* for purposes of FLSA exemption and who was just a very highly skilled technician.

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<sup>49</sup> See H.R. 648 (Graham) and H.R. 546 (Quinn).

<sup>50</sup> For a detailed discussion of this issue, see CRS Report RL30697, *Funeral Services: The Industry, Its Workforce, and Labor Standards*, by William G. Whittaker.

<sup>51</sup> *Federal Register*, Apr. 23, 2004, p. 22266, Subsection 541.301(e)(5) of the final rule.

<sup>52</sup> *Federal Register*, Apr. 23, 2004, p. 22265, Subsection 541.301(d) of the final rule.

During consideration of a body of FLSA amendments in 1989, language was proposed that would have allowed wage/hour exemption (special treatment) of certain computer services workers *as professionals*.<sup>53</sup> The initial minimum wage legislation (to which the computer services exemption had been appended) was vetoed by President George H. W. Bush and, when a subsequent measure was passed and signed, the computer services exemption had been dropped. The following year, however, the exemption, combined with another unrelated amendment to the FLSA, was passed and signed (P.L. 101-583).<sup>54</sup> The amendment directed that the Secretary, within 90 days of enactment:

... shall promulgate regulations that permit computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers as defined in such regulations to qualify as exempt executive, administrative, or professional employees under Section 13(a)(1) of the Fair Labor Standards Act .... Such regulations shall provide that if such employees are paid on an hourly basis they shall be exempt only if their hourly rate of pay is at least 6½ times greater than **the applicable minimum wage** ....(Bolding added.)

Thus, Congress avoided the Section 13(a)(1) issue (defining *professional* in terms of education and duties) by closely setting forth the manner in which the Department should approach the issue.

The Department proceeded as directed but its actions were not sufficient to resolve the issue. In 1996, the matter was revisited. The 1996 FLSA/minimum wage amendments were taken up as a floor amendment to tax legislation reported from the Committee on Ways and Means. There had been no hearing on the computer services exemption and the provision sparked little floor discussion. The restructured exemption (P.L. 104-188) moved in three directions. First. It added a new paragraph (17) to Section 13(a). Thus, the problem of defining *professional* for Section 13(a)(1) purposes was resolved. The computer services workers (or computer industry employers, as the case may be) now had their own categorical exemption. Second. To be exempt, computer services workers would need to earn, if paid hourly, “not less than \$27.63 an hour.” While \$27.63 an hour was the equivalent of 6½ times the minimum wage prior to the 1996 FLSA amendments, the linkage between the hourly rate for computer services workers and the minimum wage rate had been severed.<sup>55</sup> Third. Congress refined and expanded the definition of the body of workers who would now find themselves exempt under the new Section 13(a)(17) — the computer services exemption.

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<sup>53</sup> *Congressional Record* (daily edition), Apr. 12, 1989, p. S3741.

<sup>54</sup> *Congressional Record* (daily edition), Oct. 18, 1990, p. H10563-H10565; and Oct. 27, 1990, S. 17679.

<sup>55</sup> Congress thereafter raised the minimum wage, in steps, to \$5.15 per hour. Had linkage been retained, the qualifying hourly rate for computer services personnel would have risen to \$33.48 per hour; but, instead, the rate now dropped to the equivalent of 5.4 times the minimum wage. Subsequent changes in the minimum wage rate will not alter the qualifying rate for computer services personnel: i.e., the statutory \$27.63, which would equal \$57,470. per year if the worker were employed full time.

In the 106<sup>th</sup> Congress, the issue resurfaced. Representative Robert Andrews (D-NJ) introduced free standing legislation that would have redefined the types of computer-related work regarded as exempt under Section 13(a)(17) — while retaining the \$27.63 earnings threshold.<sup>56</sup> An umbrella bill, dealing with taxes and other issues in addition to minimum wage, the funeral exemption, an exemption with respect to certain *inside sales* workers, and the computer services exemption, was introduced by Representative Lazio. In substance, the computer services language of the Lazio bill was largely the same as that of the Andrews bill. Both died at the close of the 106<sup>th</sup> Congress.<sup>57</sup> The issue was picked up again in the 107<sup>th</sup> Congress as part of an umbrella proposal introduced by Representative Quinn and in free standing legislation proposed by Representative Andrews. Neither bill was adopted.<sup>58</sup>

In the 108<sup>th</sup> Congress, Representative Joe Wilson (R-SC)<sup>59</sup> and Senator Lindsey Graham have introduced new legislation dealing with the computer services exemption: respectively, H.R. 1996 and S. 495. The free standing bills are identical. They provide a lengthy list of types of computer work that would be considered exempt, reaffirm the \$27.63 per hour earnings requirement (without minimum wage linkage), and state that a worker qualifying under Section 13(a)(17) “shall be considered an employee in a professional capacity under” Section 13(a)(1).<sup>60</sup>

*However*, in the final rule implementing the executive, administrative, and professional exemption under Section 13(a)(1), DOL has, in some measure, altered its position with respect to computer services workers. Under subsection 541.400(a), the final rule acknowledges the dual option for exemption of computer services workers under the FLSA. “Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) ... and under section 13(a)(17) of the act.” Subsection 541.400(b) states that the Section 13(a)(1) exemption “applies to any computer employee” who satisfies the earnings test. Section 13(a)(17), it states, applies “only to computer employees whose primary duty consists” of certain specified computer-related functions. The list of functions is long and the concept of *primary duty* is not limited by the amount of time an employee devotes to a particular function. Thus, under the final rule, the exemption may be extremely broad and include most persons associated with computer work except (a) those engaged in manufacture of computers and (b) persons who merely use a computer in their work. (Subsection 541.401 of the final rule.)<sup>61</sup>

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<sup>56</sup> See H.R. 3038 of the 106<sup>th</sup> Congress.

<sup>57</sup> See H.R. 3081 (Lazio) of the 106<sup>th</sup> Congress.

<sup>58</sup> See H.R. 546 (Quinn) and H.R. 1545 (Andrews) of the 107<sup>th</sup> Congress.

<sup>59</sup> Rep. Andrews is a co-sponsor of H.R. 1996 with Rep. Wilson.

<sup>60</sup> For a discussion of this issue, see CRS Report RL30537, *Computer Services Personnel: Overtime Pay Under the Fair Labor Standards Act*, by William G. Whittaker.

<sup>61</sup> *Federal Register*, Apr. 23, 2004, p. 22267.



## Exemption for the Christmas Tree Industry

In 1938, when Congress passed the initial FLSA legislation, it chose to exempt most workers employed in agriculture.<sup>62</sup> Through the years, that exemption has been narrowed somewhat, but many agricultural workers (often, persons employed on smaller farms or under specialized exemptions) are still not fully covered by the minimum wage and overtime pay protections of the Fair Labor Standards Act.<sup>63</sup>

Certain growers of Christmas trees in North Carolina found, because of the seasonal nature of the industry, that they needed “a substantial number of workers at certain points during the year” but required fewer workers at other times. To fill their manpower requirements, the North Carolina Growers’ Association arranged for “the hiring of temporary, unskilled, legal alien agricultural workers” under the H2A program.<sup>64</sup> Under the H2A program, the workers were classified as *agricultural* and, some might argue, ought to be exempt on that basis from overtime pay protections. However, when H2A workers were initially employed in the Christmas tree industry in 1993, the Department of Labor advised the employers that such workers would be classified as “nonagricultural” and, thus, subject to overtime pay protection under the FLSA. From 1993 to 1995, the Growers complied. In 1996, as a result of conflicts of interpretation, the growers, it appears, ceased to pay overtime rates and, ultimately, were taken to court by the Department of Labor. In 2003, the U.S. District Court for the Western District of North Carolina found in favor of the Department, ordered payment of back wages (overtime pay) and future compliance with the act.<sup>65</sup>

In the 107<sup>th</sup> Congress, Representative Ballenger introduced legislation (H.R. 3486) to clarify the language of the FLSA to ensure that “Christmas tree farming is agriculture” under the act — and that workers employed in that industry would not need to be paid overtime rates for hours worked in excess of 40 per week. Referred to the Subcommittee on Workforce Protections, the bill died at the close of the 107<sup>th</sup> Congress. Representative Ballenger has reintroduced the legislation (H.R. 2516) in the 108<sup>th</sup> Congress, now seeking both to clarify the terms of the FLSA and, in effect, to overturn the decision of the District Court.

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<sup>62</sup> In 1937 and 1938, exemption of agricultural workers from minimum wage and overtime pay protection came largely to rest on the issue of cost: the cost to farmers of hiring labor and the cost to consumers of agricultural commodities. See *Congressional Record*, June 14, 1938, pp. 9257-9258.

<sup>63</sup> For a discussion of the treatment of agricultural workers under the FLSA, see United States Minimum Wage Study Commission, *Report of the Minimum Wage Study Commission* (U.S. Govt. Print. Off., June 1981), vol. IV, pp. 97-149 and 377-492.

<sup>64</sup> Workers employed under the H2A program are legally present in the United States but are not classified as *immigrants*: i.e., it is assumed that they have no intention of abandoning residence in their country of origin. They are commonly described as *guest workers*. Quoted comments, here, are drawn from *Chao v. North Carolina Growers Assn.*, W.D.N.C., No. 5:99-CV-7-V, Sept. 4, 2003, unless otherwise indicated.

<sup>65</sup> An explanation of the case and of the issues involved appears in the Bureau of National Affairs, *Daily Labor Report*, Sept. 19, 2003, p. A3.

## Exemption for the Fireworks Industry

Section 13(a) of the Fair Labor Standards Act, as noted above, provides exemption from both the act's minimum wage and overtime pay requirements for employers of certain specified categories of workers.

In the 107<sup>th</sup> Congress, Representative Sam Johnson (R-TX) introduced legislation (H.R. 5520) that would have added to Section 13(a) an additional category of minimum wage and overtime pay exempt workers: i.e., "any employee employed, on a seasonal basis, at a facility or location the primary source of revenue of which is derived from the sale of fireworks directly to consumers; ..." The Johnson bill died at the close of the 107<sup>th</sup> Congress. New legislation for the same purpose (H.R. 2263) has been introduced in the 108<sup>th</sup> Congress by Representative Pete Sessions (R-TX). The Sessions bill has been referred to the Committee on Education and the Workforce.

## Exemption of Certain Engineering and Design Professionals

Section 13(a) of the Fair Labor Standards Act provides exemption both from the act's minimum wage and overtime pay requirements for employers of certain specified categories of workers.

In the 107<sup>th</sup> Congress, Representative Lindsey Graham (R-SC) introduced legislation (H.R. 3678) that would have added to Section 13(a) another category of minimum wage and overtime pay exempt workers: i.e., "certain construction engineering and design professionals." Although the bill died at the close of the 107<sup>th</sup> Congress, now-Senator Graham has reintroduced the proposal (S. 237) in the 108<sup>th</sup> Congress. Included as exempt under the Graham bill would be "any employee providing professional consulting services recognized by a four-year degree or greater, professional licensure, professional certification, *or* at least eight years of similar work experience" subject to a series of supplemental qualifying criteria with respect to duties. (*Italics added.*) S. 237 was referred to the Committee on Health, Education, Labor, and Pensions.

## Overtime Issues of Continuing Concern

Several overtime pay issues have been under continuing consideration by the Congress but have not emerged in legislative form in the 108<sup>th</sup> Congress. While it is possible that free standing legislation may be introduced dealing with these issues, it is also possible that they could become part of a package of amendments to the FLSA as some point — possibly as a floor amendment to other legislation. It is also possible that interest in these areas may have waned. However, given the extended consideration that they have received, it may be useful to explore their implications.

## Exemption of Inside Sales Workers

From the 103<sup>rd</sup> through the 107<sup>th</sup> Congresses, legislation was introduced that would have exempted from FLSA minimum wage and overtime pay requirements employers of certain “inside sales” workers. These proposals were not enacted.<sup>66</sup>

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

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

Critics of the proposal suggested that the projected amendment was unjustified: that it would leave without FLSA minimum wage and overtime pay protection workers who were previously *covered* inside sales personnel. It was not clear, they stated, that elimination of wage/hour protections would make inside sales personnel any more efficient or expand their capacity to sell. Rather, critics contended, the measure may merely provide an opportunity for employers to circumvent the minimum wage and overtime pay requirements of current law while shifting any additional costs of selling (time and effort) from the employer to the worker. Besides, it was argued, employees were free to work flexible hours under current law without overtime pay constraints — assuming that their employers were willing to have them do so.

In the 107<sup>th</sup> Congress, the issue surfaced in H.R. 546 (Quinn), an umbrella bill that dealt with wage/hour treatment for “inside sales” workers but with other matters as well. Free-standing legislation introduced by Representative Patrick Tiberi (R-OH), H.R. 2070, also dealing with the proposed inside sales exemption, was introduced on June 6, 2001. A general oversight hearing on the inside sales exemption issue was conducted by the House Subcommittee on Workforce Protections on June 7, 2001. While employer spokespersons supported the proposed

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<sup>66</sup> See CRS Report RL30003, *Modifying Minimum Wage and Overtime Pay Coverage for Certain Sales Employees Under the Fair Labor Standards Act*, by William G. Whittaker.

“inside sales” exemption, a trade union witness spoke against it. Other comment was mixed.

On June 27, the Subcommittee marked-up H.R. 2070. Representative Major Owens (D-NY), although opposed to the legislation, urged that the threshold for exemption be increased to retain wage/hour protection for low-wage sales workers.<sup>67</sup> Representative Lynn Woolsey (D-CA), also in opposition, called for worker *choice* — urging that the decision to work overtime hours without wage/hour protection (but with the potential for enhanced sales commissions) be made “voluntary” on the part of the worker. The Owens and Woolsey amendments were voted down and the bill was approved and ordered to be reported to the full Committee on Education and the Workforce. The votes were along party lines: Republicans in favor of an “inside sales” exemption; Democrats in opposition.<sup>68</sup> The Tiberi bill died at the close of the 107<sup>th</sup> Congress.

The final rule governing Section 13(a)(1), discussed above, appears to move toward an administrative revision which could result in exemption of at least some inside sales workers, under the *administrative* exemption, from wage and hour protection through the rulemaking process. Subsection 541.203(b) provides:

Employees in the financial services industry generally meet the duties requirements for the administrative exemption *if their duties include work such as* collecting and analyzing information regarding the customer’s income, assets, investments or debts; determining which financial products best meet the customer’s needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, services or promoting the employer’s financial products. However, *an employee whose primary duty is selling financial products does not qualify for the administrative exemption.*<sup>69</sup> (Italics added.)

What constitutes the *financial services industry* may not be immediately clear and is not defined in the rule — but appears to have potential for broad interpretation.<sup>70</sup>

*Primary duty* is defined. The rule states: “The term ‘primary duty’ means the principal, main, major or most important duty that the employee performs.” The rule adds: “Time alone ... is not the sole test....” Since the final rule eliminates any

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<sup>67</sup> Under H.R. 2070, the exemption threshold would have been \$22,500. Representative Owens proposed raising it to 6½ times the current minimum wage (i.e., \$69,628), a rate that he stated would more nearly reflect a professional status. (See discussion of the computer services exemption, above.) Representative Isakson, viewing the exemption as an option favorable to workers, argued that the higher threshold would unfairly limit sales opportunities for beginning workers.

<sup>68</sup> Bureau of National Affairs, *Daily Labor Report*, June 28, 2001, p. AA1.

<sup>69</sup> *Federal Register*, Apr. 23, 2004, pp. 22263-22264.

<sup>70</sup> *Ibid*, pp. 22145-22147. Among questions raised are: Does “financial services” include the insurance industry? Banks? Brokerage firms? Tax assistance? Some real estate functions? Depending upon the definition the Department ultimately adopts, the exempt segment of the workforce could be broad or limited.

percentage factor with respect to performance of exempt duties (i.e., the amount of time devoted to such activity), an employee may spend a small portion of his or her working hours at a task which his or her employer deems *primary* or *most important* and, thus, be classified as exempt on the basis of that activity.<sup>71</sup>

The issue has become contentious as the final rule has moved toward implementation. In testimony before the House Committee on Education and the Workforce, Karen Dulaney Smith, an experienced DOL Wage and Hour Division investigator, now retired, explained in some detail how an inside customer services representative could become, under the final rule, an exempt employee — so long as the employer did not designate sales as the worker’s *primary duty*. It is a “loophole,” she suggested, that has removed the distinction between inside sales (traditionally nonexempt) and outside sales (traditionally exempt). At the least, she stated, the provision could “be a confusion to employers and could encourage more litigation.”<sup>72</sup> Conversely, Labor Secretary Elaine Chao, speaking generally of the final rule, affirmed that it is “clear, straightforward and fair” and “will end much of the confusion about these exemptions.”<sup>73</sup>

## Clarifying the Concept of *Regular Rate*

Under the FLSA, a covered worker employed through more than 40 hours in a single workweek, must be compensated for hours worked in excess of 40 “at a rate of not less than one and one-half times the regular rate” at which he is paid: i.e., *time-and-a-half*. Although the concept of *regular rate* is set forth in Section 7(e) of the act, questions have continued to arise. For example, under Section 7(e), the *regular rate* “shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee.” But, then, perhaps, not quite all. Section 7(e) also includes paragraphs enumerating what the *regular rate* “shall not be deemed to include.” (Italics added.) These exceptions include, but are not limited to, such things as “sums paid as gifts,” “payments made for occasional periods when no work is performed due to vacation, holiday, illness,” etc. The inventory is extensive but it still leaves open an opportunity for confusion with respect to the specific definition of *regular rate*.<sup>74</sup>

In the 106<sup>th</sup> Congress, Representative Cass Ballenger (R-NC) sought to clarify the issue by expanding the inventory of elements not to be included within the concept of *regular rate*. The Subcommittee on Workforce Protections conducted hearings on the Ballenger proposal. Although marked-up and reported from the full

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<sup>71</sup> *Federal Register*, Apr. 23, 2004, p. 22272. Some have argued that a job description could avoid designating “selling” as a worker’s *primary duty* — listing, instead, functions that could result in exemption.

<sup>72</sup> Hearing, House Committee on Education and the Workforce, Apr. 28, 2004, FDCH Transcripts, pp. 44, 63, and 66.

<sup>73</sup> Prepared statement of Secretary of Labor Elaine Chao, House Committee on Education and the Workforce, Apr. 28, 2004, p. 2

<sup>74</sup> Concerning a closely related issue, see CRS Report RL30542, *Stock Options and Overtime Pay Calculation Under the Fair Labor Standards Act*, by William G. Whittaker.

Committee on Education and the Workforce, the bill was not called up for floor consideration.<sup>75</sup> Meanwhile, a House-passed bankruptcy reform bill was moving through the Senate and the substance of the Ballenger proposal was added to it in the Senate — and passed. Before a conference report on the bankruptcy legislation could be agreed upon, Congress adjourned.

On April 26, 2001, Representative Ballenger introduced new legislation (H.R. 1602) on the “regular rate” issue. It would have added to the list of elements *not to be included* in calculation of the regular rate any payments:

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

Speaking broadly, the legislation was supported by industry and opposed by spokespersons for labor. The latter expressed concern that regular wage rates could be reduced with greater emphasis (and reward) assigned to various incentive programs. The option could also be used, some felt, to encourage an unjustified “speed-up” in production processes that could lead to increased potential for accidents and, with time, to reduced earnings.

Subsequently, Representative Ballenger added the following safeguards to the bill. To qualify under the terms of H.R. 1602, a plan:

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

Mr. Ballenger explained: “Performance bonuses and gainsharing programs are a way for employees to share in the success of the company they work for.”<sup>76</sup>

A Workforce Protections Subcommittee hearing on July 31, 2001 displayed sharp divisions with respect to H.R. 1602. Employer spokespersons and other proponents of the legislation spoke in terms of rewarding workers. Representative Biggert affirmed that H.R. 1602 “will encourage employers to reward their employees and make it easier for employers to ‘share the wealth’ ....”<sup>77</sup> Leonard Court of the U.S. Chamber of Commerce spoke in terms of “productivity, efficiency or incentive,” suggesting that workers could be encouraged to “give maximum effort”

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<sup>75</sup> U.S. Congress, House Committee on Education and the Workforce, *Rewarding Performance in Compensation Act*, report together with minority views to accompany H.R. 1381, 106<sup>th</sup> Cong., 1<sup>st</sup> sess., H.Rept. 106-358 (Washington, GPO, Oct. 1, 1999), 24 p. Companion legislation (S. 1878) was introduced by Senator Kay Bailey Hutchison (R-TX), but was not acted upon.

<sup>76</sup> *Congressional Record*, Apr. 26, 2001, p. E642.

<sup>77</sup> Statement of Rep. Judy Biggert, July 31, 2001.

through a system of bonuses or gainsharing. “[W]e know,” he stated, “that financial incentives motivate workers to better performance.” Many employers, he added, “believe that performance-based incentives are the most productive way to motivate and reward at both the individual and group levels.” They would also make companies “more competitive” while employees would have “predictable rewards for achieving specified goals.”<sup>78</sup>

The industry-oriented Labor Policy Association (LPA), which endorsed H.R. 1602, presented a somewhat different perspective. Incentive plans, it affirmed, “have been around almost since the industrial age first began.” An employee might earn a bonus if he (or she) worked “more quickly than the time the employer had allotted for the task .... The quicker the employee worked, the faster his or her pay increased over the base rate for the job.” Today’s incentive plans, the LPA noted, “are significantly different.” It explained: “These programs are focused on achieving important business goals .... When the goals are reached,” LPA stated, “the employees receive a financial bonus, which is usually part of the amounts the company saved by achieving the business goals.” It dubbed bonus and gainsharing plans “a win-win proposition for employees and employers because they increase employee pay while improving productivity and workplace relations.”<sup>79</sup>

Others dissented. While “employers would generally still have to pay the minimum wage,” the legislation would encourage them “to convert all additional compensation into bonuses,” protested Representative Owens. Overtime pay (the *regular rate*) would be calculated on the basis of the base rate; any bonus income would be outside of that calculation. Thus, he suggested, the employer could pay lower wages and enjoy a reduced rate when workers were asked to work overtime hours. H.R. 1602, he argued, could lead to wage rate manipulation and undermine the overtime pay requirements of the act.<sup>80</sup> There was also concern that the process would result in a *speed-up* in which the faster bonus-inspired rate would gradually become the norm.

Michael Leibig, representing the AFL-CIO, concurred with Representative Owens. He pointed to five major objections to H.R. 1602. *First*, it would “fundamentally undermine the FLSA and its encouragement of the 40-hour work week.” *Second*, it would “reduce the take home pay of hundreds of thousands” of workers. *Third*, it would “reduce the compensation of all Americans who work overtime hours.” *Fourth*, it would “encourage the present lengthening” of the work week and “lead to additional forced overtime.” *Fifth*, it would shift the pay structure to increase the proportion of income from bonuses while reducing the level of regular wages. Leibig concluded that the legislation was simply unnecessary. Bonus and gainsharing plans “flourish” under current law, he averred: “Those systems exists

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<sup>78</sup> Statement of Leonard Court, July 31, 2001.

<sup>79</sup> Statement of the Labor Policy Association, July 31, 2001.

<sup>80</sup> Statement of Rep. Major Owens, July 31, 2001.

[sic] and are spreading under the current requirements of the Fair Labor Standards Act. There is nothing in the act which impedes or prevents this.”<sup>81</sup>

In interviews following the hearing, industry spokespersons indicated no disposition to make further modifications in the language of the bill to meet labor’s objections. But, critics of the legislation also remained firm in their position. “I have never been persuaded that there is a need for H.R. 1602,” Representative Owens concluded. “Employers were paying bonuses before the Fair Labor Standards Act was enacted and continue to now.”<sup>82</sup> The legislation was not enacted.

## **Prohibiting *Forced Overtime Work* for Certain Health Care Employees**

Regulation of workhours, as noted above, has several purposes: humane consideration with respect to individual workers, the economic concern with sharing the available work, and public safety. Frequently, these several elements can combine in a single initiative. Overtime work required of healthcare professionals is such a case.

On May 30, 2001, in response to concerns that excessive hours of work may be detrimental to health care workers *and* endanger their patients, Representative Tom Lantos (D-CA) introduced H.R. 1289. Had it been enacted, the bill would have prevented an employer from *requiring* “a licensed health care employee (including a registered nurse but not including a physician) to work more than 8 hours in any workday or 80 hours in any 14-day work period, except in the case of a natural disaster” or during a “state of emergency” in the locality.<sup>83</sup> An employer would not have been allowed to “discriminate or take any other adverse action against such an employee for declining to work more than 8 hours in a workday or 80 hours in a 14-day work period.” However: “Such an employee may voluntarily work more than 8 hours a day or more than 80 hours in a 14-day work period.” A similar (but not identical) bill (H.R. 1902) was introduced on July 20, 2001, by Representative James Langevin (D-RI). Each bill, providing for amendment of the FLSA, was referred to the Committee on Education and the Workforce.<sup>84</sup>

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<sup>81</sup> Statement of Michael Leibig, July 31, 2001. Others would dispute that contention, arguing that lifting bureaucratic requirements would significantly expand such options.

<sup>82</sup> Bureau of National Affairs, *Daily Labor Report*, Aug. 1, 2001. p. AA1-AA2.

<sup>83</sup> Under Section 7(j) of the FLSA, certain employees of healthcare institutions are allowed to work a 14-day bi-weekly period rather than the otherwise standard 40-hour workweek. The Lantos bill, it was argued, would strengthen worker protections of current law.

<sup>84</sup> On June 13, 2001, Governor Angus King of Maine signed into law a measure restricting mandatory overtime for nurses except in “unforeseen emergency circumstances when overtime is required as a last resort to ensure patient safety.” Bureau of National Affairs. *Daily Labor Report*, June 18, 2001, p. A8.



As further information began to surface, additional measures were proposed. On November 5, 2001, Representative Fortney Stark (D-CA) introduced H.R. 3238, the “Safe Nursing and Patient Care Act of 2001.” Branding mandatory overtime as “a very real quality of care issue for our health system,” the Congressman observed:

We have existing government standards that limit the hours that pilots, flight attendants, truck drivers, railroad engineers, and other professionals can safely work before consumer safety could be impinged. However, no similar limitation currently exists for our nation’s nurses who are caring for us at often the most vulnerable times in our lives.<sup>85</sup>

On November 14, 2001, companion legislation (S. 1686) was introduced by Senator Edward Kennedy (D-MA). “Job dissatisfaction and overtime hours are major factors in the current shortage of nurses,” the Senator stated. He added, “Improving conditions for nurses is an essential part of our ongoing effort to reduce medical errors, improve patient outcomes, and encourage more Americans to become and remain nurses.”<sup>86</sup> Acknowledging that the “hospital trade associations” may not applaud the legislation, Representative Stark noted that it had won the endorsement of the American Nurses Association and other worker-oriented groups.<sup>87</sup>

On July 17, 2001, Senator John Rockefeller (D-WV) introduced S. 1188, the “Department of Veterans Affairs Medical Programs Enhancement Act of 2001,” a proposal to mandate that the Secretary (VA) survey the conditions under which nurses in veteran’s hospitals are employed (mandatory overtime) and render an annual report to the Congress. (A proposal with similar provisions was introduced by Representative Tom Udall (NM) on October 3, 2001 — H.R. 3017.) The legislation followed in the wake of a June 14, 2001, hearing by the Committee on Veterans’ Affairs, Senator Rockefeller explained, which had focused upon “the imminent shortage of professional nurses.” After discussing the content of the legislation, the Senator concluded, “We must encourage higher enrollment in nursing schools, improve the work environment, and offer nurses opportunities to develop as respected professionals, while taking steps to ensure safe staffing levels in the short-term.”<sup>88</sup> On October 10, 2001, S. 1188 was reported favorably from the Committee on Veterans’ Affairs.<sup>89</sup> Reported by the Committee (S.Rept. 107-80), the bill was debated but not passed. However, the substance of the Rockefeller proposal was added to H.R. 3447 and approved as P.L. 107-135.

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<sup>85</sup> *Congressional Record*, Nov. 6, 2001, p. E2007.

<sup>86</sup> *Congressional Record*, Nov. 14, 2001, p. S11794.

<sup>87</sup> *Congressional Record*, Nov. 6, 2001, p. E2007.

<sup>88</sup> *Congressional Record*, July 17, 2001, p. S7819.

<sup>89</sup> U.S. Congress, Senate Committee on Veterans’ Affairs, *Department of Veterans Affairs Medical Programs Enhancement Act of 2001*, report to Accompany S. 1188, 107<sup>th</sup> Cong., 1<sup>st</sup> sess., S.Rept. 107-80 (Washington, GPO, Oct. 10, 2001.).

Early in the 108<sup>th</sup> Congress, Senator Kennedy introduced legislation (S. 373) that would “provide for patient protection by limiting the number of mandatory overtime hours a nurse may be required to work” in circumstances in which “payments are made under the medicare program.”<sup>90</sup> See also S. 991 and H.R. 745, introduced respectively by Senator Daniel Inouye and by Representative Stark.<sup>91</sup>

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<sup>90</sup> *Congressional Record*, Feb. 12, 2003, p. S2358.

<sup>91</sup> *Congressional Record*, Feb. 13, 2003, p. E207, and May 5, 2003, pp. S5734-S5735.