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## **Compensatory Time vs. Cash Wages: Amending the Fair Labor Standards Act?**

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# Compensatory Time vs. Cash Wages: Amending the Fair Labor Standards Act?

## Summary

Since the mid-1980s, certain employer-oriented groups and individuals have urged amendment of the Fair Labor Standards Act (the FLSA) to alter current overtime pay requirements. In part, they have sought to broaden opportunities for *private sector* employers to offer to their employees workhours flexibility. Legislation to effect this end was introduced at least as early as the 99<sup>th</sup> Congress, and has been reintroduced in various forms up to and including the 109<sup>th</sup> Congress. The format has changed somewhat. The various bills have not yet been adopted.

Under the FLSA, the standard work week is normally 40 hours. After 40 hours of work in a single week, payment for additional hours of work is at the rate of *time-and-a-half* (i.e., 1½ times a worker's regular rate of pay). Within a single work week, any combination of hours can be worked. However, once the total hours of work exceeds 40 in a single week, the premium rate (time-and-a-half) must be paid.

The various proposals, differing somewhat from one Congress to the next, would have allowed *an employer* to offer to his or her employees the option of trading time off (compensatory time off, or comp time) for cash payment for overtime hours worked. Instead of being paid in cash for extra hours of work (those in excess of 40 per week), the employee would have been allowed to take time off with payment — usually (proposals vary on this) on the basis of 1½ hours of paid leave for each hour of overtime worked. The legislation provides that the arrangement would be *voluntary* for each of the parties. Either a worker or his or her employer could opt out of the program and, if a worker so desired, the accrued (and unused) comp time could later be converted to cash earnings.

Under federal law, employers that are *public agencies* now have the option of granting to their employees, within reason, flexible work hours. However, public employees work under diverse protections (for example, civil service rules) that are not available to private sector employees.

Through the years, a number of questions have been (and continue to be) raised with respect to these proposals. For example: How flexible is current law where private sector workhours practices are concerned? What level of choice would workers have under the proposal? What impact would it have on the basic wage/hour protections of the FLSA? At large, would comp time assist (or hinder) working parents as they attempt to meet their dual responsibilities of home and work?

The legislation has been contentious. Speaking generally, employers have supported the concept — often in the name of working mothers. Conversely, organized labor and various women's advocacy groups have opposed it.

There is continuing interest in this issue. This report will be updated as developments may require.

## Contents

Introduction .....	2
The Structure of the Issue .....	3
Regulating Hours of Work .....	5
Origins of the Regulatory Impulse .....	5
A Changing Workforce Psychology .....	6
To Legislate New Standards .....	7
Comp Time Proposals of the 108 <sup>th</sup> Congress:	
Provisions of the Legislation .....	9
Issues in the Debate .....	12
A Matter of Choice .....	12
Flexibility Under the Fair Labor Standards Act .....	14
Worker Eligibility and Participation .....	15
Bureaucracy and Paperwork .....	16
To <i>Intimidate, Threaten, or Coerce?</i> .....	17
The Economics of Deferred Income .....	19
Public Sector vs. Private Sector .....	20
Is the FLSA “Outdated”? .....	21
Concluding Comment .....	22
What would be changed by the proposed legislation? .....	22

# Compensatory Time vs. Cash Wages: Amending the Fair Labor Standards Act?

The issue of compensatory time off — rather than cash wages for overtime hours worked — has been intermittently before the Congress for nearly 20 years. As various proposals to give effect to “comp time” have been introduced, they have been redefined in ways intended to make them more palpable to workers and to their representatives, but without diminishing their essential thrust.

The most recent stand-alone legislation emerged *during the 108<sup>th</sup> Congress*. On February 5, 2003, Senator Judd Gregg (R-N.H.) introduced S. 317, the “Family Time and Workplace Flexibility Act” — an umbrella proposal that dealt with several workhours-related initiatives in addition to “comp time.”<sup>1</sup> *No action was taken on S. 317*. On March 6, 2003, Representative Judy Biggert (R-Ill.) introduced H.R. 1119, the “Family Time Flexibility Act.” The Biggert bill was referred to the House Committee on Education and the Workforce and, on April 9, 2003, the committee voted to report it without change. The vote was along party lines, with Democrats voting against the measure (22 nays) and Republicans (27 yeas) voting in support. Though H.R. 1119 was placed on the Union Calendar, *no further action was taken and the bill died at the close of the 108<sup>th</sup> Congress*.

Through its most recent history, the concept of workplace flexibility has appeared within the context of debate over the federal minimum wage. Although significantly scaled back, it has been used by critics of an expanded minimum wage as an off-setting measure — particularly in the interest of working women: notably, of “soccer moms.”

In March 2005, Senator Edward Kennedy (D-MA), as part of the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (S. 256), proposed an increase in the minimum wage. Immediately, Senator Rick Santorum (R-PA) proposed his own (but lower) minimum wage amendment but combined it with the *workplace flexibility act* — at that point, enhanced by a series of unrelated of pro-industry proposals. On March 7, 2005, both the Kennedy and Santorum proposals were rejected by the Senate.<sup>2</sup>

In October 2005, during consideration of authorization for the *Departments of Transportation and the Treasury* (H.R. 3058), Senator Kennedy again proposed an increase in the minimum wage. Here, Senator Michael Enzi (R-

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<sup>1</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. This report deals only with the comp time segment of S. 317.

<sup>2</sup> *Congressional Record*, Mar. 3, 2005, pp. S2132-2133. For the Santorum proposal, see *Congressional Record*, Mar. 7, 2005, pp. S2188-S2197.

WY) proposed an increase in the minimum wage (lower than proposed by Senator Kennedy) and coupled it with the *workplace flexibility act* (again, enhanced with unrelated pro-industry proposals), as a counter to the Kennedy bill. On October 19, 2005, each of the amendments was defeated.<sup>3</sup>

Finally, in June 2006, during consideration of the *National Defense Authorization Act for Fiscal Year 2007*, a further Kennedy proposal was introduced that would have raised the minimum wage. Senator Enzi countered with his own minimum wage increase (lower than proposed by Senator Kennedy) and associated with the *workforce flexibility act* and with a series of unrelated proindustry measures. On June 21, 2006, the several proposals were withdrawn.<sup>4</sup>

Some may have viewed the workplace flexibility proposal (which organized labor and various women's advocacy groups strongly oppose) as a *poison pill* amendment. Others may have seen the amendment as an effort to assist working women in coping with their responsibilities — and assisting employers in paying higher wages to minimum wage workers. In either case, the result was the same and the bills died.

A number of proposals have surfaced during recent years to amend the overtime pay provisions of the Fair Labor Standards Act (FLSA). This report is limited to consideration of “comp time.” Following a brief introduction of the general issue, this report examines the Gregg and Biggert proposals and assesses the questions that have been raised, pro and con, with respect to compensatory time: essentially, the substitution of “comp time” for payment of cash wages for hours worked beyond the 40-hour weekly standard under the FLSA.

As noted above, the various proposals may have changed in some particulars, though their essential thrust has remained the same. Here, for purposes of analysis, this report examines the Biggert bill (H.R. 1119) and the appropriate segment of the Gregg bill (S. 317) from the 108<sup>th</sup> Congress — the last attempt to deal with the issue in a single legislative format.

## Introduction

The legislation (and the issue, here) deals with *private sector employment only*. State and local government workers fall under a separate provision of the FLSA ( 29 U.S.C. § 207(o)). Those federal workers who fall under the FLSA are subject to somewhat different regulatory standards administered through the Office of Personnel Management. Both groups are also subject to a body of public sector

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<sup>3</sup> *Congressional Record*, Oct. 18, 2005, pp. S11469-S11470, and Oct. 19, 2005, pp. S11547-S11548. For the Enzi proposals, see *Congressional Record*, Oct. 19, 2005, pp. S11581-S1189.

<sup>4</sup> *Congressional Record*, June 21, 2006, p. S6203-S6204. In this instance, the Senate vote on the Kennedy amendment was 52 yeas to 46 nays. However, by prior agreement, a higher number of votes (60 yeas) was required. The two amendments were automatically withdrawn. For the Enzi proposals, see *Congressional Record*, June 20, 2006, pp. S6178-S6185.

personnel law (and related employee protections) that do not apply to workers in the private sector.

In addition, under S. 317 and H.R. 1119, employees working under a collective bargaining agreement are treated differently from those employed in establishments in which there is no union presence. Thus, given the relative decline in union membership, it may be more nearly useful to deal with the entire body of private sector worker as a union.

## The Structure of the Issue

To begin, it may be useful to review the terms used in this report and to define the relative positioning of the parties involved.

*What is overtime?*

The Fair Labor Standards Act of 1938, as amended, establishes a basic workweek of 40 hours. When covered (non-exempt) employees work hours in excess of 40 per week, they must be paid at least *time-and-a-half* (1½ times their regular rate of pay) *for those hours worked in excess of 40*. There is no statutory cap on the number of hours that can be assigned by an employer. If an employee is needed through 50 or 60 hours each week, he (or she) can be required to work through that time period. But, when the number of hours worked per week exceeds 40, the higher pay rate (time-and-a-half) is required.<sup>5</sup>

*Who schedules the hours employees are required to work? Who determines whether overtime hours are to be worked at all — and, if they are, when they will be worked?*

Scheduling work hours is the prerogative of the employer. He or she can mandate a straight 40-hour work week. Or, the employer can mandate a work week that is either shorter or longer than the generally standard 40 hours. The employer can also determine when those hours will be worked and by whom (i.e., to whom overtime hours, with overtime pay, will be assigned).<sup>6</sup>

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<sup>5</sup> Not all workers are covered under the overtime pay requirements of the FLSA. For example, executive, administrative, and professional employees are normally exempt — and there are other specific exemptions that have been written into the statute. By the 1990s, just over 76 million nonsupervisory employees were covered by the overtime pay requirements of the act. See U.S. Department of Labor, Employment Standards Administration, *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act (Section 4(d) Report)* (Washington, 1993), p. 25.

<sup>6</sup> An employer can negotiate away his workhours scheduling rights through a collective bargaining agreement with a union (where there is a union in the shop) but, in the first instance, the right and responsibility to schedule work rests with the employer. However, in certain cases, employers are restricted in the number of hours that can be assigned as a matter of public safety. For example, certain truck drivers may not be given hours to work in excess of specified standards. But these restraints are not a part of the FLSA.

*What about flexibility? Can the employer institute flexible scheduling — if he or she chooses to accommodate the non-work requirements of his employees?*

Under current law, an employer can institute flexible work schedules (and even comp time, in some cases) if he chooses to do so. *Within the context of a 40-hour workweek, any arrangement of workhours is allowable.* For example, an employer could establish a *compressed schedule* of four days of 10 hours each as the regular work week — allowing for a three-day weekend each week. Many employers have adopted such a schedule.

Further, an employer can, unilaterally, permit a system of flextime: flexible scheduling under which employees vary their arrival and departure times. Should an employee, under current law, want to work 10 hours on Tuesday and 6 hours on Friday, that is permissible. There is no extra payment (no time-and-a-half) required. A worker can, so far as the FLSA is concerned, vary his or her arrival and departure times from one day to the next and from one week to the next.

The FLSA does not establish daily minimum or maximum hours of work. Suppose a working mother or father needs to take 4 hours off on Tuesday to take a child to the doctor. Under the FLSA, this does not present a problem. She or he can work extra hours on any other day of the week to make up for the time taken off. No extra pay is required for the *make-up hours* (the comp time) — so long as the total hours of work per week does not exceed 40. Each workweek is a separate unit.<sup>7</sup>

*If Congress has built flexibility into the FLSA, then what governs whether workers can use flextime, intra-week comp time, compressed scheduling, etc.?*

Again, the scheduling of hours of work is the prerogative of the employer. The employer can permit flexible scheduling if he or she chooses to do so. But, he is not *required* to do so — and many don't. There are a variety of reasons why many firms operate on fixed schedules. One is the nature of the work process. Where workers are collectively engaged (as on assembly line work), it may not be practical to have employees set their own arrival and departure times. Similarly, in an office setting, where an employee may be needed through specific periods (a doctor's nurse, a teacher), flexible scheduling may not be practical. Or, if one thinks in terms of a production establishment (a garment factory, a poultry processing plant) with a substantial workforce, flexibility may be deemed too complicated: e.g., managing dozens of different schedules, keeping track of workers, merging processes and making sure that systems are covered.

Denying scheduling flexibility (and comp time) to workers may also be a reflection of the personal choice of an employer — and, that is the employer's option.

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<sup>7</sup> The total number of hours worked in a given week can, of course, exceed 40 hours but, when they do, overtime rates must be paid for those hours worked in excess of 40. There may be other leave options available to a worker (in some cases, annual leave or leave without pay — which would, normally, require employer approval).

## Regulating Hours of Work

Why are hours of work regulated under the FLSA? How did such regulation come about? Is there a consensus that such regulation is appropriate and useful?

**Origins of the Regulatory Impulse.** 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>8</sup> Demands were voiced largely (though by no means exclusively) in humane terms. Extended hours of work were seen as destructive of 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. It was argued that excessive continuous hours of work contributed to workplace hazard, increasing the risk of accidents and work-related injuries, and endangered both clients and the public. 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>9</sup>

Following World War I and, increasingly, during the Great Depression, the impetus for reduced hours of work seemed to shift. While social and humane considerations continued to be emphasized by trade unionists and reformers, economic factors 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 with overtime pay where covered workers were employed in excess of 40 hours per week.<sup>10</sup> By the end of World War II, the 40-hour workweek had largely become the norm.

In the context of the FLSA, hours reduction was seen as both of social and of economic value. Overtime pay requirements were viewed by Congress *as a penalty* — imposing a cost upon employers who found it more convenient (or cheaper) to pay time-and-a-half rather than to hire additional workers. The penalty was not supposed to be without an element of economic pain: rather, it was intended to be a deterrent to inordinately long hours of work. Since excessive hours of work

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<sup>8</sup> In general, see Marion C. Cahill, *Shorter Hours: A Study of the Movement Since the Civil War* (New York: Columbia University Press, 1932).

<sup>9</sup> The rationale for workhours regulation is explained in “Shorter Hours for Men as a Public Welfare Measure,” *Monthly Labor Review*, June 1916, pp. 23-29. Labor's perspective, during the fight for regulation, is presented in George McNeill, *The Eight Hour Primer: The Fact, Theory and the Argument* (Washington: American Federation of Labor, 1899), and Samuel Gompers, *The Eight-Hour Workday: Its Inauguration, Enforcement and Influences* (Washington: American Federation of Labor, undated but published in pamphlet form in the late nineteenth / early twentieth century).

<sup>10</sup> On the inter-war years, see Elizabeth Brandeis, “Organized Labor and Protective Labor Legislation,” in Milton Derber and Edwin Young (eds.), *Labor and the New Deal* (Madison: University of Wisconsin Press, 1961), pp. 193-237.



contributed to workplace hazards, it was argued, workers were not expected to bargain away the protection afforded by the 40-hour workweek — even though it might appear to be, temporarily, expedient.

Imposition of an overtime *penalty* was not always quietly embraced by employers. Among some employers, there was a continuing opposition to such government restrictions upon wages and hours. Some viewed such restraints as an infringement upon management's *right to manage*. Others had broader, more philosophical, objections. As they had argued against the FLSA in the 1930s, they would oppose any expansion of the statute — and would continue through subsequent decades to seek, through amendment, to limit the scope and impact of wage/hour requirements.

**A Changing Workforce Psychology.** With the passage of time, fewer persons were employed who had directly experienced either the adverse working conditions of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries or the economic turmoil of the Great Depression. For younger workers, wage/hour protections afforded by the FLSA came increasingly to be taken *as a given*: as standard and accepted practice.

Gradually, the demographics of the workforce changed. The percentage of workers who were trade union members commenced its decline; and, even where membership persisted, both rank-and-file and the union leadership were, arguably, of a different orientation from those of the first three decades of the 20<sup>th</sup> century. More workers were better educated — and women had begun to have enhanced labor market attachment. By the 1960s, a new movement had begun for *humanization* of the world of work and for flexibility. Legislation was approved that allowed alternative work practices for federal employees and for enhanced workhours flexibility for employees of state and local governments.<sup>11</sup> 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 recruitment, worker retention, increased productivity, and efficiency.<sup>12</sup>

Some, mainly older workers and trade unions in the industrial fields, 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 (especially younger workers, public sector unions, and non-union women's advocacy groups), however, argued that the changing character of work and of the workforce had rendered the wage/hour laws of the 1930s obsolete: i.e., that the requirements of

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<sup>11</sup> See P.L. 95-390 (the Federal Employees' Flexible and Compressed Work Schedules Act), P.L. 95-437 (the Federal Employees Part-Time Career Employment Act of 1978), and P.L. 99-150 (the Fair Labor Standards Amendments of 1985).

<sup>12</sup> The literature on work humanization and alternative work patterns is extensive. *Inter alia*, see Riva Poor, *four Days, 40 Hours; Reporting a Revolution in Work and Leisure* (Cambridge: Bursk and Poor Publishing, 1970); Harold L. Sheppard and Neal Q. Herrick, *Where Have All the Robots Gone? Worker Dissatisfaction in the '70's* (New York: The Free Press, 1972); and Barney Olmsted and Suzanne Smith, *Creating a Flexible Workplace: How to Select and Manage Alternative Work Options* (New York: AMACOM, 1994). Further research would be useful in fully assessing the impact of alternative work scheduling.

1930s legislation should no longer be regarded as inviolate. Flexibility became the new by-word: i.e., advocacy of *alternative work patterns* or, of *new ways to work*.

**To Legislate New Standards.** 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>13</sup> Gradually, both long-time critics of federal wage/hour regulation and some younger advocates of reform adopted the rhetoric of the alternative work patterns advocates.

Since the mid-1980s, various initiatives have been introduced that would restructure the overtime pay requirements of the FLSA to permit private sector employers to institute some form of compensatory time off.<sup>14</sup> Proposals varied — as did the motivation behind them. Generally, they proposed 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 proposed an even trade (an hour worked and an hour, later, of leave). Others sought to honor the time-and-a-half principle by offering 1½ hours off for each hour worked.<sup>15</sup> Speaking generally, such proposals would have: set aside (or significantly modified) the overtime pay requirements of the FLSA, permitted deferred payment of wages already earned, reduced the earnings of participating workers, and allowed employers greater flexibility in scheduling work.

In the early 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 the Flexible Employment, Compensation and Scheduling Coalition (FLECS), with other individuals and groups.<sup>16</sup> Their stated objective, framed largely in the context of a

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<sup>13</sup> Some have responded that public and private work environments are essentially different. The *profit motive* might seem a central element. The former tend to be 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 relationships are diverse. In some cases, employment is stable, work patterns carefully structured, and union protection strong. In others, employee turnover may be high, employers may easily move in and out of business, and there may be little or no union constraint.

<sup>14</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 — but under carefully defined circumstances.

<sup>15</sup> See S. 798 of the 99<sup>th</sup> Congress, introduced by Senator Malcolm Wallop (R-Wyo.). The Senator introduced similar proposals in the 100<sup>th</sup> and 101<sup>st</sup> Congresses: respectively, S. 2196 and S. 515. See *Congressional Record*, March 28, 1985, p. 6691, and March 6, 1989, pp. 3526-3527.

<sup>16</sup> U.S. Congress, House Committee on Economic and Educational Opportunities, Subcommittee on Workforce Protections, *Hearings on the Fair Labor Standards Act*, hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess., March 30, June 8, October 25, and November 1, 1995 (Washington: GPO, 1996), p. 185. (Hereafter cited as House Workforce Protections Subcommittee, *FLSA Hearings, 1995*.) The FLECS Coalition includes the LPA and SHRM, together with firms such as Haliburton-Brown & Root, the Boeing Company, Kaiser Permanente, Motorola, Inc., and groups such as National Federation of Independent  
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*family friendly* workplace and argued in behalf of workers, was *to modernize* the Fair Labor Standards Act.<sup>17</sup> The FLECS mission statement states that the overtime pay requirements of the FLSA hamper employers “in their ability to implement progressive policies that are designed to meet the demands of today’s workplace and employees’ need for greater flexibility.”<sup>18</sup> Again, opposition to the various comp time initiatives was voiced by spokespersons for organized workers and by certain women’s advocacy groups.

During the 104<sup>th</sup> Congress, several bills providing for a comp time option were introduced: among them, H.R. 2391 by Representative Cass Ballenger (R-N.C.) and S. 1129 by Senator John Ashcroft (R-Mo.). Following extensive hearings, the Ballenger bill, with certain modifications, was passed by the House (225 yeas to 195 nays).<sup>19</sup> The Ashcroft bill in the Senate (S. 1129) was far broader in its implications — and more contentious. Hearings were conducted in the Senate; but, with the close of the 104<sup>th</sup> Congress, both bills died.<sup>20</sup>

In varying forms, comp time legislation was reintroduced in the 105<sup>th</sup> and 106<sup>th</sup> Congresses. Hearings were conducted on the proposed legislation with a similar alignment of witnesses pro and con. Testimony and comment followed now well-defined lines. Proponents, largely from industry or from SHRM, pressed the need for *reform* — flexibility for working mothers and a restructuring of the FLSA for the 21<sup>st</sup> century workplace. They noted the influx of more women into the regular workforce and stressed the complexity of their dual roles as wives/mothers and as employees. Critics of the proposed legislation, generally representative of organized workers and certain women’s advocacy groups, expressed concern that the legislation, if adopted, would undercut existing worker protections and, by encouraging assignment of overtime work, would make scheduling more difficult. For low-wage workers (of whom women are a significant number), the luxury of comp time (trading income for hours off) was not an affordable option, some argued.<sup>21</sup>

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<sup>16</sup> (...continued)

Businesses, the National Restaurant Association, the Associated Builders and Contractors (ABC), with others.

<sup>17</sup> See the report by the Labor Policy Association (LPA), *Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace*, October 7, 1994, reprinted in *House FLSA Hearings, 1995*, pp. 26-53.

<sup>18</sup> House Workforce Protections Subcommittee, *FLSA Hearings, 1995*, p. 185.

<sup>19</sup> *Congressional Record*, July 30, 1996, pp. H8561-H8573, and pp. H8776-H8790.

<sup>20</sup> U.S. Congress, Senate Committee on Labor and Human Resources, *Oversight of the Fair Labor Standards Act*, hearings, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Feb. 27, 1996 (Washington: GPO, 1996). (Hereafter cited as Senate Labor and Human Resources Committee, *FLSA Hearings, 1996*.)

<sup>21</sup> Flexibility, it was variously argued, might not be useful for workers with childcare or eldercare responsibilities, for working students with a fixed class schedule, etc. — for whom a more stable and consistent work schedule (without overtime assignments) may be preferable. For others, it was argued, flexibility would be of great assistance in managing their non-work lives.

In the 107<sup>th</sup> Congress, Representative Biggert reintroduced the comp time proposal, now H.R. 1982. In general, it followed the pattern of the earlier Ballenger proposal, focusing narrowly upon flexibility within the context of comp time. Meanwhile, Senator Gregg introduced S. 624. While it included a comp time component, it also included provisions for restructuring overtime requirements at large — following generally the approach of the Ashcroft legislation. The proposals died at the end of the 107<sup>th</sup> Congress.

In the 108<sup>th</sup> Congress, the issue again arose. On February 5, 2003, Senator Gregg 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>22</sup> On March 6, Representative Biggert introduced H.R. 1119, the *Family Time Flexibility Act*, which dealt more narrowly with comp time.

On March 12, 2003, the House Subcommittee on Workforce Protections conducted a general hearing on issues raised in the Biggert proposal (discussed in more detail below). Appearing on behalf of comp time were John Dantico of SHRM and Houston Williams of the U.S. Chamber of Commerce. Teri Martell, an electrician with Eastman Kodak, appeared in support of comp time, speaking as an individual. Appearing in opposition to the proposal was Ellen Bravo, director of “9to5” — the National Association of Working Women. On April 3, on a party-line vote of 8 yeas to 6 nays, the Subcommittee voted to report the measure to the full Committee. On April 9, 2003, once again on a party-line vote, the full Committee agreed to report the bill: 27 yeas to 22 nays. No further action, however, was subsequently taken on the measure.

## **Comp Time Proposals of the 108<sup>th</sup> Congress: Provisions of the Legislation**

As noted above, the last time straight legislation (as opposed to various amendments to move extensive measures) was considered was in the 108<sup>th</sup> Congress. While there have been variations in comp time proposals through the years, it seems useful to analyze this last thoughtful consideration of the measure.

Two proposals dealing with comp time were introduced early in the 108<sup>th</sup> Congress. H.R. 1119 (Biggert) would amend the FLSA to permit employers to pay for overtime hours worked through comp time: i.e., paid leave, taken during a later period. S. 317 (Gregg) would similarly offer employers a comp time option — but also include other provisions designed generally to restructure the overtime pay requirements of the FLSA.

The two comp time proposals are very similar in content — *though neither was adopted during the 108<sup>th</sup> Congress*. The following is a simple step-by-step review of the legislation, noting the major provisions. (Bolding and italics have been

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<sup>22</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. This report deals only with the comp time segment of S. 317.

added.) The reader may want to consult the bills for precise language and internal structure.

- **Adding the “comp time” option.** Each bill would amend Section 207 of the FLSA (the section dealing with overtime pay) by adding a new Subsection (r). Neither bill defines *comp time* per se but, rather, explains what the new Subsection (r) would or would not allow.
- **Time-and-a-half basis.** In each bill, comp time would be accrued on a time-and-a-half basis: i.e., “one and one-half hours” of comp time for each hour of overtime worked.
- **Defining employee.** An “employee” under each of the bills is defined as one who *is not* “an employee of a public agency.” (S. 317 adds: “The term ‘employer’ does not include a public agency.”)
- **Employer choice.** In each bill, it is provided that “An employer may provide compensatory time off to employees” — but the employer is under no obligation to do so.
- **Collective bargaining agreement.** If an employer chooses to institute a comp time option, then he is obligated to abide by the “applicable provisions of a collective bargaining agreement” where such an agreement is properly in effect.
- **Individual bargaining.** In the absence of union representation, an agreement arrived at between the worker and the employer must: (a) be written, (b) be entered into “before the performance of the work,” (c) be entered into “knowingly and voluntarily” and (d) may not be “a condition of employment.” (H.R. 1119 adds the phrase: “affirmed by a written or otherwise verifiable record....” S. 317 adds that the written statement must be “made, kept, and preserved....”)
- **Employee eligibility.** Each bill sets a prior employment eligibility test.

H.R. 1119 provides:

No employee may receive or agree to receive compensatory time off under this subsection unless the employee has worked at least **1,000 hours** for the employee’s employer during *a period of continuous employment* with the employer in the 12-month period before the date of agreement or receipt of compensatory time off.

S. 317 provides:

No employee may receive, or agree to receive, the compensatory time off unless the employee has been employed for at least 12 months by the employer, and for at least **1,250 hours** of service with the employer during the previous 12-month period.

- **Accrual limits.** Each bill provides that “not more than 160 hours of compensatory time” can be accrued by the employee. (See discussion below.)
- **Annual cash-out of balance.** Each bill provides that the employer “shall provide monetary compensation for any unused compensatory

time off accrued during the preceding” year that was not used by the end of that year. The annual accounting period can be either a calendar year or any other 12-month period agreed upon by the parties.

- **Employer option to reduce balance owed.** Upon 30 days notice (in writing under S. 317; unspecified in H.R. 1119), an employer “may provide monetary compensation for an employee’s unused compensatory time off in excess of 80 hours....”
- **Employer may discontinue comp time option.** Each bill provides that an employer may cancel the comp time option upon 30 days notice (in writing under S. 317; unspecified in H.R. 1119).
- **Employee withdrawal from comp time option.** Each bill provides that the employee may withdraw from the comp time program “at any time.” S. 317 requires that “a written notice” be presented to the employer. H.R. 1119 does not specify the form of the notice to the employer.
- **Employee cash-out of comp time value.** Each bill provides that an employee may, at any time, through a written notice, request that his or her comp time balance be cashed out in full. The employer will provide the cash equivalent of the comp time balance “[w]ithin 30 days” after receiving the written request.
- **Intimidation, etc.** Each bill provides that an employer, participating in a comp time program, “shall not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any employee for the purpose of” (a) interfering with the right of the employee “to request or not request compensatory time off in lieu of payment of monetary overtime compensation for overtime hours” or (b) by “requiring the employee to use” his or her accrued comp time. (S. 317 adds a third qualification: i.e., that the employer shall not intimidate, etc., the employee with respect to when the comp time is to be used.)
- **Defining intimidation, etc.** S. 317 includes a definition in Section 13A(d)(2) of the bill: “... the term ‘intimidate, threaten, or coerce’ includes promising to confer or conferring any benefit (such as appointment, promotion, or compensation) or effecting or threatening to effect any reprisal (such as deprivation of appointment, promotion, or compensation).” H.R. 1119 does not provide a separate definition of intimidation.
- **Termination of employment.** Each bill provides that, where employment is terminated (“voluntary or involuntary termination”), the employee will be paid the cash amount of the accrued comp time at the regular rate (a) that he was paid when the comp time was earned or (b) that he was receiving when the employment was terminated, “whichever is higher.”
- **Scheduling use of comp time.** Each bill provides that the employee with accrued comp time “shall be permitted ... to use” such comp time “within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the employer.”

- **Remedies and sanctions.** Each of the bills contains a section devoted to remedies and sanctions for violation of the proposed comp time option, though they differ in certain respects.
- **Public notice.** Each bill provides that, within 30 days after enactment, the Secretary of Labor will update the regulations governing implementation of the proposed changes made through the legislation and, similarly, update related explanatory information.
- **Sunset provision.** Each bill provides that the legislation will terminate after five years.

## Issues in the Debate

Proposals to amend the FLSA to permit employers to institute a comp time option have triggered strong opinions, pro and con, over the past two decades. Through that period, the issues and the respective positions of protagonists have remained generally consistent. Comp time would mean, essentially, trading cash earned by working overtime hours for more leisure time — an option attractive, basically, to those who can afford it. For seasonal employees, if they were to qualify, the arrangement could mean remaining on the payroll through slack periods (enjoying pre-paid employment) rather than being laid off; but, still, the bottom line would be a cash-for-time trade-off.<sup>23</sup>

### A Matter of Choice

In his introductory comments at the March 12 hearing on H.R. 1119, Chairman Charlie Norwood (R-Ga.), a co-sponsor of the legislation, affirmed that it would allow private sector employees “to choose, at their option,” to select either paid time off or cash payment for overtime hours worked. The bill, he said, offers employees “the choice ... at the employee’s option,” and concluded: “The bill guarantees that the choice is in the hands of the employee ....”<sup>24</sup>

That perspective has frequently been reiterated by proponents of comp time. Critics of the proposal, however, appear to be unconvinced. What, specifically, does the bill provide?

- **First.** The legislation allows an employer to offer a comp time option to his employees — but it does not require that such a

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<sup>23</sup> Concerning the general legislative and policy background of comp time and immediately related issues, 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.

<sup>24</sup> Statement of Chairman Charlie Norwood, Subcommittee on Workforce Protections, at hearing on H.R. 1119, Mar. 12, 2003. Sen. Gregg expressed similar thoughts when introducing S. 317. “It gives working families a choice,” he affirmed. The bill’s comp time provision “allows employees the option of taking time off in lieu of overtime pay.” And, the Senator concluded: “... the family should have the right to choose.” See *Congressional Record*, Feb. 5, 2003, p. S1999.

program be instituted. If the employer does not choose to offer comp time, then the issue is moot.<sup>25</sup> Thus, in the first instance, the right of choice rests with the employer. If an employer decides to offer a comp time option, then the worker has a choice: to accept the option or to opt for a cash wage. (See discussion below.)

- **Second.** If the employer agrees to offer a comp time option, there is no requirement that it be offered to all employees. It would appear that he has the choice of design for the program and of establishing rules specifically to address the requirements of his particular business.
- **Third.** If the employer opts to institute a comp time program and the employee participates, the particulars of the use of the compensatory leave must be agreed to by the employer. A request by the employee to use his accumulated comp time must be honored “*within a reasonable period* after making the request if the use of the compensatory time *does not unduly disrupt the operations of the employer.*” (Bold italics added.)

An employee cannot simply announce on a Friday afternoon that he or she wants to take comp time *for that afternoon* and be sure the request will be granted. If it’s convenient and does not “unduly” disrupt the operation of the business, fine; but, the request can be denied — and use of the leave postponed to another time. That choice rests not with the employee but with the employer.<sup>26</sup>

- **Fourth.** Although the worker may have systematically accrued compensatory time for use for a specific occasion (a honeymoon, the birth of a child, study for a bar exam), the employer may, upon “30 days notice,” unilaterally convert any accrued comp time in excess of 80 hours to “monetary compensation.” Thus, the choice of an employee who wants to accumulate a large block of comp time can be reversed by an employer’s decision.
- **Fifth.** Just as the employer has the right to institute (or to refrain from instituting) a comp time program, at his choice, so does he have the right to “discontinue such policy upon giving employees 30 days notice.”<sup>27</sup>

Some may argue that a more nearly absolute guarantee of employee choice with respect to the use of comp time would be difficult to fashion. Were one to attempt

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<sup>25</sup> Here, we are speaking of comp time as proposed under H.R. 1119 and S. 317, not intra-week comp time as is currently permitted under the FLSA.

<sup>26</sup> A similar provision exists in Section 7(o)(5)(A)&(B) of the FLSA with respect to comp time for state and local governmental employees. The terms, in that context, have been defined through rulemaking and litigation. A denial of the use of comp time, normally, must not be rooted in whimsy nor mere convenience of the employer.

<sup>27</sup> It’s not clear how compensatory hours already accrued by the employee would be treated in such circumstances. The employer could *cash out* all hours earned in excess of 80. How the first 80 hours would be treated — whether the worker could insist that it remain as comp time — is unclear, though the employee may request payment in cash.



to do so, it might serve to discourage employer participation in the program. Operating a business with employees arriving and departing, at will, as they utilize accrued comp time might disrupt the operations of the enterprise and be viewed by some as an unreasonable intrusion upon managerial prerogatives. Still, the several provisions of the proposed legislation would constrain a worker's freedom to choose the comp time option and to utilize accrued compensatory hours. How important such constraints may be is an issue of policy.

## **Flexibility Under the Fair Labor Standards Act**

As noted above, Congress has built flexibility into the FLSA. Like the proposed comp time option, it operates at the choice of the employer.

Ordinarily, under the FLSA, the employee is expected to work a 40-hour week. (The purpose of the statute is to hold the hours worked per week to not more than 40 — after which the employer is penalized by being required to pay *time-and-a-half* for any hours worked in excess of 40.) Within a 40-hour work week, any arrangement of workhours is permitted without penalty. The employer can be as flexible (or inflexible) as he or she wishes.

Flexible schedules (irregular hours of commencing and ending the day's work) are permissible under the FLSA. Similarly, compressed scheduling can be instituted: i.e., four days of 10 hours each; three days of 12 hours with 4 hours on a fourth day; etc. *Even comp time is presently allowed under the FLSA* within the context of a 40-hour work week. A worker desirous of taking a couple of hours off to attend his or her child's soccer game on a Thursday afternoon can do so with his employer's agreement — making up the time beforehand (on Monday, Tuesday or Wednesday) or afterward on Friday. The employer can allow such flexibility (many do) or deny it. If the worker can be spared, there is no statutory reason why he or she can not be given the time off. If an absence would "unduly disrupt the operations of the employer," the worker can be told "no." But, the worker could also be told "no" under the proposed comp time legislation, H.R. 1119 or S. 317.

*What the worker cannot do under the FLSA* is to come in on a given afternoon, ask for time off, and make up that time the following week — or several months later. The workweek is treated as a unit of 40 hours. Within that unit, if the employer is willing, there can be flexibility. *Further, under current law*, the worker cannot accumulate blocks of comp time to be held in reserve for use several weeks or months after it has been earned.

## Worker Eligibility and Participation

Under H.R. 1119 (here, as an example), if an employer needs to have his employees work hours beyond 40 per week, the question is one of payment: cash at time-and-a-half or paid time off (comp time), calculated on a time-and-a-half basis. The comp time provisions of S. 317 are similarly structured.<sup>28</sup>

Assuming that the employer embraces the comp time option under H.R. 1119 or S. 317, the question may be raised about employee eligibility for participation. The bills approach the issue somewhat differently.<sup>29</sup>

Each bill includes a provision that compensatory time off may be provided to employees by mutual agreement where there is no formal trade union presence. Where there is a recognized union presence, the comp time can be provided “only in accordance with ... applicable provisions of a collective bargaining agreement between the employer and the labor organization that has been certified or recognized as the representative of the employees ....” Thus, in such cases, the question of comp time becomes a matter of bargaining between labor and management and, if agreement is not reached, comp time can not be implemented.

Each bill defines *overtime* as it is otherwise defined in Section 207 of the FLSA: i.e., hours worked in excess of 40 in a single week. Persons employed to work less than 40 hours a week (for example, part-time employees or persons whose regular work period is less than 40 hours) would not be eligible to accrue comp time until after they had worked a full 40 hours during the week.<sup>30</sup>

The bills, although on somewhat different terms, provide a vesting limitation. H.R. 1119 provides:

No employee may receive or agree to receive compensatory time off under this subsection unless the employee has worked at least 1,000 hours for the employee’s employer during a period of continuous employment with the

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<sup>28</sup> S. 317 is somewhat broader and, in a separate section, provides for a “flexible credit hour” program. Under such an arrangement, jointly agreed upon by the worker and the employer, the employee may work extra hours each week “in excess of the basic work requirement of the employee” to be banked for future use. The “flexible credit hour” programs does not appear to be based upon the specific need of the employer but, rather, upon the convenience of the worker with a limited accrual of 50 credit hours at any given time. The program is detailed and is merely noted here.

<sup>29</sup> In introducing S. 317, Senator Gregg identified the target groups of workers in need of a comp time option. “... who are these workers who are currently covered by the FLSA but do not have the ability to exercise workplace flexibility? They are some of the hardest working Americans. Sixty percent of these workers have only a high school education. Eighty percent of them make less than \$28,000. A great percentage of them are single mothers with children.” See *Congressional Record*, Feb. 5, 2003, p. S1999.

<sup>30</sup> Under Section 207(a) of the FLSA, the workweek (pre-overtime) is defined as a period of 40 hours. Thus, a person normally scheduled to work 30 hours a week but asked to work 6 extra hours one week would, presumably, be eligible *neither for regular overtime* (payment at time-and-a-half) nor for comp time.

employer in the 12-month period before the date of agreement or receipt of compensatory time off.

S. 317 sets the requisite number of hours for eligibility at 1,250 and omits the provision for “continuous employment” during the 12 months prior to agreeing to participate in the comp time program or receiving comp time off. If one assumes that the pre-qualifying employment will be on a full-time or near full-time basis (40-hour a week), then an employee must be employed for roughly between six and eight months with any single employer prior to eligibility. (If the hours worked are less than 40 per week, the period could be longer.) Thus, under H.R. 1119, intermittent workers (those with breaks in service) would be ineligible for the comp time option. Most seasonal workers, those in high-turnover industries, and part-time employees would also likely be ineligible in practice.<sup>31</sup> To the extent that comp time is a *family friendly* option, the eligibility of persons employed on a part-time or part-year basis (most frequently women) may be an issue.

With respect to the vesting requirement, John Dantico of SHRM, testifying before the Subcommittee on Workforce Protections, observed: “Required hours of service represent a practical and reasonable balance between the employee’s need to become comfortable with his or her new employing organization and their personal financial situation. It satisfies,” he continued, “the employer’s need to gain some assurance that the employee contemplates remaining with the organization for at least the near term future.”

However, if comp time is beneficial both for workers and their employers as proponents suggest (providing both with flexibility, improving worker morale and productivity, and reducing absenteeism), some may question why coverage should be subject to a length of service requirement.<sup>32</sup>

## **Bureaucracy and Paperwork**

The 1,000 workhours requirement of H.R. 1119, John Dantico of SHRM explained to the Workforce Protections Subcommittee, would produce a “staggered” effect as workers, individually, became eligible. In an age of “electronic payroll systems,” he observed, “most employers have the resources and abilities to notify non-exempt employees when they become eligible to accrue comp time.”<sup>33</sup>

On the other hand, some small businesses, larger than a “mom and pop” firm, may find that keeping track of eligibility (precise numbers of hours worked through

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<sup>31</sup> Under current law, the time-and-a-half pay requirement applies only to hours worked in excess of 40 in a single work week. A part-time employee whose regularly scheduled work period is 20 hours a week could be asked to work a 30 or 35 hour week and would not be eligible for overtime pay (time-and-a-half) until in excess of 40 hours in that week had been worked.

<sup>32</sup> Testimony of John Dantico of SHRM before the Subcommittee on Workforce Protections, Mar. 12, 2003. (Hereafter cited as *Dantico testimony, Mar. 12, 2003*).

<sup>33</sup> *Ibid.* It would also alleviate financial pressures for employers, he suggested, that might result were the end of year cash-out of unused comp time to occur all at once.

a series of months and length of “continuous” service) could present problems. So might tracing the number of overtime hours worked and converting them into paid time off. The program, however, would be entered into voluntarily by the employer. More complex may be the personal equation: dealing fairly (and equally) with individual workers in granting or denying entry into the program or use of comp time to which they may assume — incorrectly — that they have a right that can be exercised as they determine best.

Of greater concern may be compliance actions by the Department of Labor. With a limited staff, enforcement of wage and hour (and related) laws is already difficult. Compliance officers do not audit firms on a monthly basis — or even on a regular basis. Nor do all firms operate under the same accounting systems. With a comp time component to be factored in, a compliance officer would need to assess, for each employee, whether he was comp time eligible (met the workhours and continuous employment requirements), whether the hours worked were accurately recorded, and whether comp time credit had been drawn down and/or cashed-out appropriately. Where employment is stable, the employer is scrupulous and the firm remains in business year after year, a reasonable system for tracking comp time might be developed that would lend itself to easy compliance. However, the option would also apply to thinly-capitalized firms in industries with large numbers of workers (often poorly paid, sometimes semi-literate in English, frequently uncertain of their rights as workers) where violations of wage/hour and child labor standards may be more or less frequent.

To deal with complexities of diverse work environments and employer-worker relationships in the private sector (which is, arguably, quite different from that of public agencies), the Department could be expected to develop extensive implementing regulations and to impose reporting requirements. Some may view a private sector comp time option as a win-win situation. Others may see it as unduly cumbersome and costly. Both, likely, would urge that it be kept as simple as circumstances will permit.

### ***To Intimidate, Threaten, or Coerce?***

The view is often held that workers, as individuals, because of their economic vulnerability, are rarely in a position effectively to dissent from the clear wishes or preferences of their employers.<sup>34</sup> This disparity of power may be especially great for low-wage workers with family responsibilities. During consideration of the various comp time/flexible workhours proposals of recent Congresses, concerns have been voiced that the legislation would provide flexibility for employers but could lead to various abuses of workers — especially of those who are paid low wages.

In each bill, there is a provision that states that an employer who “provides compensatory time off ... to an employee shall not directly or indirectly intimidate, threaten, or coerce, any employee for the purpose of” (a) participating in (or not

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<sup>34</sup> Both H.R. 1119 and S. 317 would recognize the primacy of a collective bargaining agreement with respect to regulation of the comp time option. Thus, most of concern here are workers who are not covered by collective bargaining agreements.

participating in) the comp time program, or (b) “requiring the employee to use such compensatory time.” Each bill also has a provision that the employee shall be permitted to use his accrued comp time “*within a reasonable period* after making the request if the use of the accrued compensatory time off *does not unduly disrupt the operations of the employer.*”<sup>35</sup> (Bold italics added.)

Although the terms used here may seem obvious and self-explanatory, some issues could arise. Could an employer establish a three-day (or seven-day) waiting period for use of comp time — a period sufficient, perhaps, to arrange for a replacement worker — and still be within “a reasonable period?” What constitutes an undue disruption? Given the diversity of the American workplace, could precise criteria be established? (It could mean one thing for a construction contractor pouring wet concrete, but something else entirely for a university’s economics department at mid-semester.) Are the “operations of the employer” to be defined broadly or more narrowly?

If there is a dispute about any of these definitions, to whom would an employee turn?<sup>36</sup> Each bill provides remedies and sanctions although some of these may be beyond the reach, in practice, of an average low-wage worker. Some may question whether denial of use of comp time (or intimidation, coercion, etc.) would be of sufficient magnitude to cause an employee to seek legal redress — or to cause him (or her) to complain to the Department of Labor. Other considerations aside, the real or imagined employment consequences of any vigorous challenge to an employer’s determination might reasonably prevent employee action.<sup>37</sup>

On the other hand, would it be useful (or feasible) to attempt to define such concepts as “reasonable period” or “unduly disrupt” or “operations of the employer” in statute? The number and variety of workplaces could present major challenges. But, absent close definition, the protections implied through the “intimidate, threaten, or coerce” provision may be less than fully effective. Workhours flexibility could be left unilaterally to the employer — which, presumably, would not be in keeping with the spirit of the proposed legislation.

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<sup>35</sup> H.R. 1119 does not define “intimidate, threaten, or coerce” but S. 317 does: “promising to confer or conferring any benefit (such as appointment, promotion, or compensation) or effecting or threatening to effect any reprisal (such as deprivation of appointment, promotion, or compensation).”

<sup>36</sup> As in the case of state and local government, one might expect to have rulemaking by DOL, followed by possible litigation involving the several parties at interest. Unlike the state and local governmental experience, however, the private sector is more diverse and less controlled — potentially with more opportunities for dispute.

<sup>37</sup> When introducing H.R. 1119, Rep. Biggert explained: “... my bill contains explicit penalties if an employer ‘directly or indirectly intimidates, threatens or coerces’ an employee into taking comp time in lieu of overtime, and the penalties are more severe than under current law. Employers who engage in such behavior will be liable for double damages plus attorney’s fees and costs. In addition, the other remedies included under the FLSA — including civil and criminal penalties and injunction relief — still will apply. The employee may respond through a private right of action, or the Labor Department may sue on behalf of the employee.” See *Congressional Record*, Mar. 7, 2003, p. E401.

One reason for instituting comp time (though no longer central to the debate) has been employer convenience. During an especially busy period, an employer (a garment manufacturer, a food processor, a logger or construction contractor) may need to have his staff on duty through an extended period — well beyond 40 hours per week. In a non-union environment (which is where the worker protection provisions of the proposed legislation would be most critical), the employer could *encourage* his workers to accept comp time in place of overtime. This could have several implications. *First*. Many workers (perhaps, most) might be reluctant to say “no” to their employer — if it were clear that the comp time option was the employer’s preference. *Second*. While comp time could be used to smooth out the irregularities of seasonality, it could also alleviate the necessity for the employment of additional workers — one of the initial justifications for mandating overtime pay under the Fair Labor Standards Act.<sup>38</sup>

Finally, would the definition of “intimidate, threaten, or coerce” cover denial of overtime work assignments to employees who prefer cash to comp time? Scheduling work is an employer prerogative: part of the employer’s *right to manage*. So is the assignment of extra hours of work (overtime). But, some have expressed concern that employees who decline comp time and demand cash payment for overtime hours worked (where the preference of the employer is for comp time) could be viewed as uncooperative and not be considered for any subsequent overtime assignment.

## The Economics of Deferred Income

Under each of the bills, an employee would be allowed to “accrue not more than 160 hours of compensatory time off.” At the end of each year (which can be any time agreed upon by the parties), any unused leave must be cashed-out.<sup>39</sup>

How many hours an employee might accrue (or how quickly) will vary. But, reasonably, one could accrue the full 160 hours through the first three months of the year and, thereafter, retain a continuing balance. In effect, this would be one month’s pay — deferred until drawn down or cashed-out. At the federal minimum wage (\$5.15 per hour), that would be the equivalent of \$824 dollars in the account. It could be more, depending upon the worker’s rate of pay.

If paid as wages when earned, the funds would rest with the workers to be used when and how they might choose. Instead, under H.R. 1119 and S. 317, the money would be *banked* with the employer — in an account providing no interest to the worker. Some critics of the comp time proposals have voiced objections to this

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<sup>38</sup> With the comp time option, some argue, the employer would have a cost incentive to schedule overtime hours more often.

<sup>39</sup> In his Mar. 12 testimony, Dantico of SHRM stated: “Employees are limited to accrue no more than 160 hours of compensatory time off during a 12-month period.” The proposed legislation imposes no such restriction: rather, it seems clear that 160 hours is an account limit — not an annual limit. This raises the question of whether comp time can be carried from one year to the next. If a worker’s annual cash-out date were Feb. 1, for example, would all comp time accrued during December and January have to be used by Feb. 1?

arrangement, charging that the banked funds amount to an interest-free loan from the worker to his or her employer.<sup>40</sup>

Annual leave and vacation time are regularly scheduled within the context of a 40-hour work week. The worker continues to be paid his or her regular rate through each pay period at the time the leave/vacation time is used. With overtime, normally, the worker is paid in cash for the extra hours worked during the period when they were worked. Under comp time, payment for overtime hours already worked is deferred to a later period — with the employer retaining the wages due until they are drawn down as compensatory time off. If the worker opts for time off, the worker loses the cash value of the overtime hours worked but gains added leisure time.

## Public Sector vs. Private Sector

Crafted through legislative compromise, the original Fair Labor Standards Act had left large numbers of workers uncovered: among them, persons employed by state and local governments. Gradually, through the 1960s and 1970s, the act was expanded to extend wage/hour protections to this body of public sector employees. These extensions of coverage were challenged in the courts, but by 1985 (the *Garcia* decision), the issue was settled: state and local government employees were FLSA-covered.<sup>41</sup>

In the wake of the *Garcia* decision, it was clear that states and local governments would have to conform to the requirements of the FLSA; and, like other employers before them, some objected. Although a variety of issues emerged from the hearings Congress conducted, it appears that it was the potential costs of overtime (for which local officials were accountable to taxpayers), rather than simply social concerns, that motivated local governmental employers. Appeals to Congress for relief were followed by extensive negotiations with interested parties — and, ultimately, enactment of the 1985 FLSA amendments: a comp time option for state and local governments (P.L. 99-150).<sup>42</sup>

Many of the arguments most currently used with respect to S. 317 and H.R. 1119 — and their immediate predecessors — were also raised with respect to the comp time option for public sector (state and local) employers. It was argued that

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<sup>40</sup> See, for example, statement by Rep. George Miller, April 9, 2003, Miller Home Page (visited on April 28, 2003), and Ross Eisenbrey, *The Naked Truth About Comp Time*, The Economic Policy Institute, Economic Policy Issue Brief No. 190, Mar. 31, 2003.

<sup>41</sup> See *Maryland v. Wirtz* (392 U.S. 183 [1968]) *National League of Cities v. Usery* (426 U.S. 833 [1976]), and *Garcia v. San Antonio Metropolitan Transit Authority* (469 U.S. 528 [1985]).

<sup>42</sup> See U.S. Congress, Senate Committee on Labor and Human Resources, Subcommittee on Labor, *Fair Labor Standards Amendments of 1985*, hearing on S. 1570, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess., Jul. 25, Sept. 10, and Aug. 28, 1985 (Washington: GPO, 1986); U.S. Congress, House Committee on Education and Labor, Subcommittee on Labor Standards, *Hearing on the Fair Labor Standards Act*, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess., Sept. 24, 1985 (Washington: GPO, 1986). The primary concern appears to have been overtime pay: minimum wage and child labor were not major concerns for local governments.

*some* employers (even public employers) could be inconsiderate and abusive. The initial factors supportive of a shorter work week — enervating and hazardous work, humane considerations, spreading opportunities for employment — were potentially as serious for public employees as for those of the private sector. Whether such concerns were justified remains to be assessed.

There is, however, an essential difference between public and private sector employment. Corporate/firm profit was not the motivating factor for state and local governments. Unlike private sector firms, government agencies are basically permanent: they rarely merge, go out of business, file for bankruptcy — or simply disappear as private sector firms sometimes do. At the same time, public employment is circumscribed, for the most part, by civil service rules — which are thought to moderate the most egregiously arduous aspects of work. Public employment is generally subject to legislative oversight; and, in many instances, public sector employees have been somewhat freer to organize and to bargain — if not over wages, then over conditions of employment — in the absence of the opposition that some private sector employers appear to have for any form of trade union organization.

## Is the FLSA “Outdated”?

“In the archives of federal labor laws,” wrote the industry-oriented Labor Policy Association in its appeal that the Fair Labor Standards Act be modernized, “the FLSA holds a position nearly comparable to that of the Dead Sea Scrolls.” The LPA affirmed that “there are other items that are more ancient, but not many.”<sup>43</sup> Maggi Coil, with Motorola, Inc., and the FLSA Reform Task Force, attested to efforts “to bring a more than 50-year-old piece of labor law into the 20<sup>th</sup> century, and hopefully posture it also for the 21<sup>st</sup> century.”<sup>44</sup> Tim Bartl, assistant general counsel for LPA, argues that the regulations governing the act are “just terribly outdated”<sup>45</sup> and brands them as “antediluvian.”<sup>46</sup>

That perspective has been frequently reiterated by advocates of comp time. When introducing H.R. 1119, Representative Biggert affirmed that the legislation “updates an outdated law designed for the 1930s workplace.”<sup>47</sup> During hearings in the Subcommittee on Workforce Protections, Houston Williams speaking for the U.S. Chamber of Commerce, noted that the act was passed “65 years ago” and called upon Congress to “modernize” the statute.<sup>48</sup> And John Dantico of SHRM chided that

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<sup>43</sup> House Workforce Protections Subcommittee, *FLSA Hearings, 1995*, p. 30.

<sup>44</sup> *Ibid.*, pp. 16-17.

<sup>45</sup> Bureau of National Affairs, *Daily Labor Report*, June 25, 2002, p. C3.

<sup>46</sup> Timothy J. Bartl, *Work and Pay in the New Century: Upgrading Our Wage and Hour Laws To Meet the Needs of Today's Employees* (Washington: Labor Policy Association, 2002), p. 62.

<sup>47</sup> *Congressional Record*, Mar. 7, 2003, p. E402.

<sup>48</sup> Statement of Houston L. Williams before the House Subcommittee on Workforce (continued...)



the FLSA was “a rigid depression era law.”<sup>49</sup> Summarizing the hearing, the Committee on Education and Labor quoted Dantico and, similarly, stated that the *Family Time Flexibility Act* “modernizes an outdated, 1938 law.”<sup>50</sup>

Indeed, the FLSA *is over* 65 years old. Many argue, on each side of the debate, that the act needs to be updated — though their prescription for modernization may take somewhat different approaches. But the act has not been static. Some of its provisions date back to 1938 (with roots from still earlier periods); some are of more recent vintage. Since its enactment, the FLSA has undergone general amendment on eight separate occasions: in 1949, 1955, 1961, 1966, 1974, 1977, 1989, and 1996. On other occasions, there have been narrowly focused changes in the act. The hearings record, over the 65-year history of the statute, is massive. And in addition to continuing modernization of the act by Congress, it has been subject to on-going updating by the Department of Labor through the rulemaking process. Further, there has been a substantial body of litigation which has influenced the manner in which the statute has been applied — including application of the Section 207(o) comp time provisions of the act to state and local government employees.<sup>51</sup>

## Concluding Comment

The issue of comp time has produced an interesting alignment of advocates and critics. The case for flexibility (usually argued in behalf of the worker — especially in behalf of working women: single mothers, soccer moms) is most frequently made by employers and management interests. The case for the status quo — flexibility under the FLSA and cash payment for overtime hours worked — is most often made by organized labor and by worker-oriented women’s groups. In each case, there have been exceptions (with a variety of individuals arguing pro and con) — but at large, the pattern has held through the past decade.

### What would be changed by the proposed legislation?

On the one hand, the 40-hour work week/overtime pay requirement, under H.R. 1119 and S. 317, would have been set aside to allow the worker the option (if the employer is willing) to create a revolving reservoir of up to 160 hours of

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<sup>48</sup> (...continued)  
Protections, Mar. 12, 2003.

<sup>49</sup> Statement of John A. Dantico before the House Subcommittee on Workforce Protections, Mar. 12, 2003.

<sup>50</sup> House Committee on Education and the Workforce, “Witnesses Cite Practical Benefits of Letting Working Parents Choose More Time with Their Families,” press release, Mar. 12, 2003.

<sup>51</sup> For example, see in Bureau of National Affairs, *Daily Labor Report*, May 31, 1995, pp. AA2-AA3, a discussion of *Schriro v. Heaton*, 515 U.S. 1104 (no. 94-1698, May 30, 1995, denying petition for a writ of certiorari from Court of Appeals for the Eighth Circuit ) in which the U.S. Supreme Court “let stand a decision that prevents Missouri officials from dictating when state employees can use their compensatory time” under Section 207(o).

compensatory time already worked.<sup>52</sup> It is pre-paid leave. And, it can be drawn upon “within a reasonable period” when it will not “unduly disrupt the operations of the employer.” The employer determines what is a reasonable period and when a worker’s absence would be unduly disruptive. Even had the legislation been approved, the employer would still be under no obligation to adopt a comp time plan.

With the 40-hour work week limitation having been set aside, unlimited overtime hours of work would be allowed until up to 160 hours of comp time had been accumulated. Until that 160-hour accumulation had been reached, there would be no limit and no penalty upon the number of overtime hours that an employer might assign. Thus, in theory, the employee could be assigned 60-hour work weeks for two months (8 weeks) — or a variation on that theme. Then, as the worker drew down his/her comp time hours, additional hours of overtime work could be assigned. Flexibility for the employer would be significantly expanded since the overtime hours worked would be essentially without immediate financial costs. To the extent that there is seasonality in the production/sales processes, the comp time (at time-and-a-half) could likely being taken during a slack season.<sup>53</sup>

The concept of comp time would normally mean a wage reduction for the workers involved since they would be trading cash wages (otherwise earned through working assigned overtime hours) for time off at some later date.<sup>54</sup> It would be a trade-off. In practice, the worker would be buying more time away from work. In both cases, under the proposed comp time option and under current law, the opportunity of the worker to buy time off (directly as leave without pay or by drawing down pre-paid comp time hours), would be at the discretion of the employer.<sup>55</sup>

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<sup>52</sup> When introducing H.R. 1119, Rep. Biggert stated: “I also want to stress that this bill in no way affects or changes the standard 40-hour workweek.” And, later: “Again, I want to reiterate that this legislation has no effect on the traditional 40-hour workweek or the way in which overtime is calculated.” See *Congressional Record*, Mar. 7, 2003, pp. E401 and E402.

<sup>53</sup> For the employer, there is a potential advantage of preserving a crew (or body of workers) intact rather than laying them off, having them migrate to other employers or collect unemployment insurance, and having to recruit a new workforce during a subsequent busy season. The various employment-related costs could offset, for the employer, the costs of providing comp time even on a time-and-a-half basis. For the workers, the arrangement could result in more stable employment and balanced income — which many may prefer to the irregularity of intermittent cash wages for overtime hours worked.

<sup>54</sup> Where the workers were seasonally employed (to the extent that seasonal workers would be eligible under the proposed legislation), they could take pre-paid leave before being laid-off or having their employment terminated. It is the permanent employee, it appears, at whom the proposed legislation is focused.

<sup>55</sup> If one assumes that the worker would be laid-off during a subsequent period were there not pre-paid comp time to hold him to his employer, then it could be argued that the worker would come out even in financial terms (minus any interest on the banked earnings). Arguably, the worker would fare just as well, financially, and possibly better, were overtime paid for in cash, up front. The worker would still have time off (when it would not unduly disrupt the employer’s operations) and would be free to accept alternative employment.

There would, of course, be no overtime work at all unless the employer assigned it — and, without such extra hours of work, no opportunity under H.R. 1119 to accumulate comp time hours. Under each of the bills, a split system is permitted: payment of cash to those who want cash payment for overtime hours worked or payment through comp time for those who prefer that option. The employer would have the option (the flexibility) to assign overtime work either for comp time (where the workers were agreeable) or for cash wages at premium pay.

Were workers to become dissatisfied with the comp time arrangement, they would be free to drop out of the system and to request payment for accrued hours in cash. Similarly, the employer could terminate the program at will — cashing-out the hours of comp time accumulated by participating workers: at least, those in excess of 80 hours. While there would seem to be some increased record-keeping and reporting for employers (and, possibly, some additional burdens for the compliance staff of the Department of Labor), it has been argued that with computer accounting, such burdens need not be great.

The comp time option, likely, would encourage employers to experiment with irregular hours of work and to assign more hours of overtime work. It could facilitate a new attitude on the part of employers, making them more receptive to the general concept of workhours flexibility. Some workers may find such irregular scheduling attractive — especially if the result is real flexibility both for the employer and for the workforce. Others whose non-work lives involve fixed schedules (educational classes, child or elder care) might find a comp time system to be disadvantageous. It would appear to be an option appealing to those who are able to afford to trade cash income for time off and for those whose personal lives can accommodate workhours flexibility.

A central argument of proponents of comp time (and of similar alternative work patterns) is that the workplace — and the workforce — of the 21<sup>st</sup> century is dramatically different from that of earlier decades. How different at root remains to be tested. Proponents and critics of the comp time legislation, perhaps reflecting in some measure their own particular backgrounds, seem to have different perceptions of the realities of the world of work. For persons employed in a white collar semi-professional environment, the workplace may be pleasant and the labor-management relationship cooperative and congenial. For the low-wage poorly educated worker in a poultry processing plant or garment factory, the realities may be somewhat different and not so very far removed from the 19<sup>th</sup> century.