CRS Report for Congress

The Fair Labor Standards Act: Changes Made by the 101st Congress And Their Implications

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THE FAIR LABOR STANARDS ACT: CHANGES MADE BY THE 101ST CONGRESS AND THEIR IMPLICATIONS

SUMMARY

The Federal minimum wage rate is set by Congress, fixed in statute, and remains at the fixed level until Congress acts to alter it. Under the 1989 Fair Labor Standards Act (FLSA) amendments (P.L. 101-157), *the Federal minimum wage was increased*, in steps, from $3.35 per hour to $4.25 per hour as of April 1, 1991. (To have maintained the value of the Federal minimum wage in 1978 dollars, the rate for April 1, 1990, would have had to have been about $5.45.)

A limited sub-minimum wage (or "training wage") provision was added to the Act. It allows for a slightly reduced wage rate through 180 days for certain persons under 20 years of age. The arrangement sunsets after April 1, 1993. *The definition of enterprise coverage and of the small business exemption* was modified and the dollar volume threshold for coverage was changed from $362,500 to $500,000. *The tip credit provisions* were altered to make them more favorable to employers: increasing this employer credit option from 40 percent of the otherwise applicable minimum wage prior to the 1989 amendments, in steps to 50 percent after April 1, 1991. And, among other changes in the statute, the rights and protections of the Act (minimum wages, overtime pay, "equal pay" and child labor restrictions) were *extended to employees of the House of Representatives and to those of the Architect of the Capitol.* The pattern of *application of the minimum wage to the Virgin Islands and Puerto Rico was altered*, bringing the Virgin Islands up to the national standard and moving Puerto Rico in that same direction. **Later,** in October 1990, Congress further amended the FLSA with legislation (S. 2930, P.L. 101-583) that altered the evidentiary requirements for calculation a special minimum wage for American Samoa and changed the overtime pay requirements of the Act with respect to certain computer service personnel.

Since 1981, there seems to have been a gradual decline in the number of hourly paid workers employed "at or below" the Federal minimum wage: as few as 3.927 million in 1988. However, that decline would seem to be, in part at least, a reflection of the declining value of the Federal minimum wage itself through the period. [If the minimum wage were calculated in constant dollars (based upon the 1978 level), then the number employed "at or below" the minimum wage would be between 12 and 15 million persons.] The majority of such workers are women and nearly two-thirds are adults over the age of 20 years.

Initially, *in the 101st Congress*, a measure to increase the Federal minimum wage (and to make numerous other changes in the FLSA) was passed by both the House and the Senate but, in June 1989, it was vetoed by President Bush. An effort by the House to override the President's veto was unsuccessful. Later, new legislation was introduced and approved both by the House and by the Senate. On November 17, 1989, President Bush signed the bill (P.L. 101-157).

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In 1977, Congress legislated a series of step increases in the Federal minimum wage for covered workers, the first mandated increase (to $2.65 per hour) taking effect on January 1, 1978, with other increases following through 1981. Thereafter, the rate remained fixed at the 1981 level. Since the Federal minimum wage is set forth in statute, it changes only in response to specific action by the Congress.

Through the period during which the step increases were given effect (1978-1981), inflation overwhelmed the statutory increments, the mandated increases failing to keep pace with the cost of living. The value of the minimum wage was further eroded after 1981. To have maintained its January 1978 purchasing power, the Federal minimum wage would have had to have been raised to about $5.45 cents per hour by April 1, 1990.

On November 1, 1989, the House of Representatives adopted legislation to increase the Federal minimum wage and for other purposes. The Senate concurred on November 8th and the measure was signed by President Bush on November 17, 1989. (P.L. 101-157.) Under the Act, Congress increased the minimum wage to $3.80 per hour after April 1, 1990, and to $4.25 per hour after April 1, 1991.

Further, in October 1990, Congress approved additional amendments to the Fair Labor Standards Act (FLSA). S. 2930 (P.L. 101-583) alters the manner in which the Federal minimum wage is calculated in American Samoa and changes the overtime pay requirements of the Act with respect to certain computer service personnel. Public Law 101-583 was signed by President Bush on November 15, 1990.

THE SETTING AND CONTEXT

Since enactment of the initial Federal wage and hour legislation in 1938 (the Fair Labor Standards Act, or FLSA), amendments to the measure seem to have been something of a litmus test for public officials.

Support for the minimum wage has been viewed by many as an expression of concern for "the working poor" -- for those usually not represented by a trade union, with few skills and little bargaining power. Among those who have urged an increase in the Federal minimum have been social reformers, the civil rights community, spokespersons for the handicapped, trade unionists, and certain economists. Industry/employer and small business representatives, with certain other economists, conversely, have argued that the minimum wage has been harmful

to the unskilled and those newly entering the workforce, allegedly pricing them out of the market and thereby creating additional joblessness.

Minimum wage critics have also expressed concern that the concept violates the "free market," is inflationary, and imposes an unnecessary burden upon employers who are called upon to pay the bill for the decisions of the policymakers. On the other hand, some have suggested that low wages, supplemented by welfare, tax credits, and related public assistance, in effect amount to a subsidy *to the employers of low-wage workers*. In the 1930s, President Roosevelt and many in Congress viewed minimum wage legislation as a wage floor and an essential part of the Nation's overall economic structure. They saw the minimum wage as insuring a responsible relationship between the worker, his/her earnings, and the work performed.

Through the years, the respective positions have hardened, with little new in the way of argument or reason, pro or con.[1] Support or opposition may, ultimately, be as much a matter of philosophy as of economics.

SCOPE OF THE FAIR LABOR STANDARDS ACT

The minimum wage provisions of the Fair Labor Standards Act, according to 1986 data, covered about 74.6 million workers out of a total of 105.0 million employed wage and salary workers in the civilian labor force. Many "covered" workers, however, earn in excess of the minimum rate. Thus, "covered workers" and workers "employed at or below" are quite different things. The Department of Labor estimates that, when the minimum wage was raised to $3.35 per hour in January 1981, some 5.5 million workers received wage increases as their employers came into compliance with the law.

Changing Demographics of the Minimum Wage Workforce

Since 1981, the number of workers "employed at or below" the Federal minimum rate seems gradually to have declined. By 1988, the number so employed ("at or below") had dropped to about 3.927 million.[2] **However**, one must recall that, during the period, the purchasing power or value of the minimum wage had declined as well. As the value of the minimum wage erodes, the number of persons employed "at or below" the minimum wage, by attrition, can be expected to decline as well, while the general market wage increases. Were one to hold constant the purchasing power of the minimum wage at the 1978 level (that is, to increase the minimum

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[1] U.S. Library of Congress. Congressional Research Service. *The Fair Labor Standards Act: Analysis of Economic Issues in the Debates of 1937-1938*. Report No. 89-568 E, by William G. Whittaker. Washington, 1989. 76 p.

[2] U.S. Library of Congress. Congressional Research Service. *The Federal Minimum Wage Population: A Statistical Analysis, 1988 Data*. Report No. 89-690 E, by William G. Whittaker. Washington, 1989. 29 p. This report reflects the demographics at the time of the minimum wage debates in 1989.

wage in keeping with increases in the cost-of-living), then the number of persons employed "at or below" the Federal minimum in 1988 would have been between 12 million and 15 million workers and likely in excess of that by January 1990. [Estimates are based upon data provided by the Bureau of Labor Statistics, U.S. Department of Labor, and represent "wage and salary" workers, paid hourly, for 1988, and are rough approximations.] Indexation of the minimum wage, however, could have had the effect of diminishing the number of workers employed at this wage level through what some allege is a disemployment impact.

It is those employed persons, some would argue, paid a wage at or below the Federal minimum in terms of 1978 constant dollars, the economically disadvantaged "working poor," for whom an increase in the minimum wage is most critical.[3] Others, however, would argue that many minimum wage workers are women with husbands, young people with working parents, or older persons with Social Security, who are working for "pin money," to be able to buy a few "extras" -- employees for whom a minimum wage may not be critically important.

Minimum Wage Earners Primarily Young, Female

In large measure, analysis of the minimum and sub-minimum wage population seems to rest upon one's definition of "youth" and of "adult." If one thinks of a youth as a person between 16 and 19 years of age, then youth workers make up 36.1 percent of wage and salary workers employed at or below the Federal minimum wage. This leaves 63.9 percent of such workers who are adults. For FLSA purposes, "youth" workers are so defined. However, even if one defines a youth as one under 25 years of age, then the percentages are 58.1 percent youth and 41.9 percent adult.

The majority of minimum wage workers, whether youth or adults, are female. Of wage and salary workers paid hourly rates at the minimum wage, women constitute 59.1 percent of those 16 years of age and over, 64.1 percent of those 20 years old and over, and 69.2 percent of those 25 years of age and over. Similarly, the overwhelming majority of part-time workers are women. Of part-time workers (wage and salary workers) paid hourly at the Federal minimum wage, 60.0 percent (1,062,000) were women and 40.0 percent (708,000) were males.

Minimum wage debates of recent years have given rise to the view that youth workers, however defined, have less "need" for earnings than do adult workers. Thus, if one defines the minimum wage workforce in a way to make it appear to be composed predominately of youth workers, then, some argue, the need to increase the Federal minimum wage under the FLSA becomes less critical.

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[3] Generally, the minimum wage is viewed as payment for work actually performed, with a clear linkage between work and wages. Some, however, have suggested that a more narrowly focused approach to meeting the needs of the working poor might be expansion of income supplements through a tax credit. See U.S. Library of Congress. Congressional Research Service. *Minimum Wage Earnings and the EITC: Making the Connection*. Report No. 88-736 E, by Charles V. Ciccone. Washington, 1988. 23 p.

In addition to the Federal FLSA, there are State and local minimum wage laws. Where coverage is overlapping, the higher standard (the standard most nearly to the benefit of the worker) prevails. But, some workers are protected neither by State nor by Federal minimum wage coverage.

THE FLSA, MORE THAN JUST MINIMUM WAGES

While public discussion of the FLSA often focuses upon the issue of the minimum wage, the Act also deals with other labor standards issues: notably, overtime pay, child labor, industrial homework, wage/hour treatment of handicapped workers, "equal pay" protections, etc. At times, these issues have been considered within the context of general amendment of the FLSA. At other times, they have been dealt with in separate legislation, amending the FLSA in specific and narrowly defined ways.

CHANGES IN THE FLSA UNDER THE 1989 AMENDMENTS

Is the minimum wage, per se, wise public policy? Some argue that it is not and that the minimum wage provisions of the FLSA ought to be repealed in toto, contending that they are a burden to employers and harmful to workers. Others argue that the minimum wage constitutes a critical protection for low-wage workers and a vital foundation for the general wage structure. Through half-a-century, however, the Congress has repeatedly reaffirmed that a Federal wage floor is both necessary and appropriate and has, from time to time, raised that floor.[4]

THE 101ST CONGRESS INCREASES THE FEDERAL MINIMUM WAGE

In January 1977, following several years of consideration, Congress mandated a series of step increases in the Federal minimum wage. These were as follows: to $2.65, after January 1, 1978; to $2.90, after January 1, 1979; to $3.10, after January 1, 1980; and to $3.35, after January 1, 1981.

After the last statutory increase was mandated, there was some expectation that Congress would immediately take up the issue again. But, at least two factors seem to have blocked immediate consideration of further increases: first, general opposition of the Reagan Administration to the concept of a minimum wage, per se; and, a legislative standoff between pro-minimum wage forces, urging a general increase in the base rate, and critics of minimum wage who often urged creation

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[4] Congress adopted general amendments to the FLSA involving increases in the general minimum wage in 1949, 1955, 1961, 1966, 1974, 1977 and, most recently, in 1989. With the exception of 1955, each set of amendments mandated a series of step increases.

of a general sub-minimum wage for youth or various entry-level workers.[5] Since the Congress alone has the power to alter the Federal minimum wage, no further changes were instituted until the amendments of 1989. During the period, however, the actual value or purchasing power of the minimum wage declined as the cost-of-living increased.

The 101st Congress, in November 1989, mandated increases in the minimum wage beginning in April 1990 (Public Law 101-157). But, by that time, the value of the Federal minimum, in constant dollars, had declined to a level where even the newly mandated increases were insufficient to restore its 1978 purchasing power. Were one to use the wage rate of $2.65 mandated by Congress for 1978 as the base for purposes of calculation, one would find a marked decline in the absolute value of the Federal minimum wage through recent years. (See table 1, below.)

TABLE 1. Relative Purchasing Power of Value of the Federal Minimum Wage, 1978-1991(*)

Effective Date of Increase	Statutory Minimum Wage	C.P.I.[a]	% Change[b]	1978 Minimum Wage Adjusted to C.P.I.
Jan. 1, 1978	$2.65	62.1	--	--
Jan. 1, 1979	2.90	67.7	9.01	$2.88
Jan. 1, 1980	3.10	76.7	13.29	3.26
Jan. 1, 1981	3.35	86.3	12.51	3.66
Apr. 1, 1990	3.80	128.7	49.13	5.45
Apr. 1, 1991	4.25	134.5[c]	4.50[c]	5.69

* Statutory minimum wage rates were set forth in P.L. 95-151 for the period 1978 to 1981 and forward until changed by Congress. P.L. 101-157 set new rates to take effect on April 1, 1990 and on April 1, 1991. The statistical analysis, here, was prepared by Charles V. Ciccone, Specialist in Business and Labor, CRS.

[a] Consumer Price Index for all urban consumers, 1982-4 = 100.

[b] Percent change in the C.P.I. for the period from the last cited C.P.I.

[c] Estimated for month of March 1991 at a 4.5 percent rate of inflation as forecast by Data Resources, Inc., February 1990.

[5] In January 1981, a member of Congress with long experience with wage/hour questions suggested that increases in the general minimum wage might be "too high a price to pay" for passage of what was then termed a "youth opportunity" wage -- i.e., a sub-minimum rate for younger workers. See Bureau of National Affairs. *Daily Labor Report*, January 14, 1981, p. A2-A3. Hereafter cited as *DLR*.

Thus, the enactment of P.L. 101-157, while increasing the hourly rate of the minimum wage, has had the effect of institutionalizing the general reduction in the wage floor resulting from changes in the cost-of-living since 1978. As the value of the minimum wage declined, so did the number of persons employed at or below the Federal minimum rate -- thus creating a statistical illusion that workers, in general, were better paid than they were in fact.

NEW "SUB-MINIMUM" WAGE IS AUTHORIZED

Through several decades, the issue of a sub-minimum wage was debated both inside the Congress and among economic analysts.[6] By the late 1980s, the relative value of the Federal minimum wage had so eroded in comparison with the market rate (in most areas) for entry-level workers, that a "sub-minimum" wage, some suggested, was no longer economically useful. After extended debate, Congress in 1989 adopted a sub-minimum wage (or "training wage") as part of the 1989 amendments to the Fair Labor Standards Act. The provision, which went into effect April 1, 1990, while offering employers some measure of wage flexibility, was yet one more variation to the already somewhat complicated wage structure under the FLSA. The program, which was designed to be experimental and to prove (or disprove), finally, the claims of the several parties at interest, sunsets on April 1, 1993.

"Sub-minimum" Wage Concept Evolves

During the 1960s, Congress extended Federal minimum wage and overtime pay protections to workers engaged in the retail and service industries and in agriculture -- areas which have had, traditionally, among the highest concentrations of minimum wage workers. These were also industries in which large numbers of youth workers (reportedly more than 30 percent of the workforce in food services) were routinely employed and for which little training was normally required. The exemption from minimum wage and overtime pay requirements of the FLSA had been of considerable economic significance for these industries and, conversely, for their employees.

In part to soften the immediate impact for employers of these extensions of coverage (1961, 1966), but for certain equity concerns as well, Congress adopted several moderating strategies. The sentiment was expressed by the industry trade journal, *Drive-In Restaurant*, in an August 1966 article, "Congress Cushions Blow For Restaurants." Thus, the amended statute allowed for a phasing in of overtime pay requirements. Employers were allowed to count a percentage of "tip income" actually received by tipped employees toward their (the employers') minimum wage obligation and, under certain circumstances, to deduct for meals, lodging, etc., provided to workers. Certain small businesses (defined in different ways through the years and redefined in the 1989 legislation) were exempted altogether

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[6] U.S. Library of Congress. Congressional Research Service. *The Youth Sub-Minimum Wage: An Overview of Recent Consideration*. Report No. 84-699 E, by William G. Whittaker, July 2, 1984. Washington, 1984. 15 p.

from the FLSA wage and overtime pay requirements. Retail and service employers were allowed, under a program of certification, to employ certain full-time students, working part-time, at a sub-minimum wage. These various provisions, with subsequent modifications, were built into the FLSA during the 1960s.

From *Debate* to *Dogma*

Industry, however, had continuing concerns and, when the impact of the 1966 FLSA requirements began to be felt, pressed for certain broader options. These options included a general sub-minimum wage for youth workers (variously defined). Two themes seem to have been central to industry's argument: **first**, that employers could not afford to pay the higher wages (i.e., the minimum legally allowable under the FLSA); and, **second**, that young persons suffered from high rates of unemployment and, if employers could pay these persons less (a wage below the Federal minimum), they would hire more of them. With the passage of time, a **third** argument was added: that if employers could pay their workers a lower wage, they would be willing to give them more training.

Through the years and with consideration of diverse sub-minimum wage proposals, the issue was transformed from theoretical economic debate into an article of faith. Arguments pro and con came gradually to be set, with counter arguments set with equal certainty. Appeals on behalf of "the working poor" and "unemployed inner-city youth, especially minority youth" were followed by pleas to "restore the bottom rungs on the ladder of upward mobility." Minimum wages were charged with being "a cruel hoax," and defenders of a reduced wage option suggested that "a low-wage job is better than a no wage job."

The concept has been presented under diverse labels (a "sub-minimum wage," a "youth opportunity wage," -- at one point, an "older Americans opportunity wage" -- and, more recently, a "training wage"), but the essence has remained constant: that the employer should be permitted to pay certain workers a wage lower than the minimum set for other covered workers. A number of questions have been raised with respect to the concept.

- For minimum wage type work, would "sub-minimum" wage youth workers displace or be substituted for persons to whom a full minimum wage would need to be paid? If so, which workers are most likely to be the victims of such displacement?

- Would any distinction, where impact is concerned, be made between young persons who are hired in the normal course of doing business (as they are without a "sub-minimum" wage) and those hired *because* of a reduced wage option?

- How much training would employers give to "sub-minimum" or "training wage" workers that they would not otherwise provide to workers employed at the full minimum rate?

- What training would employers give to any workers that is not absolutely essential to the work for which they have been hired?

- How would the Federal Government be able to distinguish "sub-minimum" wage training from regular training? Is it possible to make such a distinction and to monitor the extent and impact of such training?

- To whom would a "training wage" apply? On a "one time only" basis to youth workers beginning their first employment? To persons under a certain age each time they change employment, regardless of experience or work record? To entry-level workers of all ages?

Anecdotal evidence strongly suggested that the entry-level wage in many sections of the country was already higher than the pre-April 1990 minimum ($3.35) and often as high or higher than the increases projected under P.L. 101-157. Some, therefore, questioned whether offering a minimum wage lower than the existing market wage (during a period of alleged labor shortage) was useful -- even as a device for reducing labor costs for employers. Further, in view of the continuing erosion of the "otherwise applicable" minimum wage, some suggested that a "training wage" would be, in fact, a "sub-sub-minimum" wage.

101st Congress Acts

After extended debate and compromise, a "training wage" was included in the 1989 FLSA amendments. As noted above, the program was to be experimental. It was designed, according to its backers, to provide answers, if possible, to the now standard questions that had come to be associated with the concept.

The "training wage" or sub-minimum wage experiment, set forth in Public Law 101-157, provides essentially for the following:

- The "training wage" can only be paid to persons under 20 years of age who have not been paid the "training wage" for a cumulative total of 90 days of employment;

- The wage rate may be utilized by employers of eligible workers through two periods and by two **different** employers:

  (1) An initial 90-day period with a first employer **during which no training is required** to be given; and, then,
  (2) A second 90-day period with a different employer **during which training is required;**
  (3) The total lifetime utilization of the "training wage" with respect to an individual employee may not exceed 180 days;

- The training during the second 90-day period must be in response to a formal plan (though what that plan must include and what constitutes "training" are flexible);

- There are anti-displacement requirements (e.g., the workers employed at the "training wage" must not displace any other worker);
- Reporting and record keeping requirements are set forth;
- Migrant and seasonal agricultural workers may not be hired at the "training wage" nor may the wage be paid to nonimmigrant guest workers;
- The "training wage" provisions of the Act sunset on Apr. 1, 1993, and, in the absence of further action by the Congress, the reduced wage option will cease as of that date.

Regulations governing administration of the "training wage" program were issued by the Department of Labor in March 1990.[7] The implementing regulations were complex because the "training wage" provisions of Public Law 101-157 were, themselves, complicated.

A COMPLEX STRUCTURE OF WAGE RATES UNDER THE FLSA

As noted above, a sub-minimum wage option for certain employers was written into the FLSA during the 1960s. In addition, under Section 14(c) of the Act, a variety of sub-minimum wage rates "related to the individual's productivity" are available to employers of handicapped persons. Sub-minimum wages may be allowed for students employed by the educational institutions which they attend. In addition, there are numerous exemptions from the minimum wage and/or overtime pay provisions of the Act.

The Post-1989 Schedule of Wages.

In the wake of P.L. 101-157, the minimum wage structure for covered workers varied with the worker, the workplace, the type of work performed and a variety of other considerations. In general, it is as follows:

General Federal Minimum Wage Rate:

$3.35 per hour until Mar. 31, 1990;
$3.80 per hour after Apr. 1, 1990;
$4.25 per hour on Apr. 1, 1991, and thereafter.

The Sub-minimum Wage (Student, Retail/Service, Etc.) Authorized by Statute prior to 1989:

$2.85 per hour until Mar. 31, 1990;
$3.23 per hour after Apr. 1, 1990; and
$3.61 per hour on Apr. 1, 1991, and thereafter.

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[7] *Federal Register*, March 1, 1990, p. 7449-9464.

The "New Training Wage" Set by the 1989 Amendments:

$3.35 per hour from Apr. 1, 1990 to Mar. 31, 1991;
$3.61 per hour after Apr. 1, 1991.
The program sunsets on Apr. 1, 1993.

Section 14(c) Wage for Handicapped Workers:

No statutory minimum; wage rates subject to negotiation between the handicapped worker and his/her employer within the context of Department of Labor guidelines.

Minimum Wages under State Statutes:

State minimum wage standards are often different from the Federal minimum wage under the FLSA and are generally different from one another; where the State and Federal standards differ, the higher standard prevails; further, some States do not permit a "sub-minimum" or "training wage."

In addition, there is the question of determining whether an individual firm is even subject to the wage/hour provisions of the Federal statute. **First**, there is the matter of general coverage, both under the concept of "enterprise" (Section (3)(r) and Section (3)(s)) and under the broader concept of interstate commerce. **Second**, Section 13 of the Act provides categorical exemptions from wage/hour or simply from the hour (overtime pay) requirements of the Act. These exemptions are numerous and have been built into the Act, item by item, through half-a-century. **Third**, general coverage provisions of wage/hour legislation also vary from one State to another. Thus, if exempt under the Federal FLSA, one may not be exempt under the applicable State statute; or, if covered by both, the State standard may, if higher, supersede the Federal requirement.

THE "TIP CREDIT" PROVISIONS ARE REVISED

In the 1966 FLSA amendments, the minimum wage and overtime pay protections of the FLSA were extended to workers in restaurants, hotels and motels, together with other new areas of coverage. But, as then-Senator Willis Robertson of Virginia noted, Congress added "some softening provisions," among them the provision for a tip credit.[8] "To ease the impact" of the new coverage for industry employers, "the Congress permitted a tip credit system under which employers in the affected industries would pay 50 percent of the minimum wage to those employees who customarily and regularly received $20 per month in tips."[9] Thus,

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[8] *Congressional Record*, August 26, 1966, p. 20793.

[9] U.S. Congress. House of Representatives. Committee on Education and Labor. *The Fair Labor Standards Amendments of 1977. Report to Accompany H.R. 3744.* House Report No. 95-521, 95th Cong., 1st Sess. Washington, U.S. Govt. Print. Off., 1977. p. 31.

a worker had to earn at least the minimum wage; but, if the employee qualified as "tipped" (earning regularly at least $20 per month in tips), the employer could count tips actually received by the worker toward up to 50 percent of his (the employer's) minimum wage obligation.

Speaking generally, organized labor would like to see no minimum wage credit for tip income, maintaining that wages ought to be paid directly by an employer and that tips are a voluntary and irregular gratuity. Again, speaking generally, industry would like to see a 100 percent tip credit, suggesting that if employees earn as much as the applicable Federal minimum wage from tips, then the employer ought to be free from any minimum wage obligation. Complicating the issue is the treatment of tip income for tax and Social Security purposes. The latter is a separate issue, though industry has sought to link the two.

In the 1977 FLSA amendments, Congress moved in a direction urged by workers. It increased the test for tip income to qualify as a "tipped employee" from $20 regularly earned per month in tips to $30 per month. At the same time, it reduced the allowable tip credit, as the workers urged, from 50 percent, in steps, down to 40 percent of the otherwise applicable Federal minimum wage.

With the 1989 FLSA amendments, Congress moved back toward a position favored by industry. Under P.L. 101-157 (1989), the tip credit was again changed, being raised to 45 percent on April 1, 1990, and to 50 percent on April 1, 1991. Thus, the wage rate schedule for tipped employees and others would be that set forth in Table 2.

TABLE 2. Minimum Wage Rates under the Tip Credit Provisions, Fair Labor Standards Act

			Wage Employer Must Pay in Cash Under Tip Credit	
Effective (*) Date of Increase	Statutory Minimum Wage	Full Min. Wage Employees	Pre-1989 Sub-Min. Wage Employees	Training Wage (1989 Law) Employees
Jan. 1, 1981	$3.35	$2.01	$1.71	-----
Apr. 1, 1990	3.80	2.09	1.78	$1.84
Apr. 1, 1991	4.25	2.13	1.81	1.81

* Wage rates are discounted by the percent of the tip credit allowable and, under the sub-minimum and "training wage," both by the tip credit and by the sub-minima. The Department of Labor advises that the relationship of the tip credit to the "training wage" is under study. The relationship suggested above could therefore change at some point.

No covered employee would be payable at a rate, in combined tip income and direct wages, less than the applicable minimum wage, whether the full minimum or one of the sub-minima. By reducing the employer's minimum wage requirement first by the amount of the sub-minimum and, then, by the tip credit, the impact of the general minimum wage requirement, otherwise applicable under the FLSA, can be significantly diminished.

MODIFYING SMALL BUSINESS/ENTERPRISE COVERAGE

In the debates of 1937-1938 on the Fair Labor Standards Act, Congress attempted to differentiate between small and large firms, with respect to those establishments whose employees would be covered by the minimum wage and overtime pay provisions of the Federal law, on the basis of involvement in interstate commerce. (It is also true that coverage, under the initial enactment, was quite limited.) In later years, the formula was modified through a new definition of "enterprise" and establishment of a dollar volume test for coverage. Through the years, the language of the Act has periodically been changed with additions and deletions from the tests for coverage.

During the 1960s, Congress instituted a dollar volume test for coverage with respect to most retail and service establishments, the figure changing from time to time as the Act has been amended. (Under the 1977 FLSA Amendments, the threshold was increased, in steps, from $250,000 to $362,500, the latter effective after January 1, 1982.) In addition, some areas of business were dealt with in specific provisions, either exempting them from coverage or mandating that they be covered. Yet another system was devised with respect to agriculture: an exemption from the wage/hour provisions of the Act with respect to "any employee employed in agriculture . . . if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days [i.e., any day during which an employee performs any agricultural labor for not less than one hour] of agricultural labor."

As a result, some suggested, the language of the statute was not easily comprehensible for the lay reader. Some urged that Congress simplify the Act by consolidating certain of its provisions.

Changes Under the 1989 FLSA Amendments

In P.L. 101-157 (1989), Congress increased the dollar volume threshold for coverage from $362,500 to $500,000. In reporting the legislation, the Committee on Education and Labor noted (September 26, 1989):

> The Committee bill proposes an adjustment in the definition of an enterprise engaged in commerce. Section 3(s) of the . . . Act currently provides several thresholds to determine which enterprises are covered by the Act. The primary threshold, subsection (3)(s)(2) which covers almost all retail and service establishments, exempts those businesses with less than $362,500 in gross volume of sales or business done. The

> Committee bill would amend subsection 3(s) and 13(a) of the Act to create a more uniform small business exemption. *Small enterprises whose total volume of sales or business done is less than $500,000 would no longer be covered.* In eliminating several confusing tests to determine applicability of the act to various industries, the Committee continues to demonstrate it's [sic] support for the principle of a true small business exemption. (Italics added.)

The purpose of the language would seem to have been clear: to set a general small business exemption of $500,000.[10]

Impact for Employers

Early in 1990, *The Nation's Restaurant News*, an industry/trade journal, explained that, in consolidating and simplifying the language of the Act, the meaning had been altered to require that some firms which might have been exempt under a dollar volume test ($500,000) would now fall under an interstate commerce test and, thereby, could be brought under the minimum wage provisions of the Act. As a result, the story noted, employers will need "to categorize each employee on a weekly basis to determine which ones engage in commerce or in the production of goods for commerce." Raymond Cordelli, speaking for the Department of Labor and quoted in the article, explained that "commerce" could include a wide variety of routine business activities: for example, processing a credit-card charge slip, or receiving and storing food that had been shipped across State lines. The article continued:

> "A person in the kitchen deboning or trimming the fat off meat might not seem as if they're engaged in interstate commerce," Cordelli said. But the butcher would indeed qualify for the higher minimum wage if the fat and bones are sold to rendering companies with offices throughout the nation.

According to the *News*, Cordelli noted that "the legislation is not open to interpretation," emphasizing "that the Labor Department would indeed enforce the law as it is currently written."[11]

The extent and manner in which the 1989 FLSA amendments alter small business coverage under the Act may not be entirely clear. In determinations of coverage for compliance purposes, individual workers and establishments may find it useful to confer with the nearest office of the Department's Wage and Hour Division.

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[10] U.S. Congress. House of Representatives. Committee on Education and Labor. *Fair Labor Standards Amendments of 1989. Report to Accompany H.R. 2710.* House Report No. 101-260, Part 1, 101st Cong., 1st Sess. Washington, U.S. Govt. Print. Off., 1989. p. 18.

[11] *The Nation's Restaurant News*, Feb. 12, 1990, p. 4.

What Congress Intended

Did Congress intend to create a blanket $500,000 small business exemption or coverage test? Or, did the Congress intend to maintain a dual standard, a dollar volume text and a coverage requirement based upon involvement in interstate commerce, and apply them both to the retail and service industry? It may not be entirely clear, for some have suggested that the problems complained of by *The Nation's Restaurant News* were the result of technical error. It is important to note, however, that while individual Members have accepted the "technical error" interpretation, the Congress itself has not acknowledged an error. Conversely, some have suggested that Congress understood, fully, the implications of the changes it made in the small business/enterprise coverage under the FLSA when voting on the 1989 amendments.

During the second session of the 101st Congress and continuing into the 102d Congress, some Members have proposed legislation to reverse the impact of the small business/enterprise provisions of Public Law 101-157: to apply the dollar volume test to retail and service establishment but not the interstate commerce test. No hearings were held on the issue, however, and no action was taken to correct the alleged *technical error* up through the end of the 1st session of the 102d Congress.[12]

LABOR STANDARDS PROTECTIONS FOR CONGRESSIONAL EMPLOYEES

For a number of years, questions have arisen about the rights and protections provided for certain legislative branch employees (e.g., congressional staff and workers employed by the various units of the House of Representatives, the Senate, and the Architect of the Capitol). While Congress had written labor standards legislation governing the private sector and State and local governmental employees, it had not brought it own employees under the same provisions of law. In part, the Congress choose to deal with its own employees through separate legislation appropriate to the specialized conditions obtaining in the Legislative Branch. Further, constitutional issues (separation of powers) are involved. And, it may be that individual Members of Congress, where employee relations are concerned, shared the attitudes of some private sector employers and resisted what they may have regarded as the intrusion of government into the labor-management relationship.

During the 100th Congress, the House addressed part of the issue by adopting H. Res. 558 which created a House Fair Employment Practices (FEP) Office. The Office has since become a regular part of the House administrative structure.

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[12] U.S. Congress. Library of Congress. Congressional Research Service. *The Small Business Exemption in the Fair Labor Standards Act: Number of Employees Subject to the 1989 Amendments*. Report No. 91-307 E, by Charles V. Ciccone. Washington, 1979. 6 p.

Both the 100th and the 101st Congresses considered legislation to extend "the rights and protections" of the Fair Labor Standards Act to employees of the House, of the Senate, and of the Architect of the Capitol. The form and the scope of the legislation varied as the measure (later emerging as the 1989 FLSA amendments) moved through Congress.

Public Law 101-157 extends the "rights and protections" of the FLSA (minimum wage, overtime pay, "equal pay," child labor, etc.) to the employees of the House of Representatives and of the Architect of the Capitol. Senate employees are **not** covered under the new enactment. As adopted by the House, the FLSA amendments did not provide for Senate coverage; and, rather than amend the legislation in the Senate, sparking the need for appointment of conferees, the Senate accepted the House version of the legislation.[13]

Coverage for employees of the House and for the Architect of the Capitol took effect on October 1, 1990. The House FEP Office administers the labor standards coverage for House employees. It was not immediately clear by whom coverage for employees of the Architect of the Capitol would be administered.[14]

On March 22, 1990, Representative Murphy introduced H. Res. 363, which would allow employees of the House of Representatives to be compensated for overtime hours worked through compensatory time off rather than in cash. Specifically omitted from the Murphy resolution, however, are the protections currently included in Section 7(o)(2) and 7(o)(3) of the FLSA. Further, the Murphy resolution makes no reference to employees of the Architect of the Capitol. The resolution was referred to the House Committee on Education and Labor. Subsequently, other similar proposals were introduced, but no further action had been taken by the close of the 101st Congress.[15]

IN OTHER CHANGES

General legislation dealing with the FLSA has normally dealt with a wide variety of wage/hour regulation and related issues. Public Law 101-157 was no exception.

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[13] U.S. Library of Congress. Congressional Research Service. *Congressional Employees: Minimum Wages and Overtime Pay, the Fair Labor Standards Act.* Report No. 89-678 E, by William G. Whittaker. Washington, 1989. 37 p.

[14] Concerning aspects of the Act that might apply to the Congress, see: U.S. Library of Congress. Congressional Research Service. *A Summary of Selected Regulations of the Fair Labor Standards Act (FLSA).* Report No. 90-499 E, by Charles V. Ciccone. Washington, 1990. 15 p.

[15] Some controversy continued into the 102d Congress with respect to application of the provisions of the FLSA to employees of the House of Representatives; but at least for now, the issue seemed to have been resolved.

The Insular Areas

While the FLSA has long applied to the various insular areas under the American flag, it has applied to them under special provisions which have taken into account the peculiarities of their local economies. Under Public Law 101-157, the distinction between *the Virgin Islands* and the States, for FLSA purposes, was eliminated. The FLSA now applies with full force to the Virgin Islands. In the case of *Puerto Rico*, special wage/hour treatment continues for specified industries. However, under Public Law 101-157, a precise schedule was established under which the special treatment would be phased out, leaving Puerto Rico to comply with the terms of the FLSA in the same manner as the States.

In late October 1990, Congress approved separate legislation amending the FLSA with respect to *American Samoa*. Minimum wages are applied in American Samoa through a board of review which assesses the ability of insular employers to comply with FLSA wage standards. Public Law 101-583 reviewed the evidentiary requirements under which the Act is applied to the island, modifying the procedures to make them less onerous for insular employers.[16]

Computer Overtime

Similarly, under supplemental legislation (Public Law 101-583), Congress altered the manner in which overtime pay is calculated for certain computer services personnel. While computer science is a relatively new field, it was argued that technical specialists in the computer services field, carefully defined, ought to be regarded as "professional" and, thus, exempt from the overtime pay protections of the FLSA.

The measure was initially considered as part of the 1989 FLSA amendments; but, due to alleged drafting errors, it was dropped from the comprehensive bill with the understanding that it would be considered later as free standing legislation. During the fall of 1990, overtime pay treatment of computer services personnel was coupled with minimum wage calculation for American Samoa and, without further hearings, passed by the Congress and signed into law.[17]

LEGISLATIVE HISTORY, FLSA IN THE 101st CONGRESS

During the 100th Congress, hearings on the general issue of minimum wages were conducted both in the House and in the Senate with legislation being reported in each body. The House bill did not reach the floor. In September 1988, the Senate spent 6 days engaged in intermittent debate on the minimum wage and

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[16] American Samoa is expected to meet the wage/hour standards of the States at the earliest possible time. See H.R. 4011 (Murphy) of the 102d Congress.

[17] U.S. Library of Congress. Congressional Research Service. *Computer Services Personnel: Overtime Pay Under Section 13(a)(1) of the Fair Labor Standards Act.* Report No. 91-759 E, by William G. Whittaker. Washington, 1991. 19 p.

related issues, ultimately returning the bill to the calendar where it remained when the 100th Congress adjourned.

PUBLIC LAW 101-157 (FLSA AMENDMENTS OF 1989)

In the 101st Congress, consideration of wage/hour legislation commenced on March 3, 1989. Quickly, each House moved to mark up and report legislation.

On March 22 and 23, 1989, the House commenced debate, concluding with adoption of general FLSA amendments by a vote of 248 ayes to 171 noes. Senate debate following almost immediately on April 6 through 12, 1989. On April 12, the Senate approved the legislation by a vote of 62 ayes to 37 noes. Another month was passed with meetings of the conference committee and adoption of the conference report: by the House, on May 8; by the Senate, on May 17. Additional time was spent in clerical activity within the legislative branch. The measure reached President Bush in mid-June and was promptly vetoed (June 13, 1989). An attempt to override the veto failed in the House by a vote of 247 ayes to 178 noes.

New legislation was immediately introduced; but, through the summer of 1989, Congress allowed the wage/hour issue to lie dormant. In the fall, negotiations were undertaken between the interested parties. In November, the FLSA amendments were called up in the House and Senate, quickly adopted, and signed by President Bush on November 17, 1989 (P.L. 101-157).

Throughout consideration of the measure, the major issues were, **first**, the amount of the increase in the minimum wage and, **second**, the sub-minimum wage for entry-level workers. Where earlier President Reagan had opposed an increase in the Federal minimum wage, *per se*, President Bush was willing to accept a low increase: an increase far lower than Congress, at first, seemed willing to enact. Further, President Bush sought a sub-minimum wage provision for entry level workers; while organized labor, with some in Congress, argued that such an arrangement was totally unacceptable.

Ultimately, Congress moved toward the position taken by the President. It restructured the amounts of the proposed minimum and altered the effective dates for the several step increases; but, overall, the increase was lower than had originally been sought. The President was granted a sub-minimum wage, but only on an experimental basis. Further, coverage under the sub-minimum was limited to persons under twenty years of age and through two 90-day periods only. Some questioned the utility of the reduced wage option when coupled with a training requirement (discussed above). Others thought the training component too nebulous and argued that little real training was required for minimum wage type work. Finally, some felt that additional youth workers should be eligible, notably those in agriculture who were excluded from the experiment.

Other issues emerged in the debates, but were given less visibility than the minimum wage, *per se*, and the sub-minimum wage option. Indexation, an issue debated extensively in 1977 when the last general FLSA amendments had been

considered, was jettisoned before the 1989 debates began. The tip credit, strongly debated during previous years, was of little controversy in 1989, the Congress expanding the credit in a manner urged by industry. Similarly, the dollar volume threshold for small business coverage was raised, a change urged by the business community. (Though, as discussed above, the result may not have been what the business community anticipated.) Congressional coverage drew little attention during floor debates. The treatment of Puerto Rico was raised as an issue in the Senate, but was early resolved. The wide-ranging, technical debates of earlier years seem to have been avoided, while the more esoteric issues do not appear to have provoked controversy.

PUBLIC LAW 101-583 (FLSA AMENDMENTS OF 1990)

On July 27, 1990, Senator McClure introduced S. 2930, a measure sought by the tuna industry (and certain other employers) that would amend the evidentiary requirements for calculation of the minimum wage as it is applied to American Samoa. The bill was referred to the Committee on Labor and Human Resources; and a week later, August 4, the Committee was discharged from further consideration of the bill -- the measure being called up under unanimous consent in the Senate and, though no hearings appear to have been held, passed.

In the House, the legislation moved somewhat more slowly. On October 18, 1990, Representative Murphy added to the Samoan bill an amendment dealing with overtime pay for computer services personnel. The measure was immediately adopted by the House. A House/Senate committee of conference was called and, on October 27, the Senate agreed to accept the House version of the legislation: i.e., a joint Samoan/computer overtime bill. The measure was signed into law on November 15, 1990, by President Bush.

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