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The Fair Labor Standards Act: Minimum Wage in the 108th Congress

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Summary

The Fair Labor Standards Act (FLSA) is the primary federal statute in the fields of minimum wages, overtime pay, and child labor. In the 108th Congress, legislation in a variety of forms has been introduced that would modify the act in each of these areas and that would extend the act's minimum wage protections to workers in the Commonwealth of the Northern Mariana Islands (CNMI).

This report deals only with the minimum wage aspects of the act. Other components of the FLSA are considered in separate CRS products.

In 1938, following several decades of discussion and research in academic and policy circles, Congress adopted the FLSA. The act is a living statute which Congress has variously modified through the years in response to altered public policy and workplace realities. It has undergone major amendment on eight separate occasions, in addition to periodic less extensive adjustments.

Currently, the general minimum wage is \$5.15 an hour. There are, however, a number of specialized minima: for example, a sub-minimum wage for youth, special calculation of the rate as it affects *tipped* employees, a reduced wage structure for persons with disabilities, etc. Early in the 108th Congress, concern with the wage aspects of the act seem to have focused, largely, upon an increase in the general rate — usually to be instituted through a series of phased step increases. Several bills would extend federal minimum wage protection to the CNMI — currently covered only by insular wage standards lower than the federal rate. See, for example: H.R. 936, H.R. 965, H.R. 4256, S. 20, S. 224, S. 448, and S. 2370. A minimum wage amendment was also proposed with respect to H.R. 4, the Welfare Reform Reauthorization.

Section 13(a) of the FLSA defines a series of exemptions from the act's otherwise applicable minimum wage and overtime pay requirements. Several proposals of the 108th Congress would amend Section 13(a) to alter the wage/hour treatment of specialized groups of workers: e.g., licensed funeral directors and embalmers, certain engineering consultants, computer services workers, retail sales workers who deal in fireworks and who are employed on a seasonal basis — with other changes in coverage. In these areas, see H.R. 1996, H.R. 2065, H.R. 2145, H.R. 2263, H.R. 4396, S. 237, S. 292, and S. 495. Minimum wage standards for inmate workers in Federal Prison Industries is treated in H.R. 1829.

Ultimately, *none of the legislation dealing with the Federal minimum wage was taken up during the 108th Congress*. There are no time constraints built into the act. Congress is not required to take up wage/hour legislation at all — though social and economic pressure (and other policy concerns) may render such action appropriate.

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The Fair Labor Standards Act: Minimum Wage in the 108th Congress

Most Recent Developments

The Fair Labor Standards Act (FLSA) of 1938, as amended, is the primary federal statute in the area of minimum wages and certain related labor standards issues: e.g., overtime pay and child labor.¹ Various bills dealing with the federal minimum wage have been introduced in the 108th Congress. *However, no action beyond referral to committee was taken on these proposals.* In each instance, the proposals died at the close of the 108th Congress.

There are no expiration dates embedded within the FLSA, so Congress is under no obligation to act on amendments to the statute — though the declining value of the minimum wage could provide an impetus for action. Were Congress to take up minimum wage legislation, it could focus narrowly upon an increase of the base rate: raising the floor above the current \$5.15 level. But, it could act more expansively, dealing with a variety of minimum wage-related issues and, perhaps, revising certain other aspects of the act such as its overtime pay or child labor provisions.

Some have urged that wage/hour amendment be coupled with tax and other benefits for business. While such *linkage* seems to have become popular during recent years, there is no structural reason to proceed in that manner. Broadening the scope of FLSA legislation (dealing with minimum wages, overtime pay, child labor, and related issues in one comprehensive bill) *could* reduce the likelihood that any measure in this area would ultimately be adopted; but, conversely, depending upon the overall content of such a package, it *could* expand the appeal of a wage/hour and child labor initiative.

¹ Child labor restriction for certain Amish youngsters was modified during the 108th Congress. See CRS Report RL31501, *Child Labor in America: History, Policy, and Legislative Issues*, by William G. Whittaker.

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. Traditionally, Congress has mandated broad general coverage and, then, specified select groups or categories of workers who are not to be protected by the act. Section 13 provides a body of exemptions (or special 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 general component parts — and of individual sub-units of each. *This report focuses narrowly upon the federal minimum wage.* Other related issues (e.g., child labor and overtime pay) are considered separately in other CRS products.²

Under the FLSA, Congress has established a basic minimum wage (now \$5.15 per hour) that must be paid to most covered workers. However, the level of the wage floor may vary from one group of workers to another with various exceptions and sub-minima built into the statute. Thus, the issue may be which minimum wage rate is applicable and to which workers it should be applied.³

Through the past century, the minimum wage (alone or with other wage/hour issues) has sparked partisan comment and assertion. The issue has not been solely *whether* there is an appropriate federal role in wage/hour regulation (that continues to be debated) but *what that role ought to be.* At what level should the minimum wage be set? Should it be indexed? How broad should minimum wage coverage be? And, if there are exemptions (which there are), upon what foundation should they rest? For example, should *small* firms be able to pay their workers at a lower rate than *large* firms? Should wage rates be productivity-based or respond to the needs and personal lifestyles of the workers involved? Might the wage floor depend upon an employee's nonwork status: e.g., whether the worker is the sole earner in a family, a secondary earner, or a student? As under current law, should the rate vary

² See, for example CRS Report RL31501, *Child Labor In America: History, Policy and Legislative Issues*; CRS Report RL31875, *Compensatory Time vs. Cash Wages: Amending the Fair Labor Standards Act?*; and CRS Report RL32088, *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, all by William G. Whittaker. See also CRS Report 98-278, *The Gender Wage Gap and Pay Equity: Is Comparable Worth the Next Step?*, by Linda Levine; and CRS Report RL31867, *Pay Equity Legislation in the 108th Congress*, by Levine and Charles V. Dale.

³ It is important to recall: *First.* Many states have state-mandated minimum wage standards. These may be roughly parallel to the federal FLSA: they need not be — and, often, are not. *Second.* Not all workers are covered under the FLSA — or under state wage/hour standards. These coverage patterns (including patterns of exemption) need to be taken into account when considering the potential impact of changes in federal wage/hour law. *Third.* Because of variations in coverage (with extensive administrative rules governing implementation and enforcement of wage/hour law), it may be perilous to suggest who is (or is not) covered by the requirements of statute. Too many variables impact coverage to allow easy assessment.

with the age of the worker — even where the work performed and productivity level among workers may be comparable?⁴

Minimum Wage: Background and Comment

When the FLSA was enacted in 1938, its coverage was largely limited to industrial workers engaged in interstate commerce. Retail, service and agricultural workers, generally, were not protected — nor were persons employed by state and local governments. On eight separate occasions through the years (see **Table 1**), the act has undergone general amendment, which has normally included language dealing with overtime pay and/or child labor as well as with modification of the wage floor. On numerous occasions, the FLSA has been subject to more narrowly focused single purpose amendment.

Table 1. Federal Minimum Wage Rates, 1938-2002

Public law	Effective date	Rate
P.L. 75-718 (Enacted June 25, 1938)	October 1938	\$.25
	October 1939	.30
	October 1945	.40
P.L. 81-393 (Enacted October 26, 1949)	January 1950	.75
P.L. 84-381 (Enacted August 12, 1955)	March 1956	1.00
P.L. 87-30 (Enacted May 5, 1961)	September 1961	1.15
	September 1963	1.25
P.L. 89-601 (Enacted September 23, 1966)	February 1967	1.40
	February 1968	1.60
P.L. 93-259 (Enacted April 8, 1974)	May 1974	2.00
	January 1975	2.10
	January 1976	2.30
P.L. 95-151 (Enacted November 1, 1977)	January 1978	2.65
	January 1979	2.90
	January 1980	3.10
	January 1981	3.35
P.L. 101-157 (Enacted November 17, 1989)	April 1990	3.80
	April 1991	4.25
P.L. 104-188 (Enacted August 20, 1996)	October 1996	4.75
	September 1997	5.15

⁴ Under current law, there are special rates for youth workers, for full-time students who work no more than part-time, for disabled persons, and for others. That these rates (except nominally for the disabled) are related to productivity may not be entirely clear.

Over the years, amendment of the FLSA has resulted in broadening coverage and adjusting the act to realities of the contemporary workplace. With the original enactment, Congress was feeling its way: learning how to deal with constitutional impediments to federal involvement in private sector labor standards regulation. Coverage patterns during the 1940s and 1950s remained relatively flat with only minor adjustment. Then in the 1960s and 1970s, there was substantial expansion of coverage with intermittent increases in the level of the minimum wage. Since 1977, change has been restricted *largely* to increases in the basic wage rate and modification of existing FLSA provisions. Amendment has often been contentious, conditioned by economic considerations and political compromise.⁵ Generally, expansion of coverage has been opposed by employers and supported by workers — reflecting, in the short term, who benefits and upon whom the costs fall.

The basic federal minimum wage rate is statutory and will remain at its current level until Congress takes specific action to alter it. Again, Congress has no specific obligation to revisit the minimum wage and thus *may* not do so. Over the long term, congressional inaction could have the effect of *repeal through attrition*. Fewer and fewer workers would likely earn the minimum wage (its value having been reduced through the impact of inflation) and the requirement, eventually, could become a dead letter. Conversely, Congress could index the minimum rate, assuring a constant rate without further congressional intervention.

Some states have a minimum wage requirement that is higher than the FLSA requirement. Where that is the case, *the higher standard normally prevails*. (See **Table 2.**) In addition, the minimum wage for American Samoa is set through a commission appointed by the U.S. Secretary of Labor and has been, generally, lower than the otherwise applicable federal rate under the FLSA. In the Commonwealth of the Northern Mariana Islands (CNMI), the insular government currently exercises authority with respect to wage standards — an issue of ongoing contention.

General Policy Concerning the Minimum Wage

For the past century, the minimum wage has been a focus of public policy discussion. Advocates for each side in the debate — academicians (notably, economists), policy analysts, and persons from the media — have argued with great vigor. Although the literature is extensive, the result is by no means definitive. FLSA historian Willis Nordlund, writing in the late 1990s, observes:

... one would presume that enough was known about the program to formulate a defensible strategy depicting effects of program change. This is not the case. There is no more agreement about these effects today than there was at the program's inception [with passage of the FLSA] fifty years ago.⁶

⁵ See *Congressional Record*, July 30, 1937, p. 7876. More generally, see CRS Report 89-568, *The Fair Labor Standards Act: Analysis of Economic Issues in the Debates of 1937-1938*, by William G. Whittaker (out of print; available from the author: 7-7759).

⁶ Willis J. Nordlund, *The Quest for a Living Wage: The History of the Federal Minimum Wage Program* (Westport, Conn.: Greenwood Press, 1997), p. xvii.

The available data and analysis, it would seem, are fragile and often contradictory. Still, critics and proponents of a minimum wage floor continue to praise and critique the concept in unusually strong and, often, unqualified terms.

Few questions in the ongoing debate are new — but they continue to be raised and debated — with little agreement even upon basic concepts. Many of the assumptions in the debate are implicit — not fully enunciated and perhaps not even recognized. Minimum wage debate, perhaps more than other economic issues, may have a psychological component, reflecting community values and fears. There continues to be an outpouring of minimum wage literature, some of it analytical but much of it purely political advocacy. Some of the major areas of concern are sketched below.

Table 2. Status of State Minimum Wage Rates

Jurisdictions with minimum wage rates <i>higher than the federal FLSA</i>		
Alaska (\$7.15)	Florida (\$6.15)	New York (\$6.00)
California (\$6.75)	Hawaii (\$6.25)	Oregon (\$7.25)
Connecticut (\$7.10)	Illinois (\$6.50)	Rhode Island (\$6.75)
Delaware (\$6.15)	Maine (\$6.35)	Vermont (\$7.00)
District of Columbia (\$6.60)	Massachusetts (\$6.75)	Washington (\$7.35)
Jurisdictions with minimum wage rates <i>at the same level as the federal FLSA (\$5.15)</i>		
Arkansas	Minnesota	Oklahoma
Colorado	Missouri	Pennsylvania
Georgia	Montana	Puerto Rico
Guam	Nebraska	South Dakota
Idaho	Nevada	Texas
Indiana	New Hampshire	Utah
Iowa	New Jersey	Virginia
Kentucky	New Mexico	West Virginia
Maryland	North Carolina	Wisconsin
Michigan	North Dakota	Wyoming
Jurisdictions with minimum wage rates <i>less than the federal FLSA</i>		
American Samoa ^b (administered)	Ohio (\$4.25)	
Kansas (\$2.65)	Virgin Islands (\$4.65)	
Jurisdictions with <i>no state minimum wage requirement</i>		
Alabama	Louisiana	South Carolina
Arizona	Mississippi	Tennessee

Source: U.S. Department of Labor, Wage and Hour Division, Employment Standards Administration, [http://www.dol.gov/esa/minwage/america.htm], Sept. 24, 2003.

- a. Coverage patterns vary from one jurisdiction to another. Some jurisdictions have a structured minimum wage system (i.e., different rates for various industries, sizes of firms, etc.). The table refers to *the highest standard applicable* under the law of the jurisdiction. In some jurisdictions, the rate (but not necessarily the pattern of coverage) is linked to the federal FLSA.
- b. For American Samoa, the minimum wage rate is set administratively and varies from one industry to another at rates lower than the federal minimum wage.

The Socio-Economic Context of Minimum Wage. The minimum wage is often presented as a mechanism through which to assist the *working poor*: usually non-union workers with few skills and little bargaining power.⁷ Some advocates of a minimum wage view it not only as socially useful but, also, as economically useful: promoting socio-economic equity, providing a floor under wages, stimulating demand for goods and services, expanding employment and, with other measures, bolstering the general economy.⁸

Some critics of the minimum wage, conversely, have viewed it as an inefficient approach to income redistribution — and an unjustified intrusion into the operation of *the free market*. They contend that minimum wage increases have an inflationary impact, restructure employment patterns, and impose an unnecessary burden upon employers and consumers. Such critics often view the wage floor as economically harmful, especially for the unskilled and new workforce entrants who, they say, may be priced out of the job market.

Economists and policy analysts continue to disagree about the impact of changes in the minimum wage and about what the effects of the minimum wage have been. The issues are both socio-economic and ideological and have changed little since the debates of 1937-1938.⁹

⁷ Concerning early interest in the minimum wage, see Lawrence B. Glickman, *A Living Wage: American Workers and the Making of Consumer Society* (Ithaca, Cornell University Press, 1997); George E. Paulsen, *A Living Wage for the Forgotten Man: The Quest for Fair Labor Standards, 1933-1941* (Selinsgrove, Pa., Susquehanna University Press, 1996); and David A. Moss, *Socializing Security: Progressive-Era Economists and the Origins of American Social Policy* (Cambridge, Harvard University Press, 1996). In her study, *Civilizing Capitalism: The National Consumers' League, Women's Activism, and Labor Standards in the New Deal Era* (Chapel Hill: The University of North Carolina Press, 2000), Landon R. Y. Storrs discusses both the origins of minimum wage legislation and the socio-economic/reform context from which the federal legislation emerged.

⁸ In his radio address of May 24, 2003, President George W. Bush stated (though in the context of tax reductions): “When people have extra take-home pay, there’s greater demand for goods and services. And employers will need more workers to meet that demand.”

⁹ See, for example “New Minimum Wage Research: A Symposium,” *Industrial and Labor Relations Review*, Oct. 1992, pp. 3-99; “The Minimum Wage: Some New Evidence,” *Journal of Labor Research*, winter 2002, pp. 1-67; David Card and Alan B. Krueger, *Myth and Measurement: The New Economics of the Minimum Wage* (Princeton: Princeton University Press, 1995); and Oren M. Levin-Waldman, *The Case of the Minimum Wage: Competing Policy Models* (Albany: State University of New York Press, 2001).

What Do We Mean by *Minimum Wage*? When people speak of a minimum wage, they often speak in terms of “a livable wage” or “a decent wage” or “a fair wage” or suggest that the working poor ought to be able to live “in reasonable comfort” and enjoy economic “dignity.” Early in the century, it was common to speak of a “living, family, saving wage.” But, when individuals use such terms, is there any reasonable assurance of a consistent meaning?

In statute, the minimum wage is clearly defined: \$5.15 per hour for most (but not all) covered workers. The FLSA does not translate that dollar amount into social or human terms. Is \$5.15 an hour actually a “livable wage” — and, livable by what standards? Does “reasonable comfort,” for example, mean safe and adequate shelter with modest amenities? How are “safe” and “adequate” and “modest” defined?

Some may view “minimum” as the lowest wage an individual will accept (a “reservation wage”) or the highest amount an employer is willing to pay. Some urge repeal of a legislated wage floor altogether — and define the “minimum” as whatever rates are set by supply and demand in a *free market* economy: i.e., a “market wage.”

How *Minimal* is Minimum? Minimum wage debates contain frequent references to the “poverty level” for a family of two or three or more (see **Table 3**). If Congress intends the minimum wage to be set at a level high enough to move a family out of poverty (as some suggest), then some measurement of family size and of total household income is necessary in assessing the adequacy of the FLSA minima. If, instead, the minimum wage is productivity-based (i.e., resting upon the contribution of the worker), then family size and non-wage income (support, for example, from other household members or through sources of income not related to the individual’s employment) would seem irrelevant.¹⁰

Under current law, a minimum wage worker employed full-time and full-year (40 hours per week for 52 weeks at \$5.15) would earn \$10,712. A full-time worker, under age 20 and paid at the statutorily permissible sub-minimum rate (\$4.25 per hour), could earn \$8,840 — for the same hours of work and for performing the same duties. After 90 consecutive days *with an individual employer*, however, his/her sub-minimum rate would ordinarily increase to \$5.15 an hour.¹¹ These amounts are prior to any deductions and exclusive of any fringe benefits. **Table 3** sets forth the level of earnings regarded as a poverty threshold, at various family sizes, for

¹⁰ Some may argue that basing a wage rate on the *productivity* of the worker may be, itself, misleading since in large measure worker productivity is based upon the skills of management and upon management-controlled elements such as work organization, availability of appropriate equipment, morale, ambience, and other similar factors.

¹¹ This suggests some of the problems in calculating minimum wage earnings. While a worker under age 20 can be paid \$4.25 per hour through the first 90 consecutive days with any employer, his wage after 90 days would have to be increased to the full \$5.15 per hour — unless he moved on to a second, third, or fourth employer, or dropped out of work for a period of time and broke the “consecutive” days pattern. Were he a full-time student working no more than part-time, he could be subject to a different sub-minimum wage option. Were he partially disabled and employed under Department of Labor (DOL) certification, he could be paid at any rate found to be commensurate with his productivity — however low that might be.

eligibility for certain federal assistance programs. The extent to which the poverty guidelines are realistic can be, and has been, debated. The guidelines have no *direct* connection with the federal minimum wage but they are frequently cited in discussions of the minimum wage and are used by some analysts as a measure of the adequacy of the wage floor.

Since much minimum wage work is also part-time and/or part-year, estimating actual annual income for minimum wage workers may be problematic. Similarly, choosing a wage rate that will comport with the work patterns of minimum wage earners and still provide “a living wage” may prove daunting. Moreover, those earning more than the statutory minimum will often receive fringe benefits in addition to cash wages: e.g., health insurance, a pension, etc. Under present law, the concept of a minimum wage is limited to a cash wage.

Table 3. Poverty Guidelines, All States and the District of Columbia (2004)

Size of family unit	Poverty guideline		
	States and District of Columbia	Alaska	Hawaii
1	\$9,310	\$11,630	\$10,700
2	12,490	15,610	14,360
3	15,670	19,590	18,020
4	18,850	23,570	21,680
5	22,030	27,550	25,340
6	25,210	31,530	29,000
7	28,390	35,510	32,660
8	31,570	39,490	36,320

Source: U.S. Department of Health and Human Services, *Federal Register*, Feb. 13, 2004, pp.7336-7338.

Note: For family units with more than eight members, add \$3,180 for each additional member. For Alaska, add \$3,980, and for Hawaii, add \$3,660. Poverty guidelines are not defined for Puerto Rico, the Virgin Islands, American Samoa, Guan, the Commonwealth of the Northern Mariana Islands, or other U.S.-related insular jurisdictions.

To Whom Should *Not Less Than* the Minimum Wage Be Paid?

FLSA minimum wage requirements have always been subject to exceptions, sometimes excluding from coverage those likely to be the most poorly paid workers. Upon what basis has Congress included — or excluded — workers from minimum wage protection under the FLSA?¹²

¹² See, for example, discussion during the 1938 debate on the original FLSA. *Congressional Record*, June 14, 1938, p. 9257.

When a Member of Congress (or, that body collectively through legislation) speaks of the “minimum wage worker,” to whom is reference made? Is the minimum wage worker viewed as a single individual? A parent? A *single* parent? The sole economic support for a family? A teenager? Is the FLSA minimum intended to be a wage floor for all workers, urban and rural — for employees only of large firms, or for those employed by small businesses as well? *Should any non-work or non-productivity factors be taken into account when setting the wage floor* — for example, age (a youth or a senior citizen), student status, family size, etc.? Whom does a legislator have in mind when setting the federal minimum wage at, for example, \$5.15 per hour? Is that mental image consistent with the demographic reality of the minimum wage workforce?

Various social and demographic distinctions have been cited to justify minimum wage rate differentials. For example, the FLSA, under certain conditions, allows a full-time student “employed in a retail or service establishment, agriculture, or the institution of higher education that such student attends” to be paid a lower minimum wage than that required for a non-student (even for equal work) — so long as the student works only “part-time” (defined by the statute). The wage level, here, is conditioned less upon productivity than upon how the worker spends his off-duty hours: i.e., enrolled in academic course work. If he drops out of school but keeps his job, the law requires that his hourly rate of pay be raised to at least the full *applicable* minimum. Similarly, even while remaining an employed full-time student, if his hours of work increase to more than part-time, he must be paid at the full applicable minimum rate. Applicability of the student sub-minimum rate (Section 14(b)) is dependent upon maintenance of full-time student status and not more than part-time employment. What is the rationale for paying a part-time worker less, on a per-hour basis (here, a sub-minimum rate) than a full-time worker — for the same work performed under the same conditions and equally well? What assumptions about “need” and “productivity” are implicitly built into the student sub-minimum wage option — and are these assumptions valid?¹³

Some may argue that younger persons, by definition, are less experienced and, therefore, less productive than “prime age” adults. This conclusion, however, *may not be valid* for *minimum wage-type work* and, indeed, an argument can be made that for low-skilled entry-level positions, young persons may be more productive: i.e., more vigorous, more nearly satisfied with such routine activity. What criteria should be taken into account with respect to the elderly (who *may* be less productive in minimum wage-type work) or for the disabled?

In short, should wages be needs-based or productivity-based? If a worker has an affluent spouse (or parents), should he (or she) be payable at a *sub-minimum* rate because his (or her) combined *family income* is relatively high? Should one who spends his wages for luxury items (tennis shoes, CD’s, etc.) be paid at a lower rate

¹³ Some may argue that this wage structure creates an incentive for young persons to leave school or to shift their primary focus from study to work. The rationale for sub-minimum wage treatment, however, is that it may offset the problems young persons have in finding work that will match their academic schedules: i.e., making them cheaper and, thus, more attractive to employ.

than one who spends his earnings for tuition, baby formula, or elder care? If needs-based, then should the minimum wage be pegged to family size: the more children, the higher the minimum wage rate? Are such distinctions useful or workable and do they lend themselves to public policy formulations?

Who Should Pay the Minimum Wage? How the minimum wage worker is defined and the intent of Congress in establishing/maintaining a federal minimum wage are critical to a consideration of by whom the minimum wage ought to be paid.

Is the minimum wage intended to be sufficient *to sustain a worker* (however defined by Congress): i.e., a single person without dependents or a sole breadwinner for a family? If so, should *an employer* be obligated to pay a wage of at least the amount needed to sustain the worker (and, where applicable, his or her dependents) — an amount that could, presumably, be affected by the assumptions built into the definition of *a minimum wage worker*?¹⁴

If a productivity-based minimum wage is not sufficient to sustain a worker (and his or her dependents, if any), then by whom should the deficiency be made up? Should it be paid by the employer who directly benefits by paying low wages (through utilizing the services of a low-wage workforce) — and, indirectly, by the consumer of the goods and services such low-wage workers provide — through an increase in the minimum wage rate? Or, should the difference between one's wage and one's need *be subsidized by* the taxpayer?

In 1975, Congress established the Earned Income Tax Credit (EITC) which, as amended, provides a tax credit to certain low-wage workers. Some laud the EITC for helping “to lift ... working families above the poverty threshold and to provide a greater work incentive to low-income workers.”¹⁵ But, the EITC can also be viewed as a subsidy, not only to workers but also to low-wage employers who may continue to pay low wages to their workers and to profit from utilization of such low-wage employees while tax revenues (through the credit mechanism, or through other public subsidies) assist their workers in meeting basic living costs. Thus, arguably, the routine cost of doing business is shifted from the individual employer to the taxpayer. Similarly, the EITC can be viewed as a subsidy to the consumers of the goods and services produced by low-wage workers.

Conversely, some argue, the EITC affords firms that operate on a slim margin an opportunity to remain in business and to provide employment, even if at low wages. However, the EITC is conditional upon the low earnings of the worker, not the marginal profitability of the employer. It makes no distinction between businesses (employers) that are struggling economically and those that are doing well. Speaking generally, some view the EITC *as a supplement to* the minimum

¹⁴ Since workers compete with each other in the labor market, paying a needs-based rate could encourage an employer to hire single persons without dependents and, thus, to keep labor costs (wages) low: to avoid hiring persons who are married with children. Similarly, youth workers, paid at a sub-minimum rate, are often thought to be, potentially, economic substitutes for older workers who must be paid a full minimum scale.

¹⁵ Bureau of National Affairs, *Daily Labor Report*, Aug. 3, 1993, p. A10.

wage, predicated upon the needs of a worker rather than upon his productivity; others, *as a substitute for* future minimum wage increases. Employer/business acceptance of the EITC and hostility toward the minimum wage *may* reflect an economic reality: with the EITC, the taxpayer subsidizes the employer's wage costs; with the minimum wage, those costs fall directly upon the employer or businessperson and indirectly upon the consumer.¹⁶

The act's small business exemption allows certain qualifying employers to be exempt from the FLSA minimum wage requirements. In general (though the exemption is complex), this could include firms "whose annual gross volume of business done" is less than \$500,000, though individual employees of such firms, engaged in interstate commerce, may be covered individually. In addition, the act contains numerous more narrowly focused exemptions.

Through the years, there has been pressure from the small business community to expand its exemption. Proponents have argued that small firms may be adversely impacted — or even driven out of business — by having to pay their workers the minimum wage. However, some may argue that no test of profitability has been proposed with respect to firms benefitting from the small business exemption: it is enjoyed by prosperous and struggling businesses alike.¹⁷ But, where small businesses are free from a minimum wage obligation, the question remains: How will workers employed by small businesses sustain themselves and, where applicable, their families? Further, what are the implications of a "small business exemption" with respect to competition between small firms and mid-sized or larger firms?

General Demographics of the Minimum Wage Workforce

Data concerning the minimum wage workforce are difficult to develop with precision. Some low-wage workers may be paid at or below the federal minimum wage — but, through exemptions built into the statute, may not be directly affected by an altered statutory rate. Conversely, some employers may choose to pay the statutory minimum because it is a convenient and generally recognized basic rate for low-wage employment — even where their workers may not be subject to the act's minimum wage provisions. In addition, persons employed at or below the federal minimum wage may change jobs (and economic status) with some frequency, moving in and out of work in response to non-work-related factors: school,

¹⁶ Concerning the EITC, see CRS Report RL31768, *The Earned Income Tax Credit (EITC): An Overview*, and CRS Report RS21477, *The Earned Income Tax Credit (EITC): Policy and Legislative Issues*, both by Christine Scott.

¹⁷ Much of the debate over increasing the minimum wage has focused upon the low-wage worker. Does he (or she) *really need* the increased income? Is he productive enough to justify (to earn) a higher minimum wage? Does he have other sources of income: for example, a working spouse or an employed parent? How will the worker spend his earnings: for essentials or for luxuries? But, comparable issues have not been raised about business. Does the small businessperson *really need* the increased profits from employing low-wage (sub-minimum wage) workers? Could he (or she) reasonably pay a higher wage? Or, is the employer's primary goal or motivation profit enhancement — at the expense of his employees and, under the EITC, at the expense of the taxpayer?

pregnancy or, perhaps, a change in marital status. Some workers may be multiple jobholders.¹⁸ And, not all workers *covered* under the FLSA are covered in precisely the same way. Thus, statistical data in this area may be a little imprecise and we may, often, be speaking of *the low-wage worker* rather than *the minimum wage worker* covered under the FLSA.

Who Are the Minimum Wage Workers? In 2003, about 2.1 million workers, paid hourly rates, earned at or below the federal minimum wage of \$5.15 per hour: about 545,000 were paid *at* the minimum rate and 1.6 million were paid *below* the minimum.¹⁹ These are workers who are 16 years of age or older.

In absolute numbers, according to data provided by the Bureau of Labor Statistics (BLS), persons working at or below the minimum are more likely to be *adults* than *youths*, more likely to be female than male, and likely to be white than of another race. Further, persons working at or below the minimum wage are more likely to be working part-time than full-time.

Critics of the minimum wage often point to a minimum wage worker who is a young person, working for “pin money” and being supported by a suburban middle-class family. Conversely, proponents of a higher minimum often view the low wage workforce as largely adult and, thus, suggestive of more serious needs.

Statistics can be used to support either interpretation. If, for example, using 2003 data, one defines a youth as someone between 16 and 19 years of age, then about 25.4% of workers, paid hourly at or below the minimum wage, are youths and 74.6% are adults. If one’s definition is more expansive, defining youth as between 16 and 24 years of age, then about 52.7% of persons earning at or below the minimum wage are youths and only 47.3% are adults. Thus, even with an expansive definition of youth (16 to 24 years of age), close to half of the minimum wage/sub-minimum wage workforce is 25 years of age or over. *For minimum wage type work*, however, the two demographic groups may well be in competition, with youth workers readily substitutable for older workers and with younger workers having an employment advantage: even where covered by minimum wage requirements, they can often legally be hired at a sub-minimum wage.²⁰

Among hourly workers, paid at or below the general minimum rate, about 66.4.% were women, about 33.6% men. Although the data are imprecise because of

¹⁸ Surveys of income *may* collect information only with respect to a worker’s main job.

¹⁹ About 72.9 million workers, out of a civilian noninstitutional workforce of about 146.5 million, were paid hourly rates in 2003.

²⁰ In addition to their legally allowable lower wage rate, other arguments can be made for the competitive advantages of youth workers. They may have more energy than older workers and may be more flexible. They are normally short-term employees who do not join unions, do not vest in pension programs, do not earn vacation benefits, are less likely to be ill or suffer job-related strains that one might associate with long-term employment or age. Conversely, the argument can be made that they are less disciplined, have fewer skills (through few skills are required for minimum wage type work), are less dependable, and may be less acclimated to the culture of the world of work.

definitional questions with respect to race and ethnicity, about 83.1% of hourly paid workers earning at or below the federal minimum wage classify themselves as “white.”²¹

In 2003, about 61.8% of workers at and below the minimum wage were employed on a part-time basis; about 37.9%, full-time. (Some statistical variation may result from a small number of multiple jobholders.) Low-wage employment may tend to be less stable than more highly compensated employment, with workers suffering involuntary joblessness or moving in and out of the labor force from discouragement, quitting to seek better wages and working conditions, or for other reasons.

Full-time employment is not synonymous with full-year employment. Estimating the annual income of minimum wage workers may be problematic since many full-time minimum wage workers may not be employed on a full-year basis. There may be periods when they are not working (or not working at the minimum wage).

Beyond uncertainties about combinations of part-time or full-time, part-year or full-year employment, one must recall that the minimum wage is a cash wage. Fringe benefits earned by a minimum wage worker are likely to be less than those of more highly paid persons, widening the gap between the economic well-being of the minimum wage worker and others. On the other hand, minimum wage workers may have other sources of income.²²

The Size of the Minimum Wage Workforce. In 2003, as noted above, there were roughly 2.1 million workers, paid hourly rates, who earned at and below the federal minimum wage of \$5.15 per hour. They constituted only about 2.9% of hourly paid workers from an aggregate of about 72.9 million hourly paid workers. This is the smallest number of persons earning at or below the minimum wage in over 20 years (see **Table 4**). An important question is: Why?

This numerical decline is not necessarily indicative of improved economic status for the low-wage worker. Rather, it may be that, as the value of the statutory minimum shrinks in terms of constant dollars, fewer workers are employed at or below the rate reflective of the reduced value of the statutory minimum. Nor does this imply that the economic status of those who have been moved, through attrition, to a rate a little in excess of the statutory minimum (that is, those who are above the statutory minimum but who are still low-wage workers) has improved: rather, their wage may have kept pace with inflationary pressures while the statutory minimum did not suggesting little or no actual change of economic status.

²¹ BLS divides the low-wage workforce into “white,” “black” and “Asian” within the context of race and provides a separate classification of “Hispanic or Latino.” Concerning this classification process, see Mary Bowler, et al., “Revisions to the Current Population Survey Effective January 2003,” *Employment and Earnings*, Feb. 2003, pp. 4-7, and 14.

²² Data here are drawn from an analysis, *Characteristics of Minimum Wage Workers: 2003*, prepared by the U.S. Bureau of Labor Statistics. BLS has used data from the Current Population Survey (CPS), provided from the U.S. Bureau of the Census.

In policy terms, this would appear to have several implications. If the statutory minimum wage remains at its current level while the general wage level rises because of inflation, the number of minimum wage workers could reasonably be expected to experience a further decline. Fewer and fewer people could be expected to be employed at the low wage level — even though their economic condition may not have improved. Thus, were Congress to take no action with respect to the minimum wage, allowing its value to continue to decline, the size of *the minimum wage workforce* could reasonably be expected to decline until it virtually disappears. This *would not mean* that the low-wage workforce had shrunk, merely that an increasingly large number of such persons would be employed *at wages above the declining real value of the statutorily defined minimum*.²³

Table 4. Number and Percent of Workers Paid Hourly at the Minimum Wage or Less

Workers paid hourly rates		
Year	Total paid the minimum wage or less	
	Number in thousands	As a percentage of hourly paid workers
1979*	6,913	13.4
1980*	7,773	15.1
1981*	7,824	15.1
1982	6,496	12.8
1983	6,338	12.2
1984	5,963	11.0
1985	5,538	9.9
1986	5,060	8.8
1987	4,697	7.9
1988	3,927	6.5
1989	3,162	5.1
1990*	3,228	5.1
1991*	5,283	8.4
1992	4,921	7.7
1993	4,332	6.7
1994	4,127	6.2
1995	3,655	5.3
1996*	3,724	5.4
1997*	4,754	6.7
1998	4,427	6.2

²³ That fewer people are employed at or below what some may regard as the more or less arbitrary federal minimum wage rate may be misleading. See *Poverty in the United States: 2002* (Washington: U.S. Department of Commerce, U.S. Census Bureau, Sept. 2003), P60-222, p. 1. The Census Bureau states that the “official poverty rate in 2002 was 12.1 percent” with “people below the official poverty thresholds” numbering 34.6 million.

Workers paid hourly rates		
Year	Total paid the minimum wage or less	
	Number in thousands	As a percentage of hourly paid workers
1999	3,340	4.6
2000	2,710	3.7
2001	2,238	3.1
2002	2,168	3.0
2003	2,100	2.9

Source: United States Bureau of Labor Statistics.

(*) Years in which a legislated change in the federal minimum wage took effect.

Under this scenario (which is generally consistent with the trajectory of legislated increases in the statutory minimum wage since its peak year of 1968), the minimum wage would have been effectively *repealed by attrition*.²⁴ In that context, an argument might be made that, since so few would actually be employed at rates at or below the statutory minimum (its relative value notwithstanding), the problem of the working poor could be handled through other more narrowly targeted means — possibly through transfers of income rather than through strictly work-related earnings. This, however, may run counter to public policy that income from work is generally preferable to transfers or entitlements.

Commonwealth of the Northern Mariana Islands (CNMI). In the mid-1970s, the CNMI entered into a quasi-autonomous relationship with the United States. By the Commonwealth agreement, regulation of overtime pay, under the FLSA, is enforced by DOL; but the minimum wage is governed by CNMI law. The CNMI controls its own immigration policy. Finally, the CNMI is regarded as within the U.S. customs area. The result has been the development of industries based upon low wages and alien contract labor, the product of which carries a “Made in America” label and competes with other American-made goods.²⁵

Through the past decade, human rights and labor standards in the CNMI have been the subject of DOL investigations, congressional hearings, and proposed legislation. In the 105th Congress, the Committee on Energy and Natural Resources voted to report legislation co-sponsored by Senators Daniel Akaka (D-Hawaii) and Frank Murkowski (R-Alaska) that would, *inter alia*, have created a U.S. controlled

²⁴ Were the minimum wage to have roughly the value that it had at its peak in 1968, the statutory rate would now (Feb. 2004) be about \$8.49 per hour rather than the current actual rate of \$5.15. It may be significant that, of proposals currently pending in the 108th Congress, the highest minimum rate would be \$7.00 per hour (the Boxer/Kennedy amendment to H.R. 4) and would take effect only 26 months after enactment — thus, potentially, allowing further decline in its real value. See CRS Report RS20040, *Inflation and the Real Minimum Wage: Fact Sheet*, by Brian W. Cashell.

²⁵ See CRS Report RL30235, *Minimum Wage in the Territories and Possessions of the United States: Application of the Fair Labor Standards Act*, by William G. Whittaker.

insular minimum wage structure.²⁶ The legislation died at the close of the 105th Congress, but the CNMI issue was the subject of further hearings by the Committee during the 106th Congress. Several general minimum wage proposals of the 106th Congress included language that would have brought the CNMI wage floor into conformity with that of the states.

In the 107th Congress, there was continuing interest in the CNMI with a number of bills introduced that would have extended FLSA minimum wage protection for workers employed in the insular jurisdiction. Normally, these proposals would have phased-in the full national rate through a series of incremental steps. In related action, on June 5, 2001, the Senate Committee on Energy and Natural Resources reported legislation to amend immigration law as it applies to the CNMI under the Covenant of Association between the Islands and the United States. (See S.Rept. 107-28.) The bill died at the close of the 107th Congress.

The issue of minimum wage protection for workers in the CNMI, in part because of the alleged concentration of sweatshop industry in the islands, remains a of the wage/hour agenda of the 108th Congress.

Minimum Wage Legislation in the 108th Congress

Early in the 108th Congress, various proposals were introduced that would have raised the federal minimum wage and/or made other changes in the FLSA. Some were single issue proposals; others included collateral provisions or were included in broader legislative packages.

Establishing a *Tradition*?

The original FLSA proposals of 1937-1938 were in the form of free-standing legislation: focusing narrowly upon labor standards but covering the entire field of wage/hour and child labor protections. As a procedural matter, the next seven rounds of minimum wage increases (1949, 1955, 1961, 1966, 1974, 1977, and 1989), though each provided for other changes in the FLSA itself, took the form of free-standing legislation. Non-FLSA or non-wage/hour issues were not addressed as part of a package with minimum wage and related concerns. Any “trade-off” to assist employers in dealing with the impact of wage/hour enactments (for example the “tip credit” and youth/student sub-minimum wage provisions) were considered within the context of wage/hour legislation *per se*.

In 1996, minimum wage and related FLSA amendments were brought to the floor in the House as an amendment to a broad package of non-wage/hour proposals mostly associated with tax matters of interest to industry. Indeed, the FLSA was a relatively small part of the overall package. While some components of the wage/hour portion of the bill had been the subject of hearings during the 104th Congress, others had not been — nor had the body of FLSA-related provisions been

²⁶ U.S. Congress, Senate Committee on Energy and Natural Resources, *Northern Mariana Islands Covenant Implementation Act*, report to accompany S. 1275, 105th Cong., 2nd sess., S.Rept. 105-201.

considered by committee as a unit. During the spring and summer of 1996, the joint minimum wage/tax revision measure moved through Congress and was signed by President Clinton on August 20, 1996 (P.L. 104-188).²⁷

When minimum wage legislation came to the floor during the 106th Congress, it largely followed the 1996 pattern. It combined tax revisions in behalf of the business community with changes in the FLSA — including an increase in the minimum wage.²⁸ By the 106th Congress, the two issues — a minimum wage increase and tax breaks for employers — had become linked in policy terms: i.e., that the former could not go forward, it seemed, without the latter.

Linkage, although a *tradition* only since the 104th Congress, appeared to be the essential focus of the legislative debate of the 106th Congress. “We came to the table,” observed Representative Rick Lazio (R-NY), “with the realization that a wage increase was fair but we also came to the table with a desire to protect the small business people who will end up bearing the direct burden of any wage increase that we pass here today.”²⁹ Senator Don Nickles (R-OK) concluded, looking ahead to the 107th Congress: “It kind of fits, frankly, to do it as a part of the tax package next year.”³⁰ Some may argue that, in practice, linkage is a matter of fairness and equity with respect to those who are called upon to fund an increased minimum wage.

However, not all concurred. Amy Borrus, writing in *Business Week*, termed the tax/minimum wage bill “a monument to legislative logrolling,” stating that “its veneer of virtue made it the perfect vehicle for a tax-break extravaganza.”³¹ Representative Charles Rangel (D-NY) seemed to sum up the views of critics of linkage: “We should not be forced to bribe the wealthy in our society in order to secure a simple dollar more per hour for the poorest working American families.”³² Thus, some may argue that proposals to raise the minimum wage have become, in

²⁷ See CRS Issue Brief IB95091, *The Minimum Wage: An Overview of Issues Before the 104th Congress*, by William G. Whittaker (out of print; available from the author: 7-7759). See also Alissa J. Rubin, “Congress Clears Wage Increase with Tax Breaks for Business,” *Congressional Quarterly*, Aug. 3, 1996, pp. 2175-2177; and Julie Kosterlitz, “A Bounty For Business,” *National Journal*, Oct. 26, 1996, pp. 2289-2292.

²⁸ In the Senate, minimum wage increases had been included within H.R. 833, as amended, the Bankruptcy Reform Act of 1999; in the House, it was part of H.R. 3081, the “Small Business Tax Fairness Act of 2000.” Though each house passed a version of the minimum wage legislation, the proposals died at the close of the 106th Congress. See CRS Report RL30690, *Minimum Wage and Related Issues Before the 106th Congress: A Status Report*, by William G. Whittaker (out of print, available from the author: 7-7759).

²⁹ *Congressional Record*, Mar. 9, 2000, p. H860.

³⁰ Bureau of National Affairs, *Daily Labor Report*, Dec. 6, 2000, p. A12.

³¹ Amy Borrus, “Why Business Isn’t Bucking This Minimum-Wage Hike,” *Business Week*, Nov. 1, 1999, p. 55. Borrus added: “And that’s how lobbyists managed to squeeze maximum benefits for their clients out of the minimum-wage measure.”

³² Bureau of National Affairs, *Daily Labor Report*, Mar. 9, 2000, p. A8.

practice, a vehicle for legislating economic benefits for employers and others in higher income brackets.³³

Current Minimum Wage-Related Initiatives

Because the minimum wage under the FLSA is set in statute, it remains at a fixed level, without regard for changes in the general economy, until Congress alters it through legislation. Various changes in the wage floor — at large and with respect to certain targeted groups of workers — have been proposed during recent years.

In 1938, the federal minimum wage rate was set at 25 cents per hour (initial proposals had called for 40 cents an hour) — a compromise to meet concerns voiced by some low-wage employers. Its real value has fluctuated through the years reaching a peak in 1968 and, thereafter, declining. *To equal its 1968 value, the minimum wage would need to be (December 2004) about \$8.68 an hour — \$3.53 above its current statutory level of \$5.15 per hour.*³⁴

A failure of the minimum wage to maintain parity with the cost of living has been a continuing concern. Should the floor remain at a fixed point, subject to action by Congress to augment it — the current pattern? Or, might it usefully be *indexed* to reflect changes in the cost of living (or shifts in other economic variables), thus providing a more regular pattern of increase? But, would indexation have an inflationary impact? Indexation was discussed early in the last century as an approach to wage stability and has remained, intermittently, an issue. It was last a subject of extensive congressional debate during consideration of the 1977 FLSA amendments, but was proposed in legislative form as recently as the 107th Congress.³⁵ Several states have experimented with minimum wage indexation in recent years. Oregon and Washington currently operate under such a system.³⁶

In the 108th Congress, legislation seems to be taking diverse paths. First, there is legislation that would increase in the minimum wage rate and, under some proposals, extend the federal minimum wage to the Commonwealth of the Northern

³³ In general, see Bureau of National Affairs, *Daily Labor Report*, Apr. 25, 2001, pp. A6-A7; and Juliet Eilperin, “Business Seeks Tax Breaks in Wage Bill: Pay Raise is Viewed as Best Chance at Cuts,” *The Washington Post*, May 14, 2001, p. A1 and A12. In an article, “Business Coalition Holds Firm for Bush Tax Cut Package,” *Congress Daily*, Apr. 19, 2001, reporters Stephen Norton and Charlie Mitchell state that trade association and business supporters of the Bush Administration’s tax package have shown “remarkable discipline in resisting the urge to press for inclusion of their own pet items” in the tax package, “mindful of assurances from GOP leaders that there will be a ‘second bite at the apple’ for business-specific provisions next year or even later this year — possibly paired with a bill to raise the minimum wage.”

³⁴ See CRS Report RS20040, *Inflation and the Real Minimum Wage: Fact Sheet*, by Brian W. Cashell; and CRS Report 98-960, *The Federal Minimum Wage and Average Hourly Earnings of Manufacturing Production Workers*, by William G. Whittaker.

³⁵ See H.R. 2812 (107th Congress), introduced by Representative Bernard Sanders (I-VT).

³⁶ See CRS Report RL30927, *The Federal Minimum Wage: The Issue of Indexation*, by Gerald Mayer.

Mariana Islands. Second, there is a series of proposals that, if adopted, would provide exemption from the act's minimum wage (and, in some cases, overtime pay) requirements with respect to certain specified categories of workers.

None of these measures became law. However, it may be worth considering them as patterns of subsequent legislation — were Congress to reconsider the impact of the Fair Labor Standards Act.

To Raise the Minimum Wage. Early in the 108th Congress, Representative George Miller (D-CA) introduced H.R. 936, a comprehensive proposal of which consideration of the minimum wage was one component. (See Sections 5201-5203.) The bill proposes an increase in the federal minimum wage, 60 days after enactment of the legislation, to \$5.90 an hour; and, 12 months later, a second increase to \$6.65 per hour. The bill would also extend the minimum wage requirements of the FLSA to the Commonwealth of the Northern Mariana Islands, beginning at \$3.35 per hour 60 days after enactment of the legislation, and rising by \$0.50 per hour at six-month intervals until the mainland standard (\$6.65) had been reached. A similar bill was introduced by Senator Christopher Dodd (D-CN), S. 448.

On February 27, 2003, Representative Miller also introduced a free-standing minimum wage proposal: H.R. 965. Its minimum wage provisions, both with respect to a general increase and to extension of coverage to the CNMI, paralleled H.R. 936. A companion proposal, identical in its minimum wage provisions, was introduced by Senator Tom Daschle (D-SD), S. 20. See also S. 224 (Daschle).

During Senate debate on March 30, 2004, on H.R. 4, the Welfare Reform Reauthorization, Senators Barbara Boxer (D-CA) and Edward Kennedy (D-MA) proposed an amendment that, were it to become law, would raise the minimum wage, in steps, to \$7.00 per hours 26 months after enactments. The Boxer/Kennedy amendment would also establish a federal minimum wage for the CNMI that would gradually be phased-up to the federal level.

On April 30, 2004, Representative Miller introduced H.R. 4256, legislation that would increase the federal minimum wage, in steps, to \$7.00 26 months after enactment of the bill — and that would extend federal minimum wage protection to the CNMI. A companion bill, S. 2370, was introduced by Senator Kennedy on May 3, 2004.

Critics, likely, would have argued that an increase in the federal minimum wage of the magnitude proposed by H.R. 4256 and S. 2370, the most expansive of those pending during the 108th Congress (i.e., to \$7.00 an hour), would be inflationary and economically ill-advised. However, proponents may counter that such an increase would still have been substantially lower than the minimum wage rate in 1968 expressed in constant dollars (i.e., \$8.68 per hour — or about \$1.68 per hour below its historical high in 1968).

To Expand Exemptions from Minimum Wage Protection. Following a pattern set through several Congresses, legislation (S. 292) was early introduced in the 108th Congress by Senator Lindsey Graham (R-SC) that would exempt from minimum wage and overtime pay any person employed as a licensed funeral director

or licensed embalmer. Companion legislation (H.R. 2065) was introduced by Representative Patrick Tiberi (R-OH). Under the proposals, were they enacted, persons employed as licensed funeral directors and/or licensed embalmers would no longer be covered by FLSA minimum wage and overtime pay protections.³⁷

S. 237, also introduced by Senator Graham, would eliminate FLSA minimum wage and overtime pay protections with respect to “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” and meeting a series of *duties tests* specified in detail in the proposed legislation. (See also H.R. 4396, a companion bill introduced by Representative Jim DeMint (R-SC).) S. 495 (Graham) would modify Section 13(a)(17) of the FLSA with respect to exemption of employers of certain computer services workers from the act’s overtime pay requirements. Detailed *duties tests*, to be met in order to classify workers as exempt from overtime pay protection, are set forth in the proposed legislation and an earnings threshold is also specified. A somewhat different bill (H.R. 1996), focusing upon the *duties tests* in Section 13(a)(17), was introduced by Representative Joe Wilson (R-SC).³⁸

Representative Pete Sessions (R-TX) has introduced legislation (H.R. 2263) that would eliminate FLSA minimum wage and overtime pay protections with respect to “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.”

More Specialized Wage Related Proposals

Legislative initiatives related to minimum wage and other FLSA provisions include, among other, the following.

Camp Safety. Section 13 of the FLSA is complicated: a body of exemptions sometimes narrowly focused to impact a specific industry or sub-segment of an industry. Under current law, “any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit conference center,” subject to certain other specified criteria, can be exempt from an FLSA minimum wage and overtime pay protection (Section 13(a)(3)).

Representative Robert Andrews (D-NJ) has introduced legislation (H.R. 2145) that would subject the existing exemption to “compliance with certain safety standards.” The bill would also impose a series of reporting requirements. H.R. 2145 was referred to the Committee on Education and the Workforce, Subcommittee on Workforce Protections. *The bill was not enacted.*

³⁷ See CRS Report RL30697, *Funeral Services: The Industry, Its Workforce, and Labor Standards*, by William G. Whittaker.

³⁸ See CRS Report RL30537, *Computer Services Personnel: Overtime Pay under the Fair Labor Standards Act*, by William G. Whittaker.

Prison Industries Labor Standards. On April 12, 2003, Representative Peter Hoekstra (R-MI) introduced H.R. 1829, a bill dealing with Federal Prison Industries (FPI) — *inter alia*, with contracting policies and labor standards practices including wage rates. Referred to the Committee on the Judiciary, the bill was reported on September 25 and passed by the House on November 6, 2003: 350 ayes to 65 nays.

As passed by the House, the bill would establish basic minimum wage rates for inmates working in the FPI program that are related to the minimum wage under the FLSA and equal to the minimum wage not later than September 30, 2009. Wages due an inmate would be subject to deduction for taxes, payment of fines pursuant to court order, restitution for victims, support of the inmate’s family, and creation of a fund “to facilitate such inmate’s assimilation back into society, payable at the conclusion of incarceration;...”

On November 7, 2003, the bill was received in the Senate and referred to the Senate Committee on the Judiciary.³⁹ *The bill was not enacted.*

Some Collateral Issues

As noted above, the content of minimum wage legislation can be as sweeping or as narrowly focused as one may choose. However, given the structure of the FLSA and the history of minimum wage-related proposals, there are a number of issues that could arise were minimum wage to be called up for floor consideration.

In each of these cases mentioned below (except that of American Samoa which operates under a special committee system), there is a threshold or triggering mechanism that modifies the impact of any change in the federal minimum wage and/or the manner in which it is applied. *In each case, if change is to occur, direct action by the Congress is required.* Such changes do not follow automatically from a legislated increase in the minimum wage — not are they related to any particular Congress.

The Youth Sub-Minimum Wage. After decades of heated debate, Congress adopted a general youth sub-minimum wage as part of the 1996 FLSA amendments. It allows an employer to pay a youth (under 20 years of age) a sub-minimum wage of \$4.25 per hour through the first 90 consecutive days of employment with an employer.

The general federal minimum wage, in 1996, was \$4.25 an hour. In establishing the youth sub-minimum, Congress set the lower rate at \$4.25 an hour in statute and

³⁹ See U.S. Congress, House Committee on the Judiciary, *Federal Prison Industries Competition in Contracting Act of 2003*, report to accompany H.R. 1829, 108th Cong., 1st sess., Sept. 25, 2003 (Washington: GPO, 2003). For general background, see also CRS Report 96-892, *Federal Prison Industries: UNICOR*, by JoAnne O’Bryant; CRS Report RL32380, *Federal Prison Industries*, by Lisa M. Seghetti; and CRS Report 93-895, *The Fair Labor Standards Act: Minimum Wage Protection for Prison Inmate Workers and for Non-Prison Labor*, by William G. Whittaker (out of print; available from the author: 7-7759).

then raised the general minimum wage, in steps, to \$5.15 per hour. As a result, unless Congress takes specific action to increase the youth rate, it will remain at \$4.25 per hour even if the general minimum wage is raised. Legislatively, the youth rate is a separate issue from the general wage floor. *The two do not increase in tandem.*

The ‘Tip Credit’ Provision. During the 1960s and 1970s, the FLSA was progressively expanded to provide protection for retail and service employees. Some of these workers were “tipped employees” and their employers argued, successfully, that since they were given tips by the public, they (the employers) ought not to be responsible to paying such tipped employees a minimum wage. Through the years, the level of the so-called *tip credit* (the value of tip income received by tipped employees that an employer could count toward his or her minimum wage obligation) has varied.

Under the 1996 FLSA amendments, recalling that the general minimum wage was then \$4.25 per hour, Congress provided a *tip credit* at 50% of the regular minimum wage (i.e., \$2.13 an hour). So long as an employee received tip income on a regular basis sufficient, when combined with an employer contribution of \$2.13 per hour, to reach the statutory minimum rate, the employer had no further minimum wage obligation. The most that he would have to pay his employees, under the FLSA, would be \$2.13 per hour.

In the 1996 FLSA amendments, Congress established a statutory minimum rate for employers of tipped employees at \$2.13 per hour, not 50% of the general minimum wage — though \$2.13 per hour would equal 50% of the pre-1996 minimum rate. Since the floor under the tip credit is set in statute at \$2.13 per hour, it will remain at that level unless Congress takes separate action to alter the base rate. The minimum cash wage under the *tip credit* provision and the general minimum wage are not linked. *They do not increase in tandem.*

The Computer Services Professional Rate. Beginning in the 1960s, a campaign was commenced to have certain computer services workers defined administratively by the Department of Labor as “professional” and, therefore, exempt under Section 13(a)(1) of the FLSA from minimum wage and overtime pay protection. When the Department demurred, Congress in 1990 enacted legislation (P.L. 101-583) directing the Secretary to develop regulations that would permit such an exemption if, among other criteria, “such employees are paid on an hourly basis” at a rate that is “at least 6½ times greater than the applicable minimum wage.” The Department proceeded as directed, developing a regulation under Section 13(a)(3) and attempting to justify the exemption on the “professional” character of the targeted personnel.

Under the 1996 FLSA amendments, Congress directly amended the act (Section (a)(17)) to exempt the targeted computer services workers where, among other qualifying criteria, they are paid “on an hourly basis ... at a rate of not less than \$27.63 an hour.” (P.L. 104-188) Then, Congress raised the minimum wage. While \$27.63 was 6½ times the then applicable minimum wage of \$4.25 per hour prior to the 1996 FLSA amendments, a critical shift had been made. The wage requirement for exemption was now set at a specific dollar amount. The computer services

threshold wage and the general minimum wage were no longer linked. *They do not increase in tandem.* Specific action by Congress is required to alter the threshold.⁴⁰

The ‘Small Business’ Exemption. From enactment of the FLSA in 1938, Congress had attempted, variously, to exempt certain *small businesses* from coverage under the act. Ultimately, Congress instituted a dollar volume test for exemption, though the level of that test has been changed through the years.

In 1989 (P.L. 101-157), Congress increased the threshold from the then-current \$362,500 to exempt “an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated).” The threshold, thus, is set at a specific dollar amount, requiring direct action by Congress to alter it. *The provision is not directly affected by any change in the general minimum wage.*⁴¹

The Case of American Samoa. American Samoa was acquired by the United States as a result of the Spanish-American War and through a series of subsequent treaties. When enacted in 1938, the FLSA applied to Samoa as it did the states of the Union. However, it does not appear to have been enforced until the 1950s.

During the early 1950s, tuna canning became Samoa’s major private sector employer. When it appeared that the industry would be required to pay its workers the national minimum wage (though its economy was somewhat different from that of the mainland), the industry appealed to Congress to write an exception into the act. Following hearings, the FLSA was amended. An industry committee structure was created under which an appropriate minimum wage for the island group would be developed administratively.⁴²

The industry committee structure was intended, it appears, to have been an interim measure while the insular economy progressed toward mainland standards. Nearly half a century later, the system remains in place. The minimum wage for

⁴⁰ See CRS Report RL30537, *Computer Services Personnel: Overtime Pay under the Fair Labor Standards Act*, by William G. Whittaker. Regulatory changes, proposed by the Department of Labor with respect to Section 13(a)(1), could impact workers in the computer services industry. See CRS Report RL32088, *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, by William G. Whittaker.

⁴¹ It was commonly assumed that the 1989 FLSA amendment would allow a flat \$500,000 small business exemption. When DOL prepared the regulations governing the small business provision, however, it was found that the exemption would only cover workers who were not engaged in interstate commerce. Workers engaged in interstate commerce would be individually covered under the act even though the firm, *per se*, might be exempt. See CRS Issue Brief IB90082, *The Federal Minimum Wage: Changes Made by the 101st Congress and Their Implications*, by William G. Whittaker (out of print; available from the author: 7-7759).

⁴² P.L. 84-1023. See also U.S. Congress, Senate Committee on Labor and Public Welfare, *Amending the Fair Labor Standards Act of 1938*, hearings, 84th Cong., 2nd sess., May 8, 1956 (Washington: GPO, 1956.)

American Samoa continues to be set administratively. *It is independent from any change in the general minimum wage rate under the FLSA.*⁴³

Welfare Reform Reauthorization

On March 29, 2004, the Senate began consideration of H.R. 4, the Welfare Reform Reauthorization (also known as the “Personal Responsibility and Individual Development for Everyone Act” or “PRIDE Act”). A focus of the proposed legislation was efficient movement of persons from welfare into gainful employment.

“This welfare bill is about workers,” stated Senator Kennedy. “It is about moving people from welfare into work.”⁴⁴ To do that, he argued, it is necessary “to ensure that work pays.” And, he added: “One of the best ways to make sure work pays is to make sure that those who are on the bottom rung of the economic ladder — those who make the minimum wage — are going to have a livable wage.”⁴⁵

Senator Kennedy argued that the current federal minimum wage at \$5.15 per hour (\$10,712 per year where a worker is engaged through 52 weeks of 40 hours a week) was inadequate. The purchasing power of the existing minimum wage, he suggested, had eroded. In order to maintain its 1968 value, Senator Kennedy noted, the current minimum wage would need to be \$8.50 per hour — though he was willing to consider a somewhat lower figure. He indicated that he would be introducing an amendment to H.R. 4 calling for a minimum wage increase and sought unanimous consent for its consideration. Senator Grassley objected. “What I object to,” the Senator from Iowa stated, “is the constant harassment on the part of people on the other side of the aisle to keeping legislation from moving along very quickly that everybody knows needs to pass” and he protested that a minimum wage amendment would be “nongermane” to the issue of welfare reform.⁴⁶

On March 30, Senator Boxer, for herself and for Senator Kennedy, introduced S.Amdt. 2945. *First*, the amendment, as introduced, would increase the general minimum wage, in steps, to \$7.00 an hour: to \$5.85 an hour 60 days after enactment; to \$6.45, twelve months after the 60th day after enactment; and to \$7.00 twenty-four months after the 60th day following enactment. *Second*, the minimum wage under the FLSA would be made applicable to the Commonwealth of the Northern Mariana Islands. Sixty days after enactment of the Boxer-Kennedy amendment, the rate in the CNMI would be set at \$3.55 per hour and would increase by 50 cent increments each six months until it reached the general FLSA rate.⁴⁷

⁴³ See CRS Report RL30235, *Minimum Wages in the Territories and Possessions of the United States: Application of the Fair Labor Standards Act*, by William G. Whittaker.

⁴⁴ *Congressional Record*, Mar. 29, 2004, p. S3266.

⁴⁵ *Ibid.*, p. S3265.

⁴⁶ *Ibid.* pp. S3266-S3269.

⁴⁷ *Congressional Record*, Mar. 30, 2004, p. S3336. The Boxer-Kennedy amendment would not affect other segments of the FLSA in which there is a statutory sub-minimum: for example, the youth sub-minimum and the administered rate for American Samoa.

There was sharp disagreement pro and con — both with respect to the merit of an increase in the minimum wage and to the germaneness of a minimum wage increase to the overall question of welfare reform. On March 30, Senator Bill Frist (R-TN) called for invocation of cloture.⁴⁸ On the morning of April 1, the Senator explained that, following 60 minutes of debate on the cloture motion, there would be a rollcall vote on “invoking cloture on the committee substitute to H.R. 4.” Senator Frist continued: “If cloture is not invoked, it will be clear that this legislation will be gridlocked by these unrelated matters and therefore will be difficult to finish.”⁴⁹

Senator Tom Daschle (D-SD) protested: “People on the other side of the aisle, for whatever reason, have refused to allow us an opportunity to have an up-or-down vote on protecting workers’ overtime, on minimum wage, and on unemployment compensation.”⁵⁰ As discussion continued, Senator Daschle affirmed: “If we really want to help people move from welfare to work, we ought to increase the minimum wage.”⁵¹ Senator Max Baucus (D-MT), speaking against cloture, stated: “We are here today [at this parliamentary juncture] because the majority chooses not to allow a vote on a minimum wage. It is that simple.”⁵² The assessment of Senator Rick Santorum (R-PA), an opponent of the Boxer-Kennedy amendment and proponent of cloture, was similarly direct. “Without cloture,” Senator Santorum stated, “we do not get a bill and we do not help millions of Americans get out of poverty. What we are playing,” he added, “is politics.”⁵³

The vote on cloture failed: 51 yeas to 47 nays. Setting welfare reform aside, the Senate moved on to other issues.⁵⁴

Legislating a *Living Wage*

During the past decade, numerous local governments have passed *living wage* statutes.⁵⁵ Although these enactments tend to vary from one jurisdiction to the next, they seem most often to (a) set a minimum wage standard higher than the otherwise

⁴⁸ *Congressional Record*, Mar. 30, 2004, p. S3359.

⁴⁹ *Congressional Record*, Apr. 1, 2004, p. S3520.

⁵⁰ *Ibid.*, p. S3529. Overtime pay protection and unemployment compensation had been raised, over a period of months, in conjunction with other legislation — each time, without a definitive up-or-down vote. Here, the process was enlarged to include an increase in the minimum wage.

⁵¹ *Congressional Record*, Apr. 1, 2004, p. S3535.

⁵² *Ibid.*, p. S3537.

⁵³ *Ibid.*, p. S3536.

⁵⁴ *Ibid.*, p. S3538. Concerning welfare reform legislation, see CRS Issue Brief IB10140, *Welfare Reauthorization: Overview of the Issues*, by Gene Falk, Melinda Gish, and Carmen Solomon-Fears.

⁵⁵ While the various “living wage” initiatives are not minimum wage proposals in the traditional sense, they share many of the same purposes.

applicable state or federal wage floor and (b) require that not less than this local *living wage* be paid to persons employed by contractors engaged by the local government or by “employers who receive special treatment from” a city or county.⁵⁶ The basic premise of the *living wage* campaign is “that anyone in this country who works for a living should not have to raise a family in poverty.”⁵⁷

By the 104th Congress, Representatives Luis Gutierrez (D-IL) and Bruce Vento (D-MN) introduced legislation (separate and different bills) that would, working from a base of federal contracting, require payment of not less than a living wage (with “living wage” defined as not less than the federal poverty line for a family of four). Similar bills were introduced in the 105th and 106th Congresses — and, again in the 107th Congress.

In the 108th Congress, the “living wage” issue reemerged and several new proposals in this area were introduced. No new legislation was adopted in this area. However, the “living wage” is separate and distinct (both in concept and in statutory base) from the “minimum wage” under the FLSA.

⁵⁶ George Tolley, Peter Bernstein, and Michael Lesage, *Economic Analysis of a Living Wage Ordinance* (Washington: Employment Policies Institute, July 1999), p. 2.

⁵⁷ Robert Pollin, and Stephanie Luce, *The Living Wage: Building a Fair Economy* (New York: The New Press, 1998), p. 1.