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Federal Regulation of Working Hours: The Ballenger and Ashcroft Proposals (H.R. 1 and S. 4)

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Summary

The Fair Labor Standards Act (FLSA) of 1938, as amended, normally requires that a covered worker receive not less than one-and-one-half times his (or her) regular rate of pay (that is, *time-and-a-half*) for hours worked in excess of 40 per week. Within a 40-hour workweek, however, there is complete flexibility. *Any configuration of hours is permitted* (e.g., 5 days of 8 hours each, 4 days of 10 hours each, 2 days of 20 hours each) *so long as the total hours worked do not exceed 40 in a single week.*

During the 104th Congress, legislation was considered that would have altered the 40-hour workweek and overtime pay requirements for private sector workers. In somewhat altered form, such legislation [H.R. 1 (Ballenger) and S. 4 (Ashcroft)] has been reintroduced in the 105th Congress. This report, very briefly, summarizes the issues presented by H.R. 1 and S. 4. For broader coverage of the subject, see CRS Report 96-570 E, *Federal Regulation of Working Hours: An Overview* (a legislative history), and the companion piece, CRS Report 97-532 E, *Federal Regulation of Working Hours: Consideration of the Issues.*

The Perspective of History

The length of the workday and workweek has been a matter of contention at least since the early 19th century. Federal policy with respect to hours of work and overtime pay requirements falls into a series of general periods — but with considerable overlap from one to another.

During the 19th and early 20th centuries, various worker, trade union, and reform groups sought a 10-hour workday and, later, an 8-hour workday. Their demands were voiced largely (though by no means exclusively) in humane terms: to provide an opportunity for the worker to develop physically, intellectually and spiritually; to share in the things his/her talents and energies had produced; to nurture and to educate his/her children; to participate in the democratic process; and to shoulder, responsibly, the obligations of citizenship in a free society. Long hours of work in factory, mine and field

were viewed as physically, mentally and psychologically debilitating, leaving workers broken in health and spirit — and, by extension, similarly affecting succeeding generations.

Following World War I and, increasingly, during the Great Depression, the impetus for hours reduction seems to have shifted. While social and humane considerations continued to be motivating elements, economic considerations took on greater weight. High levels of Depression-era unemployment made some measure of work sharing, achieved through restraints upon hours of work (overtime pay requirements) seem more desirable. Workhours restrictions were built into federal procurement legislation during the 1930s and, in 1938, an overtime pay requirement was made a central component of the FLSA.

With the end of World War II, the 40-hour workweek seems to have become standard. Periodically, organized labor has suggested that "working hours be reduced gradually, with no reduction in take-home pay, as technological change accelerates and productivity rises."[1] From time to time, legislation to reduce the standard workweek has been introduced in the Congress, but no new hours reduction legislation has been adopted. Since the late 1970s, such initiatives have largely disappeared from the public agenda.

"Alternative" Work Scheduling

At least by the late 1960s, a campaign had begun for an "alternative" approach to the world of work. Some writers have suggested that the student activism of the 1960s and attitudes engendered by the anti-war protests of that era had, in some measure, spread to the workplace. Women were working outside the home in growing numbers, while at the same time maintaining their role as the primary caregiver at home. Often, these new entrants to the workforce had not experienced the struggles of the pre-World War II decades for basic workplace protections; therefore, to them, such protections may have been a lesser priority than other options that they perceived as beneficial. At the same time, many within the business/employer community continued to argue for repeal of certain New Deal enactments. By the mid-1990s, a concerted effort to alter federal workhours regulation would be the result.

In 1970, Riva Poor, a management consultant, initiated a public relations campaign that called for a restructuring of work schedules: notably, creation of a compressed workweek.[2] Her immediate target was repeal of the 8-hour workday provisions in the Walsh-Healey Act (a 1936 law requiring minimum labor standards in the production of goods, under contract, for the federal government) and the related Contract Work Hours and Safety Standards Act (CWHSSA). Ultimately, the goal was achieved with adoption of P.L. 99-145, which, among its other provisions, repealed the 8-hour day provisions of the two statutes.

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[1] Fink, Gary (ed.) *AFL-CIO Executive Council Statements and Reports, 1956-1975.* Westport, Conn., Greenwood Press, 1977, v. 768. See also pp. 986-988.

[2] Poor, Riva. *4 Days, 40 Hours: Reporting a Revolution in Work and Leisure.* Cambridge, Bursk and Poor Publishing, 1970. 175 p. Compressed scheduling refers to a configuration of 40 workhours in other than 5 days of 8 hours each: for example, 4 days of 10 hours each.

With the beginning of the 1970s, a more permissive approach to work surfaced: that is, flexible hours, "flexiplace" employment and/or telecommuting, job sharing, etc., all encompassed in the concepts of *alternative work scheduling* or *new ways to work.* The impetus for alternative work arrangements appears to have come largely from consultants and academicians associated, broadly, with the women's movement. The initial constituency for alternative work scheduling seems to have been professional women seeking a way to balance family and workplace responsibility. With time, that constituency broadened significantly. After nearly a decade of consideration by the Congress, the *Federal Employees' Flexible and Compressed Work Schedules Act* (P.L. 95-390) was signed by President Carter in 1978. Initially experimental, the program was made permanent within the federal sector in 1985 (P.L. 99-196).

Early FLSA requirements had not applied to state and local governments; but, during the 1960s and 1970s, through a series of enactments, Congress brought local governmental employers under the Act's provisions. These extensions of wage/hour coverage were contested in the courts and, in *Garcia v. San Antonio Metropolitan Transit Authority [469 U.S. 528 (1985)],* the Supreme Court ruled that the FLSA did apply to state and local governments. However, to meet the special needs of such public sector employers and their employees (and to reduce personnel costs), Congress added Section 7(o) to the FLSA which allowed local governments to give their employees compensatory time off (comp time) in lieu of regular overtime pay (P.L. 99-150).

But, by adding Section 7(o) to the statute, Congress did not intend to set aside the FLSA overtime pay provisions. Thus, the option was wrapped in a series of protective requirements: that comp time be in conformity with collective bargaining agreements or, in the absence thereof, effected through an "understanding" between the employee and employer arrived at "before the performance of work." Further, comp time was to be calculated on a "time-and-a-half" basis. Allowance was made for the banking of comp time (accrual of *credit hours*) but within strict limits. And, public employers were directed to allow utilization of comp time at the convenience of the employee "within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency."[3]

Overtime Requirements for Private Sector Employers

By the end of 1985, compressed scheduling had been approved for federal employees and a comp time option for use by state and local governments. In each case, the workers involved were protected by public employee/civil service regulation and, somewhat more distantly, a legislative body. Although flexible scheduling (including a compressed workweek), within a 40-hour weekly period, was already permitted in the private sector, some argued that the FLSA should be amended to permit further compression and that a comp time option should be extended to the private sector as well. Employer support for modification of the overtime pay requirements of the FLSA developed quickly.

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[3] For the provisions of Section 7(o), see 29 U.S.C. 207(0) and 29 C.F.R. 553. Congressional concerns about the comp time option are discussed in U.S. Congress. House. *Fair Labor Standards Amendments of 1985*. Report to Accompany H.R. 3530. H.Rept. 99-331, 99th Cong., 1st Sess. Washington, U.S. Govt. Print. Off., 1985. 38 p.

In the 104th Congress, hearings on workhours regulation began with a proposal by the industry-oriented Labor Policy Association (LPA). The LPA report, *Reinventing the Fair Labor Standards Act To Support the Reengineered Workplace* (October 4, 1994), argued that the FLSA (with its workforce protections) was old and out-of-date: in the realm of labor laws, holding "a position nearly comparable to that of the Dead Sea Scrolls." The FLSA, it charged, discourages "progressive employment practices" such as "allowing employees to deviate from the standard 40-hour workweek" and "paying employees overtime with time-and-a-half compensatory time" rather than cash. And, further, the LPA report affirmed: "The lack of flexibility imposed by the FLSA when compensating employees for overtime work adds to the employer's burden by making it difficult to keep costs down." Some Members of Congress also saw benefits in increasing flexibility. "In order to remain competitive," Subcommittee Chairman Ballenger stated in commencing congressional review of the issue, "every U.S. firm is looking for ways to increase flexibility and productivity."[4]

Those urging modification of the overtime pay requirements of the FLSA often presented the issue in terms of worker interests, describing such proposals as *family friendly*. "Employees," Representative Ballenger suggested, "are looking for ways to juggle work, family and personal needs. All too often, the FLSA serves as an impediment to these goals."[5] "Jobs today," observed Maggi Coil, speaking for the LPA and for Motorola, Inc., "are significantly different than they were in 1938" and the FLSA, she added, "as currently written is one of the things that has outlived its usefulness and demands renovation."[6] Critics, however, viewed the matter somewhat differently. Representative Owens, the subcommittee's ranking minority member, pointed out that the FLSA "already allows flexible work schedules" and added that "the real issue is not flexibility, the real issue is fairness and paying Americans for the work they do."[7] Michael Leibig, Georgetown University law professor and Washington attorney, stated that "[e]ach of the provisions under challenge" by advocates of change "was originally placed in the FLSA regulatory scheme in response to specific employer tactics by which basic overtime provisions of the Act might otherwise be easily avoided."[8] Opposition to the initiative was voiced by trade union spokespersons and by others associated with women's advocacy, while individuals testified on both sides of the issue.

In the 104th Congress, Representative Ballenger introduced legislation essentially extending the comp time option utilized by state and local government employers to those of the private sector. In July 1996, it was reported from committee on a party line vote: Republicans in favor; Democrats, opposed. On July 30, 1996, the Ballenger proposal was approved by the House (225 yeas to 195 nays) but no further action was taken during that Congress. Meanwhile, Senator Ashcroft had introduced a more comprehensive proposal

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[4] U.S. Congress. House. Subcommittee on Workforce Protection, Committee on Economic and Educational Opportunities. *Hearings on the Fair Labor Standards Act.* Hearings, 104th Cong., 1st Sess., March 30, June 8, October 25, November 1, 1995. Washington, U.S. Govt. Print. Off., 1995. pp. 1-2, 31-35

[5] House Subcommittee on Workplace Protections, Hearings, 1995. pp. 1-2.

[6] House Subcommittee on Workplace Protections, Hearings, 1995. pp. 16-19.

[7] House Subcommittee on Workplace Protections, Hearings, 1995. p. 2.

[8] House Subcommittee on Workplace Protections, Hearings, 1995. pp. 213-218.

that would have restructured the workweek, allowed for credit hours and comp time, and that would have made other alterations in the FLSA. Although hearings were conducted on the Ashcroft bill, it did not reach the floor during the 104th Congress.

Proposals in the 105th Congress

From a foundation laid during the 104th Congress, Representative Ballenger and Senator Ashcroft presented new workhours proposals to the 105th Congress: H.R. 1 and S. 4, respectively. Each quickly became a focus of legislative attention.[9]

In December 1996, Chairman Goodling of the Committee on Education and the Workforce called for co-sponsors for new workhours/comp time legislation.[10] On January 8, 1997, a "group of House Republican women ... endorsed what they called 'family friendly' legislation" to allow comp time in place of overtime pay.[11] By late January, *The Wall Street Journal* was anticipating that "Republicans and business groups will be taking their fight directly to the public," which — a survey by "the pro-business Labor Policy Association" suggests — supports the concept of flexibility overwhelmingly.[12] H.R. 1 was introduced January 7th, hearings were conducted (with Mr. Ballenger as chair) early in February, and the bill was ordered reported from the full Committee on March 5, 1997. Again, the vote to report split along party lines: 23 Republicans in favor, 17 Democrats opposed.

As reported, H.R. 1 basically extended the comp time provisions of Section 7(o) with respect to state and local public employment to the private sector. As in the 104th Congress, there appears to have been a general division of opinion with the LPA and industry groups supporting the legislation and trade union and certain women's advocacy groups in opposition. Individuals were positioned on various sides of the issue, while the conservative Independent Women's Forum offered support. Critics were concerned that the flexibility implied by the legislation would provide flexibility primarily for employers, would lend itself to coercion of employees, and was a covert attack upon overtime pay and the 40-hour workweek. To overcome such objections, amendments protective of worker options were added (though, from the perspective of critics, these were not sufficiently strong), and on March 19, 1997, the amended bill was approved by the House: 222 ayes to 210 nays.[13]

Meanwhile, Senator Ashcroft had reintroduced, in modified form, his more comprehensive restructuring of the workweek: S. 4. The new Ashcroft bill (the "Family Friendly Workplace Act") provides, *inter alia*, for the following. **(A)** In language similar to H.R. 1 as introduced (but different from the House-passed version), S. 4 would allow

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[9] Specific provisions of the various legislative proposals and a summary of arguments, pro and con, are presented in the two CRS reports noted in the summary of this survey report.

[10] Dear Colleague Letter, Representative William Goodling, December 17, 1996.

[11] *Daily Labor Report*, January 9, 1997. pp. A1-A2. Those issuing the endorsement included Representatives Molinari, Fowler, Dunn, Myrick and Granger.

[12] *The Wall Street Journal*, January 28, 1997. p. A18.

[13] Congressional Record, March 19, 1997. pp. H1116-H1156.

for compensatory time off in lieu of overtime pay in cash. **(B)** It would allow abandonment of the 40-hour workweek and its replacement with an 80-hour bi-weekly work period during which any configuration of working hours would be permitted. Overtime rates, in this context, would not be required until after 80 hours of work during the two-week period. **(C)** It would permit, with joint employer and employee concurrence, the set aside of the overtime pay requirements of the FLSA (on a limited basis) in order to allow an employee to accrue up to 50 credit hours (*flexible credit hours)* on a straight time basis (an hour worked to equal an hour of leave at a later time). **(D)** The legislation addresses the issue of short term leave (a partial day) with respect to certain salaried, and otherwise overtime pay exempt, employees.

S. 4 was introduced on January 21, 1997. Hearings were conducted on February 4 and 13; following mark-up, an amended version of the legislation was approved by committee on April 2, 1997 (S.Rept. 105-11). Senate floor debate commenced on May 1, 1997, and continued into June. On May 15, a first cloture vote was taken, failing to secure the requisite number of votes: 53 for cloture and 47 against, with two Republicans joining Democrats in opposition.[14] On June 4, a second cloture vote was taken, again failing to secure a sufficient number of votes: 51 for cloture and 47 against, with three Republicans joining the Democrats in opposition.[15] A post-mortem discussion of the legislation occurred on June 9, 1997; but, thereafter, consideration of the measure largely ceased.[16]

Overtime pay issues are tracked in CRS Issue Brief 98005, *Federal Regulation of Working Hours: Issues before the 105th Congress*, updated regularly. Please note that the Legislative Information System (LIS) maintains current information about pending legislation. The LIS can be consulted at http://www.congress.gov.

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[14] *Congressional Record*, May 15, 1997. p. S4514.

[15] *Congressional Record*, June 4, 1997. p. S5291.

[16] *Congressional Record*, June 9, 1997. pp. S5406-S5412.