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# Minimum Wage, Overtime Pay, and Child Labor: Inventory of Proposals in the 109th Congress to Amend the Fair Labor Standards Act

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## Summary

The Fair Labor Standards Act (FLSA, 29 U.S.C. §§ 201-219) is the basic federal statute dealing with minimum wages, overtime pay, child labor, and related issues. Enacted in 1938, it has been modified through the years to take into account changing workplace trends and to meet new worker and employer demands.

The act has undergone general amendment on eight separate occasions (1949, 1955, 1961, 1966, 1974, 1977, 1989, and 1996) in addition to numerous more specific legislated changes. It has also been the subject of continuing administrative rulemaking by the Department of Labor (DOL) — and has been the focus of extensive litigation that has impacted the manner in which the act is applied.

The FLSA is divided roughly into three parts, corresponding to its subject areas: minimum wage (Section 6), overtime pay (Section 7), and child labor (Section 12). These are accompanied by a body of statutory exemptions or exceptions (Section 13). Definitions appear in Section 3. Other sections deal with administration, penalties, and related matters.

*Nothing in the act requires that Congress revisit the statute*. Amendment has tended to respond to change in the value of the minimum wage. As the level of the wage floor has eroded through inflation, Congress has revisited the FLSA and, while addressing the wage rate, it has also, often, revised coverage patterns and modified overtime pay and other requirements. Child labor, by and large (but with exceptions), has been primarily the responsibility of the Secretary of Labor, operating within general guidelines laid down by Congress.

Until recently, legislation to amend the FLSA had been free-standing — the product of extended hearings. In 1996, that pattern shifted. The 1996 FLSA amendments were adopted as a floor amendment to a broad proposal dealing with business and related tax issues. As a result, some have come to view as a new pattern *a linkage* of labor standards enhancement with sometimes unrelated benefits for employers. Others argue that there is no inherent reason to tie FLSA amendments to benefits for employers.

In the 109th Congress, it can be expected that further changes will be urged with respect to the FLSA — some to increase worker protections and others, arguably, to allow employers more flexibility by reducing them. This report will be updated to reflect legislation introduced and/or enacted by the 109th Congress.

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# Minimum Wage, Overtime Pay, and Child Labor: Inventory of Proposals in the 109th Congress to Amend the Fair Labor Standards Act

The Fair Labor Standards Act (FLSA, 29 U.S.C. §§ 201-219) is the basic federal statute dealing with minimum wages, overtime pay, child labor, and related issues. Almost immediately after its enactment in 1938, various Members of Congress proposed its amendment to address worker and employer concerns. The act has now undergone general amendment on eight separate occasions (1949, 1955, 1961, 1966, 1974, 1977, 1989, and 1996) in addition to numerous more specific legislated changes in the statute. It has also been the subject of continuing administrative rulemaking by the Department of Labor (DOL).

In the 109th Congress, further changes have been proposed — some to increase worker protections and others, arguably, to allow employers more flexibility by reducing them. This report will be updated, periodically, to reflect legislation introduced and/or enacted by the 109th Congress.

## An Introduction to the FLSA

When the federal wage and hour statute (the FLSA) was enacted in 1938, it was not an especially new concept. Questions about minimum wages, overtime pay, child labor, and related issues had been a central part of American (and world) labor policy concerns for at least half a century. But only in the wake of the Great Depression (beginning in 1929) was Congress able to forge a comprehensive federal measure that would withstand judicial review while respecting the differing interests of employers and workers.

The FLSA is divided roughly into three parts: minimum wage (Section 6), overtime pay (Section 7), and child labor (Section 12). These are accompanied by a body of statutory exemptions or exceptions (Section 13). Definitions appear in Section 3. Other sections deal with administration, penalties, and related matters.

Enforcement (and interpretation) of the FLSA is a shared responsibility. On occasion, the Congress has been precise about how the act should work. For

example, it provides a set statutory minimum wage: currently, $5.15 per hour.[1] The minimum wage remains at the statutory level until Congress takes action to alter it. On the other hand, the Congress (in 1938, but the policy is continuing) mandated that the minimum wage and overtime pay protections of the act "shall not apply with respect to ... any employee employed in a bona fide executive, administrative, or professional capacity ... as such terms are defined and delimited from time to time by regulations of the Secretary." Having so stated, the Congress moved on to other issues — and, very largely, left the *defining* and *delimiting* up to the Secretary. (See section below — "Overtime Pay.")

In defining the terms of the FLSA and making it applicable to individual workplaces, the Department has, from time to time, issued *opinion letters* — generally stating its perception of what Congress intended. Such letters can be challenged (and sometimes are), or they can be a catalyst leading to further congressional action.

# The Federal Minimum Wage

The federal minimum wage is set in statute and remains at a fixed rate (declining in value as price levels continue to rise) until changed through legislative action. Although the general rate is currently $5.15 an hour, there are also a series of *sub-minima* (or special treatments) for students, youth, persons with disabilities, regularly tipped employees, and others. In addition, special consideration for small businesses has been built into the act. For the most part, each of these *sub-minima* is in some measure separate and apart from the general wage rate.[2]

In 1968, the federal minimum wage reached, in relative terms, its highest value: $l.60 per hour. Had the rate been indexed to the equivalent or real purchasing power of the dollar, its value in December 2004 would have been $8.68.[3]

## Action of the 109th Congress

During early spring 2005, the Senate called up for consideration reform of bankruptcy legislation (S. 256). As floor amendments to that bill, the Senate considered two minimum wage proposals. (See **Table 1**.)

On March 3, 2005, Senator Edward Kennedy proposed an amendment (S.Amdt. 44) that would have raised the minimum wage, in steps, to $7.25 an hour beginning

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[1] The individual states have, often, adopted state minimum wage standards that are in excess of the federal statute or that cover areas that are not covered by the federal enactment. In such cases, the state standards, in so far as they are more protective of the worker, normally take precedent.

[2] For consideration of the various *sub-minima*, see CRS Report RL30993, *The Fair Labor Standards Act: Minimum Wage in the 108th Congress*, by William G. Whittaker.

[3] CRS Report RS20040, *Inflation and the Real Minimum Wage: Fact Sheet*, by Brian W. Cashell.

24 months (and 60 days) after enactment of the legislation. In addition, the Kennedy proposal would have applied the federal minimum wage, in steps, to the Commonwealth of the Northern Mariana Islands.[4] The Kennedy proposal was defeated (46 ayes to 49 nays) on March 7, 2005.[5]

On March 7, 2005, in connection with the amendments by Senator Kennedy, Senator Rick Santorum introduced a more far-reaching proposal (S.Amdt. 128). It would have: (a) raised the minimum wage to $6.25 an hour, in steps, to have full effect 18 months after enactment; (b) created a program of *compensatory time* as an alternative to ordinary overtime pay; (c) created an enhanced *small business exemption*; (d) altered the *tip credit* under the FLSA; and (e) provided a range of unrelated tax and other incentives for business. The Santorum proposal was defeated (38 yeas to 61 nays) on March 7, 2005.[6]

## Action Proposed

Senator Debbie Stabenow, on January 24, 2005, introduced S. 14, a composite infrastructure and jobs bill, part of which would increase the minimum wage to $7.25 an hour 24 months (and 60 days) after enactment. The bill was referred to the Committee on Finance. (See also **Overtime Pay**, below.)

Representative Phil English, on March 3, 2005, introduced H.R. 1091, a bill: (a) to increase the minimum wage, in steps, to $6.50 beginning October 1, 2008, and increasing the pattern of exemption to eliminate employers with nine or fewer employees; (b) to allow for an altered *small business exemption* under the act; and (c) to provide assorted business incentives unrelated to the minimum wage. The bill was referred to the Committee on Ways and Means and to the Committee on Education and the Workforce.

# Overtime Pay

In general, the overtime requirements of the FLSA call for a 40-hour workweek — after which a worker must be compensated at not less than a rate of 1½ times his or her regular rate of pay. No daily hours standard is provided, allowing for flexibility within the context of a 40-hour week. However, each week is regarded as a unit: hours may not be moved from one week to the next. Exceptions under the

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[4] *Congressional Record*, Mar. 3, 2005, pp. S1979-S1980. Under the Covenant attaching the Commonwealth of the Northern Mariana Islands to the United States (1975-1976), jurisdiction over labor standards was mixed: overtime pay to be governed by the United States; minimum wage, by the insular government. There may also have been (there appears to be some dispute about this) an option for the United States to reclaim jurisdiction over the minimum wage should conditions in the Islands warrant. See CRS Report RL30235, *Minimum Wage in the Territories and Possessions of the United States: Application of the Fair Labor Standards Act*, by William G. Whittaker.

[5] *Congressional Record*, Mar. 7, 2005, p. S2132.

[6] Ibid., pp. S2132-S2133.

act are technical and complex, but allow employers and their employees a variety of options within the general requirements of the statute. (See **Table 2**.)

## Action Proposed

On March 31, 2003, DOL proposed a restructuring of the *executive, administrative,* and *professional* exemption under the act (29 C.F.R. Part 54l). After nearly a year of controversy, the new regulations, somewhat altered, went into effect in late August 2004. Two bills of the 109th Congress propose a reversal of the Department's action and, for the future, indexation of the earnings threshold provision of the act. (a) S. 14, a composite infrastructure and jobs bill, by Senator Debbie Stabenow and (b) S. 223, more narrowly focused, deals specifically with overtime pay, by Senator Tom Harkin.[7] The Stabenow bill was introduced on January 24, 2005, and referred to the Committee on Finance. The Harkin bill was introduced on January 31, 2005, and referred to the Committee on Health, Education, Labor and Pensions.

Under the premise that (a) there is a shortage of nurses for American hospitals, (b) that those within the profession are often overworked, and (c) that such overwork and extended hours of work have caused nurses to seek other (alternative) professions, several bills have been introduced that would limit or restrict the hours hospital nurses work.[8]

Senator Daniel Inouye has proposed S. 71, the Registered Nurse Safe Staffing Act of 2005,which would "provide for patient protection by establishing minimum nurse staffing ratios at certain Medicare providers." Introduced January 24, 2005, the bill was referred to the Committee on Finance.

Senator Edward Kennedy and Representative Fortney Stark have introduced bills that would amend the Social Security Act "to provide for patient protection by limiting the number of mandatory overtime hours a nurse may be required to work" by certain providers of services under the Medicare program. The Kennedy bill (S. 351) was introduced on February 10, 2005, and referred to the Committee on Finance. The Stark bill (H.R. 791) was introduced on February 14, 2005, and referred to the Committee on Energy and Commerce and to the Committee on Ways and Means.

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[7] The Department of Labor's proposal (now in place) carried two provisions. The first was an increase in the earnings test for exemption. The second part was a duties test: did those identified as executives, administrators, or professionals actually perform duties befitting their exempt status. See CRS Report RL32088, *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, by William Whittaker, and CRS Report RL30927, *The Federal Minimum Wage: the Issue of Indexation*, by Gerald Mayer.

[8] The various bills, dealing with nursing, seek to amend the Social Security Act. While each deals with hours of work, none is directly related to FLSA.

# Child Labor Legislation

Efforts to restrict or to regulate child labor date from the 19th century. After a series of federal initiatives uniformly deemed unconstitutional, language dealing with child labor was incorporated within the original FLSA of 1938.

Under current federal law,[9] jurisdiction is divided between the Congress and the Secretary of Labor. Congress has enacted very general standards under the FLSA; but, on occasion, it has also written precise language governing the work of children and youth.[10] On the other hand, the Secretary has reviewed the work experience of children and youth and has established, *inter alia*, Hazardous Occupation Orders — separately for agricultural and for non-agricultural workers: 11 for agricultural workers; 17, for non-agricultural workers.

If the past is prologue, one can expect to see a number of child labor initiatives introduced in the 109th Congress. (See **Table 3**.)

## Action Proposed

On March 8, 2005, Representative Mark Foley introduced H.R. 1142, the Child Modeling Exploitation Prevention Act. The bill deals with the use of children "in the production of exploitive child modeling," and related purposes. The bill was referred to the Committee on Education and the Workforce and to the Committee on the Judiciary.

# An Inventory of Legislative Proposals

In the 109th Congress, legislative proposals dealing with the minimum wage, overtime pay, and child labor are taking a variety of forms. The tables that follow provide a simple overview of the various initiatives, broken down by the three general categories: minimum wage, overtime pay, and child labor. In some cases, a particular bill will be listed in more than one table.

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[9] States have often enacted statutes dealing with child labor. Where there is a conflict between state and federal laws, the standards more nearly protective of children and youth workers will normally take precedent.

[10] For example, during the summer of 1996, Congress adopted legislation governing the use of paper bailers and compactors by persons under 18 years of age. Again, in Oct. 1998, the Congress passed the Drive for Teen Employment Act, addressing whether 16-year-olds could drive as part of their employment. See CRS Report RL32881, *The Department of Labor's New Rules for Working Children and Youth*, by William Whittaker.

## Table 1. Minimum Wage Proposals of the 109th Congress

(The federal minimum wage is now $5.15 per hour)

| Bill no. | Sponsor | Increase minimum to: | Effective date for the final step increase | Action beyond referral | Other components |
|---|---|---|---|---|---|
| S.Amdt. 44 | Kennedy | $7.25 | To $5.85 on 60th day after enactment; to $6.55 one year (and 60 days) later; and $7.25 two years (and 60 days) later | Defeated, Mar. 7, 2005, 46 yeas to 49 nays | CNMI wage component[a] |
| S.Amdt. 128 | Santorum | $6.25 | To $5.70 six months after enactment; to $6.25, one year and six months after enactment | Defeated, Mar. 7, 2005, 38 yeas to 61 nays | Contains other wage, unrelated industry components |
| H.R. 1091 | English | $6.50 | To $5.50, Oct. 1, 2006; to $6.00, Oct. 1, 2007; and to $6.50, on Oct. 1, 2008. | — | Amends the *small business exemption*; alters the pattern of minimum wage coverage; and provides assorted business incentives |
| S. 14 | Stabenow | $7.25 | To $5.85 on 60th day after enactment; to $6.55 one year (and 60 days) later; and $7.25 two years (and 60 days) later | — | Part of a composite infrastructure bill |

a. The bill would extend federal minimum wage protection, in steps, to workers in the Commonwealth of the Northern Mariana Islands (CNMI).

## Table 2. Overtime Pay Proposals of the 109th Congress

| Bill no. | Sponsor | Action beyond referral | Impact | Other components |
|---|---|---|---|---|
| H.R. 791 | Stark | — | Limits mandated overtime for nurses serving Medicare patients, with other related provisions | — |
| S. 14 | Stabenow | — | Would reverse DOL overtime pay requirements for *executive*, *administrative*, and *professional*, *inter alia* (a) | General intrastructure bill |
| S. 71 | Inouye | — | Limits mandated overtime for nurses serving Medicare patients, with other related provisions | — |
| S. 223 | Harkin | — | Would reverse DOL overtime pay requirements for *executive*, *administrative*, and *professional*, *inter alia*[a] | — |
| S. 351 | Kennedy | — | Limits mandated overtime for nurses serving Medicare patients, with other related provisions | — |

a. The bill would impose restraints upon DOL's authority, under Section 13(a)(1), to reduce the duties requirements for overtime pay exemption, with other elements. For the future, the earnings threshold of the act would be indexed. See CRS Report RL32088, *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, by William G. Whittaker.

## Table 3. Child Labor Proposals of the 109th Congress

| Bill no. | Sponsor | Action beyond referral | Impact |
|---|---|---|---|
| H.R. 1142 | Foley | — | To prohibit "exploitive child modeling" involving persons under 17 years of age |