THE FUTURE OF WAGE LAWS: ASSESSING THE FLSA'S EFFECTIVENESS, CHALLENGES, AND OPPORTUNITIES

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

COMMITTEE ON EDUCATION AND WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINETEENTH CONGRESS

FIRST SESSION

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C O N T E N T S

QUESTIONS FOR THE RECORD

THE FUTURE OF WAGE LAWS: ASSESSING THE FLSA'S EFFECTIVENESS, CHALLENGES, AND OPPORTUNITIES

Tuesday, March 25, 2025

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS,
COMMITTEE ON EDUCATION AND WORKFORCE,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:16 a.m., in Room 2175, Rayburn House Office Building, Washington, DC, Hon. Ryan Mackenzie (Chairman of the Subcommittee) presiding.

Present: Representatives Mackenzie, Messmer, Walberg, Grothman, Miller, Omar, Stevens, Casar, Takano, and Scott.

Also present: Kiley, Owens, and Lee.

Staff present: Vlad Cerga, Director of Information Technology; Maren Emmerson, Intern; Libby Kearns, Press Assistant; Trey Kovacs, Director of Workforce Policy; Campbell Ladd, Clerk; R.J. Laukitis, Staff Director; Georgie Littlefair, Investigator; Danny Marca, Director of Information Technology; John Martin, Deputy Director of Workforce Policy/Counsel; Audra McGeorge, Communications Director; Daniel Nadel, Legislative Assistant; Kevin O'Keefe, Professional Staff Member; Ethan Pann, Deputy Press Secretary and Digital Director; Kane Riddell, Staff Assistant; Sara Robertson, Press Secretary; Ann Vogel, Director of Operations; Heather Wadyka, Professional Staff Member; Ali Watson, Director of Member Services; James Whittaker, General Counsel; Ariel Box, Minority Intern; Ilana Brunner, Minority General Counsel; Stephanie Lalle, Minority Communications Director; Jessica Schieder, Minority Economic Policy Advisor; Dhrtvan Sherman, Minority Research Assistant; Bob Shull, Minority Senior Labor Policy Counsel; Raiyana Malone, Minority Press Secretary; Kevin McDermott Minority Director of Labor Policy; Marie McGrew, Minority Press Assistant; Eleazer Padilla, Minority Staff Assistant; Véronique Pluviose, Minority Staff Director; Banyon Vassar, Minority Director of IT.

Chairman MACKENZIE. Good morning. The Subcommittee on Workforce Protections will come to order. I note that a quorum is present. Without objection, the Chair is authorized to call a recess at any time. I would like to welcome everybody to our first hearing, the first Workforce Protection Subcommittee Hearing of the 119th Congress.

Before I get started, I would like to recognize the Chairman and Ranking Member for the Full Committee. Chairman Walberg, you are recognized for as much time as you may consume.

Mr. WALBERG. Thank you, Mr. Chairman, and today I just want to take an opportunity to recognize the loss of one of our valued Committee members and friends. Representative Raul Grijalva was here a term and a half before I got here, so I had the opportunity of serving with him for the entire—my entire tenure on this great Committee.

It is interesting that before joining Congress, Representative Grijalva practiced what he preached to us over and over again. He served as a school board member in Tucson for 8 years, where he advocated for access to education for all students but especially underserved communities.

Then in the workforce area, he was a champion for workers and demonstrated why this was a Committee he chose to serve on for his entire tenure. I greatly respected his commitment to serving the Nation, serving his District, his community, his purposes. He will be dearly missed on this Committee, and I hope his friends and loved ones can find comfort in the legacy that he has left behind.

Mr. Chairman, thank you for allowing me the privilege to recognize a good member for the work that he did. Thank you. I yield back.

Chairman MACKENZIE. Thank you, Chairman Walberg. Ranking Member Scott, you are recognized for as much time as you may consume.

Mr. SCOTT. Thank you. Thank you, and I want to associate myself with the comments of the Chairman. We are deeply saddened to learn of the passing of our friend and colleague, Raul Grijalva. Raul and I sat next to each other for many years on this Committee, and we could always rely on him for a sense of optimism and humor during some of the toughest legislative fights.

In addition to being a talented doodler, he was a champion for his constituents. He was a fierce defender of unions and civil rights in the workplace, and at the Committee he was a lead sponsor fighting for legislation to fight heat illness, which would help protect indoor and outdoor workers from occupational exposure to excessive heat.

He was an advocate for universal education, regardless of immigration status, and he pushed to expand funding for English as a second language. Along with the late Donald McEachin, he was a champion on his other Committee for environmental justice. He will be deeply missed, not only as a colleague, but also as a friend and advocate, and so we send our deepest condolences to his family, staff, and everyone impacted by his loss.

Mr. Chairman, thank you for the opportunity to speak, and I yield back.

Chairman MACKENZIE. Thank you, Ranking Member Scott, and I would also like to express my condolences to the family and friends of the departed Representative. A great member of our House, and he and his presence here will surely be missed.

Now, we will continue with the hearing, and today's hearing we are going to be examining the critical reforms to modernize labor law in the United States of America.

We are seeking to bring more clarity to workers, and employers, and today's hearing we will be discussing what I hope is the bipartisan goal of bringing a much-needed update to our Federal statutes and be bringing them into the 21st Century.

As the foundation of our Nation's wage and hour protections, the Fair Labor Standard Act covers employees at nearly every workplace across the country, totaling about 140 million individuals. The American workforce has transformed dramatically since the law was adopted 87 years ago, but many of the workplace laws and policies have not been updated.

We saw during the last administration, unfortunately, even more onerous burdens being placed on workplaces and workers all across our country. They were forced into complying with many of these burdensome regulations that stifled innovation and set arbitrary standards, some of which even violated the Administrative Procedure Act, the cornerstone governing many Federal agencies that issue regulations.

For instance, the Biden-Harris administration's unlawful overtime rule attempted to raise the salary threshold to be considered an exempt employee under the FLSA by a whopping 65 percent, with automatic increases every 3 years. This rule threatened to restrict workplaces, limit professional development opportunities, and eliminate the flexible advantages exempt employees have.

Moreover, the rule was estimated that it was going to be a significant cost to employers, and actually in many ways disadvantaged the very employees that they were seeking to help. While we also saw the Department of Labor under President Biden, issue an unworkable, confusing, ABC style worker misclassification test to determine which workers are employees, and which are independent contractors.

This rule limits the ability of as many as 70 million freelancers, ride share drivers, and other independent workers to earn a living on terms that they set for themselves. The last 4 years, again we have seen this excessive, administrative ruling also continue for tipped workers.

Tipped workers can perform their duties and provide great services all across our country for so many people, but at the same time the limiting restraints that were placed on them only allowed them to do tasks for 20 percent of an employee's workday, which is essentially impossible to monitor and enforce.

Rules like this raise the question if the government cannot enforce its own standard, what is the purpose of even setting it? Finally, we saw the wage and hour division abandon the Trump administration's Payroll Audit Independent Determination Program.

This was something that was actually helping workers. We found that employees who had unknowingly in some cases, committed violation reporting themselves and then bringing this forward, making sure that back pay and overtime violations were corrected getting that money to workers faster, but the Biden Department of Labor unwisely decided to end this program, and instead focused their energy on cracking down on lawful job creators.

Thankfully, Americans chose change last November, and they are starting already to see relief from this Trump administration, as they work to undue many of these terrible mandates the workplace placed on employers all across the country.

Now, I think we also have an opportunity as a Committee. Members of our Committee, and also throughout the entire House, have offered so many positive changes that can help employers and employees as we try to update FLSA.

I would like to thank all of those who have brought forward their ideas, and among many items for us to consider at today's hearing, are simple changes that modernize FLSA, such as evaluating the methodology for overtime regular rate calculations, which often discourage employers who wish to offer childcare benefits to their employees.

Today we will hear from witnesses about how non-exempt workers are not given the same voluntary professional development opportunities as exempt workers because of FLSA's definition of compensable time. Finally, we will discuss how employee status and independent contractor status should be clearly and concisely defined under the common law standard.

I look forward to hearing our witnesses, and yield to the Ranking Member for her opening statement.

[The statement of Chairman Mackenzie follows:]

COMMITTEE ON EDUCATION & WORKFORCE
CHAIRMAN TIM WALBERG

COMMITTEE STATEMENT

Opening Statement of Rep. Ryan Mackenzie (R-PA), Chairman
Subcommittee on Workforce Protections
Hearing: "The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges and Opportunities"
March 25, 2025

(As prepared for delivery)

Good morning. Today we are here to examine critical reforms to modernize labor law, bringing more clarity to both workers and employers. At today's hearing we will discuss what I hope is a bipartisan goal of bringing an important federal statute into the 21st century.

To this day, the *Fair Labor Standards Act* is the foundation of U.S. wage-and-hour laws. It was enacted during the New Deal Era to set the baseline for minimum wage, overtime, recordkeeping, and other federal requirements enforced by Department of Labor (DOL). Needless to say, the workforce has changed since 1938. It is long overdue for Congress to update this 87-year-old law so workers and businesses have the best opportunities to succeed.

During the Biden-Harris administration, we saw DOL strongarm workplaces into complying with burdensome rules and regulations that stifled innovation and set arbitrary standards, some of which even violated the *Administrative Procedure Act*, the cornerstone governing how federal agencies issue regulations.

For instance, the Biden-Harris administration's unlawful overtime rule attempted to raise the salary threshold to be considered an exempt

employee under the FLSA by a whopping 65 percent, with automatic increases every three years to boot. This rule threatened to restrict workplaces, limit professional development opportunities, and eliminate the flexible advantages exempt employees have. Moreover, the rule was estimated to cost businesses roughly $6,000 per affected employee, or $18.8 billion annually.

We also saw DOL under President Biden issue an unworkable, confusing, ABC-style worker classification test to determine which workers are employees and which are independent contractors. This rule limits the ability of as many as 70 million freelancers, rideshare drivers, and other independent workers to earn a living on terms they set for themselves.

The last four years we have seen excessive administrative rules outlining which tasks tipped workers can perform and limiting certain tasks to 20 percent of an employee's workday, which is essentially impossible to monitor and enforce. Rules like this raise the question, if the government cannot enforce its own standard, what is the purpose of setting it?

And finally, we saw the Wage and Hour Division abandon the Trump administration's Payroll Audit Independent Determination program, which allowed workers to receive back wages owed faster and served as a tool for good-faith employers to self-report overtime and minimum wage violations. The Biden DOL unwisely decided to end this program and instead focused energy on cracking down on all job creators.

Thankfully, Americans will see relief from the Trump administration as it works to undo these damaging mandates. In order to bring lasting change to the FLSA, Committee Republicans are working on initiatives to empower workers and job creators.

Among many items for us to consider at today's hearing are simple changes that modernize the FLSA, such as evaluating the methodology for overtime regular rate calculations which often discourage employers

who wish to offer child care benefits to their employees. Today we will hear from witnesses about how nonexempt workers are often not giving the same voluntary professional development opportunities as exempt workers because of the FLSA's definition of compensable time. Finally, we will discuss how employee status and independent contractor status should be clearly and concisely defined under the common-law standard.

I look forward to hearing from our witnesses and yield to the Ranking Member for an opening statement.

Ms. OMAR. Thank you, Mr. Chairman. Good morning, everyone. Thank you to our witnesses for being here today. Mr. Chairman, congratulations on your position, and I look forward to working with you on this Subcommittee. I hope you will indulge me for a moment.

It is an honor to serve as the Ranking Democrat, not only because of the important work that we are going to do overseeing our Nation's labor laws, but because I am following in the footsteps of one of my political heroes, the late Senator Paul Wellstone of Minnesota.

Senator Wellstone served as the Ranking Member of our Senate Subcommittee counterpart, and in 1997 his first opening statement in that role was on this very topic, the Fair Labor Standards Act. Today, as we discuss this landmark law, I hope that we will do it with the same commitment to uphold fairness and strengthen worker protection and prioritize the well-being of the working people.

Now, let us be honest about what's happening in our country. Millions of workers wake up every morning, put in long hours, and still struggle to make ends meet. Meanwhile, billionaires and CEOs are making record profits off their labor. For too long our economy has only worked for the wealthy and the well-connected, while workers have been left behind.

Over the past 4 years the Biden administration and congressional Democrats fought to level the playing field, but now that progress is under attack. Since returning to the White House, President Trump has wasted no time implementing Project 2025 to attack workers, ripping away protections, dismantling labor enforcement, and handing over more power to the same corporate interests that have exploited workers for decades.

The future of the American economy depends on American workers. Today, economic inequality is reaching levels not seen since the 1920's. The Fair Labor Standards Act of 1938 was created as a reaction to that inequality and the Great Depression when workers lacked basic workplace protection.

That is why we must strengthen this landmark law, not weaken it. That means finally raising the Federal minimum wage, which has been stuck at a shameful $7.25 an hour since 2009. It means tackling wage theft because every year employers steal over 50 billion dollars from workers' pockets.

It means increasing penalties for child labor violations. It means eliminating sub-minimum wage and the 14(c) so that workers with

disabilities are paid fairly, like everyone else. There is so much we can and should be doing. I hope that is the kind of conversation that we will be having today, Mr. Chairman.

I hope this hearing is not just the latest in the long line of Republican-led efforts to undermine the FLSA under the guise of updating it. Last month, Ranking Member Scott and I wrote a letter to the Department of Labor, demanding to know the impact of DOGE's takeover and firing of countless staff at a critical DOL program, such as the Wage and Hour Division, which enforces the FLSA.

Trump's DOL failed to respond by the March 14th deadline, leaving Congress and working Americans in the dark about the future of these programs. I invite Chairman Mackenzie and my Republican colleagues to join us in demanding answers on behalf of our constituents.

I would like to submit this letter into the record.

Chairman MACKENZIE. Without objection.

[The information of Ranking Member Omar follows:]

COMMITTEE ON
EDUCATION AND WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2101 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

February 27, 2025

Vince Micone
Acting Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Dear Acting Secretary Micone:

We write seeking documents and information about reductions in the capacity of the Department of Labor (Labor Department) to protect workers' lives and livelihoods.

The Labor Department protects American workers from exploitation, ensures equal employment opportunity for workers on federal contracts, creates pathways to meaningful employment, supports people who experience unemployment or injuries that prevent them from continuing to work, and generates data relied upon by policymakers and employers alike. As news reports circulate about staffing cuts and the withholding of contract and grant payments throughout the federal government, we are vigilant about the possibility that such initiatives could, if applied to the Labor Department, put American workers at risk of economic dislocation, disabling illness and injury, and even premature death.

In recent days, we have received messages about Labor Department staff terminations and contract rescissions, which are now beginning to appear in the news media as well. Reportedly, at least six Labor Department agencies have fired employees.[1]

We are particularly alarmed by the report that one agency suffering the abrupt loss of staff is the Mine Safety and Health Administration (MSHA).[2] Weakening MSHA will imperil miners' lives. For example, one of the lessons of the Upper Big Branch Mine disaster, according to MSHA's own internal investigation, is that staffing disruptions at the managerial level resulted in MSHA's inspectors failing to adequately address smaller-scale methane explosions in the months leading up

[1] Rebecca Rainey, *Trump's Federal Workforce Cuts Hit Labor Department Enforcement*, BLOOMBERG (Feb. 24, 2025), https://news.bloomberglaw.com/daily-labor-report/trumps-federal-workforce-cuts-hit-labor-department-enforcement.
[2] *Id.*

the massive explosion that killed 29 miners.[3] As we approach the fifteenth anniversary of that tragedy, we fear that the Trump Administration will undercut MSHA's capacity at the cost of miners' lives. The consequences could be long-term, given that the training for new inspectors is so intensive that it takes two years before inspectors are released into the field unaccompanied.[4] We urge you to reverse the terminations of any MSHA personnel immediately.

We are also deeply troubled by recently announced plans for the Office of Contract Compliance Programs (OFCCP) to drastically reduce its workforce and operations. The Office of Federal Contract Compliance was established in 1965 to administer and enforce Executive Order 11,246 prohibiting discrimination by federal contractors on the basis of race, color, religion, sex, or national origin.[5] The role of OFCCP was expanded in 1975 to encompass Section 503 of the *Rehabilitation Act* and the *Vietnam Era Veterans' Readjustment Assistance Act* (VEVRAA), which respectively prohibit discrimination on the basis of disability and veteran's status and require affirmative action with respect to hiring these individuals.[6] When President Trump rescinded Executive Order 11,246 in January, OFFCP's role narrowed to Section 503 and VEVRAA.[7] According to the attached Labor Department memorandum we obtained, OFCCP has been instructed by the Acting Secretary of Labor to develop a plan to reduce its workforce by 90 percent. Currently, OFCCP has 479 employees, including 110 national office employees and 369 employees in regional and field offices. A plan proposed by OFCCP would cut the number of employees down to 50, with 14 remaining in the D.C. office and the rest divided between four regional offices. Such a drastic reduction will detrimentally affect OFCCP's work to meet its statutory obligations under Section 503 and VEVRRA and ensure taxpayer funded federal contracts remain a source of equal opportunity for workers.

We are also receiving reports of the rescission of previously authorized spending at the Labor Department. For example, we have heard that the Labor Department's Office of Administrative Law Judges (OALJ) has been commanded, at the behest of the Department of Government Efficiency (DOGE), to terminate its contracts for mediation services, leaving OALJ with less capacity to resolve disputes on a wide range of matters, from employment benefit obligations to black lung benefits.

We need a focused accounting of any staffing reductions and spending rescissions so that we can assess the consequences for the Labor Department's capacity to get things done for American workers. Accordingly, we request your responses by no later than March 14, 2025, to the following:

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[3] MINE SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB., INTERNAL REVIEW OF MSHA'S ACTIONS AT THE UPPER BIG BRANCH MINE-SOUTH PERFORMANCE COAL COMPANY, MONTCOAL, RALEIGH COUNTY, WEST VIRGINIA 179-181 (2012), https://arlweb.msha.gov/performancecoal/UBBInternalReview/UBBInternalReviewReportNoappx.pdf (noting role of lack of continuity in District Manager and field office supervisor positions).
[4] MINE SAFETY & HEALTH ADMIN., FY 2019 CONGRESSIONAL BUDGET JUSTIFICATION 13 (2019), https://www.dol.gov/sites/dolgov/files/general/budget/2019/CBJ-2019-V2-13.pdf.
[5] Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).
[6] Off. of Fed. Contract Compliance Progs., *History of the Office of Federal Contract Compliance Programs*, INTERNET ARCHIVE WAYBACK MACHINE, https://web.archive.org/web/20250114185400/https://www.dol.gov/agencies/ofccp/about/history (archiving page from Department of Labor website from January 14, 2025).
[7] Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 21, 2025).

1. How many Labor Department staff have been terminated since January 20, 2025?
2. For each Labor Department staff terminated in that time, please provide an Excel spreadsheet with the following:
   a. Agency;
   b. Directorate, program, or, where there is no relevant formal subdivision, any identifiable functional area;
   c. Job title;
   d. Classification on the General Schedule payscale;
   e. Number of years of federal service; and
   f. Justification for termination.
3. For every Labor Department grant, contract, contract indefinite delivery vehicle, direct payment, loan, or other approved spending (collectively, spending decisions) terminated or paused since January 20, 2025, please provide an Excel spreadsheet with the following:
   a. Award ID;
   b. URL for link to award on USASpending.gov;
   c. Recipient name;
   d. Total obligation;
   e. Amount of total obligation that has been paused or terminated;
   f. Description of award; and
   g. Justification for pause or termination of the award.
4. Provide the names of the following and, for each person, the salary:
   a. Labor Department DOGE Team Lead; and
   b. Other members of the Labor Department DOGE Team.
5. Provide all documents and communications, including downloads, copies, or screenshots of any messages on any digital communications platform, since January 20, 2025, identifying personnel to be terminated, criteria for terminations, goals or quotas for terminations, meetings or consultations about terminations, or any other matter related to implementation of the DOGE Workforce Optimization Initiative or Executive Order 14,210 within the Labor Department.[8]
6. Provide all documents and communications, including downloads, copies, or screenshots of any messages on any digital communications platform since January 20, 2025, about the termination or pausing of Labor Department spending decisions, including the following:
   a. Documents and communications establishing targets or quotas for terminating or pausing spending decisions, criteria for terminating or pausing spending decisions, or identifying specific spending decisions to be terminated or paused;
   b. Documents and communications about any consultations, inside or outside the Labor Department, about Labor Department spending decisions to be terminated or paused; and
   c. Documents and communications about any meetings regarding the termination or pausing of Labor Department spending decisions.

Please send all official correspondence and information related to these requests to the Committee's Democratic staff at Eleazar.Padilla@mail.house.gov. Should you have any questions about this

[8] Exec. Order No. 14,210, 90 Fed. Reg. 9,669 (Feb.14, 2025).

request, please contact Bob Shull with the Democratic staff of the House Committee on Education and Workforce at Robert.Shull@mail.house.gov.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Ranking Member

ILHAN OMAR
Ranking Member
Subcommittee on Workforce Protections

Ms. OMAR. Democrats are providing concrete solutions to safeguarding workers during these difficult times, and looking to build an economy for the future, instead of dragging our country backward. We want workers to come home safe and be paid fairly for their labor. We want children in the classrooms, not on the factory floor.

We want to raise the minimum wage so that no one is in poverty while working full-time. These goals should not be controversial. This is why we must pass key legislation, such as Raise the Wage Act, which would increase the minimum wage, and the Let's Protect Workers Act, which would hold employers accountable for breaking the law.

As we sit here today, thousands of Federal workers across the country, such as medical personnel, scientists, park rangers, face losing their livelihoods, and the ability to support their families, while the American public stands to lose essential services they provide. Workers deserve better. America deserves better. Thank you and I yield back.

[The statement of Ranking Member Omar follows:]

ED & WORKFORCE DEMOCRATS

OPENING STATEMENT

House Committee on Education and Workforce
Ranking Member Robert C. "Bobby" Scott

Opening Statement of Ranking Member Ilhan Omar (MN-05)
Subcommittee on Workforce Protections
The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities
Tuesday, March 25th, 2025 | 10:15 a.m.

Thank you, Mr. Chairman. Good morning, everyone, and thank you to our witnesses for being here today.

Mr. Chairman, congratulations on your position – I look forward to working with you on this subcommittee. I hope you'll indulge me for a moment.

It is an honor to serve as the Ranking Democrat, not only because of the important work we are going to do overseeing our nation's labor laws but because I am following in the footsteps of one of my political heroes: the late Senator Paul Wellstone of Minnesota. Senator Wellstone served as the Ranking Member of our Senate subcommittee counterpart, and in 1997, his first opening statement in that role was on this very topic: the *Fair Labor Standards Act*. Today, as we discuss this landmark law, I hope we will do so with the same commitment— to uphold fairness, strengthen worker protections, and prioritize the well-being of the working people.

Now, let's be honest about what's happening in this country. Millions of workers wake up every morning, put in long hours, and still struggle to make ends meet. Meanwhile, billionaires and CEOs are making record profits off their labor. For too long, our economy has only worked for the wealthy and the well-connected while workers have been left behind.

Over the past four years, the Biden Administration and Congressional Democrats fought to level the playing field, but now that progress is under attack. Since returning to the White House, President Trump has wasted no time implementing Project 2025 to attack workers— ripping away protections, dismantling labor enforcement, and handing over more power to the same corporate interests that have exploited workers for decades.

The future of the American economy depends on American workers. Yet today, economic inequality is reaching levels not seen since the 1920s. The *Fair Labor Standards Act of 1938* was created as a reaction to that inequality and the Great Depression when workers lacked basic workplace protections.

That is why we must strengthen this landmark law, not weaken it.

That means finally raising the federal minimum wage— which has been stuck at a shameful $7.25 an hour since 2009.

It means tackling wage theft because every year, employers steal over $50 billion from workers' pockets.

It means increasing penalties for child labor violations.

It means eliminating the subminimum wage and 14(c) so that workers with disabilities are paid fairly like everyone else.

There is so much we can and should be doing. I hope that's the kind of conversation we'll be having today, Mr. Chairman.

I hope this hearing is not just the latest in a long line of Republican-led efforts to undermine the FLSA under the guise of updating it.

Last month, Ranking Member Scott and I wrote a letter to the Department of Labor, demanding to know the impact of DOGE's takeover and firing of countless staff on critical DOL programs, such as the Wage and Hour Division, which enforces the FLSA. Trump's DOL failed to respond by the March 14th deadline, leaving Congress— and working Americans— in the dark about the future of these programs. I invite Chairman Mackenzie and my Republican colleagues to join us in demanding answers on behalf of our constituents. I would like to submit this letter into the record.

Democrats are providing concrete solutions to safeguard workers during these difficult times and looking to build an economy for the future instead of dragging our country backward. We want workers to come home safe and paid fairly for their labor. We want children in the classroom, not the factory floor. We want to raise the minimum wage so that no one is in poverty while working full-time.

These goals should not be controversial.

That is why we must pass key legislation such as the *Raise the Wage Act,* which would increase the minimum wage and the *LET'S Protect Workers Act*, which would hold employers accountable for breaking the law.

As we sit here today, thousands of federal workers across the country, such as medical personnel, scientists, and park rangers, face losing their livelihoods and the ability to support their families, while the American public stands to lose the essential services they provide.

Workers deserve better. America deserves better.

Thank you, and I yield back.

Chairman MACKENZIE. Thank you. Pursuant to Committee Rule 8(c), all members who wish to insert written statements into the record may do so by submitting them to the Committee electronically, the Committee Clerk electronically, in Microsoft Word format by 5 p.m., 14 days after the hearing.

Without objection, the hearing record will remain open for 14 days to allow such statements and other extraneous material noted during the hearing to be submitted for the official hearing record.

I note that the Subcommittee has some of my colleagues who are permanent members, or they are not permanent members of this

Subcommittee, but they may be waving on for the purpose of today's hearing. All right.

To begin with our witnesses, I would like to thank all of you for joining us here today, and we are going to introduce each of you. The first witness is Ms. Tammy McCutchen, a Senior Affiliation for Resolution Economics in New Market, Tennessee.

Our second witness is Ms. Paige Boughan, who is a Senior Vice President and Director of Human Resources for Farmers and Merchants Bank in Hampstead, Maryland, and is testifying on behalf of the Society of Human Resource Management.

Our third witness is Mr. Andrew Stettner, who is the Director of Economy and Jobs for the Century Foundation in Washington, DC. Our final witness is Mr. Jonathan Wolfson, who is the chief Legal Officer and Policy Director for the Cicero Institute in Richmond, Virginia.

We thank the witnesses again for being here today, and we look forward to each of your testimony. Pursuant to the Committee Rules, I would ask that you each limit your oral presentation to a 3-minute summary of your written statement. The clock will count down from 3 minutes, as Committee members have many questions for all of you, and we would like to spend as much time as possible on questions.

Pursuant to Committee Rule 8(d) and Committee practice, however, we will not cutoff the testimony until you reach the 5-minute mark. I woud like to remind the witnesses to be aware of their responsibility to provide accurate information to the Subcommittee, and I will first recognize Ms. McCutchen for your testimony.

STATEMENT OF MS. TAMMY MCCUTCHEN, SENIOR AFFILIATE, RESOLUTION ECONOMICS, NEW MARKET, TENNESSEE

Ms. MCCUTCHEN. Thank you for inviting me to speak to you today. I have made specific recommendations for FLSA reform in my written testimony. I suggest all of these with three principles in mind. First, the FLSA is out of date. Key sections have been unchanged for three-quarters of a century or more, although the type of work, how we work, and where we work has changed significantly in that time.

Second, we need clear and simple rules that workers and small business owners can understand without an H.R. professional or an attorney. Third, justice delayed is justice denied. Workers cannot wait months or years for their wages. They need them now.

The greatest need for reform I think comes in four areas. First, the definitions. The FLSA requires employers to pay employees for work, employers, employees, and work. The definitions of these terms are so vague and circular as to be useless. DOL's regulations run to 10,000 words.

Is it surprising that we have been debating joint employment and independent contractor for nearly a decade, millions spent on litigations, thousands of Court and agency cases, dueling regulations from one administration to the next? Only Congress can stop the madness.

Second, the overtime calculation. Most believe that overtime is 1.5 times the hourly rate. Wrong. It is 1.5 times your regular rate. Regular rate was defined in the 1949 amendments as all remunera-

tion for employment with seven exclusions, gifts, some bonuses, some benefits, except for adding stock options in the year 2000, these have not been changed for 76 years.

DOL regulations, 43,000 words—so long and complex. How can we expect workers and small business owners to get the right answers? Congress could simplify and benefit workers greatly by amending Section 7(e) to exclude non-monetary benefits provided to employees, regardless of the hours that they work.

Then an employer can give workers free meals, free public transit, childcare, college tuition, even repayment of student loans without fear of unplanned and uncontrolled overtime costs. The last two areas for reform are overtime exemptions and providing incentives to employees to self-audit.

I see my time is up, so I will end here, so thank you.

[The Statement of Ms. McCutchen follows:]

Testimony of Tammy D. McCutchen

Before the United States House of Representatives
Committee on Education & Workforce
Subcommittee on Workforce Protections

Hearing on "The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities."

March 25, 2025

Chairman Mackenzie, Ranking Member Omar, Members of the Subcommittee:

Thank you for the opportunity to speak with you today about the reform of the Fair Labor Standards Act, a topic I have thought about, for decades, as I assisted employers to comply with wage-hour laws and helped workers receive the wages they are entitled to under those laws.

Let me begin with a brief overview of my background of and commitment to increasing compliance with the Fair Labor Standards Act and state wage and hour laws. First, I grew up in a working-class family in a farming community in Cambridge, Illinois, population 2,200. My mother was a grill cook. My father was a butcher, until he became too ill to do that work and started running a cash register. My sister is a secretary. My brother was a correctional officer and then drove DoorDash, until he survived an aortic aneurism and could no longer work. Of almost 50 aunts, uncles and cousins, only 5 attended a four-year college. In short, most in my family are wage earners, living paycheck to paycheck. I love them and want them all to be paid correctly. It's personal.

Thus, when I served as Administrator of the Department of Labor's Wage and Hour Division, responsible for enforcement of the FLSA, my focus was protecting vulnerable, low-wage workers. That focus included expanding low-wage industry initiatives – targeted investigations in industries employing workers below, at, or just above the minimum wage. When I arrived at WHD, the agency had targeted initiatives in only three low-wage industries: garment, agriculture and health care. We expanded these initiatives to include retail, restaurant, hospitality, janitorial, security and others. We collected record amounts of back wages for low-wage workers.

Compliance with the FLSA continued to be my focus when I returned to private practice, although now by working with employers to identify and correct violations. In my practice, I conducted internal audits of employers' compliance in the areas of minimum wage,

overtime, independent contracting and other pay practices. When I found violations, I worked with my clients to correct their practices, including paying back wages. I also was a founding executive of ComplianceHR where I developed applications to assess FLSA and other employment law compliance using expert systems technology. I developed, for example, the Navigator OT and Navigator IC apps which assess overtime and independent contractor compliance. These applications apply a series of tests (based on federal and state statutes, regulations, case law and agency rulings) to user responses in an on-line questionnaire. With these apps, an employer or an employee advocate can quickly determine the likelihood of a violation at a much lower cost than engaging an attorney.

Yes, as an attorney, I took some of the first steps using AI to make attorneys obsolete or at least less necessary for workers and small businesses – because I have one central, driving focus: No worker, no small business, no one, should need a lawyer to figure out how a worker needs to be paid under our laws. And I can tell you that my clients wanted the same thing. Universally, they came to me wanting to know how to follow the law. They just needed guidance on how to do it. They'd usually tried to figure it out for themselves; but almost always, they'd thrown up their hands. The law was too unclear, too opaque. They needed the help of a professional. And that brought home for me one basic lesson:

We need clear and simple rules.

The FLSA: A Short History

The Fair Labor Standards Act is neither clear nor simple; and it has become grossly outdated in the 87 years since it was signed into law by President Roosevelt. Since that time, our economy has transitioned from agriculture to manufacturing, then to service, and now to technology – with workers moving from fields to factories, to offices, and now back to their homes. We have moved from rural to urban environments. The participation of women in the workforce has nearly doubled, according to BLS data. The number of workers choosing independent work over employment continues is growing exponentially: now 72.7 million people, 27.7 million full time, according to MBO Partners' 2024 State of Independence report. The FLSA is not keeping up.

In the last 87 years, Congress has amended sections of the FLSA less than 20 times, but most amendments have been in coverage (9 times), exemptions (9 times), and the minimum wage (9 times). Exemptions have been repealed more often than created. For example, amendments in 1961 and 1966 eliminated exemptions for most retail and service employees; in 1974 and 1977, overtime exemptions were repealed for over a dozen industries (including hotels, restaurants, public transit, seafood canning, and sugar processing); state and local government employees gained FLSA protections in 1985. The

only major new overtime exemptions came in 1961 with the addition of commissioned employees of retail and service establishments (as all other retail exemptions were phased out); academic administrative personnel and teachers in 1966; and in an effort led by Senator Edward M. Kennedy (R-MA) in 1996, an exemption for computer employees.

Key issues have gotten scant attention: Congress last legislated on the definition of work in 1949. That same year, the FLSA amendments included for the first time a definition of the "regular rate" in Section 7(e), 29 U.S.C. § 207(e). That section determines the types of compensation that must be included in the overtime calculation. Congress has not revisited remedies and defenses since 1989.

By my math, that's 76 years since any changes to the definitions of work or the regular rate (except the exclusion of stock options in the year 2000). Remedies and defenses were last revised 36 years ago. And Congress last considered updates to exemptions 29 years ago. I think we can all agree that much has changed since then in the type of work we preform, how we perform work, and how we are compensated for our work. It's time and past time for change, even though change will be difficult and there will be disagreements over what change is needed or advisable.

I hope we can all agree, however, that we need clear and simple rules that small businesses and workers can understand without an attorney or HR professionals. Clear and simple rules would ensure workers are paid correctly in the first instance – without having to wait months or years for a DOL investigation or private litigation. For low-wage workers, living paycheck to paycheck, justice delayed is justice denied.

The Need for Clear and Simple Rules

You may be skeptical of my claim that the FLSA is not a clear and simple law. Minimum wage for all hours worked and overtime pay for hours over 40. What's so hard about that?

Definition of Employee and Employer

Let's start here: the FLSA applies to employers and employees. Who is an employer? Who is an employee? The definitions in the FLSA, unchanged since 1938, are no help to figure this out. The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." Okay, it seems a bit circular. But maybe the definition of "employee" will clear it all up. "Employee" means "any individual employed by an employer." That's crystal clear – not! Is it any wonder that we have been debating joint employment and independent contracting now for almost a decade? Millions spent on litigation; hundreds of court cases; dueling regulations, from one Administration to the next. Only Congress can stop the madness.

We need clear and simple definitions of "employee" and "employer" in the FLSA.

My recommendations:

- Amend the definition of "employer" in 29 U.S. Code § 203(d) to mean "a person who pays an employee for services but does not include a person who contracts with an independent contractor."
- Amend the definition of "employee" in 29 U.S. Code § 203(e) to mean "a person who provides services to an employer for compensation but does not include an independent contractor."
- Reintroduce and enact the Save Local Business Act, H.R. 2826 (118th Congress), which would have amended 29 U.S.C. § 203(d) to provide that an employer may be considered a joint employer only by directly and immediately exercising significant control over the essential terms and conditions of employment.
- Reintroduce and enact the Modern Worker Empowerment Act, H.R.5513 (118th Congress), which would have amended 29 U.S. Code § 203(e) by adding a new definition of independent contractor.
- Preempt state independent contractor laws to simplify worker-classification law by ensuring one, national standard, avoiding the common situation today where a worker can be an employee in one state but an independent contractor in another state or under federal law (or an employee under one state statute but an independent contractor under a different statute in the same state.
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What is Work?

Next: Workers must be paid for work. But what is work? That's easy, work is ... well, its work. Work is central to the FLSA, but the statute does not define it. The FLSA does have a definition of the word "employ": To employ is "to suffer or permit to work." Again, circular and unhelpful. DOL has issued an entire chapter of regulations to define "work" at 29 CFR Part 785: 13 pages in the code of federal regulations, 8,500 words. Originally issued in 1961, and only 9 of its 50 sections have been updated since. The regulations are often confusing. For example, travel time: normal commute, not work, although it can become work if you are required to transport a lot of tools and equipment; travel from one job site to another, work, but travel from the last job site to home, not work; travel that requires an overnight stay is work if it occurs during your regular work hours, but it is not work if it occurs before or after those hours. An employee who works 9 to 5, then, and takes a plane to travel to a required training that leaves at 7 and arrives at 11 must be paid for 2 hours of

work (9 to 11, but not 7 to 9). Oh, and that is true whether the travel occurs on a workday or a day the employee normally doesn't work. Let's talk training time: Work or not work? Voluntary training outside normal working hours. It depends. Is the training related to your job? Work. If not, not. A supervisor says to dock worker: "The truck is late, so I don't have any work for you right now; go wait in the breakroom and I'll let you know when the truck comes in." Work or not work? Probably work, even if the worker took a nap in the breakroom. Waiting to be engaged, not work; engaged to be waiting, work.

Seriously, how is a small business owner or a worker supposed to know this stuff? Are you surprised that a supervisor or small business owner might not know that sending a worker an email telling him not to come to work may cause work to occur (reading the email)? Or what about a text message? Or a Facebook message? Or a tweet? We don't know because the FLSA wasn't designed with any of these technologies in mind. It was written in 1938, before most people had cars, much less smartphones.

We need a clear and simple definition of the term "work" in the FLSA.

My recommendations:

- Add the following definition of "work" 29 U.S. Code § 203: "All activities that an employer instructs, directs, requests or requires an employee to perform."
- Further amend 29 U.S. Code § 203 to exclude off-the-clock time of less than five minutes per shift as *de minimis* time.
- Enact H.R. 1084 introduced by Representative Hinson in the 118th Congress which would have amended 29 U.S. Code § 203(o) to exclude from hours worked time spent attending or participating in training programs is voluntary and outside an employee's regular working hours.

Calculating Overtime

Calculating overtime pay. Easy, right? Time and a half. But 1.5 multiplied by ... what? Your hourly rate, most people think, but that is wrong. It's 1.5 times a workers "regular rate" of pay, not his hourly rate. "Regular rate" is defined at Section 7(e) of the FLSA, 29 U.S.C § 207(e), as "all remuneration for employment," *except*:

1. sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;
2. payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by

an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

3. Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;
4. contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;
5. extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;
6. extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;
7. extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a), where such premium rate is not less than one and one-half times the rate

established in good faith by the contract or agreement for like work performed during such workday or workweek; or

8. any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

   (A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

   (B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

   (C) exercise of any grant or right is voluntary; and

   (D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

      (i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

      (ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

That long and complicated list raises as many questions as it answers. The phrase "and other similar payments to an employee which are not made as compensation for his hours of employment" in clause 2: does "other similar payments" restrict this to payments when no work is performed and travel expenses? Or does it mean any payments which are not made in compensation for work? Bonuses in subsection 3: an employer does not need to pay overtime on discretionary bonuses, but discretionary does not mean what most folks would think. The bonus must be discretionary both as to the fact of payment and the amount of payment, without any prior contract, agreement or promise. The construction

supervisor says at 1 o'clock, "Hey team, if you can get this wall finished by 5 o'clock, I'll give everyone an extra $100. A bonus announced in advance! Overtime is due.

My training for HR professionals on how to calculate overtime runs a solid two hours. I receive dozens of questions on what types of compensation needs to be included in the regular rate, and my answers often amaze (or, should I say, astonish) my audience, even at the annual meeting of SHRM. If HR professionals don't know the rules, how can we expect small business owners and workers to get the right answers.

DOL has regulations that attempt to instruct us on how to calculate overtime pay at 29 C.F.R. Part 778: 56 pages in the code of federal regulations, about 43,000 words, in 121 sections. The first Trump Administration made some improvements to these regulations in 2019, the first update to some of the sections since 1968 or 1971. But too many questions remain unanswered, and the Trump Administration was constrained by outdated statutory language. Except for the addition of the stock option language in 2000, the definition of regular rate was enacted in 1949 and never revisited.

Benefits, provided by employers and valued by employees, have changed much since then. Today, employers want to cover the costs of childcare and elder care, help employees pay off student loans, encourage employees to use public transportation by providing subsidies (a benefit federal employees have had for years), for example. But employers who provide such benefits risk a large, unexpected overtime bill.

We need to modernize and clarify the exclusions from the "regular rate" in Section 7(e) of the FLSA.

My recommendations:

- My primary recommendation is to amend Section 7(e) to state, simply and clearly, that all non-monetary benefits provided to all employees regardless of hours worked are excluded from the regular rate. With this amendment, an employer could provide its workers with free lunches, free public transportation, free child and elder care, free gym memberships or personal trainers – or anything that we can't necessarily think of today, but workers may value in the future.
- In the alternative:
    - Reintroduce and enact the Empowering Employer Child and Elder Care Solutions Act, H.R. 3271 (118th Congress), which would have amended 29 U.S. Code § 207(e) to exclude "the value of any child or dependent care services provided by an employer."

- Add new subsections to 29 U.S. Code § 207(e) to exclude student loan repayments, employer-provided meals, public transportation subsidies and other valued benefits that employees received regardless of hours worked.
- Amend 29 U.S. Code § 207(e)(4) to allow exclusion of the cost of self-funded and administered retirement, life, accident, health insurance and other benefits (rather than excluding only contributions made by an employer to a trustee or third person).

- Amend 29 U.S. Code § 207(e)(3) to exclude from regular rate bonuses of up to 10 percent of annual wages.

Overtime Exemptions

The last new exemption passed by Congress was the computer professional exemption in 1990, but even that is terribly out of date as millions of employees work in new tech jobs that were not even though of in 1990. We also need some clear and simple exemptions that small business owners and workers can easily understand.

My Recommendations

- Adopt a new exemption based on income alone for highly compensated employees. A simple rule for employees who earn mid six figures, for example, without regard to job duties performed.
- Amend the exemption in Section 7(i) so that all employees paid primarily on commission and therefore rewarded for extra work by extra commissions, are exempt. All commissions sales employees should be exempt regardless of industry.
- Update the computer professional exemption in Section 213(a)(17).
- Restore the companionship exemption to its original scope by reintroducing and enacting H.R. 7099 from the 118th Congress. This bill would ensure home care workers are overtime exempt regardless of their employers. Employers performing the same work should not be treated differently under the FLSA. More importantly, restoring the companionship exemption would prevent home care workers from going into the underground economy to provide care for families that cannot afford to hire caretakers through regulated and safer agency oversight.

Add Tools to Return Wages to Workers, FAST

The FLSA is so complicated that good faith employers make mistakes. Give me a day with the time and payroll records of any employer in America, and I can find a violation. But

unlike every other federal employment law, the FLSA discourages employers from correcting those mistakes. There are no affirmative defenses for employers as under employment discrimination laws. There is no private settlement of FLSA claims. There are no waivers of FLSA claims. Employers who pay back wages risk being sued for more, much more. In short, employers have no incentive to audit compliance and correct mistakes.

Such incentives would benefit workers. You cannot fund enough wage and hour investigators to visit the more than 11 million workplaces covered by the FLSA (according to the Labor Department's FY2025 budget documents). In FY2024, the Division concluded 17,300 compliance actions. At that rate, WHD could visit every workplace in 635 years. Reality check: Even if you quadrupled the agency's budget, most employers would never be investigated. And don't look to private litigation to make up the gap. In 2024, only 5,515 FLSA cases were filed in federal courts. And, both DOL investigations and federal litigation take time, a lot of time. Low wage workers, living paycheck to paycheck, cannot afford to wait, assuming a violation is ever discovered. If employers do not self-audit and self-correct, most workers will never even know they were not paid correctly.

Congress could ensure that workers get back wages fast by providing employers some incentive to comply and pay back wages, voluntarily.

My recommendations:

- Create an affirmative defense to liquidated damages, civil penalties, and criminal penalties for employers who adopt and communicate complaint procedures to address employee wage claims, investigate such claims, and take appropriate action.
- Create a new program, such as the former PAID program, allowing employers to ask the Labor Department to supervise the payment of back wages, as proposed by Rep. Stefanik in H.R. 5743 (118th Congress)
- Allow employees and their representatives to enter private settlements of FLSA claims, including waivers, with protections similar to the Older Workers Benefits Protection Act.

Other Recommended Reforms

A few other reforms for your consideration:

- Adopted in the 1989 amendments to the FLSA, a business is a covered enterprise with $500,000 in annual gross volume. The U.S. Small Business Associations size standards defining a small business, by industry, are all well above $500,000 – the

lowest at $8,500.000 for carpet cleaners. Congress should exclude more small businesses from enterprise coverage my increased in AGV in section 3(s).

- Amend section 3 to include definitions of "willful" and "repeat" violations.
- Reintroduce and enact the Working Families Flexibility Act, H.R. 1980 (117th Congress) to authorize employers in the private sector to offer compensatory time to their employees in lieu of cash overtime, as had been available to federal employees since 1985. The requirements and process for federal employee comp time should be updated and simplified, to reflect the almost 40 years of experience and difficulties with Section 7(o), 29 U.S.C. § 207(o), and its implementing regulations.
- Another option to increase workplace flexibility that so many workers seek, is to amend 7, 29 U.S.C. § 207, to allow an employer and employee to agree to pay overtime after 80 hours in a 14-day work period.

Chairman MACKENZIE. Thank you. I appreciate that strict adherence to the timing. I will now recognize Ms. Boughan, for your testimony.

STATEMENT OF MS. PAIGE BOUGHAN, SENIOR VICE PRESIDENT AND DIRECTOR OF HUMAN RESOURCES, FARMERS AND MERCHANTS BANK, HAMPSTEAD, MARYLAND, ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCES MANAGEMENT (SHRM)

Ms. BOUGHAN. Chairman Mackenzie, Ranking Member Omar, and Subcommittee members, thank you for the opportunity to testify about the Fair Labor Standards Act. My name is Paige Boughan, and I serve as State Council Legislative Director for Maryland SHRM. SHRM, made up of nearly 340,000 members, is the foremost expert, researcher, advocate, and thought leaders on issues impacting today's evolving workplaces.

With over 15 years of experience in human resources, and more than a decade of advocating on behalf of SHRM, I am pleased to share real world challenges employers face when complying with the FLSA. At the time of its enactment in 1938, workplaces looked very different. The law's provisions are critical but outdated.

To reach our workforce's full potential, SHRM believes in turning essential keys to modernizing this pivotal law, closing the workforce participation gap, and shaping the future of work. Opening doors that lead to innovation, economic growth, and more dynamic, competitive workforce.

Modernization efforts must focus on Federal and legislative solutions that prioritize clarity on which workers are covered, consistency in application, and compliance-oriented language. For the purposes of time, I will focus my oral testimony on the modernization efforts that will lean into our three C's, clarity, consistency and compliance.

Clarity, one issue is the lack of clear definitions, especially for terms essential like "employee." It must also be clear whether an employee is exempt or non-exempt from overtime pay, as uncertainly increases the risk of misclassification.

When the classification rules no longer match actual jobs, it is time for Congress and agencies to assist as there are consequences to relying on outdated definitions, or the assumption that a simple solution is to label all employees as non-exempt. From experience, some employees actually negotiate to be exempt because they value the associated flexibility and benefits that come from overtime exemption.

Consistency, a real-world example of regulatory whiplash involves mortgage loan officers, and qualification for the administrative exemption based on the duties analysis. This back and forth between agency and Court span nearly a decade before resolution at the Supreme Court.

This uncertainty and others like it affect how employees work, and businesses operate. Compliance, the unpredictability of our FLSA regulations is a concern. When DOL attempted to raise salary thresholds for EAP employees in 2024, many businesses made adjustments. When a Federal Court blocked the rule, they were left in limbo.

Smaller businesses do not always have the dedicated legal resources to respond to shifting regulations. Additionally, the absence of clear Federal standards has led to a patchwork of conflicting State mandates, making multi-State compliance more complex.

To build a stronger, more resilient economy we must unlock the full potential of the American workforce. This will only happen when we modernize workplace laws and policies, close the workplace, workforce participation gap, and shape the future of work.

I urge the Subcommittee to consider these reforms carefully. The FLSA is the foundation of U.S. labor law, but for it to remain effective, it must evolve. Thank you for the opportunity to share these insights, and I welcome any questions you may have.

[The Statement of Ms. Boughan follows:]

Written Testimony of Paige Boughan, MS, SHRM-SCP
SVP, Director of Human Resources

Testifying in her capacity as
State Council Legislative Director for Maryland SHRM

Submitted to the
Subcommittee on Workforce Protections
House Committee on Education and Workforce

"The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities"

Tuesday, March 25, 2025

Chairman Mackenzie, Ranking Member Omar, and Subcommittee Members, thank you for the opportunity to testify about the Fair Labor Standards Act of 1938 (FLSA), a law that impacts many businesses and employees across the country. This hearing is a major step in the right direction, kicking off the necessary conversations that seek to balance the rights, responsibilities and obligations of all parties under this vital law.

I am honored to offer this testimony in my capacity as the State Council Legislative Director for Maryland SHRM, bringing over 10 years of advocacy on behalf of SHRM and over 15 years of human resources (HR) experience. SHRM empowers people and workplaces by advancing HR practices and maximizing human potential. For over 75 years, SHRM has been the trusted authority on all things work. SHRM is the foremost expert, researcher, advocate, and thought leader on issues and innovations impacting today's evolving workplaces. With nearly 340,000 members in 180 countries, SHRM touches the lives of more than 362 million workers and their families globally. In Pennsylvania and Minnesota, SHRM has more than 12,500 members and nearly 6,000 members, respectively.

SHRM has an extensive affiliate network covering all 50 states and several territories, comprising nearly 550 chapters and 51 state councils. This broad reach enables SHRM to deliver localized support, resources, and networking opportunities to HR professionals nationwide. Furthermore, each chapter acts as a center for professional development, hosting events, certification courses, and legislative updates tailored to its members' needs. A key part of this network is the role of

SHRM State Council Legislative Directors, who lead advocacy efforts within their states by tracking key legislation, mobilizing SHRM members, and engaging with policymakers to advance workplace policies that support both employers and employees.

Members of the Subcommittee on Workforce Protections ("Subcommittee"), federal law must evolve to bridge the gap between how organizations assess their needs, find the right talent, and meet that talent where they work and thrive. Unfortunately, outdated laws like the FLSA are holding back organizations and the American workforce, blocking us from reaching our fullest potential.

To unlock the full potential of the American workforce, SHRM believes we must turn three essential keys to update FLSA: **modernizing pivotal workplace policies**, **closing the workforce participation gap** and **shaping the future of work**. These action items are not just priorities—they are the levers that will open doors to innovation, economic growth, and a more dynamic, competitive workforce.

SHRM's "Key" Priorities

SHRM's key priorities aim to create a world of work that works for all, and SHRM believes that addressing these challenges is a shared responsibility. To maintain economic competitiveness and ensure the U.S. remains a global leader, all interested stakeholders must come together to promote policies that modernize pivotal workplace policies that currently limit opportunities based on rigid and outdated classifications. This is how we can work towards closing the workforce participation gap and positively shaping the future of work.

I hope my testimony demonstrates to the Subcommittee that when laws fail to keep up with the evolving needs of U.S. workplaces, it can lead to unintended consequences that impact the entire economy.

Before I begin, let's not undersell how impactful the FLSA has been for nearly a century. It is undoubtedly the cornerstone of federal labor law and establishes many of the protections that are now commonplace to modern employees, such as a minimum wage, overtime pay, and child labor protections. However, the world has undergone significant changes since the FLSA was first passed and since Congress last made significant changes to the law. It has not been amended to account for significant differences in the way workers work or the kinds of work they perform. These changes necessitate federal and legislative solutions that prioritize clarity on which workers are covered, consistency in its application, and compliance-oriented language that reflects today's workforce and workplace.

Modernize Workplace Laws:

According to SHRM's 2025 State of the Workplace research report, 2024 was defined by talent shortages, technological advancements, and a rapidly evolving landscape, driving organizations to prioritize recruiting efforts while also focusing on employee experience and leadership as well as manager development to enhance and retain scarce top talent.[1] As the world of work continues to evolve rapidly, organizations must make strategic decisions to meet labor market demands.

[1] SHRM's 2025 State of the Workplace

As organizations continue to make these strategic decisions, this progress is governed by decades-old laws that have not been updated to reflect technological and workplace advancements. Simply put, the FLSA has not kept up with the changing nature of work, creating increased tension between operational needs, worker flexibility, and compliance requirements. Part of this tension stems from the lack of clear statutory language, which may not have been necessary in 1938 but is crucial today. When the FLSA was created much of its language and structure were based on the work environment of that era, which has evolved considerably. First published in 1939, the U.S. Department of Labor's (DOL) "Dictionary of Occupational Titles" defined over 13,000 types of work. Today, the Alphabetical Indexes of Industries and Occupations list more than 21,000 industry titles and 31,000 occupation titles.

In the absence of clear statutory language, regulatory agencies have stepped in to provide guidance on critical workplace issues. However, with a lack of movement in Congress, these agencies have taken on an outsized role in shaping policies related to FLSA coverage and the impact of technological advancements on work. The frequent proposing and publishing of new regulatory interpretations, followed by lawsuits challenging their lawfulness, creates uncertainty for workers, organizations, and HR professionals. These stakeholders are often left grappling to understand what the rules are, and how to build sustainable compliance structures amidst concerns that the rules will shift in a couple of years. While some organizations—with dedicated departments to track these types of regulatory and legal shifts—are equipped to handle these shifts, that is not the same for all organizations. This is particularly true for small to medium-sized organizations or organizations where they have an HR department of one, a singular person charged with the day-to-day operations. Businesses of all sizes need certainty and the best way to achieve that certainty is through legislation that creates the necessary framework for us all to operate under.

Worker Classifications:

First and foremost, I urge the Subcommittee to consider how the absence of a clear and uniform statutory definition of "employee" impacts the world of work and the type of data that can be collected. This fundamental question carries significant legal, tax, and benefits implications for employers and workers alike. However, the interpretation of this fundamental concept has been left to various federal regulatory agencies and the courts, leading to differing applications across various laws, administrations, and courts.

The FLSA defines an "employee" as "any individual employed by an employer," with "employed" further defined as "to suffer or permit to work."[2] The parameters of who falls into the definition of an "employee" under the FLSA have been the subject of court interpretations since the law was effective. In an opinion of the Supreme Court of the United States ("the Supreme Court"), it was noted that the FLSA has "no definition that solves problems as to the limits of the employer-employee relationship under the [FLSA]."[3]

The consequences of this have been well noted. According to a December 2023 U.S. Government Accountability Office (GAO) report, "[T]he tests federal entities use to determine whether a

[2] Fair Labor Standards Act, 29 U.S.C. § 203(e)(1), (g).
[3] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947).

worker is an independent contractor, or an employee are complex and differ from law to law."[4] In explaining the different metrics used:

> For example, [the Internal Revenue Service] generally relies on factors cited by courts, such as relevant case law, including the degree of control an employee has over their behavior and finances. In contrast, according to DOL' s Wage and Hour Division, under the Fair Labor Standards Act, a worker is an employee and not an independent contractor if economically dependent on an employer for work.[5]

Additionally, in noting the various aspects of nonstandard and contract work arrangements, as well as the fragmented nature of data collection, the GAO report stated that the data does not provide a cohesive national perspective on such arrangements. This issue will only intensify as work arrangements become "more varied and complex, and federal entities use numerous, varied terms to describe them."[6] Echoing GAO's concern, the complexity of this issue will continue to grow as both organizations and workers need clarity on whether a worker qualifies as an employee, given the significance of this determination.

Over 70 years ago, in 1947, the Supreme Court, in Rutherford Food Corp. v. McComb, established the economic realities factors as relevant in determining whether a worker is an employee or an independent contractor under the FLSA. Since then, the Supreme Court has neither reaffirmed nor rejected the application of these factors in determining employee status under the FLSA.

Instead, in just the past five years, regulations issued by the DOL's Wage and Hour Division (WHD) on worker classification have undergone multiple changes, raising questions about the role of regulatory guidance. A new rule was first proposed in September 2020 and finalized in January 2021, only to be delayed in March 2021 and face an attempted withdrawal in May 2021. Both actions were challenged in court, and in March 2022, the original January 2021 rule was reinstated. Shortly thereafter, WHD sought to change the rule again, publishing a proposed rule in October 2022, to which SHRM and 26 SHRM State Councils submitted a public comment. A new rule was finalized and published in January 2024, replacing the existing rule. That rule is now being challenged in multiple lawsuits. Notably, no rule providing guidance on the application of the independent contractor test to today's workforce has been in effect without legal uncertainty.

In response to this noted issue, I would like to turn the Subcommittee's attention to the legislative attempts to provide a statutory framework to determine if a worker is an employee or an independent contractor, such as the newly reintroduced bill to amend the FLSA and the National Labor Relations Act (NLRA) to clarify the standard for determining whether an individual is an employee, and for other purposes (The Modern Worker Empowerment Act, H.R.1319). This bill provides a great launching point and opens the door to an important conversation. It also addresses an important need to offer clarity, certainty, and consistency in structuring worker relationships, without granting favor to any one type of designation. Aligning the FLSA and NLRA on this key threshold issue would help reduce confusion for organizations that must comply with both laws. A

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[4] U.S. Government Accountability Office, *Work Arrangements: Improved Collaboration Could Enhance Labor Force Data*, GAO-23-104225 (Washington, D.C.: U.S. Government Accountability Office, December 2023).
[5] Id at 12.
[6] Id at 33.

uniform definition of "employee" across these statutes would provide clarity, ensuring employers and workers understand their rights and obligations.

Overtime Exempted Status:

Second, I would draw the Subcommittee's attention to the rules and regulations governing the determination of overtime-exempt status. I invite the Subcommittee to assess whether certain longstanding definitions may need to be updated to better reflect today's workforce and workplace realities. I pose this question because establishing their status as overtime-exempt or nonexempt is nearly as important as determining whether a worker is an employee.

The determination of an employee's exempt or nonexempt status for purposes of overtime is imperative for businesses looking to make long-term strategic decisions as it correlates with an organization's bottom line, benefit offerings and more. In my professional capacity and on behalf of SHRM's membership—who are uniquely positioned to navigate the complexities of overtime policies—this determination extends beyond an employee's salary and affects a range of business considerations. Employers must carefully classify employees, as these decisions influence broader workforce strategies, including compensation structures, pay rates, work schedules, workplace settings, and overall workforce composition, such as hiring full-time, part-time, temporary, or independent workers. These decisions also affect workforce morale, as some employees prefer exempt status for the flexibility and associated benefits it provides.

SHRM's survey on the 2023 proposed overtime rule, to which SHRM submitted a public comment alongside 27 SHRM State Councils, highlighted the significant effort required to classify or reclassify employees. To comply with this rule, which would have increased the salary threshold for Executive, Administrative, and Professional (EAP) employees, SHRM's research found that 64.5% of respondents would have conducted case-by-case analyses of salary levels and hours worked to determine the appropriate pay adjustments.[7] For employees transitioning to nonexempt status, respondents indicated that new timekeeping policies would be necessary, as 63% of organizations currently do not track the hours of exempt salaried workers, underscoring the added administrative burden of compliance.[8]

The determination of EAP (or white-collar) exempt status relies on three equally important tests: the salary basis, salary threshold, and duties tests. Each designation requires its own duties analysis, with relaxed requirements for highly compensated employees earning above a certain threshold. While salary thresholds have been a major topic of discussion over the past decade—rightfully so, as they help distinguish exempt from obviously nonexempt employees—another critical aspect deserves attention: the duties test.

As job roles evolve, requiring new skills and greater judgment, certain employees increasingly meet the criteria for exemption under the administrative classification. To qualify:

[7] Overtime Rule Toplines, SHRM, 2023 (unpublished).
[8] Id.

- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.[9]

The second criterion often creates confusion, as many employees rightly believe their roles involve significant judgment. In the mortgage industry, for example, loan officers assess borrowers' financial situations to determine appropriate mortgage products—clearly exercising discretion.

This issue exemplifies the ongoing back-and-forth between regulatory agencies and the courts. A 2006 interpretative letter confirmed loan officers qualified under the administrative exemption, but in 2010, the Department of Labor withdrew that guidance, leading to litigation in *Perez v. Mortgage Bankers*.[10] In 2015, the Supreme Court ruled that the withdrawal was lawful, as it constituted interpretative guidance. The Court held that agencies are not required to follow notice-and-comment procedures when issuing interpretative rules and should not be obligated to do so for subsequent reinterpretations, as occurred in this case. This case highlights how shifting agency policies, driven by different administrations, can create industry uncertainty, forcing organizations to adapt quickly.

Another example where regulations have fallen out of touch with common understanding is the 1996 regulation for "Computer Employee" for purposes of overtime-exempt status. Thinking about where technology was in 1996, and the way that technology has evolved exponentially in that time, this exemption is inherently outdated. "Further, computer technology's growth and diversification have significantly transformed the nature of work in the computer field, and traditional roles like computer programmers and software engineers have evolved and expanded into other specialized areas such as data science, cybersecurity, cloud architecture, and continually emerging jobs related to AI and machine learning. These areas were not contemplated when the "Computer Employee" exemption was codified in 1996. It would provide clarity and certainty to HR professionals for the FLSA's computer employee exemption to reflect the common understanding and current state of computer-related occupations.

Similarly, the definition for "Outside Sales Employee" exemption has not kept pace with the advancement of technology, which has made the concept of what is considered "outside" to be muddled, as technology enables a physical "home base" to be nonessential in the modern world of work. This is another area where the spirit of the law and the letter of the law are not completely aligned, which can create ambiguity.

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[9] *Fact Sheet #17A: Exemption for executive, administrative, professional, computer & outside sales employees under the Fair Labor Standards Act (FLSA)*. Retrieved March 20, 2025, from https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime

[10] 575 U.S. 92 (2015).

Given the significant time and resources required to properly classify employees—and the risks associated with misclassification—it is crucial that definitions and tests are clear and easily understood by both employers and employees. When classification frameworks become outdated or are overly rigid, the legal language no longer reflects how positions are actually structured in the modern workplace. It is essential for Congress and the WHD to regularly review and update these standards, as many aspects of today's labor landscape—such as remote work and the rise of contract arrangements—were not only uncommon but unimaginable just a decade ago. There is an opportunity to examine how definitions, regulatory tests, and criteria for various overtime-exempt statuses impact the modern workforce and create challenges for efficient business operations.

Continuous Workday Doctrine:

Finally, I urge the Subcommittee to consider modernizing an important but poorly defined term: compensable time. While the FLSA ensures employees are properly compensated for their work, it does not clearly define what constitutes compensable time. Instead, it outlines non-compensable activities, such as commuting and certain preliminary or postliminary tasks. This made sense when the FLSA was crafted for a different era and workforce. However, work has evolved significantly, and the framework for defining compensable time—impacting minimum wage, overtime, break time, and leave compliance—no longer reflects modern work arrangements.

Under the FLSA, the "workday" is defined as the period between an employee's first and last principal activities, whether or not they are working throughout. This "continuous workday" doctrine does not account for today's reality, where employees have greater flexibility in when and where they work. Remote work, flexible scheduling, and organizations allowing employees to work nontraditional hours have transformed the concept of a workday in ways unimaginable when the FLSA was enacted. In 2024, SHRM research found that 70% of employers recognized flexible work arrangements as "very important" or "extremely important" for the third consecutive year.[11] Additionally, the prevalence of flextime during core business hours (allowing employees to choose their work hours within limits during core business hours) has remained relatively stable over the past few years, with 53% of organizations offering it in 2024, down 1 percentage point from 54% in 2023, but up 3 percentage points from 2020.[12] This presents an opportunity to adopt a more flexible, practical interpretation of the continuous workday rule that does not rely on outdated assumptions. Regulations should evolve to provide clarity and consistency for employers and employees, ensuring workplace policies align with modern work structures.

Close the Workforce Participation Gap:

America has a talent problem—not due to a lack of talent, but because workers are not being connected with the skills needed for today's workforce. SHRM has long highlighted this labor mismatch, which is now exacerbated by a widening workforce participation gap, often reflected in employment disparities among different groups.

With the constant evolution of the workplace, the need to upskill and reskill all workers is paramount. SHRM research found that 1 in 4 organizations report hiring for full-time positions that require new skills, and among them, 76% struggle to find qualified candidates.[13] Given this

[11] Employee Benefits Survey, SHRM, 2024
[12] Id.
[13] 2024 Talent Trends, SHRM, 2024.

reality, federal law should facilitate workforce development, not create unnecessary barriers. Yet, under the FLSA, offering upskilling opportunities can unintentionally impact employment status, deterring businesses from investing in workforce development. If the risk of inadvertently establishing an employment relationship is too high—due to shifting and unclear regulations—companies may forgo these opportunities altogether, particularly for workers outside traditional employment relationships. SHRM research found that 47% of HR professionals say their organization does not provide training to their independent workers, and among organizations that do provide training to their independent workers, the most common types of training offered are orientation/onboarding training (59%) and compliance training (51%).[14]

This issue affects both employers and independent workers, who play a crucial role in the U.S. economy. The Senate Health, Education, Labor, and Pensions Committee's Request for Information (RFI) last year explored how legal ambiguities around worker classification harm independent workers and the broader economy. In SHRM's response, we emphasized that independent contracting benefits both workers and businesses, fostering entrepreneurship and small business formation. These workers provide companies with on-demand, highly specialized talent, helping bridge workforce gaps. The law must acknowledge that some workers choose to remain outside traditional employment structures for a variety of reasons, including the ability to be their own boss and the flexibility to set their own schedules. SHRM believes that these workers should not needlessly be cut off from benefits because of that choice.

Beyond classification issues, outdated legal definitions may also restrict benefits for employees. For example, the calculation of an employee's regular rate for overtime pay has not kept pace with evolving compensation structures. One solution proposed in the last Congress, the Empowering Employer Child and Elder Care Solutions Act, would have excluded employer-funded dependent care from an employee's regular rate, encouraging companies to offer these benefits. This is of particular interest, as SHRM research indicates that at least 80% of working caregivers anticipate the care they provide to be long-term and, looking forward, within the next 5 years, 14% anticipate taking on new or additional adult care responsibilities, and 18% anticipate taking on new or additional eldercare responsibilities.[15] The pressures of caregiving on the workforce are not expected to slow or narrow. As employees juggle caregiving responsibilities across generations, the law should promote—not hinder—expansive benefit offerings.

To close the workforce participation gap, laws must support employer strategies for attracting and retaining talent. This includes enabling flexible schedules, learning opportunities, and nontraditional work arrangements.

Shape the Future of Work:

Preparing for the future of work is essential for organizations to stay competitive. Employers must stay informed about how these changes will affect their workplaces, while workers need to understand the skills they must acquire to remain competitive in an evolving job market.

The constant back-and-forth shifts in fundamental regulatory concepts create significant challenges for companies trying to establish long-term strategic goals and plans. When each administration introduces new regulatory guidance on critical issues such as worker classification

[14] DOL Independent Contractor Ruling, SHRM, 2022.
[15] Caregiving Research, SHRM, (forthcoming).

or joint employer status, businesses are left navigating an unpredictable landscape. How can an organization be expected to set budgets, design benefits, and develop a sustainable talent strategy when the very foundation of these decisions keeps shifting? "Without stability, businesses struggle not only to plan for the future but also to attract, retain, and train the workforce they need to meet evolving demands. If organizations cannot confidently structure their workforce, how can they invest in talent development or create career pathways that support both business success and worker mobility?

Likewise, current and future workers—who are consistently advised to upskill and remain adaptable in an evolving job market—face a similar dilemma. How can they prepare for long-term success when the rules governing fundamental concepts related to work are constantly rewritten? The lack of clarity hinders both employer and worker decision-making, ultimately stifling economic growth, job creation, and the ability of businesses and workers alike to thrive in the modern economy.

Policymakers should support initiatives that ensure organizations can meet the complex demands of the modern workplace. As AI and technology advance, we must ensure a workforce capable of creating and maintaining these innovations. This includes recognizing independent workers and employees alike and ensuring laws support updated training opportunities.

Conclusion:

Forward-thinking changes to the FLSA will empower employers to design benefits and workplace policies that meet talent where they are—ensuring a dynamic, adaptable, and future-ready workforce.

SHRM and its members are committed to partnering with the Subcommittee and serving as a unifying force in its efforts on critical issues within its jurisdiction. We look forward to continuing discussions on these and other matters affecting work, workers, and the workplace. Thank you again for holding this hearing and for the opportunity to speak with you.

Chairman MACKENZIE. Thank you. Next, I will recognize Mr. Stettner for your testimony.

STATEMENT OF MR. ANDREW STETTNER, DIRECTOR OF ECONOMY AND JOBS, THE CENTURY FOUNDATION, WASHINGTON, D.C.

Mr. STETTNER. Good morning, Chairman Mackenzie, Ranking Member Omar, and other members of the Subcommittee. A 13-year old working the nightshift cleaning the kill floor of a meat packing plant. Working people putting in a 50-hour work week and getting paid for just a fraction of those hours.

Mothers forced to choose between their children and their income when they are denied a place to pump at work. These are just some of the nightmare scenarios that Americans depend on the U.S. Department of Labor to prevent. Those protections are at risk.

If Elon Musk's so-called Department of Governmental Efficiency gets its way and strips the DOL of its talent and capacity, as it closes scores of DOL offices across the country. The truth is that 15,000 plus DOL employees, like I did in 2022, raised their hand to swear an oath to the Constitution to uphold the laws of Congress enacted to protect workers.

They toiled into every corner of the country to ensure the workers come home safe and alive at the end of their shift with the pay they have earned. Through consistent and targeted enforcement, the Biden administration recovered 1 billion dollars in underpaid wages and damages. We should be increasing the budget of DOL and its enforcement powers to get at 50 billion dollars in wage theft annually.

Enforcement can only do so much. We need to change the law. The Federal minimum wage of $7.25 has not been increased since July 2009, losing half of its purchasing power. Congress should pass the Raise the Wage Act of 2023, gradually raising the Federal minimum wage to $17.00 an hour by 2028, benefiting an estimated 28 million workers.

The minimum wage and salary threshold for overtime pay should be indexed to inflation, so they never fall behind again. All Americans should be protected by the same Federal minimum wage standards. Congress should eliminate the tip credit, which allows tipped workers to be paid as little as $2.13 an hour, a level set in 1991.

Eliminating the tip credit is the easiest way to relieve the administrative burden on workers and employers. It is also time to end the discriminatory provisions for sub-minimum wage worker's disability, as little as 25 cents per hour. DOL should cease issuance of 14(c) certificates, phasing out this program, which is already steeply declining in popularity.

14(c) should be replaced by programs helping disabled individuals find jobs in non-segregated environments, such as through the Transition to Competitive Integrated Employment Act of 2023. As one of the last actions of Acting Secretary Julie Su, DOL secured a 4-million-dollar settlement for children employed at Perdue poultry plants, in dangerous jobs deboning and processing chicken.

More is needed, like the Protect the Children Act. Over the last 15 years, employers and workers have had whiplash from changing

regulations on independent contractors. Now is the time to return to core precedents. In 2024, DOL returned to the six-factor test to analyze whether a worker is, as a matter of economic reality, economically dependent on an employer for work.

This rule distinguishes between those individuals who are genuinely in business with themselves, and those who are employees, and should be paid the minimum wage and overtime. Let me close by saying that the risk of DOGE and the Trump administration to the American worker is rising.

President Trump inherited an economy that added a record 16 million jobs during the Biden administration. Workers finally had leverage in the economy to see wage gains that actually outpaced inflation. Unions won record contracts, like a 25 percent increase for the UAW.

Legislation like the Chips and Science Act catalyzed 1 trillion dollars in private investment. Even this strong recovery ran up against powerful forces. The richest 1 percent of our country, people like Elon Musk, have captured an outsized share of national wealth.

While 70 percent of American support unions, the erosion of labor law means that less than 1 in 10 can benefit, and women are paid only 83 cents for every dollar paid to a man, something we recognize today on Equal Pay Day.

Let us stand on the side of workers, and strengthen worker's rights, starting with modernizing FLSA. Thank you, and I am happy to answer any questions.

[The Statement of Mr. Stettner follows:]

Testimony of Andrew Stettner
Director of Economy & Jobs, The Century Foundation
House Education and Workforce Committee
Subcommittee on Workforce Protections
“"The Future of Wage Laws: Assessing the FLSA’s Effectiveness, Challenges, and Opportunities"
March 26, 2025

Good morning, Chairman Mackenzie, Ranking Member Omar, and other members of the subcommittee. Thank you for the opportunity to speak to the subcommittee again today about ways to strengthen bedrock protections for American workers at a moment of rising economic uncertainty. I am the Director of Economy and Jobs at the Century Foundation; an independent nonpartisan think tank with offices in Washington and New York City.

The DOGE Cloud Over the Department of Labor Threatens the Fair Labor Standards Act and Other Worker Protections

A 13-year-old working the night shift cleaning the kill floor of a meatpacking plant; working people putting in a 50-hour work week and getting paid for just a fraction of those hours; mothers forced to choose between their children and their source of income because they’re denied a place to pump breast milk at work – these are some of the nightmare workplace scenarios that Americans depend on the U.S. Department of Labor (DOL) to prevent. Those protections are at risk if Elon Musk’s so-called Department of Government Efficiency gets its way and strips the U.S. Department of Labor of its talent and capacity. The truth is that 15,000 plus DOL employees, who like I did in 2022, raised their hand to swear an oath to the constitution to uphold the laws Congress enacted to protect workers. They toil in every corner of the country to ensure that workers come home safe and alive at the end of their shift with the pay they’ve earned. But that’s not all. DOL employees also protect retirement benefits, support training such as registered apprenticeships, deliver unemployment benefits when workers lose a job, provide workers’ compensation to workers hurt during federal service, and more. The mission of every part of DOL is to ensure the labor protections passed by Congress are executed fully and fairly. The commitments to workers and employers in the Fair Labor Standards Act being discussed today will be rendered meaningless without a strong DOL.

A Strong Economy and Worker Power Are at Risk

The precarious condition of the economy makes today's hearing especially timely. Earlier this month, we marked the fifth anniversary of the COVID pandemic–remembering both the tremendous loss of life and the economic calamity that followed. When he took office for a second term in January, President Trump inherited an economy that had not only recovered all jobs lost during the pandemic, but had added a record-high 16 million jobs during the Biden Administration and achieved the longest stretch of unemployment below 4% in more than 50 years. Federal economic recovery legislation powered steady and stable growth that far exceeded the trajectory of peer nations. The Biden Administration's investments through the bipartisan infrastructure law, CHIPS and Science Act, and Inflation Reduction Act catalyzed more than **$1 trillion** in private-sector investment[1] and created good-paying jobs in manufacturing and clean energy. That includes adding 600,000 manufacturing jobs after factories lost 200,000 jobs under President Trump's first term.

With good-paying job opportunities plentiful, workers finally had leverage in the economy to see wage gains that outpaced inflation, with real inflation-adjusted take-home pay in 2024 is 5 percent higher[2] than it was pre-pandemic (2019). Backed by the strong economy and the most pro-labor Administration in history, unions representing workers at major corporations secured significant wage increases such as a 25 percent wage increase for United Autoworkers (UAW) workers at General Motors (GM)[3], Ford, and Stellantis; a 60%-plus increase for longshoremen on the east and Gulf coasts; and historic increases for healthcare workers, UPS delivery drivers, flight attendants, delivery drivers, and machinists. These gains happened with the support of a strong Department of Labor that supported workers' rights to organize and bargain collectively.

While this strong recovery has increased workers' power, America's workers deserve a raise from an economy that is still rigged against them. The richest 1 percent of the country–people like Elon Musk–have captured an outsized share of national wealth, leaving workers behind. The average CEO earned 290 times more than their average workers in 2023,[4] up from 21 times in 1965. Workers and communities, especially rural communities have been left behind - as rural counties have a shrinking share of national wealth (9% of GDP in 2003 to 7.8% in 2023).[5] While 70 percent of Americans support unions[6], the erosion of labor laws means only 9.9 percent of all workers—and less than 6 percent of private-sector workers—experience the union advantage in wages and benefits[7] that built the middle class. Women are paid only 83 cents for every dollar paid to men.[8] In fact, today is Equal Pay Day - a day that symbolizes how far into the year women must work to be paid what men made the previous year alone. In addition, the Black unemployment rate[9] (6.0 percent in February 2025, down from 9.9 percent four years ago in January 2021) still far exceeds the White unemployment rate (3.8 percent). These challenges underscore the need to bolster the critical protections provided by FLSA, such as minimum wage and overtime protections, while strengthening labor law with reforms encompassed by the Protecting the Right to Organize (PRO) Act. These policies are our most potent tools to lift American workers' economic fortunes.

The Trump Administration's actions are threatening economic progress and reducing worker power. This Administration has waged an all-out war against federal civil servants,

including mass firings and radical cuts to critical agencies like the Department of Education and Consumer Finance Protection Bureau. Eighty percent of federal workers live outside the Washington area, and these actions threaten to put hundreds of thousands of middle and working class Americans out of work in states like Georgia, North Carolina and Pennsylvania, each of which have more than 75,000 federal workers.[10] And Musk's war on workers diminishes the ability of federal agencies to provide services and protections Americans rely on every day—from sending their child to a safe school to living free of consumer scams.

This Administration's on-again and off-again announcements of large-scale tariff increases–including against U.S. allies like Canada–have spooked companies and caused stock market swings, leading to a spike in announced private and public sector layoffs and a sharply increased risk of inflation. While strategic deployment of tariffs, trade enforcement, and fair trade agreements can bolster economic competitiveness and national security, this Administration's use of tariffs has been reckless and rash. Moreover, President Trump used his address to Congress to threaten to repeal the CHIPS Act[11] which is powering the manufacturing recovery he claims he wants to bolster.

The Administration's policies have caused consumer confidence to decline and inflation expectations to rise. While we have not yet seen large consequences of the Administration's policies in the job market data because of data lags, independent forecasts show slowing growth and rising recession risk, and the Administration's looming April 2nd deadline for global tariffs, or another big event, could tip the economy over into recession. A recession would inflict both immediate pain and lasting scars on working families who lose jobs, and undermine the worker power that contributed to strong wage growth at working- and middle-class Americans coming out of the COVID pandemic.

Bedrock Workplace Protections Help Ensure American Prosperity in Changing Times

In the midst of economic uncertainty and endemic inequality, workers count on the bedrock protections of the Fair Labor Standards Act (FLSA) now more than ever. FLSA's critical standards serve as a floor for fair treatment of workers in our economy, especially those without a union, and establishes paths to the middle class. Yet, the floorboards created by FLSA have been loosened by underinvestment and neglect in recent decades. The federal minimum wage of $7.25 has not been increased since July 2009, with low-paid workers losing nearly half of their purchasing power as a consequence of Congress's failures to raise the minimum wage. As a result, in those states that require only the federal minimum wage of $7.25, workers are 46% more likely to make below $15 an hour[12]—meaning a full-time worker earns too little to lift themselves, much less their family, out of poverty. Yet, employers consistently skirt even paying these low minimum rates. Employers violating FLSA laws commit up to **$50 billion**[13] in wage theft from workers each year, including $15 billion from minimum wage violations alone. Despite its hard work to combat FLSA violations, the Wage and Hour Division of the U.S. Department of Labor is substantially under resourced—with roughly 1 investigator for every 250,000 workers[14].

Seismic changes in American workplaces require increased vigilance and reforms to strengthen the power of FLSA. As I told this subcommittee in 2017[15], the twentieth-century economy was dominated by large firms who used a traditional employment relationship at every step of production. The twenty-first-century management model frequently entails the firm retaining only the most central aspect of its identity, and outsourcing all other functions in the production process. Whereas a janitor at a bank in the 1960s could enjoy the benefits of the bank's pension plan, the new model contracts out these services to a contractor who might offer cleaning "franchises" with no wage protections or benefits. These changes have spurred an epidemic of misclassification of workers as independent contractors, stripping workers of their minimum wage and overtime protections, as well as denying them access to unemployment insurance and other critical programs. Recent research by my colleague Laura Valle-Gutierrez[16] has found that up 2.1 million (19 percent) of construction workers are misclassified as independent contractors, and the U.S. Census Bureau estimates that 6.7 percent of all workers are misclassified. The misclassification epidemic has particularly harmed lower-paid workers like home health aides and nail salon workers, who can least afford to have their rights and protections stripped through these schemes. Even when workers are paid on the books, the rise in subcontracting, use of third-party administrators, franchising, and staffing firms have made workers increasingly vulnerable to wage violations. The genius of the FLSA is that it holds employers accountable for fair treatment of their workers when the employer has the power to control the work, regardless of changing structures in the economy.

Reforming the Fair Labor Standards Act to Meet the Challenges of the Modern Economy

I appreciate the committee's interest in modernizing the FLSA when possible. The first place to start is giving America's workers a raise, by enacting a badly overdue increase in the minimum wage. Phased in over time to help employers adjust, an increase in the wage floor should be set high enough to sustain families at the minimum wage. This would help ensure the lowest-paid workers in our economy—who are disproportionately women and workers of color—are not living in poverty despite working full time jobs. It would also give a pay boost to other wage earners making above the wage floor, helping cut into endemic economic inequality in America. A key historical benchmark is the level that held throughout the 1960s[17], when the minimum wage was half of the average wage in the economy. (Today, the average non-supervisory worker earns $31 per hour, and the current minimum wage of $7.25 is less than a quarter of that amount.) That's the thrust of the Raise the Wage Act of 2023[18], which would gradually raise the federal minimum wage to $17 an hour by 2028, benefitting an estimated 28 million workers[19] who earn less than $17 an hour and or just above that amount. Critically, the Raise the Wage Act would index the minimum wage to the median hourly wage after it reaches $17 per hour, so workers won't ever see such a long gap between increases.

The next way to modernize the FLSA is by ensuring that all Americans are protected by the same federal minimum standards floor. This includes setting one fair wage for tipped workers by eliminating the so-called tip credit, which allows tip workers to be paid as little as $2.13 per hour–a floor which has not been raised since 1991. Not only does this system leave tipped workers more exposed to poverty, it places a greater administrative burden on workers and employers to ensure that each worker earns the equivalent of the federal minimum wage

when tips and wages are combined. It's also time to end discriminatory provisions allowing for a subminimum wage for workers with disabilities permitted under Section 14(c) of the FLSA, which enables employers in so-called sheltered workshops to pay workers with disabilities as low as $0.25 per hour. As people with disabilities have chosen to live and work independently in communities, the number of employers with certificates enabling them to pay subminimum wages under 14(c) has declined precipitously from 5,600 in 2001 to 801 in 2024. It's past time to end this practice–and the Department of Labor's proposed rule-making to cease issuance of 14(c) certificates [20] should go forward. In tandem with the phase-out of 14(c) Congress should expand support for the programs that help intellectually and developmentally disabled individuals find jobs in non-segregated environments, such as through the Transition to Competitive Integrated Employment Act[21] of 2023.

Enforcing Wage and Hour Laws to Stop Wage Theft and Protect Children

The next area of reform is to strengthen the enforcement powers of the U.S. Department of Labor, and its Wage and Hour Division (WHD). Through consistent and targeted enforcement, the Department of Labor recovered $1 billion in underpaid wages and damages for American workers during the Biden Administration[22], and responded to nearly 1 million calls for assistance in FY2023. Congress should increase the budget for WHD so it has additional resources to keep up with violations in an expanding economy, and provide effective compliance assistance to employers, such as the Department's FY25 request of an additional 187 full-time equivalent employees for WHD,[23] including 50 specifically for child labor. At the same time, Congress should increase civil monetary penalties so they are a meaningful deterrent for violating the law in the first place.

Preventing child labor must continue to be a top priority for increased enforcement. FLSA's child labor provisions were enacted to ensure that when young people work, the work is safe and does not jeopardize their health, well-being, or educational opportunities. Child labor investigations were a top priority of the Biden Administration. For example, on January 15th,[24] DOL secured a $4 million settlement for children employed at Perdue poultry plants in dangerous jobs in poultry plants deboning and processing chicken, using dangerous equipment, and at night. DOL and Perdue also came to an agreement that will prevent such exploitation in the future. The Protecting Children Act, introduced in the last Congress, is an example of the kind of modernized enforcement powers needed to stem child labor, including increased civil and criminal penalties for child labor violations, stronger ability for WHD to stop the movement of goods produced in violation of child labor laws alongside public information, research, and data driven enforcement.

Independent Contractors and Joint Employer - Stay the Course

Over the last fifteen years, employers and workers have had whiplash from changing regulations and administrative interpretations of independent contractors and joint employment. Congress and the Trump Administration should follow the lead of the Biden Administration in

following law and precedent that can apply consistent parameters to constantly evolving business practices. The Department of Labor's independent contractor final rule, implemented on January 10, 2024,[25] returned determinations of whether an individual is an employee for the purposes of the FLSA to the courts-established six factor test to analyze whether a worker is, "as matter of economic reality, economically dependent on an employer for work."[1] The 2024 action rightly rescinded 2021 rule[26] that disregarded US Supreme Court and Circuit Court authority and the statutory definitions by overly relying on just two factors, and failed to consider whether the work performed is central or important to the potential employer's business. The purpose of the 2024 rule is to allow employers and WHD to distinguish between those individuals who are genuinely in business for themselves (independent contractors) and everyone else, who are employees and should be paid the minimum wage and overtime. The 2024 rule should make it clear to employers like restaurants that WHD found in Minnesota[27] misclassified dishwashers as independent contractors and home health agencies that misclassified home health care workers in Montgomery, AL[28] that they should abort schemes to bilk low-wage workers through misclassification.

The FLSA is compatible with innovation in the economy. As I told this committee in 2017, "Nothing in the FLSA prevents any of the common examples of flexible work (working from home, working split shifts, doing piece work, or other forms of intermittent work) as long as these arrangements ensure that the worker is paid for their work, at least at the minimum wage, and with overtime pay for any hours over forty hours per week." This means that the FLSA already contemplates that modern technology, including smartphone apps, can be deployed for this kind of hours worked tracking just as they are for all kinds of work in the gig economy.

Similar to addressing the misclassification of employees as independent contractors, the Biden Administration's actions in 2021 rightly returned standards for joint employment responsibility[29] under the FLSA to long-established court precedent and the statute's broad definitions of covered employers. Since the 1930s, the FLSA has recognized that individuals can have more than one employer accountable for ensuring compliance with the law. Contrary to the Trump Administration's 2020 Joint Employer Rule[30], courts have consistently found that joint employment responsibility extends not just to those that pay workers but to other entities who jointly control the worker's schedule, conditions and method of payment. This includes decisions[31] that have held public agencies accountable under the FLSA for the work on home health aides contracted by government agencies, garment factory workers hired by a subcontractor for specific tasks integrated into production, and nurses hired into hospitals by a staffing agency. The principle of joint employment is clear. Powerful entities who economically benefit and control the work should not benefit from exploitation of workers deprived of the basic protections provided by the FLSA.

DOGE Cuts to the Department of Labor Will Undermine Core Labor Standards

[1] The six factors are (1) opportunity for profit or loss depending on managerial skill; (2) investments by the worker and the potential employer; (3) degree of permanence of the work relationship; (4) nature and degree of control; (5) extent to which the work performed is an integral part of the potential employer's business; and (6) skill and initiative

None of these reforms to the FLSA, or other labor and employment laws, will meet their potential without a strong U.S. Department of Labor. Actions taken by DOGE have already weakened the U.S. Department of Labor and it's likely to get worse. For example, the DOGE website lists[32] scores of leases of government offices far beyond the beltway that are being canceled, including at the Wage and Hour Division. The work of the Wage and Hour Division is done in the field, where investigators visit worksites and DOL staff at local offices answer thousands of phone calls taking complaints about wage violations and providing compliance assistance to employers. Local wage and hour offices are familiar with their local economy, understanding the nature of the industries and becoming part of the community. Forcing wage and hour inspectors to travel hundreds of miles to complete an investigation is the opposite of efficiency. Beyond WHD, DOGE has canceled leases for over 30 offices of the Mine Health and Safety Administration, including 7 in Eastern Kentucky mine country alone. As Norma Simons-Holbrook told CBS 13 News[33], that "we need the inspectors," to protect multiple family members who love their work as coal miners.

The risk of DOGE and the Trump Administration to the U.S. DOL and to American workers is growing. A federal judge ordered DOL to reinstate 170 probationary employees fired as part of a wave of Valentine's day mass terminations across the federal government. This is likely only a temporary reprieve, as all federal agencies were required to provide information to OMB by March 13th with plans for additional reduction. If further cuts go through, parts of DOL like the Employee Benefits Security Administration (EBSA) may no longer be able to protect workers like Erika, a young mother in Georgia, whose insurance company stood ready to deny her a life-saving liver transparent before DOL got involved and ensure the surgery was covered.

Across DOL, additional damage has already been done. The Office of Federal Contract Compliance Programs (OFCCP) has authority to investigate federal contractors, winning $260.8 million dollars in monetary relief for employees who were discriminated against because of their race, gender, sexual orientation, disability, or status as a protected veteran. Following President Trump's decision to revoke Executive Order 11246, which has been a hallmark of federal contracting since 1965, DOL moved to largely dismantle OFCCP,[34] including plans to reduce its staff by 90 percent and its office from 55 offices to five.

Further cuts to DOL will jeopardize its ability to promote the development of family sustaining jobs and help employers recruit qualified workers. President Trump has already revoked the Good Jobs Executive Order[35] designed to make sure federal investments create good-paying, high-quality jobs for American workers, by protecting workers' right to organize, using prevailing wage standards and supporting registered apprenticeships. What will happen if cuts reach the Office of Disability Employment Policy and its Job Accommodation Network [36], which responded to 40,000 inquiries, including helping a veteran with head and neck injuries worked with his employer to continue his job in graphic design with the use of low-cost accommodations like an ergonomic mouse and noise-canceling headset? Or the Women's Bureau and its Women in Apprenticeship and Nontraditional Occupations[37] grants, which have opened the door to good-paying construction jobs for women all across the country? These

policies don't discriminate against any group, rather they make sure employers take advantage of talent in every corner of America and that no one is discriminated against in the workplace.

Conclusion

Decades of concentration of power in the U.S. economy has undermined the power of American workers. The strong economy and the labor policies of the Biden Administration started to reverse these trends. But today's economic and policy outlook puts workers at grave risk. The Trump Administration's DOGE-driven cuts to the Department of Labor threaten to undermine the first line of protection for American workers in communities and workplaces across the nation. For nearly one hundred years, the Fair Labor Standards Act has ensured that employees—regardless of economic changes—would be treated fairly, guaranteeing them fundamental protections such as a minimum wage and overtime. Now is the time for Congress to strengthen these foundational for all protections to all workers, and ensure that the Department of Labor has the tools, talent and resources to enforce the law.

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Chairman MACKENZIE. All right. Last, we will recognize Mr. Wolfson for your testimony.

STATEMENT OF MR. JONATHAN WOLFSON, CHIEF LEGAL OFFICER AND POLICY DIRECTOR, CICERO INSTITUTE, RICHMOND, VIRGINIA

Mr. WOLFSON. Chairman Mackenzie, Ranking Member Omar, and members of the Subcommittee, it is an honor to testify today before this Committee on ways to grow the Nation's economy, and free workers to earn by modernizing the Fair Labor Standards Act.

I would also like to recognize my daughter, Hartwell, who is here with me today. My name is Jonathan Wolfson. I am the Chief Legal Officer and Policy Director at the Cicero Institute. We are a think tank with the mission of identifying, developing and advancing entrepreneurial solutions to public policy problems.

Previously, I had the honor of leading the U.S. Department of Labor Policy Office. In addition to my remarks submitted for the record, I would like to focus on two key observations today. First, is that legislation is a highly preferable way to go about amending the Fair Labor Standards Act.

Second, there is some pending legislation before this Subcommittee and other parts of this broader Committee, which are ways to address the multiple difficulties facing today's workers. First, legislation is preferable to regulation. As everyone on this panel has said, there are things that the Department of Labor has done, and that has been done in order to try to assist workers, or try to assist businesses, but ultimately old and unclear Fair Labor Standards Act leaves many vital decisions to the regulators.

For example, the definition of a tipped employee is any employee, under the statute, is "any employee who receives more than $30 a month in tips," but on top of that, the U.S. Department of Labor has issued pages upon pages of regulations.

This leaves employers vulnerable to liability and investigation, not because they pay their worker the minimum wage as required under the law, but because they treat workers who spend less than a certain amount of time in a day performing work that the Wage and Hour Division deems to not be tipped work, a term that is not defined by the Fair Labor Standards Act.

Unclear and outdated laws are not unique to Wage and Hour Division, or the Department of Labor. Every year regulatory agencies fill thousands of pages of the Federal Register, published hundreds of regulations, and issued tens of thousands of opinions, interpretations, rulings and other guidance.

An ever-changing regulatory landscape is good for lawyers, but it does not help innovators innovate, business build, or workers to work, and it is bad for the citizens who pay more for everything that they buy, and for the economy as a whole. It is time for Congress to act and improve the Fair Labor Standards Act, rather than asking DOL to try to use its power to nibble around the edges.

Congress can improve workers' lives with pending legislation. Modern workers and businesses are looking to Congress to bring the Fair Labor Standards Act into the 21st Century. Three bills that would do that include the Modern Worker Empowerment Act,

which protects the large and growing number of self-employed workers who wish to remain self-employed.

Some 72 million Americans are independent workers, and the vast majority of them prefer to be independent workers instead of employees. This law would reduce the risks from contacting with an independent worker and open more opportunities for work and flexibility for the self-employed worker, by making it easier for everyone to identify who is an independent contractor.

I would also recommend that this legislature consider providing some sort of an opt-in provision for individual workers who might be interested in becoming independent workers as well. The Working Families Flexibility Act lets private sector employers choose comp time instead of overtime pay, just like government employees can.

The Modern Workers Security Act lets businesses contribute to affordable benefit accounts for independent workers, without risking a determination that they misclassified those workers as independent instead of employees. By protecting access to benefits, it supports independent workers, while preserving the flexibility and autonomy of those workers.

In conclusion, the Fair Labor Standards Act was created to protect workers, but as the economy and country have changed, many of those protections now block workers from the kinds of business relationships that they may themselves want. From benefits workers want, that the Fair Labor Standards Act prohibits, or relationships workers hope to develop that trigger Wage and Hour scrutiny.

A revised FLSA would benefit many of today's workers. Rather than relying on the administrative State to look for gaps in the statute to create rules that address today's challenges, Congress can and should act to bring the FLSA into the 21st Century, promoting employment law systems that benefits workers, businesses and consumers alike, while helping our economy to grow.

Thank you, and I am grateful for the opportunity to be here and happy to answer any questions.

[The Statement of Mr. Wolfson follows:]

Making the Fair Labor Standards Act Work for Today's Workers and Businesses

Testimony of Jonathan Wolfson, The Cicero Institute, at the Hearing of the House Committee on Education and Workforce Subcommittee on Workforce Protections on "The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities."

Chairman Mackenzie, Ranking Member Omar, and members of the House Committee on Education and Workforce Subcommittee on Workforce Protections: Good morning and thank you for having me today. It is an honor to testify before this subcommittee on ways to protect American workers and the nation's economy by modernizing the Fair Labor Standards Act to make the law work for the modern American Economy to encourage continued growth and opportunity for the economy.

My name is Jonathan Wolfson and I am the Chief Legal Officer & Policy Director for the Cicero Institute, a nonprofit think tank with a mission of identifying, developing, and advancing entrepreneurial solutions to society's toughest public policy problems. Previously I had the honor of serving as the head of the Office of the Assistant Secretary for Policy at the US Department of Labor (DOL) where I also served as the Regulatory Policy Officer and Regulatory Reform Officer or chair of DOL's Regulatory Reform Task Force. In these roles and in my time in private law practice I have seen how the law regularly affects workers, businesses, and consumers by creating barriers that make it harder or incentives that make it easier for American workers to thrive.

Today's hearing focuses on the Fair Labor Standards Act (FLSA), a seminal law that set the boundaries for much of American employment law for nearly a century. The FLSA has also been the foundation upon which federal agencies have built a substantial regulatory apparatus that may or may not actually align with the intent of the legislators who drafted that law so many years ago. *See* 29 C.F.R. Chapter V. That regulatory apparatus and the rules written by the Wage and Hour Division can and do change when new Presidents are elected and these rulemakings impose costs on workers, businesses, and the economy.

I will focus my remarks on four key points:

First, the FLSA was and remains an important framework for employment law in American, but the law is vague in many important places or even fails to define key terminology, leaving much of the law subject to regulators' interpretation and businesses without the clarity they need to conduct their business.

Second, in our tight labor market businesses are looking for a competitive edge to attract and retain the most talented workers, but the FLSA often limits the flexibility of workers to negotiate for and employers to offer a different mix of pay and benefits than Congress contemplated in the 1930s and 1940s.

Third, the modern economy is very different from the economy of the FLSA and the FLSA should be updated to reflect this reality.

Finally, there are some specific FLSA reforms proposed both in this and prior Congresses that would help address some of the largest shortcomings of the FLSA and help America's employment laws meet the unique workforce challenges of this Century.

1. The FLSA's lack of clarity leaves important decisions up to regulators.

The FLSA was originally written in 1938 and while it has been amended multiple times since then, many of the key definitions and concepts were unclear when written and that lack of clarity remains to this day. For example, the definition of "employer" is circular: "'Employer' includes any person acting directly or indirectly **in the interest of an employer** in relation to an employee." 29 USC 203 (emphasis added). Likewise, the definition of "employee" relies on the reader having a general understanding of the terminology already since "the term 'employee' means any individual employed by an employer." 29 USC 203.

To provide color to those two definitions alone, the United States Department of Labor and its Wage and Hour Division have had to issue hundreds of pages of regulations, guidance, and compliance assistance, not to mention the numerous cases filed by the Office of the Solicitor. In just the last two administrations, WHD regulations on independent contracting, litigation about those rules, and the materials to support the rulemakings number into the thousands of pages. *See*, *e.g.,* 89 FR 1638 (2024), 86 FR 1168 (2021).

But it is not just circular definitions that create openings for the regulators to step in and create new regulations. Some definitions made sense when written but as time has progressed they seem to be ripe for revision. For example, the definition of a "tipped employee" is "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 USC 203. Upon that relatively simple and seemingly clear definition DOL has built an entire regulatory scheme resulting in significant paperwork burden for businesses and leaving many employers vulnerable to liability and investigation not because they have treated workers earning more than $30 per month in tips as "tipped workers," but rather because they have treated workers who spend less than a certain amount of time in a day performing worked WHD deems not to be "tipped work" (a term not defined by the FLSA).

Unclear and outdated laws are not unique to WHD or even DOL, so every year regulatory agencies fill thousands of pages of the Federal Register, publish hundreds of regulations, and issue tens of thousands of opinions, interpretations, rulings, and other "guidance." And while a regulated party might prefer a world where Congress' laws are the only ones they must follow, they know the power a regulator has to disrupt or even shut down their businesses. And for this reason, generations of lawyers have supported their families by helping businesses to navigate the administrative state both at the federal and state levels.

We should admit that some responsibility for this phenomenon certainly falls on legislators who want to take the easy path, pass a bill, put out the press release, and move on without getting into

the real hard work of parsing out specifics. It is a lot easier to pass a law to "keep kids safe from dangerous jobs" and leave it to the Wage and Hour Division to develop detailed rules and guidance that regulate who is a child, what kinds of jobs are dangerous, and when a family member might be exempt from the rules.

Responsibility also falls on the legislative process and political gridlock that makes it very difficult to pass any kind of legislation. Every time a new requirement enters the bill, or every time a specification goes away, some legislators who may have been part of the supporting coalition might be less willing to remain supportive. And when Congress is divided like it is today, these narrow coalitions might be all the more precarious if bills start being weighed down with lots of detailed specifics. Legislators are thus incentivized to be less specific to increase the likelihood that a bill passes.

But none of these explanations justify Congress giving away its legislative authority to the executive branch, even if we might be able to explain why it happens all the time today. The Constitutional structure doesn't call for executive branch to write the laws, just enforce them. But we've gotten this out of whack and that's why we are here today.

Ultimately these shortcomings of the FLSA drive businesses to request and WHD to provide clarity on what the law means. While the US Supreme Court has called into question deference to agency interpretations of the law, the lack of clarity in laws will only drive more requests for agency clarifications, clarifications that require more review from courts. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). The best way to fix this challenge is to make the FLSA more clear.

2. Current FLSA Limits Worker and Business Flexibility on Compensation

My economics professors taught me that a business will only remain a going concern if its long-term profits exceed its long-term expenses. And for many employers, one of their biggest budget line items is payroll costs. In a tight labor market, workers can command higher wages, greater and different benefits, and more flexibility. And in some cases, today's workers want perks that may not have been contemplated in a 1940s factory.[1] But sometimes the ability to provide those perks or a different combination of benefits is limited not by the willingness of the employer to provide what the employee wants, but by the laws and regulations surrounding those benefits. And when that occurs, both the worker and the business are worse off because the business may have to provide compensation in a way the employee values less than at the same cost to the employer or more of the less valuable thing at a higher cost of the employer.

Public employees, for example, are permitted to trade time and a half overtime pay for compensatory time where the worker receives 90 minutes of vacation for every hour of overtime they work instead of extra pay. *See* 29 USC 207(o). But this alternative is *not* available to employees of non-government organization, whether for profit or nonprofit. So employees of,

[1] Kerry Jones, "The Most Desirable Employee Benefits," Harvard Business Review, Feb. 15, 2017, available at: https://hbr.org/2017/02/the-most-desirable-employee-benefits.

say, a tax preparation company cannot request extra vacation for their long hours during tax season and must instead accept time and a half pay for those hours. Thus the law forbids workers from making the deal they would prefer when they work overtime, all in the name of "protecting workers."

Similarly, many workers today live in two earner households and childcare may be one of their largest expenses. Many workers may be more than happy to trade some compensation both during normal hours and, importantly, for overtime hours they work, if their employer would provide onsite childcare. And many businesses might be interested in providing employees with onsite childcare to reduce the likelihood employees will have to miss work if their outside childcare provider is not able to provide service on a particular day. But the Department of Labor has been clear for years that regular childcare paid for by an employer must count toward the employee's regular rate of pay, the rate that must be paid at 150% for all overtime hours.[2] This means that employees and their employers are again prohibited from entering into compensation agreements they would both readily make because of federal regulations. And to make matters worse, since this is a function of the overtime regulations, that means that the highest paid employees, those not subject to an overtime provision, are effectively permitted to make this kind of tradeoff while their lower-paid counterparts are not.

These are but two examples that show that while the FLSA is intended to protect workers, that protection can often harm the very same workers, all while making it harder for employers to afford to pay their own workers. This drives up costs for consumers, reduces worker satisfaction, and makes managing a workforce more difficult especially for the small businesses that are the backbone of the American economy.

3. Today's Economy Looks Different from the Economy of 1938

It is almost a truism to say that today's economy is very different from the economy at the time the FLSA was originally drafted. To the workers of today, the demographics of the workforce, the prominent industries, the duration of work for the same employer, the levels of education, and the rise of technology life in the first half of the 20th century would seem quite foreign. In fact, since only 2000, the workforce is more educated (by 14 percentage points), older (median age up 3 years), less white (down 11 percentage points), and more immigrant (up 6 percentage points).[3]

The changes over the last 25 years are mere blips on the radar in comparison to the FLSA-era workforce. One major change in the American workforce is the labor force participation rate. In 1948, 86.6% of men were part of the labor force while a mere 32.7% of women were part of the

[2] *See* Stephen Miller, "SHRM Praises Introduction of Child and Elder Care Benefits Bill," July 15, 2022, available at: https://www.shrm.org/topics-tools/news/benefits-compensation/shrm-praises-introduction-child-elder-care-benefits-bill.

[3] *See* Luona Lin, Juliana Menasce Horowitz, and Richard Fry, "Most Americans Feel Good About Their Job Security but Not Their Pay" Pew Research Center, December 2024, available at: https://www.pewresearch.org/wp-content/uploads/sites/20/2024/12/PST_2024.12.10_americans-jobs_report.pdf.

civilian labor force. By 1999, a full 60% of women were part of the labor force while 74.7% of men were in the labor force. And in 2023 the male labor force participation rate had fallen to 68% while the female rate was 57.5%.[4]

Numerous Americans work remotely or only go to their office a few days per week.[5] Many American workers now perform work in one state while their employer operates in another. Some workers even perform work in the United States while their employer operates internationally. And still other workers perform work for multiple different employers both foreign and domestic, whether as an employee or an independent contractor. While some Americans in 1938 and in the post-World War II era certainly had unique work arrangements, the prevalence of these kinds of work arrangements makes it much more difficult to presume that every worker in today's American economy desires the kinds of workplace, compensation arrangements, and benefits as the employee of 1950. The fact that in an economy where more than 50 million Americans are working as independent contractors shows that workers are interested in something different from the traditional workplace of mid-20th Century America.

Despite these differences, the Fair Labor Standards Act assumes that today's American worker wants DOL to protect them from such things as free daily employer-provided meals, on-site childcare, and compensatory time. And DOL dutifully investigates employers who dare to provide their employees with alternative forms of compensation not originally contemplated by the drafters of the FLSA. It's time for Congress to step up and bring the FLSA into the 21st century, offer employees and employers flexibility in negotiating compensation, and give workers a chance to chart the course that makes the most sense for their needs and wishes.

4. FLSA Reforms Worth Consideration

Members of the House Education and Workforce Committee will have ample opportunity to address many of the FLSA's shortcomings in this Congress. Multiple bills that have been filed in prior Congresses or that have already been filed this Congress are worthy of consideration because they help to bring the FLSA into the 21st century. I will highlight five.

A. Modern Worker Empowerment Act (H.R. 1319, 119th Congress)

The Modern Worker Empowerment Act protects the large and growing number of self-employed workers who wish to remain self-employed. Some 72 million Americans are independent workers and the vast majority prefer to be independent workers instead of employees.[6] Because the FLSA does not define "independent contractors" and merely defines employee and employer, businesses have long had to guess whether a worker might be classified as an "employee" even if

[4] *See* USBLS, Women in the Labor Force, June 25, 2024, available at: https://www.bls.gov/cps/demographics/women-labor-force.htm.
[5] *See* Sabrina Wulff Pabilonia and Jill Janocha Redmond, "The rise in remote work since the pandemic and its impact on productivity," BLS, October 2024, available at: https://www.bls.gov/opub/btn/volume-13/remote-work-productivity.htm.
[6] MBO Partners, "State of Independence 2024," available at: https://www.mbopartners.com/state-of-independence/.

both the worker and the business intend for the worker to be an independent contractor. WHD has developed its own standards over time and the courts have also attempted to identify key factors that indicate independence or employment.

Unfortunately, by layering multiple factors upon factors workers and businesses lack certainty on whether their relationships are subject to FLSA regulation. This diminishes the number of contracting relationships, leaving willing workers unable to find work and businesses in need of labor without workers to do it.

This bill would focus on two factors: the independent workers' control of the work performed under the contract and the independent workers' opportunities and risk inherent in entrepreneurship. By making it easier for workers to know they will be independent contractors and easier for a business to know those individuals with whom they contract are self-employed, this law would reduce the risks from contracting with an independent worker and open more opportunities for work and flexibility for the self-employed worker.

B. Tipped Employee Protection Act (H.R. 1612, 118th Congress)

The Tipped Employee Protection Act clarifies that an employer may pay a tipped wage to any worker whose total wages and tips for a day, week, or pay period exceeds the federal minimum wage. Under the FLSA, an employer should be able to pay a tipped wage to any worker who receives at least $30 per month in tips. Rather than follow the letter of the statute, WHD has developed a complicated scheme that requires employers to track a tipped workers' time in minute detail, only allowing employers to count certain activities as "tipped work" and requiring the employers to pay a higher wage for all "untipped work."

Unfortunately, this means that businesses that employ workers who earn tips are often caught in the crosshairs of WHD investigations not because they violate the letter of the statute, nor because their workers are paid less than the federal minimum wage per hour, but because they neglect to pay their workers a higher wage for portions of an hour when the tipped worker is engaged in a task the bureaucrats at DOL do not consider to be "tipped work."

This bill removes the outdated $30 threshold and uproots the tedious tracking requirements in DOL regulations by simply clarifying that a worker who receives tips and other wages must earn at least the federal minimum wage for all hours worked. This simple change will save compliance costs and numerous headaches for businesses and still ensure that tipped workers receive the wages they deserve.

C. Working Families Flexibility Act (H.R. 1980, 117th Congress)

The Working Families Flexibility Act gives private sector employees the ability to choose between overtime pay and compensatory time off. While government employees have long had this option, private-sector workers currently do not, limiting their ability to balance work and personal responsibilities.

Rigid overtime policies often force workers to take additional pay when they might prefer extra time off. For working parents, caregivers, or those who value leisure time more than additional pay, this restriction makes it harder to manage family obligations or personal development, and may even lead to more stress on the worker.

This bill allows workers to accumulate comp time in lieu of overtime pay, giving workers more control over their own schedules and more vacation time to spend in the way the employee wants. By expanding flexibility, the law would help employees balance work and life without financial sacrifice.

D. Empowering Employer Child and Elder Care Solutions Act (H.R. 3271, 118th Congress)

The Empowering Employer Child and Elder Care Solutions Act encourages businesses to provide caregiving benefits by ensuring that such assistance does not inflate an employee's overtime pay rate. Current FLSA regulations discourage employers from offering dependent care support because doing so makes every hour of the employees' overtime more expensive.

Without employer-provided assistance, many workers struggle with the high costs of child and elder care. This financial strain often forces employees—particularly women—to reduce work hours or leave the workforce entirely.

By removing barriers to employer-sponsored caregiving benefits, this bill would encourage more businesses to provide assistance, helping workers remain in their jobs while managing caregiving responsibilities. This bill could both support families and improve workforce participation, all while benefiting the businesses that hire workers who need these benefits.

E. Modern Worker Security Act (H.R. 1320, 119th Congress)

The Modern Worker Security Act allows businesses to contribute to portable benefits accounts such as health insurance and retirement accounts for independent workers without risking their employment classification status. Under current law, companies that offer benefits to independent contractors may inadvertently trigger reclassification of the worker as an "employee," discouraging the businesses from extending such support.

Many independent workers lack access to typical employee benefits with the ease of their employee counterparts in the economy. Without employer-sponsored options, self-employed individuals must navigate finding these benefits without an HR office to perform the work on their behalf.

This bill establishes a federal safe harbor, ensuring that businesses can provide benefits without changing an independent worker's classification. By protecting access to portable benefits, this law would support independent workers while preserving their flexibility and autonomy.

Conclusion

The FLSA was created to protect workers, but as the economy and country have changed, many of those protections now inhibit workers from entering into the kinds of relationships they may want with businesses. Whether that is a benefit the worker wants the FLSA prohibits or a relationship the worker hopes to develop that may trigger scrutiny from WHD regulators, many of today's workers would be better off with changes to the FLSA. Rather than relying on the administrative state to look for gaps in the statute to create rules that address today's challenges, Congress can and should act to bring the FLSA into the 21st century, promoting an employment law system that benefits workers, businesses, and consumers alike while helping our economy continue to grow.

I am grateful for the opportunity to share my perspective and look forward to your questions.

Chairman MACKENZIE. Thank you all. Under Committee Rule 9, we will now question witnesses under the 5-minute rule. I will recognize myself first, and then our Ranking Member, so again, I will be recognizing myself right now for 5 minutes.

My three questions go to Ms. Boughan, Mr. Wolfson and Mr. McCutchen, or Ms. McCutchen in that order. Ms. Boughan, you talked about seeking clarity, consistency and compliance, making compliance easier. The 2024 Overtime Rule had a negative impact on each of those things though.

As an H.R. Director, I would love to hear your experience performing your duties, and can you describe the challenges that a small bank like yours would face if the Federal Government were to finalize an overtime standard that caused a large number of your workers to lose their exempt status?

Ms. BOUGHAN. Thank you, Mr. Chairman. Sure. In my bank I have about 101 employees, and funny enough, 3 years ago before they hired me, the bank did not have a dedicated H.R. staff. These types of issues, if overtime thresholds change, would actually roll up to the Corporate Secretary and President of the bank.

They are not, you know, they do not have formal education, they are not formally trained in, you know, H.R. things. They use an outside legal counsel, which surely, they would have gotten the update and made the appropriate changes. I am mentioning that because so many small employers, they often are relying on an office manager to make these decisions.

Are we counting on them to make the right call? I hope that helped answer your question.

Chairman MACKENZIE. Absolutely. Thank you. Mr. Wolfson, BLS reported in November that 80 percent of independent contractors preferred their current work arrangement to actually being an employee.

In my home State of Pennsylvania, we have seen bipartisan support for a program around portable benefits, a pilot program being offered by DoorDash. This program allows independent contractors across the Commonwealth to access health, retirement, paid leave, and other benefits without risking their independent contractor status.

Do you have any recommendations on how this Committee could increase access to portable benefits without triggering any unwanted worker classification changes?

Mr. WOLFSON. Thank you, Mr. Chairman. Yes, I believe that the Modern Workers Security Act is a great step in that direction. It would make it very clear that when a worker wants to receive that sort of compensation in the form of a portable benefits payment, and that the business that they are interacting with on an independent basis, wants to put that money into the account, that those dollars do not count toward a determination that that business is in fact their employer,

Under the multi-factor test that the Wage and Hour Division is currently using under regulation for independent contracting, providing dollars in the form of a benefit, even if that is what the worker wants, even if that is what the business wants, that is one fact that the Wage and Hour Division could use to determine that a worker is in fact an employee.

A lot of businesses are afraid to do that because the worker and the business do not want the employer/employee relationship, they want an independent relationship, and so this opens the door for that opportunity. It is something that Governor Shapiro and the democrats and republicans support together in Pennsylvania to do, and I think it is a really good idea for us to take national.

Chairman MACKENZIE. Great, thank you. My final question is for Ms. McCutchen, as is the case with so many laws and regulations, oftentimes the smallest of businesses are the ones that are the hardest hit. They just do not have the compliance ability. They do not have the resources.

In your view, what challenges have small businesses faced when dealing with FLSA compliance in recent years?

Ms. MCCUTCHEN. Well, they do not have lawyers, and they often do not have H.R. personnel, so they are relying on their advice generally from their accountants who just do not know the law. It is not wage theft when they make a mistake, it is more like forgetting to run one of 50 items through the automatic checkout at a grocery store. It is an oops.

If they do the oops right now, there is no settlement of claims, there is no waivers, there is no affirmative defense like there is under Title 7. What happens is they get hit with a sudden, huge bill, and it means bankruptcy. I have seen it. That is my lived experience.

Chairman MACKENZIE. All right. Well, thank you to each of you for those responses to my opening questions. I now recognize the Ranking Member for the purpose of questioning the witnesses.

Ms. OMAR. Thank you, Mr. Chairman. Due to the relentless cuts to the Department of Labor's capacity, the agency is struggling to fully enforce the laws already on the books and protect the rights of all workers. Thankfully, some laws, such as the FLSA, provide workers with the right to bring their claims in Court themselves to recover lost wages, and receive other remedies.

However, with the rise of forced arbitration agreements, more and more workers are finding the courthouse doors closed to them. Mr. Stettner, can you explain how forced arbitration agreements

harm workers, and allow more law-breaking corporations to evade accountability for labor violations?

Mr. STETTNER. Sure. In recent years, forced arbitration agreements have expanded from business to business, to business to consumers and workers. That means when someone's rights are violated, they do not have the same ability to take that claim to Court and get full restitution, and they are forced to go into arbitration.

Ms. OMAR. President Trumps Project 2025 playbook calls for eliminating Federal child labor rules that identify which jobs are too hazardous for children to be allowed to work. Mr. Stettner, what do you think would be the consequences of removing rules that limit children from being employed in jobs that are dangerous workplaces?

Mr. STETTNER. You know, the simple answer is more children will get injured, and maybe even die. There are a list of occupations that the Fair Labor Standards Act, through its regulations, based on research from Occupational Safety and Health, you know, are too dangerous for children.

This is common sense things; operating a saw in a meat processing plant is an example. Working in a coal mine. These are things that we do not want children in the 21st Century to be forced to work in when they should be in school. It will mean that more children are going to be working at night, and not being able to, you know, complete their homework.

Unfortunately, we have seen this go in the wrong direction. Despite many criticisms of what the Biden administration did on child labor, wanting to enforce more, states are going in the opposite direction, and we have had 30 states propose changes to child labor law and eight states actually roll back protections for children in workplaces that are unsafe.

We should not be going back to the 19th Century, we should be allowing kids to learn and get the safe work experience as they build for their own future.

Ms. OMAR. Thank you, Mr. Stettner. Mr. Chairman, I request unanimous consent to add to the record the Project 2025 proposal to weaken Federal child labor rules, and an article titled "Trump's Early Actions Mirror Project 2025, the Blueprint He Once Dismissed."

Chairman MACKENZIE. Without objection.

[The information of Ms. Omar follows:]

Child labor excerpt from PROJECT 2025, HERITAGE FOUNDATION, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE (Paul Dans & Steven Groves eds. 2023), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf

- **Congress should expand apprenticeship programs outside of the RAP model, re-creating the IRAP system by statute and allowing approved entities such as trade associations and educational institutions to recognize and oversee apprenticeship programs.**

  In addition, religious organizations should be encouraged to participate in apprenticeship programs. America has a long history of religious organizations working to advance the dignity of workers and provide them with greater opportunity, from the many prominent Christian and Jewish voices in the early labor movement to the "labor priests" who would appear on picket lines to support their flocks. Today, the role of religion in helping workers has diminished, but a country committed to strengthening civil society must ask more from religious organizations and make sure that their important role is not impeded by regulatory roadblocks or the bureaucratic status quo.

- **Encourage and enable religious organizations to participate in apprenticeship programs, etc.** Both DOL and NLRB should facilitate religious organizations helping to strengthen working families via apprenticeship programs, worker organizations, vocational training, benefits networks, etc.

Hazard-Order Regulations. Some young adults show an interest in inherently dangerous jobs. Current rules forbid many young people, even if their family is running the business, from working in such jobs. This results in worker shortages in dangerous fields and often discourages otherwise interested young workers from trying the more dangerous job. With parental consent and proper training, certain young adults should be allowed to learn and work in more dangerous occupations. This would give a green light to training programs and build skills in teenagers who may want to work in these fields.

- **DOL should amend its hazard-order regulations to permit teenage workers access to work in regulated jobs with proper training and parental consent.**

Workforce Training Grant Program. The federal government spends more than $100 billion per year subsidizing higher education but close to zero supporting people on non-college pathways.

- **Congress should create an employer grant worth up to $10,000 per year or pro-rated portion thereof for each worker engaged in**

TIME

POLITICS • DONALD TRUMP

Trump's Early Actions Mirror Project 2025, the Blueprint He Once Dismissed

By Nik Popli
January 24, 2025 1:21 PM EST

President Donald Trump made clear during his campaign that he wanted little to do with Project 2025, the sweeping and controversial conservative policy blueprint created by the Heritage Foundation. But just days into his second term, many of Trump's early actions align with the Project 2025 agenda.

An analysis by TIME found that nearly two-thirds of the executive actions Trump has issued so far mirror or partially mirror proposals from the 900-page document, ranging from sweeping deregulation measures to aggressive immigration reform.

Democrats had seized on Trump's connection to Project 2025 during the campaign, pointing out that many of the playbook's contributors previously worked for Trump or had connections to his orbit. Trump repeatedly said he had "no idea who is behind" the conservative blueprint and that some of its ideas were "absolutely ridiculous and abysmal." He appeared to soften his stance after winning the election, telling TIME in November, "I don't disagree with everything in Project 2025, but I disagree with some things."

Despite Trump's past disavowals, many of the individuals involved in drafting Project 2025, such as Russell Vought and Brendan Carr, have been tapped to serve in prominent positions in his Administration. Vought was nominated to run the Office of Management and Budget, while Carr was tapped to lead the Federal Communications Commission. The Heritage Foundation declined to comment for this story.

A White House spokesperson tells TIME that Trump "had nothing to do with Project 2025" and that his first raft of executive orders "delivered on the promises that earned him a resounding mandate from the American people - securing the border, restoring common sense, driving down inflation, and unleashing American energy."

When Project 2025 was published in April 2023, it was designed as a roadmap for a future Republican presidential administration, with the goal of reshaping the federal government in ways that align with conservative, free-market values. The initiative's agenda includes aggressive deregulation, curbs on immigration, challenges to civil-rights protections, and a substantial reduction of the federal workforce, all with the aim of reducing the size and scope of government while reasserting executive authority.

While many of Trump's executive orders resemble Project 2025's proposals, not all of them fully align with the document's recommendations. Some executive actions, such as the push to declare an energy emergency and the attempt to challenge birthright citizenship, are not directly addressed in the blueprint, for example. But dozens of executive actions rolled out by the new administration reflect Project 2025's core objectives, particularly in areas like immigration reform, government restructuring, and deregulation.

"I suspect a lot of liberal think tanks are green with envy that a conservative think tank has this much sway over the policy agenda," says Bill Galston, chair of the Brookings Institution's Governance Studies program and a former advisor to President Bill Clinton. He adds that the influence of think tanks, however, "is bound to decline once the President and the Republican majority in Congress start working together on legislation."

Still, by embracing some elements of the Heritage Foundation's blueprint, Trump's second term appears shaped by a vision that was laid out before his return to the White House, says Skye Perryman, chief executive of Democracy Forward, a national legal organization that recently launched Democracy 2025, a resource center created in response to Project 2025 that is tracking the new administration's actions. "This is a

playbook that we've seen before and we knew would be implemented," Perryman says. "The real shame is that on the campaign trail, Trump did not level with Americans. He didn't seek to try to convince Americans that this was his agenda. He acted as if he didn't have anything to do with Project 2025, when we know and have seen that he's really seeking to accelerate that agenda."

Here's a breakdown of some of the parallels between Trump's executive actions and Project 2025.

Immigration and border security

Trump's early actions on immigration and the border demonstrate share Project 2025's vision for a more aggressive, militarized approach to immigration enforcement. For example, the blueprint advocates for the use of active-duty military personnel and National Guardsmen to assist in border security efforts, including arrest operations. Trump took similar steps almost immediately, signing an executive order on his first day in office calling for the deployment of National Guard troops to the southern border.

Trump also issued an executive order suspending the U.S. Refugee Admissions Program, which is similar to Project 2025's recommendation for an "indefinite curtailment" of refugee admissions. Trump has also moved to extend the restrictions on asylum seekers and halt certain immigration pathways—policies similar to Project 2025's calls to limit refugee and asylum programs as part of a broader strategy to control immigration.

Environment and energy policy

Trump's early actions on environmental regulation and energy policy also mirror recommendations from Project 2025, particularly the blueprint's stance against climate change initiatives that some Republicans believe are unreasonably burdensome to American businesses.

On the first day of his second term, Trump signed an executive order promoting the use of Alaska's vast energy resources, echoing Project 2025's call for expanded oil and gas drilling in the region. Project 2025 also argues for Alaska energy exploration to protect national security, emphasizing the need to unlock its natural resources "as a counter to growing Russian and Chinese interest in Antarctic resources." Trump's executive order established a policy to harvest Alaska's natural resources and mandated federal agencies to expedite permitting, leasing, and development of Alaskan resources, with a strong focus on liquefied natural gas (LNG) projects.

Trump also re-signed an executive order pulling the U.S. out of the Paris Climate Agreement, a signature policy action of his first term that is directly in line with Project 2025's stance. The blueprint suggested that America's exit from international climate accords would strengthen national sovereignty and economic competitiveness by removing restrictions on industries. "The next conservative Administration should rescind all climate policies from its foreign aid programs (specifically USAID's Climate Strategy 2022–2030); shut down the agency's offices, programs, and directives designed to advance the Paris Climate Agreement; and narrowly limit funding to traditional climate mitigation efforts," Project 2025 says.

Trump also made a move to curtail offshore wind development, which the blueprint characterized as part of an agenda that would close off large sections of the ocean to commercial activity.

Government reform and bureaucratic restructuring

One of the central goals of Project 2025 is to reshape the federal bureaucracy, reducing its size and influence, and empowering the executive branch. Trump issued a number of executive orders on his first day in office that reflect those objectives.

He revived the Schedule F executive order—a move he first introduced in 2020—that aims to reclassify certain federal employees as political appointees, effectively making it easier to remove them. Project 2025 had called for the reinstatement of this policy. The move has sparked concern among Democrats and civil service advocates, who view the policy as an attack on the independence of the federal workforce. Trump argues that it is necessary to root out political bias and inefficiency in government agencies, a point that is central to both his own Administration's agenda and the broader goals of Project 2025.

Project 2025 also outlines plans for significant cuts to the federal workforce, focusing on reducing regulations and eliminating agencies seen as unnecessary or counterproductive. Trump's early actions suggest he is taking steps in this direction, such as streamlining government functions, implementing a hiring freeze for all federal civilian employees, and focusing on reducing the size and scope of regulatory agencies.

While these moves are not identical to Project 2025's specific proposals—which include eliminating the Departments of Homeland Security and Education—they reflect the overarching philosophy of shrinking government.

Cultural issues

Trump has also adopted several social policy changes that echo Project 2025, particularly concerning issues of gender identity and diversity initiatives. One of Trump's first executive orders reversed Biden-era protections for transgender individuals in the military, reinstating the ban on transgender service members, which aligns with Project 2025's recommendation to "proudly state that men and women are biological realities" and eliminate policies that conflate gender identity with biological sex.

Trump also took steps to dismantle diversity, equity, and inclusion (DEI) initiatives within the federal government. One executive order rescinded policies that required federal contractors to promote affirmative action and diversity programs, in line with Project 2025's call to eliminate initiatives that promote racial or gender-based quotas.

Foreign relations

Trump's early actions also include a return to a more isolationist and unilateral approach to foreign policy, which echoes Project 2025's stance on international agreements and alliances. He signed an executive order to withdraw the U.S. from the World Health Organization, marking a return to the foreign policy positions that defined much of his first term. Project 2025 explicitly called for this action, describing the WHO as an ineffective and politically biased organization that undermines American sovereignty.

In addition to his withdrawal from the Paris Agreement, Trump has also taken steps to distance the U.S. from other international partnerships, consistent with the isolationist philosophy outlined in Project 2025. One executive order issued states, "no further United States foreign assistance shall be disbursed in a manner that is not fully aligned with the foreign policy of the President of the United States," claiming that the "foreign aid industry and bureaucracy are not aligned with American interests and in many cases antithetical to American values."

Ms. OMAR. According to the New York Times, the resurgence of child labor appears to be linked, at least in part, to the exploitation of migrant children. Mr. Stettner, to what extent do you think the current administration's approach to immigration enforcement could affect child labor enforcement?

Mr. STETTNER. When you make it harder for immigrants to work lawfully with status, you are forcing themselves, and unfortunately, their children to go underground into the economy and work in dangerous conditions.

Also, you are making a cloak of fear that is impacting immigrants and their willingness to complain when the law is being violated, that is enacted to protect them, but they are so worried about risking their immigration status, you know, that they will not complain.

Last, if we see a return to policies like family separation, you are going to be leaving more children isolated with no other way to support themselves, than working in very dangerous jobs, for example, cleaning at night in factories with dangerous chemicals and equipment.

Ms. OMAR. Thank you, Mr. Stettner. Mr. Chairman, I hope we can all agree that children are the biggest assets of our Nation, and that we will work to make sure child labor is enforced, and that we are doing everything to protect our children. I yield back.

Chairman MACKENZIE. Thank you. Next, we go to Chairman of the Full Committee, Mr. Walberg from Michigan.

Mr. WALBERG. Thank you, Mr. Chairman. Thank you for this hearing, and thanks to an excellent Committee for being here. Mr. Wolfson, 25 years ago the Worker Economic Opportunity Act amended the Fair Labor Standards Act, to exempt certain types of equity compensation, such as employee stock options from inclusion in overtime regular rate calculations.

While this law appropriately exempted many types of compensation, it did not exempt restricted share units, and other full value share awards. How should restricted share units be treated when it comes to calculating overtime pay?

Mr. WOLFSON. Thank you, Mr. Chairman. I think that the concept that I would propose would be that any sort of compensation that is not based on you have to work this number of hours to get this amount of pay, should not be calculated as part of an overtime calculation.

Ultimately, restricted stock options, those should all be included as items that we want to encourage employers to provide to their employees and so including them as part of the overtime pay calculation reduces the likelihood that those employers are going to provide that to their employees.

I think that we should treat it in the same way that we do a contribution to a pension plan, or a contribution to a 401K where we want to encourage employers to do this, and so we are not going to punish the employer when that worker then does overtime hours, by making them figure out how much that is worth to a specific hour of time. We want to encourage those things, and so I think that that exemption should be much more broadly applied.

Mr. WALBERG. Which benefits with that flexibility employee in the long run.

Mr. WOLFSON. Absolutely, yes it does.

Mr. WALBERG. Thank you. Welcome to your daughter as well. Ms. Boughan, community banks like the one you work for are an essential tool for small businesses to gain access to capital they sorely need. Federal regulations often make doing business more challenging for these banks.

When an employee's classification is changed from exempt to non-exempt under FLSA. How does that affect payroll processes, and other H.R. requirements for that employee?

Ms. BOUGHAN. Thank you. As I said in my oral testimony, some employees actually prefer an exemption because it comes with certain flexibility and benefits that are perceived by the employee. When you are having if an overtime threshold is changed, and you are having to place an employee from exemption to non-exemption it places, you know, a burden on the timekeeping system.

Mr. WALBERG. Impacts the feelings of the employee himself or herself as well.

Ms. BOUGHAN. Absolutely. I think that is one thing that I have seen and felt in the past year. We have had to change employee exemptions, and sometimes the employee does not quite understand why the exemptions, in my experience, why the exemption is being taken away. They feel like a certain career progression has been taken away from them.

Mr. WALBERG. They have been downgraded.

Ms. BOUGHAN. I would agree with that.

Mr. WALBERG. Benefits are important, but also perception is important as well. Thank you. Ms. McCutchen, in your written testimony you mentioned that the FLSA should allow private sector employees to choose compensatory time, or comp time, which is extra paid time off work in lieu of receiving extra wages for overtime hours worked.

Most government workers—let me State that again, most government workers are eligible to receive comp time, but FLSA prohibits the private sector from using comp time. Is this an oops? I love your technical term. How should a straightforward change like this benefit workers?

Ms. MCCUTCHEN. Well, this is an interesting one because unions and large employers actually have objected to the many comp times bills that have been proposed, but employees want it. They want more paid time off, and that is what you get with comp time, so this is a—this particular bill is something that benefits workers.

If you want to benefit workers, you have to allow them to choose cash, or paid time off, and if you look at any of the—Forbes, or SHRM recent surveys about the types of benefits employees today are looking for, paid time off is high on the list.

Mr. WALBERG. That is the benefits of flexibility?

Ms. MCCUTCHEN. Absolutely.

Mr. WALBERG. It allows them to choose what they feel best about.

Ms. MCCUTCHEN. Right. They could work 4 days a week, and in a prior week they might have to work 50 hours, and then that—the next week they can work 30, and that is the type of flexibility that employees really, really want today.

Mr. WALBERG. I love that for opening week of deer season. Thanks.

Ms. MCCUTCHEN. Well, in Pennsylvania, in Hershey where I worked, we got that first day off.

Mr. WALBERG. OK. Well, thank you for your testimony. My time has expired. I yield back.

Chairman MACKENZIE. Thank you. Next, we will go to Mr. Takano from California.

Mr. TAKANO. Thank you, Mr. Chair, and thank you to the witnesses for being here. Mr. Stettner, overtime pay is among the bedrock protections in the Fair Labor Standards Act. Where might an unscrupulous employer seek to exploit insufficient overtime protections? Where, and how might that happen?

Mr. STETTNER. You know, what we have seen, you know, with as we mentioned, the salary tests, and how it is moved around, you might seek to put someone right that that threshold, and then you are not paying them time and a half. To the point that we were saying, you know, around comp time. You know, many—most Americans in salaried jobs have paid time off. More workers should have paid time off.

It does not mean you should not be paid overtime for that week that you work 50 hours a week. Unfortunately, violations of overtime are the bulk of the damages in the Wage and Hour Division protects. Just keep working some extra hours to finish the shift, come in a little bit early to open up off the clock, all these things can be legal, but pay people the extra that they are entitled to.

The goal of the law is to keep people working 40 hours a week, so they can take care of themselves, and take care of their families.

Mr. TAKANO. Well, thank you. Let me stress the importance of overtime pay. Let us take an example of an eligible worker who works 50 hours a week and makes $36,000 a year. Under the

Obama and Biden overtime thresholds, that worker would get around $85 back in their pocket every week from overtime pay.

That is over $4,400 a year that could go toward gas, groceries, rent, and a savings account and other expenses of everyday life. Mr. Stettner, can you tell me how much that same worker, making $36,000 a year would make in overtime earnings under the Trump overtime threshold?

Mr. STETTNER. Basically they would make zero in extra overtime because this flexibility means they are being asked to work at very low wages, nothing close to support a family, just because they have been classified, wrongly or rightly, as a salaried worker.

Mr. TAKANO. Under President Trump's overtime threshold, someone making $36,000 a year, which is not enough to live comfortably in any U.S. State, makes too much to qualify for overtime pay, so that worker would earn no overtime pay for additional hours worked. That is what you are saying?

Mr. STETTNER. That is correct.

Mr. TAKANO. Now, Mr. Stettner, how many U.S. workers would be deemed ineligible for overtime pay under the 2017 Trump Rule, more or less?

Mr. STETTNER. It would have been more than 8 million workers would have lost either additional overtime pay or would have lost the protections that would have been afforded to them with the increase in the threshold.

Mr. TAKANO. 8 million Americans would have lost any ability to earn overtime pay, so overtime hours worked would be uncompensated. 8.2 million workers were left behind once the Trump administration slashed the salary threshold. On a national level, that cost Americans 1.2 billion dollars in lost wages. Mr. Stettner, what did the Trump Overtime Rule mean for the take home pay of that worker making $36,000?

Mr. STETTNER. You are cutting, you know, thousands of dollars a year, money that that family needed to meet basic expenses, education, transportation, paying your rent. At least in my family, that is why people worked overtime, either to make the bills, or like my brother-in-law, to be able to buy a boat. We wanted to buy something, put in extra overtime at the factory.

That is what the union worker wants in America, and that is what all workers in America should be able to receive.

Mr. TAKANO. hen it comes to overtime compensation, what is more meaningful, A, being paid time and a half for hours worked, or B, being paid, offered compensatory time off?

Mr. STETTNER. I think given the choice of being you can have a day off to go to the game because you want to be with your son the next week, and getting overtime for the prior week, people would rather have the money in their pocket, and the paid time off.

I do not know why in this moment of record American profits and economic growth for the wealthy, we cannot give people both their right to overtime pay, and some paid time off.

Mr. TAKANO. Overtime protections, like other protections on the FLSA represent the livelihoods of the American workers. They are not throw away lines to use during campaign speeches as a gimmick. Americans deserve to be compensated fairly for their work,

not conned out of the wages they earned through sweat and hard work by billionaires.

After all, it is far harder to work a 50 to 60-hour week to feed your family, than it is to spend 17 days of your first 3 months on the job golfing, like our President has. I yield back.

Chairman MACKENZIE. Ms. Miller from Illinois.

Ms. MILLER. Thank you, Chairman. Ms. McCutchen, there is a serious shortage of homecare services in this country, thanks largely to the Obama administrations' 2013 home care regulation, which removed the long-standing Fair Labor Standards Act exemption for home care and companion care.

Department of Labor estimated that the cost of home care services increased 1.6 billion during the 5-years after the rule went into effect. How can the FLSA work better for those who require home healthcare services?

Ms. MCCUTCHEN. Well, first of all you could reintroduce and enact the bill that would restore the companionship service exemption to its original form back when I was Wage and Hour Administrator in the Bush administration.

This is an incredible, important issue to me. As we age, as more people retire, it is much better for people to be cared for in their home than to be institutionalized, but it is become so expensive that most working families cannot afford it, if they have to pay overtime in addition to wages that are between $10 and $15 an hour for most home care workers.

In addition, another problem is that the attack on independent contractors has really hurt the home care industry, particularly, for example, in Florida, where most home care workers are independent contractors, but the Department of Labor has been attacking their status.

Everything that has been happening in the last 4 years have just been increasing the cost, and I am afraid that working families seeking home care will have to go to an underground economy, hire people that are not employed by an agency that screens, screens then for past felonies, that provides insurance, and make sure that the home care worker is safe in the homes of these families.

Mrs. MILLER. Thank you for shedding light on that. Ms. McCutchen, also as you note in your written testimony, the Fair Labor Standards Act is nearly an 87-year-old statute that desperately needs more clarity and simplicity. Can you elaborate on the differences between the ABC test, and the common law standard as stated in the Modern Worker Empowerment Act for determining whether a worker is an employee or an independent contractor?

Ms. MCCUTCHEN. Yes, so I will answer that for both the ABC test and the current regulations of the Department of Labor. There is—the proposed legislation is very simple. Who controls the work of the employee? If it is the worker, then the worker is an independent contractor. If it is an organization, then they are the employer.

The ABC test is complicated. Nobody understands it, and even in California where it was enacted into statute, there are over 50 exceptions and exemptions to it, and the same thing with DOL's

regulations. There is a last section that says "oh, and we'll consider any other factor that we find relevant," which makes it impossible from the beginning for people to understand whether they are independent contractors, or whether they are employees, and for small businesses to understand that too.

If they do not understand, if they do not know the rules, then how can we expect them to get it right? We should not call it wage theft. We should call it good people trying to follow the law, but they need to be told what the law is clearly and simply.

Mrs. MILLER. Well, one thing the government does well is complicate things, and we are excited to be in the majority now, because we want to deregulate and make things work better. Mr. Wolfson, survey after survey shows that independent contractors prefer their current work arrangement to being an employee.

The Biden administration's attempts to restrict independent contracting were an affront to independent contractors, who made their preference clear. What can Congress and the Trump administration do to support and protect the independent workforce?

Mr. WOLFSON. I think there are three things that the legislature could look at. One, is as Ms. McCutchen just mentioned, the Modern Worker Empowerment Act, which goes back to a standard of who is in control of the business, and making that the determining factor.

The second as I alluded to in my oral testimony is the attempt to allow certain workers to just opt-in to independent contractor status. There were some bills in prior legislatures that would allow that to happen, where a worker could simply opt-in and say I am in fact an independent worker. I understand the risks and benefits of that, and I am going to do that, and take that to the worker.

The third thing is this Modern Worker Security Act, which would allow independent workers who, to your point, prefer this arrangement. Many of them may have been married to someone who receives other benefits, but maybe they receive a health savings account with their spouse's employment, and they would like the business that they work with, maybe they are in Pennsylvania, and they work for DoorDash.

They would like DoorDash to put some dollars into their health savings account, and that would allow them to do that without DoorDash having to count that person as an employee, and that protects the worker and the business, and allows that transaction to happen.

Mrs. MILLER. Thank you and I yield back.

Chairman MACKENZIE. Thank you. Mr. Casar from Texas.

Mr. CASAR. Thank you. Just to break down what my colleague from the Republican majority side of the aisle just advocated for is this bill they are calling the Modern Worker Act that is going to help you. Really, at the end of the day, let us break down what it is the Republican majority wants to do to the American worker.

They want to make it so that multi-billion-dollar companies do not have to pay their taxes, instead you, their employee, has to pay more in taxes. That is what their bill is all about. The Republican majority's bill that is attacking the labor standards that we won after the Great Depression, under FDR.

What they want is to say big multi-billion-dollar companies do not need to pay overtime to you. No. You need to work over 40 hours a week and not get paid anything extra for it. That is at the end of the day what this bill is all about. You are going to continue to hear under this Republican majority that they are for letting you be your own business owner.

If people are indeed independent contractors at small businesses, we should absolutely support them, and support that. What they want to do is to make it so that people who are employees of large corporations can instead be mislabeled as small business owners.

If you are just an employee being told where to go work, when to go work, and to just go do your job for a big corporation, call it a big corporation in big tech, or a big corporation in big pharma, or big construction company, they want to be able to say you are your own business, so you pay the taxes, instead of the big corporation.

They want to say you are your own business, and so you do not get overtime protections. You just have to labor away until a job is done and get paid whatever you are told. We should not buy some of these continued attacks on what workers won in the 1930's. I have seen this happen in my own district where a group of workers that clearly basically ran all of YouTube Music, and YouTube is part of Google, wanted to organize into a union.

What we heard from Google was these are not our workers, even though this contractor that they work for only exists because of Google, only exists to run YouTube, but they wanted to deny their ability, deny these Austin, Texas-based workers their ability to negotiate for higher wages and higher pay.

Do not buy this stuff about how we are trying to help the small businesses when really what this bill would do, would make it so that the American worker cannot negotiate with gigantic corporations like Google. There are ways that we could support small businesses and independent workers.

I have spent a lot of time working on how big agriculture is jacking up prices, not just at the grocery store for the consumers, but is screwing over small businesses and small producers all over America.

I have a bill that I thought we could get a lot of Republican support for because many Republicans, small ranchers, and small farmers and small producers, and small processors, were all for it, to say let us take on the gigantic companies that are paying less and less to small businesses for their product, and jacking up prices at the grocery store.

You get almost no Republican support for that kind of proposal. What we are seeing Republican support for is letting companies off for child labor in that same sector. The Fair Labor Standards Act should actually be protected and supported and expanded for the American worker.

What I have heard this whole Committee, I have been watching it from my office, came down here and watched some of the testimony from the other side of the aisle just a moment ago, is all about taking us to pre-1938 labor standards.

That is what is in Project 2025. That is what is being executed right now, is making it easier to put children on the cutting room

floor to do child labor jobs, not making sure our kids can have a good education, and making sure their parents are paid well enough that they do not feel pressure to send their kids to go work in a factory, or at the meat packing plant illegally.

We should be talking about giving people more overtime pay, but the bill that is being advocated for right before I got to talk here is to deny more and more Americans their own overtime pay. In the moment where we are talking about taxes here in Congress, the Republican majority's tax bill is to give billionaires an enormous tax cut.

You will be hearing lots about it. What people watching at home have not heard enough about is this bill. This bill that is being pushed by the Republican majority to make it so that workers do not get paid for their overtime and then have to pay tons more in taxes because they get called independent contractors when they are really employees. Let us not fall for this scam, let us actually support our small businesses, and support workers by taking on big monopolies, and making sure that working people and small businesses get to keep more of their money in their pockets, not less. Thank you and I yield back.

Chairman MACKENZIE. Mr. Messmer from Indiana.

Mr. MESSMER. Thank you, Chairman, and witnesses today. Ms. McCutchen, you mentioned in your written testimony overtime pay is based on an employee's regular rate of pay, not their hourly rate of pay. Unfortunately, regular rate calculations discourage businesses from offering benefits to employees, such as childcare, elder care, and dependent care services.

Could you go into more detail into how the Empowering Employer Child and Elder Care Solutions Act would help?

Ms. MCCUTCHEN. It would free employers to provide childcare. For example, like the DOL does, they actually have an onsite childcare facility where employees can drop off their kids, but guess what, they do not pay overtime on the value of that benefit.

In the private sector you have to, and the complexity is how do you determine what the hourly value of full-time childcare is going to be for the employees and have your payroll system programmed correctly to include that in the regular rate. By not—and it is not just childcare, right, to me it is like you really want to help workers pay back their student loans?

Make a change to that one section, and you can encourage employers to offer repayment of student loans as a very valued benefit. This is a change that is great for workers, and I really, it is the one thing I would really love to see happen because it is childcare, elder care, college tuition, and repayment of student loans.

Public transit subsidies, another benefit that Federal employees get, as you all know, but a private employer cannot because if they do it, they might get sued, they might have a huge overtime bill, it is hard to calculate what that overtime would be, so this is—it has not been changed since 1949, 76 years ago. It is time to recognize that the benefits that we pay our employees today, and that employees want is very, very different than in 1949.

Mr. MESSMER. Thank you. Are there any other legislative fixes needed to the FLSA that would stop discouraging businesses from offering these benefits?

Ms. MCCUTCHEN. Well, I would also suggest that we need to put new provisions in the FLSA to allow businesses who make mistakes to correct them, to self-audit and self-correct. The FLSA is different from any other Federal employment law. There are no affirmative defenses like in Title 7, right?

Let us have an affirmative defense to encourage employers to have a wage and hour policy, to have complaint procedures, to investigate those complaints, and to pay back wages when they are due. Let us bring back that PAID Program, which I used during the first Trump administration to bring millions of dollars of back wages to workers under the PAID Program.

Let us allow private settlement of claims, and private waivers just like under any other Federal employment law. Then employers would be less scared to make those mistakes.

Mr. MESSMER. Thank you. Ms. Boughan, the Biden administration's Overtime Rule would have cost businesses roughly 18.8 billion dollars according to an estimate from the American Action Forum. Those increased compliance costs will have to come from somewhere within the businesses themselves.

What decisions are businesses forced to make once its large regulatory burden is enacted at the Federal level?

Ms. BOUGHAN. Thank you, Congressman. I think you know it can be hard, but you know, one thing you look at every year is the need for labor, so you can be creative in perhaps getting more done with less people.

Mr. MESSMER. Thank you. Mr. Wolfson, not exempt or hourly workers often want to participate in professional development opportunities outside of regular work hours, but FLSA's compensable time requirements restrict their ability to take advantage of these opportunities.

Do you believe that non-exempt workers should have the same ability under the FLSA to attend voluntary training as their exempt or salary counterparts do?

Mr. WOLFSON. Yes, Congressman. I think that the worker who would like to enhance their skills and upskill, so that they could move on to additional jobs in their career, should be encouraged to do so, and many businesses want to train their workers to do another thing. There might be professional development opportunities for that worker.

If they are an exempt worker from overtime, then it is really clear that those workers are doing those activities. To the Chairman's question earlier, many workers want that status of being able to move up, but by requiring employers to count provision of additional training in the off hours, as hours worked, or even at the training cost as part of the overtime calculation, businesses are less inclined to offer that. Which is going to further divide the exempt worker from the non-exempt worker, and make it harder for that non-exempt worker to move up in their career in that job.

I think it is really important that the Fair Labor Standards Act recognize that, and all these changes, recognize that the employer and the worker do have the opportunity to negotiate. We want to

give the worker the ability to ask for the things they want, and the employer to provide that if that is in everyone's best interest.

Mr. MESSMER. Thank you. I yield back my time.

Chairman MACKENZIE. Thank you, sir. Next up, my fellow Pennsylvanian, Ms. Lee from Pennsylvania.

Ms. LEE. Thank you, Mr. Chairman. I do want to say that it is a little interesting of a choice to be holding a hearing on dismantling protections for equal pay on Equal Pay Day, but we need Equal Pay Day because wage laws in our country were never designed to be fair.

From the very beginning they have reflected the choices that we make, the choices about who we value, whose labor are fairly paid, and who we leave behind. For generations Black workers, brown workers, women, and especially Black women, have been trapped at the bottom of that hierarchy.

We see that clearly in today's economy where the people holding up entire industries, nursing home aides, restaurant servers, grocery store workers are often the lowest paid. Those are overwhelmingly women. These are disproportionately women of color, and they are working full-time jobs that still do not cover the rent, food, childcare, their basic needs.

Mr. Stettner, in your testimony you share a report from the Institute for Women's Policy Research, finding that women earned about 83 cents on the dollar compared to men. For Black women, of course, it is closer to 67 cents. For Latinas closer to 58 cents on the dollar compared to white men.

When we talk about modernizing wage laws, we cannot afford to leave this context out, as long as skyrocketing corporate profits and poverty wages exist side by side in our country, our communities will continue to suffer needlessly. We have grown accustomed to the idea that some people are bound to be wealthy, and others are bound to live paycheck by paycheck.

The billionaires in the White House are counting on us staying accustomed to that idea. This should come as no surprise given that our country, and my home State of Pennsylvania, has been stuck at a minimum wage of $7.25 for the last 16 years. Mr. Stettner, do you believe that $7.25 is enough for a worker to take care of their families?

Will we ever address the wage inequity if that remains the Federal wage floor?

Mr. STETTNER. The $7.25 minimum wage I think everyone with common sense can know even a full-time job you will not be able to support yourself, you know, and most of us cannot even support a family on that little bit of amount of money per week.

Ms. LEE. My Democratic colleagues and I have supported legislation to raise the minimum wage, and institute automatic increases based on the cost of living. How will those types of proposals benefit working people?

Mr. STETTNER. It means that working people can know each year, as the price of living goes up, that their wages will go up. In many parts of the country, January 1st is a celebration day because states have put indexing in place. Once Congress does that, we will not have to be debating, and keeping as a token or a chip,

whether the minimum wage for the American worker goes up each year.

Ms. LEE. Thank you. I can tell you from my time working on the Fight for 15, that 15 is not enough. We need a wage that reflects the real cost of living. Workers should not have to cobble together multiple jobs just to stay afloat. We also need to talk about the sub-minimum wage.

While Republicans in the House are fighting to give over 4.5 trillion in tax breaks to billionaires and large corporations, tens of thousands of workers with disabilities are being paid as little as 25 cents an hour. Mr. Stettner, can you start by explaining the legal basis of separate treatment for workers by disability?

Mr. STETTNER. Section 14(c) of the FLSA allows people with disabilities to work in what are called typically sheltered workplaces. It is the employer that gets to see well, based on your ability, how much can I pay you? Which is that is why people have been paid as little as 25 cents per hour.

Only certain workplaces are allowed to operate in this way under Section 14(c) through certificates. People with disabilities do not want to work in segregated workplaces. They want to live and work in their community. That is why the number of certificates have gone down each year to just only about 500 across the country, and many states are already outlawing this practice.

The Department of Labor has done the right step. We have issued a proposed rule to cease issuing anymore certificates, and the idea that the Trump administration will not follow through and rather would say let us put more workers with disabilities in this discriminatory environment in 2025 is something that is hard to contemplate.

Ms. LEE. Thank you. Just in the interest of time, I think there is so much more that we can talk about. The sub-minimum wage, right? Separate from the wages for those workers with disabilities, but those workers who work in service industries, restaurant workers, folks who we know live off of tipped wages where they see their employer able to shift the burden to the consumer, but we also know that those jobs are more likely to come with sexual and workplace harassments.

We have not talked about the benefits cliff where we know so many folks who work for lower wages, recognize the simple math that if they get too little of an increase, but not enough, then they would lose the benefits that keep them in their homes, or keep them with healthcare.

Those are all issues that we have to take much more seriously, so I thank you all so much for your time, and for allowing me to join today and I yield back.

Chairman MACKENZIE. Mr. Grothman from Wisconsin.

Mr. GROTHMAN. Thank you. Interesting point, and in addition to pointing out the benefits cliff, the current welfare programs discourage people from working, and I guess because some people like depending on the government. We should also point out that they strongly discourage people from getting married because obviously if you are a single parent, and you marry somebody with an average income, all of a sudden you are no longer in poverty, and you could lose $25,000 a year in benefits.

I guess I will ask you guys, that is not exactly the topic, but since it was brought up, is there a strong marriage penalty in society that causes people to perhaps not want to be married and lose all their Federal benefits? Would either Ms. Boughan or Ms. McCutchen care to tackle that?

Ms. BOUGHAN. Thank you, Congressman. That is something I have not really thought too much about, so I probably cannot answer in detail.

Mr. GROTHMAN. OK. Well, we will just go with common sense here, right? When you have a bag full of $30,000 worth of benefits, daycare benefits, free and low income housing, free food stamps, earned income tax credit or what not, and you get married and you are no longer eligible for those benefits, do you think it causes less marriages in our society? There is like a $25,000 penalty for being married.

Ms. MCCUTCHEN. Let me take that up. Absolutely, and this particularly goes to, and it is very similar with Section 14, which by the way is in the FLSA, so the DOL cannot just write it out to the FLSA because they are not Congress. When I was wage and hour administrator, and I recovered back wages for 14(c) violations, the families came to me and say, we do not want all these back wages in one lump sum, because we are going to lose other Federal and State benefits if our son or daughter gets that huge chunk of back wages.

Getting rid of 14(c) and other things in the Federal, can discourage work and marriage.

Mr. GROTHMAN. Yes, yes. Now, Mr. Stettner, I am kind of appalled at your hostility toward 14(c). People here understand, if you have certain disabilities, spina bifida, down syndrome, quadriplegic even, in order to give you the benefit of work, and make a little extra money, usually these people are on SSI for most of their income, they are allowed to work for under minimum wage, OK?

I wondered—and I love to tour these facilities. It makes you feel really good to see these incredibly happy people who at first blush how life has dealt kind of a tough situation, but they are working for 2 bucks an hour, or 3 bucks an hour, enough to buy—to work on their own, enough to be like their siblings, have a job, maybe buy some clothes, buy some gifts for people, what have you.

How many 14(c) certificate like workplaces have you seen in the last few years?

Mr. STETTNER. As a President of the Autism Society of America of Maryland, taking care of my daughter who has autism, what we have done is we have helped people with autism get good jobs in the community, working in a manufacturing plant, working in a defense intelligence agency in Northrop Grumman.

We can do better in 2025 than segregating people with disabilities into shelter workplaces. Let us do better with things like the Transition to Integrated Employment Act, which would allow states and communities to give the supports, coaching and otherwise, so people can actually work in their own local restaurants, their own local bakeries where I buy my baked goods.

They do not need to be in segregated workplaces.

Mr. GROTHMAN. OK. What I am asking is have you talked to these folks? Whenever I tour my facilities that take advantage of

14(c) I am always impressed on how happy the people are who are there. They are able to work there for an extended period of time, and establish new friendships, which is also important for these people.

Frequently, if you are that disabled, your parents have to worry are you going to have any friends outside your parents. Here you have friends that last for years and years and years.

Do you feel, and there are people who can work in a goal of all these workshops is to have people work outside, but some people can, and some people cannot. That would be obvious to anybody who toured them that the vast majority of people here are happy. The vast majority of the people working on the floor, probably could not find somewhere to work in the community.

Again, I will ask you, have you specifically touring these places to talk to the employees to see whether they are happy or unhappy?

Mr. STETTNER. Most people with disabilities and their parents want them to work, and a tribute to themselves.

Mr. GROTHMAN. I will just cut you off, I am out of time, but that is just plain not true.

Chairman MACKENZIE. Mr. Kiley from California.

Mr. KILEY. Thank you, Mr. Chair. Mr. Wolfson, you have done some outstanding work on supporting independent workers, freelancers who comprise about a third of the American population at this point. That number is fairly likely to grow.

I think it is very important that right now we take advantage of the opportunity to put protections for independent workers into statute, which is why I introduced the Modern Worker Empowerment Act, Modern Worker Security Act, which I know you mentioned in your introduction.

Before getting into that though, would you mind just giving us a brief recap of the effect that the attacks on independent workers have had in California with AB5 as your institute has shown, and then the threat posed by the Biden administration's effort to sort of mimic that legislation?

Mr. WOLFSON. Mr. Chairman, thank you. I think the key thing to remember is after California passed AB5, a number of businesses, including businesses that no one would consider the businesses that, you know, Mr. Zaydar is calling, they are abusing their workers.

The New York Times told photographers, freelance writers in California, that they would not work with them anymore because they did not want to have to provide the benefits that California was going to require them to provide those workers for just a small amount of work.

People in the film industry, people in lots of industries who were making significant sums of money lost their positions, and so people in your district were losing their jobs, truckers were told you are no longer going to be allowed to move products from the ports out of the ports, including when we had massive port challenges of moving goods during COVID.

We had people who were unable to move those goods because those workers knew the risks and the benefits that they were taking upon themselves in starting the business. Then California's leg-

islature came in, and they said we are not going to allow you to make that decision anymore.

We are going to protect you from yourself. We are going to protect you from making money because we think we know better what your relationship with that other business ought to look like. The reality is we do not do that in most places in America. We wouldallow an individual who wants to contract with someone to do work at their house, to hire who they choose to work with, and to come to an arrangement for how much that is going to cost.

If suddenly, anybody who is coming to do HVAC work at my house, I had to provide them—I was legally required to provide them with the same employee benefits that workers who worked with me at the Cicero Institute receive from our organization, that would change the entire calculus of how much I am willing to pay them, what I am willing to pay them, what I am willing to do.

We need to allow people to have those interactions, and so I thank you for proposing those bills. I think both of those bills will go a long way toward helping workers in states across the country who want to be independent workers, to be able to be independent workers to work with those businesses and not discourage those businesses from hiring them.

Mr. KILEY. Absolutely. One of the bills seeks to actually provide a clear, sort of common law-based standard for being an independent worker, which is what has prevailed in this country for a very long time.

You know, that of course, the Trump administration had a similar standard in its first instantiation, which this legislation essentially seeks to restore, but to do so in a durable way, so that we do not have the uncertainty that comes with the new administration coming in, potentially changing the rules.

Then the other bill deals with this topic of portable benefits that you have written a lot about, so could you just tell us a little more about what those are, and why under current law sometimes employers, or I should say, hiring entities, are discouraged from offering them to independent workers?

Mr. WOLFSON. Yes, so as Ms. McCutchen mentioned, one of the factors at the very end of the Wage and Hour Division's rule on independent contracting, that is the current regulation. It is obviously being challenged right now, but the one from the last administration explicitly says, we can consider whatever additional factors we want to.

One of the factors that has traditionally been considered in deciding whether a worker is an employee or not, is whether there are benefits that are provided to those workers. Your bill would explicitly say that the mere provision of access to benefits, if that is the arrangement that the worker and the higher entity want to do, is not going to be considered as a factor in determining whether that person is an employee.

I will give you an example. If an individual worker has a spouse who has, as I mentioned earlier, a health savings account, or a retirement account, and their employer does not fill the entire account, but they would prefer to have the tax preferences of having those dollars put into the health savings account, maybe they recognized that they can actually save tax dollars by putting it into

the account from the business directly, and then they do not have any of the business taxes that Mr. Casar is worried about.

In those circumstances right now, if they put that money—if the business puts money into the health savings account, so you have a business in town that asks someone to do computer repair for them on an independent basis, they put money in that health savings account. Right now, that could be a factor that the Labor Department considers employment, even though the worker will benefit by getting the tax preferences of putting that money directly into the health savings account.

That is what the portable benefits concept is, it allows workers to have an arrangement with the hiring entity to put dollars into those accounts, so that the worker can get the benefits from those types of retirement, other types of savings accounts, and the business can interact in the relationship in the best way that gives both the worker and the business the relationship that they want.

Mr. KILEY. Yes, it is a total win/win. I mean under current law the dynamic you describe is sort of a no good deed goes unpunished, whereas if you want to provide this level of security and benefits to an independent worker, then that might cause, you know, the entire relationship to be recharacterized in a way that is in neither the interest of the hiring entity, or of the worker.

What we are trying to do is provide a safe harbor to prevent that from happening. Thanks so much for your work on this topic, I yield back.

Chairman MACKENZIE. Mr. Owens from Utah.

Mr. OWENS. Thank you. Ms. McCutchen, in 2018, President Trump signed an executive order to exempt seasonal outdoor recreational businesses operating on Federal lands from certain FLSA requirements, such as overtime. These businesses offer mostly trips that quickly hit the 40-hour mark to trigger an overtime requirement.

The executive order stated that unless an exemption was in place, Federal regulations would threaten to raise significantly the cost of guided hikes and tours on Federal lands, preventing many businesses from enjoying this great experience.

With your background at the Wage and Hour Division and private practice, can you explain what relief this executive order provided for these businesses?

Ms. MCCUTCHEN. Yes, thank you for the question. There are, and that was great, but it is also any sort of business that does tours, whether on Federal lands or not because, you know, when you are doing an overnight hike, which Americans love to do. I live now in the foothills of the Great Smoky Mountains.

We love to do those overnight hikes. If you have an employee who is on Federal land doing those overnight hikes, you are going to hit over 40 hours very, very quickly because you are basically on duty 24 hours. A 2-day trip gets you into overtime, and that means more costs, and that means charging Americans more to go on those trips.

Again, it is a win/win for America because more people get to enjoy our national parks and our national lands at a much lower cost.

Mr. OWENS. I would imagine also it negatively impacts a small business owner trying to run a business because of the extra cost that is demanded at this point?

Ms. MCCUTCHEN. That is what most of these businesses are, are the small, independent businesses. I was just looking up the other day to rent an e-bike to go on Cades Cove Drive in Great Smoky Mountains, on No Car Day, and that is a small business, right?

The people who are providing this work are small businesses, who by the way, this gets hooked to the whole wage theft thing, they do not know that they are violating the law. If they do not know, and they get hit with the dealing with investigation or private litigation, they can be bankrupted because they are just trying—no good deed goes unpunished.

Mr. OWENS. I am going to kind of wrap with this one last statement, but I will just say this. It is time for us now to truly protect the small business owners. That is where that powers our middle class, which is where our culture comes from, so I implore the business owners to take this risk, go out, and we are going to make sure we do everything we can to protect them.

Later this spring I will be introducing an Outdoor Recreational Outfitting and Guiding Act. This would exempt eligible employees from overtime limits, in order to support and expand the outdoor tourism industry.

I would encourage more Americans to experience the natural beauty of our Nation that it has to offer, and this bill will be a step in the right direction to create a long-term solution for outfitters and guides, that would have been unfairly affected by this onerous requirement of the Fair Labor Standard Act. Thank you Chairman, and I yield back.

Chairman MACKENZIE. All right, the Ranking Member of the Full Committee, Mr. Scott from Virginia.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman. Mr. Stettner, a lot has been said about workers wanting to be independent contractors. Let me just check. If you are an employee, you get minimum wage. You are entitled to minimum wage. Is that right?

Mr. STETTNER. That is correct.

Mr. SCOTT. If you are an independent contractor, you are not?

Mr. STETTNER. That is correct.

Mr. SCOTT. If you are an employee, you are entitled to overtime, and if you are an independent contractor, you are not?

Mr. STETTNER. That is correct.

Mr. SCOTT. If you are an employee, if you lose your job through no fault of your own, you are entitled to unemployment compensation?

Mr. STETTNER. That is correct.

Mr. SCOTT. If you are an independent contractor, you are not. If you get hurt on the job, if you are an employee, you get worker's comp?

Mr. STETTNER. That is correct.

Mr. SCOTT. If you are an independent contractor, you do not?

Mr. STETTNER. That is correct.

Mr. SCOTT. If you are an employee, your employer pays part of your Social Security responsibility?

Mr. STETTNER. That is correct.

Mr. SCOTT. If you are an independent contractor, you have to pay it all yourself?

Mr. STETTNER. You pay the whole thing.

Mr. SCOTT. Your safe workplace under OSHA, you are entitled to a safe workplace under OSHA if you are an employee. It does not apply to independent contractors.

Mr. STETTNER. For the most case, yes.

Mr. SCOTT. If some of the—if the employees have health and pension benefits, if you are an employee, you get those. An independent contractor you do not.

Mr. STETTNER. That is correct.

Mr. SCOTT. We just heard if you spend hours in training, if you are an independent contractor you get to volunteer. If you are an employee, you actually get paid for the time you spent in that kind of training. Is that right?

Mr. STETTNER. That is correct.

Mr. SCOTT. What are the advantages, so you lose all that, what are the advantages of being an independent contractor?

Mr. STETTNER. You know, no one probably in this Committee disputes that if you are genuinely in business for yourself to make profit, you should be an independent contractor. In the world that I live in, I have seen janitors and said well, you are conditioned of working to clean this business building in Boston is to pay for a franchise and get paid less than you would get paid in the minimum wage.

In the world that I live in, we found dishwashers in a restaurant in Minnesota who were given the privilege of washing dishes because they had a business, and that was their skill. These do not make common sense. What these workers are losing when we call them businesses, call them independent contractors, they are losing their right to the minimum wage and overtime.

Mr. SCOTT. The employer saves a lot of money when he misclassifies people as independent contractors. Do workers in your opinion want to be independent contractors, or are they relegated to be independent contractors because the businesses only will hire them if they call themselves, and agree to be, independent contractors, so the businesses can avoid the costs?

Mr. STETTNER. There are just so many myriad of examples of businesses misclassifying their workers as independent contractors, and those workers really having no choice, and it is really to cut corners, and to increase their profits.

Mr. SCOTT. The Department of Labor is going through staffing reductions. The Economic Policy Institute suggests that more than 50 billion dollars could be stolen from workers through wage theft. What would the impact of reductions at the Wage and Hour Division have on the ability to recover stolen wages for workers that have earned them?

Mr. STETTNER. We have just about one investigator for every 250,000 workers in the economy. Already DOGE has canceled leases for offices across the country. That means that the few investigators that we have are going to have to drive hundreds of miles to investigate.

They are not going to be there to answer calls from employers seeking to comply or workers seeking to complain. It is going to in-

crease the amount of wage theft that goes unchecked in our economy.

Mr. SCOTT. We have had headlines about a recent dip in the stock market, and we also know that under President Biden, the economy created 16.2 million jobs, a record for a single term, and more jobs than any Republican President created whether they served four or 8 years.

Unemployment rate fell. He was the first—President Biden was the first President on record not to have a single month of seasonally adjusted job loss. What indicators do you—are you watching to see if the Trump administration is performing from an economic perspective?

Mr. STETTNER. Well, we are already seeing consumer sentiment dropping, business sentiment dropping, and we are waiting for the other shoe to drop, which will be people losing their jobs with the rising unemployment claims.

Mr. SCOTT. Thank you, Mr. Chairman, I yield back.

Chairman MACKENZIE. Thank you to the Ranking Member of the Full Committee. I would like to recognize the Ranking Member of the Subcommittee now for her closing remarks.

Ms. OMAR. Thank you, Mr. Chairman. Thank you once again to our witnesses for speaking with us today. For far too long, the American economy has not properly served workers who uplift it. Instead, the wealthy and well-connected benefit from the labor of millions of working Americans, and now, the ultra-wealthy oligarchs like Elon Musk are trying to tip the scales even further in their own favor at the expense of working families.

As we sit here today, Republicans' disastrous economy and labor policies are threatening the future of millions of workers across America. DOGE has stripped the Department of Labor of critical resources and fired countless Federal workers, and the Department has failed to answer basic questions to inform us and the American public about the extent of these cuts.

To top it off, the Trump administration appears poised to tank the strong economy they inherited. The Fair Labor Standards Act was written at a time when workers were similarly threatened. At this critical moment where workers futures hang in the balance, we absolutely cannot dismantle or diminish the FLSA, and further strip workers of their protection.

Committee Democrats have a vision for the economy in which our labor laws deliver for workers. We must build on the FLSA to increase the minimum wage, combat wage theft, eliminate the subminimum wage, and increase penalties for child labor violations. I hope that we can continue to have this important conversation to discuss how Congress can strengthen this landmark legislation.

The FLSA must always prioritize the health and safety of workers. Thank you, and I yield back.

Chairman MACKENZIE. Thank you to the Ranking Member, and thank you to all of our witnesses again for taking the time to join us today with this Subcommittee. This discussion again it is not only our first Subcommittee Hearing of this Congress, but it is also just the start of our work to update and modernize FLSA.

It is an important piece of legislation for employers and employees all across this country, and we want to continue to encourage

our businesses to do the right thing, make sure that they can expand and grow right here in the United States of America by offering good paying jobs, family sustaining wages, and all of the products and services that so many Americans enjoy in their daily lives.

This law has not been updated significantly in the way that it should be for 87 years. We need to do that to help employees. Employees were devastated during the Biden administration, with rising inflation that did not keep pace with wage growth. There was no way that was going to be possible because inflation was so out of control from the massive spending that was going on here in Washington, DC.

We all know that employees were devastated by Bidenflation. What could we do to help our workers? We can innovate. We can modernize our labor laws to help them. Our Republican members have put forward a series of legislation that I think is going to be something that we should really consider to help as we go forward.

Representative Kiley, he has the Modern Worker Empowerment Act is one possible option to help clear up worker classification issues, and clear out decades of litigation and confusion, which have frustrated both businesses, and workers. We also have Mr. Messmer's proposed legislation around Empowering Employer Child and Elder Care Solutions Act.

We know that far too many working families right now are struggling with the cost of childcare, and elder care as well, and so this is something that could help potentially in those situations. Finally, we should also consider codifying programs at the Department of Labor, such as the Payroll Audit Independent Determination or PAID Program.

Mr. Grothman's bill, the Ensuring Workers Get Paid Act could be one potential avenue to pursue. Finally, the topic of migrant children and all children across our country, making sure that they are safe is something that was brought up in this hearing. I could not agree with you more. That is something that we want to make sure that child labor is stopped in its tracks here in the United States of America.

For far too long we thought this was a dead issue, only to see its resurgence during the Biden administration. We saw the New York Times, as was mentioned, put out a piece that said, "As Migrant Children We're Put to Work. The U.S. Ignored Warnings." The White House and Federal agencies were repeatedly alerted to signs of children at risk.

The warnings were ignored or missed. That is what the Biden administration did to children, and migrant children right here in the United States of America. A total disgrace. It is up the Trump administration to clean up that mess of the Biden administration, and make sure that we protect all workers, all employers, and most certainly all children in this country.

I want to thank our panelists again for testifying. I would like to thank everybody who asked questions, and hopefully we can work together to actually improve the lives of all Americans throughout this Congress.

Without objection, there will be no further business, and the Subcommittee stands adjourned. Thank you.

[Whereupon at 11:34 a.m., the Subcommittee on Workforce Protections was adjourned.]

[Additional submissions from Ranking Member Omar follows:]

U.S. Department of Labor

Office of Federal Contract Compliance Programs
200 Constitution Avenue, N.W.
Washington, D.C. 20210

February 25, 2025

MEMORANDUM FOR: VINCENT MICONE
Acting Secretary of Labor

THROUGH: MICHELE HODGE
Deputy Director
Office of Federal Contract Compliance Programs

FROM: MICHAEL SCHLOSS
Acting Director
Office of Federal Contract Compliance Programs

SUBJECT: Reorganization of the Office of Federal Contract Compliance Programs

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The Office of the Secretary instructed the Office of Federal Contract Compliance Programs OFCCP to develop a plan to reduce its workforce by 90 percent. This memorandum outlines OFCCP's proposed strategy.

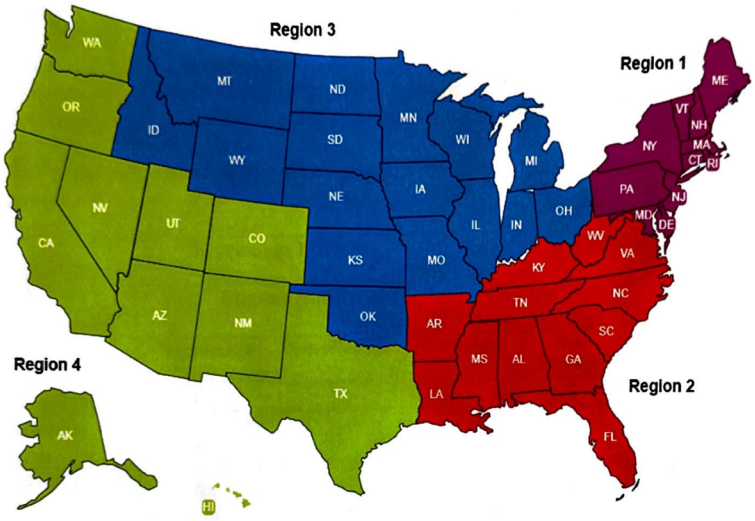
As of February 12, 2025, OFCCP had 479 onboards, including 317 investigators. This number includes 110 National Office employees and 369 employees in regional and field offices. With the elimination of Executive Order 11246, OFCCP will focus its mission to the work required by Section 503 of the Rehabilitation Act (Section 503) and the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA). This proposal seeks to reorganize the agency to meet these statutory provisions within a fiscally efficient and effective organizational structure.

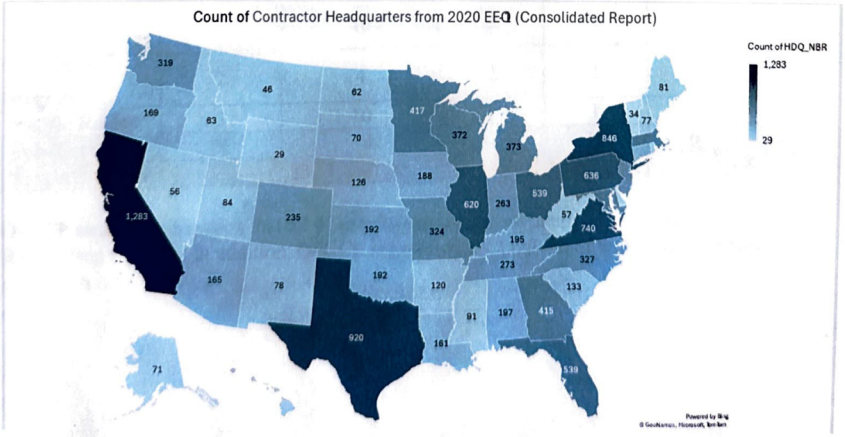
Please note that OFCCP remains under a Continuing Resolution through March 14, 2025. Any reorganization will require, in addition to the funds necessary to operate OFCCP at the projected reduced level, additional funds necessary to downsize (i.e., buyouts, annual leave lump sum payments, severance pay, relocation expenses, office closures, etc.)

BACKGROUND

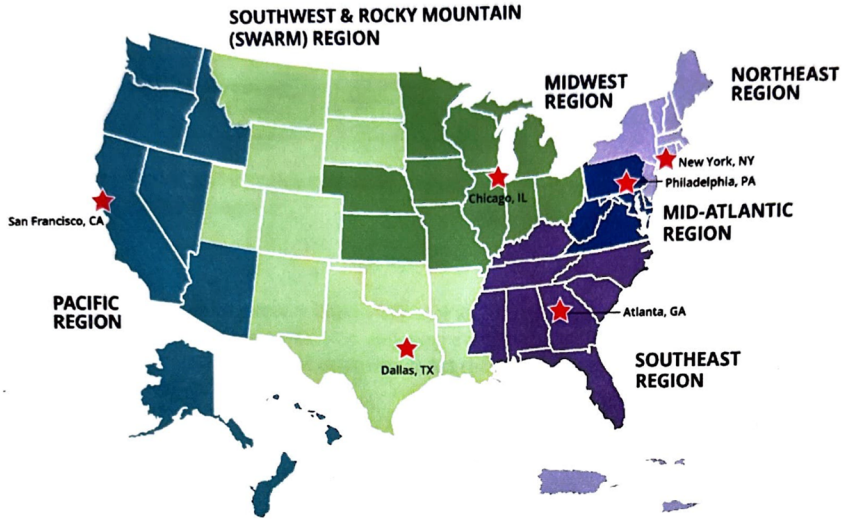
Presently, OFCCP has 55 offices throughout the country, including the national office, six regional offices, and 48 district offices (see below regional map). With Section 503 and VEVRAA reviews, there is still a need to conduct onsites. Therefore, OFCCP would maintain a limited field presence to support such efforts outside of the National Capital Region.

OFCCP will realign the four regional offices to equitably reflect the contractor universe in the corresponding states.





OFCCP's Current Regional Structure



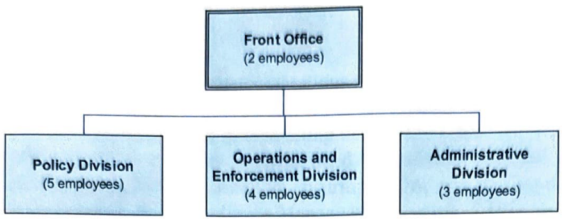
REDUCTION IN FORCE

With this proposal, OFCCP would maintain a total workforce of 50 employees to ensure that OFCCP carries out the requirements under the two statutes – Section 503 and VEVRAA – at a level of effort consistent with OFCCP's past practices relating to those statutes.

OFCCP NATIONAL OFFICE STRUCTURE

The National Office establishes all policy and program operations implemented by the regions. The National Office also houses the Career Deputy Director who acts as the OFCCP Director during periods of transition. OFCCP would reduce the National Office to 14 employees[1].

[1] The numbers in this proposal do not account for non-career employees.



The National Office will continue to lead and support all policy, operations and administrative matters on behalf of the agency.

Front Office

The Front Office includes a career Deputy Director and a Staff Director (GS-0301-15). The Front Office handles all correspondence, including executive and Congressional correspondence, and will administer the Freedom of Information Act (FOIA) program and agency records management program.

Policy Division

The Policy Division oversees the development, formulation, coordination, and promulgation of program policies, regulations, directives, and procedures; oversees and coordinates impact analyses of regulatory options; develops, presents, and evaluates courses through the OFCCP Training Academy and provides training materials to the regions for localized courses. The Division also reviews, measures, and evaluates training program accomplishments and implements and oversees special projects. The Policy Division develops, coordinates, and plans agency communication, outreach, and public engagement efforts, and coordinates agency responses and involvement in studies conducted by GAO and other entities.

In addition, the Policy Division will be responsible for reviewing and suggesting changes to OFCCP regulations designed to reflect the removal of EO 11246 and focus on 503 and VEVRAA. The agency may be tasked with operationalizing additional directives related to federal contractors such as Executive Order 14173.

The Policy Division includes one senior executive as well as a Supervisory Program Specialist (GS-0301-15), a Program Analysis Officer (GS-0343-14), a Supervisory Program Specialist (GS-0301-14), and a Regulatory Analysts (GS-0301-13).

Operations and Enforcement Division

The Operations and Enforcement Division (previously Division of Program Operations) reviews complaints and appeals, as required by program regulations and policy, which are submitted by the field to the OFCCP Director for decision; provides overall operational guidance and coordinate policy implementation and program operations in all regions to ensure uniformity and consistency; and conducts quality assurance audits of field operations to ensure quality and

consistency in compliance reviews, complaint investigations, and technical and compliance assistance.

OFCCP will rename the Division of Program Operations to the Division of Operations and Enforcement. This name change provides transparency to the historic functions of this division and clarifies the roles and responsibilities in supporting the agency's mission. The Operations and Enforcement Division will continue monitoring the daily operations and enforcement activities of the field including, but not limited to, ensuring quality and guiding the field through the investigative process within the Compliance Management System (CMS).

The Operations and Enforcement Division will be led by one senior executive and include a Supervisory Program Specialist (GS-0301-15), a Program Specialist (GS-0301-14), and a Program Analyst (GS-0343-13).

Administrative Division

The Administrative Division (previously Division of Management and Administration Programs) provides advice on budget, administration, management, personnel, and labor/management relations to the OFCCP Director and Deputy Directors; and reviews and investigates all administrative and management support services for OFCCP programs.

The Administrative Division will continue managing all administrative matters. However, the Division will consolidate all administrative functions in the national office instead of bifurcating functions within each region.

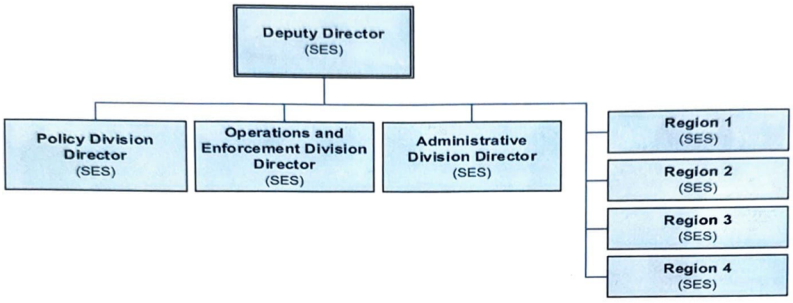
The Administrative Division will be led by a senior executive and include an Administrative Officer (GS-0341-15) and a Management and Program Analyst (GS-0343-13).

Former Division of Enforcement

The former Division of Enforcement coordinated OFCCP's enforcement-related activities across its six regions, provided subject matter expertise in OFCCP compliance evaluations with systemic findings, and led program initiatives that advanced the agency's strategic use of enforcement related resources, reviewed complaints against federal contractors for systemic discrimination issues.

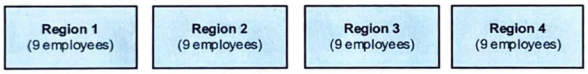
With the revocation of Executive Order (EO) 11246, OFCCP would eliminate the Division of Enforcement comprised of Labor Economist and Statisticians charged with conducting systemic statistical analyses based on EO 11246 and Title VII principles. These skillsets are no longer needed to enforce 503 and VEVRAA.

Proposed OFCCP Organizational Restructure

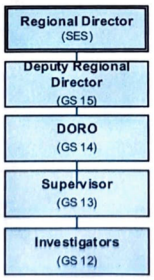


OFCCP FIELD STRUCTURE

We propose that, along with the 90 percent reduction, the number of OFCCP regional and field offices be reduced from 54 to 4. The regional offices will remain located in a major metropolitan area.



The regional office reporting structure would be truncated to include a senior executive, a Deputy Regional Director (GS-1801-15), a Director of Regional Operations (GS-1801-14), Supervisory Compliance Investigator (GS-1801-13) and Compliance Investigators (GS-1801-12).



VSIP/VERA

To achieve the desired reduction in force, OFCCP seeks permission to use the Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Program (VSIP).

VSIP and VERA will accomplish the agency's mission needs and the Administration's requirements. OFCCP proposes to offer VSIP to all retirement eligible and early retirement eligible employees. OFCCP does not envision success with VERA without VSIP.

The following table depicts employees eligible to retire prior to the Deferred Resignation Program.

	Retirement Eligible		Early Retirement			
	Eligible Now		Eligible 25 Years, any Age		Eligible 20 Years, Age 50	
	Manager	Non-Manager	Manager	Non-Manager	Manager	Non-Manager
National Office	4	12	3	5	2	4
Northeast Region	3	5	1	4	2	1
Mid-Atlantic Region	5	2	3	1	0	1
Southeast Region	6	15	3	0	0	2
Midwest Region	2	10	3	4	1	3
SWARM Region	2	4	2	1	0	0
Pacific Region	3	10	2	1	1	2
Sub-Total	**25**	**58**	**17**	**16**	**6**	**13**
TOTAL	**83**		**33**		**19**	

OFCCP awaits confirmation that all 42 employees confirmed their participation in the Deferred Resignation Program. In addition, OFCCP is awaiting the final list of terminated probationary employees.

S. HRG. 105–9

FAIR LABOR STANDARDS ACT REFORM: REVIEW OF FLEXIBLE WORKPLACE MEASURES

HEARING

OF THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

EXAMINING PROPOSALS TO REFORM THE FAIR LABOR STANDARDS ACT, FOCUSING ON RECENT CHANGES IN THE AMERICAN WORKFORCE AND THE NEED FOR FLEXIBLE WORK SCHEDULES

FEBRUARY 4, 1997

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CONTENTS

STATEMENTS

TUESDAY, FEBRUARY 4, 1997

APPENDIX

FAIR LABOR STANDARDS ACT REFORM: REVIEW OF FLEXIBLE WORKPLACE MEASURES

TUESDAY, FEBRUARY 4, 1997

U.S. SENATE,
SUBCOMMITTEE ON EMPLOYMENT AND TRAINING,
OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room SD–430, Dirksen Senate Office Building, Senator DeWine (chairman of the subcommittee) presiding.

Present: Senators DeWine, Jeffords, Enzi, Warner, Kennedy, Dodd, and Wellstone.

OPENING STATEMENT OF SENATOR DEWINE

Senator DEWINE. Good morning. I would like to welcome everyone to this hearing of the Senate Labor and Human Resources Subcommittee on Employment and Training.

Let me begin by first welcoming to the Senate and also to this committee Senator Mike Enzi of Wyoming.

Senator, welcome.

Senator ENZI. Thank you.

Senator DEWINE. This subcommittee has jurisdiction over Federal policies affecting employment and training. In today's hearing, we will focus on some of the key changes that have taken place in American society and the American workplace in recent years. Specifically, we will discuss issues concerning a more flexible workplace.

In next week's hearing, we will address specifically the legislation that has been proposed in the U.S. Senate in this area.

It is our intention to have the legislation ready for full committee markup by the end of the month and available for the leadership to take up on the Senate floor as soon as possible after that.

Now let me turn to the subject of today's hearing. The issue today is providing flexible work options that empower employees. Let us take one example—letting workers choose between overtime pay or paid time off—and another example—letting workers make their work schedules flexible on a biweekly basis.

These are really not radical ideas. In fact, those Americans who are employed by the public sector have enjoyed these scheduling options for years.

These options have been on trial in the public sector, so I believe it is appropriate for us today to try to determine how well those policies have worked. In this regard, let me begin by citing the

view of one top executive in the public sector, and I quote: "Broad use of flexible work arrangements to enable Federal employees to better balance their work and family responsibilities can increase employee effectiveness and job satisfaction while decreasing turnover rates and absenteeism."

That is the view, of course, of President Clinton, expressed on July 11, 1994. The President recognized that people sometimes have to struggle pretty hard to balance the demands of work and family.

Several years after the President made that earlier statement, the President went even further, calling on all Federal agencies to develop a plan of action for better implementation of these flexible work schedules.

Again I quote: "I am directing all executive departments and agencies to review their personnel practices and develop a plan of action to utilize the flexible policies already in place—flexible hours that will enable employees to schedule their work and meet the needs of their families." End of quote. This was from a Presidential memorandum dated June 21, 1996.

It is clear that the President understands what flexibility in the workplace means to quality family life. And the American people certainly agree as well. A national poll conducted in September 1995 shows that the American work force endorses flexible work options. When asked about a proposal to allow hourly employees the choice of time and a half in wages or time off with pay, 75 percent agreed with the proposal. Sixty-five percent said they favored more flexible work schedules.

This poll was conducted on behalf of the Employment Policy Foundation, and copies of the poll results are available in the hearing room today.

I believe these poll results tally with what most of us really know intuitively. As both the economy and American family life grow more and more complex, the men and women in America's work force want greater flexibility to be able to cope with all of these changes.

There is a real need out there that these poll responses only begin to suggest. In my view, we have a very important opportunity with this legislation. If we move forward on this in a thoughtful and bipartisan way and design the best possible flextime policy, we will have gone a long way toward making America's workplace as productive and fulfilling as it can be and as it should be.

Let me turn to the ranking member of the subcommittee, Senator Wellstone.

OPENING STATEMENT OF SENATOR WELLSTONE

Senator WELLSTONE. Thank you, Mr. Chairman.

I am extremely pleased to be serving with you. I want to congratulate you on your position, and I look forward to working with you. I have a lot of respect for the work that Senator DeWine has done, especially his focus on children, and I know that you will operate this subcommittee in a respectable and productive way.

There is one housekeeping matter that I hope we can get some clarification on in the future. I note that the two panelists the

Democrats have chosen are at the end of the testimony. I hope we can do a little bit better in the future on that. I know that in the past, we have had a two-to-one ratio, and now we have a three-to-one ratio of witnesses, and I'd like to get a chance to sit down and talk with you about that as well.

I have to say how proud I am to be the ranking Democrat on this subcommittee of the U.S. Senate Labor and Human Resources Committee, especially this Subcommittee on Employment and Training, which has jurisdiction over some of the most crucial laws we have in this Nation for protecting the rights and the living standards of American working men and women.

Today we are talking about the Fair Labor Standards Act. I note that during the last Congress in 1995, at a House of Representatives hearing on the same topic we are considering today, a witness compared the Fair Labor Standards Act negatively to the Dead Sea Scrolls. The Fair Labor Standards Act was first passed in 1938, so the point was that the law is old. The remark was meant, I think, somewhat humorously, but the witness said that since jobs as we have traditionally known them are going the way of dinosaurs, the Fair Labor Standards Act had better evolve, or it will also become extinct.

The statement was made by a witness representing one of the organizations we will hear from today, although not by one of today's witnesses.

Mr. Chairman, I know that today's witnesses will have some criticisms of the Fair Labor Standards Act. That is fair. No law is so sacred that it should not be examined. I am for progress as long as we are moving forward and not turning the clock back. In fact, I am all for putting the Fair Labor Standards Act at the center of public attention. Wages and working hours are far from an archaic subject for millions of working Americans.

I do not want us to take for granted the many protections and standards that are on the books. Not all of them are fully respected and enforced, as perhaps we will hear about today, but they are on the books, and they have been achieved as an outcome of a people's history, a half-century of people's history which is still ongoing.

The magic of the market alone did not give us either the minimum wage or the 40-hour work week. Neither is the market keeping millions of working Americans out of poverty. In fact, millions of people work 52 weeks a year, 40 hours a week plus, and they are still poor; and they have families that they want to care for and spend time with.

So that for me, wages and working hours are very live issues. I am pleased to be talking about them today. I think we could have a hearing every week in this subcommittee for the rest of this Congress on the State of work in America. I appreciate today's focus on trends in work and family; that is appropriate.

Tomorrow is the anniversary of the enactment 4 years ago of the Family and Medical Leave Act, a very significant step forward for family members who work. Any conversation about how to provide employees with needed flexibility obviously should look at whether and how, based on the success of the Family and Medical Leave Act, we have done what we need to do to expand its provisions.

Some of us will be introducing a measure to expand that Act tomorrow; I would expect to hear that topic addressed today. We will also be discussing to some extent, although perhaps in more detail next week, proposals to allow employers to offer private sector employees comp time, and we will discuss a proposal, as I understand it, to get rid of the 40-hour work week—not to move forward, unfortunately, as I see it, but rather to turn back the clock.

It seems to me to be a plan that would allow employers in some cases to ask employees to work more than 40 hours in a week and pay no premium, either in hours or in pay, for those hours worked over 40. As far as I can tell, that is the aim of the proposal to move to an 80-hour biweekly work period. I have trouble seeing it as much more than an offer to cut workers' wages when compared to current law. I will be interested to hear how such an offer is seen as friendly to family, except perhaps for those families who believe they currently have too much money—and there are not too many families like that today in America.

I think there is little question that many workers would like to have more flexibility and control over their working hours. One of the main questions I hope to have answered is what really blocks employers from offering more flexibility now. Is it purely the need to pay a premium for hours worked in a week over 40? I just do not see it as unreasonable to require that premium pay, especially if the granting of time off at a later date contributes to greater employee retention and productivity. That is an option clearly available to employers now. And I hope we can learn how many make use of it, and if the number is few, then why is the number few?

I think the voluntariness of any proposal will also inevitably be an issue as we look at the particular proposals. No matter what appears to be guaranteed by what is written, we are still struggling to assure the protections of many current labor laws. Ask the farm workers, ask people in the garment industry, oftentimes with far from total success, what are the guarantees for working families.

Finally, Mr. Chairman, for those who say their aim is to provide to private sector employees what many public sector employees now enjoy—comp time or "flextime"—I remind them that there are those of us on the subcommittee who would be delighted to offer millions of American workers some other things that they do not currently have which many public sector employees have—a union, paid vacation and sick leave, a guaranteed pension, health benefits, and life insurance. Many companies do offer their wage-earner employees some of these benefits, and I applaud that, but many do not.

I think these are the relevant considerations as we talk about work and family.

Mr. Chairman, I look forward to today's testimony. We have a very important topic before us.

Senator DEWINE. Thank you.

Our first witness is Senator Kay Bailey Hutchison who, along with Senator Ashcroft, has sponsored Senate bill 4. Senator Ashcroft could not be with us this morning, but he will be testifying at our hearing next week.

Senator Hutchison, thank you very much for joining us.

5

STATEMENT OF HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Thank you, Mr. Chairman, and thank you, Mr. Wellstone—I see you as a potential cosponsor for our bill——

Senator DEWINE. We will work on that. [Laughter.]

Senator HUTCHISON [continuing]. Because I do believe that we will be able, and I hope we will be able, to show you that this is adding to opportunities, not taking anything away. And that is what we are trying to do here.

As you know, as all of us know, what we are trying to do is give more flexibility in the workplace to hourly employees that exempt employees now have, that Federal employees now have, that many State employees now have, and it has worked very well. It has given a kind of a release valve for the tension of not being able to take your child to the doctor or have your parent-teacher conference because there is this flexibility.

What we want to do in fact is just what you suggested, Mr. Wellstone, and that is to improve the Fair Labor Standards Act to make it more accommodating to families and their needs today, and that is the purpose of our bill.

There are 60 million hourly employees in our country who do not have the same flexibility that you and I and other exempt employees have. The reason that we want to give this flexibility is to add the ability to get time and a half in compensation, which is always there—if that is what the employee wants, it is there—but in addition to that, we would add the option of time and a half time compensation if that is what the employee chooses, and we would allow the person to be able to say: I would like to leave work early Friday in order to go to my parent-teacher conference, and I would like to make up the time on Monday.

All it does is add one more week to the flexibility. Within the 40 hours, they can now do this, but if the employee wants to get off early on Friday and carry over until Monday, that is what is restricted by the Fair Labor Standards Act.

The Fair Labor Standards Act was enacted, as you said, in 1938. At that time, 16 percent of the mothers in this country worked. Today, 75 percent of the mothers of school-age children are in the workplace. So you can see immediately that there is more stress involved in being able to meet the needs of the family and yet also be a good employee.

So we are trying to add to the existing options, add to the existing law, rather than do something that takes away from it or continues this restriction that does not allow employers and employees to sit down together and work something out if the employee is asking for it.

So the first option is that our bill would allow an employer and an employee to say, I would like to work extra hours this week, or fewer hours this week, and make up next week, and get either time and a half pay, which is the option that the employee can always ask for, or time and a half time, which also can be banked and put together up to 240 hours if the employee then would like to work something out where he or she could take off more time of an extended period and still have the basic pay scale that he or she depends on for the family income.

The second option would allow the employer and the employee just to work out customized hours such as we have in the Federal system, where you can work extra hours, 10-hour days for 4 days, and then take Friday off and have a 3-day weekend every other weekend. That is an option that many Federal employees have, and they really like that, and they like that flexibility. We would like to be able to offer that to hourly employees to be able to have as an option.

And the third option would be that nonexempt employees, hourly employees, would be able to voluntarily work overtime in order to have flextime on an hour-by-hour basis.

So that basically, we are just putting more options on the table, and we are adding one more week into the flexibility; rather than making that have to be within a one-week period, it would be within a 2-week period.

And let me mention that because of concerns that were raised in the early stages of this bill by unions that this would in some way encroach on their ability to collective bargain, that is also exempted out of this bill so that a collective bargaining agreement will not be abrogated by this law; it will prevail.

So I think we have tried to address the myriad of concerns that you have raised and others have raised in an effort to really provide options in the workplace and the needs of today that we believe will make life better for families, will take much of the stress off a family that has two working parents and also allow employers and employees, if there is not a prevailing union contract, to be able to work things out among themselves.

Mr. Chairman, I thank you for your leadership in holding these hearings and letting us look at these options, and I want to say that the person who has been the real mover in this and who deserves a lot of the credit is John Ashcroft, the Senator from Missouri, who unfortunately could not be here today, but he is going to come and testify before you at a later time. I wanted to start the ball rolling on his behalf, because he has been a Governor, and he has worked with many of the options that we are talking about in his State. I have worked with them in my State; as State treasurer, my employees were allowed to have comp time. We did not even have the time and a half requirement, which is even better for employees, but we did have hour-for-hour comp time, which a number of employees used to be able to meet their family responsibilities. It worked very well, as it has in the Federal system, and I would just like the hourly employees of our country to have the same opportunities that those who are exempt now have.

Thank you.

[The prepared statement of Senator Hutchison follows:]

PREPARED STATEMENT OF SENATOR HUTCHISON

Mr. Chairman, I want to thank you for conducting this hearing and giving me this opportunity to speak on behalf of S. 4, the Ashcroft-Hutchison Family Friendly Workplace Act. I also want to thank you for your cosponsorship of the bill, and I want to take this opportunity to thank Senator John Ashcroft for his leadership on this bill. While he is unable to testify today, I know that he looks forward to doing so during your next hearing on this issue.

Mr. Chairman, when I speak with working families throughout Texas, and I ask them how they are coping with the growing and competing demands of workplace and family, I hear a lot of different stories, as I am sure you do from your constituents in Ohio. I hear from workers who give up the security of a steady paycheck to be able to start their own small business and who need to be able to deduct the cost of their health insurance. I hear from two-income working parents trying to find and pay for quality day care for their children, and who could do so with an additional per-child income tax credit. And I hear from single-income parents struggling to make ends meet, and who asked for and starting this year will be able to take advantage of the homemaker IRA, a bill I introduced last year to allow stay-at-home spouses to save for their retirement in the same manner as their working spouses.

But most of all, Mr. Chairman; I hear from families who just can't seem to find enough hours in the day. Parents who not only work full time, but who might also be attending school to remain competitive in the workplace, or who are caring for an elderly parent, or volunteering in the community, or perhaps all of the above—all while trying to find the time to properly raise and nurture their children.

Mr. Chairman, while we in Congress can and are working to give families relief in the area of taxation and regulation, unfortunately we cannot expand the day beyond 24 hours. The Family Friendly Workplace Act, however, does the next best thing . . . it will give America's roughly sixty million hourly wage workers the flexibility to craft work schedules that will help them find the extra time they need for family, personal, and community commitments.

As you know, under the provisions of the Fair Labor Standards Act of 1938, workers paid by the hour, or so-called "non-exempt" employees, may only work 40 hours in a week at their normal rate of pay. Additional hours worked, either at the request of the employer or the employee, must be paid at the overtime rate of time-and-a-half. Because it is so expensive for their employers, less than 20 percent of non-exempt employees work overtime in an average week. Of those who do work overtime in a given week, they invariably must work at least a full 40 hours the following week in order to keep their jobs and maintain their incomes.

Mr. Chairman, this law was crafted during the height of the industrial age and in the wake of the great depression to protect workers from abusive conditions, and at a time when only 16 percent of mothers worked outside the home. That was then.

Now, employers are much more attuned to the needs and preferences of their employees. Communications technology and broad social forces are changing the way in which we define the workplace and, indeed, work itself. And, in this era of two-income families, a full 75 percent of mothers with school age children are now in the workforce. Rather than protect workers, this new deal law has increasingly become a straight-jacket for employees seeking ways to make that 24 hours go a little farther.

The time has come to give non-exempt employees the same flexibility that salaried, or "exempt" employees presently enjoy and that Federal employees have enjoyed since 1978. By untying the hands of employers and employees who may wish to agree to mutually

beneficial scheduling arrangements, but who are prohibited from doing so under existing law, the Family Friendly Workplace Act will ensure that the Federal Government will no longer stand in the way of achieving an optimal work environment for each particular workplace and each particular worker.

As an initial matter, let me make clear that the bill expands, but does not replace the existing law requiring overtime pay for overtime work. For those employees who are asked or who are required to work more than 40 hours in a single week, they will always have the option of receiving overtime pay, period. This bill simply affords the employee additional options, upon the mutual agreement of the employee and employer.

The first option the bill will offer is for the employee working overtime to receive paid time off, at a time-and-a-half rate, rather than time-and-a-half pay. Thus, an employee required to work 50 hours in a week, for example, could choose to receive a 40 hour paycheck and then bank 15 hours of paid time off.

Up to 240 hours of such "comp time" could then be banked by the employee, and could be used at any time that does not unduly disrupt the employer's business—the same standard as that found in the Family and Medical Leave Act. But unlike the FMLA and some recently-introduced bills to expand the FMLA, our legislation does not purport to dictate the reasons for which an employee could take time off. Our bill would allow an employee to take that banked time off for any reason whatsoever: to attend a PTA conference, to get the car fixed, or to just take an occasional day off. Moreover, should the employee later decide that he or she needs the money instead, the banked time may be cashed-out at the rate of pay in effect when it was accrued or the pay rate in effect when it is cashed-out, whichever is higher. Thus, the employee has absolutely nothing to lose by choosing comp time as an option to help juggle competing responsibilities.

The family friendly workplace act also addresses those 80 percent of non-exempt employees who are not normally required to work overtime. The bill will allow those employees to create a customized bi-weekly work schedule so that, for example, a worker could work 9-hour days and take every other Friday off, with pay. (This particular schedule is in fact very popular among Federal hourly workers.) Again, the worker is protected, because if the employer requires more than 80 hours of work over two weeks or additional hours not in accordance with the agreed to biweekly schedule, that additional time would be considered overtime and subject to time-and-a-half pay.

Finally, non-exempt employees would be allowed, again upon agreement with the employer, to voluntarily work overtime in order to bank so-called "flex time" on an hour-for-hour basis. Thus, an employee could choose to work overtime, bank that time, and use it at a later date for any reason so long as it does not unduly disrupt the employer's business operation.

These added scheduling options will have a host of benefits for employers and employees alike. Three fourths of Federal employees say they support comp and flex time, say they have more time to spend with their families as a result of these options, and say that flexible schedules have improved their morale and productivity. A

democratic polling firm found recently that the same proportion of Americans, 75 percent, favor expanding these options to all private sector employees.

An additional benefit of the legislation is that hourly wage workers in seasonal or cyclical industries who may not have extensive vacation or other benefits will have annual disruptions to their income reduced or eliminated. During busy periods, when overtime is required, comp time can be accumulated (at a time-and-a-half rate) and used during those slower periods when an employee might otherwise be out of a paycheck.

Mr. Chairman, a reporter recently asked me, "why would anyone be opposed to this bill?" I did not have an answer to that question. Employees like it; employers like it; and families will be strengthened by it. The only real concern I have heard voiced about the bill is that some employers who now pay overtime may somehow coerce employees into taking hour-for-hour flex time instead of receiving time-and-a-half pay.

I think anyone who has examined the bill carefully must conclude that it adequately protects employees against this potential abuse. First, as I said, an employee required to work overtime will always have the option of getting paid overtime pay. No employee may be required to participate in any flexible work schedule. Should an employer attempt to convince his or her employees otherwise, using any direct or indirect form of intimidation or coercion, that employer will be subject to severe fines, back pay, and even criminal prosecution and imprisonment. In fact, Mr. Chairman, the potential penalties for employers are stricter under this bill than they are under the Fair Labor Standards Act.

If unions are concerned that this bill will infringe on their influence, they should not. The bill does not in any way supplant or replace any collective bargaining agreement to the contrary.

In short, the Family Friendly Workplace Act presents a win-win situation for both workers and their employers. Employees get time off, with pay, when they need it, and employers get a happier, more productive workforce. But most importantly, families and communities will be strengthened because parents will have the flexibility they need to spend more time with their children, to volunteer in the community, or to do whatever it is they need or desire to do to improve the quality of their lives and the lives of those around them. This is sensible legislation that the American public is requesting, and I urge your subcommittee and the full committee to give it timely, favorable consideration.

Thank you very much for giving me this time today, and I would be happy to answer any of your questions.

Senator DEWINE. Senator Hutchison, thank you very much. Your last statement anticipated my question. You and I both have had the privilege of serving our States in elected office, and I had the opportunity as lieutenant Governor in Ohio to see how this was used at the State level and to see how employees in fact used the comp time. It was something that I found was very popular among State employees. In Ohio, they could and still do take it as time and a half. You tell us that in Texas, it is one-for-one?

Senator HUTCHISON. Yes. It has been one-for-one.

Senator DEWINE. But even in that case, your experience was that it was utilized quite extensively?

Senator HUTCHISON. Absolutely. It was, and it did allow people to have that flexibility, and I think the workplace was much more smooth because you did not have that fear on the part of a parent who could not get away to attend that parent-teacher meeting or the doctor's visit.

Senator DEWINE. Thank you.

Senator Wellstone?

Senator WELLSTONE. Thank you, Mr. Chairman.

Senator Hutchison, first of all, my understanding is that your bill goes to an 80-hour, 2-week time frame, so an employer could require an employee to work 50 hours 1 week without any overtime if in fact then you moved to 30 hours the next week. Is that correct?

Senator HUTCHISON. No, Mr. Wellstone, it is not. We specifically say that an employer cannot force an employee to work more than 40 hours. That is absolutely in the law. And in fact, we have very stiff penalties if there is a violation of an employer forcing over the 40-hour work week.

Senator WELLSTONE. But if it were within an 80-hour period, if an employee were asked in one given week to work more than 40 hours, if it were the flextime, would there be an hour and a half premium paid, or not?

Senator HUTCHISON. No. Let me say that if an employer said to an employee, I would like you to work 50 hours this week and 30 hours next week, then the employee would have the absolute option to say, Fine, if you want me to work 50 hours, you will pay me time and a half overtime; or the employee could say, Fine, I will work 50 hours if you will give me time and a half time to put in the bank, or eventually to cash in.

The employee will always have the right to ask for the time and a half overtime over 40 hours.

Senator WELLSTONE. But the flextime under this piece of legislation is one-to-one; it is not one-and-a-half-to-one; is that correct?

Senator HUTCHISON. If the employee says that that is what he wants to do—if the employee comes to the employer and says, I would like to work 50 hours this week, and I would like to bank that 10 hours into a bank for the ability to work, then, 30 hours next week, or I would like to work in an 80-hour week, I would like to work 10 hours Monday, Tuesday, Wednesday and Thursday and take off all of Friday, then if the employer says okay, that can be done under this law.

Senator WELLSTONE. But the employer does not have to offer comp time under your law, right?

Senator HUTCHISON. Over 40 hours, the employer does have to—if the employee says, I want time and a half for every hour I work over, the employer has to do it. The employer cannot force this. That is what we were very careful to provide.

Senator WELLSTONE. We need some clarification as to whether the employer in fact has to offer the comp time or whether it can be flexible time, because there is a difference.

Senator HUTCHISON. It is voluntary. If the employer and the employee agree on the flextime, the hour for hour, where the employee

says, I would like to work 10 hours Monday, Tuesday, Wednesday, Thursday and then have Friday off next week, and the employer says okay, then that is an option that is here. But the employer is never able to force an employee into any of this. This is an option. It really allows the employee to ask for this from the employer and for them to voluntarily agree, and there are very stiff penalties if the employer is found to have coerced the employee.

Senator WELLSTONE. But the issue here—are we on a 5-minute limit, is that it, Mr. Chairman——

Senator DEWINE. How much do you want?

Senator WELLSTONE. No, no. There are other people. Maybe we can have another round.

Senator DEWINE. I have not turned it off yet, Paul.

Senator HUTCHISON. I am working on Mr. Wellstone to be a cosponsor of this. [Laughter.]

Senator WELLSTONE. There are two issues here. The employer has the option as to whether or not it is comp or flextime, in which case, within the 80-hour framework—given what is going on right now in this country in a lot of areas of work, the question becomes how voluntary is this, really, for employees vis-a-vis their employers, and then if the employer has the option only on the flextime and not the comp time, then what you have done is turned the whole idea of the 40-hour work week and then the notion of time and a half or overtime on its head. That is the problem.

Senator HUTCHISON. Well, Mr. Wellstone, I think that what you are saying is that employers are going to misuse their employees. If they are going to misuse their employees, they are going to do it in a 40-hour work week as well.

What we are saying is that the employee will have the option of asking for time and a half in time rather than time and a half in overtime pay, but the employee will never be forced to take the time and a half in time. The employee always has his or her right for exactly what he or she is entitled to, and if one hour over 40 hours is asked by the employer, and the employee says, I want time and a half for that hour, he gets it. And if the employer does not give it to him, there are stiff penalties.

What we are trying to do is give employers and employees more opportunities to voluntarily work for the employees' benefit and leeway and opportunity, and by stiffening the penalties for any kind of coercion—I mean, we are including jail time if an employer does coerce, to send the signal that that will not happen. But I think you have got to have some confidence that employers will want to work with employees, and if you do not have that confidence, then that same person could be just as easily abused in 40 hours as in a 2-week period.

Senator WELLSTONE. Well, Mr. Chairman, there are others here, and we may have another round of questions. I have confidence in the rationale and the history of the Fair Labor Standards Act. I have confidence in the reason why we went to a 40-hour week and why we have some protection for workers when it comes to overtime, and I do have confidence in some employers.

But I have spent entirely too much time with farm workers and entirely too much time with wage earners in this country, in a whole lot of workplaces that are not unionized, to know full well

that there is a real danger of abuse of power here. It is not exactly an equal relationship. And you had better believe that I worry about where this is going when I see one of the most important things that we have had as part of our labor law essentially being dismantled here.

Senator HUTCHISON. Well, I think that there is a different atmosphere today than there was in 1938, which is why I think that we can address some of these issues like 75 percent of mothers of school-age children working, look at their concerns and ask them directly. And I would just ask you to talk to some of the Federal employees who have been able to use this flextime, and really ask them straight out how they feel about it and try to get the input, because everything that I have seen shows that they really like it and that it is a pressure relief valve for them.

Senator WELLSTONE. I appreciate your focus on the mothers, and I think there may be some comment around here, because I think many of us are concerned about the concerns and circumstances of working women and their families, and there is much that we could do on leave policies, there is much that we could do on health care, there is much that we could do to provide protection for part-time workers and temporary workers. Maybe we can expand this, and then we will really have something that is real important to those women.

Thank you, Mr. Chairman.

Thank you, Senator Hutchison.

Senator HUTCHISON. Thank you.

Senator DEWINE. Senator Enzi?

Senator ENZI. Thank you, Mr. Chairman. It is a pleasure to be on your subcommittee.

I am a certified professional in human resources, so I have filled out the forms, I have worked with the employees. I would also mention that I am a small businessman. Now, in Washington, a small businessman has a completely different definition than what I really am. My definition of small businessman does not deal with whether it is 500 employees or 100 employees or 50 or 25 or 10. My definition of small businessman is that if you are the person who sweeps the sidewalk and cleans the toilets and waits on the customers, you are a small businessman. That is a different level of flexibility than some of the big businesses have, where they can do some of the very sophisticated kinds of job training. If everybody has to do all the work, there is less flexibility.

But one of the possibilities for flexibility that these people need is provided by the legislation that Senator Hutchison is talking about this morning, and I am pleased that that is being presented, and I am pleased to be an original cosponsor of it. I do think that it will provide an opportunity for people to have more time with their families.

There have been some drastic changes in the workplace, and I appreciate that you have brought those out—the computers, the high-speed modems, the cellular phones, the pagers, the fax machines, and telecommuting make some big differences, where there will be more in-home businesses.There are more mothers working. Some of that is by choice I know that in a lot of families, though,

one of the parents works to pay the bills, and one works to pay the taxes.

An awful lot of people are working two jobs to make ends meet, and usually, each person is often working two jobs, and the reason they are working that second job is because they cannot get extra hours at the job that they really prefer. They work for another company which also is making sure that they do not have overtime.

The downsizing problems today are leading to less flexibility as well as families making less money than if they were doing the jobs that they prefer to do. There has been a huge increase in temporary positions in this country, again, so that there is not the need to have an additional time by an individual in the company, and what that has done is take away flexibility from families.

I do think that the flextime provision of this legislation will be one of the most used provisions, one of the most requested provisions by the employees. For the employer, unless he has a situation where their workload is not a steady workload—and that is becoming more common in the workplace today, too—it will not be as often requested by the employer as it will be by the employee, but it will be accommodated by the employer.

So I appreciate your comments about how it works on an 80-hour week. I do think that it will provide the kind of flex that people need. I have never bought into the notion that Federal employees ought to have more flexibility than those in small businesses or even the medium or large businesses. I do know of some companies in Wyoming that used to be able to do that sort of thing—they used to be able to provide some flextime—and they cannot do it anymore, and it is the employees who are upset. It is the employees who want to make this change again. It is the employees who are the driving force behind making the change.

So I thank you for your comments.

[The prepared statement of Senator Enzi follows:]

PREPARED STATEMENT OF SENATOR ENZI

Thank you Mr. Chairman. I am proud to be an original cosponsor of S. 4, the Family-Friendly Workplace Act, which amends the Fair Labor Standards Act of 1938. I am a strong supporter of both employee and employer rights—always have been. Providing employees with flexible work schedules and increasing choices and options for their time at work—and quality time with their families—makes good common sense. The addition of flexibility will also help businesses with small work forces—which is also a priority of mine.

The Fair Labor Standards Act of 1938 has been beneficial. Our society, however, has braved a storm of changes since this Act was passed 59 years ago. Just look at how our nation's work environment has changed since 1938. We now have personal computers, high speed modems, cellular phones, pagers and fax machines. American suburbanization has created audio and video conferencing, satellite offices, and most importantly, "telecommuting." There has been an influx of women into our nation's workforce since 1938. According to the Bureau of Labor Statistics, 76% of mothers with school-age children now work. Moreover, 63% of mother and father households now see both parents working outside of the home—one works to pay the bills, while the other works to pay the

taxes. Despite such demographic and technological advancements, American employers and employees remain tethered to a 59-year-old Act that forbids them from crossing that "bridge to the 21St Century." This is why the Fair Labor Standards Act of 1938 yearns for a modern-day fix.

Some people are now working two jobs to make ends meet—the second at less pay than the first since labor costs are being held down by avoiding overtime. These jobs are generally inflexible and provide the employee with little or no family-time. In addition, a large portion of these jobs are "temp" positions—which, once again, drive down the cost of paying overtime wages. The Family-Friendly Workplace Act provides the time off employees desire, while keeping the option of overtime wages open. It is often the case, however, that people can bank time easier than money. Once they get the money—they spend it. The average worker never sees the money anyway. I can tell you from experience that this generation isn't interested in overtime they want the time off. The Family-Friendly Workplace Act goes the extra mile by giving them the ability to choose either one.

This important legislation simply permits voluntary agreements between labor and management to utilize a more self-serving work environment—labor gets choices and management gets higher productivity and happier workers. S. 4 amends the Fair Labor Standards Act of 1938 by providing compensatory time off that would allow employers to offer and employees to CHOOSE to use compensatory time for school and family activities and a whole range of other personal reasons. Under S. 4, employees would have the right to choose compensatory time instead of cash wages at a rate not less than one and one-half hours of each hour of overtime worked. Employees would be able to accrue up to 240 hours annually and have the opportunity to "cash-out" their accrued hours every 12 months. That's a lot of time we should be spending with our kids a true investment in our nation's future.

I am baffled at how anyone could possibly oppose the choices and options provided for under S. 4. In fact, federal employees have enjoyed flexible work schedules since 1978 19 years! I have never "bought into" the notion that federal employees should somehow be blessed with greater flexibility in the workplace than private sector employees. I am fully confident that the provisions in S. 4 will not only grant our nation's workforce with choices and options that are family-friendly, but safeguard both employers and employees from the possibility of abuse. We must take action now to help employees balance the demands of work and family lives. I believe that S. 4, the Family-Friendly Workplace Act, is an important first step in helping our nation's working parents do just that.

Senator DEWINE. Thank you, Senator Enzi.

Senator Kennedy?

Senator KENNEDY. Thank you very much.

We welcome you, Senator Hutchison, and thank you for taking the interest in this particular proposal and for making the presentation today.

I will just say at the outset that I think we have a real opportunity—I appreciate Senator Enzi's discussion about what is happening out in the work force. I do not think there is any question

that workers are being squeezed. We all read about how the roof is coming off on Wall Street, but it is not coming off on Main Street. That is why we fought for an increase in the minimum wage, even though there was a substantial group in the Senate who were opposed to it. That is why we have tried to make sure that workers, even part-time workers, will be able to participate in health care and health insurance and pensions. But that is another issue for another time.

We have a real opportunity to do something for families by extending the Family and Medical Leave Program. We will have the introduction of that program by Senator Dodd, who was the principal author of it, but we have a real opportunity to do something for families. That includes 13 million workers. It is working for companies of 50 or more employees. The commission, which is bipartisan, said that. We could pass that very, very quickly, and it would permit 13 million Americans to be able to take some time off when a child is sick or in the case of the adoption of a child or a serious illness in the family.

The President has talked about the 24-hour provision in addition, for parent-teacher meetings or for medical appointments. We could build on something that would make a major difference in terms of families. We cut that off at 50 employees—only half of the work force is affected—so we could do something there.

So I would hope that as we are looking at how to really try to help and assist family members, we will also consider those.

I must say with all respect that I draw the conclusion that this proposal provides flexibility for the employer, not for the employee. It is flexibility for the employer. Many of the things that you have identified, like being able to take an hour or two on a Friday and being able to make up the time on Monday, they can do now under the 40-hour week. They can do that now. You will hear testimony from workers at TRW where they work 10 hours, 4 days a week. You can do that now.

So there is flexibility within the system. What we basically established, and it was good 40 years ago, was that we are not going to have mothers in this case working 15 to 18 hours a day at the discretion of the employer; and we are not going to go back to the time of extraordinary exploitation of workers. Maybe that was old and bizarre at that time, but I think it is untenable even today, quite frankly. And you do not have the protections. The idea that you are saying that, well, they just want to take off on Friday and come back on Monday—they have to get a certification that it is not going to interrupt the production and so on. This is right back in the hands of the employer. They do not have that flexibility guaranteed. They do not have it guaranteed.

And when you have the Department of Labor today saying there is not adequate protection for people at the lowest level of the economic ladder, in the sweatshops, in garment factories, which has just been exposed all over this Nation, and when in at least half of those conditions, people are not even today able to get the adequate minimum wage or other protections, to just say, well, we are going to give them one more responsibility, and those nice employers who are exploiting those workers in those places, we are sure are going to do the right thing. We are not going to give you any

more inspectors to go out there—as a matter of fact, last year, when we were looking for more inspectors here in the budget resolution, we could not get any more inspectors. And there is nothing in your proposal that says you are going to request additional funding to make sure there will not be that exploitation.

So it just seems to me, Senator Hutchison, that I would like to give American workers what we have, Federal employees, on health insurance. It is so interesting when you say, well, the Federal employees have flextime, and we want to do the same for them on flextime. Well, we have Federal insurance, too, for 10 million. Tell those workers back home in this country about the kind of coverage that we have and only pay $111 a month as a premium.

The fact is that Federal employees have paid vacations and other benefits, all of which have been worked out as a result, in many instances, of unions for the Federal employees. So to suddenly say that they have flextime, and we want to do it for the neediest workers out there in these sweatshops is a big jump, I think, quite frankly, Senator Hutchison. And I just hope that as we go through this, we will be able to find out who is really getting the benefit of this, whether it is just going to be the employers, which is the way I read it—maximum flexibility for the employers so that these employees are going to do their bidding and minimum in terms of the employees.

The other point I just want to mention, because I know we have to move along, is that as I understand it, the question of exempting on collective bargaining agreements applies only to 9(a) of the National Labor Relations Act, so therefore, the railroads, airlines and construction are not covered and would be preempted under your provisions in any event. That is a particular detail, and I am not interested in trying to flyspeck today.

I might submit some other general questions so that we can begin the debate and discussion.

I want to thank you very much. I have great respect for you, and I know you have thought about this and given it a lot of attention, and I am grateful to you for taking the time and being willing to testify on this matter because it is a matter of importance. We are always grateful to hear from you and value very much your representations here.

Senator DEWINE. Senator Jeffords?

Senator HUTCHISON. If I could just respond briefly.

Senator DEWINE. Yes, of course.

The CHAIRMAN. I would be happy to let you respond on my time.

Senator HUTCHISON. Thank you. First of all, I want to correct one thing that the Senator said, and that is that under the Fair Labor Standards Act, an hourly employee cannot work 10 hours, 4 days, and then take the following Friday off of the next week—that is the problem—or 9 hours for 2 weeks and have every other Friday off as a Federal employee can. That is the flexibility that we are seeking. And if you believe that every worker should have the same rights as Federal employees, let us take the first step and give them this flextime, and let us see if it works. It does not cost anything, and it is voluntary, and we do have heavy penalties for people to be able to exercise their rights if their rights are violated.

We use the same standard in our bill as the Family and Medical Leave Act does with regard to disruption of the work, so I think we are doing everything we can to accommodate concerns. I believe that we are protecting the union interests if there is collective bargaining, but mostly we are addressing a reality, which is that 75 percent of the mothers of school-age children of this country are working. And if we can provide a little more flexibility that is totally voluntary for employers and employees, and we do everything on earth to show that it is completely voluntary, and if you believe that people are trying to do what is best in our country with employers and employees and that we have protection for those employers who would violate those parameters, then I think we need to open up and see if it works. And if there are abuses, there are remedies, and that is what we have provided for, and if the abuses abound, then let us address it again—but why not try something that would be a release valve for these pressured working parents to allow them to have the income stream that they need, but also to have the flexibility if they are able to sit down with their employers and ask for that flexibility that we give them that safety valve.

Senator DEWINE. Senator Jeffords?

The CHAIRMAN. I would like to say, Mr. Chairman, that as the chairman of the full committee, my hope this year is that when the Republicans introduce a bill, it does not automatically become a bad bill against the workers. I am a cosponsor of this legislation, and I would hope that we could work together, especially on the Medical Family Relief Act, of which I was one of the original sponsors, to see whether or not these bills can be combined, because our hope here is to get us into looking at the modern world, the modern workplace, all the problems it has, and to find ways to make it more friendly for both employers and employees. I think Senator Hutchison did a marvelous job of explaining that aspect of it.

I am going to take a kind look at the Democrat's proposal for family and medical leave and hope that we can sit down and work out a bill that will be very favorable in all respects to employers and employees.

Thank you, Mr. Chairman.

Senator DEWINE. I am going to take the remainder of my 5 minutes which I did not use to ask a couple of questions, Senator Hutchison.

Isn't it true when we are talking about the flexible work week—you were talking about the 80 hours—isn't it true that you do not even get to that unless there is an initial agreement between an employee and an employer? If the employee does not want to be involved in that, the status quo of the law today prevails; isn't that right?

Senator HUTCHISON. That is right.

Senator DEWINE. And isn't it true that all your bill does is allow the employer and employee to do something that, if they both want to do it, Federal law currently prohibits them from entering into a voluntary agreement to do?

Senator HUTCHISON. Mr. Chairman, I am glad that you emphasize that point because I think that that does put it in perspective. In most instances when I have talked about this bill, people have

said, "What? Do you mean an employer and an employee cannot do this now?" I mean, this is common sense which is out there on the other side of the beltway, but somehow is not as prevalent here inside the beltway.

So I am glad you ask that question because it is absolutely true—the law today prevails if the employee wants it to prevail.

Senator DEWINE. So in the example that has been given, if you go to a 50-hour work week, a 50 and a 30, you would only go to a 50 and a 30 if both parties prior to that had agreed that that was what was going to happen.

Senator HUTCHISON. That is right, and if both parties do not agree, then the employee has the absolute right to say: I worked 50 hours; I get time and a half overtime.

Senator DEWINE. Senator Dodd?

Senator DODD. Thank you, Mr. Chairman. I do not want to hold it up, and I gather Senator Kennedy raised the issue of the Family and Medical Leave Act.

Senator DEWINE. Very eloquently, yes.

Senator DODD. There are a couple of bills—one which I have offered which would lower that threshold from 50 to 25. We had a bipartisan commission, that spent 2 years on it—a very good commission, by the way, and people really worked very hard on it. They did surveys of employers and employees. I was quite stunned by the results because I would have assumed at the outset, given the difficulty of an employer having to accommodate a new law, that you would anticipate some problems with it.

In fact, the surveys came back—and I will put this in the record, Mr. Chairman, because I think I am right—about 96 percent of the employers indicated no difficulty whatsoever at all with the law, which surprised me, frankly. I would have expected a lower number given the fact that, as I say, it was a new law and the awkwardness of accommodating that into the workplace.

On the basis of that—just for historical purposes, we originally offered the definition of small business as 25 and then raised it to 50 as part of a compromise when the bill was passed. Frankly, we had the votes to put it at 25 when we passed the bill in 1993, but I had made a commitment to Dan Coats, Kit Bond and Arlen Specter, all of whom were tremendously helpful on this legislation, and I felt I should stick with the commitment we had made, so I left it at 50 even though we had the votes to move it to 25 in 1993. Four years ago today, in fact, that became the law of the land.

So I would like to have my colleagues consider bringing it down. It would pick up 13 million additional employees in this country who are presently not covered. I must say, Mr. Chairman, particularly in the smaller business, I have less concern, because where people know each other, they are more inclined to accommodate the needs of people than they are in larger facilities. But as we all know, there are examples where that does not happen, and the pain incurred by families when they are unable to make a choice between their family needs and the workplace.

I would point out that Senator Murray will also be proposing an idea that would not expand the time at all, but would add the academic setting. This is something that has attracted a lot of attention with PTAs, nationally, and so forth, and I presume it is a mat-

ter that we are going to want to discuss. I am sure our colleague from Texas has some sympathies with this and may even have some ideas where parents want to spend more time, and we all understand the value of parents spending some time, at a school when the need arises, 24 hours, it would be a part of that. And as I say, I am sure there will be some controversy associated with it. But I must say there is a lot of merit in the idea of providing working parents the opportunity during the academic year with full notice, a month's notice in advance to the employer, to get a 24-hour period where they would be involved as a teacher aide, for PTA meetings, or available for parent-teacher counseling and so forth with regard to their children.

I would just raise those issues for any comment you may want to make, Kay—and you may have already done so, and if so, I can read your comments later. I appreciate, Mr. Chairman, the opportunity to express those points.

Senator HUTCHISON. Well, I would just say that I think this bill is really a stand-alone from yours, and I do not think they necessarily need to be mixed, although the chairman of the committee has said they might be looked at as a package.

Nevertheless, this one has no minimum number of employees; it will affect anyone. It is just voluntary across the board, and it allows one more option for the parent who is an hourly employee to be able to ask the employer for some flexibility, either in time in lieu of overtime pay, time and a half time, time and a half pay, or in working flextime over an 80-hour, 2-week period if it is acceptable to the employer and if the employee asks for it.

I think these options can do nothing but add to the ability of families to have a relief valve from the stress of having two parents working. I certainly think that looking at your bill is something that everyone should do, but I do not think it is mutually exclusive in any way to this bill passing, and I think we can find some common ground on a bipartisan basis for allowing these kinds of options that Federal employees now have and that have worked very well, and that many State Government employees are now able to do. It has worked, and it is just time for the private sector to catch up.

Senator DODD. Thank you, Mr. Chairman.

I have been notified by staff, to protect Senator Coats and myself, that Family and Medical Leave is under the jurisdiction of family.

Senator DEWINE. That is absolutely correct.

Senator DODD. Thank you, staff.

Senator DEWINE. Senator Wellstone?

Senator WELLSTONE. Senator Hutchison, I want to let you go, but I have just two very quick final points. I really appreciate your emphasis on families and work, and I thank you for being here. I think you have done just a superb job. I should have at the very beginning said "Welcome," but after hearing you, I think you have been very impressive.

I think the concern that we have—there are a number of concerns, but just speaking for myself—is this whole question of voluntary and what it actually means in the reality of the workplace. In theory, people could voluntarily agree to $2.50 an hour for a

minimum wage, but we have minimum wage protection, and that is what this Fair Labor Standards Act is about. So I think we are going to have to really zero in on that and let us see.

Senator HUTCHISON. From the line of your questions, Mr. Wellstone, I understand exactly what you are trying to prevent, and if you will look at our bill, and if there are other things that you think we can do to make sure that it is truly voluntary for the employee, let us work together, because I think this is an added option, and it takes nothing away, and that is exactly what we intend for it to do. And if we can meet your standards, then I hope you will work with us, and I still hope you will sign on and be a cosponsor.

Senator WELLSTONE. Thank you, Senator.

Senator DEWINE. On that happy note, we will conclude.

Senator Hutchison, thank you very much.

Senator HUTCHISON. Thank you.

Senator DEWINE. I will now ask the second panel to come up, and I will introduce you as you are coming up.

The first witness on the second panel will be Sandra Boyd, who is assistant general counsel to the Labor Policy Association. She also chairs the Flexible Employment Compensation and Scheduling Coalition, lectures frequently and has authored numerous articles and books.

Our second witness is Mr. Michael Losey, who is president and CEO of the Society for Human Resource Management. Mr. Losey has over 28 years of management and executive-level experience and is a frequent speaker, author and spokesperson on human resource issues.

Our third witness is Sallie Larsen, who is vice president of human resources and communications at TRW Systems Integration Group in Fairfax, VA. She has over 20 years of management experience with TRW.

Our fourth witness on this panel is Christine Korzendorfer, who is an executive assistant for TRW Systems Integration Group's Proposal Operations. She is a working mother and has offered to share her thoughts and concerns about flexible work options.

We will start with Sandra Boyd. I will ask the panelists to try to keep your comments to 5 minutes. That will give us the opportunity to have some good questions, we hope. Thank you.

Ms. Boyd?

STATEMENTS OF SANDRA J. BOYD, ASSISTANT GENERAL COUNSEL, LABOR POLICY ASSOCIATION, AND CHAIRMAN, FLEXIBLE EMPLOYMENT COMPENSATION AND SCHEDULING COALITION, WASHINGTON, DC; MICHAEL R. LOSEY, PRESIDENT AND CHIEF EXECUTIVE OFFICER, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, ALEXANDRIA, VA; SALLIE LARSEN, VICE PRESIDENT OF HUMAN RESOURCES AND COMMUNICATIONS, TRW SYSTEMS INTEGRATION GROUP, FAIRFAX, VA; AND CHRISTINE KORZENDORFER, ADMINISTRATIVE ASSISTANT, PROPOSAL OPERATIONS, TRW SYSTEMS INTEGRATION GROUP, FAIRFAX, VA

Ms. BOYD. Thank you. First of all, let me say that my interest in workplace flexibility is not just a hypothetical; it is very personal as well. I appear before you not only as an attorney but as a wife and mother of two young children, and I can personally attest to the benefits of being able to work in an environment that permits flexibility.

My current job allows me to not only fulfill my job responsibilities but to volunteer at my son's school, go with my daughter on field trips, take care of the kids, go to the doctor and all the other responsibilities that go along with being a parent. Most days, at least, I feel like I do a fairly good job at striking that very delicate balance, but I am mindful, however, that my ability to have this kind of flexibility is in large measure because I am a professional employee, and I am exempt from the overtime provisions of the Fair Labor Standards Act.

Employers, as you will hear, have far fewer options available to their nonexempt work force because of the restrictions in the FLSA.

The FLECS Coalition, which I am also here representing, is dedicated to modernizing the Fair Labor Standards Act to provide employees greater workplace flexibility. In short, we believe employers and employees ought to be able to reach agreements on flexible schedules beyond the standard 40-hour work week and to bank compensatory time in lieu of cash overtime where such arrangements are mutually beneficial. Salary basis reform for white collar employees would also increase flexibility options.

Contrary to what you may hear, employers interested in true workplace flexibility are not trying to save money or avoid overtime pay. Real workplace flexibility works only when employers and employees can reach mutually beneficial arrangements. Choice is key.

The employers I represent know that providing flexibility in the workplace is a win-win. For employees, it means more control and an ability to strike that balance between work and personal demands. For employers, increased workplace flexibility has bottom line benefits as well, such as increased employee retention and productivity gains.

As a recent Ford Foundation study concluded: Restructuring, the way work gets done to address work-family integration and lead to positive win-win results—a more responsive work environment that takes employees' needs into account and yields significant bottom line results.

While many companies have implemented creative workplace programs, they are limited in what they can do because of the restrictions in the Fair Labor Standards Act.

The FLSA is an obstacle to workplace flexibility because while it provides some fundamentally important employee protections, with which we do not disagree, it is rigid in many respects.

The FLSA requires that all overtime-eligible employees—and that is most of the work force—be paid at least the minimum wage and receive cash overtime for hours worked in excess of 40 in a work week. This is the case even if the employee would prefer, for example, to bank that overtime in the form of comp time or flex the schedule beyond the work week.

An employee cannot waive his rights under the FLSA under any circumstances, not even through collective bargaining. An employer faced with a request by an employee to trade hours between work weeks or bank overtime is faced with this untenable choice—be in compliance with the FLSA and say "no," or say "yes," be flexible, be employee-friendly, and expose your company to liability.

The 40-hour work week and time and a half overtime penalty provisions were devised in 1938 in large measure as a penalty to encourage employers to hire more employees. Needless to say, some 60 years later, the needs of many in the work force have changed since that period of time, and it is questionable whether this rigidity without alternatives really meets all of those changing needs.

As the chairman referred to before, a recent poll done by Penn and Schoen for the Employment Policy Foundation indicated that 89 percent of all workers want more flexibility, either through flexible scheduling or through the choice of compensatory time.

The results of the Penn and Schoen poll are certainly consistent with what FLECS members are hearing from their employees. Polling data aside, even if only a small minority of employees wanted more flexible scheduling or comp time off, then through their collective bargaining representative or individually, if they are not represented, they ought to be able to make those kinds of agreements.

In conclusion, let me commend the subcommittee for addressing this subject. It is very important to many workers' lives. While finding solutions to the needs of employers and employees seeking to increase workplace flexibility will not be easy, we believe that beginning the dialogue on this issue is a necessary first step. Lifting the current roadblocks in the FLSA to provide employers and employees more options, such as flexing the work week, banking comp time and salary basis reform, is a critical first step. Ensuring that employers and employees be permitted to voluntarily choose those options is critical.

Employers know that flexibility works, but only when it is chosen freely by both parties. For those employees who receive cash overtime and want to do so within the current FLSA framework, that choice must be honored.

A cautionary note is in order, however. The solutions to workplace flexibility must not be more complicated than the problem itself. The solution is too complex, and the requirements are too burdensome; employers will not offer it, and we will not have advanced the cause of workplace flexibility. On the other hand, employee protections must be in place.

The challenge is to strike a balance and develop legislation that the average small business owner can easily implement if they choose, and employees can understand. We believe this challenge can be met, and we look forward to working with all members of the subcommittee on this very important issue.

Thank you, Mr. Chairman.

Senator DEWINE. Ms. Boyd, thank you very much.

[The prepared statement of Ms. Boyd may be found in the appendix.]

Senator DEWINE. Mr. Losey?

Mr. LOSEY. Mr. Chairman, members of the subcommittee, good morning. I am Mike Losey, president and CEO of the Society for

Human Resource Management. This is a professional society, and it is the leading voice of the human resource profession in our Nation, representing over 80,000 professional and student members in over 430 chapters in many, many communities in our Nation.

I remind the committee, however, that these are individual members. We do not permit employers to join.

Thank you for the opportunity to share my experience as well as the experience of SHRM members from companies of all sizes and all industries. These people are virtually unanimous in the opinion of expressing a strong desire to update the Fair Labor Standards Act and update it to reflect the realities of today's work force.

Enacted, of course, in 1938, it is one of the Nation's oldest labor laws and has remained essentially unchanged since it has been established. It has, however, served our Nation and our employees well. However, to ensure its continued contribution to our global effectiveness, we must recognize that FLSA is outdated and in some cases even unfriendly to our Nation's businesses and their employees.

When the Fair Labor Standards Act was passed, as has already been highlighted by my fellow panelists, it was clearly Depression recovery-directed legislation. The unemployment rate was 19 percent when your predecessors debated this law almost 60 years ago. The emphasis was on creating jobs. A 50 percent penalty was imposed on employers who worked employees beyond 40 hours.

However, I will remind everyone that in 5 years, World War II brought the unemployment rate to the lowest of this century, to 1.2 percent. Subsequently, employers began providing health insurance, pension plans, and many other employee benefits, including better practices, in an attempt to recruit and retain needed workers.

And much more has changed. In 1938, fewer than 16 percent of married women worked outside the home. Today, we all know it is over 60 percent. And according to the U.S. Department of Labor Women's Bureau, and I quote: "Women are not only more likely to work outside the home today than in the past, but they also spend more time at work than did women in earlier years."

Today, employers are faced with growing national and international competitive requirements. They have got to attract the best in employees as well as attempt to moderate and control their expenses.

Despite wide-ranging and successful efforts by employers to increase our global competitiveness, employers have been limited because of the constraints by FLSA. We need your help to remove some of these obstacles, and we believe this can be done in a manner which truly provides flexible options for employees without adversely impacting their interests.

One example that we have already talked about is the FLSA as it relates to compensatory time off for private sector employees. We are pleased that the Senate is working to address this issue through the introduction of Senate bill 4, the Family Friendly Workplace Act. While public sector employers are permitted to allow employees to bank compensatory time off in lieu of overtime pay, private sector employees do not have this option. In fact, as

has been stated this morning, it is specifically prohibited, notwithstanding the apparent satisfactory experience in the public sector.

Many employees today value and, I would argue, in some cases actually need, time off more than cash as they struggle to balance work and family demands. A 1995 U.S. Department of Labor Women's Bureau survey found that the top concern of working women is flexible scheduling in the workplace.

But of equal importance is to note that much of the U.S. economic growth is with small and medium-sized firms. These smaller firms may have cyclical or irregular workloads and customer demands. Although you can anticipate in our membership, our members come from the largest of companies, given our breadth, they also represent the smaller companies, and in fact over 56 percent of our members are from companies with less than 1,000 people and 44 percent are from companies with less than 500 people. These companies need flexibility.

If these companies had the opportunity to work with employees and offer compensatory time in lieu of cash for overtime, layoffs during slow periods could be reduced, thereby promoting improved job security and a more constant income level for the employee. Employers would have more control over their costs in this kind of situation without disadvantaging any employee. And if this happens, I predict there will be less employer reluctance to extend full-time employment opportunities, and I know that that is an objective we all seek.

I want to emphasize, however, that SHRM also strongly feels—and supports what has been said here already today—that protections must be in place to ensure that the employees are not coerced into choosing compensatory time instead of overtime when it is not their preference.

SHRM has also long supported allowing employers to adopt a pay period of greater than 1 week and only be required to provide overtime compensation for hours worked in excess of an overage of 40 hours during that period per week. Therefore, we commend Senator Ashcroft for demonstrating his commitment to providing flexibility to employees by including provisions in S. 4 which would allow employers and employees to establish work periods of 80 hours over a 2-week period.

In conclusion, SHRM applauds Senator Ashcroft and you, Mr. Chairman, the members of the committee, and the Senate leadership for embracing a commitment to update the Fair Labor Standards Act for the 21st century. Representing human resource professionals who will be implementing these employee-friendly measures and offering them to employees, we look forward to working closely with Senator Ashcroft, the members of this committee and their staff to ensure that balanced, easy-to-use and easy-to-administer legislation is achieved as it progresses through the legislative process.

Thank you very much for your time.

Senator DEWINE. Mr. Losey, thank you very much.

[The prepared statement of Mr. Losey may be found in the appendix.]

Senator DEWINE. Ms. Larsen?

Ms. LARSEN. Thank you. Good morning, Mr. Chairman and members of the subcommittee. I am Sallie Larsen, vice president of human resources for TRW Systems Integration Group.

I would like to tell you today about a young Purdue University graduate who returned to her home State of California to look for her first job. She was single and unemployed. At the time, she had three main requirements for a job: fair pay, interesting work, and of course, an office location near the beach. Her main requirements were obviously in reverse priority order.

Twenty years later, this graduate is a young woman with management experience. She has a working spouse and three children under the age of 7. Two of the children are in elementary school, and two of them play soccer. She still has three main requirements for her job: fair pay, interesting work, and of course, job flexibility. She had to give up on that office location near the beach.

This woman is just one of the many employees at TRW who now place job flexibility at the top of their priority list. I am pleased to be able to talk to the subcommittee about many of the employees at TRW where we find that we have had to implement aggressive and innovative human resources policies over the last 20 years. I would also like to share with you some of our concerns.

TRW is a global manufacturing and service company headquartered in Ohio. We have both space and defense and automotive services, and we employ 64,000 employees in 24 countries.

My group is the Systems Integration Group. We are a high-technology provider of systems and services to civil, Federal, and international customers, as well as State and local governments.

For the past 10 years, I have been part of the management team that has been charged with three main constituents that we have to serve—customers, employees and shareholders. As our chairman and CEO, Joe Gorman, has said, it is our job to "delight" these three constituents.

The objective is to use our employees, by having them be "delighted" as the way that we will then be able to delight our customers and shareholders.

We believe our partnership with our employees is very serious. This partnership is demonstrated by TRW's long history of pioneering successful human resource policies and practices. In 1980, we implemented for the first time, flextime, and we were one of the first companies to do that.

Flextime, which is different than comp time, is allowing employees to start and end around a flexible schedule around a core set of hours. This was implemented within the regulations of the Fair Labor Standards Act. At the time, the work force was delighted with this flexibility.

Over the years, however, the bar has been raised on what "delights" versus what "satisfies" our employees. They are highly educated, they now have dual-career families, they have a diverse work force, we have long commutes, we have people who want to exercise, volunteer, pursue their educational degrees. This list could go on, and it does.

What we have found is that it is critical for us to work with our employees to maintain an opportunity for them to balance their personal and professional lives.

In today's competitive market, we have found another reason to look at raising the bar on what delights our employees. To compete with hundreds of other companies in the Silicon Valley, which I am sure you have heard about, where the want ads far exceed the regular newspaper, we are competing with other companies around how to find and attract high-caliber employees.

When looking at flexible policies and programs that we could implement, we turn to our employees and management and ask them what would they want. Again, workplace flexibility was at the top of the list.

We implemented what is called a "9/80" for all employees at 14 locations in 7 States. A California employee recently shared with me how happy he was that he was able to take every other Friday off to finally be a Boy Scout leader for his son's troop. This is an hourly employee.

I am sorry that Senator Kennedy is not here, because he was wondering how we were able to achieve this without self-exempting ourselves from the Fair Labor Standards Act. We did what we call a "work around," working around the barriers of the Act yet still being in compliance. What we did was we went into our systems, and we moved our work week to end in the first week of the pay period on Friday at noon. That means that employees could work their 40 hours within the first pay period and then work the rest of their 40 hours in the second half of the work week. Employees could choose to stay on the standard 5-day, 8-hour week if they wanted to.

Where are we today? Management and employees are delighted. Since implementation of our "9/80," our attrition rate has dropped from 24 to 12 percent—over one-half. In a recent employee survey in one of our units, 93 percent of the employees said that they would prefer to stay on a "9/80" schedule, and 83 percent of the employees said this was a key factor in their decision to stay with TRW.

Imagine the benefits. On the "9/80" schedule, employees could get up to 26 3-day weekends a year.

Based on the flexibility of this and other programs, we went into our assessment mode and looked at what else we could do for our work force to again achieve employee delight. In our business unit, we have a compelling business need to better understand our employee work habits. We decided to implement the professional work schedule last year, which allows our exempt salaried employees a 2-week pay period for job flexing with their supervisors' approval.

For example, an employee in my organization could flex by taking afternoons off when she has a night class to study for her master's degree in human resources. She is able to make up those hours in the 2-week pay period.

Again, employee delight is measurable. At brown bag lunches and open forums, my boss has asked employees, How do you feel about this—have you taken advantage of the flexible work schedule—and over two-thirds of the employees raise their hands.

Unfortunately, while the professional work schedule helps our salaried employees with 2-week job flexing, partial-day time off and additional time off, we are unable to offer this benefit to our hourly employees. These employees, when I go to employee meetings and

we talk about their concerns and issues around workplace flexibility, are amazed to learn that it is a 60-year-old law that keeps them from being full members of our team. Their most common complaint to me is: Why do you treat me as a second-class citizen? I try to explain to them that it is not TRW that treats them as a second-class citizen, but that it is the law.

When I evaluate these and other workplace flexibility programs for our employees, I confess that the "me" factor does play a part. I joined the company 20 years ago, right out of college. I now have a spouse who works for the Federal Government. So I have seen first-hand that workplace flexibility and hourly leave do have a positive effect on our parenting responsibilities.

I have three children. Two are in elementary school, and two play soccer. Bill coaches the soccer teams, and I am a soccer mom. We also worry about when our 3-year-old, Jared, starts school and after-school activities, and we both have parents who are reaching their late seventies, and we worry about eldercare issues.

As you may have guessed, I am that Purdue graduate who started with TRW some 20 years ago. Do I want a company that offers fair pay, interesting work and workplace flexibility? Definitely, yes. To the limits of the current law, TRW has been able to provide all three. I would like, personally and professionally, to be able to do more.

I want to thank the committee for your efforts to look at the reform of the Fair Labor Standards Act in order to promote more workplace flexibility.

I want to thank you for giving me this opportunity to tell TRW's story as well as mine. I would also like to acknowledge that my daughter Kelsey is here today to see how Congress is working to solve our problems together for this workplace as well as the workplace of the future.

Thank you.

Senator DEWINE. Thank you, Ms. Larsen.

[The prepared statement of Ms. Larsen may be found in the appendix.]

Senator DEWINE. Ms. Korzendorfer?

Ms. KORZENDORFER. Good morning, Mr. Chairman and members of the subcommittee. My name is Christine Korzendorfer, and I am an executive assistant for TRW's Systems Integration Group's Proposal Operations. I provide administrative support to all levels of senior management, including daily interaction with division and operations-level staff. I am an hourly employee.

Thank you for inviting me here today to share my views about legislation that may permit more flexible work schedules. I support any changes in laws that will help workers better manage their personal and professional lives. However, I am particularly interested in the idea that if current law is changed, as an hourly employee, I may have a choice of taking comp time in lieu of paid overtime.

I am the mother of a 14-year-old daughter, Jennifer, who is with me today, and a 2-year-old son. My husband is self-employed, and he works 7 days a week, very long hours. Because of his schedule, I am very responsible for running the household and for the well-being of my children. I take them to the doctor, I go to their par-

ent-teacher conferences, and I am getting my daughter prepared to enter high school.

Because I work in TRW's Proposal Operations, I am on-call 24 hours a day. This means I could be working in the office up to 15 hours a day or, if I am not actually in the office, I am on-call via a beeper in case someone needs to contact me.

My days are very long and stressful, but yet very rewarding. This schedule provides me with a lot of overtime pay, and this pay is important to me—however, the time with my family is also very important. If I had a choice, there are times when I would prefer to take comp time in lieu of overtime. What makes this idea appealing is that I would be able to choose which option suits my family best.

Just recently, my son was ill, and I had to stay home with him. I took a day of vacation, which I would have preferred to use on vacation with my family. I did not want to take unpaid leave. On the day he was ill, I had already banked 22 hours of overtime. If I had had the choice, I would have used comp time in lieu of that overtime for that day off from work. Besides, I would have only had to use about 5½ hours of comp time to cover that 8-hour day.

I would like to share with you another example when compensatory time would have made a great difference in my family's life. Three years ago, I had a miscarriage, which caused me to lose 2 weeks from my job. Then, 4 months later, I became pregnant, not knowing that in my eighth month, I would be put to bed rest by my doctor. I subsequently delivered a wonderful, healthy baby boy.

To take the needed time off, I used all my vacation, my sick leave, my long-term sick and long-term disability leave. This combination of leave, however, did not cover my extended time off. From there, I went to the Family and Medical Leave Act. The net result is that I lost pay. However, if I had had a choice, I could have used banked comp time in conjunction with this time off without losing pay.

I am anticipating that when my daughter reaches high school, there will be more demands placed on me to support her activities and interests. This could include sports, other after-school activities and perhaps a job which may require my time. These demands will increase when my son reaches school age. Knowing that I could have a choice in how to use my overtime would allow me to better combine my family and work obligations—or maybe I would just want to take flextime if that were an option.

I appreciate the time you have given me to share my opinions about comp time and flextime scheduling. I think that giving employers the opportunity to offer their employees flexible work schedules to help them meet work and family commitments will increase worker satisfaction and productivity.

I would like to add something that is not written in my statement. I am happily pregnant again, due in August, and my doctor has advised me that I could be put to bed rest again. Please pass your legislation as soon as possible so that I can use my comp time to cover my leave of absence.

Thank you.

Senator DEWINE. Thank you very much.

Ms. Boyd and Mr. Losey, I wonder if either of you has looked at the use of comp time and flexibility that public employees have. We now have a few years of experience in that area. How has that worked?

Ms. BOYD. I can tell you that in State and local governments which have been able to use comp time since 1985, I think the evidence is that it works very well. People are very comfortable with it, they know how to use it, and they use it frequently.

It is interesting if you look at the number of cases that have been brought by employees or by unions regarding the use of comp time, they are very, very few and far between, which suggests to me that in fact employers and employees can work out these arrangements very well.

Mr. LOSEY. I would second that. It is somewhat surprising that we have second-guessing in regard to how this concept will work given the fact that it has existed since 1978, and also an environment where the union membership is substantially greater than it is in the private sector, around a 40 percent penetration rate. So labor is——

Senator DEWINE. Forty percent in the——

Mr. LOSEY. In the public sector versus the private sector, which is about 11 percent.

Senator DEWINE. What about the coercive factor? There has been the allegation, and additional witnesses will talk about that concern.

Mr. LOSEY. Our position as I stated is that there should be no coercion. It simply will not work.

Senator DEWINE. But what does experience tell you in the public sector, though?

Mr. LOSEY. In the public sector, I do not know of bad experience in that area, including the historical reluctance of labor for this type of issue.

Senator DEWINE. Ms. Boyd?

Ms. BOYD. There are very, very few cases regarding coercion or when people have the ability to take their comp time or flex time in the public sector, which suggests to me that it is working well.

Senator DEWINE. Ms. Larsen, you talked about the sort of double-standard or dual system between exempt and nonexempt employees. Does that create any morale problems or questions? You related some questions that you have heard that have been raised.

Ms. LARSEN. Definitely. In our workplace, we work in teams for the most part, an as Christine noted, she is part of the Proposal Operations team. So you have groups of employees going in, working long hours to win a piece of new business for the company, and a certain class of employees could use the advantages of the professional work schedule to perhaps have approved time off later with their supervisors' approval. Currently, our nonexempt hourly employees do not have that option. That is where a lot of the misunderstandings come about "Why me?" They take exception to that fact since they consider themselves professional employees at their jobs.

Senator DEWINE. These would both be members of the same "team"?

Ms. LARSEN. Right. They are putting together a proposal to win new work on a new software system. They would be working as Christine does to get the proposal written, to get it edited, to get it out the door—they are all there for all those hours, eating all that pizza.

Senator DEWINE. OK. You talked, Ms. Larsen, about what TRW has done in regard to flextime or the flexible week. I guess a question that I would have as I was listening to the testimony is, well, if it is that simple to do, what is the problem? I mean, if you can do that now, what is the problem—or is it that simple?

Ms. LARSEN. Well, that is exactly the answer. The testimony made it look like it was done with mirrors, but it really requires a lot of hard work. To implement the professional work schedule, we worked over a year. We had to put in a complete new payroll system and time-tracking system to accommodate those schedules. Similarly with our "9/80," to Senator Kennedy's question, we had to then go in and revamp what was seen as the normal work week, which ends on Friday at the end of the day, and we moved that up to Friday noon in terms of our systems capability.

So there is a lot of behind-the-scenes work, and it costly.

Senator DEWINE. You are maintaining a dual system, basically.

Ms. LARSEN. Absolutely.

Senator DEWINE. And of course, I would assume that that is a hurdle that certainly smaller companies would not be as likely to want to go over, and maybe some big companies would not want to as well. That is a hurdle.

Ms. LARSEN. Well, what we did was to look at what was the cost of implementing both in management time and in employee time in the implementation phase versus what we would get out of it by achieving our employee delight factor.

Senator DEWINE. OK. Senator Wellstone?

Senator WELLSTONE. Thank you, Mr. Chairman.

I have just a couple of questions, but first a quick response to the experience in the public sector. I think somewhere around 40 percent of the public sector work force is unionized, which gives them bargaining power, which gives them protection vis-a-vis abuses that could take place, whereas I think in the private sector, it is about 12 percent. I think that is not an unimportant statistic or an unimportant context to consider here.

Mr. Chairman, I wonder if I could just have included in the record—I have been looking at some of the coalition members of the Flexible Employment Compensation and Scheduling Coalition, and I note they include the Labor Policy Association, the National Association of Manufacturers, the National Federation of Independent Business, the National Restaurant Association. The reason I mention this is because I think all of these organizations and some others listed here were strongly on record as opposed to raising the minimum wage—as long as we are talking about what benefits workers and families. And I am going to do my own research to see where people stood on the Family and Medical Leave Act.

So if I could ask unanimous consent that this be included in the record.

Senator DEWINE. Without objection.

Senator WELLSTONE. I thank the chair.

[Information referred to was not received by press time.]

Senator WELLSTONE. Ms. Boyd——

Senator DEWINE. If I could—I cannot resist this, Paul—are we going to get into what every witness thinks about every public policy issue? I suppose we could do that.

Senator WELLSTONE. No, Mr. Chairman, but when we are talking about fair labor standards, we are talking about wages and working conditions, and we are talking about amending it——

Senator DEWINE. I understand.

Senator WELLSTONE [continuing]. So I thought this was relevant background material—not every issue, but just these issues which affect working families.

Senator DEWINE. I understand. Go ahead.

Senator WELLSTONE. I thank the chair.

Ms. BOYD. While we are clarifying things, let me be clear that the Labor Policy Association took no position on the minimum wage increase.

Senator WELLSTONE. The Labor Policy Association took no position?

Ms. BOYD. That is right.

Senator WELLSTONE. OK, fine. That is good to know; I thank you, and I stand corrected.

I think the rest of my statement was accurate on the different organizations, and it is just interesting to have it on the record to see the different frameworks from which people are operating.

Ms. Boyd, you claim in your prepared statement that "real workplace flexibility works only when employers and employees can agree on mutually beneficial arrangements such as flexible scheduling"—and I emphasize this because I think you are absolutely right about this part of it. Choice is key.

But Senator Ashcroft's bill, which is what we are discussing, does not ensure that choice for employees. Instead, the employer can deny a worker's request to use comp time, even if that request is made months in advance, if the employer decides that granting the worker's request will "unduly disrupt the employer's operation." How does this language ensure the choice that you say is so important? I think this was the point that Senator Kennedy was trying to make earlier about who has the choice.

Ms. BOYD. First let me say that that standard, being able to take compensatory time with reasonable notice and unless it is unduly disruptive, is exactly the same standard that State and local governments have used since 1985 and which I believe has been the subject of fewer than a dozen reported cases, which again suggests to me that employees and employers can work these things out.

I do believe that employee choice is preserved. I think the choice that Senator Kennedy was asking about was would people truly have the choice whether to continue to receive their overtime in cash or to bank it in comp time, and I absolutely believe that that is preserved in S. 4.

I also think with respect to when people take the time for comp time that that is something that employers and employees can work out. And if you are an accounting firm and you have a lot of nonexempt employees, you could give somebody a year's notice, and the first 2 weeks of April is probably never a good time to take off.

So it is something that employers and employees can and are able to work out together.

Senator WELLSTONE. Well—and there are so many good panelists here, and I do not want to use up all my time—but it seems to me that as a matter of fact, it is pretty clear in this bill that even if a worker makes a request, an employer can turn it down, and the experience you draw from is public sector with this operative language, and I think that that is comparing apples and oranges because in the public sector, well over 40 percent of the work force is unionized, and you have nowhere near that in the private sector, which gives those workers some power, which gives them some bargaining power, which gives them some protection, not to mention all the ways in which public sector is more public, and not to mention a whole host of other benefits that workers have which give them leverage.

So I again come back to this whole question of where are the real guarantees going to be if we are talking about doing away with the 40-hour work week.

Ms. BOYD. Well, I do not think we are talking about doing away with the 40-hour work week, just as a starting point. But second, from personal experience, I was a public sector employee—I worked for the DC. courts when I was in law school—and I was not represented by a union, and I made no money. But every time I worked overtime, I chose comp time because I knew I needed the time off during exams. That worked very well, and I believe that that will be and has been most people's experience in the public sector with comp time and that it can work equally as well in the private sector.

Senator WELLSTONE. Well, just for the record, in the Ashcroft bill—and there are different bills here—it is an 80-hour framework. And one more time—I am sorry to keep focusing on this point, and we may have to come back to this later—but your experience was that you worked in DC.—is that correct——

Ms. BOYD. Yes.

Senator WELLSTONE [continuing]. And you did not have a union representing you, but you had no problem; correct?

Ms. BOYD. Absolutely.

Senator WELLSTONE. OK. That is good. But as a matter of fact, I have had an opportunity to spend a good part of my adult life with wage-earners in many nonunion workplaces, and it is not always such a pleasant experience. And I would remind everyone here that there have been plenty of articles and plenty of exposes about plenty of the violations of some of the laws we have on the books right now guaranteeing workers a safe workplace and decent working conditions. There are whole industries where we have that problem right now. So I do not think we should be too abstract about this—quite apart from your own experience. And I understand your point, but I think——

Ms. BOYD. I am sorry—I absolutely agree that enforcement is key, that it is important and that those kinds of working conditions which you are speaking of should be treated accordingly. But I guess one question that I would have for you is whether we are going to continue to legislate to the lowest common denominator. Why not allow the TRWs of this country—which I believe are the

majority of kinds of employers that we have in small, medium, and large-sized businesses—why prevent what they are willing and able to do for their employees?

Senator WELLSTONE. I think that Ms. Larsen's testimony was fascinating, and in fact, I may want to get some written questions to you all if that is okay, because I think everybody here has had something important to say. They have been able to do that within the context of existing law.

The point that was made was yes, but we have got to go through some of these requirements and some of the paperwork. But I would like to note that you would have to make the same kinds of adjustments with this proposed change in the law. The only difference is that with the existing law, we pay people time and a half when they do overtime work. We have a 40-hour work week, we have a fair labor standard, and we live up to it.

Ms. BOYD. I believe Ms Larsen's point was also, though, that they could be doing a whole lot more; that they do what they can under the current law, but that it is difficult and that they could do a lot more.

Senator WELLSTONE. I thank the chair, and I thank the other panelists.

Senator DEWINE. Senator Enzi?

Senator ENZI. Mr. Chairman, it is a delight to have a panel with so much expertise as well as first-hand experience, actually working with the problem. I like that. And it will not be possible to cover in 5 minutes the questions that ought to be asked on this, so I will ask unanimous consent that I be able to address some questions in writing and have their responses put in the record as well.

Senator DEWINE. Without objection.

[Questions of Senator Enzi may be found in the appendix.]

Senator ENZI. Thank you.

I will change the subject slightly now. We talked a little bit about the Family and Medical Leave Act and its successes. Mr. Losey, would you say that this Act has been as successful as the administration has made it out to be? Is everything good with that Act?

Mr. LOSEY. No, Senator. I think it reflects a couple of things. One thing is the existing practices of enlightened employers. That existed prior to the passage of the Act; it has existed since then. I think another issue is a survey that was referenced by the Senator. This was conducted very, very soon after the regulations were issued. I remind the committee that this was a 13-page law that resulted in 300 pages of regulations.

Our experience and my personal experience, Senator, is that many employees still, even now, and certainly at the time of the survey did not understand their rights, and many employers did not, either.

Our feedback from our members—and we have constantly gone back and asked them to give us specific examples—two-thirds of them claim that they can point to almost daily problems with trying to administer within the law the Family and Medical Leave Act, particularly with intermittent leave. And I am not trying to be

humorous, but I think a lot of people who say it is no problem are not operating within the law.

Senator ENZI. Thank you. I am also concerned a little bit with the impression that people have that the Family and Medical Leave Act only requires unpaid leave from work. Can you give me some comments on that?

Mr. LOSEY. Well, that is really not the case because a substantial portion of the leave given in many companies' practices is paid; I think it is more than half.

Also as we know, in other cases, companies have historically provided in demanding situations—because these are employees, and employees are not the enemy—accommodations for serious illness, disability, family matters. That has been my experience. In my 35 years in this field, I have never turned down a request for extended leave because of a demanding personal situation.

Senator ENZI. It is also my understanding that if we do—and I would love to be able to pick your brain a little bit here—that if we do expand the Family and Medical Leave Act, it would perhaps raise some privacy questions, as I think it already has. Have you had any comments from your membership that have talked about private-related issues?

Mr. LOSEY. Well, in the current situation, it is limited to the urgent family matters. If we extend it to this public interest type of situation, then how does the employee notify for perhaps very personal reasons what the nature of the leave is?

And yes, to answer your question succinctly, we have had that issue come up. It is not a note from the doctor anymore. Maybe it is a note from the soccer coach or from the principal. This is the type of administration that if this Nation burdens every employer, I mean, to create a mandate at this level is not insignificant.

Senator ENZI. I know that there is concern by people talking about what has happened.

Ms. Larsen, TRW is a considerably bigger company than any of them that I deal with, and when you have done this "work around" policy, you talked about having some groups that were set up. Even setting up the groups, is there some potential legal liability that the company worries about?

Ms. LARSEN. I am not sure I understand the question, but our most common practice when we look at employee benefit programs and changes is to go to our work force through employee meetings and what we call "sensing sessions" and ask them what would they like, what would they prefer.

Are we concerned about some of the practices that we have implemented now? We have found that they are within the limits of the law and that they are making a return for us in terms of some of the statistics I quoted in terms of our retention. Also, right now we are on a very steep growth curve, so we have been able to attract some employees who clearly say in the interview that this is the key reason why they prefer to come to TRW.

Senator ENZI. I will phrase the question a little differently, then. The work group is the only mechanism that allows you to do that. If you had a smaller work force and could not have the same work group approach, would you still be able to do the "work around" situation that you are able to do now? How small a business do you

think would be able to take advantage of the same things that you are able to do, I think, because of size?

Ms. LARSEN. Well, no, I disagree to a certain extent, and maybe that is what is a little misleading. We are able to do it because of size, but actually, I believe there is more cost when you go to size because we have large HR information systems that keep track of our employees, keep track of family and medical leave. So when we do our "work arounds," we have not only got to do the communication to the employees, but then we have to go back to the system. In our smaller unit, you do not have that same issue because the computer systems are not as complex, the tracking systems are not as complex. They would still have to do something to make that happen. Sometimes size works for you, sometimes it works against you. So, not being in that small company, I could not say for sure, but for us it was a cost factor that we had to spread over our larger base. And I would guess for a smaller company, depending on the type of information systems they use, that they would have to make the same cost-benefit trade-offs.

Senator ENZI. And small business has such a problem of not wanting to hire an attorney to decide everything that they are reluctant to change any of the start-of-the-week and end-of-the-week situations that might be necessary.

Ms. LARSEN. Well, it is a complexity, and especially, depending upon what State you operate in, it can become even more complex.

Senator ENZI. Thank you. I will submit some other questions, Mr. Chairman.

Senator DEWINE. Ms. Boyd, the statement has been made several times here today that the Ashcroft bill would abolish the 40-hour work week, and you started to answer that. I wonder what your comments are about that?

Ms. BOYD. Yes. Unfortunately, Senator Wellstone is not here to hear this. I think there is a very common misconception about this. S. 4 adds additional options onto the Fair Labor Standards Act. Without written agreements, employees and employers could not flex beyond the work week or have a biweekly schedule, bank credit hours, or choose comp time. Without those agreements in place, either through collective bargaining or individually, the basic 40-hour work week, the basic FLSA provisions as we know them, continue to operate. These are just additional options that would be available.

Senator DEWINE. And again, this has to be an agreement——

Ms. BOYD. It has to be a written agreement.

Senator DEWINE [continuing]. That is entered into between the employee and the employer.

Ms. BOYD. Right. And I think very strong coercion language has also been included, which I do not believe is present in any other labor law that I am aware of.

Senator DEWINE. Well, what is the protection? I would like you to talk about that for a moment. What is the protection against the coercion or the potential of coercion? What is to stop—and I will just be real plan about it—what is to stop an employer, if this bill passes, from saying it works to his benefit to have a 50/30 work week, for example, and not pay overtime——

Ms. BOYD. And not pay overtime.

Senator DEWINE [continuing]. Or not pay it in the conventional way.

Ms. BOYD. In that circumstance just as in the current law, if you were an employer who was not paying overtime at all after the 40 hours, you would have exactly the same kind of recourse as an employee. You can call the Department of Labor—they are obligated to pursue those kinds of complaints—or you can get your own attorney, and the employer without the agreement being in place would be required to go back and pay time and a half cash overtime, the possibility of double damages, attorney's fees, costs, civil and criminal penalties, just as is the case under the current Fair Labor Standards Act.

Senator DEWINE. Mr. Losey?

Mr. LOSEY. Well, sir, on the coercion issue, under current law, we frequently have a problem with employees who volunteer for overtime. The law specifically says that you cannot require nor permit, and I think we have to prove, and we have proven with that situation, that employers can understand the law; they do not permit employees to volunteer for overtime, they pay it if it works—even if it is worked unapproved, retroactively, it is paid.

The second issue—and I do not want to speak negatively in terms of the labor input here today—but I have some concern if it is only the employer held accountable for the absence of coercion, how do they control coercion if it comes from the union? Frequently in the workplace, the union, as a free and democratic society, can exercise its own influence on workers. Would the workers be preempted from the rights under the law for which the employer has no control because of—you understand my point.

The second and most important thing, sir, is that we are not talking about coercion—we are talking about options and choices. We have an intelligent work force. They are adults. We have seen that when people have flexible benefits—how much vacation do you want, how much life insurance, what health insurance—they react very positively. When they have 401(k) plans and investment options, they react very favorably to fitting their company commitment to their welfare to their personal needs. When you retire, do you want it in cash, do you want it in a 10-year period certain—all of these options have proven there is no question no one would give it up. So when the employee is fully protected, why would we not offer this option?

Senator DEWINE. In regard to Senator Wellstone's concern that if an employer denied the drawing down of the banked comp time, the standard is what for that? Would you tell us again?

Mr. LOSEY. My understanding of the law, sir, is that when the employee accumulates and has decided he wants time off in the future at the time and a half rate, the company cannot unreasonably withhold that. There is a minor exemption where there would be a significant disadvantage. It might be limited to a situation where someone is in charge of the oven, and if they all leave, the oven goes cold, something like that.

But I do not think it would be to the employer's advantage to lose it, because they will lose the privilege. They will respond to the occasion. They are good citizens for the most part. And we will be the first ones, for any employer who abuses this and thereby jeop-

ardizes the right of right other employers and employees to bring it to anybody's attention, to get the sanctions.

Senator DEWINE. This standard, which in essence says the employer must allow the employee to use the comp time within a reasonable time if such use does not unduly disrupt the operations of the employer, is a standard which is currently in law today for public employees; is that correct?

Ms. BOYD. Yes, and in fact——

Senator DEWINE. So we have had some experience with that language.

Ms. BOYD. Absolutely, and the Department of Labor has written regulations around that after notice and comment, and there has been 10 years, now 12 years' worth of experience with that exact standard.

I would also like to point out that while I thin this law originally, or at least the comp time parts of it, were based on the State and local government experience with comp time, the comp time provisions contained in S. 4 have many more employee protections that are not available to State and local government employees. There is an annual cash-out provision; employees can ask to cash out unused comp time banks at any point.

Senator DEWINE. They can give 30 days' notice and cash it out; right.

Ms. BOYD. And employees have to do that within 30 days. Employers cannot discontinue programs without giving employees notice, and they cannot draw down banks below 80 hours. There are many, many more employee protections, I think in part to address some of the concerns of Senator Wellstone and his colleagues.

Senator DEWINE. I would like to thank the members of the panel. Ms. Korzendorfer, good luck. That is good encouragement for us, and we will certainly keep that in mind.

Let me also, Ms. Larsen, as the father of eight children, congratulate you and Kelsey. Kelsey has done very well. She has held up through some very long questions by the members of the subcommittee.

We thank all of you very much, and I will at this point invited our third panel to come forward.

Senator DEWINE. As the third panel is coming up, let me begin to introduce them. The first witness is Mark Wilson, who is the Rebecca Lukens Fellow in Labor Policy at the Heritage Foundation. Previously, he served as a senior economist in the United States Department of Labor. Mr. Wilson has numerous publications relating to labor policy issues.

Our next witness will be Mr. William Kilberg, who represents the Fair Labor Standards Act Reform Coalition. His testimony will be based on his experience as a management attorney and his former experience in forcing the Fair Labor Standards Act as Solicitor of the United States Department of Labor.

Karen Nussbaum, who will be our next witness, is director of Working Women's Department of the AFL-CIO. Previously, she served as the director of the Women's Bureau at the United States Department of Labor. She is a working mother and has been a labor advocate for 25 years.

Dr. Edith Rasell is an economist at The Economic Policy Institute, and she has offered to share her thoughts and concerns about flexible work options.

We will start with Mr. Wilson, and I would ask everyone if they could to try to keep to a 5-minute time period for your oral statements. As you all know, your written statements have already been submitted, and for all the panelists they will become part of the record.

Let me just say to our panelists that I appreciate very much as chairman of the subcommittee the fact that we did have these statements to us. We generally follow a 24-hour rule, and we were pretty close to that, so I appreciate that very much. It makes it easier for us to prepare for these hearings, and we hope that future witnesses in days ahead can comply with that rule as well as the panelists did today.

Mr. Wilson?

STATEMENTS OF MARK WILSON, REBECCA LUKENS FELLOW IN LABOR POLICY, THE HERITAGE FOUNDATION, WASHINGTON, DC; WILLIAM J. KILBERG, FAIR LABOR STANDARDS ACT REFORM COALITION, WASHINGTON, DC; KAREN NUSSBAUM, DIRECTOR, WORKING WOMEN'S DEPARTMENT, AFL-CIO, WASHINGTON, DC; AND DR. M. EDITH RASELL, ECONOMIST, THE ECONOMIC POLICY INSTITUTE, WASHINGTON, DC

Mr. WILSON. Thank you, Mr. Chairman, members of the committee. Thank you for inviting me here to testify today on the need to reform the Fair Labor Standards Act to provide for flexible work schedules.

As you have noted, my testimony will be entered into the record, and I would just like to summarize it if I could.

Over the past 25 years, the United States has moved from a manufacturing economy to a global service economy, and more and more American women are working than ever before. As others have noted, we all intuitively know this. I would like to take a few moments here to provide some actual numbers behind this to give you an idea of the extent to which it has changed over the past 25 years.

Women now account for over 46 percent of the labor force, up from 29 percent in 1950. The labor force participation rate for married mothers with children under the age of 6 has increased from 11 percent in 1950 to over 47 percent today. In 1995, well over 68 percent of all mothers with children under the age of 18 were in the labor force.

In 1995, according to the Bureau of the Census, only 5.2 percent of all families mirrored the traditional "Ozzie and Harriet" style of family structure—a married couple with a wage-earning father and a stay-at-home mother with two children.

In 1995 as well, almost 75 percent, or 18.4 million married families with children had both spouses working, and in over 38 percent of these families, women were working full-time all year around.

The concerns over the well-being of families often force women, single parents, as well as husbands to choose not to work or to change jobs or to forego a job that draws on their full talents, as our previous panel identified. In many cases, this scenario could be

avoided by enabling employers to offer flexible schedules to their workers. The FLSA in some regards currently impedes an employer's ability to accommodate employee requests for greater flexibility, however.

The Department of Labor has even prosecuted employers for violating the Fair Labor Standards Act by offering their workers the same flextime options that Federal Government employees currently enjoy.

The concept of alternative work schedules, flextime, compressed weeks, flexible credit hour programs, is not new or untested. They were first introduced in Germany in 1967 as a means of relieving commuter problems. Shortly thereafter, employers in Switzerland began to offer flextime as a way to attract women with family responsibilities into the labor force.

The Hewlett-Packard Company was the first to introduce flextime in the United States in 1972, and it was mentioned in the previous panel; TRW introduced it in 1980.

Since then, however, the number of private sector workers taking advantage of flextime or some form of compressed work week schedule in the United States has grown relatively slowly. In recognition of this, in 1978, Congress passed the Federal Employees Flexible and Compressed Work Schedules Act that enabled Federal workers to arrange alternative work schedules to meet their personal needs. It was so successful that Congress extended the program in 1982 and then made it permanent in 1985, as well as extending it to all public sector workers, State and local workers, in 1985.

Organized labor has been a vocal opponent of enabling private sector employers to offer flexible schedules, particularly compressed work weeks, outside the context of collective bargaining. Federal employee unions, however, recognize the value of flextime to their members despite testimony from leaders in the AFL-CIO strongly opposing flexible schedules. In 1976 when this subject was first debated in Congress, members of the oldest and largest independent union of Government workers, the National Federation of Federal Employees, mandated their leadership to seek flextime work schedules, and the American Federation of Government employees voiced their support for the concept of flextime and proposed its broader implementation.

By 1992, 528 Federal union contracts contained provisions of alternative work schedules, and in 1996, well over 40 percent, and in some quotes, 52 percent, of Federal employees were taking advantage of various flexible scheduling arrangements.

The Fair Labor Standards Act was enacted to protect low-skill and low-paid workers, but in today's economy where both parents are likely to be working, its rigid and inflexible provisions hurt more than they help.

Given the success of the Federal program, it is disturbing that after nearly 20 years since flextime was first introduced in the United States, only 15.3 percent of all private full-time employees are working on flexible schedules.

Enforcement is important. In last year's budget, DOL's Wage and Hour Division and the Employment Standards Administration received a substantial budget increase precisely to add more inspec-

tors. It is important. It is also important to keep in mind that the complaints related to wage and overtime provisions of the Fair Labor Standards Act have been declining and as a percentage of total employment, are very, very small.

Congress should extend the same freedom to private workers that Federal employees have, flextime, and enable employers to offer flexible schedules and compensation options to their workers. As a Federal employee, I took advantage of flextime, and I was not a member of a union, and my wife significantly appreciated the fact that I could flex my schedule out to attend to the needs of our children.

Thank you very much.

Senator DEWINE. Thank you, Mr. Wilson.

[The prepared statement of Mr. Wilson may be found in the appendix.]

Senator DEWINE. Mr. Kilberg?

Mr. KILBERG. Thank you, Mr. Chairman and members of the subcommittee. My name is Bill Kilberg, and I am a partner with the law firm of Gibson, Dunn and Crutcher. I am here today representing the Fair Labor Standards Act Reform Coalition, which includes a wide range of associations and individual employers who are concerned about white collar exemption provisions of the Fair Labor Standards Act.

The FLSA too often has frustrated these employers' efforts to respond sympathetically and effectively to their employees' needs. Both as a management attorney and, in a former life, as Solicitor of the United States Department of Labor, charged with the responsibility of enforcing the Fair Labor Standards Act, I have experienced the law's inflexibility. While the underlying goal of preventing work force exploitation retains its validity, the FLSA's 60-year-old structure far too often works against the interests and desires of the employees it purports to protect.

That is why S. 4, the Family-Friendly Workplace Act, is so important. As other witnesses have noted in some detail, Senator Ashcroft's proposal offers several carefully-measured workplace scheduling options that will facilitate flexibility while preventing abuse.

Less attention has been paid, however, to another aspect of S. 4 that I believe is most critical, and that is clarification of the so-called salary basis test. This regulatory standard—and it is that, regulatory, not a statutory standard—is one of many measures used to determine whether a specific individual is an exempt "executive, administrative or professional" employee. This test provides that an employee is compensated on a salary basis only if he or she receives a predetermined weekly salary that "is not subject to reduction because of the quality or quantity of work performed." While deductions are permitted for absences of a day or more for reasons such as illness or vacation, deductions for less than a full day's absence violate the definition.

A problem has arisen because of misinterpretation of the regulation. Seizing on language in the introductory section of the regulation, stating that a salaried employee should not be subject to deduction from pay, a perception has developed that salaried status

can be lost based on the mere theoretical possibility of deductions applicable to the employee.

In recent years, starting in about 1990, most courts have applied the "subject to" principle as an ironclad rule which unequivocally mandates a loss of exemption if anyone can come up with a theoretical circumstance under which existing employer policies might allow improper deductions. Beginning with the Ninth Circuit's decision in Abshire v. County of Kern, and mushrooming in a series of subsequent cases such as Martin v. Malcolm Pirnie, Inc., courts have demonstrated a willingness to deny exemptions based on nothing more than this draconian "subject to" theory.

The consequences of this misinterpretation re enormous. In Pirnie, for example, only a very small handful of partial-day deductions had been made—about $3,000 worth over a 2-year period. The court itself labeled these as "de minimis." Many of these deductions were entirely understandable.

One employee, for example, properly concerned that any pay for time worked on her doctoral thesis would be allocated to corporate overhead and thus improperly be charged to government contracts, voluntarily directed that she did not want to be paid for the portions of workdays so spent. Under S. 4, the employer would have been free to grant such leave by agreeing to provide premiums for any overtime pay worked in that week. In Pirnie, however, the court held that the employer's "policy" of allowing such deductions caused not just this employee but an entire class of highly paid engineering professionals to lose their FLSA exemption for a 2-year period, leaving the employer with a liability approaching three-quarters of a million dollars.

In the short term, the burden of such decisions falls primarily on employers in the form of outrageous damage awards paid to employees who could not have expected overtime premiums for their highly skilled and highly paid jobs. For private sector employers alone, according to a study by the Employment Policy Foundation, potential damages are at least $20 billion a year. In the public sector, the number increases by a multiple.

In the long-term, however, employees bear the brunt of these legal anomalies. Faced with the possibility of high dollar damage awards, employers are not willing to leave their heads on the chopping block. Instead, they are changing personnel policies to make absolutely clear that no employee ever can take partial-day leave unless it falls within the statutory exemption found in the Family and Medical Leave Act. Employees who want to attend to personal matters are welcome to do so, but only at the expense of taking a full day off.

The salary basis issue has been an active concern of Congress for a number of years now. A bipartisan proposal in the House of Representatives cosponsored by Representative Rob Andrews and Thomas Petri received a hearing as early as 1993. At about the same time as Senate floor debate on the FMLA, Members of both sides of the aisle acknowledged the need for stand-alone legislation to address salary basis concerns for partial-day leave not mandated by the FMLA. Proposals from Senator Kassebaum and Senator Ashcroft followed, but neither bill received action during the 104th Congress. Separate legislation was also sponsored on the House

side by Representative Petri, addressing both the salary basis issue and other badly needed reforms.

S. 4 provides the best opportunity to date for a meaningful and effective remedy. I urge the subcommittee to act quickly on the proposal.

Thank you very much.

Senator DEWINE. Thank you, Mr. Kilberg.

[The prepared statement of Mr. Kilberg may be found in the appendix.]

Senator DEWINE. Ms. Nussbaum?

Ms. NUSSBAUM. Thank you, Mr. Chairman, for the opportunity to present the views of the AFL-CIO and of working men and women on S. 4 and the time-money stress felt by many working families.

At the AFL-CIO, I direct the new Working Women's Department, and as you mentioned, for the past 25 years, I have been an advocate for working families and particularly working women and am myself the mother of three young children.

Of the years, I have talked with thousands of working men and women in every walk of life about today's subject. And when I served as director of the Women's Bureau, I initiated "Working Women Count," a survey of more than 250,000 working women, conducted in 1994, and I have been gratified by the many references to it by Senators and other witnesses alike.

Over the last 25 years, a new picture of working families has come into focus, a picture in which family incomes are down for most families, the gap between the top fifth of families and the rest is growing, and work hours are up.

The need to make up for declining wages is creating more time pressures on families who need to spend more hours in the paid work force, and that is part of the cause for the record numbers of women who now work for pay.

As a result, many families feel they are just barely keeping it together. As a man in Birmingham told us, "I've got a middle-class job, but I cannot afford a middle-class car or a middle-class house." And a working mother spoke for many when she said, "My life feels like I am wearing shoes that are two sizes too small."

"Do not get me wrong—women like working, but they have serious concerns about the job and identify stress as their number one problem. The solutions are clear if not simple. They are time and money. Workers today feel compelled to spend more hours working, taking time away from their family and community life—but the important issue here is control over working hours."

Women around the country have explained to me that flextime that provides flexibility to the employer, but wreaks havoc on an employee's schedule, is no solution. This was voiced to me by the female bank executive who was repeatedly expected to work late with no notice; the waitress at a diner who was suddenly changed to the night shift despite the fact that she had no child care in the evenings, and the nurse, scheduled to work a second shift only an hour before her first shift ended.

When you ask these workers and many like them if changing the 40-hour work week helps them, they respond with a resounding "No." In polls done last year, majorities responded that, yes, they

want more family time, but they do not support changing laws that provide overtime pay for 40 hours.

Moreover, those people actually covered by the Fair Labor Standards Act say they are far more likely to want overtime pay than the time. When low-income workers choose to work overtime, they do it for the money, and when the right to overtime pay is challenged, these workers say they fear they will never see the money again.

With rising productivity, profits, stock market and CEO paychecks, we can do better than provide the no-win choice of time or money. We need to provide real control over work hours and make it possible for working families to afford to take time off by building on what works—for example, expand the FMLA to cover more workers and provide time off for more family needs; set higher standards for fair pay. Passing an increase in the minimum wage was an important first step. We also need to enforce and expand equal pay laws identified by working men and women as an important way to improve family incomes and having the resources to adequately enforce current minimum wage and overtime laws. And we need to provide paid leave for basic needs. You know, fewer people are covered by paid sick leave, paid vacation or paid family leave.

At the same time, the Commission on Leave report recommends that institutions develop paid leave systems.

With all this in mind, allow me to turn my attention to S. 4, the so-called Family Friendly Workplace Act. What S. 4 purports to do is to give working families what the sponsors claim to be a new option, but in fact S. 4 means more control for employers and less money for working people. Let me give you a few examples of why I believe this to be true.

First, S. 4 claims that employees will have the right to choose whether they prefer comp time or overtime pay, but in practice that choice will prove to be illusory. How many workers, especially low-wage, part-time or temporary workers, will feel free to insist on overtime pay knowing that the employer prefers comp time? And how many employers will feel constrained from coercing employees with the meager remedies in the bill?

Second, under S. 4, workers who choose comp time cannot count on using the time when the family need arises, which has been discussed earlier.

And third, under the 80-hour provision, our reading of this bill is that there is no employee option; the bill is strictly a permission for employers to establish such schedules if they so desire. And when Senator Hutchison described the bill as prohibiting employees from having to work over 40 hours when they do not want to, that sounds like a ban on mandatory overtime which, frankly, would be very appealing, but I do not think that that is what is in the bill.

There are many other examples of why S. 4 does not give more control over working lives for workers. In conclusion, I need to say that we see nothing "family-friendly" about repealing the 40-hour work week and allowing employers to require employees to work 50 or 60 hours a week in 1 week and then 20 or 30 in the next. There is nothing family-friendly in taking away from employees the right

to overtime pay, and there is nothing family-friendly about expanding the class of employees who are exempt from the FLSA and thus will have no right to either overtime pay or compensatory time off.

These proposals are a step backward, and we urge the committee to reject them.

Thank you very much.

Senator DEWINE. Thank you, Ms. Nussbaum.

[The prepared statement of Ms. Nussbaum may be found in the appendix.]

Senator DEWINE. Dr. Rasell?

Dr. RASELL. Thank you, Mr. Chairman and members of the committee. I appreciate the opportunity to testify.

I agree with many of the other panelists that families are under time constraints and need more flexibility. However, we should not and need not weaken the provisions of the Fair Labor Standards Act to achieve this flexibility.

The current provisions of the FLSA already allow employees much greater flexibility than many employers are willing to permit. Employer inflexibility, much of which may be necessary given the requirements of their workplace but which is far beyond what is required by the FLSA, is a major obstacle to employee flexibility.

For example, under current law, employers can allow employees to vary their arrival and departure times and take time off during the day while still working a 40-hour week; or, under current law, employers could offer workers a compressed work week such as 4 10-hour days per week, permitting one additional day off per week; or employers could reduce the length of the usual work week, or job-sharing could be encouraged. All of this and more is currently possible.

However, while many companies say they support such policies, they are actually used in very few firms and by very few people. A survey of 121 private companies found that just 14 percent routinely made available a flextime program. Moreover, 92 percent of those without a flextime program said it was unlikely that they would adopt such a program in the future. Only 10 percent of full-time hourly workers have flexible work schedules.

And I want to point out that Mr. Wilson's testimony emphasized this same point—that while these options are available under the law, very few workers are able to take advantage of them.

I want to comment on the testimony of the last panel and compliment Ms. Larsen and TRW for their commitment to their employees. Unfortunately, not many companies offer anything like the level of flexibility that she described, but her examples clearly illustrate the types of options available under current law.

I also want to comment on a couple of other people's testimony, Ms. Boyd and Ms. Korzendorfer, who referred to the comp time/overtime issue. I will take, for example, the issue of being able to take comp time off. Ms. Korzendorfer remarked that she is an hourly employee, does have occasional overtime work for which she receives overtime pay, but that she would prefer to get comp time. And I want to illustrate how she could achieve her goals, which she things are only achievable under the comp time option, but she could achieve those same goals under the current law.

Let us assume she usually works 40 hours a week, and in 1 week, she gets 2 hours of overtime for which she is paid the equivalent of 3 hours. In some subsequent week, she wants more time off, and under current law, what she would be able to do would be to take time off without pay. The upshot of this is that she would have worked 40 hours plus 2 hours comp time in the first week, 37 hours in the second week, and been paid for 80 hours of work. That is exactly what would have happened if she had had the comp time option. She would have worked her 40 hours the first week, her 2 hours of overtime and, in a subsequent week, would have taken her 3 hours of comp time, and she would have been paid overall for 80 hours of work.

The only difference in these two scenarios—and an important difference this is—is that by taking the overtime pay up front, she is getting compensated when she did the work. When, in the comp time option, you delay taking your compensation until some point in the future when you take your comp time, this poses a risky problem for workers in that sometimes they do not get the comp time, and companies can go out of business. So it provides more security for people to get the overtime pay at the time they do the work.

In my written testimony, I also question whether employees can actually make a free choice about taking comp time or overtime pay. This has been referred to today by other people. I also question why the biweekly work program described in S. 4 is necessary if workers were to have comp time; this provision appears especially vulnerable to abuse.

But to conclude, while no one can predict the future, the current situation can shed light on what could be expected if this bill were enacted. Clearly, current law permits much more flexibility than many employers are willing to allow. We also have the example of the public sector which has been mentioned multiple times this morning, where employees are able to bank their comp time hours—for many workers, up to 240 hours, and for some people, up to 480 hours.

However, a major problem—and I hope you will hear more about this from other witnesses—is that for many workers, the banks are full. The employees have difficulty getting permission to take their comp time.

All of this implies that many employers are not willing to allow employees more flexibility in taking time off and in arranging their schedules and suggests a pessimistic future for employees under S. 4. If employers are unwilling to grant workers flexibility now, how will workers be able to use the comp time they would earn under the provisions of S. 4?

Instead of working to pass this amendment, I think we should focus our energy on encouraging more employers to offer workers flexible schedules, making modifications to the Family and Medical Leave Act and other things that would give workers the flexibility that they want. It is not necessary to compromise the protections provided by the Fair Labor Standards Act with this amendment.

Senator DEWINE. Thank you very much, Dr. Rasell.

[The prepared statement of Dr. Rasell may be found in the appendix.]

Senator DEWINE. Ms. Nussbaum, have you had the chance to look at President Clinton's proposal in regard to comp time?

Ms. NUSSBAUM. No, not in any detail.

Senator DEWINE. Well, you are familiar or aware that he has a proposal?

Ms. NUSSBAUM. Yes.

Senator DEWINE. Do you have a position on that proposal?

Ms. NUSSBAUM. No, we do not. We feel that the bill that we are looking at today is one that is clearly unacceptable, and it is hard for us to anticipate a situation that would respond to the problem of the potential abuses. But we do not have a position on the President's bill.

Senator DEWINE. Well, I do not have all the details in front of me, and this was in The Washington Post some time ago—this is a comparison between the President's bill and this bill. Let me just read to you the key provisions of the Clinton proposal.

Workers get one and a half hours of comp time for each hour of overtime worked. Workers may accrue up to a total of 80 hours of comp time a year. Workers, with 15 days' notice, may cash out their accrued comp time. Employers may terminate or modify a comp time program with 60 days' notice. The employer must make comp time options available to all workers.

It appears relatively similar to at least the comp time section of this bill, and I wonder if, based on what I have read to you, you have an opinion about that?

Ms. NUSSBAUM. No. I am afraid I cannot comment specifically on the bill. We are very concerned about issues of a big bank that will never be recovered particularly by employees who are in marginal workplaces, and we are very concerned about issues of enforceability.

Senator DEWINE. I understand that, and the concerns that you have expressed about the Ashcroft-Hutchison bill I assume would be similar to concerns you would have about the Clinton proposal.

Ms. NUSSBAUM. And we look forward to discussing it when it comes before this committee or another committee, sir.

Senator DEWINE. We will try again another day.

Ms. NUSSBAUM. Great.

Senator DEWINE. I am intrigued by your comment that the 80-hour over a 2-week period of time provision of this bill is something that would violate the 40-hour work week and that, if I understood your testimony correctly, it is something that an employer could require the employee to participate in.

Now, I have heard the testimony of Senator Hutchison, who says that that was never her intention; I have spoken with Senator Ashcroft, who has said that that is not his intention. And then, when you look at the bill, there is a section on page 15 which reads as follows: "Except as provided in paragraph 2," which has to do with collective bargaining, "no employee may be required to participate in a program described in this section. Participation in a program described in this section may not be a condition of employment."

So I am curious—I just looked at this quickly in response to your statement—but it would appear to me that the bill as written does not back up what your testimony was, that this could not be en-

tered into unless it was a voluntary agreement between the employee and the employer, which is exactly what all the testimony has been so far.

Ms. NUSSBAUM. Senator, I do not have the bill in front of me, but I am guided by the counsel of the attorneys at the AFL-CIO, who referred to an earlier provision in the bill which appears to negate the section that you have just referred to. And we would seek to provide written testimony on this——

Senator DEWINE. Well, I would appreciate it if you could do that because it is not the intent of the authors of this bill, and I doubt that it is the intent of any of the cosponsors of the bill—it is certainly not my intent—to provide for employers to have the ability to require employees to engage in this at all. In fact, just the contrary is true.

So I would appreciate it if within a reasonable period of time, your office could submit to us your lawyers' analysis of why that is true. And in all seriousness, I would think that it would be appropriate—and we would request that you do this—if you would give us some indication as to whether or not—and the President has spoken on this several times—you have an opinion about the President's proposal. For you to be here today and say that you have no opinion about that, I find a little disturbing. So I cannot compel you to have an opinion about it, I guess, but with the concerns that you have already expressed, it would seem to me that you would have the same concerns with the President of the United States' proposal in regard to the specific area of comp time.

My time is up, but we will come back for a second round. Let me turn to my colleague.

Paul, go ahead.

Senator WELLSTONE. If the chair wants to continue with another question——

Senator DEWINE. No. Go ahead. Let us stay to 5 minutes and then we will just keep going in rounds, if we can.

Senator WELLSTONE. Well, Mr. Chairman, I think part of the reason why Ms. Nussbaum did not come here today to speak about the President's proposal is with considerable justification. She is focused on what could be, I think, a very serious negative impact on working people with this proposal.

I think all of us here are committed to what you need to do when it comes to wages and working conditions for working families. When we talk about the work force, I think we all agree it has changed dramatically, and I do not need to tell Ms. Nussbaum because this has been a good part of his life's work with 9 to 5—formed by women and mothers who work.

Here is the issue about this 40-hour week and, essentially, this 80-hour framework and basically abolishing the idea of a 40-hour week. An employer—and this is a question for either Ms. Nussbaum or Dr. Rasell—this is my layperson understanding of this, and this gets to the crux of what I think is a fundamental issue—an employer can say to an employee, Look, we want you to work 50 hours this week and 30 hours next week. That is what we need from you.

Now, in theory, an employee is free to say, I cannot do that—in theory. And we can talk about the law of the land. I mean, employ-

ers are supposed to pay minimum wage, but some do not. We can give you many examples of where they do not do that right now. So that for good reason, we are worried about if this bill were to pass what it would really mean to people.

Now, in theory, an employee could say, no, I do not want to do that. The question is where is the protection for that employee.

The second question—and all the panelists can respond to this, of course—has to do with the need for agreement. So there are two different issues here. One is, with dramatically unequal terms of power, are employees really going to be able to say no without worrying about losing their jobs? And who is going to enforce that?

The second thing is there has got to be an agreement. Well, it apparently does not have to be a written agreement. I am looking through the wording of this—and you would think from the testimony, there would have to be a written agreement between the employee and the employer—but actually, the language says on the agreement on comp-time or flextime that it must be written or "otherwise verifiable." I mean, that is a loophole that could swallow the requirement. What does "otherwise" mean? I have no idea what that means. It could be on a tape recorder, but tapes get lost. It could be in the computer, but that could get lost.

I mean, you actually do not even have a requirement in this bill for written agreement. So let me just get a response from each of you on this whole question of what this is really going to mean in terms of the 40-hour week. There are many concerns that we have about this, but that is one central concern.

If I could, because we only have two minority witnesses here today, I want to start with them, and then we will go back.

Yes, please.

Ms. NUSSBAUM. On the issue of protection for employees—and on both issues, actually—the central problem here is who has the power in the relationship. A garment worker or a poultry worker or a janitor working the night shift does not have much power when she goes to her employer and says, No, I do not want to work the extra hours this week, or, I want pay instead of time.

It is quite easy for an employer to simply not hire that person in the first place, to not assign overtime for the person who wants to get the pay instead of the time, or to find other reasons to dismiss that employee.

The employees feel very vulnerable about keeping their jobs for just about every reason, and those people who are at the low end of the scale, who make up the vast majority of workers today, do not have the power.

Senator WELLSTONE. And the vast majority of women who are workers today.

Ms. NUSSBAUM. Eighty percent of women earn less than $20,000 a year. They do not exercise much bargaining power in the workplace.

And on this issue of the public sector, which I think is interesting, not only are public sector employers more typically unionized, but they also have civil service laws that constrain their activities, and they are not subject to the same downward pressure on wages that low-wage industries are. And we see in talking with low-wage workers the tremendous pressures they are under. They will not

challenge an employer in the hopes that the 800 Wage and Hour investigators who control 6 million enterprises in this country will get around to their workplace.

Senator WELLSTONE. Dr. Rasell, I wonder if you could respond. I am thinking about this as a social scientist, and I would love to do a survey of women in the work force, many of whom are low-wage workers, and ask them in the privacy of their homes whether they think, when an employer comes to them and waives the 40-hour requirement and says, I want you to work 50 hours this week, and next week, you can work 30 hours, and this is the deal, whether they think they can really say no to that or whether they have any real bargaining power, or whether they just really think this is a huge step backward for them. I would love to get their response.

Dr. RASELL. Well, I think that that is a very good question, and I am not sure we know the answer to it. But I think we can look at the Family and Medical Leave Act, where there are protections and opportunities there for people to take time off, but we also hear that people do not take the time off when they want it because they do not want to be labeled "on the mommy track" or be stigmatized in other ways. So I think that that is just one example and a completely innocuous kind of thing where people are not even making the choices they want because of fear of repercussions, which probably have nothing to do with job loss or anything like that, which might be an issue in the situation that we are talking about today.

I think it is a very real problem.

I think your second question about being able to take the comp time and the joint agreement to make that happen—I think that that, if anything, is just as big a problem. I think that if employers were truly interested in allowing employees to have flexible work schedules, we would see a lot more today in the workplace in that regard than what we see.

We do not see it, and I think that that is because employers, for whatever reasons—and maybe many of these are legitimate—they feel that they want the employees there 40 hours a week or whatever their work week is, 9 to 5, and they do not want them gone.

Given that, I do not know how these people are going to take their comp time, and I think the history in the public sector, where these people have enormous numbers of banked hours—480 hours is 60 days; who wants that kind of—it could be cash instead—who wants that kind of stuff sitting in their bank? They cannot take it. They cannot take the time off. And I think that that is also a serious problem.

Mr. KILBERG. May I, Senator?

Senator WELLSTONE. Mr. Kilberg?

Mr. KILBERG. I would like to respond to Senator Wellstone's question. I cannot respond to it, Senator, as a social scientist, but I can, however, respond to it as a lawyer and as a former Solicitor of the Department of Labor.

The fact situation that you pose does not have anything to say about S. 4. The same outcome would be true if S. 4 passed as before S. 4. An employer today can insist that an employee work 50 hours in week one and 30 hours in week two. The employer will

have an obligation to pay 10 hours of overtime at a rate of time and a half for all hours worked over 40 in week one. That does not change under S. 4.

It is true that the employee can enter into an agreement with the employer to bank those surplus hours, but that is the only thing that changes.

Insofar as the concerns that everyone has had about voluntariness, let me point out that nothing in this bill would change the present burdens of proof that exist under the Fair Labor Standards Act. The burden of proof under the FLSA is with the employer. So if there is a written agreement, and the employee says, That is not a real agreement, I was coerced into it, the employer is going to have the burden to show that there was in fact an absence of coercion. The employer is the one who will have to keep records, just as the employer does not with regard to minimum wage and overtime.

We have heard some comments regarding the public sector and 480 hours of banked time. Of course, the provision in this bill is for 240 hours of banked time maximum. But I do not hear anyone, certainly not from the AFL-CIO, calling for repeal of such flex and comp time provisions either in the Federal Government or in State Government. Rather, it has had uniform union support.

Mr. WILSON. Mr. Chairman, if I might make a comment, regarding the banking of hours and the buildup of banked hours and the inability of employees in the private sector to not take those, an important provision in S. 4 is that on an annual basis, employers will have to cash out those banked hours, and employees can choose to cash out those banked hours at any time within a 30-day notice. That is something that perhaps should be extended to public sector works as well in their compressed hours and their ability to bank it.

Dr. Rasell gave a very good example of how an employee can, within a pay period, move hours around, but an important provision in S. 4 is that it allows and empowers employees to move credit hours and compensatory hours across pay periods and to be able to accumulate those so that if an employee wants to accumulate hours of comp time to use a month later or a month and a later to attend a field trip with his or her son or daughter, they can do that.

Regarding bargaining power, with an unemployment rate of 5.3 percent and employers both struggling to find skilled as well as unskilled workers, certainly the bargaining power for both men and women in this country has increased substantially vis-a-vis the employer, and it has very little to do with the annual wage or salary of a particular employee.

With the written agreement, the "otherwise verifiable" argument that you made, I do share that concern, Senator, on that language, although in application, employers will for legal protection obtain written approval. How else will they be able to protect themselves from an inspector from the Wage and Hour Division? That is a very easy thing to hold up. I do not believe that they will obtain a tape-recorded message or some other more ambiguous verifiable statement. Employers will in application obtain a written statement

much as they do an I-9 form and other forms of identification when an employer applies.

Senator WELLSTONE. I thank you for that clarification, and I have just a very quick response to Mr. Kilberg. In all due respect, I think my example does speak to this legislation because the difference right now—we keep focusing on the 40-hour week, do we want to basically turn the clock back on the Fair Labor Standards Act—the difference right now is that if an employer wants an employee to work more than 40 hours, that employer has got to pay time and a half; that is the law of the land. With this legislation, within this 80-week framework, an employer can say to an employee, I want you to work 45 hours, and the next week, it will be 35 hours, and you can bank it or it can be comp. The employer could say I want it to be comp, or the employer could say I want it to be flextime.

Now, you think that this empowers employees. I do not see, given the reality of what is going on around this country, that a lot of employees are going to be able to say no to that. That is the difference. Right now, the law of the land is clear. Under this, we change the law of the land, and we assume in theory, because the unemployment rate is an officially defined 5.5 percent or whatever, that in fact you have got an equal relationship, and this will empower employees, whereas I think what is going to happen is the employers are going to say, For those employees who want to do it the way we want you to do it—not all employers; a lot of people do good work now, and in fact there are all kinds of opportunities to be flexible right now, and I wish more would be so—I do not think it is going to be the equal relationship. I think you are going to have coercion here.

And there are many, many examples right now in this country in critical sectors of the economy—the lower wage the work force, the worse it gets—many of which affect women right now that show, regardless of what the theory is, that at the nitty-gritty level of where people are working, we see plenty of abuse. We see some awful working conditions. We see some awful wage conditions, in violation of existing law. And yet you assume that in theory that will not happen when you basically go against the 40-hour work week. I do not think the evidence supports you.

Mr. KILBERG. If we make the modifications to the salary basis test that are called for in S. 4, we will free up a number of investigators who are presently out, seeking large damage awards for highly compensated professional employees, who could better spend their time dealing with the problems of low-age workers.

Mr. WILSON. Let me give you an example, Senator. When I was an employee for the U.S. Department of Labor, when push came to shove and an important project needed to be completed by the end of the week, we had to put in extra hours to do that. I was empowered at that point in time to either take those hours as flextime or to be able to cash them out if I wanted to as comp time.

That is where the employer can make the request and indeed will make a request for additional work. In many instances, the workers themselves will realize that this particular project or this particular sale has got to be accomplished before the end of the day and will put in extra hours to do that for the benefit of both them-

selves as well as the business they are working for. And this bill will empower them to then choose as to whether they take their time in pay or in time at some point in time in the future.

Senator DEWINE. Senator Enzi?

Senator ENZI. Before my time starts, I did not even get the testimony of two of these witnesses until I arrived here, and I do read the testimony before the hearing so that I can reflect on it and possibly do some research. I would hope that we would be able to get testimony in a more timely fashion, Mr. Chairman.

Senator DEWINE. It will be the procedure of this committee to have a 24-hour rule and to have it enforced.

Senator ENZI. In light of not having that, some of these questions may not be as intelligent as I would like them to be, but I am going to wade into them, anyway.

Ms. Nussbaum, if a union wanted to borrow for flex or comp time, could they bargain for it and then be exempted from the Fair Labor Standards Act? Now, I know from your discussion that they would not be interested in doing that, but would they have the right to do that?

Ms. NUSSBAUM. Unions cannot bargain to exempt themselves from Federal law, but indeed they can bargain many, many forms of flexibility, as Dr. Rasell described, and in fact we do; we bargain many forms of flexibility including the ones that we discuss in the public sector. And even more important, we provide for paid leave at far higher rates than do nonunion employers.

Senator ENZI. I guess I will not get into the issue of whether union or nonunion employers pay more because most of my requests for this comp time have been from companies that pay extremely well, and it has come from the employees, not the employers.

Dr. Rasell, in your comments, you said that many employers already do not provide the sorts of things that they would be allowed to do. Are you implying that none would?

Dr. RASELL. Well, I am saying that if the concern truly is providing flexibility for employees, there is much more that could be happening right now that we do not see happening. So I am trying to think about what this means for what we are trying to put in place in S. 4, and if there are constraints now on employers and the amount of flexibility that they are going to allow workers to have—it may be that they have got to run their assembly lines certain hours or whatever; I mean, there may be completely legitimate reasons why they want people there these 8 hours every day—but if that is the case, I am not sure how people are going to take this comp time. And if that is the case, then I think they should take it in pay, and in the future, if they could work out some time off, then they have been paid already, they can take some leave without pay and be polled in that regard. They have not been disadvantaged by not having the comp time option, but they have the security of knowing they have received compensation for their overtime work.

Senator ENZI. So you think some people might want to have comp time and that some employers might want to provide that as opposed to none?

Dr. RASELL. I think this is true; I think people do want more time off, yes. I think it can happen within the current bounds of the Fair Labor Standards Act.

Senator ENZI. I am not aware of anywhere in the Fair Labor Standards Act where it allows employees to demand time off at the present time. We talked about whether the employers are willing to give all the time that everybody wants; that is not a covered issue, I do not believe.

You made a comment that the time off without pay could have been taken by the person who testified previously. My experience is that there are a lot of people out there who feel that if they take the money, they spend the money; they never wind up with the time. And I find that to be a more prevalent feeling among women in the work force. They feel that time belongs to them; money belongs to the family. They have a much stronger family belief than most of the men workers that I have been with, and so they prefer to take a flextime or a comp time situation and use the time later for their families. Should we be able to provide that for them?

Dr. RASELL. I think that we need to maintain the protections currently in the law, and I think getting the compensation up front is the way to do that.

Senator WELLSTONE. I am sorry. Could you repeat that? I did not hear your response.

Dr. RASELL. I just think that maybe if people get their paycheck, they spend it, and they do not have money sitting in the bank so they could take time without pay. This is a problem. But nonetheless their income is the same under either circumstance, and I think that maybe if people were aware of that option, if the money could be sitting in the bank and earning interest, they would under the current law receive their compensation for their overtime hours at the time it was earned and not at some point in the future when it may be in jeopardy.

Senator ENZI. In one of the businesses that I worked with when we had some extra work and wanted to know if the people wanted to do it, they said, Yes, if I can have time off next week, but if I have to take the money, I do not want to work. We explained to them that they had the capability of taking that money this week and not working next week and spending that money next week, but somehow the paychecks do not get distributed at home quite the same way as they do on paper, and it gets to be a bit of a problem for them. So I am hoping that everyone will reflect a little bit on the flexibility that we are talking about here and not the mandatory things that seem to be implied.

There were also comments that we should not touch FLSA. I am interested in whether you think we should not address these concerns at the salaries that were mentioned before, the instances where people were actually volunteering because they were concerned about the business and their role in that business, and they wanted to make the business prosper, and we do not allow it—we cannot allow it.

Should we not address those?

Dr. RASELL. This is not an area that I am deeply versed in, however, let me just say a couple of things. From what lawyers tell me, I think the law could be clearer, so that might be an area that

needs some work. But I think it is also true that part of the benefits of being an exempt employee, a salaried worker, is that you do have some flexibility in your work hours. The understanding is that sometimes you are going to work more than 8 hours a day, more than 40 hours a week; other days, you are going to work less. And these instances where people are docked pay for taking a couple of hours off, I think is the question. Why is that going on—not the issue of what happens under the Fair Labor Standards Act.

Senator ENZI. Well, I hope before people make up their minds on S. 4, they will take a little closer look at the bill and some of the provisions because we have already noted some concerns, but they actually are answered in the bill, and I do not have time to go into how they are answered in there. And I do think that this is a better solution than FLMA because this actually results in paid time rather than unpaid time, and that seems to be the preference of most of the people I have spoken with.

Ms. NUSSBAUM. Sir, if I may, it provides paid time that you have already worked for. It is not like a paid vacation time or something. You put in the hours to get that pay that you then take on the paid leave on another occasion, so it is not exactly like paid time.

Senator ENZI. It is exactly like paid time. They get paid for the time that they put in. That is also how you calculate when you are figuring vacation times, when you are doing the accounting process. So you can be paid for it.

Thank you for the time. I yield my time.

Senator DEWINE. I want to thank our panelists very much. Let me just say that Senator Warner was here, and without objection, I will enter his written statement into the record at this point.

[The prepared statement of Senator Warner follows:]

PREPARED STATEMENT OF SENATOR WARNER

Just as with the TEAM Act last year, I believe it should be a top priority of this Congress and this Committee to reform our labor laws to reflect the workplaces and lifestyles of the 1990's. The Fair Labor Standards Act has a been a bulwark against worker oppression for nearly six decades, but with its prohibitions against workplace flexibility, the FLSA has itself become incompatible in some ways with worker happiness and productivity.

S.4, the Family Friendly Workplace Act, will introduce voluntary flexibility into the a workplace. But let me be clear about some things the bill would not do. It would not end the 40-hour workweek for those who desire such a schedule. It would not end the ability of workers to receive overtime pay for extra hours worked above their normal schedule. It would not allow employers to force employees into unwanted schedules. These are all unfair charges that misunderstand the nature of this legislation.

Representing a commonwealth with an enormous number of federal employees, have seen first-hand the success of the "comptime" and "flextime" provisions which federal workplaces have utilized since the mid-1980's. It is time to extend this system to the rest of the country.

I am proud to have two representatives from TRW Systems Integration Group in Fairfax, Virginia here to share their insights about flexible work schedules with the subcommittee. You can see

from their testimony that TRW and its employees have mutually sought to introduce as much flexibility into their workplace as the FLSA will allow: TRW can attract and keep motivated employees, and their employees can juggle the demands of high-level work, family obligations, and the stress of metropolitan living.

Yet the testimony of Ms. Larsen and Ms. Korzendorfer make clear the limits of TRW's policies. Hourly employees such as Ms. Korzendorfer cannot take advantage of the professional work schedules that salaried employees enjoy. Moreover, while TRW has worked hard to implement flexible schedules within the confines of the FLSA, the flexibility is much more limited than TRW's employees might desire.

Senator DEWINE. The record will remain open for any questions from members of the subcommittee to the witnesses we have had here today.

I will also State that next week, we will have the second hearing where we will specifically focus on the bill that is in front of us, Senate bill 4.

Thank you all very much.

[The appendix follows.]

APPENDIX

PREPARED STATEMENT OF SANDY BOYD

Mr. Chairman and distinguished members of the subcommittee: My name is Sandy Boyd. I am the Assistant General Counsel to the Labor Policy Association (LPA), a public policy organization of senior human resource executives representing over 250 major corporations. LPA's purpose is to ensure that U.S employment policy supports the competitive goals of its member companies and their employees. The total number of persons employed by LPA member companies in the United States is approximately 12 percent of the private sector workforce.

I also Chair the Flexible Employment Compensation and Scheduling Coalition (FLECS), a group of over 50 companies and associations, representing both small and large businesses, not for profit and for-profit, committed to ensuring that this country's wage and hour laws meet the needs of employees and employers now and in the 21st century. A list of FLECS Coalition members and its Statement of Purpose is attached to my testimony.

On a personal note, let me say that I am pleased to appear before you today to speak about workplace flexibility. My interest in flexible workplaces is not just hypothetical, it is personal as well. I appear before you not only as an attorney but as a wife and mother of two young children. I can personally attest to the benefits of working in an environment that permits flexibility. My current position allows me to fulfill my job responsibilities while volunteering at my son's school, going with my daughter on field trips, taking the kids to the doctor and all of the other responsibilities that go along with being a parent. While it is not always easy, I believe, most days at least, that I've been able to strike a successful balance at work and at home. I am mindful, however, that my ability to have this flexibility is in large measure because I am a professional employee exempt from the overtime provisions of the FLSA. Employers have far fewer options available to their nonexempt work force because of the restrictions in the current law.

The FLECS Coalition is dedicated to modernizing the Fair Labor Standards Act (FLSA) to provide employees greater workplace flexibility. In short, we believe employers and employees ought to be able to reach agreements on flexible schedules beyond the standard 40 hour workweek and to bank compensatory time in lieu of cash overtime where such an arrangement is mutually beneficial. Salary basis reform for white collar employees would also increase flexibility options. Contrary to what you may hear, employers interested in true workplace flexibility are not trying to "save money" or "avoid overtime pay." Real workplace flexibility works only when employers and employees can agree on mutually beneficial arrangements, such as flexible scheduling. Choice is key.

The employers I represent know that providing flexibility in the workplace is a win-win. For employees, it means more control and an ability to strike a balance between work and personal demands. For employers, increased workplace flexibility has bottom line benefits as well, such as increased employee retention and productivity gains. As a recent Ford Foundation study concluded:[1]

Restructuring the way work gets done to address work-family integration can lead to positive "win-win" results-a more responsive work environment that takes employees' needs into account and yields significant bottom line results.

The FLSA Prevents True Workplace Flexibility

While many companies have implemented creative workplace programs, they are limited in what they can provide their employees because of restrictions in the Fair Labor Standards Act (FLSA).

The FLSA is an obstacle to workplace flexibility because, while it provides some fundamentally important employee protections, it is rigid and paternalistic in many respects. The FLSA requires that all overtime-eligible employees, and that is most of the workforce, be paid at least the minimum wage, and receive cash overtime for all hours worked in excess of 40 in a workweek. This is the case even if the employee would prefer to, for example, bank their overtime in the form of compensatory time or flex their schedule beyond the workweek. An employee cannot waive his or her rights under the FLSA, under any circumstances, not even through collective bargaining. An employer faced with a request by an employee to trade hours between workweeks or to bank overtime is faced with this choice: be in compliance with the FLSA and say "no" or say "yes," be flexible and expose the company to liability including back pay, double damages, attorneys' fees, court costs and possibly

[1] "Relinking Life and Work: Toward a Better Future," Ford Foundation (1996).

civil penalties. For many employers and employees this arrangement is anything but "employee friendly."

The 40 hour workweek and time and one-half overtime penalty provisions were devised in 1938 in large measure as a penalty to encourage employers to hire more employees, obviously a paramount concern during the Great Depression when unemployment rates were high. Needless to say, some 60 years later the needs of many in the workforce have changed considerably since that period of time. It is questionable whether the rigid 40 hour workweek with cash overtime, and no alternatives, really meets those changing needs. A quick look just at the changing participation of women in the workforce reveals why workplace flexibility is increasingly important to many employees:

> From between 1948 and 1995 women's labor participation rates almost doubled, from 33 percent to 59 percent, respectively. The Bureau of Labor Statistics estimates by the year 2005 the rate will increase to 63 percent.
>
> According to the Bureau of Labor Statistics, 62 percent of two parent families with children have both parents working outside the home.
>
> The Bureau of Labor Statistics also reports that about 76 percent of married women with school age children work outside the home.

Given this change alone it is no surprise that more employers are being asked for more flexible work arrangements. Even among employers who do everything they can under current law, there is more that could be done if more options were available under the FLSA.

What Employees Want: Time and Flexibility Are Paramount

For many overtime eligible employees seeking to juggle work and family responsibilities, time off and scheduling flexibility is valuable-often more valuable than additional cash overtime compensation. For those employees, being able to choose, for example, compensatory time off in lieu of cash overtime would make an important difference in their lives. This need was reflected in a poll conducted by Penn+Shoen, for the Employment Policy Foundation. A copy of the poll's results are attached to my testimony. The poll indicates that 88 percent of all workers want more flexibility, either through scheduling flexibility and/or the choice of compensatory time. The poll also indicates that 75 percent of those polled favored a change in the law that would permit hourly workers the choice of either receiving time and one half overtime in wages or in time and one half compensatory time. Significantly, of those polled who currently receive overtime wages, 57 percent responded that they would sometimes take compensatory time with 58 percent of that group indicating that they would more often choose compensatory time rather than cash overtime. Clearly, to many hourly workers more paid time off is a valuable commodity. In addition to compensatory time, the Penn+Shoen poll indicates that at least 65 percent of those polled were interested in more flexible work schedules.

The results of the Penn+Shoen poll are certainly consistent with what FLECS members are hearing from their employees. Polling data aside, even if only a small minority of employees wanted more flexible scheduling or compensatory time off, then through their collective bargaining representative, or individually if they are not represented, they ought to be able to strike mutually satisfactory arrangements with their employers.

Suggested Options to be Added to the Fair Labor Standards Act

There are three basic options that the FLECS Coalition believes ought to be included in the FLSA so that employers can offer more their employees more flexibility. These include:

Flexing the Workweek. The FLSA makes it difficult to institute flexible schedules for employees entitled to overtime. Any time an employee works over 40 hours in a workweek, the employer must pay overtime compensation. This inhibits employers from instituting flexible scheduling. For example, instead of working two 40 hour workweeks in a row (a total of 80 hours over a two week period), an employee might prefer to work a "9/80" schedule which involves 80 hours over a 9 day period, such as 45 hours the first week with 35 the next, and a scheduled day off every other week. Under current law, the employer would have to pay overtime for the additional five hours worked in the first week, even though the employee works an average of 40 hours in each workweek. As a result, many employers simply cannot afford to institute these kinds of schedules for employees entitled to overtime-even when employees request it. Many employers, therefore, only allow this type of option to exempt, salaried employees. This creates an unnecessary tension in the workplace between exempt and nonexempt employees. The advantages of being able to "flex" the workweek and have a structured day off every other week during the workweek

are numerous. Employees have pointed out the following advantages: being able to take care of personal matters that are only conducted during traditional business hours (Monday-Friday, 9-5) such as doctors appointments and service repairs; being able to volunteer at a child's school or in the community; and being able to have a structured schedule that accounts for the unique needs of child and elder care arrangements.

The FLECS Coalition believes that these types of schedules are beneficial to all concerned and that employers and employees ought to be free to "flex" the 40 hour workweek when it is advantageous to both parties.

Compensatory Time Off. Unlike their public sector counterparts who have the ability to choose whether to receive their overtime in time and one half cash or bank it for future time off, private sector employees have no such choice. Under the FLSA an employee in the private sector who is entitled to overtime must receive the overtime in cash. Many employees have obligations or needs, such as elder or child care, that make receiving compensatory time an attractive option. Other employees would like time to pursue different interests, to volunteer or advance their education. Whatever the reason, employees with their employer's agreement, ought to be able to bank their overtime in the. form of compensatory time.

President Clinton, last summer in his acceptance speech at the Democratic convention, and repeatedly thereafter, stated that he believed employees should have the option of banking compensatory time. Just prior to the end of the 104th Congress the President even transmitted a bill to Congress which would allow employees just such an option. While there are sections of the President's compensatory time proposal with which we disagree, we believe it was a step in the right direction which demonstrated that this in an issue for which a bipartisan solution is attainable.

Clarification of the Salary Basis Test. Employees exempt from the FLSA's overtime provisions must be paid their salary "on a salary basis" as that term is defined by the Department of Labor. Unfortunately, the term "payment on a salary basis" has been the subject of much court litigation over the past decade, including Auer v. Robbins, a case presently before the Supreme Court. The result of this litigation has been to create confusion and uncertainty, causing many employers to curtail some of the flexibility options previously available to exempt employees. For example, under the salary basis test exempt employees may not take partial days leaves of absence without the employer risking the loss of the employee's exemption status (and therefore being entitled to two and possibly three years of back overtime pay, double damages, attorneys fees and costs)—even when an employee

requests it. Other practices such as the payment of overtime, reducing paid leave accounts by the hour and the setting of work schedules of otherwise exempt employees have all been challenged as contrary to exemption status. This has caused cautious employers to choose unattractive options. In order to be in strict compliance with the salary basis test, they only permit employees to take paid or unpaid leave in full day increments and don't pay any additional compensation above and beyond the salary for fear that an exempt employee will be considered a nonexempt hourly worker. The FLECS Coalition believes that the salary basis test needs legislative attention to remove those obstacles which prevent exempt employees from achieving workplace flexibility.

It should be noted that the salary basis test is just one portion of DOL's antiquated white collar exemption tests, found at 29 CFR Part 541, that deserve attention. DOL's tests for determining who is exempt from the overtime provisions have not been substantively revised since the 1950's. I challenge anyone to take a hard look not only at the salary basis but duties portion of the regulations and determine with any confidence where the line between exempt and nonexempt employees falls. Instead of examining how much an employee is compensated or even the kind of work they perform, the regulations have become a hypertechnical trap for the unwary. While employers strive to keep up with the conflicting nuances of the rules, plaintiffs' attorneys have learned to "game" the system and use the ensuing confusion to their advantage. In the long run, this confusion benefits no one. Clarity and common sense need to be restored in these rules. I have also attached two articles to my testimony which further discuss these and other issues in the FLSA.

CONCLUSION

In conclusion let me first commend the Subcommittee for addressing the subject of workplace flexibility which is so important to many workers lives. While finding solutions to the needs of employers and employees seeking to increase workplace flexibility won't be easy, we believe that beginning the dialog on this issue is a necessary first step.

Lifting the current roadblocks in the FLSA to provide employers and employees more options, such as flexing the workweek, banking comp time, and salary basis reform, is a critical first step. Ensuring that employers and employees be permitted to voluntarily choose such options is also critical-employers know that flexibility works, but only when it is freely chosen by both parties. For those employees who receive cash overtime and desire to do so within the current FLSA framework, this choice must be honored. A cautionary note is in order, however. The solutions to workplace flexibility must not be more complicated than the problem itself. If the "solution" is too complex and the requirements too burdensome, employers will not offer it and we have not advanced the cause of workplace flexibility in any respect. On the other hand, employee protections must be in place. The challenge is to strike a balance and develop legislation that the average small business owner can easily implement, if they chose, and employees can understand. We believe this challenge can be met and we look forward to working with all Members of the Subcommittee on this important issue.

PREPARED STATEMENT OF MICHAEL R. LOSEY

Mr. Chairman and Members of the Subcommittee: Good morning. I am Michael R. Losey, SPHR. I am the President and CEO of the Society for Human Resource Management (SHRM). The Society is the leading voice of the human resource profession, representing the interests of 80,000 professional and student members from around the world. We do not permit employers to join. SHRM provides its membership with education and information services, conferences and seminars, government and media representation, online services and publications that equip human resource professionals for their roles as leaders and decision makers within their organizations. The Society is a founding member and I am the Secretary General of the World Federation of Personnel Management Associations (WFPMA) which links human resource associations in 55 nations.

Mr. Chairman, I appreciate the opportunity to appear before you and the members of the Subcommittee today to share my experience, as well as the experience of thousands of human resource managers who constitute the society for Human Resource Management, on the important issue of workplace flexibility.

SHRM members from companies of all sizes have expressed a strong desire to update the Fair Labor Standards Act (FLSA) to reflect the realities of today's workforce. SHRM is well suited to discuss the experience of professionals from large, medium and small companies. Over half of our members are from companies with fewer than 1,000 employees. Our membership also draws from across the spectrum of industries and employers. Despite the large variety in company sizes and industries in which SHRM members find themselves, our members are virtually unanimous in expressing frustration regarding the inflexibility and antiquity of the Fair Labor Standards Act. In fact we receive more requests from our members for clarification and information about the rights and responsibilities under the FLSA than for any other employment issue.

Today's complex workplace demands sensible laws which respect the need for flexibility, ease of use and ease of administration. These qualities all contribute to more efficient operations which translate into growth and greater employment opportunities for employees.

Enacted in 1938, the Fair Labor Standards Act is one of this nation's oldest labor laws, and one which has remained largely unchanged since it was established. It has served our nation and its employees well. However, to ensure its continued contribution to our global effectiveness, we must recognize that the FLSA is outdated and, in some cases, even unfriendly to our nation's businesses and their employees.

When the FLSA was enacted, it was clearly depression recovery-directed legislation. Interestingly, the unemployment rate on average was 19 percent when your predecessors originally passed the law. The emphasis was on creating jobs. The tactic was the creation of a penalty or those employers who worked employees beyond a 40 hour work week. The assumption was that no employer would pay a penalty of 50 percent overtime wages and would instead hire more employees.

However, in just a few short years, World War II brought the unemployment rate to the lowest of this century—only 1.2 percent. (Today, of course, it is at 5.4 percent, the lowest in six years.) Subsequently, employers began the trend of providing health insurance and pension plans in an attempt to recruit and retain needed workers.

But as you know, much has changed. For instance, in 1938, less than 16 percent of married women worked outside the home. Today, it is more than 60 percent. Three-quarters of the mothers of school-age children work outside the home. According to the U.S. Department of Labor Women's Bureau, "[w]omen are not only more

likely to work outside the home today than in the past, but they also spend more time at work than did women in earlier years. Women have increasingly opted to work both full time and year round, partly due to economic necessity, but also due to movement into occupations that require full-time, year-round work." Human resource professionals and employers find themselves constrained by the FLSA when attempting to offer workers greater flexibility in scheduling while continuing to provide customer services and remain competitive.

Today, employers are faced with growing national and international competition to attract and retain qualified workers, as well as to reduce operating expenses. Despite wide ranging and successful efforts by employers to increase our global competitiveness, employers have been limited because of the constraints imposed by a law which has remained virtually unchanged for almost 60 years. We need your help to remove those obstacles and believe that this can be done in a manner which truly provides flexible options for employees without adversely affecting their interests.

One example of the restrictive nature of the FLSA is the issue of compensatory time off for workers in the private sector. We are pleased that the Senate is working to address this issue through the introduction of S. 4, the Family Friendly Workplace Act. While public-sector employers are permitted to allow employees to "bank" compensatory time off in lieu of paying overtime on an hour for hour basis, private-sector employers do not have such an option. In fact, offering private sector employees the choice of compensatory time or overtime payments is specifically prohibited, notwithstanding the apparent satisfactory experience of the public sector. I might also note that since the historic Congressional Accountability Act applied the FLSA to Congressional offices, this option is also specifically prohibited for Congressional employees. This bill should be expanded to provide these family-friendly workplace flexibility options for Congressional employees as well.

Many employees today value—and in some cases actually need—time off more than cash as they struggle to balance work and family demands. Thus, employers should be permitted to assist these employees by providing compensatory tune off as an option for them. U.S. Department of Labor Women's Bureau survey found that the top concern of working women is flexible scheduling in the workplace. In addition, much of the U.S. economic growth is with small and medium sized firms. As I mentioned earlier, many of our members are from small companies. Fifty-six percent of our members are from companies with less than 1000 employees and 44 percent come from firms with less than 500 people. These smaller firms may have cyclical or irregular work loads and customer demands. If companies had the ability to work with the employee and offer compensatory time in lieu of cash for overtime, lay offs during slow periods could be reduced, thereby promoting a more constant income level for the employee. Employers could then control their costs without disadvantaging any employee. If this happens, there will be less employer reluctance to extend new full-time employment opportunities.

I want to emphasize, however, that SHRM also strongly feels that protections should be in place to ensure that employers do not coerce employees to choose compensatory time off instead of overtime pay. We fully support more employee options and choices at work. Flexible options have proven to be very successful. For instance, cafeteria benefit plans and 401(k) savings plans that offer investment options have been very well received by employees.

In addition, SHRM has long supported allowing employers to adopt a pay period of up to two or four weeks and only be required to provide overtime compensation for hours worked in excess of an average of forty hours per week. Therefore we commend Senator Ashcroft for demonstrating his commitment to providing flexibility to employees by including provisions in S. 4 which would allow employers and employees to establish work periods of 80 hours over a two week period.

SHRM is not recommending that overtime payments be eliminated or reduced, only that the FLSA provide more flexibility by allowing employees the option of compensatory time off when they prefer to have it. We believe that employees should receive compensatory time off at the same rate that they would receive if they were paid for the overtime. In other words, if an employee worked 4 hours of overtime one week, the employee could choose either 6 hours of pay or 6 hours of compensatory time off.

In summary, providing compensatory time off as an option for employees would be an improvement for several reasons: It would improve employees' morale by providing them with means to juggle the demands of work and family life; It would help employers with recruitment, retention and productivity; It would ensure that private sector employees have the same rights as public sector employees; and, finally, It would allow businesses in cyclical industries to better adjust to those cycles, thereby allowing employees increased financial security during low business cycles.

The Society of Human Resource Management applauds Senator Ashcroft, the members of this Committee and the Senate leadership for embracing a commitment to update the FLSA for the 21st century. Representing the human resource professionals who will be implementing these employee friendly measures and offering them to employees, we look forward to working closely with Senator Ashcroft and the members of this Committee to ensure that balanced legislation is achieved as it progresses through the legislative process. To ensure that these options will be fully utilized by employers and employees, they must be easy to understand, use and administer. With this goal in mind, SHRM will continue to work closely with the Senate on these and other provisions within the bill designed to provide employees with flexibility.

I have included a copy of the Society's more detailed policy statement on FLSA reform with my statement. SHRM stands ready to assist the Senator Ashcroft, the members of this Committee and the Senate leadership as this important legislation progresses through the Committee process and to the Senate floor.

Thank you for your time. I would be happy to answer any questions.

PREPARED STATEMENT OF SALLIE LARSEN

Good Morning, Mr. Chairman and members of the Subcommittee. I am Sallie Larsen, Vice President for Human Resources at TRW's Systems Integration Group in Fairfax, Virginia. I would like to tell you today about a young Purdue University graduate who in 1977 returned to California to look for her first job. At the time, she was single and unemployed. Her main requirements for a job were fair pay, interesting work, and, of course, an office location near the beach. Clearly in reverse priority order.

Twenty years later, this graduate is a young woman with management experience, a working spouse, and three children under the age of seven. Two of the children are in elementary school and play on soccer teams. And yes, she still has several main requirements for her job: fair pay, interesting work, and, of course, flexibility. Again, in reverse priority order.

This woman is just one of the many employees at TRW who now places flexibility at the top of their list of job requirements. For the past twenty years TRW has moved aggressively and creatively to meet this need. I am pleased to be invited to appear before this subcommittee to talk to you about the policies we have implemented over the years that provide a wide range of flexible options to our employees to help them manage their personal and professional lives. I would also like to share some of our concerns.

TRW is a global manufacturing and service company headquartered in Cleveland, Ohio. It is strategically focused on providing products and services with a high technology or engineering content to the automotive and space and defense markets. We employ approximately 64,000 people in 24 countries.

My organization, TRW's Systems Integration Group, headquartered in Fairfax, Virginia, employees approximately nine thousand people in twenty-one states and the District of Columbia. Our job is to provide program management, systems and software engineering, and engineering and support services to defense, civil, federal, international and commercial customers, and state and local governments.

For the past ten years, I have been part of the management team serving our three constituents: customers, employees, and shareholders. Joe Gorman, TRW's Chairman and CEO, has repeatedly emphasized that our objective is to delight both customers and shareholders. Our success in achieving this goal comes in a large part from our success in delighting our employees. We take our partnership with them very seriously.

This partnership is demonstrated by TRW's long history of pioneering innovative human resource policies and practices. In 1980, in our Defense Systems Group, we implemented flexitime for over twenty-one thousand employees across the country which allowed them to modify their work schedule within the confines of an eight hour work day. This meant that all employees could flex their start and end times around standard core hours. This new schedule was implemented within the limits of what federal law would allow us to provide. At the time, the workforce was delighted with this new scheduling flexibility.

Over the years, however, the bar has been raised on what "delights" versus what "satisfies" our workforce. Our employees are highly educated. Many are in dual income families balancing multiple priorities. They have children. They have aging parents. Many of our employees have long commutes. They have outside educational pursuits, they want to volunteer in the community. The also want time to exercise at fitness centers. This list could go on and it does. In order to maintain employee

morale and increase productivity, we have had to respond to the needs of our changing work force.

In today's very competitive marketplace, the pressure to attract and retain scarce talent is another reason "delight" is becoming even more difficult to achieve. To compete with hundreds of Silicon Valley, California companies looking for the same caliber of talent we are, Sunnyvale unit, had to reexamine and create employee benefit policies that would provide a competitive edge over other companies. When assessing the options, again, flexibility was at the top of the employee list.

In 1995, with employee input and management support, TRW introduced a "9/80" work schedule for all employees at fourteen locations in seven states. A California employee recently shared a story about how happy he is at being able to participate in his son's Boy Scout activities by working eighty hours in nine days, and having every other Friday off. As an hourly employee, he does not receive over-time for those extra hours but he does receive the day off.

You may be wondering how we were able to give him and three thousand other employees this flexible work schedule without violating the regulations of the Fair Labor Standards Act (FLSA).

We had to find a "work around" that achieved our business objectives but still kept our company in compliance with the law. The work week was modified to end at Friday noon in the first week of a pay period to comply with the FLSA. Hourly employees still receive overtime for all hours worked over forty in a work week. Employees can also choose to stay on a five eight-hour day schedule and continue to receive daily overtime for hours worked lin excess of eight in a work day. Imagine the benefits! On the "9/80" schedule, employees can get up to twenty-six three day weekends a year.

Where are we today? Both management and employees are delighted. Since implementation of "9/80", our annual attrition rate in Sunnyvale has dropped from 25 percent to 12 percent—over one-half. In a recent employee survey, over 90 percent of all employees preferred and wanted to continue the "9/80" work schedule. 83 percent of these employees said it was an important factor in their decision to stay with TRW.

The problem is that "work arounds" to create and implement programs like the "9/80" are done at some cost to the company and some loss of employee productivity during implementation phase. However, given the current legal constraints, "work arounds" are the only viable option if a company really wants to implement creative work schedules.

In September 1996, we were recognized by Working Mother as one of its top one hundred companies who care about work and family issues. In addition to wages that are average or above average, opportunities for women to advance, child care support and other family-friendly benefits, the magazine recognized several of our alternative work schedules. These include flexitime, compressed workweeks, job-sharing, telecommuting, and part-time employment. I have submitted a reprint of this article with my written testimony.

Based on the successes of our previous flexible work programs, we recently implemented another "work around" called "The Professional Work Schedule".

In our business unit, we have a compelling business need to better understand our employee work patterns for bidding new work. In meeting the needs of these employees, we saw an opportunity to add even more flexibility for all of our salaried employees and managers in scheduling work across a longer period of time.

The Professional Work Schedule allows exempt, salaried employees to record all hours worked and to flex these hours over a two week pay period with their supervisor's approval.

For example, an employee in my organization has set up a regular schedule of one afternoon off every week to spend time studying before a weekly night class. She adds the hours to other days in the two week pay period. In addition, her supervisor has the ability, based on hours worked and business needs, to grant approved time off at a later date.

Again, employee delight about the Professional Work Schedule has been favorable and measurable. At open forums and brown bag lunches, over two-thirds of the employees raised their hands when asked if they had taken advantage of the flexibility of the Professional Work Schedule.

One employee who works in our proposal operations where hours are long as employees work to win new business for the company, recently told me that with the Professional Work Schedule, he now can take some time off and not worry about using vacation. By separating our billing and pay systems, employees can be recognized for working long hours today by taking approved time off later in the year.

The Professional Work Schedule helps our salaried employees with two week flexing, partial day time off, and additional time off. However, we are unable to ex-

tend this schedule to our hourly employees because of the restrictions of the Fair Labor Standards Act. These employees are amazed to learn that it is a sixty-year old law that is substantially unchanged since it was passed that stands in their way of becoming a full member of the team. Their most common complaint: "Why am I treated as a second class citizen?" Our answer: it is the law, not the company's unwillingness to offer the Professional Work Schedule to them.

When I evaluate these and other employee benefit programs and policies at TRW, the. "me factor" does play a part. I joined the company twenty years ago right out of college. I now have a spouse who works for the federal government and three children. I have seen first hand that the flexibility government employees have with work schedules and hourly leave—that the private sector doesn't have today—can make a positive difference in sharing our parenting responsibilities.

We both volunteer in Kelsey's and Kendall's elementary school classes, and Bill coaches on the girl's soccer teams. We wonder how much more challenging life will be when Jared, our three year old, starts school. We also worry about elder care issues as our parents reach their late seventies.

As you may have guessed, I am that Purdue graduate that joined TRW in 1977. I am that executive who works at TRW today. Do I want a company that offers fair pay, interesting work, and flexibility? Definitely, yes. In fact, I am delighted that TRW, within the limits of the current law, has delivered all three. I would like, both personally and professionally, to be able to do more.

I want to thank the committee for their efforts to look at reform of the Fair Labor Standards Act in order to promote more work place scheduling flexibility. I also want to thank you for giving me this opportunity to tell TRW's story, as well as mine.

PREPARED STATEMENT OF MARK WILSON

Mr. Chairman, Members of the Committee, thank you for inviting me to testify on the need to reform the Fair Labor Standards Act (FLSA) to provide for flexible work schedules. Please accept my written testimony and enter it into the record. It should also be noted that the following testimony is my own view and does not necessarily reflect that of The Heritage Foundation.

Over the past 25 years, the United States has moved from a manufacturing to a global service economy, and more American women are working than ever before. Workers are demanding more flexible hours, working conditions, and compensation packages, than current laws and regulations allow. America's economy, labor market conditions, and labor-management relations have changed dramatically since the Fair Labor Standards Act (FLSA) was passed in 1938, yet few provisions of the Act have been updated to reflect those changes. For example:

> Women now account for over 46 percent of the labor force, up from 29 percent in 1950. The labor force participation rate for married mothers with children under 6 years of age has increased from 11 percent in 1950 to over 47 percent today. In 1995, over 68 percent of all mothers with children under the age of 18 were in the labor force. [1]
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> In 1995, only 5.2 percent of all families mirrored the traditional, "Owe and Harriet" style of family structure: married couple with wage-earning father, stay-at-home mother, and two children: [2]
>
> In 1995, almost 70 percent of single women and 55 percent of single men headed families with children. [3]
>
> In 1995, almost 75 percent, or 18.4 million, married families with children had both spouses working. In over 38 percent of these families the women were working full-time year-round. [4]
>
> Two recent national polls revealed that 65 percent of Americans favor changes in labor law that would allow for more flexible work schedules and 58 percent would choose paid time off more often than Overtime wages. [5]

Concerns over the well-being of their families often force women, single parents, and husbands to choose not to work, to change jobs, or to forego a job that draws on their full talents. In many cases, this scenario could be avoided by enabling em-

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[1] This data is from various press releases of the Bureau of Labor Statistics.
[2] "Bureau of the Census, 'Money Income in the United States: 1995," September 1996.
[3] Bureau of the Census, "Money Income in the United States: 1995," September 1996.
[4] Ibid.
[5] Princeton Survey Research Associates, "Worker Representation and Participation Survey, Top-Line Results," October 1994; Penn+Schoen Associates, Inc., "Flexible Scheduling and Compensatory Time Poll," conducted for the Employment Policy Foundation, October 27, 1995.

ployers to offer flexible work schedules. The FLSA, however, currently impedes an employer's ability to accommodate employee requests for greater flexibility in scheduling. For example, a worker may want to work 44 hours one week in order to take a half-day off the following week to attend a parent/teacher conference without using any leave or losing any pay. The FLSA, however, requires that employee receive money instead and is therefore forced to use other leave (usually vacation leave) to care for the schooling of their children. The Department of Labor has even prosecuted employers for violating the FLSA by offering their workers the same flex-time options federal government employees currently enjoy.[6]

THE HISTORY OF FLEXIBLE WORK SCHEDULES

The concept of alternative work schedules is not new nor untested.[7] They were first introduced in Germany 1967 as a means of relieving commuting problems. Shortly thereafter, employers in Switzerland began to offer flex-time as a way to attract women with family responsibilities into the labor force. The Hewlett-Packard Company was the first to introduce flex-time in the United States in 1972.[8] Since then, the number of private sector workers taking advantage of flex-time or some from of compressed workweek in the United States has grown relatively slowly.[9]

In 1978, Congress passed the Federal Employees Flexible and Compressed Work Schedules Act, that enabled Federal workers to arrange alternative work schedules to meet their personal needs. It was so successful that Congress reauthorized the program in 1982 and made it permanent in 1985. In 1985, Congress also extended to all public sector workers the flexibility to use compensatory time in lieu of overtime pay.

Organized labor has been a vocal opponent of enabling private sector employers to offer flexible schedules, particularly compressed workweeks, outside the context of collective bargaining. Federal employee unions; however, recognize the value of flex-time to their members despite testimony from leaders in the AFL-CIO "strongly" opposing flexible schedules.[10] In 1976, members of the oldest and largest independent union of government workers, the National Federation of Federal Employees, mandated their leadership to "seek flexitime work schedules." and the American Federation of Government Employees voiced their support for the concept of flexitime and proposed} its broader implementation."[11] By 1992, 528 federal union contracts contained provisions on alternative work schedules,[12] and in 1996, more than 52 percent of federal employees were taking advantage of flexible scheduling arrangements.[13]

President Clinton acknowledged the benefit of flexible scheduling when he directed all executive departments and agencies to expand their use of flexible family friendly work arrangements in a memorandum on July 11, 1994.[14] In issuing the memorandum, Mr. Clinton stated, "broad use of flexible work arrangements to enable Federal employees to better balance their work and family responsibilities can increase employee effectiveness and job satisfaction, while decreasing turnover rates and absenteeism."

The Fair Labor Standards Act (FLSA) was enacted to protect unskilled, low-pay workers. But in today's economy, where both parents are likely to be working, its rigid and inflexible provisions hurt more than they help. The FLSA deprives workers of the right to order their daily lives, both on and off the job, to meet the respon-

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[6] Craig E. Richardson and Geoff C. Ziebart, 'Red Tape in America: Stories from the Front Line," The Heritage Foundation, 1995, p 109.

[7] Alternative work schedules includes flex-time, flexible credit hour programs, compensatory time, and compressed workweeks.

[8] Barney Olmsted and Suzanne Smith, "Creating a Flexible Workplace," American Management Association, 1989.

[9] By 1991, nearly 20 years after flex-time was first introduced in the U.S., only 15.3 percent of all private full-time employees were working on flexible schedules compared to 27.0 percent of federal government employees. See: Bureau of Labor Statistics, "Workers on Flexible and Shift Schedules," August 14, 1992.

[10] In testimony before Congress in 1977 and 1978, the AFL-CIO "strongly" urged the rejection of the Federal Employees Flexible and Compressed Work Schedules Act. See: Part-time Employment And Flexible Work Hours, Committee on Post Office and Civil Service, U.S. House of Representatives, 95th Cong., 1st Sess., May 24, 1977, pp. 167. Flexitime and Part-time Legislation, Committee on Governmental Affairs, U.S. Senate, 95th Cong., 2nd Sess., June 29, 1978, pp. 217.

[11] Ibid.

[12] Office of Personnel Management, "Labor-Management Relations Guidance Bulletin," July 1995.

[13] Office of the Press Secretary, "Conference on Corporate Citizenship Panel I," The White House, May 16, 1996.

[14] Office of the Press Secretary, "Expanding Family-Friendly Work Arrangements in the Executive Branch," The White House, July, 11, 1994.

sibilities of work and home. Given the success of the federal flex-time program, it is disturbing that after nearly 20 years since flex-time was first introduced in the U.S., only 15.3 percent of all private full-time employees were working on flexible schedules.[15] Congress should extend the same freedom to private workers that federal employees have—flextime—and enable employers to offer flexible schedule and compensation options to their workers.[16]

PREPARED STATEMENT OF WILLIAM J. KILBERG

Mr. Chairman and Members of the Subcommittee: The Fair Labor Standards Act Reform Coalition, which I represent, includes a wide range of associations and individual employers who are concerned about white collar exemption provisions of the Fair Labor Standards Act ("FLSA").[1] The FLSA too often has frustrated these employers' efforts to respond sympathetically and effectively to their employees' needs. Both as a management attorney, and in my very different former role of enforcing the FLSA as Solicitor of the United States Department of Labor, I have experienced the law's inflexibility firsthand. While the underlying goal of preventing workforce exploitation retains its validity, the FLSA's 60-year-old structure far too often works against the interests and desires of the employees it purports to protect.

That is why S. 4, the Family Friendly Workplace Act, is so important. As other witnesses have noted in some detail, Senator Ashcroft's proposal offers several carefully measured workplace scheduling options that will facilitate flexibility while preventing abuse. Compensatory time, for example, would allow employees to elect leave in lieu of cash overtime premiums, enabling them to build up a bank of paid leave that can be used for family and personal emergencies. Flexible scheduling, which is also included in the bill, would authorize adjustment schedules over two-week periods, providing greater flexibility to deal with ongoing family or personal demands.

Less attention has been paid, however, to another aspect of S. 4 that I believe is most critical: clarification of the so-called "salary basis" test. This regulatory standard, which is one of many measures used to determine whether a specific individual is an exempt "executive, administrative, or professional" employee, provides that an employee is compensated on a salary basis only if he receives a predetermined weekly salary that "is not subject to reduction because of the quality or quantity of work performed."[2] While deductions are permitted for absences of a day or more for reasons such as illness or vacation,[3] deductions for less than a full day's absence violate the definition.

A problem has arisen because of misinterpretations of the regulation's concluding section, which states:

> The effect of making a deduction which is not permitted under these interpretations [i.e., a deduction for less than a full day's absence] will depend upon the facts in the particular case. Where deductions are generally made when there is no work available . . . the exemption would not be applicable to [the employee] during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered lost if the employer reimburses the employee for such deductions and promises to comply in the future.[4]

Although consequences for exempt status under this regulation clearly flow from "making a deduction"—and apply only "to [the employee] during the entire period when such deductions were being made"—the Department of Labor and most courts have reached a different conclusion. Seizing on language in the introductory portion of the regulation stating that salaried employees should not be "subject to" deduction from pay, a perception has developed that salaried status can be lost based on the mere theoretical possibility of deductions applicable to the employee.

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[15] Statistical Abstract of the United States 1994, "Workers on Flexible and Shift Schedules: 1985 and 1991," p 410.

[16] In 1978, Congress recognized the benefit of these work-arrangements and passed the Federal Employees Flexible and Compressed Work Schedules Act.

[1] In addition to the legislation currently before the Subcommittee, the Coalition advocates other white collar exemption reforms pertaining to the duties standards and treatment of highly compensated employees. The Coalition looks forward to future hearings by this Subcommittee at which these further FLSA issues will be addressed.

[2] 29 C.F.R. §541.118(a).

[3] 29 C.F.R. §541.118(a)(2)-(3).

[4] 29 C.F.R. §541.118(a)(6).

Most courts, in fact, have applied the "subject to" principle as an ironclad rule, which unequivocally mandates a loss of exemption if anyone can concoct a theoretical circumstance under which existing employer policies could allow improper deductions. Beginning with the Ninth Circuit's 1990 decision in Abshire v. County of Kern,[5] and mushrooming in a series of subsequent cases such as Martin v. Malcolm Pirnie, Inc.,[6] courts have demonstrated a willingness to ignore all the other facts in the case to deny exemptions based on nothing more than this draconian "subject to" theory.

The consequences of this misinterpretation are enormous. In Pirnie, for example, only a very small handful of partial day deductions had occurred, which the court itself labeled "de minimis." Many of these deductions were entirely understandable; one employee, for example, had voluntarily directed that she did not want to be paid for the portions of workdays she spent working on her doctoral thesis. Under S. 4, the employer would have been free to grant such leave by agreeing only to provide premiums for any overtime worked in that week notwithstanding time spent working on the thesis. In Pirnie, however, the court held that the employer's "policy" of allowing such deductions caused an entire class of highly paid engineering professionals to lose their FLSA exemption.

In the short term, the burden of such decisions falls primarily on employers, in the form of outrageous damage awards for employees who could not have expected overtime premiums for their highly skilled and highly paid jobs. For private sector employers alone, according to a study by the Employment Policy Foundation, potential damages approach $20 billion per year. The actual figure may be much higher, since the study was based on a two-year statute of limitations rather than the three-year statute accompanied by doubling for "liquidated damages" that is available if a violation is deemed "willful," and a damage calculation method resulting in less than one-third of the damages yielded by more aggressive methodologies that have been advocated by plaintiffs in some recent cases.

In the long term, however, employees bear the brunt of these legal anomalies. Faced with the possibility of high-dollar damage awards, employers will not willingly leave their heads on the chopping block. Instead, they inevitably will change personnel policies to make absolutely clear that no employee ever can take partial day leave unless it falls within the statutory exception for leave mandated by the Family and Medical Leave Act ("FMLA"). The doctoral candidate who wants to work on her thesis will be told the next time that she has to do it on her own time. Employees who want to attend to personal matters will be welcome to do so—but only at the expense of taking a full day off.

In fact, when the Abshire and Pirnie decisions first came out a few years ago, one of my clients related to me the story of a longtime employee who had fallen off the roof of his home and had become paralyzed from the neck down. After a while, this employee returned to part-time duty, but he was never physically able to resume full-time status. If the client had reclassified this employee as hourly, he would have suffered reductions in his pension, vacation, stock savings investments, and—most importantly—his medical benefits. Instead, the client retained the employee as salaried, but reduced his salary in accordance with the hours the employee was unable to work in any particular week. Unfortunately, the result of this generosity, under Abshire and Pirnie, was to put the client at risk of overtime liability to every one of its salaried employees. Given these consequences, this client has expressed serious reservations about its freedom to act in such a compassionate manner the next time a similar situation arises.

Expansion of the FMLA could never resolve such problems. No matter how many specific categories of leave that Congress might mandate, it could never anticipate and catalog every circumstances under which an employee might legitimately wish to take unpaid leave. Nor should it want to. If flexibility is good for employees—justifying the current statutory exception from the salary basis requirement for leave mandated by the FMLA—then policies contemplating non-mandated leave should not create a loss of FLSA exemption. An employer should be free to tell the employee that leave can be taken, with the only cost being overtime liability to that employee in the week in which the leave is allowed.

Unfortunately, this problem is showing no signs of imminent self-correction. Sensing the problems that the current inflexible rule has created, the Department of Labor recently reversed earlier guidance by articulating a rule denying exempt status on a class-wide basis only if the "facts in the particular case" indicate that em-

[5] 908 F.2d 483 (9th Cir. 1990), cert. denied, 111 S. Ct. 785 (1991).
[6] 949 F.2d 611 (2d Cir. 1991), cert. denied, 113 S. Ct. 298 (1992).

ployees are "subject to" deductions "as a practical matter."[7] However, such a rule—at least according to the Department—would still lead to a loss of exemption in cases such as Malcolm Pirnie. Moreover, this wholly discretionary standard invites employers to play a high stakes game of chance, hoping that policies authorizing leave will not be frowned upon under the unintelligible "practical matter" test. No prudent employer would be willing to take such a gamble.

Recent judicial decisions likewise offer no comfort. While a few courts have expressed reservations about the broad "subject to" standard,[8] other recent decisions seem to reflect a judicial game of "Can you top this?" Several courts have held, for example, that the mere act of accounting for absences through paid accrued leave triggers a loss of exemption, notwithstanding the lack of any reduction in predetermined salary.[9] Even the payment of hourly overtime bonuses to certain employees, in addition to their predetermined weekly salaries, has been enough for some courts to find a loss of exemption.[10]

On some of these issues, such as the effect of additional overtime premiums, the Department of Labor has promulgated regulatory guidance and opinion letters that should be helpful.[11] Many courts, however, have ignored these pronouncements in a misguided attempt to construct a philosophically pure "subject to" requirement. Moreover, even if the Department were inclined to issue guidance resolving the entire "subject to" problem, that regulatory change would operate only prospectively.[12] Irrational salary basis claims already pending, but not yet decided, are just as dangerous to the purposes of S. 4 as claims yet to be filed. Since S. 4 is merely intended to restore the common-sense view that prevailed before cases such as Abshire, the salary basis portion of the bill should be amended to make clear its retroactive application to cases pending but not yet decided. Such a retroactivity provision has appeared in each of the many significant salary basis bills introduced in the past six years.

Mr. Chairman, the salary basis issue has been an active concern of Congress for many years. A bi-partisan proposal in the House of Representatives, cosponsored by Rep. Rob Andrews (D-NJ) and Thomas Petri (R-WI), received a hearing as early as 1993. At about the same time, during Senate floor debate on the FMLA, members on both sides of the aisle acknowledged the need for a standalone legislation to address salary basis concerns for partial-day leave that is not mandated by the FMLA. Proposals from Senator Kassebaum and Senator Ashcroft followed, but neither bill received action during the 104th Congress. Separate legislation was also sponsored on the House side by Rep. Petri, addressing both the salary basis issue and other badly needed reforms to the FLSA's duties standards.

S. 4, however, provides the best opportunity to date for a meaningful and effective remedy. Coupled with other measures in the bill, the salary basis provisions of this legislation—modeled after Rep. Petri's bill—offer an important mechanism that employers can use to help their employees cope with the demands of modern family life. I urge this Subcommittee, therefore, to act quickly on this proposal.

PREPARED STATEMENT OF KAREN NUSSBAUM

Mr. Chairman, thank you for the opportunity to present to this Committee the views of the AFL-CIO and of working men and women on S. 4, the Family Friendly Workplace Act, and on the time-money stress felt by many working families.

At the AFL-CIO, I direct the new Working Women's Department. For the past 25 years, I have been an advocate for working families and particularly working women. I've done research, worked on legislative solutions, been a public servant in the federal government, built organizations to shape the transformation of work, and am, myself, a working mother of three children. Over the years, I've talked with thousands of working women and men in every walk of life about the very subject

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[7] Brief for the United States as Amicus Curiae at 10, Auer v. Robbins, No. 95-897 (U.S. argued Dec. 10, 1996).

[8] See Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995), cert. granted, 116 S. Ct. 2545 (1996).

[9] Klein v. Rush-Presbyterian-St. Luke's Medical Center, 990 F.2d 279 (7th Cir. 1993); Benzler v. State of Nevada, 804 F. Supp. 1303 (D. Nev. 1992).

[10] See, e.g., Hilbert v. District of Columbia, 784 F. Supp. 922 (D.D.C. 1992), aff'd in part and rev'd in part on other grounds, 23 F.3d 429 (D.C. Cir. 1994).

[11] See, e.g., Wage and Hour Division Letter Ruling (July 17, 1987) (stating that docking of accrued leave does not affect an employee's salaried status since it results in no actual loss of pay); 57 Fed. Reg. 37,666, 37,676 (Aug. 19, 1992) (reaffirming position); see also 29 C.F.R. §541.118(a) (stating that the "salary basis" definition is met if an employee receives a predetermined amount constituting all or part of his compensation," contrary to court rulings stating that overtime bonuses in addition to an employee's predetermined salary trigger loss of exemption).

[12] 57 Fed. Reg. 27,678 (Aug. 19, 1992).

of today's hearing. Additionally, when I served as the director of the Women's Bureau at the U.S. Department of Labor, I initiated Working Women Count!—a survey of more than 250,000 working women, conducted in 1994?

PICTURE OF AMERICAN FAMILIES

Over the last 25 years, a new picture of American families has come into focus—a picture in which incomes are down the gap between the top fifth of families and the rest is growing ever wider and work hours are up.

In an abrupt turnaround, the vast majority of working families—the bottom 80%—are seeing their incomes stagnate or fall behind. Average pay for production workers alone has fallen 12% since 1979, in dollars adjusted for inflation.

While income for most American families is going down, the top fifth of families has seen their incomes grow by nearly 20% since 1979. We see the gap between those at the top and the rest of society widening. In 1980, top CEOs were paid 41 times what the average worker earned. Today, top CEOs earn 145 times what the average worker earns. This gap is also replicated in benefits. High-income earners are three times more likely to have health insurance and five times more likely to have pensions.

And there's a gap in work and family policies, as well. Despite the fact that low-income families need family-friendly workplaces even more than do high-income earners—because their lower pay limits their ability to purchase flexible dependent care and take unpaid leave—it is higher-income employees who are more likely to have company-supported child care, job sharing, and paid leave.

The financial pressures on working families have driven record numbers of women into the paid workforce. Nearly half of the workforce is women—doubled since the time of their grandmothers—and even a majority of mothers with infants now work for pay. The number of women working multiple jobs has increased more than four fold in the last 20 years. Women now account for almost half of all moonlighters. At the same time, hours for men are going up too. One-fourth of all full-time workers spent 49 or more hours a week on the job in 1990. Of these, almost half were working 60 hours or more.

How does it add up? The need to make up for declining wages is creating more and more time pressure for families who need to spend more and more hours in the paid workforce. As a result, many families feel they are just barely keeping it together. As a man in Birmingham told us: "I've got a middle-class job but I can't afford a middle-class house." A working mother spoke for many when she said, "My life feels like I'm wearing shoes that are two sizes too small."

Don't get me wrong. Women like working—79% of respondents to the Working Women Count! survey said they liked or loved their jobs. But they reported serious concerns on the job and identified stress as their number one problem. The solutions are clear, if not simple—time and money.

CONTROL OVER HOURS

Workers today feel compelled to spend more hours in the paid workforce, taking time away from family and community life. But the more important issue here is control over working hours. Women around the country have explained to me that "flextime" that provides flexibility to the employer—but wreaks havoc on a employee's schedule—is no solution. This was echoed by the bank executive who was expected to work late with no notice; the waitress at a diner, who was changed to the night shift, despite the fact that she had no child care for evening hours; and the nurse, scheduled to work a second shift shortly before her first shift ended. When you ask these workers, and many like them, if changing the 40-hour work week helps them, they respond with a resounding "no." In polls done by the AFL-CIO and the Economic Policy Institute, last year, majorities responded that they want more family time, but they do not support changing the laws that provide overtime pay after 40 hours; and they were skeptical that changes in the law could be enforced to protect workers.

TIME IS MONEY

Moreover, those people actually covered by the Fair Labor Standards Act are far more likely to say they want overtime pay, as opposed to time. When low-income workers choose to work overtime, they do it for the money. And when the right to overtime pay is challenged, these workers worry they'll never see the money, again.

69

REAL SOLUTIONS

With rising productivity, profits and CEO paychecks, we can do better than provide the no-win choice of time or money. We need to provide real control over work hours, and make it possible for working families to afford to take time off, by building on what works:

Expand the Family and Medical Leave Act to cover more workers and provide time off for more family needs. The report of the bi-partisan Commission on Leave finds that the FMLA has virtually no negative effects on employers, while it has clear benefits for workers and their families.

Set higher standards for fair pay. Passing an increase in the minimum wage was a great first step. We also need to take steps to enforce and expand the equal-pay laws, identified in many polls by working people—both men and women—as an important way to improve family incomes.

Provide paid leave for basic needs. At the times when families are under the greatest stress, working families are less likely to receive paid sick leave, paid vacation, and paid family leave. The Commission on Leave report identified the lack of paid leave as the biggest reason why employees in family-and-medical-leave-covered institutions do not take family and medical leave. The Commission recommended that employers, employee reps and others give serious consideration to the development of a uniform system of wage replacement for periods of family and medical leave.

With all this in mind, Mr. Chairman, allow me to turn my attention to S. 4, the so-called "Family Friendly Workplace Act."

What S. 4 purports to do, to respond to the needs of our hard-pressed working families, is to give them what the sponsors of this legislation claim to be a new option. Workers can have more time to devote to their families' responsibilities, the sponsors say, but only if the workers are prepared to surrender the overtime earnings on which they depend to make ends meet. For too many working families, that is a Hobson's choice.

FALSE ANSWERS

Although the Committee has deferred until next week its examination of the legislation that is pending before it, my testimony would not be complete if I did not at least briefly state the AFL-CIO's adamant opposition to S. 4, the so-called Family Friendly Workplace Act.

We see nothing family-friendly about repealing the 40-hour workweek and allowing employers to require their employees to work 50 or even 60 hours in one week, and 20 or 30 hours the next.

We see nothing family-friendly in taking away from employees the right to overtime pay and substituting a system of compensatory time off that is riddled with loopholes and limitations.

And we certainly see nothing family-friendly about expanding the class of employees who are exempt from the Fair Labor Standards Act and who thus will have no right to either overtime pay or compensatory time off.

These proposals are, in our view, large steps backwards. Their enactment would mean more control to employers—and less money for workers. We, therefore, would Urge this Committee to set these proposals aside and begin work on measures that will meet the real needs of our hard-pressed working families—like an expansion of Family and Medical Leave and stronger equal pay laws.

STATEMENT OF THE AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES

The American Network of Community Options and Resources (ANCOR) currently represents over 650 agencies across the United States that together support more than 50,000 people with disabilities. ANCOR promotes and assists private providers by serving as an accurate and timely source of information at the national level. The association communicates with and assists members through formal outreach, training and other special services regarding trends and innovations in the disability field. About 85 percent of the members of ANCOR are nonprofit agencies, the rest are proprietary and family-care providers.

Most of the funding for community services for people with disabilities comes from federal, state and local sources. The federal/state Medicaid program is a major resource, as are other Social Security programs, including Supplemental Security Income, Disability Insurance, Medicare and Title XX Social Services. As federal and state budgets tighten, there are increasingly fewer dollars to go around. All levels

of government are now looking for ways to make additional cuts, and pay raises and benefits are kept to a minimum to protect programs.

Direct support workers are the most important resources our members have, but there is little money available for expansive employee benefits. One of the most valued things our members can offer to their employees is flexibility in the workplace. Unfortunately, currently law prohibits the private sector from offering the range of flexible opportunities currently available to federal, state and local government employees. It is time this discrimination against private-sector workers stopped.

The Family Friendly Workplace Act (S 4) introduced by Senator John Ashcroft would give our members an opportunity to provide their employees with greater flexibility and more work options.

Many workers have expressed interest in compensatory time and flex time. They would like to have the opportunity to forgo receiving overtime pay and instead accumulate hours to take off at a later date for personal use. Time is more valuable than money to many people, particularly when working just an hour or two more in one workweek would result in so little extra take-home pay, but when the hours are banked together for use at a later date, they add up and can be used to take together a day—or perhaps more—at a time.

In the human service field, hours worked might involve the following:

A direct-support worker might stay on the job for a couple of extra hours one evening to read to a sick child because the worker who comes on duty for the next shift will be tied up with the demands of the other children who live in a group home, and the child will otherwise not get the one-on-one attention he can benefit from at this time. The employee who stays over can then take a couple of hours off one afternoon to go to his or her own child's school to attend a school play.

A maintenance worker can bank overtime hours plowing driveways and shoveling snow in the winter to take off and go fishing with his children in the summer.

A direct-support worker who works overnight might stay a couple of hours from time-to-time in the morning waiting for the employee who works the next shift to arrive, or to stay with someone who is sick and cannot go to school or training. She could use this time to go to the theater with her husband once a month.

An office secretary could bank hours worked one week to type a special report for a board meeting to take off at a later date to join a group of friends driving to a discount shopping mall in another town.

These are but a few examples of the ways that a compensatory time or flexible credit hour program could work. Many, many workers would use these options in lieu of taking overtime pay.

Biweekly work programs would also be welcome in the human service field. There are many people who would like to be able to work nine nine-hour days to take a regularly-scheduled day off every two weeks, permitting the employee to catch up with personal chores while children are in school, or just to enjoy having three days off in a row to rest and unwind after the responsibility of supporting a challenging group of people with disabilities.

These are truly family-friendly programs that benefit employees. Private sector employees should have the same flexibility that is offered to public-sector workers. These programs are options. Workers want choices. They want to have a greater opportunity to control their own lives without being required to conform to rigid schedules that were common almost 60 years ago when the Fair Labor Standards Act was passed, particularly in these days when both husbands and wives have to work, and there are so many single-parent families where there is no opportunity to share responsibility for children's school events, or to attend to sick children or older family members who also live in the family home.

People shouldn't have to lie about being sick or take time off without pay. They should be able to accumulate hours and take time off as paid personal comp-time leave instead. Not all ANCOR members will want to use these programs if they do become law. In some cases the extra bookkeeping will be prohibitively complicated and costly, and some may find that it is difficult to find other employees to cover an extra shift of duty. However, those who do understand the value of these kinds of benefits will find that employees will be more willing to work for each other if they can later take advantage of this flexibility to do something they wish to do at a later date.

Employees who are provided with more flexibility tend to be happier on the job. They have better attendance records when they do not have to take sick leave or time off without pay in order to attend to personal business, and both they and their

employers can plan in advance for personal leave time. They do not experience burnout as quickly and staff turnover is reduced.

The employee protections which prohibit coercion or the use of compensatory time as a condition of employment should be adequate to protect people who would rather receive overtime pay than accumulate compensatory or flexible credit hours. Unfortunately, those few employers who exploit their workers are likely to do so anyway. They will ignore these prohibitions just as they now ignore the minimum wage and overtime requirements. The provisions of the Family-Friendly Workplace Act will not increase exploitation.

Federal employees have enjoyed programs like these since 1978, and state and local employees have the comp time option as well. Employees in the private sector should no longer be discriminated against. Please resist further efforts to complicate the bill and pass the Family Friendly Workplace Act.

RESPONSE TO QUESTIONS OF SENATOR ENZI FROM MICHAEL R. LOSEY

Question 1. Are employers experiencing difficulties when complying with the Family and Medical Leave Act? Is the number of employers experiencing such difficulties increasing?

Answer 2. Surveys indicate that employers are in fact experiencing difficulties when complying with the Family Medical Leave Act. The results of several surveys of the SHRM membership are enclosed for the hearing record:

> We sent the Commission on Leave's Westat Survey to SHRM members attending our March 1996 legal and legislative conference and 71 percent of the respondents indicated that their organization has found compliance with the FMLA "somewhat" or "very difficult".
>
> This finding was consistent with the results of our June 1994 survey which found that three fourths of the members were experiencing daily administrative problems in attempting to comply with the FMLA.
>
> A separate survey on The Top 10 Human Resources and Health Care Issues conducted by the Indiana Chamber of Commerce indicated that Indiana employers identified compliance with the Family and Medical Leave Act as their "biggest human resources related legislative or regulatory concern[.]"
>
> The most recent survey of our members showed that after three years of enactment, nearly 6 out of 10 human resource professionals say their organizations spend additional dollars implementing the FMLA. About half (51 percent) said that their organizations had not benefited from the FMLA. The most significant FMLA costs, according to 36 percent of the respondents, is the expense incurred for replacement workers.

Other FMLA costs include: Continuation of health insurance—33 percent; Loss of productivity—33 percent; Time spent to explain the FMLA—25 percent; Administrative costs to track leave—24 percent; Overtime for workers not on leave—20 percent; Decreased morale due to increased work loads—10 percent; and Attorney fees—8 percent.

The U.S. Department of Labor has recently begun to receive an increasing number of complaints regarding the FMLA, with most of the complaints being resolved without going to court. This surge of complaints filed suggests that both employers and employees are just coming to an understanding of the Act, its obligations and its administrative requirements. It also suggests that employers are generally trying in good faith to comply with the statute, but are typically either unaware of tracking and administrative requirements or are confused by the complexity of the statute and its burdensome implementing regulations.

While it is difficult to know whether administrative problems are increasing or decreasing, it is our professional judgement that the Act is still not yet fully understood by employers or utilized by employees. It has also been our experience that many employers are unaware of the level of detail of compliance necessary to comply with the Act. This finding is consistent with the U.S. Commission on Leave's finding that employers and employees were unfamiliar with the law. In fact the U.S. Commission on Leave Westat researcher stressed that the Commission's report is "only the first look at what the survey can provide on the dynamics associated with the law" and noted that "additional research would be needed to provide a more global examination of the impact of this legislation."

I am also enclosing for inclusion in the record a May 6, 1996 Lawyers Weekly USA article which discusses the widespread nature of FMLA implementation problems and the October 2, 1996 Investor's Business Daily article.

We strongly believe that technical corrections to the Act would greatly ease the administrative problems for employers.

Question 2. How much paperwork is an employer required to "fill-out" when complying with the Family Medical Leave Act? Would such requirements also be required by an employer when complying with the Family-Friendly Workplace Act?

Answer 2. The paperwork requirements under Family Medical Leave Act include a physician certification form, the employer's written response to an employee's request for leave upon receipt of the certification form and the employer's notice to the employee regarding whether the leave will be taken pursuant to the FMLA. The difficulties experienced by employers with this process are illustrated by the following statement by Hallmark Cards to the Senate Subcommittee on Children and Families for the May 1996 hearing on FMLA implementation problems:

> The Medical certification Process is Cumbersome for Both Employers id Doctors. The medical certification process as defined by the DOL is cumbersome. Employers have little means of questioning what the employee's doctor says, other than for the employer to send the employee for second and third opinions at the employer's expense. It is likely to take at least two weeks for the employer to obtain the employee's initial medical certification. As indicated above, Hallmark's experience has been that most FMLA absences are not pre-scheduled. Thus, the employee is usually already absent when the employer learns of the need for a medical certification. The employer has two calendar days to send the FMLA notification and medical certification forms to the employee under Section 825.301. Since the employee is gone, these forms are often mailed. The employer cannot require that the employee have the FMLA medical certification back for 15 days after the employee receives it. The entire process from the time Hallmark learns of the absence until Hallmark receives back the completed form can often take close to three weeks. (This assumes that the employee submits the certification in a timely fashion. Frequently, there are additional delays caused either by the employee's or the doctor's delay.) Only then can the employer determine whether in fact the absence is covered by the FMLA.
>
> Not only is the initial medical certification process cumbersome, but the employer's only option under the DOL regulations in the event that the employer disagrees with the initial certification is to obtain second—and third—opinion. See Section 825.307. Each of these steps is likely to take at least an additional 15 days, and, by the time that doctors are found, appointments are scheduled, and results are obtained, could easily take longer than 15 days. Thus, in cases where the initial medical certification is disputed, it could easily be two months or more before the employer has sufficient information to determine whether an absence should be covered by the FMLA.
>
> Doctors Are Unfamiliar with FMLA Medical Certification Requirements. Further compounding the problems caused by the DOL regulations is the fact that many doctors are unfamiliar with the FMLA and the requirements that employees submit medical certification forms. Hallmark has had several doctors in the Kansas City metropolitan area complain that Hallmark has imposed the lengthy medical certification form on the medical community; they simply do not recognize that this is a federal regulatory requirement.

As indicated in the enclosed testimony by SHRM's witness, Libby Sartain, SPHR, CCP, Vice President of People with Southwest Airlines, who testified last year before the Senate Children and Families Subcommittee, stated that:

> The Department of Labor determined that employees can take FMLA leave in as little as eight minute increments. The tracking of this leave is very difficult to say the least. This difficulty has been exacerbated by the FMLA's vague definition of serious health condition.

Kathleen Fairall, who testified on SHRM's behalf at the S. 4 Senate hearing on February 13, recounted her recent frustration at repeated but unsuccessful efforts to try to obtain an FMLA physician certification for an employee. After negotiating past the receptionist and others in her final effort to obtain the certification form, she asked the physician to take ten minutes to fill out the form, to which he responded, "Where do I find the ten minutes?" Other physicians, however, simply refuse to fill out the paperwork, try to charge the employers or employees for filling out the paperwork or complain about the excessive administrative requirement. Without the cooperation of certifying physicians, employers cannot comply with the two-day requirement.

While the legislative language of the Family-Friendly Workplace Act does not impose administrative burdens comparable with the FMLA, and while nothing in S. 4 requires employers to change current practices or to agree to certain options, SHRM continues to work closely with Senator Ashcroft and members of the Labor

and Human Resource Committee to ensure that the options provided under the Family-Friendly Workplace Act will user friendly for both employers and employees. The easier that the flexible options are for employers and employees to understand, use and administer, the more likely that employers will make the options available to their employees on a widespread basis.

Question 3. Large businesses often have the ability to implement "work around" policies that allow flexible work schedules without violating the Fair Labor Standards Act of 1938. My concern is that small business owners tend to shy away from such "risky" policies due to the legal liability of possibly violating the 1938 Act. Many small business owners lack the financial means of hiring legal counsel needed for constructing such policies. Without legal counsel, are "work around" policies a legal liability for small employers? If so, would the passage of the Family-Friendly Workplace Act (S. 4) relieve small businesses from such liability?

Answer 3. Employers of all sizes, large and small, risk legal liabilities whenever they attempt to work around the archaic strictures of the Fair Labor Standards Act. This is especially true for smaller businesses which do not have the financial resources to retain legal counsel. Without such counsel, they would be ill-advised to attempt to find creative work schedules which would satisfy the needs of employees and yet remain within the strict requirements of the FLSA's 40 hour, seven day work period. The Family-Friendly Workplace Act would give employers of all sizes, but particularly to small ones, great comfort in knowing that they can accommodate their employees' needs without exposing themselves to legal liabilities. Employers today face growing national and international competition to attract and retain qualified workers, and need Congressional support to enhance both employees' job satisfaction and businesses' competitive standing.

Again, Senator Enzi, thank you for the opportunity to testify on important workplace flexibility legislation. We look forward to continuing to work closely with you and your staff as the Senate amends S. 4 and moves the measure to the Senate floor.

[Additional material may be found in committee files

PREPARED STATEMENT OF EDITH RASELL, M.D.

Mr. Chairman and members of the Subcommittee on Employment and Training. I am Edith Rasell, an economist at the Economic Policy Institute. Thank you for inviting me to testify on Senate Bill 4, the Family Friendly Workplace Act.

The purpose of the hours provision in the Fair Labor Standards Act (FLSA) was and is to restrict the length of the work week. Requiring employers to pay an overtime pay premium provided an economic disincentive to work weeks longer than 40 hours. In short, the FLSA established the 40-hour week standard. Currently, however,

* average hours worked per week are rising, despite a growing share of the labor force being employed part time;
* people are working more overtime hours, despite the pay premium disincentive; and
* work hours are rising in the US, while hours per week are falling among all our major industrialized trading partners with the exception of Canada where the rise has been lower then in the US.

This is not a time to weaken the hours provision of the FLSA.

Nonetheless, given the growing numbers of two-earner families and single-parent families in which the parent works, employees have a need for more flexibility in their work schedules. However, the current provisions of the FLSA already allow employees much greater flexibility than many employers are willing to permit. Employer inflexibility, much of which may be necessary given the requirements of their workplace but which is far beyond what is required by the FLSA, is a major obstacle to employee flexibility.

For example, under current law employers can allow employees to vary their arrival and departure times and take time off during the day, even while requiring a specified number of hours to be worked each week. Under current law, employers can offer workers a compressed work week such as four ten-hour days per week, permitting one additional day off per week. Employers can reduce the length of the usual work week. Job sharing can be encouraged. All this and more is currently possible. However, while many companies say they support such policies, they are actually used in very few firms and by very few people. A survey of 121 private

companies found that just 14% routinely made available a flextime program. Moreover, 92% of those without a flextime program said it was unlikely they would adopt such a program in the future (Stroh and Kush 1994). Only 10% of full-time hourly workers have flexible work schedules (BLS News, August 14, 1992).

Proponents of S. 4 argue that this amendment would give to private employees the same flexibility currently enjoyed by federal and other public sector employees. However, the situations of private and public sector employees are very different. In the public sector, 43% of workers are covered by collective bargaining agreements which afford them additional protections. In the private sector, just 11% of workers are covered.

Currently, state and local employees may accumulate comp time in place of overtime pay. But many employees have reach their maximum number of bankable hours: 240 hours (30 days) for most workers and 480 hours (60 days) for police and firefighters. A major problem is that employees have difficulty obtaining their employer's permission to use their comp time hours.

This proposed amendment to the FLSA stipulates that employees will make the choice of receiving compensatory time off or overtime pay, and the decision about participating in the flexible credit hour or biweekly work program. The bill prohibits any coercion by employers in these decisions and prohibits making participation in these programs a condition of employment. However, because the bargaining power of employers and employees is so unequal, ensuring such a free choice for all workers is not possible. The pressures can be very mild but also very effective. We know that some people do not exercise their options under the Family Medical Leave Act because they do not want to be stigmatized (e.g., being on the mommy track) by taking the time off that they desire and to which they are legally entitled. Through such subtle influences or more overt ones, workers choices can be compromised.

If workers cannot exercise a free choice, then this bill would put overtime pay at risk. In any given week, some 13% of hourly workers receive overtime pay. Approximately 60% of overtime pay recipients earn less than $10 per hour, or about $20,000 per year if they work full time, year round. About 62% live in families with incomes below $40,000. In a period of stagnant wages, many of these workers rely on their overtime pay. They cannot afford a flexible schedule if it means less take home pay.

If there were no overtime pay premium to discourage work weeks of greater than 40 hours, then the length of the average workweek would rise and fewer people would be hired. An estimated 1.4 million jobs would be lost (Golden 1997).

While no one can predict the future, the current situation can shed light on what could be expected if S. 4 were enacted. Current law allows much more flexibility than employers are willing to permit. In the public sector where employees are able to bank their comp time hours, the banks are frequently full. All this implies that many employers are not willing to allow employees more flexibility in taking time off and suggests a pessimistic future for employees under S. 4. If employers are unwilling to grant workers flexibility now, how will workers be able to use the comp time they would earn under the provisions of S. 4?

Instead of working to pass S. 4, we should focus our energy on encouraging more employers to offer workers the flexible schedules that are currently allowed. Employers could also offer paid personal leave days for workers to use at their discretion. Moreover, employers could shorten the average work week. This would not only give workers more time off, but evidence suggests it would also boost productivity and raise employment. It is not necessary to compromise the protections provided by the FLSA with this amendment.

75

Tuesday, February 11, 1997

The Honorable Mike Enzi
United States Senator
United States Senate
SH-116 Hart Senate Office Building
Second Street and Constitution Ave., N.E.
Washington, D.C. 20510-5003

Dear Senator Enzi:

We at Unicover Corporation are very pleased to have been asked to testify regarding S.4 before the Senate Employment and Training Subcommittee.

While our formal testimony before the Committee offers enthusiastic support in general for the bill to allow for compensatory time off, biweekly work program, credit hours, and salaried exemption provisions, there are two provisions of this bill which we believe should be amended.

1. We believe that the requirement that accumulated compensatory time and flexible credit hours remaining unused be paid out once a year diminishes the benefit of this program to employees significantly. Based upon our brief experiment with compensatory time in the early 1980's, we know that people set about to accumulate significant amounts of time in order to have an extended vacation sometimes more than a year into the future. We also saw that people who had used most of their available vacation before an unexpected event arose (such as a wedding) were able to bank additional time to permit them to attend such an event where their only alternative would have been to take unpaid leave.

   Currently our employees accrue vacation at a rate of 2, 3, or 4 weeks per year depending on their length of service. Even today it is not at all unusual to find that employees cannot do the things that they want to do because they do not have enough vacation time accrued, sometimes even because illness or other emergencies resulted in exhausting available leave. The every 12-month payout requirement can mean an employee who has something special planned, beyond the mandatory payout date, for which they want to accumulate additional time may be forced to take cash instead. We therefore recommend that the 12 month payout requirement be eliminated, be expanded to at least 24 months or made negotiable between employer and employee (at the employee's option) in order to be more of a benefit to the employee.

2. The provision under flexible credit hours that employees may bank up to 50 hours in a 12 month period seems illogical. Employees will be most likely to use their time off in full day increments so that 6 days and 2 hours does not make much sense on the face of it. Since this is a voluntary program "initiated and requested" by the employee, each request for which presumably must be approved by the employer, it is not clear to us why a maximum amount of time which can be earned in a 12 month period needs to be stated in this legislation. If a maximum amount does need to be included for some reason, we recommend that it be an intuitively logical number of hours such as 40 or 80.

76

Finally, we do confess some discomfort with the language "An employer . . . shall not directly or indirectly intimidate, threaten, or coerce any employee . . ." Unicover Corporation's interest in compensatory time is in providing a benefit to employees that will keep them happy and working for Unicover Corporation. Intimidating or coercing them certainly would not achieve our objective. On the other hand, the breadth of this language would create the opportunity for the occasional disgruntled employee to "stick it to" the company. We understand that some protection against abuse may be in order, but hope it can be narrowed somewhat.

Thank you for considering our views.

Sincerely,

UNICOVER CORPORATION

James A. Willms

James A. Willms
Executive Vice President

[Whereupon, at 12:25 p.m., the subcommittee was adjourned.]

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[Additional submissions from Rep. Walberg follows:]

March 25, 2025

The Honorable Ryan Mackenzie
Chairman
Subcommittee on Workforce Protections
Committee on Education and Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Ilhan Omar
Ranking Member
Subcommittee on Workforce Protections
Committee on Education and Workforce
U.S. House of Representatives
2101 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Mackenzie, Ranking Member Omar, and Members of the House Education and Workforce Subcommittee on Workforce Protections,

On behalf of the National Restaurant Association, I write to express our support for the Tipped Employee Protection Act and urge its passage to provide long-term certainty and stability for restaurant employers and their tipped employees.

We appreciate the Committee's focus on modernizing the Fair Labor Standards Act (FLSA) to better reflect today's workforce and ensure the law works for both employers and employees. One of the most important steps Congress can take to improve the FLSA is passing the Tipped Employee Protection Act.

The FLSA established the tip credit system, which has long served as the foundation for how restaurants compensate their tipped employees, allowing workers to earn well above the federal minimum wage while providing employers the flexibility to invest in their businesses and staff. However, past regulatory overreach has threatened this system, most notably with the Department of Labor's now-withdrawn 80/20/30 rule, which imposed arbitrary limitations on how tipped employees could spend their time and created significant compliance burdens for restaurant operators.

While the Restaurant Law Center's successful lawsuit led to the withdrawal of this rule, the risk remains that a future administration could reinstate similar burdensome regulations. The Tipped Employee Protection Act provides a legislative solution that ensures the tip credit remains intact by clarifying the definition of a tipped employee in the FLSA. The bill prevents regulatory overreach by specifying that a tipped employee is defined without regard to their specific job duties so long as their wages and tips meet or exceed the applicable minimum wage. It eliminates the confusion and compliance burden created by shifting regulatory interpretations of tipped employment, restoring certainty and simplicity to the tip credit system. Most importantly, it protects tipped employees' earning potential, ensuring they continue to thrive under a pay structure that allows them to earn significantly more than the minimum wage.

The restaurant industry, composed of predominantly small businesses, has struggled with the impact of arbitrary, complex regulations that increase costs, force operational changes, and ultimately reduce income opportunities for tipped employees. The Tipped Employee Protection Act provides a much-needed, permanent solution to prevent future administrations from undermining a system that has worked for decades.

We appreciate the Committee's leadership in examining ways to strengthen and modernize the FLSA and urge swift passage of the Tipped Employee Protection Act to preserve economic certainty for restaurants and their employees.

Thank you for your consideration.

Sincerely,

Jordan Heiliczer

Director of Labor and Workforce Policy
National Restaurant Association

Independent Work Coalition

March 25, 2025

The Honorable Ryan Mackenzie
Chair
Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

The Honorable Ilhan Omar
Ranking Member
Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

Dear Chair Mackenzie, Ranking Member Omar, and Members of the Subcommittee:

Thank you for holding today's hearing, "The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities." The Independent Work Coalition (IWC) and the 15 undersigned organizations appreciate the Committee's consideration of policies that strengthen independent work opportunities for individuals across the country.

The IWC is comprised of a diverse group of associations, businesses, and other stakeholders that support independent work and the millions of Americans who work as independent contractors. The coalition is dedicated to advocating for policies that strengthen independent work opportunities and empower individuals who choose to be in business for themselves. Likewise, IWC is committed to educating policymakers about the important role independent contractors play across every sector of the economy.

While independent work has played an important role in our economy for decades, a growing share of Americans are increasingly choosing to secure additional income opportunities outside of traditional employment or pursue their own entrepreneurial endeavors altogether. For example, the number of people working occasionally as independent contractors is up by 130% since 2020.[1] Similarly, the number of individuals choosing careers as full-time independent contractors has similarly grown from 13.6 million in 2020 to 26 million in 2023.[2] This is true even as nearly 8 million traditional employment roles are currently available.[3] While the internet and digital connectivity have made these opportunities more accessible to many, worker preferences for flexibility, autonomy, and earning scalability are major factors driving this trend.

With this in mind, IWC and the undersigned organizations support the Committee's work to explore policies that support the workers, businesses, and communities that rely on the independent contractor model. IWC commends Rep. Kiley for his commitment to advancing independent work opportunities for the millions of Americans who choose to pursue their own entrepreneurial endeavors and earnings opportunities through introduction of the Modern Worker Empowerment Act (H.R. 1319) and the Modern Worker Security Act (H.R. 1320). The Modern

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[1] In 2020, 15.8 million people worked occasionally as independent contractors; in 2023, that number is up to 36.6 million. *See*, MBO Partners, 4 Long-Term Trends Driving the Growth of the Independent Workforce (December 8, 2023).

[2] MBO Partners, "State of Independence in America 2023" (October 2023).

[3] Jeff Cox, Job openings see gains in January in a sign of labor market stability, CNBC (March 11, 2025).

Independent Work Coalition

Worker Empowerment Act provides clarity for workers and businesses by establishing a common-sense definition for independent contractor status across federal law. Moreover, the Modern Worker Security Act clarifies that independent workers can participate in innovative programs designed to connect them with portable, work-related benefits without fear of potentially jeopardizing their independent contractor status under federal law.

IWC and the undersigned organizations stand ready to continue working with you to advance policies that support independent work across every sector of the economy.

Sincerely,

American Association of Advertising Agencies (4As)
Americans for Prosperity
American Trucking Associations
Association of Bi-State Motor Carriers
Associated Builders and Contractors
Financial Services Institute
Flex Association
HR Policy Association
National Association of Wholesaler-Distributors
National Council of Chain Restaurants
National Retail Federation
Small Business & Entrepreneurship Council
The LIBRE Initiative
The Transportation Alliance
Workplace Solutions Association

March 25, 2025

The Honorable Ryan Mackenzie
Chairman
Committee on Education and Workforce
Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

The Honorable Ilhan Omar
Ranking Member
Committee on Education and Workforce
Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Mackenzie, Ranking Member Omar and Members of the U.S. House Committee on Education and Workforce's Subcommittee on Workforce Protections:

On behalf of Associated Builders and Contractors, a national construction industry trade association with 67 chapters representing more than 23,000 members, I appreciate the opportunity to comment on the subcommittee's hearing, "The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities."

While the Fair Labor Standards Act is the foundation of American labor standards, its ambiguous composition is responsible for an ever-shifting regulatory environment that creates uncertainty for workers and businesses alike, risking legitimate independent contractors in the construction industry losing critical opportunities for work. In addition, the FLSA fails to accommodate for the state of the modern economy and the needs of independent contractors.

ABC supports legislation that clarifies who qualifies as an independent contractor and protects workers who have long been properly classified as independent contractors in the construction industry. These workers play a vital role in providing specialized skills, entrepreneurial opportunity and stability during fluctuation of work common to the industry. Further, independent contractors play an important role for large and small contractors, delivering construction projects, safely, on time and on budget for their government and private customers. For this reason, ABC supports the following legislation:

- **H.R.1319, the Modern Worker Empowerment Act**, introduced by Rep. Kevin Kiley, R-Calif., which amends the FLSA to base worker classification determinations on two clear tests: a business's control over a worker's work and how it is performed and the worker's opportunity to express entrepreneurial discretion. This legislation also clarifies that safety, legal and insurance guidelines and contractual project completion deadlines are not determinants of worker classification. Further, it would ensure the worker classification standard is consistent between the FLSA and the National Labor Relations Act.

- **H.R.1320, the Modern Worker Security Act**, introduced by Rep. Kiley, which provides businesses with the opportunity to offer flexible or portable benefits to workers without the risk of the provision of these benefits jeopardizing worker classification determinations.

In addition, ABC encourages representatives to reintroduce H.R.1980, the Working Families Flexibility Act, from the 117th Congress. This legislation amends the FLSA to provide workers

choice between compensatory overtime pay and compensatory time off at a rate not less than 1.5 times hours worked. At the same time, it ensures that offering such compensatory time is only provided in accordance with applicable provisions of collective bargaining agreements when an employee is represented by organized labor or affirmed between the employer and employee when the employee is not represented by a labor organization.

ABC urges the committee to advance the Modern Worker Empowerment Act to provide businesses and workers alike with a clear, workable and straightforward standard for determining worker classification. Further, ABC encourages the committee to expand opportunities for businesses to provide benefits to workers through the advancement of the Modern Worker Security Act.

ABC appreciates the opportunity to comment on today's hearing and looks forward to continuing to work with the Subcommittee on Workforce Protections.

Sincerely,

Kristen Swearingen
Vice President, Legislative & Political Affairs

AMERICANS for TAX REFORM

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20005
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F:(202)785-0261
www.atr.org

March 18, 2025

Dear Members of Congress,

I write in support of H.R. 1319, the "Modern Worker Empowerment Act," and H.R. 1320, the "Modern Worker Security Act," both of which have been introduced by Congressman Kevin Kiley (R-Calif.). These bills would protect the rights of independent workers by codifying clear, practical criteria for allowing a worker to self-identify as an independent contractor.

Americans for Tax Reform urges all members of Congress to cosponsor the Modern Worker Empowerment Act and the Modern Worker Security Act.

Workers have faced a jarring back-and-forth when it comes to regulation of their independent contractor status. After the Trump administration reinstated longstanding precedent with a simple two-factor test in its 2021 independent contractor rule, the Biden administration rescinded that rule and implemented its own 2024 rule that greatly restricted the ability for workers to self-identity as independent contractors.

The Modern Worker Empowerment Act would codify a two-factor test for determining independent contractor status akin to the 2021 rule, focusing the analysis on whether another person has "significant control" over the details of the work being performed and whether the worker takes on the "opportunities and risks" of entrepreneurship. In effect, this bill would give workers greater flexibility to identify as independent contractors if they choose to do so and it would prevent a future administration from reverting back to more restrictive rules imposed by the executive branch.

The Modern Worker Security Act would further protect the rights of independent workers by clarifying that receiving voluntary portable benefits has no bearing whatsoever on independent contractor status. This ensures that independent workers can receive voluntary benefits—such as health savings accounts, health insurance coverage, retirement savings, or skills training—without losing the ability to be their own boss.

Workers should be able to choose the status that works best for them and deserve to have stability. Together, these two bills will protect worker choice and improve quality of life for independent workers.

All members of Congress should cosponsor the Modern Worker Empowerment Act and Modern Worker Security Act.

Onward,

Grover Norquist
President, Americans for Tax Reform

March 24, 2025

The Honorable Ryan Mackenzie [R-PA]
Chair
Subcommittee on Workforce Protections
House Education and Workforce Committee
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Ilhan Omar [D-MN]
Ranking Member
Subcommittee on Workforce Protections
House Education and Workforce Committee
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Dear Members of Congress,

As supporters of worker choice and economic opportunity, we the undersigned organizations write in strong support of the focus of the Subcommittee on Workforce Protections' hearing on "The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities".

In order for America's workers, small business entrepreneurs, and industries to thrive in the 21st century, Congress must prioritize reforms that let Americans chase opportunity rather than permission. Over time, changes to the Fair Labor Standards Act (FLSA) and ensuing regulations have required businesses to increasingly invest in costly, unhelpful government compliance requirements instead of investing in the American workforce and the innovations that help foster long term success.

In particular, the following legislation restores much needed contract freedom for American workers and businesses in critical areas, which will improve career pathways for tens of millions of Americans while helping to drive economic growth that everyone benefits from.

We strongly support and ask Members of Congress to pass:

- H.R. 1319, Modern Worker Empowerment Act, which would harmonize an employment test under FLSA and the National Labor Relations Act (NLRA) that is straightforward to comply with and protects self-employment career pathways.
- H.R. 1320, Modern Worker Security Act, which would allow businesses to offer portable benefits to independent contractor clients without facing reclassification penalties that take away self-employment opportunities.
- Working Families Flexibility Act, which would give all American workers eligible to earn overtime the same opportunity that federal employees have – a choice between earning time and a half pay or accumulating time and half paid leave.

- Ensuring Workers get PAID Act, which helps employers identify and resolve minimum wage and overtime pay violations. Self-reporting businesses receive assistance from the Department of Labor (DOL) to fix the issues and ensure their workers are made whole.

Together, these bills would create significant new opportunities and flexibility for the American workforce, allowing businesses and workers to create mutually beneficial arrangements that help everyone. We ask that you support each of these bills to advance economic opportunity as soon as possible.

Sincerely,

Austen Bannan
Employment Policy Fellow
Americans for Prosperity

Grover Norquist
President
Americans for Tax Reform

Will Swaim
President
California Policy Center

Rowan Saydlowski
Director
Center for Worker Freedom

Patrice Onwuka
Director, Center for Economic Opportunity
Independent Women

F. Vincent Vernuccio
President
Institute for the American Worker

Michael Melendez
Executive Vice President
Libertas Institute

Steve Delie
Director of Labor Policy
Mackinac Center for Public Policy

Paul Gessing
President
Rio Grande Foundation

Isabel Soto
Director of Policy
The LIBRE Initiative

College and University Professional Association for Human Resources

March 25, 2025

The Honorable Tim Walberg
Chairman
Committee on Education and Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Bobby Scott
Ranking Member
Committee on Education and Workforce
U.S. House of Representatives
2101 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Walberg and Ranking Member Scott:

On behalf of the College and University Professional Association for Human Resources (CUPA-HR), thank you for holding today's hearing on modernizing the Fair Labor Standards Act. I write in strong support of the *Working Families Flexibility Act,* which the committee considered in several previous Congresses and the House of Representatives passed in 2017. We urge the committee to consider and the House to pass the legislation again this Congress.

CUPA-HR serves as the voice of human resources in higher education, representing more than 41,000 human resources professionals and other campus leaders at over 1,800 colleges and universities across the country. Higher education employs over 4 million workers nationwide, with colleges and universities in all 50 states.

The *Working Families Flexibility Act* would amend the Fair Labor Standards Act to allow private employers, including private colleges and universities, the opportunity to offer non-exempt employees who have worked overtime hours the choice between paid time off (known as compensatory time or comp time) or overtime pay. Under current federal law, public-sector employers, including public-sector colleges and universities, may offer this benefit, but private-sector employers may not.

On April 11, 2013, CUPA-HR President and CEO Andy Brantley testified before the House Subcommittee on Workforce Protections on the benefits of compensatory time. Drawing on his experience as associate vice president and chief human resources officer at a large public university, Dr. Brantley provided several examples of instances where employees benefitted from compensatory time even though the university provided a wide range of generous paid leave policies to all employees. Dr. Brantley lamented that compensatory time was not an available benefit when he served in a prior position as director of human resources at a private institution.

Representing both public and private colleges and universities, CUPA-HR believes employers at private universities should be afforded the opportunity to provide the same flexibility to employees as public universities. Again, we urge you to support this legislation.

Respectfully Submitted,

Joshua A. Ulman
Chief Government Relations Officer
College and University Professional Association for Human Resources
9234 Kingston Pike #458
Knoxville, TN 37922
josh@ulmanpolicy.com

cc: Members of the Education and Workforce Committee of United States House of Representatives

C | W | I
Coalition for Workforce Innovation

Rep. Tim Walberg (R-MI)
Chair
Committee on Education and Workforce

Rep. Bobby Scott (D-VA)
Ranking Member
Committee on Education and Workforce

February 26, 2025

Chair Walberg & Ranking Member Scott,

On behalf of the Coalition for Workforce Innovation ("CWI") we submit this statement for support for H.R. 1319, the Modern Worker Empowerment Act (MWEA) introduced by Representatives Kiley (R-CA). This legislation will support individuals who seek independent work throughout the economy by affirming a commonsense and modern worker classification test under the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA).

CWI's membership represents worker advocates, entrepreneurs, start-ups, businesses, and trade associations that support the modernization of federal workforce policy to enhance choice, flexibility, and economic opportunity for all workers. Our broad and diverse stakeholders showcase healthcare, technology, media, transportation, logistics, and retail sectors where independent workers have gained access to flexible work arrangements that fit their lifestyle. Today's diverse independent workers span all ages and include part-time students, caregivers, and retirees. These individuals are primarily motivated by finding a source of supplemental income or organizing work around their lives and not the other way around. Independent work also serves as a foundation to small businesses as well as the first step for many new entrepreneurs.

Over the past few years, threats from the Department of Labor (DOL) and the National Labor Relations Board (NLRB) necessitate the need for legislative actions to preserve and protect independent work. The regulatory back and forth between rules favored by changing Administrations undermines stakeholders throughout the economy. Far from providing needed clarity, these efforts continue to create uncertainty for workers and businesses who seek independent work relationships to find wage-earning opportunities, to satisfy consumer demand, and to fortify supply- chain resilience. CWI urges congressional action to provide real rules of the road by supporting the Modern Worker Empowerment Act which creates a clear definition and standard across federal laws to protect independent workers.

CWI is committed to building an economy that works for all types of workers by preserving flexibility and entrepreneurship while protecting against potential abuse. For this reason, CWI

supports common sense congressional action, like the Modern Worker Empowerment Act, that provides support for those who choose to work independently and to fit work within their lives and not the other way around.

To learn more about CWI, please visit www.workforceinnovation.net

Sincerely,

Coalition for Workforce Innovation

555 12th Street NW, Suite 1001
Washington, D.C. 20004

1-800-552-5342
NFIB.com

March 25, 2025

The Honorable Glenn Grothman
United States House of Representatives
1211 Longworth House Office Building
Washington, D.C. 20515

Dear Representative Grothman,

On behalf of NFIB, the nation's leading small business advocacy organization, I write in support of H.R. 2299 the *Ensuring Workers Get PAID Act of 2025*. This legislation would reinstate and codify the Department of Labor's (DOL) Payroll Audit Independent Determination (PAID) program, which provided small businesses flexibility to self-report and correct minor wage and hour violations before incurring a penalty.

Under the first Trump Administration, the Department of Labor launched the PAID program as a six-month pilot program on April 3, 2018. The program was aimed at resolving wage and hour claims more expeditiously and without litigation, which would improve employer's compliance with the *Fair Labor Standards Act* (FLSA) and ensure that more workers received legally owed back wages faster. Under the PAID program, employers conducted self-audits of their payroll, and if they discovered an overtime or minimum wage violation, they would self-report those violations to the Wage and Hour Division (WHD), who would work with employers to correct any violations and quickly provide back wages to affected workers.

Small businesses overwhelmingly supported the PAID program. In fact, according to a recent NFIB Member Ballot, 88% of NFIB members believe the Department of Labor should allow employers to self-report and correct minor overtime and minimum wage violations before incurring a penalty.[1] Unfortunately, the Biden Administration ended the program on January 29, 2021.

Unlike larger businesses, many small businesses do not have dedicated compliance officers or human resources departments, leaving the business owner responsible for handling payroll in-

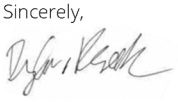
[1] NFIB Member Ballot, Mandate, vol. 580, March 2022, *Should the Department of Labor allow employers to self-report and correct minor overtime and minimum wage violations before incurring a penalty?* (Yes: 88% No: 5% Undecided: 7%).

house. This can lead to unintentional errors. The PAID program was successful in helping small business owners correct unintended errors before incurring costly fines and/or litigation.

As Congress looks to capitalize on increased small business optimism and deliver pro-growth economic and regulatory policies, reinstating the PAID program would help honest small business owners comply with the law before being assessed penalties under the strict liability standard wage and hour laws operate under.

NFIB supports the Ensuring Workers Get PAID Act and urges Congress to promptly enact this legislation. Small businesses appreciate your leadership to reduce compliance burdens.

Sincerely,



Dylan Rosnick
Principal, Federal Government Relations
NFIB

IndependentWomen®

Seniors Need Better At-Home Care Options

Representative Ryan Mackenzie
Chairman
U.S. House Committee on Education and Workforce
Subcommittee on Workforce Protections
Washington, D.C. 20510

Representative Ilhan Omar
Ranking Member
U.S. House Committee on Education and Workforce
Subcommittee on Workforce Protections
Washington, D.C. 20510

March 25, 2025

Dear Chairman Mackenzie, Ranking Member Omar, and Members of the Subcommittee on Workforce Protections,

Independent Women is the leading national women's organization dedicated to advancing policies that expand people's freedom, opportunity, and well-being.

We are pleased the Subcommittee is presenting this hearing, "The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities." We commend the committee for examining how the Fair Labor Standards Act (FLSA) treats in-home caregiving arrangements for elderly Americans.

Elder care is a crucial concern for many Americans. As the desire to age in place remains strong among an **overwhelming majority** of Americans (88%), the need for affordable in-home caregiving support is more critical than ever. Approximately **one-third** of seniors require such assistance to maintain their independence, yet the average annual cost of **$60,000** poses a significant financial burden for many, particularly the large portion of seniors who live on fixed incomes.

Many older Americans are also yearning for more companionship. Data from 2023 reveals that **57%** of U.S. adults aged 65 and over reported feelings of loneliness. These feelings, along with social isolation, can significantly impact an individual's health and well-being. They are associated with a range of physical and mental health concerns, including dementia, stroke, heart disease, anxiety, and depression. Live-in

caregiving can be a solution to address social disconnection while also enabling Americans to age in place within their home.

To better address the caregiving needs of seniors, policymakers should advance solutions that are both flexible and budget-neutral. For example, rescinding the 2013 Home Care Final Rule will encourage more caregiving relationships by creating a better regulatory framework for those receiving and providing care. This has been proposed by House Education and Workforce Committee Chairman Tim Walberg, who introduced the **Ensuring Access to Affordable and Quality Home Care for Seniors and People with Disabilities Act** in the 118th Congress.

In 1974, Congress amended the FLSA to extend federal minimum wage and overtime pay protections to in-home workers. However, some workers were exempted from these requirements, including those providing companionship services to elderly or disabled individuals.

The Department of Labor revised its guidance in 2013 with the introduction of the "**Home Care Final Rule**," which took effect in 2015. This rule narrowed the definition of "companionship services," making it more difficult for caregivers to qualify for the exemption.

Under the new rule, 80% of services provided to an elderly or disabled person must be focused on "fellowship" (conversation, games, reading) or "protection" (accompanying on walks, monitoring). If a caregiver spends more than 20% of their time on "care" services (dressing, meal preparation), they can no longer claim the companionship exemption. The updated guidelines also introduced complex recordkeeping requirements for households employing these caregivers, including keeping detailed records of the actual hours worked.

We must ensure that workers are treated fairly, including in-home caregivers. But needlessly restrictive rules like these price many seniors out of the market – potentially leading them to forgo the companionship care they need – and deny independent caregivers the autonomy to determine their own working relationships with families.

Excessive federal regulation can also encourage people to operate outside of the regulatory framework completely. Those who choose "off the books" caregiving risk legal repercussions for non-compliance with tax and labor laws, as well as exploitation and other harmful outcomes.

For these reasons, we urge Congress to rescind the 2013 Home Care Final Rule and restore the previous companionship exemption standard. While this will not solve every problem related to long-term care for senior citizens in this country, it will remove unnecessary regulatory burdens and make it easier for seniors to get the care they need in the comfort of their own homes. It could also serve as a critical first step toward a better caregiving model that benefits households and caregivers alike.

Thank you again for raising this important issue.

Respectfully,

Heather Madden
Policy Staff Director
Independent Women's Voice

FINANCIAL SERVICES INSTITUTE | VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS AND INDEPENDENT FINANCIAL ADVISORS

VIA ELECTRONIC MAIL

July 1, 2024

The Honorable Bill Cassidy, Ranking Member
United States Senate Committee on Health, Education, Labor and Pensions
428 Dirksen Senate Office Building
Washington, DC 20510

Re: Request for Information on Portable Benefits for Independent Workers

Dear Senator Cassidy:

I write on behalf of the Financial Services Institute (FSI) [1] in response to your Request for Information (RFI) on ways to modernize federal law to allow independent workers access to portable workplace benefits like retirement and health care.[2] The RFI seeks information on ways to remove federal legal and regulatory barriers to portable benefits for independent workers while protecting their flexibility and freedom to earn a living as they best see fit.

FSI appreciates the opportunity to comment on this important subject. Independent financial advisors are small business owners by choice. As explained in further detail below, their independent contractor status is central to their business and enables them to better serve their clients. Recent efforts to expand employee protections to more workers have threatened independent financial advisors' ability to continue to operate as independent contractors. We outline specific pain points that could be addressed in future legislation. Like many small business owners, our financial advisor members also struggle to find quality, affordable medical insurance for themselves and their staff. FSI has explored potential solutions that could be offered to members. We discuss below what we are currently able to offer our members and the shortcomings that could be addressed with future legislative solutions.

Background on FSI Members

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the United States, there are more than 500,000 independent contractors in the financial and insurance industries, including 160,000 independent financial advisors, who account for approximately 52.7 percent of all producing independent financial advisors.[3] By their choice, these financial advisors are self-employed

[1] The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

[2] https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-requests-information-from-stakeholders-on-portable-benefits-for-independent-workers

[3] Cerulli Associates, Advisor Headcount 2019, on file with author; NERA Economic Consulting, The Role of Independent Contractors in the Finance and Insurance Sectors (Nov. 2022), (finding that more than half a million people work as independent contractors in the financial and insurance sector and in financial-services occupations).

independent contractors, rather than employees of independent financial services firms.[4] They own and operate approximately 130,000 financial advisory and insurance brokerage firms, employing approximately 330,000 people and accounting for 27 percent ($47 billion) of the output of the financial-advisory and insurance-brokerage industry. Between 2015 and 2019, independent contractors in the financial services sector created approximately 54,000 new businesses and 174,000 new jobs.[5]

Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide Main Street Americans with the affordable financial advice, products, and services necessary to achieve their investment goals. This business model has two players: financial advisors and independent financial services firms. Financial advisors normally establish their own business without any coordination with or approval required by the firm. Some advisors engage in limited operations, such as purchasing and selling securities on behalf of clients. Others may have a more significant enterprise, offering a full range of financial planning, investment advice, insurance, tax, and estate-planning services.

FSI's members serve clients across all income levels. Through their association with independent financial services firms, independent financial advisors are able to provide financial advice that helps investors save for common financial needs such as college tuition, homeownership, retirement, and support for their aging parents. These advisors' services are especially important in underserved minority and rural communities that lack access to a robust financial-services market, because they frequently offer a one-stop shop for affordable investing advice, tax preparation, financial education, and estate planning.

Financial advisors affiliate with independent financial services firms because it is required by securities regulations.[6] Those regulations require anyone who effectuates securities transactions or offers advice concerning investing in securities to register with the SEC or affiliate with a corporation that is registered with the SEC. Individual advisors who choose to affiliate with a financial services firm do not individually register as broker-dealers but instead agree to supervision by their firms, which assume responsibility for ensuring compliance with federal law and the conduct rules of the Financial Industry Regulatory Authority, Inc. (FINRA).

Critically, *financial advisors are not employees of independent financial services firms*. The key

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[4] The use of the term "financial advisor" or "advisor" in this letter is a reference to an individual who is a registered representative of a broker-dealer, an investment adviser representative of a registered investment adviser firm, or a dual registrant. The use of the term "investment advisor" or "advisor" in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.

[5] NERA Economic Consulting, The Role of Independent Contractors in the Finance and Insurance Sectors (Nov. 2022).

[6] In particular, under the Securities Exchange Act of 1934 (Exchange Act), anyone who effectuates securities transactions or offers advice concerning investing in securities, including independent financial advisors, must register with the SEC or affiliate with a corporation that is registered with the SEC, such as an independent financial services firm. 15 U.S.C. § 78o(a)(1). Federal regulations also require registered investment advisors to implement written policies and procedures designed to prevent violations of the federal securities laws. 17 C.F.R. § 270.38a-1. Individual advisors who choose to satisfy these requirements by affiliating with a financial services firm do not individually register as broker-dealers but instead agree to supervision by their firms, which assume responsibility for ensuring compliance with applicable laws. *Id.*; FINRA Rule 3110.

relationship is the one between a client and his or her financial advisor—not the separate, symbiotic relationship between the financial advisor and his or her affiliated independent financial service firm. Financial advisors frequently switch their firm affiliations, taking their clients and preexisting businesses with them. The firms do not control financial advisors, who set their own hours and rates, maintain their own physical premises, and hire and supervise their own staff. Financial advisors make significant investments in their own businesses and realize profits or losses according to their own successes or failures. They generally operate their business free from the control of the firms except for purposes of compliance with federal and state rules and regulations. Many financial advisors also offer clients services wholly unrelated to their firm affiliation, like tax advice and estate planning.

Thus, financial advisors are independent business owners who comply with certain contractual obligations such as legally required regulatory compliance measures. These advisors are therefore not correctly classified as employees under the Fair Labor Standards Act (FLSA).

Discussion

FSI appreciates the opportunity to comment on how labor and employment laws can be updated to better fit the modern economy. We remain concerned that recent efforts to expand employee protections to more workers have threatened independent financial advisors' ability to continue to operate their businesses and serve their Main Street American clients. FSI also supports some efforts to expand access to benefits for independent workers. These points are discussed in greater detail below.

I. Shortcomings of the Current Worker Classification Model

As an initial matter, we suggest that future legislative or regulatory solutions include language that supervision for regulatory compliance and risk management efforts in industries like financial services should not be considered evidence of control for the purposes of an employment relationship. The now rolled back 2021 DOL Independent Contractor Rule[7] included such language, which brought the FLSA definition into alignment with the Internal Revenue Code (IRC). Unfortunately, the DOL's 2024 Independent Contractor Rule eliminated the helpful clarifying language.

As outlined above, FSI's financial advisor members have an independent contractor relationship with an independent financial services firm. These advisors enjoy the freedom of running their own practice and offering their clients comprehensive advice, products, and services. Further, financial advisors generally choose between working as independent contractors or as employees of financial services firms. Many prefer to be independent contractors: independent advisors reported overall levels of satisfaction with their broker-dealer that was 5% higher than employee advisors and were around 45% more likely to recommend their affiliated broker-dealer to a colleague than were employee advisors.[8]

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[7] Independent Contractor Status under the Fair Labor Standards Act, 86 FR 1168, January 7, 2021 *available at:* https://www.federalregister.gov/documents/2021/01/07/2020-29274/independent-contractor-status-under-the-fair-labor-standards-act

[8] *Wealth Management Firms Need Advisors as Brand Evangelists to Attract New Talent, J.D. Power Finds (July 6, 2022), available at: https://www.jdpower.com/business/press-releases/2022-us-financial-advisor-satisfaction-study*

As we explained in our comments on the DOL's Independent Contractor Rule[9] when it was proposed, even though some independent contractors might benefit from reclassification as employees, others would not, and over-classification of workers as employees would likely harm workers as a whole. For example, reclassification may cause wage cuts or drive many independent contractors out of the workforce. In a study of the economic impact the DOL's Independent Contractor Rule would have on our members,[10] up to 20% of advisors would retire rather than be reclassified as employees. As a result, a significant number of Main Street investors would lose access to a trusted financial advisor. Further, 78% of advisors said that they expect account minimums to increase under the rule, restricting their ability to serve smaller accounts. This would be a particularly harmful outcome for less affluent investors, including younger individuals, minority households and those in rural areas. These financial advisors also estimated that they could no longer serve 31% of their existing clients because of increased account minimums and fees.

Independent financial services firms operate in a highly regulated environment overseen by the SEC, FINRA, and state securities divisions. Independent financial advisors choose a broker-dealer to affiliate with and have a large number of choices in a competitive market. Because independent financial services firms closely supervise financial advisor activity to comply with SEC, FINRA, and state securities regulatory requirements and engage in related risk management measures, firms are sometimes accused of misclassifying their financial advisors. Thus, they waste significant resources defending their worker classification decisions to the IRS, DOL, and state employment regulators.

Importantly, the SEC and FINRA do not differentiate between employees and other associated persons for securities law purposes.[11] Financial services firms must supervise the securities activities of their personnel regardless of whether they are considered employees or independent contractors. In addition, the FLSA, Internal Revenue Code (IRC) and state employment regulators may evaluate the definitions of independent contractor and employee differently. This leads to a confusing patchwork of legal and regulatory requirements for independent financial services firms and their financial advisors. The 1997 Taxpayer Relief Act added language to the IRC stating that supervision for compliance with securities laws cannot be interpreted as control for the purpose of an employment relationship.[12]

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[9] Financial Services Institute, Comment Letter on Employee or Independent Contractor Classification Under the Fair Labor Standards Act (December 13, 2022) available at: https://www.regulations.gov/comment/WHD-2022-0003-53818

[10] Financial Services Institute and Oxford Economics, The DOL's Independent Contractor Classification Rule Would Decrease Access to Advice and Increase Costs for Investors (January 2023) *available at:* https://financialservices.org/wp-content/uploads/2023/01/Oxford-Economics-Report-on-Proposed-IC-Rule-for-FSI.2023.1.17.pdf?_gl=1*mzvzwt*_gcl_au*NzE3MjQ5MjMuMTcxMDM2MzcxMw..

[11] See, for example, *In the matter of William V. Giordano*, Securities Exchange Act Release No. 36742 (January 19, 1996); FINRA, general information -- "As a registered representative, whether you are an employee or an "independent contractor" (for regulatory purposes there is no distinction between the two terms), you are obligated to follow all applicable securities laws and regulations." https://www.finra.org/registration-exams-ce/manage-your-career/obligations-your-firm

[12] Conference Report to Accompany H.R. 2014, Taxpayer Relief Act of 1997, Rpt, 105-220 at p457, 105th Congress (July 30, 1997) *available at:* https://www.congress.gov/105/crpt/hrpt220/CRPT-105hrpt220.pdf

II. Exploring Portable Benefits Options for Independent Workers

It is currently challenging for small and medium sized businesses to obtain reasonably priced health insurance for themselves and their employees. FSI has explored various options to help financial advisors solve this problem, including association health plans (AHPs). Insurance is regulated by individual states meaning that not all states allow AHPs and where available they are cost-prohibitive. There are currently no AHPs for us to offer or carriers willing to underwrite them. However, we are able to offer Professional Employer Organization (PEO) services that include health insurance and other benefits. Unfortunately, this solution does not work for everyone due to the fact that the health insurance is packaged with a variety of other business support services that our members may not need or cannot afford.

Through our CoveredAdvisor benefits program, FSI has partnered with multiple PEOs to try to alleviate the dearth of access to quality, affordable medical insurance for independent advisors and their staff. When our members partner with these PEOs, due to federal regulations, the PEOs must run the advisors' payroll and HR services. Once they pay for those features, which are costly, they gain access to large-group benefits such as medical, vision and dental insurance. Further, insurance is regulated at the state level and some states impose minimum size limits to qualify. For example, in Maryland and New Mexico, a firm must have 50 employees to qualify. While this program has proven helpful for some, it's not a single solution to inaccessible standalone medical insurance, which is desperately needed by independent advisors. We encourage the Committee to consider allowing small employers to band together to purchase health coverage allowing them to share costs and the administrative burden.

Conclusion

Thank you for considering FSI's comments. Should you have any questions, please contact our Director of Legislative Affairs, Hanna Laver, at (202) 499-7224.

Sincerely,

Dale E. Brown, CAE
President & CEO

STATEMENT FOR THE RECORD
On
The U.S. House Committee on Education & the Workforce, Subcommittee on Worker Protections
"The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges and Opportunities"
March 25, 2025

On behalf of the Financial Services Institute (FSI), we thank the Subcommittee for holding this hearing to consider policies protecting independent work and empowering independent workers. Specifically, we write to express our support for the Modern Worker Empowerment Act (H.R. 1319), which would clarify the definition of "employee" across federal law to protect independent workers. FSI represents independent financial services firms and the financial advisors affiliated with them. As discussed in further detail below, financial advisors' independent contractor status is a defining characteristic of our industry, and this legislation will ensure that independent financial advisors remain properly classified.

Background on FSI Members

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the United States, there are more than 500,000 independent contractors in the financial and insurance industries, including 160,000 independent financial advisors, who account for approximately 52.7 percent of all producing independent financial advisors.[1] By their choice, these financial advisors are self-employed independent contractors, rather than employees of independent financial services firms.[2] They own and operate approximately 130,000 financial advisory and insurance brokerage firms, employing approximately 330,000 people and accounting for 27 percent ($47 billion) of the output of the financial-advisory and insurance-brokerage industry. Between 2015 and 2019, independent contractors in the financial services sector created approximately 54,000 new businesses and 174,000 new jobs.[3]

Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide Main Street Americans with the affordable financial advice, products, and services necessary to achieve their investment goals. This business model has two players: financial advisors and independent financial services firms. Financial advisors normally

[1] Cerulli Associates, Advisor Headcount 2019, on file with author; NERA Economic Consulting, The Role of Independent Contractors in the Finance and Insurance Sectors (Nov. 2022), (finding that more than half a million people work as independent contractors in the financial and insurance sector and in financial-services occupations).
[2] The use of the term "financial advisor" or "advisor" in this letter is a reference to an individual who is a registered representative of a broker-dealer, an investment adviser representative of a registered investment adviser firm, or a dual registrant. The use of the term "investment advisor" or "advisor" in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.
[3] NERA Economic Consulting, The Role of Independent Contractors in the Finance and Insurance Sectors (Nov. 2022).

establish their own business without any coordination with or approval required by the firm. Some advisors engage in limited operations, such as purchasing and selling securities on behalf of clients. Others may have a more significant enterprise, offering a full range of financial planning, investment advice, insurance, tax, and estate-planning services.

FSI's members serve clients across all income levels. Through their association with independent financial services firms, independent financial advisors are able to provide financial advice that helps investors save for common financial needs such as college tuition, homeownership, retirement, and support for their aging parents. These advisors' services are especially important in underserved minority and rural communities that lack access to a robust financial-services market, because they frequently offer a one-stop shop for affordable investing advice, tax preparation, financial education, and estate planning.

Financial advisors affiliate with independent financial services firms because it is required by securities regulations.[4] Those regulations require anyone who effectuates securities transactions or offers advice concerning investing in securities to register with the SEC or affiliate with a corporation that is registered with the SEC. Individual advisors who choose to affiliate with a financial services firm do not individually register as broker-dealers but instead agree to supervision by their firms, which assume responsibility for ensuring compliance with federal law and the conduct rules of the Financial Industry Regulatory Authority, Inc. (FINRA).

Critically, *financial advisors are not employees of independent financial services firms.* The key relationship is the one between a client and his or her financial advisor—not the separate, symbiotic relationship between the financial advisor and his or her affiliated independent financial service firm. Financial advisors frequently switch their firm affiliations, taking their clients and preexisting businesses with them. The firms do not control financial advisors, who set their own hours and rates, maintain their own physical premises, and hire and supervise their own staff. Financial advisors make significant investments in their own businesses and realize profits or losses according to their own successes or failures. They generally operate their business free from the control of the firms except for purposes of compliance with federal and state rules and regulations. Many financial advisors also offer clients services wholly unrelated to their firm affiliation, like tax advice and estate planning.

Thus, financial advisors are independent business owners who comply with certain contractual obligations such as legally required regulatory compliance measures. These advisors are therefore not correctly classified as employees under the Fair Labor Standards Act (FLSA).

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[4] In particular, under the Securities Exchange Act of 1934 (Exchange Act), anyone who effectuates securities transactions or offers advice concerning investing in securities, including independent financial advisors, must register with the SEC or affiliate with a corporation that is registered with the SEC, such as an independent financial services firm. 15 U.S.C. § 78o(a)(1). Federal regulations also require registered investment advisors to implement written policies and procedures designed to prevent violations of the federal securities laws. 17 C.F.R. § 270.38a-1. Individual advisors who choose to satisfy these requirements by affiliating with a financial services firm do not individually register as broker-dealers but instead agree to supervision by their firms, which assume responsibility for ensuring compliance with applicable laws. *Id.*; FINRA Rule 3110.

Discussion

The Modern Worker Empowerment Act would harmonize the definition of the term "employee" across the FLSA and the National Labor Relations Act (NLRA), providing independent entrepreneurs with much needed clarity. The current patchwork of definitions of the term "employee" creates uncertainty for independent financial advisors and their clients. The Modern Worker Empowerment Act creates a clear definition and standard to ensure that independent contractors remain properly classified.

Further, the bill would clarify that requiring a worker to comply with outside legal and regulatory requirements cannot be used as evidence of an employment relationship. Similar language was included in the Department of Labor's (DOL) 2021 Independent Contractor Rule. Unfortunately, in 2024 the Biden Administration rescinded that rule and replaced it with a multi-factor totality of the circumstances test. The Biden Rule eliminated the streamlined "core factor" framework of the 2021 Rule, making it harder for workers and businesses to correctly classify workers.[5] The Modern Worker Empowerment Act would clarify that supervision to ensure compliance with outside legal and regulatory requirements (such as FINRA and SEC rules) cannot be used as evidence of an employment relationship. This is critical to ensure that independent financial advisors remain properly classified as independent contractors.

Conclusion

We thank the Subcommittee for holding this hearing and for the work it is doing to preserve independent contractor status in the workforce. Should you have any questions or would like more information on FSI and our position on this important issue, please contact our Director of Legislative Affairs, Hanna Laver, at (202) 499-7224.

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[5] Financial Services Institute, Comment Letter on Employee or Independent Contractor Classification Under the Fair Labor Standards Act (December 13, 2022) available at: https://www.regulations.gov/comment/WHD-2022-0003-53818. *See also,* Financial Services Institute, Statement for the Record on the U.S. House Committee on Education & the Workforce, Subcommittee on Workforce Protections "Examining Biden's War on Independent Contractors," April 19, 2023.

HRPA HR POLICY ASSOCIATION®

March 4, 2025

Tim Walberg
Chair, U.S. House Committee on Education & Workforce
2176 Rayburn House Office Building
Washington, D.C. 20515

Dear Chair Walberg,

HR Policy Association strongly supports a timely and necessary amendment to the Fair Labor Standards Act (FLSA) regarding the treatment of Restricted Stock Units (RSUs) in overtime calculations.

During the 106th Congress, Senator McConnell sponsored S.2323, the Worker Economic Opportunity Act (WEOA), which successfully amended the FLSA to exempt employee stock options, stock appreciation rights, stock purchase programs, and similar employer-provided grants from inclusion in overtime pay calculations. This bipartisan measure was an important step in enabling employees at all levels to share their company's growth.

While WEOA addressed various forms of equity compensation, it did not extend its benefits to restricted share units (RSUs) and similar forms of full value share awards—even though the rationale for promoting broad-based employee ownership applies equally to these awards. RSUs, typically granted as a fixed number of shares or a fixed value, serve as a strategic tool to attract and retain talent, aligning employee interests with the long-term success of their companies. By excluding RSUs from the "regular rate of pay" for overtime calculations, we would reduce the administrative burden on employers, encourage equitable wealth distribution, and ultimately increase federal revenue.

If RSUs were excluded from overtime calculations more companies would offer this benefit to employees. According to the National Association of Stock Plan Professionals (NASPP) 2024 Incentive Plan Design Survey, 28% of companies award time-based full value stock awards (RSUs) to their general workforce / non-exempt population. Restricted stock awards are the most common type of equity vehicle offered to the broad-based workforce and much more common than stock options. High-tech companies are more likely to award RSUs to their full population (59%) versus non-high-tech companies (11%).

Amending the FLSA to exclude RSUs from the "regular rate of pay" for overtime calculations would benefit non-exempt workers and employers alike. Specifically, it would

- Help lower wage workers build wealth by allowing employees the ability to participate in equity markets, contribute to long-term personal savings, and achieve both short-term financial goals (such as building emergency savings) and long-term financial goals (such as a supplement for retirement).
- Enhance engagement, productivity and retention among front-line workers and instill a sense of ownership that all employees contribute to the company's long-term value creation.
- Level the playing field for all employers, not just high-tech companies, to attract and retain talent by offering equity awards without the significant burdens of administrative complexities, dedicated resources for compliance and exposure to costly legal risks.
- Close the loophole on the treatment of one equity vehicle over another (*e.g.*, stock options), providing for consistent treatment of all equity types and preventing plaintiff attorneys from penalizing employers that choose to design consistent compensation programs applicable to both exempt and non-exempt workers.

For these reasons, we believe the time is right to update the FLSA to promote and support employers in providing modern benefits that align with the needs of today's workforce.

HR Policy Association looks forward to working with lawmakers to enact legislation to amend the FLSA to exclude time-based, full value stock awards, including restricted share units, from the "regular rate of pay" for overtime calculations.

Thank you for your consideration and your continued commitment to advancing policies that benefit employees, employers and ultimately the U.S. economy. Please contact me with questions or requests for more information at Cbirbal@HRPolicy.org.

Sincerely,

Chatrane Birbal

Chatrane Birbal
Vice President, Policy & Government Relations
HR Policy Association
www.HRPolicy.org

CC: Members of the House Education and Workforce Committee

HRPA HR POLICY ASSOCIATION®

February 25, 2025

Kevin Kiley
U.S. Representative
2445 Rayburn House Office Building
Washington, D.C. 20515

Tim Walberg
Chair
House Committee on Education & Workforce
2176 Rayburn House Office Building
Washington, D.C. 20515

RE: HR Policy Association Support for the Modern Worker Empowerment Act and the Modern Worker Security Act

Dear Representative Kiley,

HR Policy Association ("HRPA" or "Association") writes to applaud your leadership and express our support for the Modern Worker Empowerment Act and the Modern Worker Security Act. The Association has long advocated for greater clarification of the law on worker classification, the importance of independent contractors to the American economy, and the need for greater social security for contractors without losing the flexibility of the contractor classification. As detailed below, the Association believes that these bills further these objectives and accordingly strongly advocates for their passage.

HR Policy Association is a public policy advocacy organization that represents the chief human resource officers of more than 350 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce. Since its founding, one of HRPA's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

The legal standard governing worker classification at the federal level has changed with every Presidential Administration since 2008, creating significant uncertainty for companies and workers unlike. Differing state laws and overly strict regimes (such as California's AB5 law) have further complicated the classification issue at best and unnecessarily restricted innovation and flexibility at worst.

The need for a new, straightforward standard that ends regulatory oscillation, provides legal clarity, and reflects modern work arrangements is therefore abundantly clear. The Modern Worker Empowerment Act meets each of these needs. The bill provides a clear and predictable two-factor test that reflects the modern employer-employee work relationship and is based on well-established legal principles of worker classification.

As the gig economy continues to grow and more and more workers rely primarily on app-based work for income, there is undoubtedly a need for contractors to be able to access the social safety net generally reserved for full-time employees. Unfortunately, most current laws governing worker classification – including at the federal level – prevent employers or other entities from providing these types of benefits to contractors without losing the desired flexibility that gig work provides or creating a full employer-employee relationship sought by neither party.

To ensure contractors have access to needed benefits while preserving desired flexibility, HR Policy has long advocated for a legislative solution that would establish a safe harbor for employers to provide contractors benefits such as health insurance, workers' compensation, skills training, and paid leave while retaining the contractor classification. Because the Modern Worker Security Act would create such a safe harbor, HR Policy supports its passage.

The Modern Worker Empowerment Act and the Modern Worker Security Act bring much needed updates to worker classification law that promote legal clarity and continued workplace flexibility and innovation. HR Policy Association looks forward to supporting these bills through the legislative process to secure passage.

Sincerely,

Gregory Hoff

Gregory Hoff
Assistant General Counsel
Director, Labor and
Employment Law and Policy
HR Policy Association

CC: Members of the U.S. House Committee on Education & Workforce

IndependentWomen®

March 10, 2025

The Honorable Kevin Kiley
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Kiley,

Independent Women is the leading women's organization dedicated to advancing policies that expand people's freedom, opportunity, and well-being.

We are pleased to strongly support the **Modern Worker Empowerment Act** and the **Modern Worker Security Act**, two federal bills that provide important protections for independent workers and expand access to critical benefits.

Protecting Independent Contracting

Independent Women has fought for worker freedom, particularly protecting independent contractors against mass reclassification efforts at the federal and state levels. We are alarmed by the rising threats to new models of work that free American workers from traditional nine-to-five jobs.

Worker freedom is a women's issue. Half of the **over 70 million** freelancers nationwide are women. Many women work independently to balance earning incomes with raising children, caregiving for aging parents, and managing their health issues. **Nine out of ten** female workers who shifted from full-time employment to independent contract work said they did so to prioritize flexibility over stability.

The Biden administration, following the **example of California**, sought to destroy flexible work and force the reclassification of millions of men and women as employees, hoping to create a new pool of unionizable workers. Imposing a new rule changing the standard to determine independent contractor status to a test that weighs in favor of reclassifying workers as employees injected confusion, complexity, and uncertainty into the business environment.

Through our "Chasing Work" **storytelling campaign**, we profile many women and men who depend on independent contracting, from female truckers to journalists. They fear that their livelihoods are at risk.

We believe the Modern Worker Empowerment Act would provide a clear and predictable test to determine worker classification under federal labor law.

Portable Benefits

Similarly, the Modern Worker Security Act is critical to secure portable benefits for independent workers without affecting their classification under federal law.

Voluntary portable benefits are a welcomed step to providing the nation's independent workforce with access to critical benefits, such as health insurance, unemployment insurance, disability insurance, life insurance, and retirement benefits—without losing their flexibility.

The Fair Labor Standards Act (FLSA) legally prevents companies from offering workplace benefits to independent contractors because they are non-employees. Millions of workers currently lack access to employer-provided employment benefits.

While some independent contractors can access workplace benefits through their other W-2 jobs or through the employment of their spouses and family members, **our research** finds that upwards of **40%** of independent workers lack access to any options.

Independent workers express a desire to gain access to work-related benefits. Some **80%** of self-employed U.S. workers support the idea of creating a portable benefits fund to help self-employed workers obtain health insurance and retirement savings.

The Modern Worker Security Act would clear the federal hurdles and permit portable benefits plans nationwide.

Thank you for your leadership in protecting worker rights. Independent Women strongly supports these bills and stands ready to support your efforts to advance these bills through Congress and to President Trump for signature.

Sincerely,

Patrice Onwuka
Director, Center for Economic Opportunity
Independent Women

1huddle

March 24, 2025

The Honorable Tim Walberg, Chairman
Committee on Education and Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Bobby Scott, Ranking Member
Committee on Education and Workforce
U.S. House of Representatives
2101 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Walberg and Ranking Member Scott,

I write to you today in strong support of the *Flexibility for Workers Education Act* (H.R. 2262), a critical piece of legislation that will modernize outdated provisions of the Fair Labor Standards Act (FLSA) and help American workers gain the skills they need to thrive in today's rapidly evolving job market.

As the founder and CEO of 1Huddle, I have seen firsthand how restrictive labor laws hinder workforce development and limit opportunities for workers to acquire new skills. The FLSA, which was enacted in 1938, was designed for an industrial workforce. While its protections remain important, the law has not kept pace with the needs of today's economy—one shaped by technological advancements, a growing service sector, and a persistent skills gap, with approximately 8 million open jobs nationwide[1].

A major issue with the current law is how it treats employer-provided education and training. Under existing regulations, when businesses offer voluntary training outside of work hours, those hours are classified as compensable time. This discourages employers from offering training programs, thereby limiting workers' ability to upskill and advance in their careers.

The *Flexibility for Workers Education Act*, introduced by Congresswoman Ashley Hinson, proposes a simple but important fix: allowing businesses to provide voluntary upskilling, training, and educational programs to employees outside of work hours without requiring those hours to be counted as compensable time. This change would ensure that workers can pursue professional growth without placing an undue financial burden on employers.

The legislation maintains strong worker protections—participation in these training opportunities would be entirely voluntary, occur outside of work hours, and could not involve productive work for the employer. Removing this regulatory hurdle would expand access to employer-sponsored education, making it easier for workers to develop the skills necessary for higher-paying jobs and career advancement.

Consider a restaurant owner who wants to help a busboy become a bartender by offering to pay for a mixology class. Under the current framework, the owner must also pay the employee for the time spent in the class, even though participation is voluntary. This requirement discourages many employers from providing training, which in turn limits opportunities for workers to gain new skills and advance.

The impact of these outdated rules extends beyond the restaurant industry. In manufacturing and other skilled trades, employers often struggle to provide training that helps employees transition into more technical, higher-paying roles. By modernizing the FLSA to accommodate voluntary education and training, this legislation will play a crucial role in addressing the nation's skills gap and helping businesses fill critical positions.

[1] https://www.bls.gov/news.release/jolts.nr0.htm

The *Flexibility for Workers Education Act* is a commonsense solution that benefits both workers and employers. It does not impose new mandates or costs on businesses; rather, it removes outdated restrictions that have long hindered workforce development. Encouraging businesses to invest in upskilling their employees will:

- Provide workers with greater access to career-advancing skills and training;
- Help close the skills gap and fill high-demand jobs;
- Improve employee retention and job satisfaction; and
- Strengthen the economy by increasing worker productivity and earnings potential.

Promoting career and technical education, incentivizing apprenticeships, and supporting skills-based training initiatives will help ensure that American workers remain competitive in a rapidly changing global marketplace. It is time to adapt our laws for a 21st century workforce, and the *Flexibility for Workers Education Act* represents a vital step in that direction.

I respectfully urge the Committee to support this important legislation and to continue advancing policies that promote workforce development and economic opportunity.

Thank you for your leadership on this issue, and I appreciate your time and consideration.

Sincerely,

Sam Caucci
Founder & CEO, 1Huddle

March 25, 2025

Representative Ryan Mackenzie
Chair
Subcommittee on Workforce Protections
House Education & Workforce Committee
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Representative Ilhan Omar
Ranking Member
Subcommittee on Workforce Protections
House Education & Workforce Committee
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Dear Chair Mackenzie, Ranking Member Omar, and members of the House Education & Workforce Subcommittee on Workforce Protections:

The undersigned organizations, which represent various industries and employers across the country, urge you to support Representative Grothman's Ensuring Workers Get PAID Act, which would reinstate the Payroll Audit Independent Determination (PAID) program. The PAID program enabled employers to proactively rectify any inadvertent overtime and/or minimum wage violations under the Fair Labor Standards Act (FLSA), resulting in employers having the opportunity to fix unintentional mistakes, employees receiving their back wages more quickly, and less costly litigation for all parties. This is a common-sense legislative proposal, and we urge your support for the bill.

Currently, if an employer unintentionally violates the FLSA, the only means of ending a claim are through a court-approved settlement or a DOL-initiated investigation. Employers were not incentivized to self-audit and fix any mistakes that may have occurred.

The PAID program, on the other hand, provided employers with an alternative method to fix violations of the FLSA without the threat of costly litigation and penalties. Under the program employers could audit their payroll, self-report any violations to the Department of Labor (DOL), and enter into an agreement with DOL to pay 100% of the back wages to employees over a two-year period. DOL would supervise and approve the agreement and not investigate the employer for the self-reported violations. The PAID program incentivized employers to find and fix unintentional violations and resulted in workers receiving their back wages faster than via litigation. The program was, unfortunately, ended under the Biden administration.

The Ensuring Workers Get PAID Act would reinstate the PAID program, once again incentivizing employers to self-audit and self-report and ensuring workers receive their due compensation quickly without the parties having to undergo costly and lengthy litigation. This is a common-sense approach to this problem, and we urge you to support this legislation.

Sincerely,

American Hotel & Lodging Association
Associated Builders and Contractors
Associated General Contractors of America
HR Policy Association
Independent Electrical Contractors
International Foodservice Distributors Association
International Franchise Association
National Council of Chain Restaurants
National Federation of Independent Business
National Restaurant Association
National Retail Federation

March 25, 2025

Representative Ryan Mackenzie
Chair
Subcommittee on Workforce Protections
House Education & Workforce Committee
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Representative Ilhan Omar
Ranking Member
Subcommittee on Workforce Protections
House Education & Workforce Committee
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Dear Chair Mackenzie, Ranking Member Omar, and members of the House Education & Workforce Subcommittee on Workforce Protections:

The undersigned organizations, representing various industries and employers across the nation, urge you to reintroduce and support the Working Families Flexibility Act (H.R. 1980, 117th Congress), which would modernize the Fair Labor Standards Act (FLSA) and give workers increased agency over their work and lives.

The Working Families Flexibility Act would allow employers to offer employees the choice of taking their overtime pay in the traditional form of regular compensation in their next pay check or as paid time off from work to use at a later date, or "comp time." Employees would be able to consider their own circumstances and choose the best option for them. In either case, the employee receives full compensation for the hours worked at the premium overtime pay rate. The bill also includes protections for workers who choose to take comp time over regular compensation, including allowing workers to convert their payments to comp time whenever they wish and obtaining any unused comp time as cash payments at the end of the year, ensuring workers never miss out on their earnings.

Workers today are routinely indicating they want more flexibility in their work, but federal wage and hour laws currently prohibit private sector employers from offering the choice of comp time, requiring they pay employees cash compensation for any overtime hours worked. This is a rigid and outdated policy that no longer meets the needs of today's workforce. Moreover, the option of taking comp time has existed – and been successful – in the public sector for decades. Providing the option of banking overtime as future paid leave will give workers the flexibility they desire, enabling them to care for loved ones, attend the activities of their children, and manage their own health and wellbeing as needed. At a time of rapidly changing economic landscapes and

workforce preferences, the Working Families Flexibility Act would better accommodate the needs of the 21st Century workforce.

The Working Families Flexibility Act is a much-needed step towards modernizing the FLSA to better accommodate the needs and preferences of today's workers. We urge you to reintroduce and support this legislation.

Sincerely,

American Hotel & Lodging Association
Associated Builders and Contractors
Associated General Contractors of America
HR Policy Association
Independent Electrical Contractors
International Foodservice Distributors Association
International Franchise Association
National Council of Chain Restaurants
National Federation of Independent Business
National Restaurant Association
National Retail Federation

PARTNERSHIP TO PROTECT
WORKPLACE OPPORTUNITY

March 24, 2025

Representative Ryan Mackenzie
Chair
Subcommittee on Workforce Protections
House Education & Workforce Committee
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Representative Ilhan Omar
Ranking Member
Subcommittee on Workforce Protections
House Education & Workforce Committee
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Dear Chair Mackenzie, Ranking Member Omar, and members of the House Education & Workforce Subcommittee on Workforce Protections:

The Partnership to Protect Workplace Opportunity (PPWO) thanks you for holding your hearing on modernizing the Fair Labor Standards Act (FLSA). Modernization of our nation's foundational wage and hour law is critical to addressing the needs of the 21st Century workforce, but misguided regulations can hinder those efforts. We therefore urge you to consider the negative impact the Biden administration's overtime final rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees" (RIN 1235-AA39), has had and will continue to have on the economy. PPWO would like to share the letter that we and 90 employer organizations recently sent to the Trump administration urging they abandon their defense of the final rule in court.

PPWO is a coalition of a diverse group of associations, businesses, and other stakeholders representing employers with millions of employees across the country in almost every industry. Formed in 2014, the Partnership is dedicated to advocating for the interests of its members in the regulatory debate on changes to the FLSA overtime regulations. PPWO's members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees.

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As we explain in our letter, the Biden administration's final rule was issued despite the concerns raised by businesses, nonprofits, higher education institutions, and the public sector. If allowed to proceed, the rule will likely result in the reclassification of large numbers of employees from salaried to hourly, leaving those workers with fewer opportunities for flexible work arrangements, career development opportunities, and access to benefits and employers with additional administrative costs and staffing challenges. Two federal district courts have already struck down the rule, having recognized that the Department of Labor exceeded its authority in issuing the rulemaking. Both cases are now before the U.S. Court of Appeals for the 5th Circuit.

PPWO has urged the Trump administration to abandon its defense of this flawed rulemaking in court. Doing so would allow the more reasonable 2019 Trump-era overtime regulation to remain in place. Congress can play a role in this fight as well and pass legislation to ensure appropriate overtime regulations are implemented in the future.

Thank you for your consideration. PPWO looks forward to working with the subcommittee on this issue moving forward.

Sincerely,

Partnership to Protect Workplace Opportunity

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March 18, 2025

Lori Chavez-DeRemer
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Pam Bondi
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Secretary Chavez-DeRemer and Attorney General Bondi:

The Partnership to Protect Workplace Opportunity (PPWO) and the 90 undersigned organizations write to urge you to abandon the administration's defense in federal courts of the Department of Labor's (DOL) 2024 final rule (the 2024 Rule) altering the overtime regulations under the Fair Labor Standards Act (FLSA), entitled "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees" (RIN 1235-AA39). The Biden administration issued the 2024 rule over the concerns of businesses, nonprofits, higher education institutions, and the public sector that the rule would result in the reclassification of large numbers of employees from salaried to hourly. This reclassification would leave those workers with fewer opportunities for flexible work arrangements, career development opportunities, and access to critical benefits and employers with additional administrative costs and staffing challenges. Two federal district courts have struck down the 2024 Rule, and DOL's enforcement position on this issue is now governed by a rule issued by the Trump administration in 2019 (the 2019 Rule).

PPWO is a coalition of a diverse group of associations, businesses, and other stakeholders representing employers with millions of employees across the country in almost every industry. Formed in 2014, the Partnership is dedicated to advocating for the interests of its members in the regulatory debate on changes to the Fair Labor Standards Act overtime regulations. PPWO's members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees.

The 2024 Rule made three changes to the overtime regulations under the FLSA. It twice increased the minimum salary threshold, under which all workers must be paid overtime for any hours worked over 40 in a given workweek. The first increase raised the threshold to $43,888 on

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July 1, 2024, giving the regulated community only two months to come into compliance. The second increase was set to raise the threshold to $58,656 on January 1, 2025. To come to this figure, the Biden administration used a new methodology for determining the threshold, abandoning the common-sense methodology adopted by DOL in the 2019 Rule. Finally, the 2024 Rule established triennial automatic updates to the threshold, leaving no opportunity for the regulated community to comment or raise concerns and no means of stopping the increase if there was an economic downturn. Federal district courts nullified the 2024 Rule, however, before the second increase and any automatic updates could take effect.

Both increases in the 2024 Rule would have forced employers to reclassify large numbers of employees from salaried to hourly, resulting in reduced career advancement opportunities and flexibility in the workplace as well as lost benefits to those workers. At the same time, employers would have faced increased administrative costs and scheduling challenges related to tracking hours for formerly exempt workers. These costs would likely have been passed on to consumers in the form of higher prices.

If implemented, the automatic increases in the rule would increase the threshold regardless of the economic circumstances at the time. This would inevitably exacerbate any economic problems, such as supply chain disruptions, worker shortages, and high inflation. Forced increases in labor costs at economically vulnerable times could have devastating consequences for the economy.

As mentioned, two federal courts have nullified the 2024 Rule, but those two cases are still moving through the federal court system. In the business community and the state of Texas's combined challenge to the rule, *Texas and Plano Chamber of Commerce, et al, v DOL*, the U.S. District Court for the Eastern District of Texas ruled in favor of the plaintiffs, nullifying the rule. The judge explained that DOL's authority on the overtime regulations "is not unbounded," and the new threshold "effectively eliminates" all other criteria in the overtime regulations, creating a "salary-only test." He also said the Department's automatic updates "violate[] the notice-and-comment rulemaking requirements of the [Administrative Procedure Act]." DOL appealed the decision to the U.S. Court of Appeals for the 5th Circuit in November 2024. Since President Trump took office, the Department has requested extensions to their deadline to file an opening brief. Their brief is now due on May 6. In *Flint Ave v DOL*, the U.S. District Court for the Northern District of Texas ruled against the Biden administration's rule, using the same reasoning as the Eastern District of Texas. On February 28, DOL filed a Notice of Appeal with the court, sending the case to the 5th Circuit. The regulated community supports the District Courts' positions that the 2024 Rule exceeded DOL's authority.

Again, PPWO and the undersigned organizations urge you to abandon defending the 2024 Rule. Thank you for your consideration in this manner. We look forward to working with DOL and the Department of Justice on this issue during the Trump administration.

Sincerely,

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Partnership to Protect Workplace Opportunity
AICC, The Independent Packaging Association
Air Conditioning Contractors of America
American Association of Advertising Agencies (4As)
American Bakers Association
American Foundry Society
American Hotel & Lodging Association
American Pipeline Contractors Association
American Road & Transportation Builders Association
American Society of Travel Advisors (ASTA)
American Staffing Association
American Supply Association
AmericanHort
Amusement & Music Operators Association
Asian American Hotel Owners Association
Associated Builders and Contractors
Associated Equipment Distributors
Associated General Contractors of America
College and University Professional Association for Human Resources
Construction Industry Round Table
Consumer Technology Association
Electronic Transactions Association
Energy Marketers of America
FMI – The Food Industry Association
Foodservice Equipment Distributors Association
Global Cold Chain Alliance
Health & Fitness Association
Heating, Air-conditioning, & Refrigeration Distributors International
HR Policy Association
IAAPA, the global association for the attractions industry
Independent Electrical Contractors
Independent Lubricant Manufacturers Association
International Foodservice Distributors Association
International Franchise Association
International Warehouse Logistics Association (IWLA)
ISSA, the Worldwide Cleaning Industry Association
Manufactured Housing Institute
Manufacturers' Agents Association for the Foodservice Industry (MAFSI)
National Armored Car Association
National Association of College and University Business Officers
National Association of College Stores
National Association of Convenience Stores
National Association of Electrical Distributors (NAED)
National Association of Independent Colleges and Universities

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National Association of Landscape Professionals
National Association of Manufacturers
National Association of Mutual Insurance Companies
National Association of Wholesaler-Distributors
National Automobile Dealers Association
National Beer Wholesalers Association
National Club Association
National Cotton Council
National Cotton Ginners Association
National Council of Chain Restaurants
National Council of Farmer Cooperatives
National Demolition Association (NDA)
National Federation of Independent Business
National Funeral Directors Association
National Grocers Association
National Lumber & Building Material Dealers Association
National Marine Distributors Association
National Marine Distributors Association
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
National RV Dealers Association (RVDA)
National Sporting Goods Association
National Stone, Sand & Gravel Association
National Tooling and Machining Association
NATSO, Representing America's Travel Centers and Truck Stops
NCA – The National Confectioners Association
Outdoor Amusement Business Association
Outdoor Power Equipment and Engine Association
Outdoor Power Equipment and Engine Service Association
Power & Communication Contractors Association
Precision Machined Products Association
Precision Metalforming Association
PRINTING United Alliance
Restaurant Law Center
Saturation Mailers Coalition
SIGMA: America's Leading Fuel Marketers
Small Business & Entrepreneurship Council
Southeastern Cotton Ginners Association
Texas Cotton Ginners' Association
The Latino Coalition
The Ohio Society of CPAs
The Transportation Alliance
Tree Care Industry Association

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TRSA – The Line, Uniform and Facility Services Association
U.S. Chamber of Commerce
Workplace Solutions Association

[Questions and responses submitted for the record by Mr. Stettner follows:]

COMMITTEE ON
EDUCATION AND WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

April 10, 2025

Andrew Stettner
Director of Economy and Jobs
The Century Foundation
1150 Connecticut Avenue NW, 8th Floor
Washington, DC 20036

Dear Mr. Stettner:

Thank you again for testifying at the March 25, 2025, Committee on Education and Workforce Subcommittee on Workforce Protections hearing titled "The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities." Enclosed are additional questions submitted by Committee members following the hearing. Please provide a written response no later than May 1, 2025, for inclusion in the hearing record. Responses should be sent to Daniel Nadel (Daniel.nadel@mail.house.gov, (202) 226-3873) of the Committee staff. We appreciate your contribution to the work of the Subcommittee.

Sincerely,

Ryan Mackenzie
Chairman
Subcommittee on Workforce Protections

Questions for the Record from
REPRESENTATIVE SUMMER LEE

Committee on Education and Workforce
WP Subcommittee hearing titled: "The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities"

Tuesday, March 25, 2025
10:15 A.M.

Representative Summer Lee (D-PA)
Questions for Witness Andrew Stettner

1. We are one of the only countries in the world that allows employers to burden consumers with the cost of paying employees, a vestige of American segregation and slavery. In Pennsylvania, 74% of tipped workers are women, and nationally 29% of tipped workers are women of color. Not only are these workers more likely to endure abuse and sexual harassment, and face mistreatment because they rely on tips, they also make as little as $2.13 an hour.
    a. How does this different treatment under the Fair Labor Standards Act affect tipped workers' income security?
    b. Are tipped workers more susceptible to wage theft because of this treatment?

2. Conservatives love to use derogatory terms, like "welfare queen" to distance themselves from workers making low wages. But we know that workers making low wages are really just mathematicians who are constantly having to evaluate whether a one-dollar-an-hour wage increase can cover the difference of losing a one-hundred-dollar-a-week child care subsidy, losing Medicaid, CHIP, or housing vouchers if they make incremental wage gains that still do not afford them stability.
    a. When we talk about wage increases, should we also be talking about the federal government increasing the eligibility threshold for benefits to ensure that workers actually come out ahead?

Questions for the Record from
REPRESENTATIVE HALEY STEVENS

Committee on Education and Workforce
WP Subcommittee hearing titled: "The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities"

Tuesday, March 25, 2025
10:15 A.M.

Representative Haley Stevens (D-MI)
Questions for Witness Andrew Stettner

1. American workers are the backbone of our economy. From your favorite main street local restaurant to cutting edge manufacturing facilities, businesses depend on their workers to deliver to consumers around the world. We here in Congress need to ensure that employees in all industries are compensated fairly, paid what they are owed, and are safe in their workplaces.

   The Fair Labor Standards Act (FLSA) is the bedrock of worker rights and protections. I will always support good faith efforts to improve and expand the law in ways that make it easier for workers to make a dignified and safe living for their families.

   However, I am deeply concerned that House Republican's legislative agenda paired with the Trump Administration's reckless efforts to dismantle federal agencies will leave workers exposed to bad actor employers looking to take advantage of vulnerable employees.

   As our country looks to prepare our economy to lead the world in the 21st century, we need to ensure workers are put first and foremost so that the gains of that leadership translate into economic security for families.

   On that note of America's global economic competitiveness, I'd like to talk about manufacturing, the main economic driver of my district in Southeast Michigan. Building American manufacturing capacity has many benefits including bolstered national security and less vulnerable supply chains, but perhaps the most important of these benefits is the thousands of middle-class jobs it created in communities like mine.

   a. Mr. Stettner, you've written extensively on manufacturing in this country and are well aware that workforce development is a huge factor in expanding our capacity. How do strong worker protections help attract people to manufacturing jobs?

   b. On the flip side, how would hallowing out the Department of Labor offices that enforce wage laws, worker safety regulations, and other legal protections undermine efforts to build a strong manufacturing workforce?

c. What would be the signal sent to bad actor employers, if these protections and enforcement mechanisms were gutted?

2. Now I'd like to go a bit deeper on federal workforce reductions and how they'll impact workers across the country. DOL's Wage and Hour Division is charged with enforcing FLSA wage laws that make sure workers are paid what they are owed. I am concerned that the Trump Administration's massive regulatory rollback and workforce reductions will come to Wage and Hour.

   a. Mr. Stettner, you are a veteran of the Department of Labor. Wage and Hour has been under-resourced for years and will likely continue to be so under the Trump Administration and Congressional Republicans. How would legislation to water-down existing wage protection laws make it even more difficult for an already stretched enforcement workforce to protect workers from wage theft?

Response to Questions for the Record
Director of Economy & Jobs, The Century Foundation
House Education and Workforce Committee
Subcommittee on Workforce Protections
"The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities"
March 25, 2025

Andrew Stettner, Director of Economy & Jobs

Representative Summer Lee (D-PA)

1. We are one of the only countries in the world that allows employers to burden consumers with the cost of paying employees, a vestige of American segregation and slavery. In Pennsylvania, 74% of tipped workers are women, and nationally 29% of tipped workers are women of color. Not only are these workers more likely to endure abuse and sexual harassment, and face mistreatment because they rely on tips, they also make as little as $2.13 an hour.
a. How does this different treatment under the Fair Labor Standards Act affect tipped workers' income security?

A: The Fair Labor Standards Act allows employers to pay tipped workers a lower minimum wage. This leaves workers worse off, even after taking account tips. We know this because several states have one fair wage that pays tipped workers the same minimum wage as other workers. In these states, only 11% percent of wait staff are in poverty. That's compared to 18% of wait staff in states that abide by FLSA's $2.13 subminimum wage for tipped workers.[1]

b. Are tipped workers more susceptible to wage theft because of this treatment?

Current law requires workers to receive tips to meet the minimum wage. Employers can use a variety of schemes to steal tips from workers. This includes adding tips automatically to customer bills and skimming tips off the top. Employers can force employees to pool tips and employers can illegally distribute tips to workers and managers not subject to the tipped

[1] Dave Cooper and Elise Gould, *Seven facts about tipped workers and the tipped minimum wage,* Economic Policy Insitute, May 2018
https://www.epi.org/blog/seven-facts-about-tipped-workers-and-the-tipped-minimum-wage/

minimum wage. Having one fair wage for tipped workers provides transparency between hours worked and the minimum amount paid reducing the risk of wage theft.

2. Conservatives love to use derogatory terms, like "welfare queen" to distance themselves from workers making low wages. But we know that workers making low wages are really just mathematicians who are constantly having to evaluate whether a one-dollar-an-hour wage increase can cover the difference of losing a one-hundred-dollar-a-week child care subsidy, losing Medicaid, CHIP, or housing vouchers if they make incremental wage gains that still do not afford them stability.

a. When we talk about wage increases, should we also be talking about the federal government increasing the eligibility threshold for benefits to ensure that workers actually come out ahead

In nearly all communities, workers need to earn more than $30 per hour in order to approach a level where they can meet their basic needs like food, child care, housing, transportation and health care.[2] Congress should look at how to ensure that workers earning above the minimum wage but below a living wage can best meet their needs. The best solutions are universal policies like universal pre-k and a public option for health insurance that all working families can count on. Short of that, Congress should start by finding ways to ease benefit cliffs for key benefits like child care, housing and health insurance to ensure that workers have support during a transition into a better paying job. Longer transition periods give these workers more time to remain on benefits. For example, allowing a parent to stay on subsidized child care for a year or more after getting a raise could serve as a bridge to school age years when child care costs go down.

Representative Haley Stevens (D-MI)
Questions for Witness Andrew Stettner
1. American workers are the backbone of our economy. From your favorite main street local restaurant to cutting edge manufacturing facilities, businesses depend on their workers to deliver to consumers around the world. We here in Congress need to ensure that employees in all industries are compensated fairly, paid what they are owed, and are safe in their workplaces.

The Fair Labor Standards Act (FLSA) is the bedrock of worker rights and protections. I will always support good faith efforts to improve and expand the law in ways that make it easier for workers to make a dignified and safe living for their families.
However, I am deeply concerned that House Republican's legislative agenda paired with the Trump Administration's reckless efforts to dismantle federal agencies will leave workers exposed to bad actor employers looking to take advantage of vulnerable employees.

As our country looks to prepare our economy to lead the world in the 21 st century, we

[2] MIT Living Wage Calculator, https://livingwage.mit.edu/

need to ensure workers are put first and foremost so that the gains of that leadership translate into economic security for families.

On that note of America's global economic competitiveness, I'd like to talk about manufacturing, the main economic driver of my district in Southeast Michigan. Building American manufacturing capacity has many benefits including bolstered national security and less vulnerable supply chains, but perhaps the most important of these benefits is the thousands of middle-class jobs it created in communities like mine.

a. Mr. Stettner, you've written extensively on manufacturing in this country and are well aware that workforce development is a huge factor in expanding our capacity. How do strong worker protections help attract people to manufacturing jobs?

A: Workers have historically been attracted to manufacturing jobs because they have been family sustaining, paying a higher wage with better benefits than other comparable jobs for workers without a college degree. In recent years, the manufacturing wage premium has narrowed dramatically. During that same period, the number of manufacturing job openings have increased and Deloitte predicted that the sector could be near 4 million workers over the next decade.[3] Raising the conditions of work is a critical element in attracting additional workers to these careers, which are critical for national security and economic prosperity overall. Strong workforce protections, including the minimum wage, health and safety and the right to collectively bargain, can help increase the quality of jobs and attract more workers into the field.

b. On the flip side, how would hallowing out the Department of Labor offices that enforce wage laws, worker safety regulations, and other legal protections undermine efforts to build a strong manufacturing workforce?

Manufacturing workforce advocates often talk about the sector's reputation as being dirty, dangerous and dark, which is discouraging younger workers from coming into the sector. Advances in technology are helping the sector to shed that reputation. However, each time a worker is maimed or killed on the job, it makes it harder to 'sell' the sector to parents and community leaders. Already hundreds of OSHA staff have been forced out through DOGE's "fork in the road" program. This will make it harder for OSHA to inspect factories to prevent injuries before they take place, and to respond quickly to violations that can spiral into life-threatening situations.

c. What would be the signal sent to bad actor employers, if these protections and enforcement mechanisms were gutted?

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[3] John Coykendal, et al. *Taking charge: Manufacturers support growth with active workforce strategies,* March 2024
https://www2.deloitte.com/us/en/insights/industry/manufacturing/supporting-us-manufacturing-growth-amid-workforce-challenges.html

Gutting workforce protections makes it harder for factories that follow the rules to compete. It sends the message that companies can cut corners and put workers at risk as a business strategy. In the long run, workers and companies all thrive when health and safety is protected. Policy should encourage the high road.

2. Now I'd like to go a bit deeper on federal workforce reductions and how they'll impact workers across the country. DOL's Wage and Hour Division is charged with enforcing FLSA wage laws that make sure workers are paid what they are owed. I am concerned that the Trump Administration's massive regulatory rollback and workforce reductions will come to Wage and Hour.

a. Mr. Stettner, you are a veteran of the Department of Labor. Wage and Hour has been under-resourced for years and will likely continue to be so under the Trump Administration and Congressional Republicans. How would legislation to water-down existing wage protection laws make it even more difficult for an already stretched enforcement workforce to protect workers from wage theft?

We need strong wage and hour laws, with meaningful consequences for violations, to incentivize companies to play by the rules and enable Americans to enjoy the fruits of their labor.
Already there is only 1 Wage Hour Division investigator for every 270,000 workers in the country. As a result of the cut-backs to WHD staff, these ratios will get even worse. If companies know that DOL is less likely to investigate them, and that even if they do they are less likely to be found liable for violations, they have less incentive to abide by the law. Weaker laws and fewer investigators give a carte blanche to those employers who seek to gain a competitive advantage by cutting corners at the expense of workers.

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