FLEXIBILITY IN THE WORKPLACE: DOES THE FAIR LABOR STANDARDS ACT ACCOMMODATE TODAY'S WORKERS?

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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Table of Contents

FLEXIBILITY IN THE WORKPLACE: DOES THE FAIR LABOR STANDARDS ACT ACCOMMODATE TODAY'S WORKERS?

Wednesday, March 6, 2002

Subcommittee on Workforce Protections

Committee on Education and the Workforce

U.S. House of Representatives

Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:02 p.m., in Room 2175, Rayburn House Office Building, the Honorable Charlie Norwood, Chairman of the Subcommittee, presiding.

Present: Representatives Norwood, Biggert, Ballenger, Isakson, Culberson, Owens, Kucinich and Mink.

Staff present: Molly McLaughlin Salmi, Professional Staff Member; Victoria Lipnic, Workforce Policy Counsel; Christine Roth, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Greg Maurer, Professional Staff Member; Travis McCoy, Legislative Assistant; Kevin Smith, Senior Communications Counselor; Scott Galupo, Communications Specialist; Patrick Lyden, Professional Staff Member; and Deborah L. Samantar, Committee Clerk/Intern Coordinator.

Peter Rutledge, Minority Senior Legislative Associate/Labor; Michele Varnhagen, Minority Labor Counsel/Coordinator; and, Dan Rawlins, Minority Staff Assistant/Labor.

Chairman Norwood. The Subcommittee on Workforce Protections will now come to order.

Under Committee Rule 12(b), opening statements for the hearing are limited to the Chairman and Ranking Minority Member of the Subcommittee. If other Members have statements, they will be included in the hearing record. With that, I ask unanimous consent for the hearing

record to remain open for 14 days to allow Member statements and other materials referenced during the hearing to be submitted for the record.

The focus of today's hearing is on flexibility in the workplace, specifically regarding the ability of the Fair Labor Standards Act to accommodate the needs of today's workers. I would like to take a moment to extend a very warm welcome to our witnesses. We are grateful for your time and willingness to come. We very much appreciate your being part of this process, and we look forward to your testimony. I have just a short statement and then I will yield the remainder of my time to my colleague and Vice Chair of the Subcommittee, Judy Biggert.

OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

We will first hear about the demographic changes that have occurred in the workplace over the past several decades. The composition of the workforce has changed dramatically, and the nature of work has moved away from manufacturing-based industries to service-based industries. What we will hear is that today's workforce is vastly different from that of 1938, when the Fair Labor Standards Act was put into place.

We will also hear about what matters most to workers today. Workers want the ability to balance work and family. Not surprisingly, for many workers the ability to balance work and family has become the most important aspect of a job, outranking all other job-related issues. Given the opportunity, most Americans want flexible work options in order to spend more time with their families or pursue interests outside of work such as starting small businesses.

Likewise, helping workers balance work and family can be a useful tool for employers in attracting and retaining qualified employees. Companies can improve business results by implementing practices that help employees balance their work and personal responsibilities. Providing employees with more control over their hours and more flexibility in how work gets done can go a long way toward boosting employee morale and enhancing productivity.

Finally, we will hear from our legal experts about the problems that employers face under current law when they attempt to respond to employee demands for greater flexibility. I am very mindful that the Fair Labor Standards Act provides important protections for workers. I am also mindful that it may be unnecessarily rigid in keeping up with the flexibility demanded by today's workers.

I would now like to yield the remainder of my time to my colleague, Judy Biggert, for her opening remarks.

OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

SEE APPENDIX A

OPENING STATEMENT OF CONGRESSWOMAN JUDY BIGGERT, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Thank you very much, Mr. Chairman. I commend you for holding this important hearing, for as you have noted, there have been some very dramatic changes in the past 60 years in the composition and character and demands of the workplace.

What was once a manufacturing-based economy with a primarily male workforce has evolved into a fast-paced global economy based on services and technology with nearly equal numbers of men and women in the workforce. Of course, one of the most dramatic changes has been the increased number of women in the workforce, particularly those with young children.

In 1969, some 38 percent of married women with children worked for pay, while in 1996, 68 percent did so. The reality of today's workforce is that both parents are working or a single parent is balancing all of the household needs. And these changes highlight the demand for greater flexibility in work schedules.

Today, more than ever before, workers face a difficult dilemma: how to balance the demands of work and still have enough time for family and personal commitments. While this conflict weighs most heavily on working mothers, recent surveys have shown that younger workers, particularly young men, are more willing to make sacrifices in their jobs, careers and education, in order to achieve more balance in their personal lives.

Providing workingmen and women with increased control over their work schedules may sound relatively simple. But private sector employers and their workers are constrained by the Fair Labor Standards Act, which does not permit a great deal of flexibility. The testimony today will show that the law was designed for a different workforce with different needs.

As we in Congress consider how to make flexible work schedules available to more Americans, no doubt some will say that there are already a variety of ways to give workers additional time off under current law. Yet the options available under current law, for example, do not permit employees to work additional hours in order to accrue paid time off to be used at a later date. Furthermore, flexibility between workweeks is limited as the law discourages employers from allowing workers to increase their hours in one week in order to account for time taken during a subsequent week.

Most workers simply want additional flexibility in the workplace and more choices than are currently available. For employers, addressing work and family concerns can lead to greater employee satisfaction, which in turn, means more productive work practices and a better business result. I, too, want to thank our witnesses for being here today, and I look forward to your testimony. Thank you, Mr. Chairman.

WRITTEN STATEMENT OF CONGRESSWOMAN JUDY BIGGERT, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE SEE APPENDIX B

Chairman Norwood. I yield to the distinguished Ranking Minority Member from New York, Mr. Owens, for whatever opening statement he wishes to make.

OPENING STATEMENT OF RANKING MEMBER MAJOR R. OWENS, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Thank you, Mr. Chairman and Madam Vice Chairwoman. I want to welcome today's witnesses and express my appreciation for your willingness to take the time and effort to be here this afternoon. And since there are going to be votes, your time and effort is going to be a little longer than expected.

Today's hearing is to examine the issue of flexibility in the workplace and the extent to which the Fair Labor Standards Act, particularly the requirement to pay time and a half for hours worked in excess of 40 hours a week, affects that issue. As many recall, this is an issue we debated extensively in the 104th Congress and the 105th Congress when Republicans unsuccessfully sought to enact comp time legislation. That was bad legislation then. It deserved to be defeated then and it deserves to be defeated now.

I remember I was willing to compromise to the point on the floor of the House when I offered that the legislation should apply only to people who are making above minimum wage. The other folks needed the cash. And even that was not accepted.

If the intent today is to resurrect that fight, then let me say at the outset that I believe that the 40-hour week is the most family-friendly legislation this Congress has ever enacted. Weakening the 40-hour week may make it easier for employers to require workers to work longer hours, but it will not enhance worker flexibility and will not make it easier for workers to balance demands of work and family.

There are, of course, many things that Congress can do that would improve the ability of workers to balance work and family needs. We can provide workers with the right to refuse to work excessive overtime without jeopardizing their job. We can guarantee a right to paid leave for workers facing family and medical emergencies. More basically, we can provide a right to unpaid family and medical leave to all workers. Even more basic than that, we can raise the minimum wage.

Chairman Norwood, in the event it is your intent to achieve any of these goals, I am more than willing to work with you. Let's combine all those goals with the goal of more flexibility. I

think we can achieve more flexibility if we follow that course.

I yield back the balance of my time.

Chairman Norwood. Thank you very much, Mr. Owens. And I would ask your indulgence of the witnesses. We have a vote. We're going to recess as quickly as we can and go vote. And I would ask all Members to return as fast as they can.

We are now in recess, subject to the call of the chair.

[Recess.]

Chairman Norwood. The Committee will come to order. We will now proceed with our panel of witnesses.

Our witnesses today are Dr. Ronald Bird, Chief Economist with the Employment Policy Foundation; Dr. Carl E. Van Horn, Professor and Director of the John Heldrich Center for Workforce Development at Rutgers State University of New Jersey; Mr. William Kilberg, Senior Partner with Gibson, Dunn & Crutcher, testifying on behalf of the U.S. Chamber of Commerce; and Mrs. Judith Conti, Co-founder and Director of Legal Services and Administration with the D.C. Employment Justice Center.

Before we begin, I would like to remind the Committee Members that we will ask questions after the entire panel has testified. In addition, Committee Rule 2 imposes a five- minute limit on questions.

Dr. Bird, if you would please begin.

STATEMENT OF RONALD BIRD, CHIEF ECONOMIST, EMPLOYMENT POLICY FOUNDATION, WASHINGTON, D.C.

Thank you, sir. As Congress reviews the effectiveness of employment policies and assesses the need for change, I think it is important that decision-makers be aware of the realities of workplace demographics. Effective policies reflect the facts of the population that policies are intended to serve and of the economic structure in which they operate. Policies built on erroneous assumptions risk unintended consequences, at best doing no good, and at worst actually harming more than they help.

Much of today's employment policy framework was constructed over half a century ago, reflecting the experience of the Great Depression. Today's American workplace is dramatically different and more complex than the workplace of two generations ago. The important workplace changes of the past 50 years reflect at least five dimensions of change that affect policy.

Now, I've given you my written testimony. And what I'm going to do today is summarize five salient features from it, and I'm just going to mention five of the charts that I attached.

First of all, job availability is an important consideration. Figure 1, that I have given you, illustrates an important point about that. We have moved from an era in which workers were plentiful and job opportunities were scarce to one that is just the opposite. Qualified workers are scarce in today's job market, and job opportunities are in fact plentiful, especially for those who have the skills and the education that the modern economy demands. Figure 1 shows the strong performance of the economy.

In the past 25 years, the American economy has produced 35 million new jobs net. Continuing this strong job creation trend is central to any successful employment policy approach. This past year, we've been in a recession. But still, job growth has continued in the areas that reflect the new economy, the new technologies and the expanding role of America in a competitive economy, in a competitive world.

Unemployment, which has gone up in the last year during this recession is still well below the peaks reached in previous business cycles. Maintaining a growing labor force to fill new jobs created by growth and the vacant jobs that will occur from retirement of the baby boom generation will strain all the sources of labor supply.

The second major change that we are seeing is in industrial structure. We have moved from an era in which most jobs were in centralized mass production-oriented manufacturing enterprises to one in which most jobs, and indeed the best jobs, are in service industries.

In the global integrated economy, jobs in the high value-added areas of business management services, information, and other professional services are the fastest-growing segments, and that's where America's comparative advantage lies. Figure 9 in your packet shows that industrial change as the service sector has risen to become the dominant sector in the economy.

The third category of change that's very important from the standpoint of employment policy is occupational structure. We have moved from an era in which most jobs were in routine, low skill assembly and equipment operator occupations to one in which most jobs, and the fastest-growing types of jobs, are in creative and knowledge-intensive professional, technical, and management-related fields.

Figure 10 in your packet highlights the effect of this change. As you see in the chart, management and professional occupations have now grown to be the single largest employment group. This structural change and the kinds of jobs created will exacerbate the already tight employment outlook for the future and have far-reaching implications for both education and employment policy.

Item number four is education. We have moved from an era in which most workers needed little formal education to one in which the workforce is highly educated and in which the demand for even higher educational attainment is increasing.

The change in the occupational and industrial structure of the American economy is also reflected in an increased demand for skills and training. And this is what Figure 12 in your packet

highlights, the dramatic difference in job growth in relation to educational attainment. Over just the last five years, and the last five years really reflect a trend that has been going on for 30 years, job growth for jobs held by college graduates has increased more than eight times faster than job growth for all people with just a high school diploma or less.

Finally, item number five is the issue of diversity. We have moved from an era in which most workers came to the workplace with similar expectations and similar needs to one in which workers come to the workplace with complex and conflicting expectations and needs. And in the packet that I have provided for you, Figure 16 highlights that change in terms of the increasing prevalence of dual-earner married couple households. This change has important implications for the concerns about work and family balance. Another remarkable trend in Figure 16 is also the increase in households that are not family households, and single individuals living alone. Those are the two fastest-growing groups.

At the heart of the policy concerns raised by these trends and challenges is the fundamental mismatch between the realities of the 21st century and the assumptions about the workplace that underlie current employment policies. As a consequence, I think Congress really needs to reassess whether current employment laws and regulations are meeting employees' needs and preferences in the areas of flexible scheduling, innovative compensation, employment work structures, alternative employment arrangements, and employee involvement.

Thank you very much. I appreciate the opportunity to be here with you today.

WRITTEN STATEMENT OF RONALD BIRD, CHIEF ECONOMIST, EMPLOYMENT POLICY FOUNDATION, WASHINGTON, D.C. – SEE APPENDIX C

Chairman Norwood. Thank you very much, Dr. Bird.

Dr. Van Horn, if you could please begin.

STATEMENT OF CARL E. VAN HORN, PROFESSOR AND DIRECTOR, JOHN J. HELDRICH CENTER FOR WORKFORCE DEVELOPMENT, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, NEW BRUNSWICK, NJ

Thank you, Mr. Chairman, and thank you Members of the Committee for inviting me to be here today. I direct the John J. Heldrich Center for Workforce Development at Rutgers University.

The Heldrich Center is one of the nation's largest university-based research institutes dedicated to strengthening the workforce, improving education and governmental performance and workplace management. We identify best practices in the workplace. And since 1978, we have conducted quarterly surveys of the American workforce under a project that we call “Work Trends” which is done in partnership with our colleagues at the University of Connecticut Survey Research

Center. During that time, we have interviewed over 10,000 American workers and employers about a wide range of issues affecting work in America.

In our work, we meet leaders from businesses of every size in our state and across the country, and I hear the same questions today that I have heard since the economic boom began in the mid 1990s. How can employers identify and recruit the best people? And once they have brought them on board, how can they keep them?

And while the economy has slowed down last year in most respects, the war for talent, as HR people call it, continues unabated. For employers, the importance of having a workforce with the knowledge, skills, and commitment to keep pace with global change remains a huge concern. In fact, in a survey we released just two weeks ago, employers are still facing a skills crunch. Nearly half of them told us it was difficult to find qualified workers in the past year.

Our survey research, as well as other respected reports and studies, agree that productive companies that wish to hire and keep the best people need to understand their current and prospective employees' leading workplace concerns and be prepared with policies to address them. Balancing work and family and the need for continuing education are dominant concerns of American workers, and more importantly, they expect their employers to address these issues.

Almost all Americans are deeply concerned about balancing work and family, yet our data consistently show over the years that only half of U.S. workers feel that they are satisfied with how that is working out. Workers rate the ability to balance work and family as the most important aspect of their job. Ninety-seven percent, and I don't know what happened to the other 3 percent, said this is the most important issue. They rate this higher than job security, salary, quality of working environment, and relationships with co-workers. And while we have found that U.S. workers generally say they are satisfied with their jobs, these same working Americans say there is still something fundamentally wrong with the way they are working today, and they believe it can be changed for the better.

Now, how does this information, this frustration about work-family issues, express itself? Well, basically our data show that nearly all adults are concerned with spending more time with their immediate family. They are more concerned with having flexibility in their work schedules to take care of family needs. And they are experiencing a great deal of stress at work.

Now these figures, I think, dispel the common belief that balancing work and family is only a concern for employees with children. Thirty-three percent of American households have children at home. But as these findings show, far greater numbers are concerned about the issue of the lifetime crunch than just those with children.

With the growing elderly population and longer commutes and time-intensive medical treatments and technologies, the general complexity of American life, workers of every type of family group face new time and money pressures. What's more, Americans face ever-increasing demands to acquire continuing education and training.

The evidence is clear that today's workers know they need education and training beyond their formal schooling, and they know that it must be completed primarily on their own time and with their own resources. Federal data show that 60 million adults, almost half the workforce, Mr. Chairman, enrolled in one or more adult education programs during 1999. That's a 12 million person increase from 1991.

When "Work Trends" researchers asked Americans about the importance of upgrading their skills, almost all of them said they needed more specific training in a skill to get a better job. Yet only about half of them said they are getting enough needed education and training through their employers. So in short, I want to add that Americans are not just juggling work and family, but they are juggling work, family, and education, all three in a complex mix.

In asking them what policies they would support in the workplace, we have found that there's a gap between what American workers strongly support and the number of employers who are offering these policies. This is summarized on the chart that's in the back of my testimony. While most U.S. workers agree that their employers care about balancing work and families, one in ten said that employers don't offer the benefits that are necessary, and the real gaps are between things like flexible scheduling of work, hours and days. There is a much greater congruence between what employers do with emergency time off and unpaid leave than there is in flexibility for hours and days.

The other area where there is a gap is between those who want on-site childcare. Fifty percent want that versus 12 percent who say their employers provide that. Tuition reimbursement is another area, although this may change with the tax law changes that occurred last year. Only 33 percent of employers were said to offer this policy.

Our survey findings project some shifts in the way work is organized and conducted in the 21st century. And in today's economy, a progressive, family-friendly, flexible policy is a very important emerging incentive for employers to get and retain the kind of qualified workers that I referred to earlier. The experiences of several large firms in our state, such as Johnson & Johnson, Schering-Plough, Merck, and Ford Motor Company show that progressive work-life policies are effective. These companies lead their industries in profitability, and they offer very innovative, generous, family-friendly policies.

As workers struggle to meet the demands of employers, and employers struggle to meet the demands of a fast-changing economy, the message to employers and policy-makers is clear. Policies promoting worker flexibility, strong families, and increased skill attainment have the potential to meet the needs of both workers and the companies that employ them.

Thank you, Mr. Chairman.

WRITTEN STATEMENT OF CARL E. VAN HORN, PROGESSOR AND DIRECTOR, JOHN J. HELDRICH CENTER FOR WORKFORCE DEVELOPMENT, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, NEW BRUNSWICK, NJ – SEE APPENDIX D

Chairman Norwood. Thank you very much, Dr. Van Horn.

Mr. Kilberg, you are now recognized, sir.

STATEMENT OF WILLIAM J. KILBERG, SENIOR PARTNER, GIBSON, DUNN & CRUTCHER, LLP, WASHINGTON, D.C., TESTIFYING ON BEHALF OF THE UNITED STATES CHAMBER OF COMMERCE

Thank you, Mr. Chairman, and Members of the Subcommittee. I am pleased to appear today on behalf of the United States Chamber of Commerce. I have submitted written testimony for the record.

I speak from the perspective of one who has practiced labor and employment law for over 32 years. I have also had the great privilege and honor to serve as Solicitor for the United States Department of Labor for four of those years. In that capacity, I was the chief legal officer for the agency charged with interpreting and enforcing the Fair Labor Standards Act.

The FLSA is one of the great labor protective statutes, but its regulatory structure has failed to keep pace with the rapidly evolving workplace. My co-panelists have detailed these changes. I won't repeat what they have said; I will only note that regulations that are gender-specific and make reference to promotion men, copy boys, and the like are in need of some serious updating.

I commend you, Mr. Chairman, and Representatives Biggert, Ballenger, Andrews, Graham, Petri and the other lawmakers who have introduced legislation aimed at updating this outdated legal regime in order to lessen the rigidity of the FLSA and recognize the realities of today's workplace. Areas where the FLSA is not accommodating to modern workers are not hard to identify. Let me address just two of them. The first is compensatory time.

The FLSA's overtime provisions prohibit compensatory and flex time arrangements outside a given work week for private sector, non-exempt employees. Public sector employees at the local, state and federal levels can contract to earn one and one-half hours of paid time off for each hour worked over 40 in a week and can use that time as they wish. It becomes a right that can be exercised within reason when they need to exercise it for reasons that do not have to be explained or proven. It is a way that many employees view as a form of forced savings, unlike cash overtime, which can be spent and is then not available to fill in the blanks in future workweeks when time off is desired.

Is this arrangement good for all employees at all times? No, of course it isn't. But should it be an option for private employees as it is for public employees? Absolutely, it should.

When Congress provided this benefit for state and local employees in 1985, it stated its view that public sector employees should have the freedom and flexibility provided by comp time arrangements. Private sector employees, too, should have that option. Now, some expressed the

fear that employers will take advantage of such arrangements and coerce employees into detrimental agreements.

Representative Biggert's bill, H.R. 1982, has at least five provisions that would help to ensure the rights of employees. It would prohibit employer coercion. It would mandate annual cashing out of comp time benefits. It would limit the total number of comp time hours accruable. It would allow employees to cancel comp time arrangements at any time in their sole discretion. And it would make it illegal for employers to intimidate employees or in any way to interfere with their right to take accrued time off. These protections ought to prevent and remedy any potential employer abuses.

Let me talk a little bit about the duties test under the Fair Labor Standards Act. I was Solicitor of Labor in 1975. The last time the dollar threshold for exempt employees was revised, we raised it up to $155 a week. If that threshold were $25,000 a year today or a little less than $500 a week, over 45 million workers would be non-exempt and provided all of the Act's overtime protections without question. If we rationally assumed that everyone earning over $75,000 a year were exempt from the overtime requirements of the Act, and that would be about 10 million workers, we could then concentrate on the 60 million workers earning between $25,001 and $74,999. Maybe then, too, we could simplify the duties tests.

Right now to be exempt, workers must be classified as professional, executive, or administrative employees. It sounds easy, but the tests are so convoluted as to be nearly impossible to apply by the average employer. Engineers and accountants, one would think, would be exempt professionals, but not always. If the engineer is not a licensed professional engineer and the accountant not a certified professional accountant, no amount of education will help them if they are deemed to be merely using skills as distinguished from exercising discretion and judgment.

For example, a federal district court found that instructors who train NASA space shuttle ground personnel were not exempt professionals because they relied on simulation scripts, material which would be incomprehensible to most, if not all of us, sitting in this room right now. Even computer professionals who have a separate exemption crafted, at least crafted when the Internet was still a Defense Department experiment, have changed so dramatically that those provisions no longer provide relief where they should. In my testimony, I talk further about the administrative exemption and the salary basis test, and I won't repeat those comments here.

My observations are neither new nor original to me. For over 20 years, the Department of Labor has publicly recognized the need to review its FLSA regulations. In 1981, the Department indefinitely stayed its last proposal to adjust the FLSA salary thresholds in response to public comment calling for a more comprehensive regulatory review. In 1985, the Department published an advance notice of proposed rulemaking. Ever since, in regular six-month intervals, the Department has identified FLSA reform as a regulatory priority in both Republican and Democratic administrations. Procrastination is no longer acceptable.

Thank you very much.

WRITTEN STATEMENT OF WILLIAM J. KILBERG, SENIOR PARTNER, GIBSON, DUNN & CRUTCHER, LLP, WASHINGTON, D.C., TESTIFYING ON BEHALF OF THE UNITED STATES CHAMBER OF COMMERCE – SEE APPENDIX E

Chairman Norwood. Thank you, Mr. Kilberg.

Ms. Conti, you are now recognized for five minutes.

STATEMENT OF JUDITH M. CONTI, CO-FOUNDER AND DIRECTOR, LEGAL SERVICES AND ADMINISTRATION, D.C. EMPLOYMENT JUSTICE CENTER, WASHINGTON, D.C.

Thank you, Mr. Chairman and Members of the Subcommittee. My name is Judith Conti, and I appreciate the opportunity to speak to you today. I bring three perspectives to you. I am the co-founder of the D.C. Employment Justice Center, a nonprofit organization devoted to securing and enforcing workplace rights for low-wage workers. In addition to being a worker advocate, I am also an employer running a small organization where managing limited funds is a priority. Finally, in my previous job, I represented many middle and upper middle class workers in employment disputes.

I have had much experience with the FLSA. And one thing I have learned is that regardless of income level, all workers want to be paid a fair wage for a hard day's work. Thus, the concerns I raise today apply to all workers who are covered by the FLSA. I would like to take this opportunity to highlight a few of the most important points of my written testimony.

We all agree that between the erosion of the 40-hour workweek and the rise of dual-income families, workers need more flexibility in the hours that they work. The question before us is how to best achieve that flexibility, taking into account both employers' legitimate considerations and the needs of working men and women. By and large working people do not want to earn less money in order to have more time off, and their reluctance is understandable.

Over the last 30 years, incomes are down, and the gap between the top fifth of families and everybody else continues to grow. H.R. 1982 will result in less money in the paychecks of working men and women, and that is not a tradeoff that they are even willing to consider in the absence of real flexibility that they can control, which brings me to my second point.

Workers want flexibility in their jobs not volatility and unpredictability. Allowing employers to substitute comp time frees them from the incentive to adhere to the 40-hour workweek and can only result in the increase of mandatory and unscheduled overtime. Workers need to know in advance what their hours of work will be in order to plan their lives and obligations, and in some cases to schedule other jobs. Thus, any legislation which increases the likelihood of unscheduled overtime, is not worker friendly, nor is it geared to providing greater

worker flexibility.

In addition, under H.R. 1982, employers still retain substantial authority over when employees can use their comp time. Thus, when emergencies do come up, employees need immediate flexibility. It is quite possible that the employer will not grant a request on such short notice. In such a case, accrued comp time loses its value to the employee. Unlike cash overtime, the employee cannot use it at his or her own convenience.

My third point involves enforcement of the prohibitions against coercing employees to take comp time in lieu of overtime. Bills like H.R. 1982 assume a world in which employers and employees meet on equal terms. In the real world however, no bill, no matter how tightly drafted, can protect an individual worker from the pressure that is inherent in the workplace relationship. An employer need not exercise much overt coercion in order to convince an employee to accede to terms and conditions of employment that are favorable to the employer.

How can workers remedy comp time violations? First of all, if a worker's request to take comp time is denied, and she thinks that denial is unreasonable, it will be virtually impossible to get a court to hear the matter in time to allow the worker to take the comp time as she wanted. And that is assuming that the worker can even find an attorney willing to take the case.

A significant amount of my time at the Employment Justice Center is spent trying to find pro bono or low-cost legal placements for our clients. Because of the economic reality of legal practices, it is my experience that if a wage case is not worth at least $10,000, it is next to impossible to place it on a contingency or low-cost basis.

By my calculations, under this legislation, then, a worker must have a minimum hourly wage of at least $31 and hit the max of 160 banked hours in order to make a comp time enforcement suit economically feasible. This translates into a yearly salary in excess of $60,000, which means no effective remedies for low-wage workers or a significant percentage of middle class workers either.

You may be thinking that if damages are that small, what's the harm. Well, for the EJC's clients, we often see wage cases of values between $500 and $1,000, which for our clients can mean the ability to feed one's children or pay the rent that month. But regardless of the amount of damages, Congress should not enact legislation that provides any sort of de facto safe haven for employers to coerce employees out of the wages that they have rightfully earned.

So how do we achieve real flexibility for today's working people? Contrary to the suggestions we've heard today, we don't need to amend the FLSA to do it. And I encourage you to read the legislative history of the FLSA that makes clear at the time that it was passed; it was done so contemplating a service economy as we have today.

Within the confines of the FLSA, employers are absolutely permitted to allow for flex time, compressed work weeks, adjusted hours within the week, telecommuting, split shifts, job sharing or the carryover of unused vacation and sick days from one fiscal year to the next. A 1995 Bureau of Labor Statistics' study demonstrated that only about one-fourth of all employers take advantage of

the flexible work options which are entirely permissible under the FLSA. Moreover, of the employers who did allow such flexibility, the vast majority of workers who are allowed to take advantage of these schedules were executive and managerial employees not covered by the FLSA.

And if employers are so concerned with allowing employees to bank hours so that they can have more time off, why do only 13 percent allow employees to carry over unused vacation to the next year, and just over a third allow the carryover of sick days. The fact that employers are largely not using the flexible options already available to them strongly suggests that the motivation for this comp time legislation is less to help workers and more to reduce the wages that employers must pay out.

If we are truly committed to providing more flexibility for workers, we must build on flexibility that really works by expanding the Family and Medical Leave Act to cover more workers and provide more time off for more family needs. We also need to set higher standards for pay, not only increasing the minimum wage, but expanding and enforcing equal pay laws. And finally, we must take steps to stop the epidemic of employers misclassifying hourly workers as exempt salary workers or independent contractors. Misclassified workers are routinely forced to work large amounts of overtime without overtime pay. Thus, they lose both flexibility and income. To correct this problem, we must increase DOL enforcement resources and adjust for inflation the hopelessly outmoded salary levels that are used to determine exempt status.

Thank you for your careful consideration of these very important issues for working men and women of all income levels.

WRITTEN STATEMENT OF JUDITH M. CONTI, CO-FOUNDER AND DIRECTOR, LEGAL SERVICES & ADMINISTRATION, D.C. EMPLOYMENT JUSTICE CENTER, WASHINGTON, D.C. – SEE APPENDIX F

Chairman Norwood. Thank you very much, Ms. Conti. I will yield myself five minutes to ask a few questions.

Ms. Conti, I am just curious, in your previous life when you were an attorney and you said you represented a lot of worker disputes, were those all labor union disputes?

Ms. Conti. No, they were not, Mr. Norwood. A percentage of the practice involved labor and unions, but the firm that I worked for, in fact, wanted to build a significant employment practice aside from its labor union community and entrusted me with the responsibility to do that. So the workers that I represented in the FLSA context and various other contexts of employment law were mostly non-unionized workers including a large percentage of federal government workers and federal law enforcement officers who are prohibited from unionization.

Chairman Norwood. But they would be unionized, wouldn't they?

Ms. Conti. No. Federal law enforcement officers are prohibited from unionization by executive order.

Chairman Norwood. Okay. This is an interesting discussion that's going on here. Dr. Van Horn's research shows that 95 percent of working adults are concerned about spending more time with their immediate family. There is also a recent study from Radcliffe Public Policy Center that shows 64 percent of workers saying they would prefer to have more time rather than more money. Maybe even more noteworthy, is the finding that among households with an annual income under $25,000, workers are split with 49 percent choosing time and 50 percent choosing money.

Now you have testified that they are wrong, that basically workers don't want more time, they want to receive the money. And I want to know who is correct here.

Ms. Conti. Mr. Norwood, actually, it's not quite as simple as that. What I have testified is that workers do not want to take a pay cut in order to have illusory flexibility. I think what we need to discuss first of all, though, is the reason for the increase in wanting more time at home, the increase in stress that people are showing in the workforce. It is because of the gradual and the continued erosion of the 40-hour workweek, something that the FLSA is designed to protect. So no matter what we do, our guiding principle should be to protect the 40-hour workweek for working men and women.

Chairman Norwood. So they aren't wrong then? These studies are not wrong, that people would like to have, in a case like this, more time with their families than they would money? Those studies are correct?

Ms. Conti. The studies are correct that people want to have more time for themselves, whether it is for their families or for their own lives. They want predictability in scheduling so that they can turn to their own lives.

However, there are significant populations of people that have jobs where regular overtime is part of their job; it is part of the regular compensation they receive and rely on to pay their bills. And the point I am making, and I do not believe that it is inconsistent with those studies at all, is that those workers do not want to give up those extra wages that they regularly depend on and accept as part of their regular workweek.

Chairman Norwood. Well, of course everyone wants to be paid more and work less. Me too. Everyone wants that. What I'm trying to get at is, are the studies right? When you ask a person out there, if you have a choice, would you rather have more time off to spend with your family than you would more money, then Dr. Van Horn is correct. That's basically what they're saying.

You are saying, as I understand it, you don't think employees should have to trade their pay for time off. I think that employees ought to be able to decide that. Ms. Biggert's bill gives people options. I mean you don't have to do any of this. But surely somebody who is working out there would think this is a good idea, but they cannot even do it because we have not changed the law. It is my impression that about 11 percent of the workforce is unionized. That means 89 percent of our workforce is not unionized. Why don't we let them choose? You don't have to do it if you

don't want to do it. If you don't want to do it, say no, not doing that, I want to do my hours or whatever or I want to be paid for overtime. Whatever. We want to give employees the choice.

I can appreciate your concern for those workers at the lowest end of the scale. I see where you are coming from there, but wouldn't you acknowledge to me that there are some employees out there that are perfectly capable of making this decision for themselves?

Ms. Conti. Well, Mr. Chairman, as you no doubt know from my written testimony, there is a list of various protections that I believe are important if we are to have any sort of comp time legislation in order to make sure that we do truly preserve employee choice.

I would submit, however, that it is not quite as simple for workers that are on the lowest economic scale. For example, as a thirty-something lawyer in D.C., I have a number of friends and colleagues who are associates, junior associates at large law firms making well into the six figures.

Chairman Norwood. You were the one who brought that up, that you were overly concerned or that you were extra concerned about people at the low end of the scale. I am just simply saying, why not give people a choice out there. They want it.

Ms. Conti. Well, actually Mr. Chairman, I made clear that my testimony is representing all workers of all income levels. What I am saying is that it is not so simple as just income level. It is the amount of control over the flexibility and over the conditions of your work that you have.

Chairman Norwood. Well, Ms. Biggert spent a lot of time talking to a lot of people about that before she introduced her bill. She worked on that too. And as Mr. Kilberg pointed out, there are great protections inside that bill because none of us want to walk on the rights of the workers. But what we are trying to do is do something for the workers that seem to be saying over and over again in the 21st century we need this.

My time has run out. I now yield to Mr. Owens.

Mr. Owens. Thank you, Mr. Chairman. Perhaps I have not looked closely at the bill since Mrs. Biggert began to work on it. I recall, the last time I read it, the discretion for the scheduling of the time off is the employer's. The employer has the power to schedule the time off for the worker. The worker does not have that power. If there is any change in that, somebody should enlighten me. That's a very important factor.

Dr. Bird and Mr. Kilberg, both of you stressed, or made some assumptions that I thoroughly agree with, that if you have the skills and education needed in this modern economy, there are demands for your services. You were talking about workers who were in demand because the new economy, the new e-technology, demands workers who have high value added. I'm using your language. I would agree with you if you were talking about professionals in the $60,000 and up category. Probably they would choose in some cases to take their chances on less cash and more flexibility. But if you get rid of the provisions in the FLSA, you are dealing with a large number of workers who don't even make minimum wage. And overwhelmingly, I don't know what the latest studies state, the studies that we had before showed that they preferred cash. They have to have the

cash because they can't live without the cash.

Do you know what a person making minimum wage salary is? It's less than $11,000 a year. So am I correct that you are making assumptions that this should only apply to people who are professionals, who are in high demand in the new economy, information technology workers?

Mr. Kilberg. No. No. No, not at all.

Mr. Owens. Dr. Bird and Mr. Kilberg used the language, so I'm addressing this to them. They used the language of, you know, this is an economy which has people who are in demand, and that leads to certain assumptions you can make; am I correct?

Mr. Kilberg. I don't see any reason to disallow lower-paid employees the same options that higher-paid employees would have. The assumption you have to make is that their employers will abuse lower-paid employees and the law will be violated, and the Department of Labor and the various state Departments of Labor will be unable to enforce the law. I don't think that's right.

Mr. Owens. My apologies, Mr. Kilberg. Dr. Van Horn and Dr. Bird made those points.

Mr. Kilberg. I'm sorry; I thought you were inviting me to comment.

Mr. Owens. It was Dr. Van Horn and Dr. Bird who strongly made those points that professionals have choices, that value-added workers with high value had choices. You are not concerned with the lower income workers, the people making minimum wage?

Dr. Van Horn. What I said is that there is a strong demand for highly skilled workers in today's economy, even though we've had a downturn in the economy.

Mr. Owens. That leads to a new situation that requires a new FLSA. Those are the assumptions you were making, right?

Dr. Van Horn. I didn't say that. I have not commented on the FLSA. My testimony doesn't speak to that.

I am reporting to you on research that is done reflecting the views of employers and workers. How that's achieved was not part of our research. So I'm not commenting on the applicability of the FLSA to their concerns. What I am saying is that they expressed a concern, and it was across all income levels, sir. The need for flexibility wasn't simply at the higher income levels. And we, in fact, looked at that kind of question. Of course, we have information on the demographics of the respondents, and there is a slightly higher concern about these issues of balancing work, family and education on the part of women, as you might expect, they being the primary caregivers in many families. But it is not that great a difference between men and women. It is actually fairly small. It's only about 10 percent.

Mr. Owens. The surveys that you are referring to, were people clearly told that the employer will have the final word in scheduling their time off?

Dr. Van Horn. No, we did not ask that question.

Mr. Owens. You left that one off?

Dr. Van Horn. No, that was not the focus of our research.

Mr. Owens. But you don't think we need changes in FLSA?

Do you want to comment, please, Dr. Bird?

Dr. Bird. Well, just two points I'd like to put in here. First of all, I think the discussion that we have heard here about whether people want the choice or don't want the choice reflects the increasing complexity, as the data shows, in the workforce. In fact, there are some people who would not choose compensatory time, and there are people who would choose it. Flexibility allows people to make choices that fulfill their needs the best. And we do have a more diverse workforce in terms of the needs that people have. Some people have needs for more cash. Other people have needs for more time.

Secondly, from my perspective, the trends in job growth are jobs requiring more education and more skills.

Mr. Owens. Yes, we agreed on that.

Dr. Bird. The reason I raised that, from my perspective, is because I am concerned about those who are least advantaged. And one of the ways to help the least advantaged among us the most, I think, is to give them more opportunities to acquire the skills, acquire the education and training, that they need to move up the ladder, rather than to just focus on protections that keep them trapped in a low wage dead end-type job.

Mr. Owens. My time is up, but I think what you're not saying is they need the protection of overtime cash. The cash they get from overtime is the first protection. The other protections, I would agree, they need those, too.

Dr. Bird. As I understand what's being described here, the individuals would have a choice of the cash or the time. Some people who would prefer the cash would get the cash. Those who prefer the time would get the time. And everybody would be better off than under a straightjacketed policy.

Mr. Owens. People making less than minimum wage don't have a choice.

Mrs. Biggert. [Presiding.] The gentleman's time has expired.

The gentleman from Georgia is recognized for five minutes.

Mr. Isakson. I thank the gentlelady, and I apologize that I was in and out during the testimony. My first question, actually, is to the gentlelady who is our Chairperson to make sure I am on target about your legislation. As I understand from what I have heard, your legislation would provide for some flexibility under the old 1938 standards in an agreement that is between the employee and the employer, if the employer allowed it and if the employee wanted it. Is that correct?

Mrs. Biggert. Yes, it would allow for more flexibility. This really is voluntary and the employee could make the determination whether they would like to have comp time or cash.

Mr. Isakson. Thank you very much.

Ms. Conti**,** I did hear part of your testimony. What is your objection to that?

Ms. Conti. Mr. Congressman, the legislation as written does not have the proper protections to truly enforce the voluntary standard. In the workplace, the reality of the worker-employer relationship means that some things that might appear on the surface to be voluntary really aren't. With this legislation, the employee who opts for comp time instead of overtime ends up getting paid less money. It is not lost on them that the employer will pay less wages, and that that is something that is likely favorable to the employer.

It doesn't take much in the tone of an employer's voice to suggest what the answer would be. And the legislation, as it is drafted now, does not have the proper protections to truly ensure that it is voluntary or the appropriate remedies to enforce any type of coercion.

Mr. Isakson. Without a long answer, give me an example of what a proper safeguard in your opinion would be.

Ms. Conti. Well, Mr. Congressman, in my testimony on pages 11 and 12, there are actually 18 points that I think are important for the proper kinds of protections, but, in particular, more enforcement by the Department of Labor to remedy wage and hour violations, greater penalties rather than just the hours lost and liquidated damages, including payments for comp time within regularly hour calculations of the week in terms of benefits, continuing to compute overtime. By raising these few issues, I don't mean to suggest that they are more important than the other protections that are listed here, but they are a few examples.

Mr. Isakson. Quickly, Mr. Kilberg, would you comment on that?

Mr. Kilberg. Yes. I have read Ms. Conti's testimony, and I believe that after she lists the 18 points she goes on to say, but even if those were adopted, it would not be acceptable.

There is an assumption here that all employers are scofflaws. If that were true, then the Fair Labor Standards Act is not protective, either. Why pay the minimum wage if you can get away with not paying the minimum wage? Why pay overtime if you can get away without paying?

I don't think that's really what goes on in the world. I think most employers do abide by the law. I think if you have a law that says the employer may not coerce an employee into entering into an agreement like this, that the overwhelming majority of employers will abide by it. And I think the protections that are set forth in H.R. 1982 are sufficient and will protect employees.

Mr. Isakson. Well, my reason for focusing on that as I did here is because of my first job in 1960. I worked for someone and I remembered I still have the framed paycheck at home somewhere in the basement in a box. It was $1.10 an hour, which I presume, was 1960's minimum wage.

In the last 22 years before I came to Congress, I was the employer of about a thousand people. The world has changed a lot since 1960. It's changed a whole lot since 1938. And I would just say I disagree but I understand there is always potential for coercion. In fact, organized labor, and a lot of the laws that we have today came about because business was not responsive either to child labor, or to individuals. There were problems, and that's why those laws and those movements came about. But we're in a totally different world.

I want to compliment the gentlelady for trying to find a way to give choices and opportunity to employees in concert with employers in a different world other than existed in 1938. It's also something to throw out any opportunity for flexibility that an employee wants, according to the testimony that's come from so many of them, because of what was suspect in the day and time of coercion without enforcement. I have a hard time subscribing to that. It would be like throwing out all (401) k's because of Enron. That would be a pretty stupid thing to do.

So it may be we need to do some perfecting, but I want to congratulate the gentlelady on doing something that I think is not only appropriate but in the best interest of employees.

My time has expired, so I will yield back.

Mrs. Biggert. The gentleman yields back. The gentlewoman from Hawaii, Mrs. Mink, is recognized for five minutes.

Mrs. Mink. Thank you very much. This is a repeat of several hearings that this Committee has had on this important issue. The point that you make, Dr. Van Horn, about the interest of the worker having flexibility I think is something that most of us do not disagree with. I think workers would like to have a lot more flexibility. My question to you is where, in the Fair Labor Standards Act, is flexibility prohibited?

Dr. Van Horn. As I suggested before, I am not an expert on the Fair Labor Standards Act. I wasn't asked to comment on that, so I would yield that to the other panelists who are. I am not a lawyer.

Mrs. Mink. The response is really to the point that I was seeking, because in looking at your chart here of the all the desirable characteristics that workers are interested in, flexible work hours and flexible work days, and so forth and so on, all are within the permitted parameters of the Fair Labor Standards Act. So your findings really do not support the notion that we need to reform the Fair Labor Standards Act or the workers' interests in having some of these things would not be met, because as I understand it, flexible work hours and flexible days and all those kinds of things are

quite permitted.

What is not permitted is requiring a worker to work overtime without compensation at time and a half. That is not flexibility that is a question of compensation. And so I think that the points that Ms. Conti raises are very valid.

I have a question for Mr. Kilberg of the Chamber. Supposing you could wave a magic wand and Congress enacted all 18 points that Ms. Conti raised in her paper, would you support this legislation?

Mr. Kilberg. I think I would support some of the points. I would have to go back through them; I don't have them in front of me at the moment. But as I recall, some of them would undercut the flexibility of what H.R.1982 is trying to do.

Mrs. Mink. Which flexibility? I don't look at the legislation that is before us as an item of flexibility. It's an item to decline due compensation for work already performed by the worker.

Mr. Kilberg. No, not at all. An employee, as you say, can now earn overtime and take that money, put it in his pocket, and then a month later take time out and compensate himself with the money from his own pocket. But some employees prefer to have a kind of a forced savings account. That's really what it is. You have the same option in the public sector. We provide that to state and local employees, to federal employees. Why shouldn't private sector employees have exactly the same freedom to contract to earn overtime in terms of future time off rather than cash, if they choose?

Mrs. Mink. I like that idea of a forced savings. Is this actual money from which the employer then calculates the workers' benefits as though it were money in the savings bank and that money was paid actually for the employment?

Mr. Kilberg. Not any more than the employer would use overtime compensation for purposes of benefit calculation. In most instances, overtime compensation is excluded from pension benefit calculations.

Mrs. Mink. Do you have any statistics or reports to indicate that overtime compensation is not credited by employers for the purposes of calculating benefits, social security entitlement, charges that they have to pay for Medicare and so forth? It is my assumption that all of the overtime compensation is wages. And what is the big deficit of this legislation is not the question of flexibility; it is the question of this so-called work that has been performed not being credited with any sort of a cash payment. There's no money in the bank. You call it a deferred savings account, but who is paying interest on it? And you never know whether you're going to get it or not.

I mean, I am not hostile to the idea of allowing workers to make this choice, but the choice is an empty basket. And I really defy you to answer all of these questions that have been put very well here by Ms. Conti to answer. Is there a time and one-half compensation guarantee if you work in this bill under these voluntary circumstances?

Mr. Kilberg. Yes. Yes. In H.R.1982, yes, absolutely. And the employee can cash it out.

Mrs. Mink. So any employee can cash it out at any time? That's not the way I read the bill. It is an employer decision as to whether it can be cashed out and when.

Mr. Kilberg. Well, that's not as I understand H.R. 1982.

Mrs. Mink. That's how I understand the bill. And I am very worried.

Mrs. Biggert. The gentlewoman's time has expired.

Mrs. Mink. And I am very worried about the absence of money in terms of your deferred savings account.

Mrs. Biggert. I recognize myself for five minutes.

Mr. Kilberg, Ms. Conti has said that employers already have the flexibility under the law. If that's the case, why aren't more employers not already offering this?

Mr. Kilberg. Because it would be illegal.

Mrs. Biggert. So there really isn't the flexibility?

Mr. Kilberg. No. The Fair Labor Standards Act is a very rigid, wooden statute, and the regulations and interpretations under it are equally wooden and rigid.

Mrs. Biggert. Comp time is already available in the public sector. And the statement has been made that public sector employers are unique and face different situations than private sector employees. In your experience working with employers, and as the former Solicitor of Labor, do you think that the public sector and private sector employers are so different as to make comp time unworkable in the private sector?

Mr. Kilberg. No, I really don't. I don't think that any of the differences that have been identified are relevant quite frankly.

Mrs. Biggert. It seems as if there is a question of whether comp time really is payment for services. Are employees losing cash? Is comp time really making them lose money? Do you see that there's a difference? Which is correct?

Mr. Kilberg. I don't believe there is. Again, it would be a voluntary approach under your legislation. It is simply the opportunity to buy future time off after having earned overtime now. I think that the so-called losses are really quite minimal.

Mrs. Biggert. Even in the private sector today, someone could, within a seven-day work period, ask their employer if they could take time off to go, let's say, to a child's play or take them to the dentist or to the doctor. And as long as they had put in the extra hours within that seven-day

period, that would be okay under the Fair Labor Standards Act?

Mr. Kilberg. Yes. And you would have the same economic consequences that Representative Mink identified.

Mrs. Biggert. The problem arises for example when something comes up on a Friday and an employee needs to take their child to the doctor. They don't have any comp time, so that would not carry over to the next week. It would be illegal for that employer then, to grant that time off to an employee, correct?

Mr. Kilberg. That's correct. That's because the statute insists that everything be measured within a single 40-hour workweek.

Mrs. Biggert. And yet, under the current law, that's okay if it's just within the seven-day period.

Mr. Kilberg. That's right.

Mrs. Biggert. Could you explain how comp time would work? The employer comes to the employee and says I'd like you to take comp time?

Mr. Kilberg. I think it works quite the opposite way. The employee would come to the employer and suggest that he or she have the opportunity to transfer otherwise compensable overtime into a comp time bank to be used at a later point in time.

Mrs. Biggert. And the employer would not have to provide comp time, right?

Mr. Kilberg. Right. It really would have to be a voluntary agreement between employer and employee.

Mrs. Biggert. Would an employee have to take comp time in lieu of cash for overtime work?

Mr. Kilberg. No. It would be an agreement.

Mrs. Biggert. And if they felt that they were being coerced into taking comp time?

Mr. Kilberg. The bill makes it very clear that this would be a violation. Obviously, that means that if a complaint were filed with the Wage and Hour Division of the Department of Labor, they could enforce the Act against the employer.

Mrs. Biggert. And how would they do that? What would be the procedure?

Mr. Kilberg. Well, generally, there would be an investigation by the Wage and Hour Division, and they would seek either the employer's agreement to injunct the relief, or they would turn it over to the Solicitor's Office and the employer would be prosecuted.

Mrs. Biggert. Has that been done in the public sector? Do you know of any cases that have been brought for coercion?

Mr. Kilberg. I don't know the number of cases that have been brought in the public sector for that specific kind of violation.

Mrs. Biggert. Do you know of any cases in the public sector in which someone was denied the comp time when they asked for it?

Mr. Kilberg. I don't know what the history of compliance in the public sector has been.

Mrs. Biggert. Do you have any idea about how many public sector employees take comp time versus cash?

Mr. Kilberg. My understanding is quite a few. It is deemed to be a very popular option indeed. The reason that the Fair Labor Standards Act was amended in 1985 was because the public sector had not been covered under the FLSA. And when the Supreme Court handed down the Garcia decision, there was concern on the behalf of public sector employees as well as employers that one of the things that would be lost by coverage under the federal law was voluntary compensatory time arrangements.

Mrs. Biggert. Wouldn't you agree that H.R. 1982 has more safeguards for private sector employees than what is provided under the current law for public sector employees?

Mr. Kilberg. I agree. I think it has greater safeguards.

Mrs. Biggert. Thank you. I see my time has expired.

I would like to thank the witnesses again for taking the time to testify before this Subcommittee. If there is no further business, the Subcommittee stands adjourned.

Whereupon, at 3:25 p.m., the Subcommittee was adjourned

APPENDIX A - OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

The Honorable Charlie Norwood
Chairman
Subcommittee on Workforce Protections

Hearing On "Flexibility in the Workplace: Does the Fair Labor Standards Act Accommodate Today's Workers?"

March 6, 2002

The focus of today's hearing is on flexibility in the workplace, specifically regarding the ability of the Fair Labor Standards Act to accommodate the needs of today's workers.

I would like to take a moment to extend a warm welcome to our witnesses. We very much appreciate your willingness to be a part of this process and we look forward to your testimony. I have just a short statement and I will then yield the remainder of my time to my colleague and vice chair of the subcommittee, Judy Biggert.

We will hear first about the demographic changes that have occurred in the workplace over the past several decades. The composition of the workforce has changed dramatically and the nature of work has moved away from manufacturing-based to service-based industries. What we will hear is that today's workforce is vastly different from the workforce of 1938, when the Fair Labor Standards Act was put into place.

We will also hear about what matters most to workers today. Workers want the ability to balance work and family. Not surprisingly, for many workers the ability to balance work and family has now become the most important aspect of a job, outranking all other job-related issues. Given the opportunity, most Americans want flexible work options in order to spend more time with their families or pursue interests outside of work.

Likewise, helping workers balance work and family can be a useful tool for employers in attracting and retaining qualified employees. Companies can improve business results by implementing practices that help employees balance their work and personal responsibilities. Providing employees with more control over their hours and more flexibility in how work gets done can go a long way toward boosting employee morale and enhancing productivity.

Finally, we will hear from our legal experts about the problems that employers face under current law when they attempt to respond to employee demands for greater flexibility. I am mindful that the Fair Labor Standards Act provides important protections for workers. I am also mindful that it may be unnecessarily rigid in

keeping up with the flexibility demanded by today's workers.

I now yield the remainder of my time to my colleague, Judy Biggert, for her opening remarks.

APPENDIX B - WRITTEN STATEMENT OF CONGRESSWOMAN JUDY BIGGERT, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

The Honorable Judy Biggert
Vice Chair
Subcommittee on Workforce Protections
Hearing On "Flexibility in the Workplace: Does the Fair Labor Standards Act Accommodate Today's Workers?"
March 6, 2002

Thank you Mr. Chairman. I commend you for holding this important hearing, for as you noted, there have been some very dramatic changes in the past 60 years in the composition, character and demands of the workplace.

What was once a manufacturing-based economy with a primarily male workforce has evolved into a fast-paced global economy based on services and technology with nearly equal numbers of men and women in the workforce. Of course, one of the more dramatic changes has been the increased number of women in the workforce, particularly those with young children.

In 1969, some 38 percent of married women with children worked for pay, while in 1996, 68 percent did so. The reality of today's workforce is that both parents are working or a single parent is balancing all of the household needs. These changes highlight the demand for greater flexibility in work schedules.

Today, more than ever before, workers face a difficult dilemma: how to balance the demands of work and still have enough time for family and personal commitments. While this conflict weighs most heavily on working mothers, recent surveys have shown that younger workers – particularly young men – are more willing to make sacrifices in their jobs, careers and education in order to achieve more balance in their family or personal lives.

Providing working men and women with increased control over their work schedules may sound relatively simple. But private sector employers and their workers are constrained by the Fair Labor Standards Act, which does not permit a great deal of flexibility. The testimony today will show that the law was designed for a different workforce with different needs.

As we in Congress consider how to make flexible work schedules available to more Americans, no doubt some will say that there are already a variety of ways to give workers more time off under current law. Yet the options available under current law, for example, do not permit employees to work additional hours in order to accrue paid time off to be used at a later date. Furthermore, flexibility between workweeks is limited as the law discourages employers from allowing workers to increase their hours in one week in order to account for time off during a subsequent week.

Most workers simply want additional flexibility in the workplace and more choices than are currently available. For employers, addressing work and family concerns can lead to greater employee satisfaction, which in turn, means more productive work practices and better business results.

I, too, want to thank our witnesses for being here today and I look forward to your testimony. Thank you Mr. Chairman.

APPENDIX C - WRITTEN STATEMENT OF RONALD BIRD, CHIEF ECONOMIST, EMPLOYMENT POLICY FOUNDATION, WASHINGTON, D.C.

EMPLOYMENT POLICY
FOUNDATION

Statement of
Ronald Bird
Chief Economist, Employment Policy Foundation
before the
House Workforce Protections Subcommittee
March 6, 2002

I am Ronald Bird, Chief Economist of the Employment Policy Foundation (EPF). EPF is a research and educational foundation established in 1983 to provide policymakers and the public with the highest quality economic analysis and commentary on U.S. employment policies affecting the workplace. I appreciate the invitation to appear before you to discuss the demographic trends that are shaping the future of the American workplace.

As Congress reviews the effectiveness of employment policies and assesses need for change, it is important that decision-makers be aware of the realities of workplace demographics. Effective and efficient employment policies reflect the population that the policies are intended to serve and of the economic structure in which they operate. Policies built on erroneous assumptions risk unintended consequences – at best doing no good and at worst harming more than helping.

Much of today's employment policy framework was constructed over half a century ago – reflecting the experience of the Great Depression and the social and economic structure of the 1930s and 1940s. Today's American workplace is dramatically different and more complex than the workplace of two generations ago. The important workplace changes of the past 50 years reflect at least five dimensions of change that affect employment policy:

Ronald Bird
March 6, 2002

1. **Job availability** – we have moved from an era in which workers were plentiful and job opportunities scarce to the opposite – qualified workers are scarce and job opportunities are plentiful.
2. **Industrial structure** – we have moved from an era in which most jobs were in centralized, mass production oriented manufacturing enterprises to one in which most jobs – and the best jobs – are in service industries. In the globally integrated economy, jobs in the high value-added business, information and professional services sector comprise America's comparative advantage and greatest job growth resource.
3. **Occupational structure** – we have moved from an era in which most jobs were in routine, low skill, assembly and equipment operator occupations, to one in which most jobs – and the fastest growing types of jobs – are in creative and knowledge-intensive professional, technical and management-related fields.
4. **Education** – we have moved from an era in which most workers needed little formal education to one in which the workforce is highly educated and in which the demand for even higher educational attainment is increasing.
5. **Diversity** – we have moved from and era in which most workers came to the workplace with similar expectations and needs to one in which workers come to the workplace with complex and conflicting expectations and needs.

Today's American workplace is not the workplace of a generation ago. Fifty years ago most workers fit into a similar mold: male, full-time, eight to five, blue collar, hourly wage workers who had learned most of their skills on the job. Then, for those lucky enough to find a niche in a large company, the expectation of continuing employment and steady advancement made a homogeneous pattern of work an ideal arrangement.

Ronald Bird
March 6, 2002

Unfortunately, the job security associated with the old economic order was an illusion. By the 1970s, it became apparent that companies not responding to changing technology and global competition could not provide lifetime employment because they themselves could not survive. People who relied on old skills, old habits and old ways of working were at a serious disadvantage. In twenty years, the American workplace has been transformed by technology and global competition.

These changes have significant implications for workplace policies. One-size-fits-all policies are unlikely to be efficient or effective. Legislated or regulated requirements that benefit one group of workers are likely to be disadvantageous for other groups of workers. Flexibility and choice have become paramount for creating policies that promote job growth, opportunity, innovation and competitiveness.

Job Availability

In the past twenty years, the American economy has produced 35 million new jobs. (See Figure 1.) The recession of the past year has produced barely a ripple in the long-term perspective of job creation. Nearly 64 percent of all persons over age 15 are employed. (See Figure 2.) For people ages 25 through 54, the prime work-eligible category, the employment to population ratio stands at 81 percent. These numbers represent a higher percentage of the eligible population working than in any other major industrial country. The largest group of people not working is comprised of those who have voluntarily retired – 15 percent of the adult population shown in Figure 3. Unemployment, even in the current recession, is well below the peaks reached in previous business cycles. Figure 4 shows that since 1980 the peaks of unemployment following recessions have become progressively lower, and the troughs of

Ronald Bird
March 6, 2002

unemployment during business expansions have also trended lower. Most importantly, recessions have become less frequent over the last twenty years, and the current recession may go on record as the mildest ever.

Job availability is also shown in the increase of labor effort employed over the last five years. Total annual hours of work increased 21.7 billion hours between 1995 and 2000. This level of effort demanded could not have been fulfilled without significant sources of new labor supply. The largest source of increased labor supply over the past 5 years came from increased participation of women in the workforce. (See Figure 5.) Over 39 percent of increased labor effort was supplied by increased participation of women. Immigrants and guest workers supplied 38 percent of the increase, and men supplied 23 percent.

Figure 6 shows that continuation of growing work effort needed through increased participation by women will be difficult in future years. Women's labor force participation is now over 60 percent of the adult population, and will soon equal the labor force participation rate of men. At the same time, aging of the Baby Boom generation will lead to record numbers of retirees, while increased longevity will mean continued growth in the demand for goods and services. The 50.8 million employees now age 45 and over in 2001 will leave the labor force over the next 30 years. (See Figure 7.) Over 30.9 million Americans now 45 and older will be older than age 75 and living in retirement in 2031. These retirees may be joined by an additional 30.2 million retirees now ages 35 through 44 for a total retired population of 61.1 million.

Maintaining a growing labor force to fill the new jobs created by growth and the vacant jobs from retirements will strain all sources of labor supply. Figure 8 illustrates the magnitude of the labor shortage that lies ahead – over 35 million unfilled jobs unless current trends are offset by higher productivity growth, higher labor force participation of women and of older adults,

Ronald Bird
March 6, 2002

immigration or lower consumption growth. The perspective of 50 years ago that jobs were scarce and employment uncertain has been replaced by a new reality of job availability and scarcity of qualified employees.

Industrial Structure

Behind the macroeconomic changes in total job availability, the American workplace has undergone a fundamental restructuring. Changing industrial structure – reflecting the impact of both technology and global economic integration – has altered the kinds of workplaces in which Americans are employed. Figure 9 shows two aspects of that change – the decline in manufacturing employment and the rise in employment in service industries, especially business and professional services and finance. The rise in service industries employment reflects the growing role of American businesses in global economic enterprises. The increase in these jobs is only part of the story. The new jobs being produced in the service industries are well-paying jobs that pay above median wage levels.

Occupational Structure

EPF's assessment of workplace trends also reveals a fundamental shift in occupational structure, as the American workplace becomes the nexus for information, professional services and management to support globally integrated enterprises. Figure 10 shows the effect of this change as management and professional occupations have grown to become the single largest employment group and traditional jobs in production, manual labor and crafts have declined as a proportion of total jobs. This structural change will exacerbate the already tight employment outlook and have far-reaching implications for both education and employment policy.

Ronald Bird
March 6, 2002

Even during the recession of the past year, employment demand for skilled professionals, managers and specialists in management-related occupations continued the strong growth trend of the past five years. Jobs in these skill and experience intensive occupations increased by 1.0 million on average in 2001 compared to 2000, while jobs in production, manual labor and crafts occupations declined by 800,000. These differing occupational growth patterns continue as long-term trends that reflect the impact of technology and global competition on the American economy.

If the trends of the past 30 years continue – and the opportunities presented by the global marketplace suggest that they will – 43.3 percent of the jobs in the American workplace 30 years from now may be in highly paid managerial, professional and management-related occupations – nearly twice the proportion of 30 years ago. These growing occupations include accounting, finance, technical sales, engineering, computer science, human resource management and information technology. Jobs in technical support specialties, including skilled construction trades and crafts will also remain strong.

Lower-skill jobs, such as equipment operators, assembly line workers and manual services workers, will fall to only 23.1 percent of the total. The traditional pyramid of occupations in the domestic workplace is being turned on its head as technology and globalization turn American workplaces into centers of management, information and professional services for globally integrated productive enterprises.

Education

The changing occupational and industrial structure of the American economy is also reflected in an increased demand for skills and training. Figure 11 shows that over the past 30

Ronald Bird
March 6, 2002

years the educational requirements of all jobs have been rising, but especially so for the management-related and professional specialty jobs that have been the fastest growing occupational groups.

Over the past five years, jobs requiring a college degree have increased almost nine times more than jobs requiring a high school diploma or less. (See Figure 12.) In 50 years, the American workplace has been transformed from one in which over 75 percent of the adult population had less than a high school diploma to one in which 58 percent have some college training and nearly half of those hold four year degrees. (See Figure 13.) Figure 14 shows that since World War II every generation achieved a higher rate of college completion, until the most recent. The college completion rate has declined for the current cohort of 23 to 33 year olds. This trend has serious implications for our ability to meet the skill needs of the future.

The growing demand for skills and education and the shortage of qualified employees to fill those needs is shown by the increasing wage premium that employers are paying for educated workers. Figure 15 shows that in 1970 the average college educated worker earned only about 50 percent more than the average worker with only a high school diploma. Today, the earnings advantage of the college degree is nearly twice the high school graduate's earnings. The demand for skills is shown in both jobs growth and earnings growth data.

Diversity

The diversity of the workforce is evident along many dimensions: age, gender, race and ethnicity, national origin, education, occupations and preferences for patterns of work. Overall, more than 69 percent of men and more than 57 percent of women are employed, but the patterns by age show even greater in-roads for women. In the prime age category of 25 through 54, over

Ronald Bird
March 6, 2002

75 percent of women are employed. The growth of labor force participation by women over the past 30 years has been remarkable and has impacted every aspect of the economy and society. The aging of the American workforce has also begun to impact the economy and society and will have increasingly important impacts in the future. The great success of the American workplace has been its ability to blend diverse elements into a cohesive and productive workforce.

Figure 16 shows one aspect of the impact of increased labor force participation of women – the increasing prevalence of dual earner married couple households. In 1940, the single earner (typically the husband) family household was the norm. Today, dual earner families are the most common household type (37 percent of households), while single earner family households account for only 21 percent.

Another remarkable trend has been the rise in non-family households – single individuals often living alone. Single individual non-family households are increasingly common among both younger and older workers, reflecting the effects of both delayed marriage and subsequent divorce.

Figure 17 shows the strong relationship between dual earner status and education. Since higher education attainment is strongly correlated with higher earnings, the greater incidence of dual earner families as education increases tends to magnify the total family income differences between families at different educational attainment levels.

When the presence of children (under age 18) is added to the analysis of working household types, the diversity of individual employee situations becomes even more complex. Figure 18 shows eight distinct categories of household types from which employees may come. Each of these different household type perspectives implies different needs and preferences of employees in terms of working conditions and arrangement. These complex differences are also

Ronald Bird
March 6, 2002

reflected in Figure 19, which shows average total weekly hours worked of the adult earners in each of the eight household types.

The presence or absence of children is an important determinant of employee needs and preferences regarding working arrangements. Leave to take care for ill children, for example, was second only to the employee's own illness as a reason for taking leave identified in the 1999-2000 survey of persons covered by the Family and Medical Leave Act. Figure 20 shows that nearly two-thirds of employees have no children under 18. Employees without dependent children may not share the same preference for family leave options as those with children. Figure 21 shows the similar data from the perspective of individual children. Over half of children in working families live in dual earner households. Twenty-four percent live in single earner married couple households, and 26 percent live in single parent households.

Another dimension of workplace diversity is in terms of work arrangements and schedules. Flexible work arrangements and schedules encourage higher labor force participation by offering choices that fit the diverse needs and preferences of potential employees. Figure 22 shows the variety of work arrangements found in today's workplace. Alternatives like temporary staffing and independent contracting are important innovations that contribute to greater workplace productivity and meet the needs of workers who choose those arrangements. It is notable, however, that these alternatives have grown in terms of number of employees using them, but traditional employment arrangements have grown apace. The proportion of employees in traditional employment arrangements remains unchanged from past years.

Diverse hours of work are another significant aspect of the workplace. Many women, youth and older workers – people who may not have had the opportunity to participate in the labor force 30 years ago – are able to choose jobs with shorter hours so that they can handle

Ronald Bird
March 6, 2002

family responsibilities, attend school or just enjoy life. Part-time employment – less than 35 hours per week – grew from 14 percent to 19 percent of total jobs between 1960 and 1983, as women entered the labor force in greater numbers and as young people extended their schooling years. Since 1983, the proportion of jobs in the part-time category has declined to around 16 percent as full-time jobs growth accelerated in the 1990s. More than 80 percent of part-time workers choose a part-time schedule because it fits their personal needs and preferences. Today's recognition of part-time employment as a positive aspect of the workplace is a far different reality from the 1930s when part-time work was seen as a second-best alternative.

As many facts have changed, others have remained constant. One of the constants is the incidence of overtime work. Figure 23 shows that the proportion of full-time hourly workers who work overtime schedules, 28.7 percent, is essentially unchanged from twenty years ago.

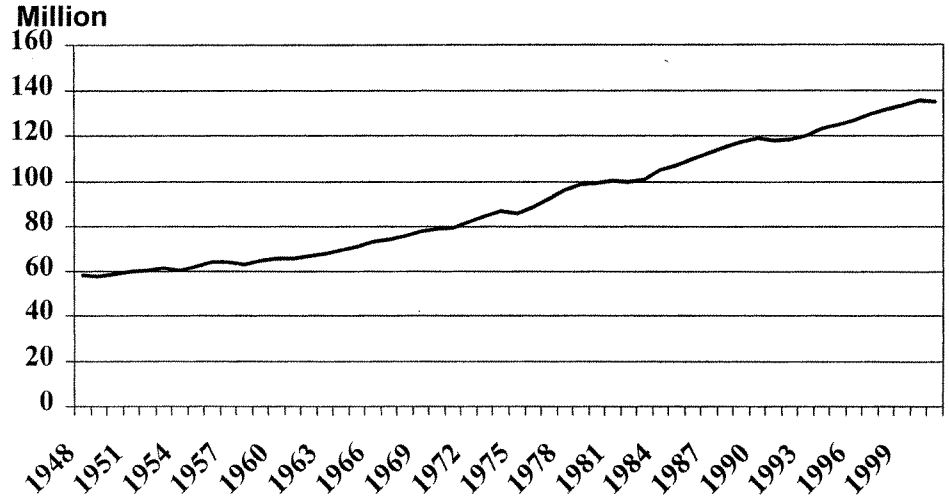
Conclusion

At the heart of the policy concerns raised by these trends and challenges is the fundamental mismatch between the economic realities of the 21st century and the assumptions about the workplace that underlie current employment policies. Current policies, typically reflecting the 1930s environment of high unemployment, economic stagnation, scarce jobs and hierarchical management, are counterproductive in the modern environment of tight labor markets, rapid change, multiple-earner households and rising productivity built on principles of teamwork and collaboration in the workplace. As a consequence, Congress needs to reassess whether current employment laws and regulations are meeting employees' needs and preferences in the areas of flexible scheduling, innovative compensation, employment work structures, alternative employment arrangements and employee involvement in workplace decision-making.

Figure 1

135 Million Jobs

1948 – 2001 Civilian Employment

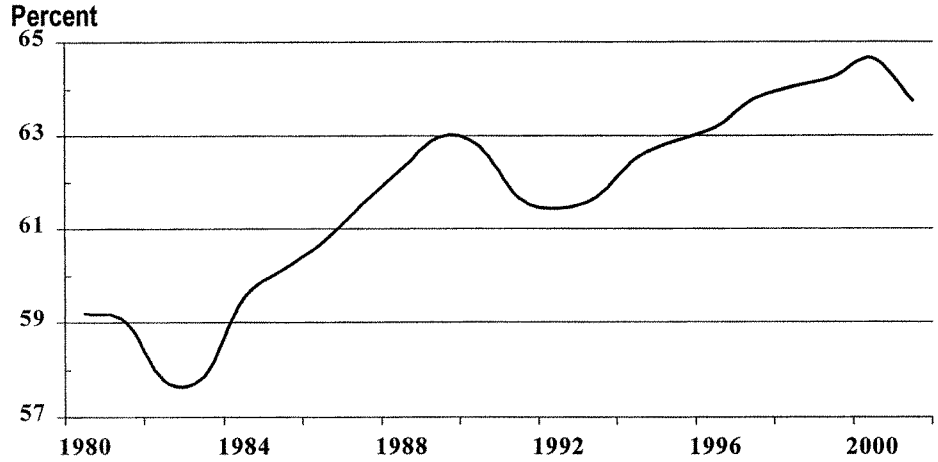


Source: Employment Policy Foundation tabulations of BLS/ Census Current Population Survey data.

Figure 2

Employment Population Ratio

Proportion of Population Age 15 and Above Employed, 1980 - 2001

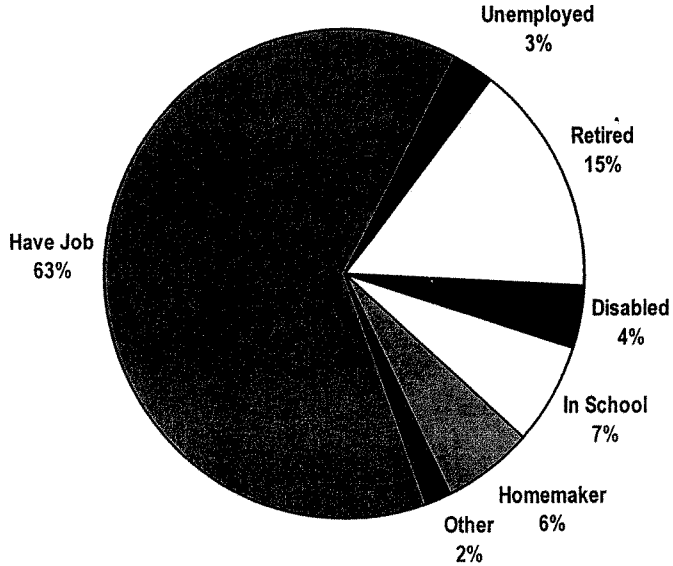


Source: Employment Policy Foundation tabulations of BLS/Census data.

Figure 3

Employed and Not-Employed by Reason

U.S. Population Age 15 and Above, March 2001

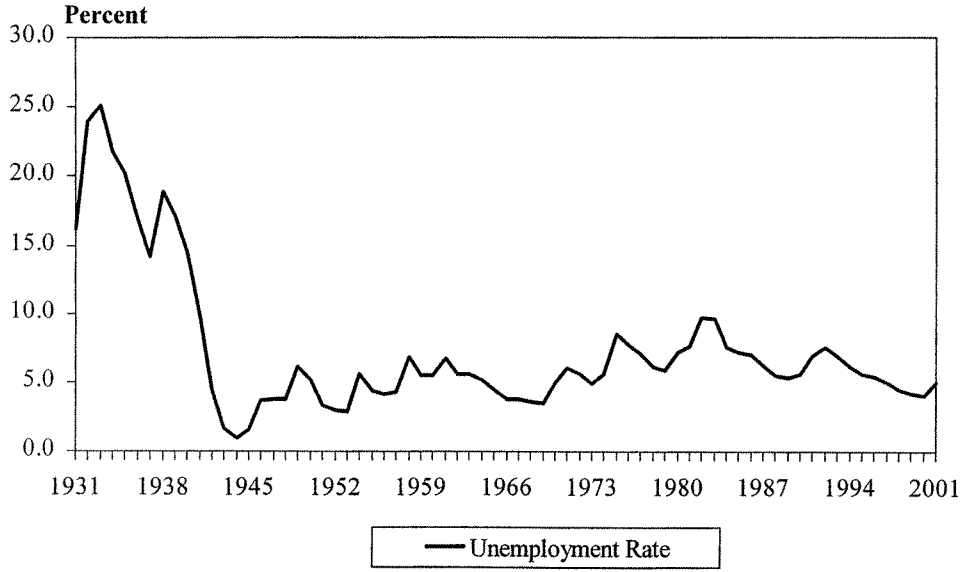


Source: Employment Policy Foundation tabulations of BLS/Census Current Population Survey data.

Figure 4

Unemployment Rate - Civilian Labor Force

1929-2001

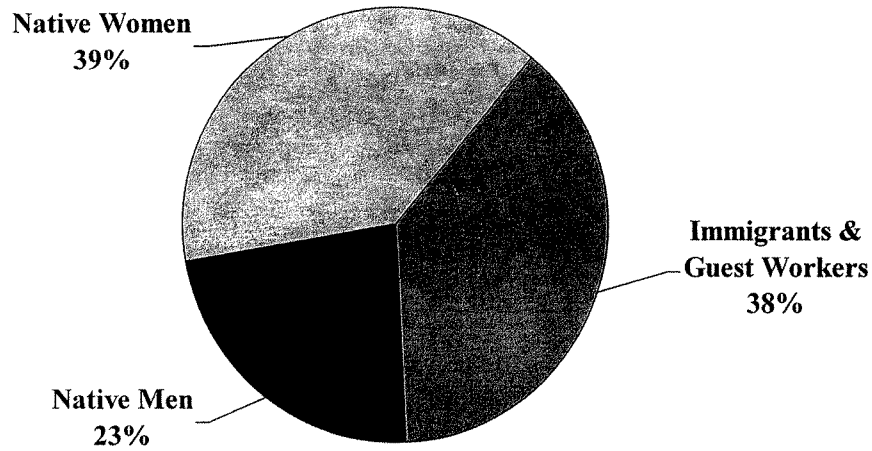


Source: Employment Policy Foundation tabulations of data from the U.S. Census Bureau and the Bureau of Labor Statistics, Current Population Survey.

Figure 5

Sources of Increased Labor Effort

Proportion of 21.7 Billion New Annual Hours of Work, 1995 –2000

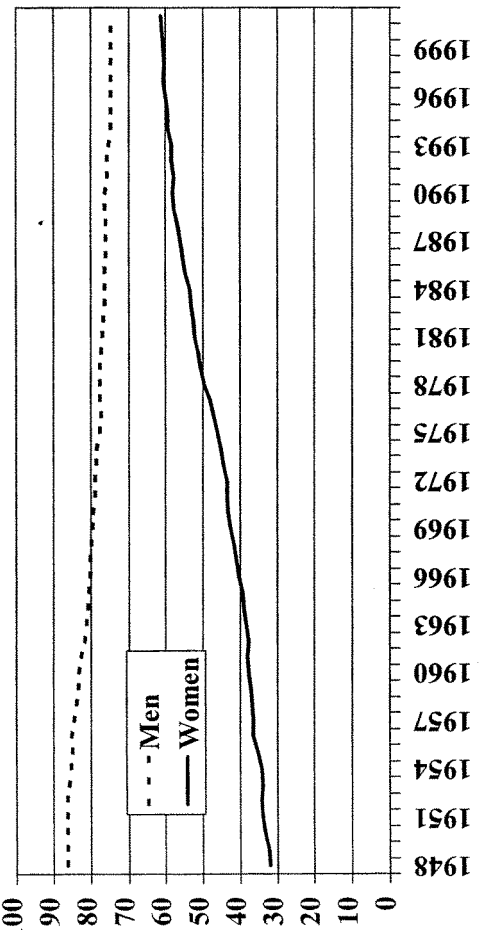


Source: Employment Policy Foundation tabulation of CPS data, 1995 and 2000.
Estimated current total annual hours: 239 billion hours.

Figure 6

Maintaining and Increasing Participation Rates Will Be Difficult

Labor Force Participation of Women and Men 1948 –2001

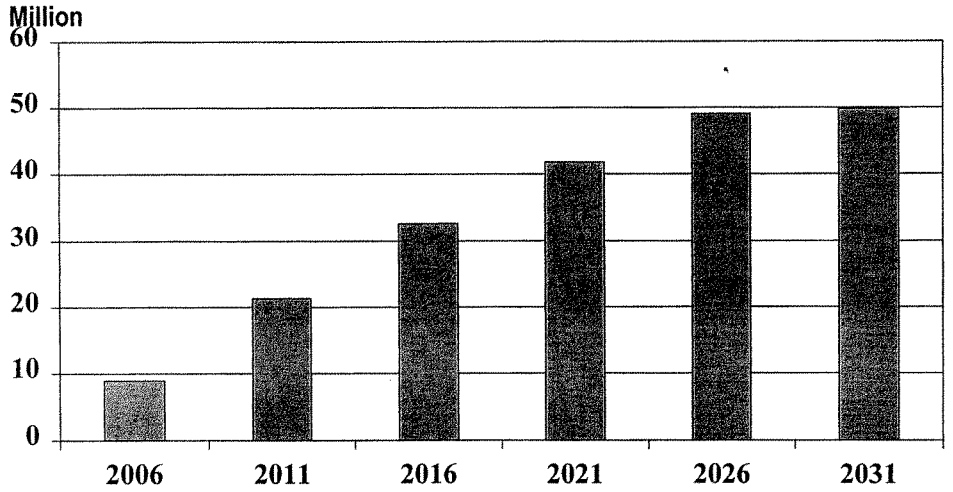


Source: Employment Policy Foundation tabulation of BLS data.

Figure 7

Experienced Employees Will Be Hard To Replace

Cumulative number of workers age 45+ in 2001 who will have retired

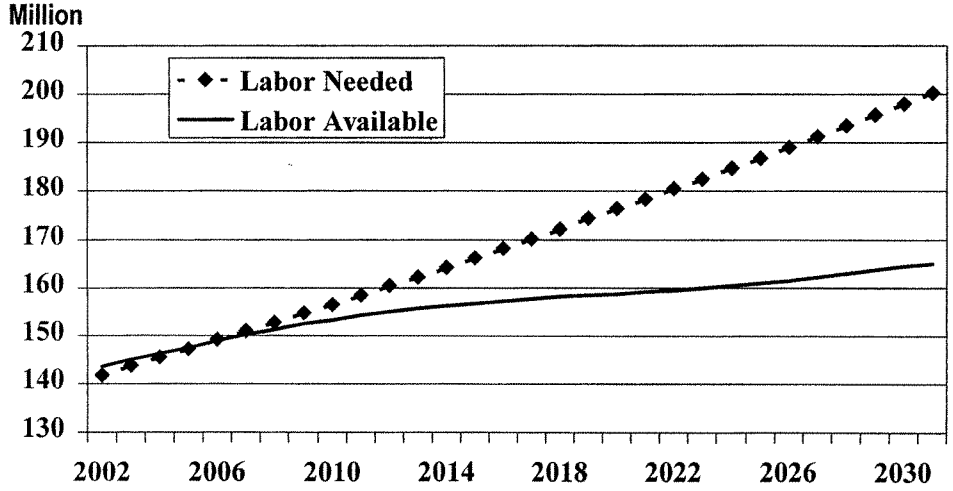


Source: Employment Policy Foundation Projections based on Census/BLS data.

Figure 8

Labor Demand Will Outstrip Supply

Expected Labor Force and Labor Force Demand, 2002 - 2031

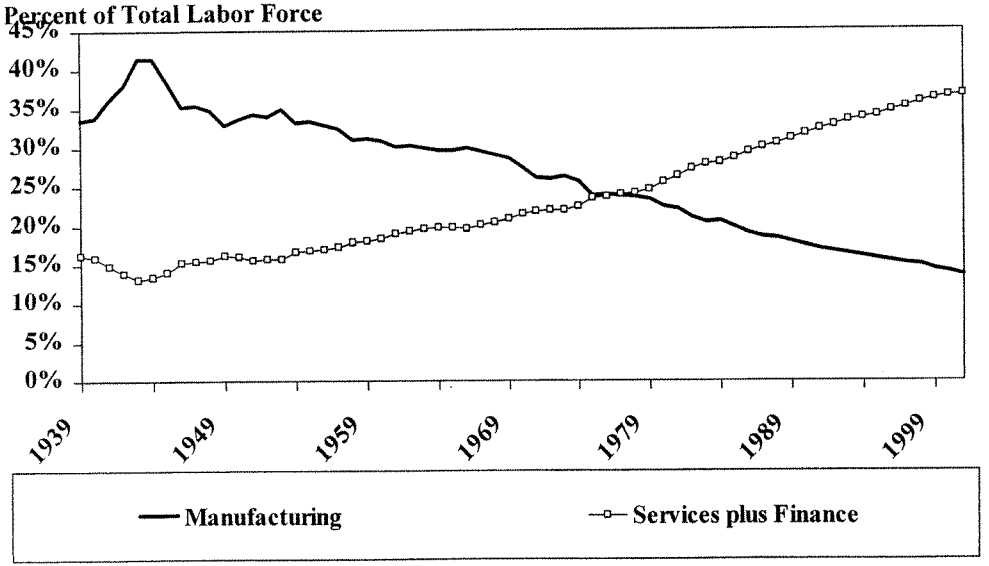


Source: Employment Policy Foundation analysis and projections of Census/BLS and BEA data.

Figure 9

Non-Farm Employment by Industry

1939-2001

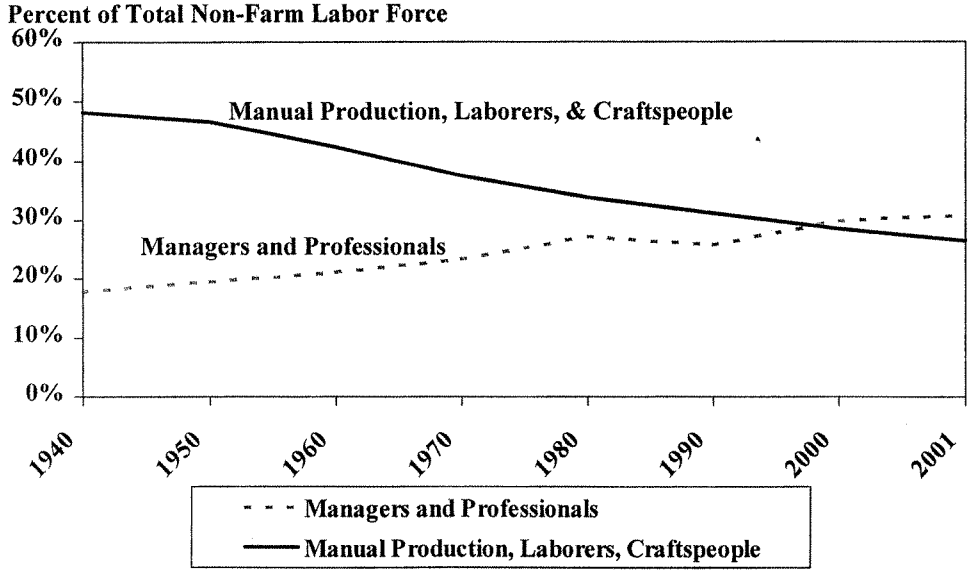


Source: Employment Policy Foundation tabulations of data from the Bureauof Labor Statistics, Current Establishment Survey

Figure 10

Employment by Occupation

1940 - 2001

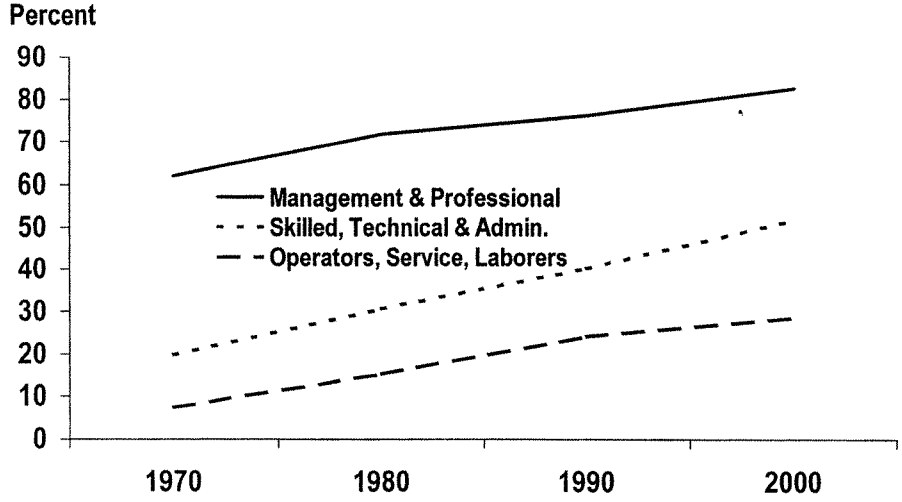


Source: Employment Policy Foundation tabulations of Decennial Census data and Current Population Survey data, March Annual Demographic and Income Supplement.

Figure 11

Skill Requirements Are Increasing for All Jobs

Employees with Post-Secondary Education Attainment, 1970-2000

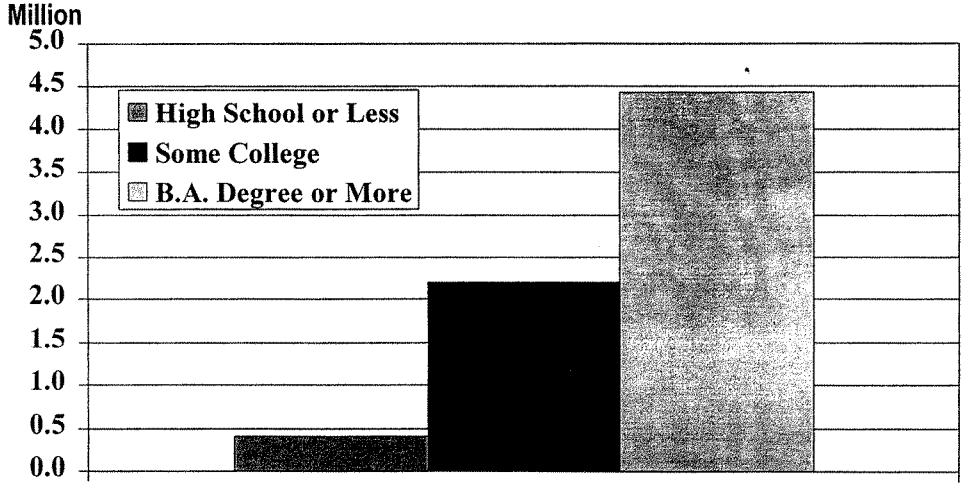


Source: Employment Policy Foundation tabulations of Census/BLS data.

Figure 12

Most New Jobs Require College Degree

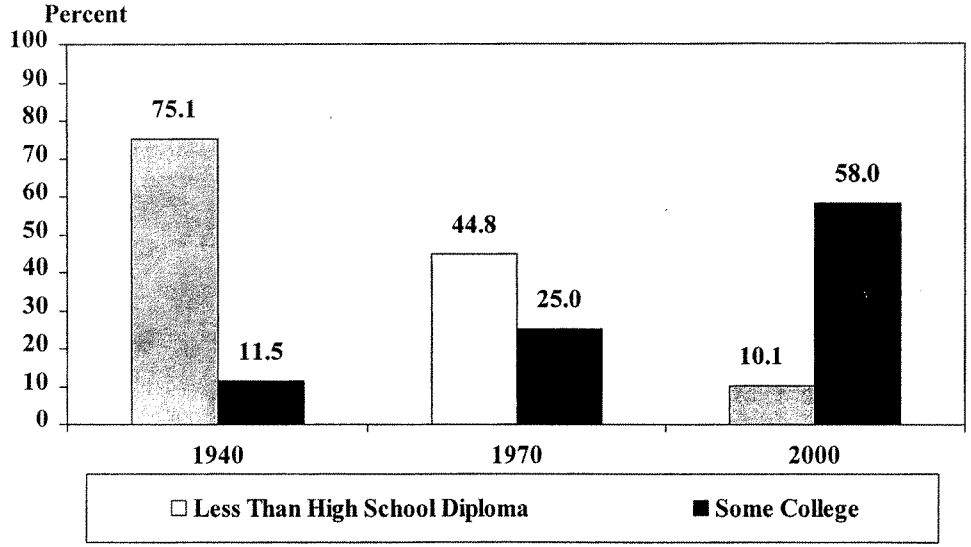
Employment Increase by Education Level Age 25 +, 1996-2001



Source: Employment Policy Foundation Tabulations of Bureau of Labor Statistics/Census Current Population Survey Data.

Educational Attainment of the U.S. Population

1940 – 2001

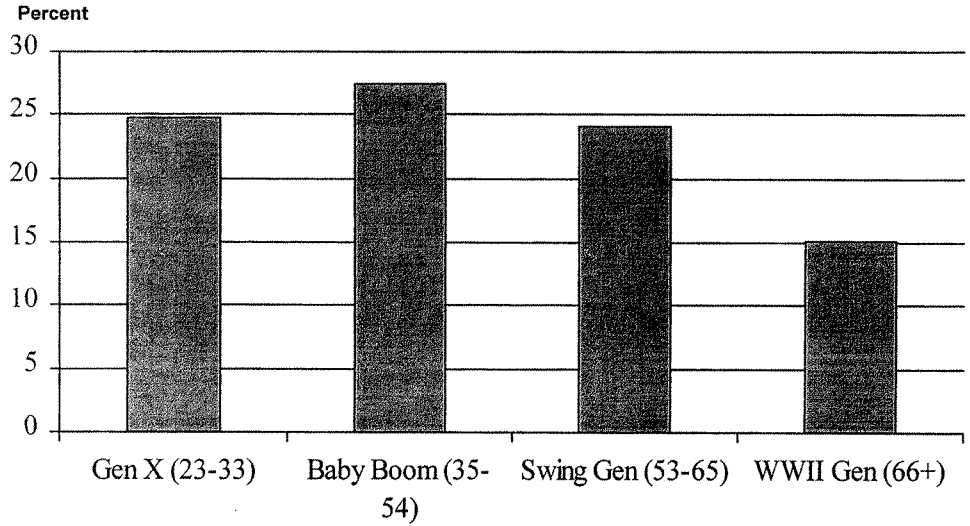


Source: Employment Policy Foundation tabulations of data from the U.S. Census Bureau and the Bureau of Labor Statistics, Current Population Survey, Annual Demographic and Income Supplement

Figure 14

College-Educated Population by Generation

1998

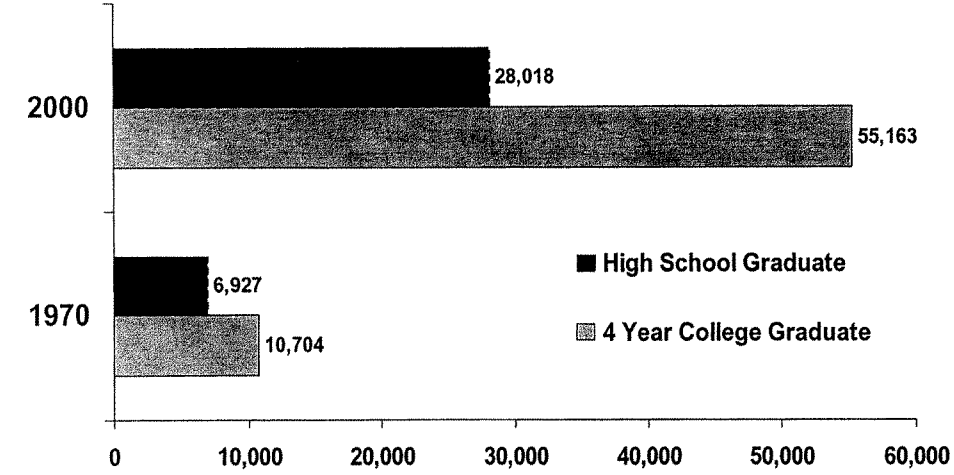


Source: Employment Policy Foundation tabulations of data from the U.S. Census Bureau.

Figure 15

Earnings of High School and College Graduates

Full-time Employees, 1970 and 2000

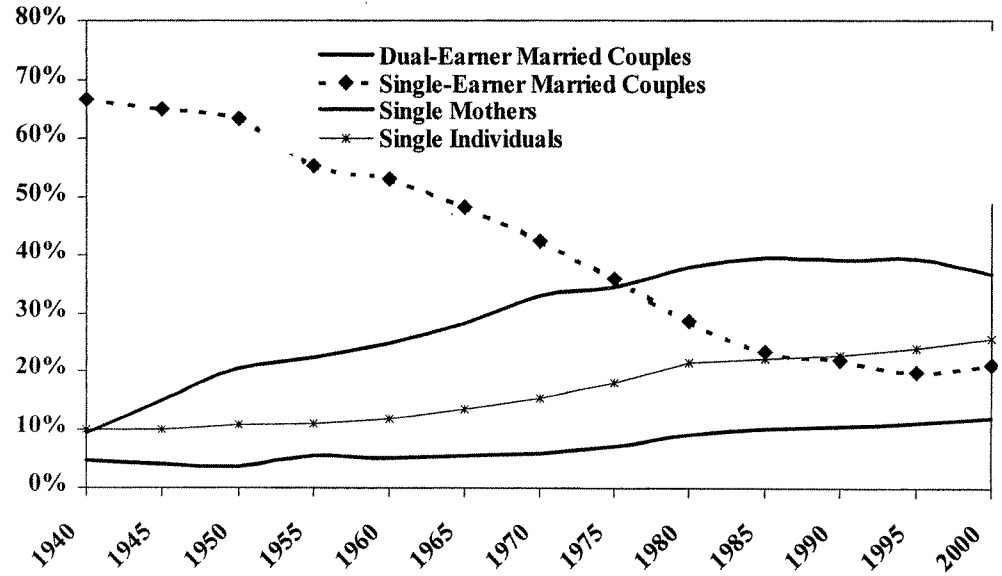


Source: Employment Policy Foundation tabulations of Census/BLS data.

Figure 16

Changes in Working Household Types

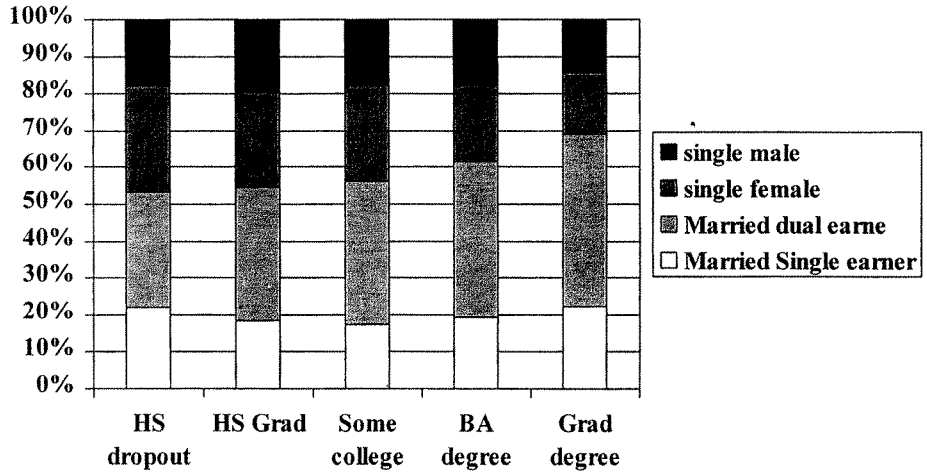
1940- 2000



Source: Employment Policy Foundation tabulations of Bureau of Labor Statistics data, 1940-2000.

Figure 17

Working Household Types and Education Attainment

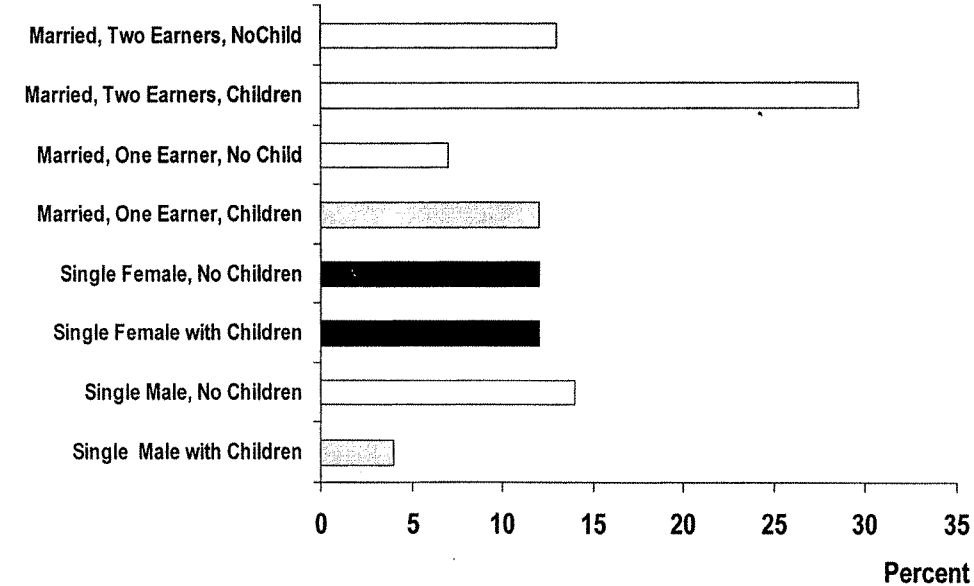


Source: Employment Policy Foundation Tabulation of CPS Microdata, March 1999.

Figure 18

Diverse Employees Have Diverse Needs

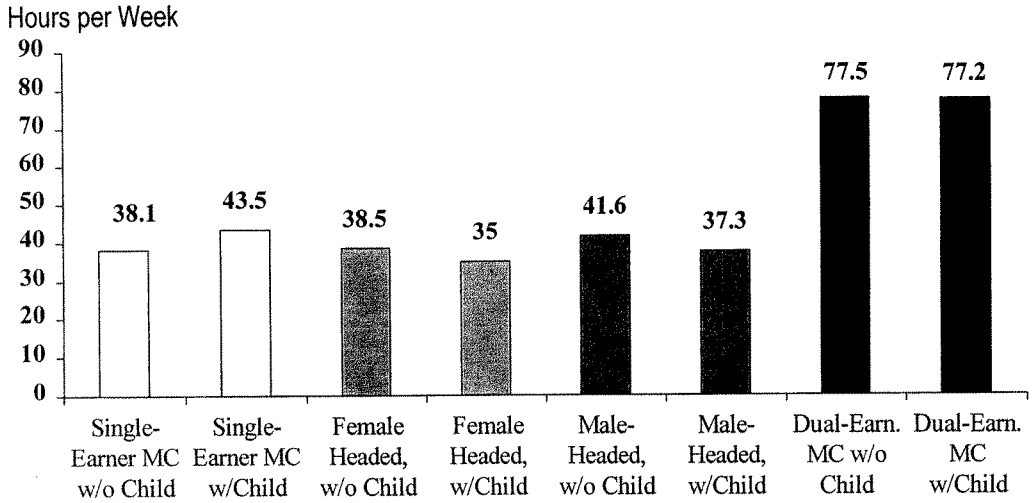
Employees by Marital Status and Presence of Children Under 18



Source: Employment Policy Foundation tabulations of Census/BLS data, March 2000.

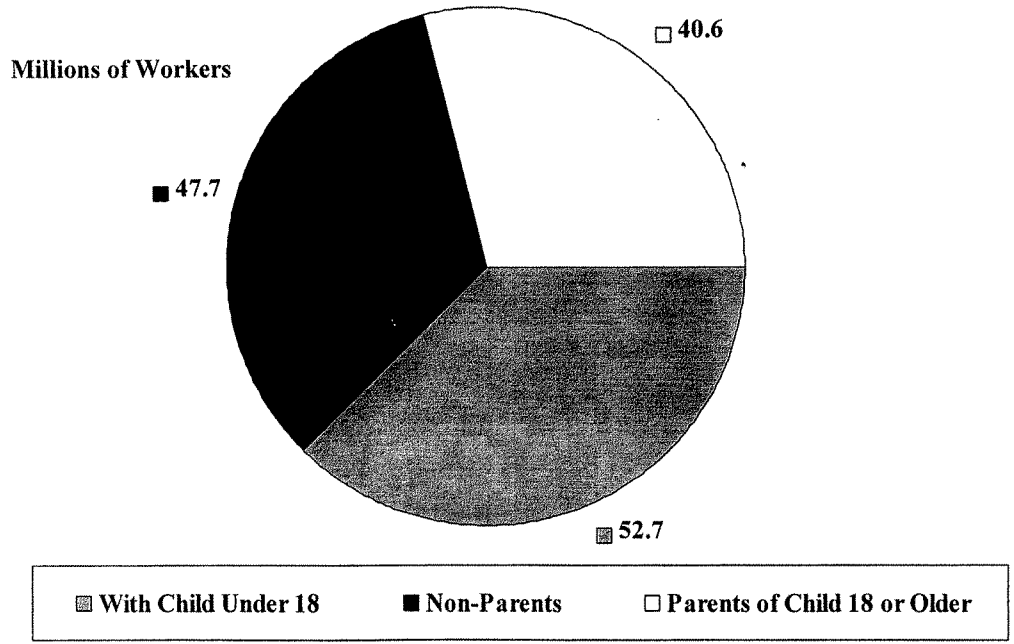
Figure 19

Average Workweek Duration by Household Type



Source: Employment Policy Foundation Tabulation of CPS Microdata, March 1999.

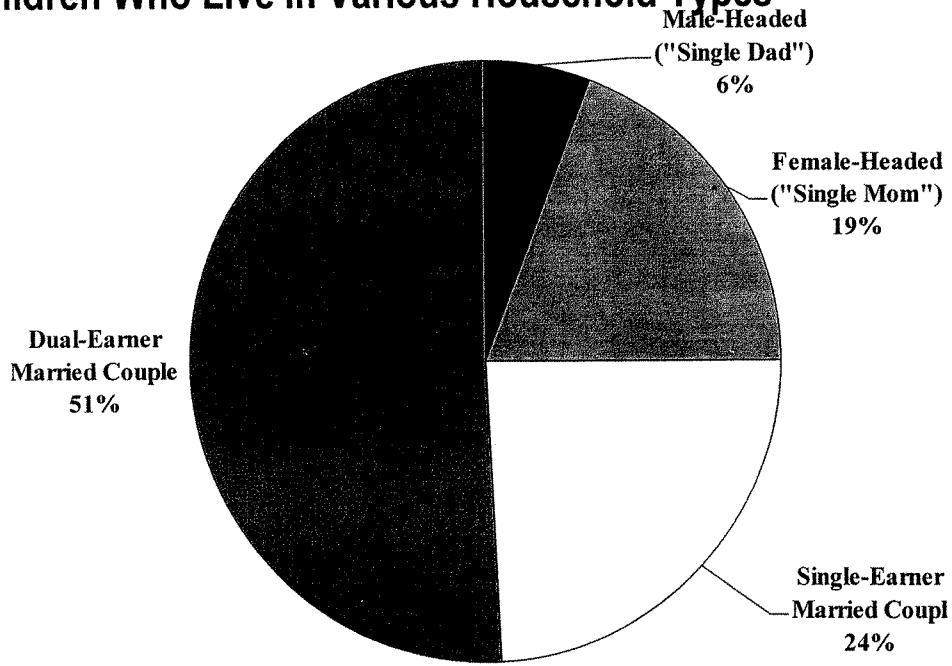
Figure 20
Parental Status of U.S. Workers



Source: Employment Policy Foundation tabulations of November 2000 Current Population Survey, March 2000.

Figure 21

Children Who Live in Various Household Types

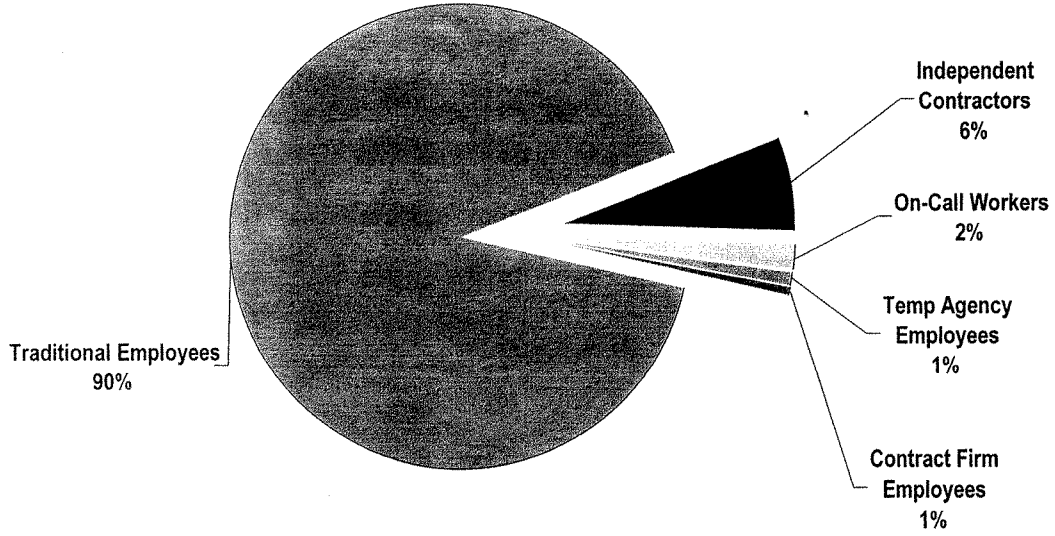


Source: Employment Policy Foundation Tabulations of CPS Microdata, March 1999.

Figure 22

Alternative Work Arrangements Reflect Diverse Needs

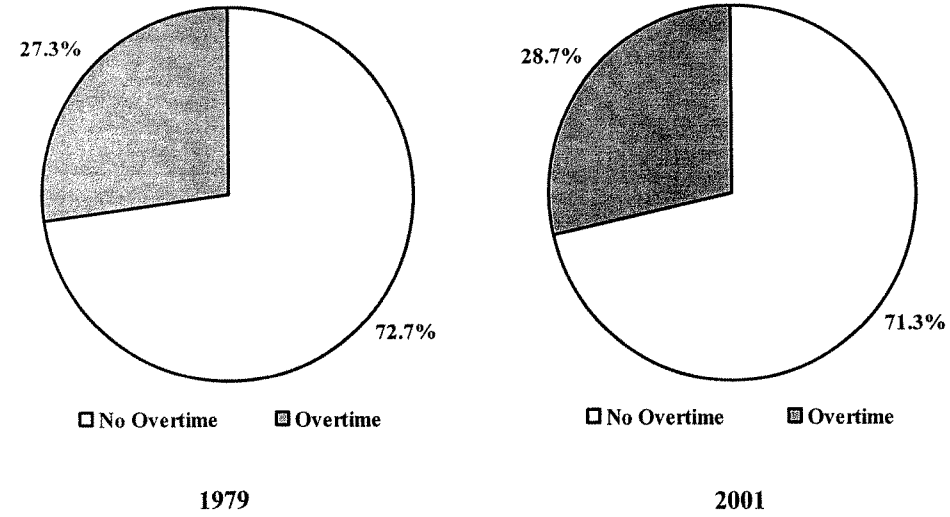
Traditional and Alternative Work Arrangements



Source: Employment Policy Foundation tabulation of BLS/Census Current Population Survey data, February 2000 supplement series.

Figure 23

Full-Time Hourly Employees Who Work Overtime



Source: Employment Policy Foundation tabulations of the February 2001 Current Population Survey, OutgoingRotation subgroup and the March 1979 Current Population Survey, Annual Demographic and Income Supplement.

APPENDIX D - WRITTEN STATEMENT OF CARL E. VAN HORN, PROGESSOR AND DIRECTOR, JOHN J. HELDRICH CENTER FOR WORKFORCE DEVELOPMENT, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, NEW BRUNSWICK, NJ

Testimony
March 6, 2002

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Testimony before the Workforce Protection Subcommittee
Committee on Education and the Workforce
U.S. House of Representatives

"Worker Perceptions of Balancing Work, family, and Education"

My name is Carl Van Horn, and I direct the John J. Heldrich Center for Workforce Development at Rutgers, the State University of New Jersey, where I also serve as a Professor of Public Policy. The Heldrich Center is a university-based research institute dedicated to strengthening the American workforce by improving education, government performance, and workplace management. We identify best practices in job placement and training programs and policies and perform quarterly surveys of the American workforce, we call *Work Trends*. Working in partnership with the Center for Survey Research at the University of Connecticut, we have interviewed over 10,000 American workers and employers about a wide range of issues affecting work in America.

In our work, we meet with leaders of businesses of every size in our state of New Jersey and across the country. I hear the same questions today that I've heard since the economic boom began in the mid and late 1990s: How can employers identify and recruit the best people? And once they have brought good people in, how can they keep them? While the economy has slowed down this past year, in most respects the so-called "war for talent" continues. For employers, the importance of having a workforce with the knowledge, skills, and commitment to keep pace with global change remains a huge concern.

In fact, we released a new survey only two weeks ago that shows employers are still facing a skills crunch. Nearly half of U.S. **employers** told us it was difficult to find qualified workers in the past year. Close to a third of employers report they expect to experience difficulty finding qualified workers in the year ahead. What's more, four of ten employers who cannot fill current jobs, cite the lack of workers with high-level skill requirements as the primary barrier.

Our survey research, as well as other respected reports and studies agree. Productive companies that wish to hire and keep the best people need to understand their

current and prospective employees' leading workplace concerns, and be prepared with policies to address them. Balancing work and family and the need for continuing education are dominant concerns of Americans, and more important, they expect their employers to address these issues. Our research finds that most Americans are frustrated about these all-encompassing problems in their lives. Almost all Americans are deeply concerned about balancing work and family, yet our data show consistently over the years that only half of US workers are very satisfied with how they are achieving this goal.

Workers rate the ability to balance work and family as the most important aspect of a job, our data show. *Ninety-seven percent of workers have said that balancing work and family is important to them, and 88% have indicated that it is very or extremely important.* Workers rate the ability to balance work and family as more important than any other job factor including job security, salary, quality of working environment, and relationships with co-workers and supervisors. While we have found that U.S. workers generally say they are satisfied with their jobs, these same working Americans also report that there's still something fundamentally wrong with how they work today, and they believe it can be changed for the better.

How does this frustration with work-family issues express itself? Our survey data have found that nearly all working adults (95%) are concerned about spending more time with their immediate family. Almost as many (92%) say they are concerned with having more flexibility in their work schedule to take care of family needs. Nearly nine in ten (88%) report that the amount of stress is an important job factor, and similar numbers (87%) report they are concerned with getting enough sleep. *Sixty percent* of American workers, in fact, indicate they are *very or extremely concerned* with the amount they are sleeping. Almost half (46%) of U.S. workers spend more than 40 hours on the job, with a significant number (18%) working more than 50 hours a week. In addition, nearly half (45%) of workers report needing to work overtime with little or no notice.

These figures also help dispel the common belief that balancing work and family is a concern for employees with children. We know that only 33% of American households have children present, but these findings show that far greater numbers are feeling the work-life time crunch. With a growing elderly population, longer commutes, time-intensive medical treatments and technologies, and the general complexity of American life, workers of every type of family group face new time and money pressures. These can range from caring for an elderly parent to providing essential volunteer work. What's more, Americans face ever-increasing demands to acquire continuing education and job training in order to stay competitive in the new economy.

The evidence is clear that today's workers know they need education and training beyond their formal schooling, but in large part expects that it must be completed on their own time and through their own resources. Federal data show that about 60 million adults, nearly half of the workforce, enrolled in one or more adult education programs during 1999, a 12 million person increase over 1991. The increase in

adult education enrollment between 1991 and 1999 *alone* is about double the number of all persons enrolled in higher education at either point in time.

When *Work Trends* researchers asked Americans about the importance of upgrading their skills, almost all workers (85%, *Work Trends* 1999) said that needing more specific training in a skill is a key barrier to getting a job, and that the opportunity to get more education and training is important to them (88%). Yet half of workers (47%) agree with their employers that getting the education and training they need is the workers' responsibility alone to find the time and the resources to get the training they need.

In short, Americans are juggling work, family, *and* education needs. In asking them what policies they would support in the workplace, we've found a gap between the policies Americans strongly support, and the number of employers who are offering these policies. While most U.S. workers agree that their employers care about balancing work and family, one in four said his/her employer **does not** offer benefits to support achieving this balance. In our survey, workers placed the highest importance on policies that promote flexibility in their work schedules to address their personal and family needs, such as emergency time off (91%), unpaid leave (90%), and flexible hours (87%) (see figure 5-1, below). Many employers offered an emergency time off policy and unpaid leave, workers reported. But far fewer employers offer flexible work hours (61%) and flexible workdays (48%). And, while half of all workers (49%) said that on-site childcare is important, only *12%* of employers offered this benefit. In addition, seven in ten workers said tuition remission is an important benefit, but only 33% of employers were said to offer this policy. About half of workers thought the opportunity to telecommute was important, but only a handful of their employers offered this policy.

Our survey findings project some of shifts we can expect in the way work is organized and conducted in the 21st century workplace. Workers in significant majorities are telling us they're ready to embrace alternative work arrangements, lifelong learning, and flexibility in work schedules. In today's economy, progressive family-friendly and flexible work arrangements are an emerging incentive for attracting quality employees and strengthening the corporate workforce for competing in today's knowledge-driven economy.

Meeting children's needs is only one challenge of the work-life balancing act. Elder care and the need for adult education and job training are increasingly dominant responsibilities. Workers are uncertain about their economic future and have a desire to upgrade their skills to remain competitive in a volatile labor market. The continuing demand for highly skilled and experienced workers provides a powerful incentive for employers to embrace policies that promote continuing education.

The experiences of several large firms such as Johnson & Johnson, Schering-Plough, Merck and Ford Motor Company show us progressive work-life policies are effective. These companies lead their industries in profitability and market share, offer innovative, generous family-friendly and tuition reimbursement

policies, and experience voluntary turnover rates of about 6 %, with application to new job ratios of well over 20 to 1. In thinking about policy changes, however, we must bear in mind that change has not come as quickly at small firms with fewer than 50 employees. Yet these establishments employ over 43 percent of the American workforce and represent 92 percent of all businesses.

As workers struggle to meet the demands of employers and employers struggle to meet the demands of a fast-changing, uncertain economy and labor market, their message to employers and policymakers is clear. Policies promoting worker flexibility, strong families, and increased skill attainment, have the potential to meet the needs of both workers and companies.

APPENDIX E - WRITTEN STATEMENT OF WILLIAM J. KILBERG, SENIOR PARTNER, GIBSON, DUNN & CRUTCHER, LLP, WASHINGTON, D.C., TESTIFYING ON BEHALF OF THE UNITED STATES CHAMBER OF COMMERCE

STATEMENT OF WILLIAM J. KILBERG
SENIOR PARTNER, GIBSON, DUNN & CRUTCHER LLP
AND
FORMER SOLICITOR, UNITED STATES
DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON WORKPLACE PROTECTIONS,
HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE

"Flexibility in the Workplace:
Does the Fair Labor Standards Act Accommodate Today's Workers?"

March 6, 2002

Chairman Norwood and Members of the Subcommittee:

I am pleased to appear today on behalf of the United States Chamber of Commerce to discuss the Fair Labor Standards Act ("FLSA"). The United States Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector and region. Gibson, Dunn & Crutcher LLP is a member of the Chamber's Labor Relations Committee. In speaking on the Chamber's behalf, I bring to bear a perspective that comes not only from years of advising employers about FLSA issues and litigating on their behalf, but also from having served, as my attached biography indicates, from 1973 through 1976 as Solicitor of the Department of Labor. In the latter capacity, I functioned as chief legal officer for the agency charged with interpreting and enforcing the FLSA.

The FLSA is an important and effective worker protection statute, and I am confident that it will continue to protect workers in the years to come. It is, however, long overdue for revision, having failed to keep pace with the rapidly evolving workplace. As my esteemed co-panelists have testified in detail, today's workplace bears little resemblance to its post-Depression counterpart. Unlike sixty years ago, when Congress enacted the FLSA, few workers today have a "stay at home" spouse; men and women alike are looking for ways to reconcile the competing demands of work and family. Moreover, the line between "blue-collar" and "white-collar" workers has become blurred as radical changes have redefined America's workforce. From the technologization of the workplace, the metamorphosis of the economy from a manufacturing base to a service base, and other equally momentous developments, a large class of highly skilled and compensated technical workers has emerged. It should come as little surprise to this country's lawmakers and regulators that the FLSA and the Department of Labor's interpretive regulations, which have undergone little if any substantive change since their codification in 1938 and 1954, respectively, are outdated remnants of a

different era that do not reflect the new realities of the workplace. Indeed, the Department of Labor's regulations are so outdated that they are drafted in language that has not been used for decades by government agencies, *e.g.*, the exclusive use of the male pronouns "he," "him," and "his," to refer to "the employee" or "the worker" is reflective of a time long since passed. Additionally, the regulations are replete with references to outdated job titles, such as "machine man" and "promotion man."

More importantly, the substantive obligations presently placed on employers by the FLSA and the interpretive regulations promulgated thereunder are too rigid for the modern workplace. In particular, the law's strict requirements prohibit compensatory time and flex-time arrangements outside a given workweek for private sector employees and employers. The law therefore outlaws many voluntary employer-employee efforts to adopt flexible, family-friendly work schedules. The overtime provisions also present obstacles to the extension of bonus and profit-sharing arrangements to non-exempt, lower paid workers. Although Congress enacted remedial legislation with respect to stock option programs, there are still difficulties in this regard. In addition, there are ongoing problems with the administrability of the statute's "white collar" exemptions. The Department's convoluted duties and salary basis tests, which set forth the criteria for satisfying the white-collar exemptions, produce absurd results in the modern workplace; today, highly skilled and compensated technical workers are often more akin to exempt "professionals" or "administrators" than to non-exempt blue-collar employees, but are often unable—at least in the Department of Labor's narrow view—to satisfy the FLSA's antiquated exemption standards. The jobs performed by these workers do not fit into the neat little boxes envisioned by the drafters of the FLSA regulations; their compensation, therefore, remains mired in constraints engineered to redress Depression-era evils.

I commend Chairman Norwood and the other Members of this Subcommittee for recognizing the importance of having wage and hour rules that reflect the realities of today's workplace. In particular, I would like to praise the Members of this Subcommittee, including Representatives Biggert and Ballenger, and other lawmakers like Representative Petri who have introduced legislation aimed at updating what is at present a painfully outdated legal regime. Finally, I am pleased that the present Administration has made the revision of the FLSA's outdated regulations a top priority. I am hopeful that this Administration will follow through with its expressed intentions in a way that previous Administrations have not. Though the need for reform is widely recognized, no Congress or Administration to date has managed to take the next step. It is my sincere hope that the Members of this Committee will work within Congress and with the Department of Labor to move forward to amend the FLSA and its regulations to comport with the needs of today's workers and the realities of today's workplace.

Compensatory Time

One of the best examples of how the FLSA is working to the detriment of

employees and employers in the modern workforce is in the area of overtime. The FLSA's overtime provisions prohibit compensatory time and flex time arrangements outside a given workweek for private sector, non-exempt employees. In the public sector, workers entitled to overtime compensation can elect to "exchange" cash overtime payments for paid time off. Under these "comp time" arrangements, employees earn one-and-one-half hour of paid time off for each overtime hour worked. Accrued time off can be used to take care of family responsibilities, attend school functions, visit the doctor or dentist, or handle other personal obligations that often must be dealt with during working hours. "Comp time" arrangements offer employees the advantage of a "forced savings" plan; employees electing "comp time" can, by working overtime, assure themselves that future weeks' pay will not be jeopardized should the need arise for time off. Moreover, these employees earn the right to take the compensatory time off when they need it, provided their absence does not unduly disrupt their employer's business.

Congress specifically amended the FLSA in 1985 to provide "comp time" flexibility for public sector workers; this followed the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority,* which rendered the FLSA applicable to government workplaces. Congress made this accommodation due to the fact that " many . . . government employers and their employees [had already] voluntarily . . . worked out arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek." Moreover, the passage of the public sector "comp time" provision represented a "recogni[tion] [of] the mutual benefits arising from" those previously agreed to arrangements, and an intention not to "eliminate[] the freedom and flexibility [previously] enjoyed by public employees."

Despite the fact that employees in the private sector are struggling with the same competing demands on their time as are employees in the public sector, the FLSA does not offer comparable flexibility to private sector employees; in fact, the statute absolutely prohibits private employers and employees from entering into "comp time" agreements other than within a single 40-hour workweek. Private sector employees are frustrated with this disparate treatment and have stepped forward time and time again to express their desire for equal treatment in this context. This Subcommittee has previously heard from private sector employees who have described, in detail, the benefits they could realize from electing compensatory time off in lieu of cash overtime payments. And a survey conducted by Penn & Schoen Associates, Inc. in 1995 found that 75% of the private sector employees surveyed favored a proposal that would give workers the option of paid time off in lieu of overtime compensation.

Opponents of alternative overtime arrangements believe that employers will manipulate "comp time" to their advantage, *e.g.,* by coercing employees into agreeing to non-traditional arrangements and/or by making it difficult for employees to use "comp time" once accrued. Although I understand these concerns, I believe they are unwarranted, particularly given that these types of arrangements have worked successfully and to the advantage of employees in the public sector for

years, as Congress recognized in 1985. Moreover, the various "comp time" bills that have been introduced, including Representative Biggert's recently introduced H.R. 1982, contain protections that, while limiting the overall flexibility provided to employers and employees, help to ensure that employees' rights will not be subject to abuse. For example, Representative Biggert's bill prohibits employers from coercing employees into agreeing to "comp time" arrangements, mandates that accrued "comp time" be cashed out on a yearly basis, limits the total number of "comp time" hours accruable, entitles employees to cancel "comp time" arrangements at any time at their sole discretion, and makes it illegal for employers to intimidate, threaten, or otherwise coerce employees in a manner that interferes with their rights to take accrued time off. I have confidence that such protections would be more than adequate to prevent and remedy any potential employer abuses.

Opponents also argue that the law and regulations as presently drafted are sufficiently flexible; employees, they argue, do not need the additional option of "comp time." Employees themselves disagree, however; they are some of the loudest voices calling for increased flexibility in this context. In addition, as I stated earlier, allowing employees to elect paid time off in lieu of immediate cash overtime compensation is, in effect, a forced savings arrangement. Employees who are not confident in their saving abilities may prefer the comfort of knowing that future weeks' pay will not be affected by time off for personal appointments, family activities, etc. And finally, once accrued, "comp time" is an entitlement that the employer cannot take away; the availability of unpaid leave is not always similarly guaranteed. Despite critics' arguments, there are many advantages to be realized from "comp time" that are not presently available to employees in the private sector. Given the success that "comp time" programs have had in the public sector, and the fact that the potential benefits of extending these programs into the private sector far outweigh the potential risks, I see no reason why Congress should not give private sector employees the added flexibility of being able to elect, at their own discretion, an alternative overtime compensation arrangement.

Congress, on its own or by freeing the Department of Labor to issue more flexible regulations, needs to release private employers and employees from the strict overtime rules that presently restrict their ability to experiment with non-traditional, flexible work arrangements. The "comp time" idea is only one option—a particularly attractive option given its proven success in the public sector. Another possibility would be to amend the strict "40-hour workweek" rule to permit employers to calculate overtime entitlements based on the number of hours worked in two week (rather than one week) periods, *i.e.,* overtime obligations would kick in at 80 hours measured over two weeks rather than 40 hours measured over one week. This would allow an employer and an employee to enter into a 30/50 arrangement, for example, whereby the employee would alternate 30 hour and 50 hour weeks. Presently, the overtime obligations that would be incurred by the employer in the 50 hour week make this, in many instances, a prohibitively expensive alternative.

Though the legislation proposed to date is not perfect from anyone's perspective—some feel it affords too much flexibility, others not enough—it represents a much

needed step in the right direction. I urge you to give private employers the flexibility necessary to create workplaces that are sensitive to, and accommodating of, employees' personal and family responsibilities.

White-Collar Exemptions: The Duties and Salary Basis Tests

As I noted, the FLSA's drafters envisioned a law that would protect employees at the lowest rungs of the economic ladder, helping "those who toil in factory and on farm to obtain a fair day's pay for a fair day's work." Accordingly, the Act exempts from its overtime requirements a number of classes of employees, including any persons "employed in a bona fide executive, administrative, or professional capacity." The requirements for these "white-collar" exemptions are left to the Secretary of Labor to establish by regulation. Unfortunately, those regulations – which set forth both duties and salary basis tests for each exemption – have remained largely unchanged since 1954, while the responsibilities and methods of payment of American "white-collar" workers have changed dramatically.

One aspect of the duties tests that has produced incongruous results in the courts is the "administrative-production dichotomy," a concept derived from the less-than-clear regulatory requirement that an exempt administrative employee's work must be "directly related to [the] management policies or general business operations of [the] employer or [the] employer's customers." The dichotomy creates an artificial division between those employees who "produce" the goods or services that the employer offers to the public and those whose duties involve ancillary, service functions that support the employer's principal mission. The problem with this approach, which might have made sense when most employees worked "in factory and on farm" and the assembly line worker could easily be separated from the human resources director, is that it results in disparate classification of the same job depending upon the function of the employer. For example, a California court applying the administrative-production dichotomy under state law recently found insurance claims adjusters working for what it characterized as a corporate entity that provided claims adjusting services to be non-exempt production workers. This decision led to a landmark $90 million "gotcha" windfall verdict and sent tidal waves through the insurance industry, which had uniformly considered claims adjusters to be exempt administrators. In contrast to the California court's decision, a federal court of appeals held that a customer service coordinator who performed claims adjusting services for a moving company was not a production worker, and therefore was exempt, because the employer's purpose was not to "produce" claims adjusting services, but instead to move goods. This is the type of inconsistent, nonsensical result produced by this test – an employee performing identical functions and earning the same pay could be considered exempt at one employer and non-exempt at another, depending not upon the nature of the employee's job, but instead upon the nature of the employer's business.

Another troublesome aspect of the duties tests is the requirement that exempt administrators and learned professionals exercise discretion and judgment in the performance of their duties. The Department of Labor distinguishes these

characteristics from the use of skill. Thus, highly-skilled workers, including engineers and others who apply their knowledge and training to perform advanced tasks, may not be considered exempt because they are merely "utilizing skills" as opposed to "exercising discretion and judgment." For example, a federal district court found that instructors who trained the NASA space shuttle ground personnel were not exempt professionals because they did not exercise the requisite amount of discretion. Remarkably, the court relied on the fact that the instructors performed their duties by following simulation scripts and guidance from supervisors, even though these directions would have been incomprehensible to a lay person.

Yet another difficulty is the area of advanced technology workers, a group of employees whose existence could not have been contemplated half a century ago. Congress tried to address this in part in 1996 by mandating that the Department of Labor establish a special exemption for computer professionals paid at least $27.63 per hour. This temporary remedy, however, has already become outdated as the number and duties of technology workers continue to expand into the Internet and beyond. In that regard, I commend Representatives Andrews and Graham, who have introduced legislation to update this exemption in an attempt to keep up with these new classes of jobs.

In addition to the executive, administrative, professional, and computer professional exemptions, the statute exempts certain other classes of employees, including outside sales personnel. Moreover, the FLSA exempts certain inside sales personnel in retail and service establishments, provided they meet specified criteria. Although inside salespersons in wholesale establishments were traditionally considered exempt under the general administrative exemption, a leading court of appeals decision held that wholesale salespersons were "production workers" not entitled to this exemption. While clear distinctions between types of sales personnel may have been appropriate for Willy Loman in *The Death of a Salesman*, such distinctions are no longer consistent with the structure of today's sales force, and the Byzantine rules based upon these distinctions should be revamped.

These and other issues continue to frustrate employees and employers as they try to fit the round pegs of new economy jobs into the square holes of the old economy FLSA. Congress has recognized the need for reform and, each session, a number of piecemeal solutions are proposed to exempt specified classes of employees. For example, in this Congress, legislation is pending to exempt construction engineering and design professionals, who are well-compensated employees commonly regarded as professionals but who may not meet the rigid, antiquated requirements of various aspects of the exemption duties tests.

In sum, the duties tests are long overdue for an overhaul. Indeed, the longer version of each test has been rendered irrelevant by the Department of Labor's failure to increase the salary level at which the short test applies. That level has remained at $250 per week for many years. As an alternative (or perhaps a supplement) to reworking the duties tests to more accurately reflect the realities of the modern workplace, another logical way to address much of the inconsistency, confusion and

lack of flexibility of the current tests is to establish a presumption that employees compensated at or above a certain comfortable level are exempt, white-collar workers who can negotiate the terms of their own employment and who do not need the paternalistic, rigid structure of the FLSA to protect them from oppression by their employers. Either way, extensive revision of these tests is sorely needed.

In addition to the duties tests, the Department's regulations also generally require that exempt executives, administrators and professionals be paid on a "salary basis," that is, that they be paid the same amount each week regardless of the quantity or quality of their work. The pay of exempt employees may be docked only for specified reasons, including for violations of safety rules of major significance (although not for violations of other rules). Although public sector employers are free under these regulations to dock employees' pay for absences of less than a full day, the salary basis test prohibits private employers from doing so. Thus, private employers are prohibited from granting leave without pay as a means of accommodating exempt employees who need to take part of a day off for personal business.

Should an employer take such a deduction from the salary of an exempt employee (even in a good faith attempt to accommodate an employee's request for time off) or adopt a policy allowing for impermissible deductions, all employees who, "as a practical matter," could be subject to such deductions lose their exempt status. This is another regulatory "gotcha" that provides fodder for plaintiffs' lawyers and windfalls for well-compensated employees.

The Department of Labor's regulations provide for a "window of correction," by which an employer may pay back an impermissible deduction and preserve the exempt status of the docked employee and other similarly-situated employees. This window is not available in cases "[w]here deductions are generally made when there is no work available" because this "indicates that there was no intention to pay the employee on a salary basis." "On the other hand, where [an impermissible] deduction . . . is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." This window of correction does not allow many well-intentioned employers to rectify their errors, however, because the Department of Labor and a number of courts have read the "or" as "and," limiting the availability of the window of correction to those cases where deductions were both inadvertent and for reasons other than lack of work. The window of correction should be revised to provide real opportunities for employers to correct technical docking errors and to avoid unexpected and significant overtime liability.

Conclusion

For the better part of two decades, the Department of Labor has been promising a comprehensive review of the FLSA and its regulations; no relief has been forthcoming, however. In 1981, the Department "indefinitely stayed" its last

proposal to readjust the FLSA's salary thresholds for exemption in response to public comments urging a more comprehensive review of the regulations. In 1985, the Department published an advance notice of proposed rulemaking seeking comments from the public on all aspects of the exemption regulations. Ever since, the Department has semiannually published statements of regulatory priority prominently featuring reform of the FLSA regulations, though I hold out hope that the Department's most recent statement of intention to act in this area will finally lead to significant change.

As the economy enters the new millennium, employers still contend with the conflicting pressures of the FLSA's increasingly obsolete requirements. Employees are demanding flexibility that employers are prohibited from providing, and, despite the best of intentions, employers are finding it increasingly difficult to navigate the layers of complexity and potential liability imbedded in the current exemption regulations.

The calls for change have been long-standing; procrastination is no longer acceptable. Without corrective action, the problem will only worsen as the economic world continues to evolve. It is time for lawmakers and regulators to act on their long-standing promises and to work together to bring the FLSA back into some semblance of compatibility with the contemporary economy and the modern worker.

APPENDIX F - WRITTEN STATEMENT OF JUDITH M. CONTI, CO-FOUNDER AND DIRECTOR, LEGAL SERVICES & ADMINISTRATION, D.C. EMPLOYMENT JUSTICE CENTER, WASHINGTON, D.C.

Written Testimony Submitted by
Judith Conti, Co-Founder and Executive Director, Legal Services and Administration
of the D.C. Employment Justice Center
to
the Subcommittee on Worker Protection of the House Committee on Education and the Workforce:

Hearing on Flexibility in the Workplace: Does the Fair Labor Standards Act Accommodate Today's Workers?

March 6, 2002

Mr. Chairman, my name is Judith M. Conti. I am the Co-Founder of the D.C. Employment Justice Center and its Director of Legal Services and Administration. The EJC's mission is to secure and enforce the rights of low-income workers in the Washington, D.C. metropolitan area through legal assistance, advocacy, and education. Before founding the EJC, I practiced law with the firm of James & Hoffman, P.C., where I represented employees in a wide range of employment and labor matters. On behalf of the EJC and the thousands of workers it serves, thank you for the opportunity to present testimony to this Committee.

I want to focus my remarks today on why current efforts to amend the Fair Labor Standards Act as a response to the need for flexibility in the workplace -- particularly, revisions allowing employers to give workers compensatory time off in lieu of cash overtime -- would seriously weaken the fundamental protections of the FLSA that most workers rely on, and would actually deprive working families of the flexibility that they need in this current economic environment. Although we have seen a host of such proposals in the last several years, including H.R. 1892, the "Working Families Flexibility Act," I direct my comments today to the fundamental flaws that underlie all such bills. I also want to address what we consider to be far sounder alternatives for achieving workplace flexibility. Finally, I will comment on proposals to change the salary basis test and to exclude bonuses from regular rates of pay because these are further examples of erosions to important employee rights under the statute.

My perspective on the importance of preserving the FLSA's cash overtime requirement stems from serving the needs of hundreds of low-wage workers in the D.C. metropolitan area. Now, just as the many decades ago when Congress first enacted the FLSA, workers remain vulnerable to the most basic of exploitations, including the failure of employers to pay them correctly for their work. And, those workers who remain particularly vulnerable are women and minorities. Last year, the EJC advised and counseled over 900 individual workers. Over half of them - 56% were women. A combined 90% of our clients were either African American

(69%) or Latino (21%). Fourteen percent of our cases involved inadequate compensation for hours worked. Over one-quarter of the cases we handled involved termination, and a similar number involved claims of illegal discrimination. A striking percentage of cases in these last two categories – termination and discrimination – involved workers' rights to take protected, unpaid leave to care for themselves or for a family member with a serious medical condition. Time and time again, we find ourselves trying to enforce this nation's bedrock employment protections on behalf of workers who still face rank economic exploitation and a loss of dignity on the job. To be sure, these same workers want time with their families and time to make contributions to their communities. But not at the expense of their paychecks.

For over sixty years, the Fair Labor Standards Act has maintained a simple and straightforward requirement to protect the paychecks and the hours of covered employees. Under Section 7, a covered employee who works more than 40 hours in a single week is entitled to premium pay -- time and one-half -- for each overtime hour the employee works.

It is important to recall the purposes of Section 7. By requiring employers to pay their workers time and one-half for every hour worked in excess of 40, Congress intended both to spread employment and to compensate workers for the burden of additional work. By penalizing employers who required excessive hours from their employees at exploitative wages, the Act sought to take away the advantage of producing goods "under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being." As President Roosevelt said, these objectives are designed to "protect workers unable to protect themselves from excessively low wages and excessively long hours."

The demographics I am about to cite make it crystal clear that working people in general, whether they earn $60,000 or $15,000, or whether they work as data entry clerks or hotel housekeepers, cannot afford to trade wages for time off. Far from being a relic of the New Deal or old-fashioned protectionism, as critics of the FLSA like to call it, the statute gives vital protection to hourly workers regardless of their income.

Thus, the premises of the FLSA have as much vigor today for all covered workers as they did when the statute was enacted. **The first and foremost principle is this: working people do not want to compromise their paycheck in order to have more time off from work.** The choice of working more for less is a false choice, and one that working people are not prepared to make. Without a union contract, only the wage and overtime provisions of the FLSA protect them from increasing their hours and receiving less pay. At the same time, however, I want to reiterate another important point.

American workers consistently reject the trade-off between wages and time off that the comp time revisions to the FLSA would offer. In 1995, at a hearing on the very topics we are discussing today, economist Edith Rasell cited a then-current study

showing that the public strongly opposed a policy that would allow employers to schedule compensatory time off in lieu of overtime pay for those who worked more than 40 hours per week. Indeed, 64% of all workers, regardless of their political ideology, opposed this revision to the FLSA. As recently as 18 months ago, the Bureau of National Affairs reported that "the percentage of Americans who prefer receiving more money over other workplace perks is rising."

The reluctance of working people to trade pay for time off follows inevitably from our workforce demographics. Over the last 30 years, a new picture of American families has come into focus, which shows that incomes are down, the gap between the top fifth of families and the rest of us continues to grow, and working hours are on the rise. In fact, inequality between the shop floor and the executive suite is at an all-time high, despite the nation's strong economic growth. According to Business Week, the average CEO made 42 times more than the average blue-collar worker in 1980, 85 times more in 1990, and a staggering 531 times more in 2000. Real wages, particularly those computed on an hourly basis, "have slid or remained stagnant since the mid 1970's," and "family income has also suffered, with median family income falling .5% in the period from 1989-1995." At the EJC, we have seen firsthand how September 11 has exacerbated these problems. Those tragic events have caused a dramatic rise in both unemployment and underemployment, as restaurant workers, hotel employees, taxicab drivers, and others struggle to make ends meet while working reduced hours, often so that their co-workers can also keep their jobs.

This leads me to two additional and important points that must inform the debate over comp time. Employees are working increasingly long hours and lack real flexibility over their schedules. Longer hours affect workers at all income levels, not just the ones we represent at the EJC. Only a law that gives them the right to exercise genuine choice over their schedules, without at the same time forcing them to lengthen their workweek, will truly benefit them. The many proposals we have seen in recent years that would allow employers to substitute comp time for overtime pay undermine both of these objectives.

The overtime provisions of the Act were intended to promote a national "hours of work" rule. Despite the fact that Americans already work longer hours than their counterparts in most industrialized nations, Section 7 of the Act is an effective brake on further increases in the length of the workweek for covered workers today. According to a recent study, those workers exempt from the FLSA's overtime protections work over twice a many overtime hours as those who are non-exempt. A full 44% of workers exempt from the premium pay requirement (most executives and supervisors, certain administrative and professional employees, and outside salespeople) work in excess of 40 hours per week, while only 20% of those employees who are covered by the statute's mandatory overtime pay provisions work longer than 40 hours.

Thus, allowing employers to substitute comp time off for cash overtime frees them from the pressures to adhere to a 40-hour week and can only result in an increase of

forced overtime. This is compounded by the fact that In virtually every comp time proposal we have seen in recent years, employers maintain substantial discretion over when employees can actually use their earned time off. The fact that in many instances, employers can simply require co-workers to absorb the job responsibilities of the absent employee compounds that discretion. For all of these reasons, comp time, unlike cash overtime, costs little or nothing to the employer. It is a safe bet that we will see an increase in the number of hours employers will require their employees to work if Congress amends the FLSA to provide for comp time in lieu of overtime, a result that makes a mockery of the claimed rationale for this change.

I would argue, in fact, that comp time is all about doing away with the overtime disincentive, and with impósing additional burdens on employees. That is surely the point for small, poorly capitalized businesses that cannot now afford to pay -- and therefore require -- overtime. In fact, during the debates five years ago on this very same issue, the National Federation of Independent Businesses candidly acknowledged that many of small businesses supported a comp time bill because it gave them "something . . . [to] offer in exchange" for forced overtime. And it was certainly the principal reason why Congress amended the FLSA in 1985 to allow compensatory time in the public sector. As the National Association of Counties reported, the "financial impact" of the FLSA's overtime provisions on county governments" would have been "enormous" because counties could not "afford time and a half." Estimates like these led to the enactment of the comp time exception for the public sector, to protect public employers from the "impossible financial burdens" of the FLSA's overtime provisions. Thus, history shows us that comp time, with its attendant promotion of overtime hours, responds to the economic needs of employers, and has little or nothing to do with the needs of employees.

Indeed, it is significant that employers have not, in the main, begun to implement the types of scheduling changes already available under the FLSA without incurring overtime liability, despite their clamor for flexibility on their workers' behalf. A recent study cites Bureau of Labor Standards statistics showing that "only a little more than a quarter (27.6%) of workers have flexible schedules which allow them to vary the time that they begin or end their work days." However, managerial and professional employees -- those exempt from the FLSA's overtime provisions were the primary beneficiaries of such schedules. In those categories, 42.6% had such flexibility, compared to a paltry 14.6% of "operators, fabricators, and laborers." Statistics about the provision of paid leave, sick time to care for oneself or for someone else, the carryover of various forms of leave from year to year, as well as estimates about the availability of such alternatives as compressed time, indicate that "there is little evidence . . . that employers are using the flexibility available to them under existing law in scheduling work without incurring overtime liability." This too calls into serious question the real motivation for the push to substitute comp time for overtime.

This leads me to my next point: Workplace flexibility benefits workers only if they have genuine choice in the matter. But the workers who pass through the EJC's

doors, like thousands of workers across the country who have no designated representative, simply have no free choice in a matter as fundamental as how they will get paid for their work.

Bills like H.R. 1982 conjure up a world in which employers and employees meet on equal terms; where an employer's request carries no undue pressure or coercive effect; and where employees -- and especially the large number of low-wage and contingent workers who are in most need of the law's protections -- are free to resist an employer's request that they opt for comp time in lieu of overtime pay. This is a vision of the workplace in which employees get to use their comp time when they want to; in which the same employees who have arrived at a comp time "understanding" with their employer will not hesitate asking to convert such time into cash pay; and in which employees have the wherewithal and protections to challenge their employers' abuses thereof.

In the real world in which EJC's clients live, however, compensatory time off in lieu of overtime is never truly voluntary. As I've emphasized, no bill, no matter how tightly drafted, can protect an individual employee or applicant, acting alone, from the pressure that is built into the workplace relationship to agree to an employer's request to substitute comp time for cash overtime. Other significant questions of voluntariness arise with the recent comp time proposals that we have seen. For example, unlike cash overtime, which an employee is free to use at will, accrued comp time loses its beneficial value to the employee any time the employer retains discretion to deny the leave. Employees who bank significant amounts of comp time also depend on their employers to stay in business long enough either to cash them out or grant them leave to take time off. Of course, this is a particular danger in small, thinly capitalized businesses, which are present in increasing numbers in this economy.

Finally, as one commentator has aptly stated, "employers stand to benefit considerably from comp time because it would transform the overtime system from one of mandatory payment to one where employees must enforce their own rights and employers possess certain veto powers over those rights." A swift, effective enforcement scheme would act as a partial check on the coercive nature of the comp time proposals that we have seen. However, such a scheme does not exist. A study by the General Accounting Office over two decades ago found that in 1978-1979, willful and repeat violations of the FLSA's wage and overtime provisions were common and that the Department of Labor's enforcement efforts were "inadequate." Several follow-up studies showed the persistence of most problems, combined with a reduction in DOL's resources to address them. Data now shows that both compliance with, and enforcement of, the FLSA's overtime requirements "remain highly problematic." Quite simply, allowing employers to substitute comp time for cash overtime will create additional enforcement needs that cannot possibly be addressed without substantial increases in the Wage and Hour Division's budget and resources, thus making employees even more powerless to secure their "choices."

Our experience at the EJC shows us that low-wage workers who insist upon being paid what they are owed face an overlooked, but very real, hurdle. An individual wage claim may amount to no more than $500 or $1000, or one or two days off. This money due and owing represents something substantial to the worker. It is highly unlikely, however, that she will find many advocates willing to bring her case, or that she will find a government agency stretched for resources very responsive to her single claim. Imposing a comp time system on top of this would provide even greater license to employers to feel that they could violate the Act with little or no consequences.

Over the course of the debate, opponents of substituting comp time for cash overtime pay have articulated a long list of safeguards that are necessary to address the issues identified above, in order to imbue any proposal that substitutes comp time for overtime pay with at least some attributes of voluntariness. These safeguards include:

4150. Exclusions for garment andonstruction industries, as well as other vulnerable, part-time, temporary, or seasonal employees;

4151. Voluntary participation:
as evidenced by a written agreement maintained according to FLSA recordkeeping requirements;
may be negotiated by union or other representative designated by employees;
employee may withdraw agreement on reasonable notice;
imposing regular reporting requirements on employers;

4152. rate is one and one-half times the regular rate of pay;

4153. including comp time hours used as hours worked in the week they are taken for purposes of calculating overtime and benefits;

4154. including payments for comp time within employee hour calculations for benefits purposes;

4155. comp time hours earned are capped at 80 hours;

4156. Employee controls use of banked time, subject to reasonable notice to employer and employer emergencies;

4157. prompt payment of cash to employees upon request;

4158. employer cannot require employee to use comp time, or substitute it for paid or unpaid leave;

4159. Secretary of Labor has with broad authority to limit or eliminate comp time in order to protect particularly vulnerable employees;

4160. prohibiting unused comp time from limiting the availability of unemployment insurance;

4161. allowing for the use of comp time for a qualifying event under the Family and Medical Leave Act, 29 U.S.C.§ 2601, *et seq.*;

4162. annual cash out of unused hours at highest rate of pay during accumulation period; immediate cash out of unused time on termination of employment;

4163. priority for cash out of banked hours during bankruptcy proceedings;

4164. allowing for employees to use comp time in lieu of any other paid or unpaid leave or time off to which they would be entitled;

4165. prohibiting discrimination, including allocation of overtime on basis of an employee's election of comp time or cash overtime;

4166. strict penalties for violations, including interference with voluntary participation or use of banked hours, or violating prohibition on mandatory overtime; creating penalties that include payment for the overtime hours in dispute, liquidated damages, other equitable relief, and, in some situations, civil monetary penalties per violation; and

4167. establishing a sunset provision.

I take the time to list these provisions for the Committee today not for the purpose of suggesting that there is such a thing as an acceptable comp time bill, but rather, to demonstrate the difficulties of securing compensatory time off that is truly voluntary on the part of employees without treating it in all material respects as the equivalent of cash wages.

But flexibility from the perspective of workers is not simply the choice between money and time. Instead, it involves more fundamental changes in the structure of work that will enable workers to meet their commitments outside of the workplace. Flexibility is not, as I have discussed above, a substitute for additional pay, but rather, a complementary measure.

As Lonnie Golden has stated in his recent article, "The Time Bandit: What U.S. workers surrender to get greater flexibility in work schedules:"

> A major first step toward creating a more family-friendly workplace would be to foster more flexibility and less volatility in the timing of work hours. Today's time-crunched families would benefit greatly from more work-hour flexibility (the ability of employees to adjust the length or timing of their work week), and less work-schedule volatility (the degree to which the length or

> schedule of work hours varies unpredictably at the employer's discretion). These changes will require a fundamental restructuring of workplaces, managerial practices, and labor markets in order to allow the 21st century workers to better balance the competing demands on their time.

One obvious conclusion from Golden's analysis is that comp time does virtually nothing to address the need for greater work-hour flexibility and less work-schedule volatility. The employee who needs to take tomorrow off to care for a sick relative or attend a meeting at school is unlikely to be able to make a request for comp time on such short notice and, in any event, cannot be assured that she will receive permission to take her leave at that time. By the same token, a comp time system cannot counteract the unpredictable shifts that an employer may insist upon as to the length or scheduling of work hours.

According to Golden, current access to flexible work schedules among full-time workers is more likely to occur 1) among those who work no less than 50 hours per week rather than those who work the standard 40 hours, and 2) in conjunction with more scheduling volatility. Indeed, Golden concludes that in the absence of "fundamental changes in the way the number and timing of work hours are determined in workplaces," substituting comp time for overtime pay "would be more apt to increase rather than reduce the average overtime for affected workers and overemployment of the already most-overburdened workers."

What would real flexibility look like for today's working families? First, any form of workplace flexibility that does more harm than good to today's working women and men must not undermine the principle that overtime work is to be compensated at one and one-half times an employee's regular rate. Real flexibility needs to work in tandem with the economic protections of Section 7 of the Act. Of course, this can be done. Because the FLSA does not impose limitations as to scheduling, time off, or vacations, accommodations to workers can and should be made within the framework of the statute. Thus, employers should start relying on the scheduling latitude built into the FLSA itself if they are serious about responding to the needs of their workers, by providing, flextime, compressed work weeks, and adjusted hours within the week, for example, all of which are permissible under the statute.

Second, we must build on what works. Therefore , we must expand the Family and Medical Leave Act to cover more workers and provide time off for more family needs. The report of the bipartisan Commission on Leave found that the FMLA has virtually no negative effects on employers, while it has clear benefits for workers and their families. Simply by lowering the coverage threshold to employers with 25 employees would increase the percentage of the private workforce covered by the FMLA from 57% to 71%. Giving employees just 24 hours a year to take their children or elderly parents to regular doctor's appointments, or go to parent-teacher meeting, would give families meaningful flexibility that most do not have now. Other expansions, such as letting parents use their own sick leave to care for sick

children, or allowing victims of domestic violence to use FMLA leave for making vital arrangements for legal protection or shelter, would also be significant steps toward giving families the flexibility they need.

We also need to set higher standards for fair pay. Increases in the minimum wage help enormously. But we also need to take steps to enforce and expand the equal pay laws, which working people have repeatedly identified as an important component in improving family income.

Unfortunately, most families cannot afford to take full advantage of the unpaid leave that the FMLA now provides, just as comp time is no bargain for a family that needs every penny of overtime to stay afloat. In the long run, families need some form of paid leave – some guarantee that flexibility will not come at so high a cost as to be meaningless. Steps toward real flexibility for working families must therefore include assessments of the feasibility of paid family-leave insurance.

Finally, I want to address two additional aspects of the FLSA that proponents of "reform" have targeted: the salary basis test and the inclusion of bonuses in establishing regular rates of pay.

Salary Basis Test

The success of the overtime premium in discouraging excessive hours has also created incentives for employers to evade those requirements. One way is for employers to claim that their employees are covered by the so-called "white collar" exemptions for professional, executive, or administrative employees, since exempt employees may be paid a fixed salary regardless of the number of hours worked. Congress clearly intended very limited use of these exemptions and empowered the Department of Labor to formulate regulations to protect employees from misclassifications that would deny them the right to overtime.

DOL has created three "tests," which apply equally to the exemptions for executives, administrators and professionals. First, the employee must be paid on a salary, as opposed to an hourly basis (the "salary basis" test). Second, the employee must be paid at least a minimum salary (the "salary level" test). Third, the employee must have duties and responsibilities that reflect an executive employee (the "duties" test). The duties test itself has two forms – the short test, under which is more easy to qualify as an executive (and therefore exempt from the FLSA's overtime provisions), and the long test.

This enforcement scheme worked well for nearly four decades, in large part because the salary level test alone automatically placed a high percentage of the workforce outside the reach of the exemptions, that is, outside of the Act's overtime requirements. However, since 1975, this regulatory scheme has been crippled. Since that date, the government has failed to adjust the salary levels for inflation so that today, they are close to or below minimum wage. In the GAO's words, these tests have been "effectively eliminated." Salary levels must be raised account for

inflation and to more accurately capture the realities of the modern workplace. This would mean that more workers would automatically be covered by the FLSA's overtime protections; and more workers would be protected under the long version of the duties test.

At the same time, however, we should not carve out any more wholesale exemptions to the Act's coverage, as recent bills have proposed for such occupations as funeral directors, computer technicians (?), and inside sales persons. Instead, we should test coverage by examining workers under the lens of the duties test. That test identifies workers whose degree of responsibility, autonomy, and managerial authority render their exemption from the FLSA's overtime requirements consistent with the underlying purposes of the Act, to prevent their exploitation by employers with respect to their hours. Job title alone is not a reliable indicator of job status. This is increasingly the case as work has become increasingly fragmented and dominated by technology. We continue to need the duties test, in combination with an updated and realistic salary test, to protect many American workers from excessive overtime.

Bonus test

Current law requires employers to include "non-discretionary" performance bonuses in the "regular rate of pay" for purposes of calculating overtime. A number of proposed amendments to the FLSA would eliminate this requirement, allowing the employer to pay overtime based on a regular rate that does not include bonus payments, thereby reducing overtime compensation to workers.

These are significant sums of money to many workers, as I've discussed. These workers depend on the 40-hour work week and overtime payments to maintain their standard of living and still have time to care for their families. The last thing they need right now is a Congressionally-mandated pay cut. The ill effects of this amendment are much more insidious and potentially far damaging than this. If employers could exclude bonus payments from overtime pay, they could easily design their compensation systems to avoid paying any premium for overtime work, thereby removing disincentives to work employees over 40 hours per week.

The purported business reasons given for the proposed amendment do not begin to justify this massive wealth transfer from workers to employers. First, proponents claim that under the current system, compensation payments are too difficult to calculate. This contention is wholly specious. Even small businesses have access to computers that can readily make these payroll calculations, which are far less complex than those routinely required to comply with tax, securities and pension laws. And if these calculations are so difficult, why are more employers than ever offering incentive compensation plans to their employees?

Second, proponents claim that current law makes it difficult for employers to give bonuses to salaried employees that are equal to those given hourly employees who work overtime. While this might be true, what is not explained is how this result

could possibly adversely affect productivity for salaried workers. To the contrary, productivity would seem to be enhanced by awarding additional pay to those employees who work more hours. At any rate, this completely speculative effect hardly justifies an amendment that would effectively gut the 40-hour week and slash pay for non-salaried workers who work overtime.

Conclusion

In conclusion, I want to reiterate that workers depend on the wage and overtime protections of the Act. Whether in the form of comp time amendments, bonus exclusions, or relaxing the exemptions, proposal that weaken these protections can only wreak havoc on those who depend on their hourly wages to support their families. Workers need more flexibility. But we cannot allow it to come at the expense of pay, and, as I hope I have shown, employers who are truly committed to providing flexibility to their workers do not need to extract such a sacrifice from them.

APPENDIX G – SUBMITTED FOR THE RECORD, STATEMENT OF CONGRESSMAN DENNIS KUCINICH, COMMITTEE ON EDUCATION AND THE WORKFORCE

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"Flexibility in the Workplace: Does the Fair Labor Standards Act Accomodate Today's Workers?
Statement of Rep. Dennis Kucinich
March 6, 2002

The provisions of the Fair Labor Standards Act (FLSA) pertaining to work hours have, for more than half a century, protected American workers from exploitation while allowing employers some measure of flexibility in dealing with their workforces. Its requirement of premium pay for hours over forty a week provides an economic incentive for employers to limit the amount of time most hourly employees are required to work. At the same time, employers are able to vary the starting and ending times of work, and to some extent distribute hours as they prefer.

Members of the majority would replace this system with one that provides employees with 1.5 hours of compensatory time for every hour an employee works over forty. Previous proposals have also sought to replace the 40-hour-per-week system with an 80-hour-over-two-weeks system.

These proposals are touted as increasing workplace flexibility. But the advantages conferred are one-sided. While employers are given greater flexibility to determine when and for how long their employees work, the employees themselves are given few options. Workers, under these proposals, are not given a choice between comp time and overtime pay. No protections exist to ensure that accumulated comp time can actually be used at all, let alone at the employee's convenience. Nothing prevents employers from selectively offering comp time.

Like so many other proposals proferred by the majority of this Subcommittee, comp time amendments to the FLSA simply seek to tilt the balance between employer and worker to the side of the employer. This is rather remarkable given that American workers, due to numerous erosions of our labor law and a lack of rigorous enforcement, are already among the least protected in the industrialized world.

Despite existing FLSA protections, American workers currently work more hours than the workers of any other industrialized country - by some studies over a month more per year than during decades past. There exists an almost inexorable demand on U.S. workers to increase their hours, and as a result, both average hours and overtime hours in the United States are rising.

Paradoxically, at the same time a large segment of the American population is unemployed or *under*employed. Studies conducted in the mid-1990s indicate that 4.3 million workers involuntarily hold part-time rather than full-time jobs, and 3 million contingent workers would prefer full-time work. Coupled with the approximately 8 million unemployed Americans, there exist over 15 million workers who would prefer to work more.

Because it will allow employers to squeeze more work out of existing employees rather than hiring new ones, amending the FLSA will only aggravate this maldistribution of work. The Economic Policy Institute estimates that eliminating the overtime disincentive will reduce employment by 1.1% in manaufacturing and 1.8% in nonmanufacturing sectors, for a total of 1.4 million jobs lost. Moreover, the substitution of compensatory time off for overtime pay may reduce the earnings of American workers.

Notwithstanding the FLSA's sixty-year history, this Subcommittee on Workforce Protection continues to waste members' time by entertaining proposals to roll back labor law designed to protect workers. I hope in future hearings the majority will deem actual workforce

protections worthy of discussion.

Thank you, Mr. Chairman.

Dennis J. Kucinich

APPENDIX H – SUBMITTED FOR THE RECORD, LETTER FROM WILLIAM J. KILBERG, P.C., TO CHAIRMAN CHARLIE NORWOOD, MARCH 18, 2002

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March 18, 2002

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The Honorable Charlie Norwood
Chairman, Subcommittee on Workforce Protections
Committee on Education and the Workforce
United States House of Representatives
2181 Rayburn House Office Building
Washington, D.C. 20515

Re: *Hearing on Flexibility in the Workplace: Does the Fair Labor Standards Act Accommodate Today's Workers? (March 6, 2002)*

Dear Mr. Chairman:

I am writing to respond more fully to questions that were raised by Representative Mink at Wednesday's hearing on the Fair Labor Standards Act. Ms. Mink expressed concern that under voluntarily-elected compensatory time off arrangements, as provided for in Representative Biggert's bill, H.R. 1982 ("Working Families Flexibility Act of 2001), employees would be denied the income, Social Security contributions, and other benefits that they presently receive for overtime work. As I mentioned in my testimony, I appreciate Ms. Mink's concerns but believe that they are unfounded.

A "comp time" arrangement is akin to a savings plan whereby employees elect to defer overtime earnings in exchange for the right to take paid time off in the future—in other words, employees voluntarily purchase future time off (something of value to both employees and employers) in exchange for present overtime. Employees are guaranteed the right to take the time off at their convenience, provided they do not unduly disrupt the employer's operations. (In the traditional scenario, the employee takes the cash up front and can save it, as necessary, to cover future unpaid absences, which, unlike "comp time," may or may not be granted by the employer.)

An employee who has elected "comp time" will ultimately be paid, in cash, for all hours accrued—whether at the time the leave is taken or when the hours are "cashed out." Whenever

the employer pays the employee for accrued "comp time," it will make all required contributions, including to Social Security and Medicare. For this reason, employees are just as well off electing "comp time" as they are receiving cash up front. The only benefits "lost" to the employee are those not earned because of the employee's choice to work fewer hours, not because of the employee's choice to use "comp time." The same "loss" would result if the employee was paid in cash for overtime and subsequently took unpaid leave instead of "comp time." And, of course, the employee has gained the significant benefit of additional paid time off to be with his or her family or to attend to other non-work activities, as he or she desires.

Ms. Mink also asked whether employers would pay interest on income deferred in "comp time" arrangements. Again, I understand this concern, but it is my feeling that the sums at issue are too small to justify the tedious burdens involved in making interest calculations; those burdens, by making "comp time" arrangements prohibitively expensive to administer, could defeat the flexibility the law intends to afford. Moreover, employees who voluntarily elect "comp time" in lieu of immediate cash compensation for overtime may benefit in other ways. For example, some employees may receive raises during the period between their accrual and use (or cash out) of "comp time" and will therefore receive more valuable compensation for their overtime than they would have if they had chosen to receive cash compensation up front.

Please let me know if I can provide any further clarification on these issues.

Sincerely,

William J. Kilberg, P.C.

WJK/lsg

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bcc: Randel K. Johnson
Molly Salmi, Esq.

Table of Indexes

WORKPLACE FLEXIBILITY:
OPTIONS FOR PUBLIC SECTOR WORKERS

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

COMMITTEE ON EDUCATION AND
THE WORKFORCE

HOUSE OF REPRESENTATIVES

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Table of Contents

WORKPLACE FLEXIBILITY:

OPTIONS FOR PUBLIC SECTOR WORKERS

Wednesday, May 15, 2002

Subcommittee on Workforce Protections

Committee on Education and the Workforce

U.S. House of Representatives

Washington, D.C.

The Subcommittee met, pursuant to notice, at 11:33 a.m., in Room 2175, Rayburn House Office Building, Hon. Charlie Norwood, Chairman of the Subcommittee, presiding.

Present: Representatives Norwood, Biggert, Isakson, Owens, and Kucinich.

Staff present: Molly McLaughlin Salmi, Professional Staff Member; Christine Roth, Professional Staff Member; Travis McCoy, Legislative Assistant; Ed Gilroy, Director of Workforce Policy; Greg Maurer, Coalitions Director for Workforce Policy; Kevin Smith, Senior Communications Counselor; Heather Valentine, Press Secretary; Patrick Lyden, Professional Staff Member; and, Deborah L. Samantar, Committee Clerk/Intern Coordinator.

Peter Rutledge, Minority Senior Legislative Associate/Labor; Maria Cupril, Minority Legislative Associate/Labor; and, Dan Rawlins, Minority Staff Assistant/Labor.

Chairman Norwood. A quorum being present, the Subcommittee on Workforce Protections will come to order. The Subcommittee is meeting today to hear testimony on the issue of workplace flexibility for employees in the public sector.

Under Rule 12(b) of the Committee rules, any oral opening statements at hearings are limited to the Chairman and the Ranking Minority Member of the Subcommittee. If other Members have statements, they will be included in the record of the hearing. With that, I ask unanimous consent for the hearing record to remain open for 14 days to allow statements and other extraneous material referenced during the hearing to be submitted for the official hearing record.

As I said, the Subcommittee has convened today to examine flexibility in the workplace, specifically to look at options that are available to employees of federal, state, and local governments. I'm going to make a few brief remarks, and then yield the balance of my time to my colleague and Vice Chair of the Subcommittee, Judy Biggert.

I would like first of all to welcome today's witnesses. Some of you have traveled quite a distance to share your views and expertise with the Subcommittee and we truly appreciate your willingness to participate in this process. I would like to take just a moment to recognize one of our panelists, Andy Brantley, who hails from the fine state of Georgia. Andy, we're delighted you're here.

OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Today's hearing is the second in a series of hearings on workplace flexibility. The Subcommittee has already held one in March of this year. The testimony presented at that hearing focused on three important issues.

First, there have been dramatic demographic changes that have occurred in the workplace over the past several decades. Not only has the composition of the workforce changed to include a wider range of workers with more diverse needs, but also the nature and the structure of the jobs.

Second, what matters most to workers today is the ability to balance work and family. There have been several recent studies showing that a significant percentage of working adults are very concerned about being able to spend more time with their families. In fact, many workers would prefer time to money. Workers want options that will allow them to make choices about spending more time with their families or pursuing interests outside of work.

Third, we heard from experts about the legal problems that private sector employees face when they attempt to respond to employee demands for greater flexibility. Clearly, the Fair Labor Standards Act, which is the primary federal law governing hours of work, fails to provide private sector workers with what they need and expect to have in terms of workplace flexibility. This may or may not be as significant an issue for those in the public sector, particularly those in the Federal Government, because as we will hear from our witnesses today, current law already allows for increased flexibility in the public sector.

I would now like to yield the balance of my time to my colleague, Judy Biggert, for any remarks that she might wish to make.

WRITTEN OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE – SEE APPENDIX A

OPENING STATEMENT OF VICE CHAIR JUDY BIGGERT, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EUDCATION AND THE WORKFORCE

Thank you, Mr. Chairman. Thanks so much for yielding me the time, and many thanks for revisiting an issue that means a lot to the working men and working women of America.

At the first hearing on workplace flexibility, we heard about the changes in job structure, workforce diversity, and education that have significant implications for workplace policies.

As the Chairman noted, workers today have different needs and want more flexibility and choices in their work schedule. Without question, one of the most important changes has been the increase in the number of women, especially mothers, who work outside the home. With all of these changes has come an increased pressure that many working parents feel in trying to balance the needs and demands of their family and their work.

We'll hear today about the public sector's lengthy track record with respect to comp time and other flexible work schedules. Since 1978, the Federal Government has had a variety of options for the federal workforce. In addition, we now have nearly two decades of experience with state and local government use of compensatory time.

I think that our witnesses will attest to the popularity of programs such as comp time that allow for some degree of workplace flexibility. Of course, the concept behind comp time is simple. If workers have to work overtime, they should be allowed to choose how they want to be compensated - with more money or more time off. For some, time can be more valuable than money and most workers just want to be able to make the choices for themselves.

So thank you, Mr. Chairman, and I look forward to working with you and others to ensure that private sector workers are permitted the same degree of flexibility under the law as their public sector counterparts.

WRITTEN OPENING STATEMENT OF VICE CHAIR JUDY BIGGERT, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE – SEE APPENDIX B

Chairman Norwood. Thank you, Mrs. Biggert.

It is now my pleasure to yield to the distinguished Ranking Minority Member, Mr. Owens, for whatever opening statement he may wish to make. Mr. Owens.

OPENING STATEMENT OF RANKING MEMBER MAJOR R. OWENS, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Thank you, Mr. Chairman. I, too, want to extend my welcome to the witnesses. I look forward to your testimony.

Proponents of comp time legislation have long contended that, because comp time works well in the public sector, it should be extended to the private sector workers. It is important to note, however, that the Congress did not extend comp time for the benefit of public employees, but to reduce overtime costs for state and local governments.

Reducing overtime costs in the private sector results in the scheduling of more overtime and the hiring of fewer workers. As a consequence, the proponents of extending comp time are arguing that we do so not on the basis of saving cost to private sector employers, but to benefit private sector employees.

While comp time generally works well in the public sector, the areas of litigation that have arisen around public sector comp time raise serious concerns about extending comp time to the private sector. For example, if comp time is to be equivalent to overtime, then earned comp time should belong to employees to be used at their discretion. Much of the litigation around public sector comp time, however, has been concerned with the extent to which employers may require employees to use comp time, which the courts have said they generally may do, or prevent employees from using comp time, which the courts have said they generally may not do.

In the private sector, which is much less regulated, and where an employer stands to directly profit depending on how comp time is used, protecting the ability of workers to control their comp time is potentially a much more difficult proposition. As importantly, there are obvious structural differences between the public sector and the private sector indicating that it may be substantially harder to fairly operate a comp time system in the private sector.

First, the public sector is much more highly organized. Unions represent more than 40 percent of public sector workers, while less than 15 percent of private sector workers are represented by unions. Even where unions do not represent public employees, Civil Service laws that provide just cause standards of discharge and discipline often protect them.

By contrast, more than 85 percent of private sector employees are at-will employees who may be discharged or disciplined for almost any reason, or no reason at all. In addition, unlike a private sector employer, public managers are unlikely to directly personally profit by evading their employees' overtime pay requirements and public employers are far less likely to go into bankruptcy.

I do not mean to imply that this is not an important hearing. We are responsible for the comp time laws in relation to state and local workers, and it is important that we understand how those laws are working. I'm also not certain that there are not lessons to be drawn from the public sector experience. However, I strongly disagree with the simplistic notion that because comp time works in the public sector, it will automatically work in the private sector. The differences between the public and private sector are real and they are significant.

Far from benefiting workers, extending comp time to the private sector is likely to undermine overtime pay, increase overtime violations, and result in workers working longer hours for less money and with less time off.

I yield back the balance of my time.

Chairman Norwood. Thank you very much, Mr. Owens.

I'd like to introduce our panel of witnesses now.

We will begin this morning with Mr. Donald Winstead, the Acting Associate Director for Compensation Administration at the U. S. Office of Personnel Management. Thank you for being here. Secondly, Mr. Andy Brantley, Associate Vice President for Human Resources, the University of Georgia. I was going to say, Andy, that at least the two of us know where Bogart, Georgia is, but I see Mr. Isakson has arrived, so now I know that there are three of us here who know where Bogart, Georgia is. Next, we're happy to have with us Mr. Thomas Anderson, Human Resources Director for Fort Bend County, Texas. We appreciate your long trip to spend time with us, Mr. Anderson. And finally we have Mr. Dennis Slocumb, Executive Vice President, International Union of Police Associations, AFL-CIO. Mr. Slocumb, thank you, sir, for spending your time with us this morning.

Before the witnesses begin, I would like to remind the Members of the Subcommittee that questioning the witnesses will be permitted after the entire panel has testified. In addition, Committee Rule 2 imposes a five-minute limit on all questions. However, it doesn't impose how many rounds we can have, so we'll decide on that as we go.

In front of you is a timer with lights. It shows you the green, caution, and red. We would ask that if you can, try to stay within the time limit. I'm not too heavy on the gavel with witnesses, only with Members of Congress, but if you can stay with that time frame, we would appreciate it.

Mr. Winstead, we would like to start with you, please.

STATEMENT OF DONALD J. WINSTEAD, ACTING ASSOCIATE DIRECTOR FOR WORKFORCE COMPENSATION AND PERFORMANCE, U. S. OFFICE OF PERSONNEL MANAGEMENT, WASHINGTON, D.C.

Mr. Chairman and Members of the Subcommittee, good morning. My name is Don Winstead. I am the Acting Associate Director for Workforce Compensation and Performance for the Office of Personnel Management. Among my duties is management of the Federal Government's pay and leave administration programs, including flexible and compressed work schedules.

I appreciate the opportunity to appear before you today to discuss two important work scheduling options available in the federal workplace -- flexible work schedules and compressed work schedules. Under Title V, United States Code, a "flexible work schedule" includes designated core hours and days when an employee must be present for work, and designated hours during which an employee may elect to work in order to complete the employee's basic non-overtime work requirement. A "compressed work schedule" is a schedule under which an employee's basic work requirement for each two-week pay period is scheduled by the agency for fewer than 10 workdays. Compressed work schedules are always fixed schedules. These two options are often jointly referred to as alternative work schedules, or AWS.

I will first provide a short legislative history of these options, and then discuss the extent to which they are actually being used in the federal workplace. I will conclude by discussing a few of the nuts and bolts about how these programs are implemented.

The genesis of the AWS program goes back to 1974, when the General Accounting Office recommended that the hours of work and premium pay provisions of Title V and the Fair Labor Standards Act be amended to permit alternatives to the basic eight-hour workday and 40-hour workweek.

In 1978, Congress enacted the Flexible and Compressed Work Schedules Act. The three-year experiment established by this Act eventually included more than 1,500 organizations with over 325,000 employees. It covered the entire spectrum of federal agencies and activities. Generally, the experiments were well received by employees and produced positive results.

In 1982, Congress extended AWS experiments for three more years. This legislation provided that agencies would have 90 days to review and terminate existing schedules that had an "adverse agency impact." This was defined as a reduction in productivity, a drop in services to the public, or increased agency costs. In addition, the law provided that employees in a bargaining unit would be covered by AWS programs, only to the extent expressly provided for under a collective bargaining agreement. These AWS programs were made permanent in 1985.

Today, AWS programs are widely used and are an important fixture in the federal workplace. A 1998 survey conducted by OPM found that 92 percent of federal agencies reported offering flexible work schedules, and 79 percent reported offering compressed work schedules. Seventeen percent of federal employees reported using flexible work schedules, and another 17

percent reported using compressed work schedules.

Under current law and regulation, the option to establish an AWS program is at the discretion of the agency. This discretion is subject to the obligation to negotiate with the exclusive representatives of bargaining unit employees. The authority to suspend the premium pay and scheduling provisions of Title V, United States Code, and the overtime provisions of the FLSA, applies only to organizational units participating in an AWS program. All other provisions of Title V and the FLSA remain in effect for non-participating organizations.

For employees under flexible work schedule programs, overtime hours are all hours of work in excess of eight hours in a day or 40 hours in a week, which are officially ordered in advance by management. The requirement that overtime hours be officially ordered in advance also applies to non-exempt employees under the FLSA. Agency AWS plans may also provide for "compensatory time off." This is time off on an hour-for-hour basis in lieu of overtime pay.

For employees under flexible work schedules, the overtime hours of work may be regularly scheduled or irregular or occasional. Under a flexible work schedule, any agency may grant compensatory time off in lieu of overtime pay at the request of the employee, including prevailing rate employees and FLSA non-exempt employees. Compensatory time off in lieu of overtime pay may not be required for any prevailing rate employee, any FLSA non-exempt employee, or any FLSA exempt employee whose rate of basic pay is equal to or less than the maximum rate for Grade 10 of the General Schedule.

That, in a nutshell, is how alternative work schedules are administered in the Federal Government. The AWS program generally is considered to be a successful program, and is a key component of the Federal Government's strategic rewards environment.

This concludes my remarks, and I would be happy to answer any questions.

WRITTEN STATEMENT OF DONALD J. WINSTEAD, ACTING ASSOCIATE DIRECTOR FOR WORKFORCE COMPENSATION AND PERFORMANCE, U.S. OFFICE OF PERSONNEL MANAGEMENT, WASHINGTON, D.C. – SEE APPENDIX C

Chairman Norwood. Thank you very much, Mr. Winstead.

Mr. Brantley, you are recognized now for five minutes.

STATEMENT OF ANDY BRANTLEY, ASSOCIATE VICE PRESIDENT FOR HUMAN RESOURCES, UNIVERSITY OF GEORGIA, ATHENS, GA, TESTIFYING ON BEHALF OF THE COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES (CUPA-HR)

Good morning, Mr. Chairman and Members of the Subcommittee. Thanks for allowing me the opportunity to be here.

Before my arrival at the University of Georgia in January of 2001, I was the Assistant Vice President for Business Administration and Director of Human Resources at Davidson College, a private liberal arts college just outside of Charlotte, North Carolina. I am here today on behalf of the College and University Professional Association for Human Resources (CUPA-HR).

CUPA-HR is the professional association representing nearly 6,500 human resource professionals at public and private universities and colleges across the country. The Association works and is committed to the development of high-quality professional human resources programs on our college and university campuses. I am currently the Immediate Past President of the Association.

Representing both public and private colleges and universities, CUPA-HR is in a unique position to discuss the use of compensatory time in the public sector and its possible application for use in the private sector. We applaud the Chairman and the Committee for holding this hearing and also applaud the leadership of Vice Chair Judy Biggert, Chairman Charlie Norwood, and other Members of the Committee.

As an entity, higher education institutions are extremely complex organizations. They may be comprised of teaching hospitals, research facilities, agricultural operations, and more, all of which complement extensive, diverse academic program offerings. As a result, colleges and universities are not only the largest employers in many communities, but frequently the largest employers in states, and also employ a wide diversity of workforce skills among faculty and staff.

To meet the diverse needs of our colleges and universities, we strive to offer competitive benefits to our employees, and we also sponsor a number of work-life programs. Being very comprehensive organizations, colleges and universities realize that we need to be flexible and that we need to provide workplaces that are flexible for our employees.

The University of Georgia was chartered in 1785 and has an enrollment of over 32,000 students. As a comprehensive land grant and sea-grant institution, we offer numerous baccalaureate, masters, doctoral, and professional degrees. More than 17,000 faculty, staff, and students are run through our payroll on any given month. Our workforce, as I mentioned, is very diverse and our employees have diverse needs. We are most definitely the largest employer in Athens, Georgia and one of the largest employers in the state of Georgia.

As UGA's chief Human Resources Officer, I am pleased that we offer the option of comp time for our employees. As a public employer, the University of Georgia has the opportunity to

provide compensatory time for any of our employees that choose to work overtime during a given week. According to university staff, compensatory time is very, very valued on our campus.

While employees have used comp time in the past to deal with such issues as family crises, more often than not, our non-exempt employees at the university use comp time to meet everyday challenges presented in balancing work and family issues. One employee on our campus who works in the College of Veterinary Medicine provided a recent example of how she uses comp time to meet her needs. The employee uses comp time to run little errands and do things that help her meet the needs of her young child. Although a visit to the doctor's office can be brief, there are also times when this employee would prefer to preserve her leave time and utilize the comp time for those one-to-two hours where she's away from the office.

In 1996, the city of Atlanta hosted the Olympics. Several Olympic events were held in Athens, Georgia. Many of our employees, unfortunately, had to spend several days where they were not allowed to work. Through the work of our staff counsel and executives across the campus, we utilized the ability to accumulate comp time so that our employees could utilize that time during the Olympics when the campus was closed, a very, very valuable benefit to our employees.

While these demonstrate our flexibility at the University of Georgia, when I was at Davidson College, it was a different story. Examples include our admissions office staff, which frequently works significant numbers of hours during December and January with no hope of compensatory time during the slow times in late spring. We gladly paid those individuals overtime. However, comp time was an issue that they valued more.

During calendar year 2000, an extremely hard-working employee at Davidson College was diagnosed with terminal cancer. Had he been allowed to accumulate comp time in his very busy job, he would have been allowed to remain in a full pay status for a much longer period of time than he was able to do as he fought his illness. These are just a sampling of situations that occur on private college campuses every week.

As Associate VP for HR at UGA, offering employees the choice of comp time is something that we value very much. It is not without its issues. Keeping track of comp time is not always an easy task, but it's one that we feel is essential in providing this flexibility to our employees.

Mr. Chairman, thank you again for the opportunity. I look forward to answering any questions from the Committee.

WRITTEN STATEMENT OF ANDY BRANTLEY, ASSOCIATE VICE PRESIDENT FOR HUMAN RESOURCES, UNIVERSITY OF GEORGIA, ATHENS, GA, TESTIFYING ON BEHALF OF THE COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES (CUPA-HR) – SEE APPENDIX D

Chairman Norwood. Thank you, Mr. Brantley, very much.

Mr. Anderson, you are now recognized for five minutes.

STATEMENT OF THOMAS M. ANDERSON, JD, SPHR, HUMAN RESOURCES DIRECTOR, FORT BEND COUNTY, ROSENBERG, TX, TESTIFYING ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT (SHRM)

Thank you. Good morning, Chairman Norwood and distinguished Members of the Subcommittee. I appreciate the opportunity to speak with the Committee today.

My name is Tom Anderson. I'm the Human Resources Director for Fort Bend County in the State of Texas. I'm testifying this morning on behalf of the Society for Human Resource Management, an organization of over 165,000 HR professionals.

I have served the human resource profession for over 25 years, in both the public and private sector. I'm also a certified mediator, attorney, and I'm proud to share with the Subcommittee that Governor Perry has recently appointed me as a Commissioner to the Texas Commission on Human Rights. Given that I have served both the public and the private sectors of our nation's workforce, I believe that I will provide the Subcommittee with a unique perspective on today's topic.

In 1978, Congress passed the Federal Employees Flexible and Compressed Work Schedules Act, acknowledging the fact that the flexible work schedules would provide an essential benefit for federal employees by allowing a choice between compensatory time off and overtime pay. This program was made permanent in 1985 and extended to state and local agencies and their employees.

It is troubling that the Federal Government has not extended this same benefit to hard-working private sector employees who contribute equally to this nation's workforce and economy. In light of the Federal Government's inaction, two states, Michigan and Washington, have recognized the importance of granting compensatory time off not only to public sector employees but also to those working in private industry. The state of Rhode Island currently has a proposal pending before its state legislature.

SHRM commends Representative Judy Biggert for reintroducing the Working Families Flexibility Act as H.R. 1982. This legislation amends the Fair Labor Standards Act to allow employers to offer voluntary compensatory time off programs to their non-exempt employees. As the composition of our workforce continues to change and as the desires or needs of the American family continue to change, now more than ever working men and women require flexibility to

manage work/family responsibilities. H.R. 1982 is the vehicle that will provide it.

There is no reasonable explanation why the Federal Government has, for nearly 20 years, denied private sector employees the right to voluntarily accrue compensatory time off. Mr. Chairman, I'd like to specifically comment on the structure of the Fort Bend County compensatory time off program and share with you some of the benefits in administering the program, such as what we have in our workplace.

It is the policy of Fort Bend County that non-exempt employees are eligible to accrue compensatory time off in lieu of overtime pay. There are, however, some job functions for which the policy makes exemptions and allows those employees working within those specific job classifications to either choose overtime pay or compensatory time off. There are still other non-exempt employees that receive only overtime pay at a rate of time-and-a-half their regular rate of pay for overtime hours worked.

Most non-exempt employees of Fort Bend County are eligible to accrue up to 240 hours of comp time. Should an employee accrue more than 240 hours, he or she will then be compensated at one-and-a-half times their regular rate of pay. As the Fair Labor Standards Act specifies, law enforcement officials may accrue up to 480 hours of comp time. This policy has been in place for seven years, and continues to be widely accepted and considered a pro-active benefit among most of the employees of Fort Bend County. Accrual of comp time has been very positive for county employees because it allows employees and managers to work out time off in a regular and reasonable manner, just like any other scheduled time off vacation and certain scheduled sick leave, sick time.

Although there is no immediate up front cost to the employer, there is a possibility of unfunded liability. Unfunded liability could occur at a point when the employee terminates employment with the employer. Under the FLSA, any unused comp time is then cashed out at the wage level in which the employee was being compensated upon termination, or the average of the previous three years' wages, whichever is higher. This is problematic in a situation in which an employee accrued comp time at a lower hourly rate but may be compensated at one-and-a-half times their ending rate of pay, which may be higher. However, comp time cash out provision can be handled like overtime payments. Thus, an employer should be able to account for compensatory time off accruals in his budgets, based on what is legally permissible.

In general, my observation is that comp time provides for a governmental entity and what it could do for private sector employers is that it is a consistent and effective means by which an employer can provide the flexibility in the workplace necessary to assist their employees with work/life balance. Comp time is a benefit to employees for employees. For example, an employee who has 24 hours of banked comp time and would like to utilize eight hours of that time has the flexibility and the option to use that comp time as a paid time off to attend a child's school activity, close on a home, tend to sick relatives, or other personal activities. Those are examples of things that have happened even in Fort Bend County.

On the other hand, there may be occasions where the employee opts for overtime pay. The point is, at the present time, public employees have that choice and private sector employees do not

have the same or similar options. While it is true that employers ultimately decide when an employee may take time off from work, these situations exist. They exist already, whether it involves any missed work from vacation request or rescheduling of work hours.

There will be, for example, incidents where an employee requests to use comp time while one employee is off work sick, another is on vacation. In a small department, this is likely to be considered a circumstance where the request for taking comp time would unduly disrupt the workplace and consequently, denial of the time off would be appropriate. However, from my experience, most employees understand that scenario and would not contest the supervisor's denial of the comp time request. Most situations of comp time requests made by employees have been satisfactorily resolved within a reasonable period between employees and their supervisors, using seniority or other neutral criteria.

Now more than ever, employees are in need of increased flexibility. Comp time goes a long way in making this necessity a reality for many public sector employees. For private sector employees, it serves to complement benefits offered under other federal laws, such as FLMA.

Finally, I cannot speak for all employees or employers, but I have found that many private sector employees are perplexed by the fact that they do not have the same options to choose between compensatory time off and overtime pay. The fact that many employers are supportive of the comp time provision only adds to this misunderstanding.

The Federal Government should permit private sector employees to make responsible decisions in electing between paid time off or cash payments for overtime work. Employees should be allowed to make work/life choices that make sense to themselves as employees and that make sense to their families. It is a question of freedom to choose at no cost to the employer -- an employee's choice, Mr. Chairman.

Mr. Chairman, this concludes my formal remarks to the Subcommittee. Thank you for the opportunity to appear before you today, and I'll be pleased to answer any questions that you or the other Members of the Subcommittee may have for me. Thank you.

WRITTEN STATEMENT OF THOMAS M. ANDERSON, JD, SPHR, HUMAN RESOURCES DIRECTOR, FORT BEND COUNTY, ROSENBERG, TX, TESTIFYING ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT (SHRM) – SEE APPENDIX E

Chairman Norwood. Mr. Slocumb, you are now recognized, sir.

STATEMENT OF DENNIS SLOCUMB, EXECUTIVE VICE PRESIDENT AND LEGISLATIVE DIRECTOR, THE INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO, (I.U.P.A.), ALEXANDRIA, VA

Thank you, Mr. Chairman and Subcommittee Members. I'm Dennis Slocumb, the Executive Vice President of the International Union of Police Associations. I'm glad to be here today to talk about the use of compensatory time in the law enforcement arena. It's an extremely important issue, both to the law enforcement officers and to the agencies that employ them.

I'm here today after 32 years of service in the Los Angeles County Sheriff's Department. During that time, I worked virtually every job, from a patrol officer in south central Los Angeles to a criminal investigator and kidnap specialist. I retired from the Sheriff's Department, after 32 years of service, as a Detective Lieutenant.

Our organization, I.U.P.A., is the fastest-growing and most active law enforcement association in the United States. Our affiliates represent law enforcement in many of the largest departments in the country -- Los Angeles, Houston, Dallas, Boston, Milwaukee; and here in Washington, D.C., we represent the Uniform Secret Service officers as well as the police at National and Dulles Airports.

Law enforcement is a stress-filled job. One of the many problems facing working police officers today is the need for some control over their personal schedules. The pressure of more police working longer hours on rotating shifts in undermanned departments is intense. The job is underpaid and it's rough on family life. Many of our officers are working two jobs to get by. They work hard, often alone, and whether they're responding to two men in body armor spraying a neighborhood in North Hollywood with machine guns or running into a tower full of fire or jet fuel and Americans, they are our very last line of defense. They die, sometimes young, in heroic efforts, but frequently, quietly and alone, a few years into a long-anticipated retirement.

The University of Iowa conducted a study in 1998 published in the Journal of Occupational and Environmental Medicine which found that public safety officers have more than twice the risk for heart disease, hypertension, stroke, and other cardiovascular ailments.

Our department members want and need and appreciate the comp time provisions of the FLSA. It allows them time for family, relief of stress, a PTA meeting, or a ball game with their kids. It's important to their survival. As you support law enforcement professionals, it could not be more important that the provisions of the FLSA allowing compensatory time be maintained, improved, and rigorously enforced.

One of the most important programs I.U.P.A. provides is the monitoring and enforcement of the provisions of the Fair Labor Standards Act. In the documents that I provided to the Committee, we explain our auditing procedures and enforcement system. Our general counsel, Mike Leibig, appeared and argued each of the three public sector cases heard by the Supreme Court since 1985. We've provided counsel in over 28 federal cases to ensure that where problems are

found, enforcement action follows.

But in contrast with all of that auditing and court cases, more than 90 percent of the employing agencies with whom we have members are in compliance with the FLSA comp time provisions, which makes one thing quite clear. Our members need compensatory time, and the agencies that employ them benefit. Where problems have arisen, the Department of Labor and the courts have been open to enforcement.

During the 1985 Fair Labor Standards Act hearings on public sector amendments, the final version of comp time was supported by the National Association of Counties, National Public Employer Relations Association, U.S. Conference of Mayors, National League of Cities, National Conference of State Legislatures, our organization, NAPO, the firefighters, and the AFL-CIO. It was popular then and it's valuable and popular today.

All of this is not to say that there are no problems in the use of compensatory time in the public sector, but these problems have been limited, in large part to three issues. They're detailed in my written testimony, but they include employer forced time off; employer refusal to allow access to the use of accrued compensatory time; and ambiguity about the appropriate remedy when an employer has been found to have violated compensatory time provisions. Any effort to expand the availability of compensatory time to the private sector would need to correct the problems that have arisen in the public sector and some others specific to the private sector, which are in my written testimony.

However, the use of compensatory time in the private sector seems still to be substantially a different consideration. Public employees have contractual, Constitutional, and Civil Service protections not generally afforded private employees. We can challenge abuses within the context of those protections, whereas private employees who are employed at will cannot.

In 1985, then Governor Ashcroft recognized that state and local governments are qualitatively different in structure and function from private business and that public employees serve under exceptional circumstances. He defined the most significant characteristic of that as the protection that public employees receive because they work for the government.

Thank you very much, sir.

WRITTEN STATEMENT OF DENNIS SLOCUMB, EXECUTIVE VICE PRESIDENT AND LEGISLATIVE DIRECTOR, THE INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO, (I.U.P.A.), ALEXANDRIA, VA – SEE APPENDIX F

Chairman Norwood. Thank you, Mr. Slocumb. I appreciate your comments. It crossed my mind, as you gave your testimony, that I suppose if NAFTA continues, everybody will be a public employee before we know it, and we'll solve this problem that way.

I'd like to start my questions with my friend from the University of Georgia. Mr. Brantley, why did the University of Georgia come to the realization that it was in everyone's best interest to offer comp time, to have a comp time policy? What caused that?

Mr. Brantley. The University has had a compensatory time policy for a number of years. When the policy was first implemented, it was to provide a balance, as I discussed earlier, and a way for the University to give employees the option of receiving overtime or utilizing that time to preserve leave.

One of the things you may be aware of is, with the University of Georgia system, accumulated sick leave also counts towards service credit. So giving employees the option of utilizing comp time for minor errands or things like that also preserves the sick leave balance, which affects the employees' retirement.

Chairman Norwood. So in your case, and I think most cases, the employee has a choice here?

Mr. Brantley. That is correct.

Chairman Norwood. Do the University officials say you must take time off or you may/may not receive time-and-a-half pay? Explain to me the process that the employee has to go through to actually make this election? Do they do it weekly? Do they do it monthly? How does that work?

Mr. Brantley. We do have a process in place whereby the employee makes it known to the supervisor that he or she would prefer to receive comp time instead of overtime. That allows the employee to accumulate a maximum of 60 hours of compensatory time.

Chairman Norwood. Do they make that selection once a year? How does that work?

Mr. Brantley. It's made until the person revokes it, so it's in effect until that employee indicates otherwise to the supervisor.

Chairman Norwood. Can you revoke it one week and go back to comp time a month later?

Mr. Brantley. I guess theoretically you could, but I do not have experience with employees making those frequent choices.

Chairman Norwood. So employees decide for themselves whether they want time-and-a-half pay or they need more time off; a sick mother, whatever?

Mr. Brantley. That is correct.

Chairman Norwood. How many employees at the University of Georgia take advantage of comp time? What percent?

Mr. Brantley. The comp time policy is distributed among the departments. As I mentioned before, there are over 17,000 employees, and over 10,000 of these are benefit-eligible, so the actual

administration of the compensatory time policy is handled at the department level. I'm not sure of the exact number of employees that choose that.

Chairman Norwood. You don't know exactly how many? Well, just out of curiosity, what would you guess?

Mr. Brantley. I would guess 30 to 40 percent.

Chairman Norwood. And employees at the University of Georgia are very comfortable, and don't have any doubts that this is their decision to choose?

Mr. Brantley. Most definitely.

Chairman Norwood. And they're happy that they have a choice?

Mr. Brantley. That is my opinion.

Chairman Norwood. I think the needs of state employees, as Mr. Slocumb mentioned, and private sector employees are not different. Perhaps this choice would be just as needed by a workforce in the nursing profession, for example, that's under a great deal of difficulty and stress, too.

Andy, do you think this policy that the University of Georgia has helps you retain the most highly talented, qualified people we can possibly get at the University of Georgia?

Mr. Brantley. In my opinion, it does. One of the things that is important for me as the chief human resources officer at the University of Georgia is in years where the state government in Georgia is struggling budgetarily, the provision of benefits like compensatory time, like flexible schedules, or working with employees to look at different options for their work/life needs is a way of recruiting and retaining qualified, highly skilled employees.

Chairman Norwood. What do you think employees do when they don't have this option, but absolutely must take some time off?

Mr. Brantley. They either utilize their sick leave and whittle away at the time that they've accumulated for serious illness, or they have to use their vacation leave to accomplish the things they need to do.

Chairman Norwood. So without a good flex-time/comp time program, people, in my opinion are put in a bad situation where sometimes they have to fudge a little bit because something has come up that is so critical they must take off, but can't afford to lose their jobs.

Mr. Brantley. I agree.

Chairman Norwood. Major Owens, it is your turn.

Mr. Owens. Are there any limits placed on when Fort Bend County employees may use their comp time?

Mr. Anderson. Yes, sir. It's like any other leave provision. It does need to be coordinated with the individual department's supervisors.

Mr. Owens. Is that negotiated or coordinated?

Mr. Anderson. Well, they're non-union. They're not represented employees in Fort Bend County, so those decisions are handled pretty much like any other leave period that may be asked for such as vacation, or scheduled sick leave as a result of an operation.

Mr. Owens. Is there a cut-off point at which accumulated leave must be utilized?

Mr. Anderson. Yes, the Fair Labor Standards Act requirement is 240 hours and 480 hours for law enforcement employees. There are some departments that I mentioned in my testimony that only get paid for overtime, and there are one or two other departments that do have a choice.

Mr. Owens. Mr. Brantley, at the University of Georgia, are there requirements that workers must use accumulated overtime?

Mr. Brantley. Our policy indicates that a person may accumulate no more than 60 hours of compensatory time. If that time is not utilized by the end of the subsequent quarter in which that time is accumulated, they must be paid overtime. So as you see, we're much more conservative then the current law allows.

Mr. Owens. Does the employee have some choice in negotiating?

Mr. Brantley. Yes. I mean, obviously, business needs have to be considered. Someone in the registrar's office probably would not be allowed to use comp time the day before graduation.

Mr. Owens. Mr. Winstead, you stated that comp time is only provided at the choice of the employee. How is employee choice protected? Is it union protected? What allows the employee to have that choice?

Mr. Winstead. In the Federal Government, compensatory time is the choice of the employee for those who are below a certain grade level or those who are covered by the overtime pay provisions of the Fair Labor Standards Act. Those employees do have an opportunity to choose whether they will receive overtime or compensatory time off.

For certain higher-graded employees, or employees who are not covered by the Fair Labor Standards Act, the agency does have the authority to pay compensatory time off in lieu of overtime pay at the agency's discretion.

Mr. Owens. While employees are supposed to be protected from being required to take comp time instead of overtime pay, I've heard complaints from federal workers that their supervisors will only

assign overtime to workers who agree to take comp time instead of pay. Such practices would undermine choice.

Is this lawful, and if so, how common is this? If it isn't lawful, what is done to make certain that such practices don't occur?

Mr. Winstead. As I mentioned, for certain higher-graded employees and for employees not covered by the Fair Labor Standards Act, the agency does have the authority to compensate the employee through compensatory time off instead of overtime pay.

We have not heard complaints from federal employees at the Office of Personnel Management about agencies' practices regarding the use of compensatory time off under those circumstances for higher-graded employees. The lower-graded employees do have the choice as to whether they use compensatory time off or overtime pay.

Mr. Owens. I have one last question. Is it true that the employees above GS-10 who earn additional pay for overtime work are not necessarily compensated at the same 1.5 of their regular pay?

Mr. Winstead. That's correct. Under the federal overtime pay law that applies to higher-graded employees who are not covered by the Fair Labor Standards Act, the overtime pay is limited to 1.5 times the rate for a GS-10 Step 1, and for employees above the top rate for a GS-10 and at the higher grades, in many cases, they perform overtime work and receive less than 1.5 times their regular rate of pay for that work.

Mr. Owens. Who sets the rate?

Mr. Winstead. The Congress set the rate in the statute that governs overtime pay for federal employees.

Mr. Owens. Thank you.

Chairman Norwood. Thank you, Mr. Owens.

Mrs. Biggert, you are now recognized.

Mrs. Biggert. Thank you, Mr. Chairman.

Mr. Winstead, in your testimony you noted that 17 percent of federal employees reported using a compressed work schedule and 17 percent reported using a flexible work schedule. Has OPM conducted any employee satisfaction surveys on the alternative work schedules?

Mr. Winstead. In that same survey that was conducted in 1998, which reported the percentages that you referred to here, we did ask employees about their satisfaction with those programs, and by and large, employees said that they were very satisfied with those flexible and compressed work

schedules programs.

Mrs. Biggert. You also mentioned that under current law and regulation, the option to establish the alternative work schedule is at the discretion of the employer, or the agency head. Do you know how many agencies have made a decision not to offer comp time or flexible schedule?

Mr. Winstead. In terms of the actual number of agencies, I don't know that. The same study that we did back in 1998 indicated that 92 percent of federal agencies have used or are using flexible work schedules and 79 percent are using compressed work schedules.

Mrs. Biggert. Can an agency decide to offer certain divisions those opportunities, and not other divisions?

Mr. Winstead. Yes, it can be approved for certain organizational units of an agency and not others.

Mrs. Biggert. Going back to something that Mr. Owens said about the hour-for-hour instead of an hour-and-a-half for each hour of overtime worked, do employees take advantage of the option, even though it's hour-for-hour rather than the hour-and-a-half?

Mr. Winstead. Yes, they do. In fact, the compensatory time provisions that apply to federal employees pre-date the Flexible and Compressed Work Schedules Act of 1978. The current provisions go all the way back to 1946. So those provisions have been in effect in the federal workforce for many, many years, and federal employees have used them extensively. I don't happen to have with me any statistics regarding the use of compensatory time off, but I do know that it is a widely used program.

Mrs. Biggert. Thank you.

Mr. Slocumb, I assume that there are collective bargaining groups within the police I.U.P.A.?

Mr. Slocumb. Yes, ma'am.

Mrs. Biggert. Is the flexible time schedule or any alternative within the bargaining agreement, or is this just because it's provided by statute?

Mr. Slocumb. Well, the Fair Labor Standards Act provides it. There are compressed schedules and those types of things that are subject to collective bargaining in those venues that have collective bargaining.

Mrs. Biggert. So someone in that unit would not have it unless it was collectively bargained for even though it's in the statute?

Mr. Slocumb. No, that's not correct. Everyone would have the protections of the Fair Labor Standards Act, whether they have collective bargaining or not.

Mrs. Biggert. Okay. Do you think that it has improved the morale of the police officers?

Mr. Slocumb. Absolutely.

Mrs. Biggert. Okay. You said in your testimony that you were concerned that comp time in the private sector could be used to avoid the overtime premiums. Could you explain that?

Mr. Slocumb. Yes. The issue of comp time, even in the public sector, was never an issue of money or hours; it was an issue of an option for compensation. There still are probably, even in the department I came from, people who drive around the provisions of the Fair Labor Standards Act by having what they call drawer time. It's occurs in those places where people work a substantial amount of overtime and the budget doesn't allow for them to be paid for it. So if they work late tonight they come in late tomorrow, and nothing is written down.

It's an effort agreed upon probably by both parties. Likely it's not because it's the price of working at some of the more sought-after units, that people won't put in for overtime, but the payoff is that management won't watch hours that closely.

Mrs. Biggert. My time is up. Thank you, Mr. Chairman.

Chairman Norwood. Thank you, Mrs. Biggert.

That sounds to me like comp time that's not official.

Mr. Slocumb. Well, that's correct.

Chairman Norwood. I mean that's what they're doing.

Mr. Slocumb. In a way, except there's no option. The option isn't you get time-and-a-half on the books or paid. The option is you work it and you just come in late tomorrow.

Chairman Norwood. Do any of you think there are many people in America today working over 40 hours in a week that are not receiving time-and-a-half?

Mr. Winstead, is that a major problem in the workplace today?

Mr. Winstead. We have heard some complaints from federal employees at higher-grade levels who receive less than time-and-a-half overtime pay.

Chairman Norwood. They don't qualify, do they?

Mr. Winstead. They don't quality for time-and-a-half overtime under the Fair Labor Standards Act, that's correct.

Chairman Norwood. But what about those who qualify under the Fair Labor Standards Act? Do you think that is a major problem in America today?

Mr. Winstead. In the federal workforce, no, it would not be. Employees who are covered by the Fair Labor Standards Act certainly are entitled to time-and-a-half overtime pay.

Chairman Norwood. What do people do if they are forced or asked or made to work 48 hours a week and the employer won't pay them time-and-a-half for those eight hours? I wonder what people do about that today?

Mr. Winstead. In the federal workforce, they can file a claim.

Chairman Norwood. Well what do they do about that in the private sector?

Mr. Winstead. I'm not in a position to address what happens in the private sector.

Chairman Norwood. Has anybody got a thought about that? Mr. Brantley, you were in the private workforce.

Mr. Brantley. I was at Davidson College for six-and-a-half years as the director of HR. Employees there were very meticulous about maintaining time and ensuring that all hours worked were reported. However, my personal feeling is that if we had not accurately reported hours for an employee, that person would have contacted the Department of Labor.

Chairman Norwood. How about it, Mr. Anderson? What do you think? You worked in the private sector too, didn't you?

Mr. Anderson. Yes, I did, but I worked for employers that had organized employees that were unionized, and union officials very meticulously made sure that those things did not occur.

We did have some exempt employees that were also permitted to have overtime, but that was a company decision. I'm not aware of any employer that permits employees to work over 40 hours and not get compensated at time-and-a-half.

Chairman Norwood. Mr. Slocumb?

Mr. Slocumb. We currently have a lawsuit pending in federal court in South Carolina, and our allegation concerns state troopers there are forced to work overtime without compensation.

Chairman Norwood. But that's not the private sector, though. That would be state employees.

Mr. Slocumb. Correct.

Chairman Norwood. I was in the private sector, too, and I made payroll for 25 years. It's my observation there are not many Americans out there today that aren't aware that if they work over 40 hours and aren't compensated with time-and-a-half, that they have to just accept it. They can go

to the Labor Department.

My point in all of this is, if we allow people in the private sector to choose comp time, they would still be aware of the ways to resolve a comp time problem. I am not overly concerned that Americans wouldn't know what to do if they felt they were being cheated in some way, and most employers I know wouldn't need the aggravation. It is easier to pay the time-and-a-half than it is to mess with the Labor Department. At least, that's been my observation.

Mr. Anderson, what caused Fort Bend to come up with the comp time program? How did you make that decision?

Mr. Anderson. I've only been with Fort Bend County for a couple of years, and this was instituted before I got there. I don't know the entire process, other than the fact that the Fair Labor Standards Act allowed the public employers to do it. But they also came up with some variations in a couple of departments, which I mentioned in my presentation, that were applicable to emergency workers. That would be road and bridge, drainage, and EMS. There are some different provisions for them.

We also permit, with the department's concurrence, some exempt employees at one hour for one hour to accumulate comp time. It's more than a de minimus amount of time. It's got to be something substantial. But that's up to individual departments, and that is choice.

Chairman Norwood. Which costs the most, gentleman? I'm talking about your speculations regarding the private sector. Would it cost more to manage this system than it does to actually pay time-and-a-half? Is it somewhat burdensome for the employer to even want to do this, and/or to employ another person to keep up with who's working what hours and so forth?

Mr. Brantley, what do you think about that?

Mr. Brantley. There's no doubt at the University of Georgia that maintaining comp time from a payroll standpoint and also from a departmental standpoint is something that takes time and effort. Whether or not it's a cost that's greater than overtime or less so, I really don't know that I could respond to that. But it's something that does take time, and does take effort.

Chairman Norwood. I'll conclude and turn to Mr. Owens.

However, my point is that it isn't easy for an employer to decide that they want to offer a comp time/flex time system. They have to devote resources to it. My own personal experience is that the reason you do that is because you have happier, more satisfied employees who would love to have the ability to choose. "If I'm going to work overtime, I want time-and-a-half because I have a sick child," or, "I need some time off, because I have a sick mother." I trust the American people to make those decisions.

Mr. Owens, you're now recognized, sir.

Mr. Owens. Mr. Chairman, I'm going to forego a second round, because I have a very important meeting to go to.

Chairman Norwood. I understand. We are delighted that you could spend some time with us. Thank you very much.

Mrs. Biggert.

Mrs. Biggert. Thank you, Mr. Chairman.

Mr. Anderson, in your testimony, you noted special demands on women in the workplace. Based on your observations, how has comp time enabled women to better meet those demands?

Mr. Anderson. Well, certainly, the demographics of the American workforce have changed from the time I was a young Marine Corps officer till I went into the private sector, and now the public sector. For example, more and more women are getting into manufacturing. In my previous job in the private sector, the changes in the workforce composition were dramatic in the period of time that I was in the manufacturing arena.

Women do have special needs. There are some who are single parents, who have responsibility for children. That's an issue. As the workforce ages, in some cases both males and females have older parents, and there are issues involved with taking care of the elderly in their family. Sometimes in that regard, whether it's something that they want or not, women end up taking the responsibility for care, perhaps more often than the males.

But it is important to be able to accommodate those work/life balances, and to take care of those needs. Certainly these responsibilities have fallen significantly on the female workforce, and continue to be the case in the public sector also.

Mrs. Biggert. In your experience, what kinds of things are considered unduly disruptive in the workplace that would prevent employers from granting comp time?

Mr. Anderson. We have 78 departments in Fort Bend County, and some are very large like the sheriff's that has 400 or 500 employees, and some are very small with one or two employees. So the smaller departments, where you might have somebody out sick or out for some other reason, would basically shut down. You can't shut down a particular department just because there aren't enough employees to cover it.

Then there are some special skills that are needed, and if the department doesn't have any of those people there, then that department would in fact shut down, and couldn't provide service to the citizens.

Mrs. Biggert. Thank you.

If you had the opportunity to change the public sector what would be the biggest problem in adding increased flexibility? What would you do? Maybe all of you could briefly respond?

Mr. Winstead?

Mr. Winstead. I'm not really in a position to speak for the administration on that kind of issue. We do look at the programs periodically to see how they are working, and this month we are conducting a government-wide survey of federal employees that will explore a wide variety of issues and gauge their views on many issues, not just this one. We look at those kinds of results and then make decisions about what kinds of changes might be needed, but at the moment, I couldn't speak to that particular question.

Mrs. Biggert. Well, we'll look forward to your report.

Mr. Brantley. In my opinion, the comp time issues that are currently available for public sector employees are already pretty generous. The 240-hour provision is quite generous.

I think the issue would be clarifying the types of opportunities for our employees in terms of utilizing comp time. Sometimes that issue between employer/employee is not clear, and providing that protection for employees and that clarity, if you will, for employees to understand the types of circumstances that comp time can be used for, I think will be beneficial.

Mrs. Biggert. Thank you.

Mr. Anderson?

Mr. Anderson. I think that the reasonable period of time is troubling, to some extent. Obviously, employees and supervisors will sometimes differ as to what is a reasonable time to allow the comp time to be taken.

As I said in my testimony, I think most employees understand that. Small departments and large departments don't have the same issues. I guess maybe in the departments that are kind of in between the big ones and a small ones, it would be also troubling, as far as the employees and the supervisors determining what would be unduly disruptive. So those are the two areas I think that may need some attention.

Mrs. Biggert. Mr. Slocumb?

Mr. Slocumb. There are probably three things.

One is the employer forcing the employee to take compensatory or accrued time off when it's not convenient for the employee.

Chairman Norwood. Mr. Slocumb?

Mr. Slocumb. Yes, sir.

Chairman Norwood. May I interrupt you on that point right there?

Mrs. Biggert, does your bill allow for the employer to force the employee to take compensatory or accrued time off when it's not convenient for the employee?

Mrs. Biggert. No, no, it does not allow that.

Chairman Norwood. Does it speak to that?

Mrs. Biggert. Yes, it does.

Chairman Norwood. So if they did that, it would be illegal?

Mrs. Biggert. Yes.

Mr. Slocumb. Currently, it is not illegal, sir.

Chairman Norwood. In Mrs. Biggert's bill, where we're trying to allow comp time and flex time, if an employer did that, it would be no larger or smaller a crime than not paying time-and-a-half, for which the employee can go to the Labor Department and "raise cain."

Mr. Slocumb. We applaud that provision.

Chairman Norwood. Could you support Mrs. Biggert's bill?

Mr. Slocumb. I haven't read the bill in its entirety and been able to study it, but I would certainly support that provision in it.

Chairman Norwood. Well, we would really love to hear from you about supporting the bill, because, I sense strongly that you represent people that value this greatly, and all we're trying to do is to get it to the other 90 percent of the workforce.

Mr. Slocumb. I understand.

Chairman Norwood. Excuse me for interrupting you, but that was important.

Mr. Slocumb. That's quite all right.

As I was saying, regarding the issue of unduly disruptive, we have a Department of Labor ruling and several court rulings where employers are required to give compensatory time off to an employee, even if it means hiring someone else to work for overtime to replace them.

That's probably the most misunderstood part of it in the law enforcement arena. The department from which I came would deny compensatory time off if they had to hire someone for

overtime, and minimum staffing levels were such that they wouldn't do it. The bulk of our lawsuits have had to do with that notion and the inability of officers to get time off when they needed it.

Believe me, law enforcement and public safety officers do not want time off when anything is going on. I mean, we had policemen arresting firemen at Ground Zero, and in public safety, certainly in law enforcement, the issue is generally trying to get people to leave a scene when they're no longer needed than it is ever to get them there.

Chairman Norwood. There isn't a Member on this Committee that doesn't recognize, appreciate and are grateful to our men and women in blue that do that very thing.

Mrs. Biggert, do you have any other questions?

Mrs. Biggert. Was there one more issue?

Mr. Slocumb. Well, the last one was the ambiguity about remedies, when an employer has been found to violate the provisions of the compensatory section of the FLSA.

Mrs. Biggert. Thank you.

Thank you, Mr. Chairman.

Chairman Norwood. I have two last thoughts, but I want to ask Mr. Anderson about Harris County. You mentioned that in your testimony, I believe. In your experience, have you noticed or do you believe it's common for an employer to demand of an employee that they use comp time versus time-and-a-half?

Mr. Anderson. Well, Harris County is our big brother to the north and I don't have any firsthand knowledge of the county, other than some of my associates from the county.

There may be a time when that's appropriate, but I think that needs to be measured. I know in Representative Biggert's bill, it is not a factor. It's voluntary between the employee and employer. That seems to be reasonable. But in the public sector there may be other demands. When you're talking about taxpayer dollars, there is a need to go ahead and force the employees to take some time off, but that's just my opinion.

Chairman Norwood. Let me summarize this thing.

I have attended I don't know how many hearings on this issue over the last five years, and I have never heard from a public sector witness that came before us that this was a bad idea, even if it was going to cause additional paperwork, additional employees, and so forth. What I have noticed, though, over the last five years, is that everybody who is against this is some way or another connected with the unions, which is 10 percent of the workforce.

Now, my view is that a lot of our workforce is mom-and-pop, and you don't have an adversarial relationship with yourself and four employees. You can't. You have to get along to

make a little business like that work.

What do you think if we simply applied this law to everybody but unions, and let them do what they wanted to do? If they feel that this is such a terrible thing, they ought not to have to do it. Let the other 90 percent of the workforce, the employer and the employee, decide if they want time-and-a-half cash, or they want to have time off?

Does anybody have any thoughts about that?

Mr. Winstead. Mr. Chairman, I would just make the observation that in the Federal Government, in fact, there must be a collective bargaining agreement with the union, who have established a compressed work schedule already, under the current law.

Chairman Norwood. And we wouldn't interfere with that. They could do whatever they needed to do.

Mr. Winstead. I understand.

Chairman Norwood. They can have their collective bargaining, but we would allow the mom-and-pops, the small business owners of the country, and the 90 percent of the people that aren't necessarily unionized to have a break.

Mr. Slocumb, do you have any thoughts about that?

Mr. Slocumb. Only that I would think, coming from the AFL-CIO, that you're describing probably the weakest employees, or the employees with the least access to the courts or the Department of Labor and those types of things.

The lawsuits that we've brought in the public sector were suits where we discovered irregularities in comp time systems that many of the employers didn't even realize were irregularities, so it becomes a matter of education and a matter of access to the courts, and to the Department of Labor.

I would guess a mom-and-pop employee would not have a clue how to access the Department of Labor or to articulate violations of the Fair Labor Standards Act. We've had it since 1985, and I can assure you many of our members were not aware of some of the restrictions or some of the benefits that they had under it.

Chairman Norwood. I agree with you, they probably wouldn't know how to necessarily go hire a lawyer. That was the point I tried to make earlier. All of them know if they work 48 hours a week that they're due time-and-a-half, and in every community, you pick up the telephone and you call the Labor Department. At that point you don't need to know anything else, because the Labor Department picks it up and runs with it. If they know about time-and-a-half, it won't be long before everybody knows that they have comp or flex-time available to them, too, and if they're mistreated, they make a local telephone call.

Mr. Anderson, do you have any thoughts about not involving the unions, and doing what the other 90 percent of the country wants, and giving them some flex-time and comp time? What do you think?

Mr. Anderson. I certainly support that position. I think that the unions are sophisticated. They can make those arguments, whether their membership wants that flexibility or not.

With the small departments, I don't think there's any system that we could devise and I think Representative Biggert's bill goes a long way towards being a good system. But I don't think any system is going to be perfect, and there's going to be problems, but you work out those issues.

Chairman Norwood. Part of this hearing today is for us to learn from you who work with comp time and flex-time in the public sector, what you have experienced over the years having this available to your employees, and what we can put into a bill for public employees to make sure we don't have problems.

Mr. Anderson. When I was in the private sector, there were many occasions when employees wished they had the flexibility; the non-exempt employees wished they had the flexibility to access comp time.

Chairman Norwood. Andy, there is nothing a Congressman likes better than to please everybody. I mean we just love it if we can make everybody happy. Now, if the unions don't want this, let's make them happy and not give it to them. Let's give it to the rest of the country, the 90 percent who have testified here again and again over the last five years that do want it.

What do you think?

Mr. Brantley. Mr. Chairman, my first position out of graduate school was as a labor relations representative for the Chrysler Corporation. My role every day was to work with union and management interpreting and understanding union contacts. I can tell you unequivocally, if union membership wanted this benefit, it would be negotiated as part of their contract.

Chairman Norwood. Right. That's my point. They can get it anyway. What we're doing as the Federal Government is saying to the 90 percent of the workforce, “Sorry, our law won't allow you even the possibility of having it.”

Well, it's been an interesting hearing. You know, hearings are for us to learn, and the four of you have been very generous with your time and very helpful to us simply trying to figure out what's the right thing to do.

I want to thank you all for your travel time and your efforts to be with us today, and unless any of you have one last comment, this Subcommittee now stands adjourned. Thank you, gentlemen.

Whereupon, at 12:42 p.m., the Subcommittee was adjourned.

APPENDIX A - WRITTEN OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

The Honorable Charlie Norwood
Chairman
Subcommittee on Workforce Protections

Hearing on
"Flexibility in the Workplace: Options for Public Sector Employees"

May 15, 2002

We are here today to examine flexibility in the workplace, specifically to look at options that are available to employees of federal, state and local governments. I am going to make a few brief remarks and then yield the balance of my time to my colleague and vice chair of the Subcommittee, Judy Biggert.

I would like to welcome today's witnesses. Some of you have traveled quite a distance to share your views and expertise with the Subcommittee and we appreciate your willingness to participate in this process. I would like to take just a moment and recognize one of our panelists, Andy Brantley, who hails from the fine state of Georgia.

Today's hearing is the second in a series of hearings on workplace flexibility. The Subcommittee has already held one in March of this year. The testimony presented at that hearing focused on three important points. First, there have been dramatic demographic changes that have occurred in the workplace over the past several decades. Not only has the composition of the workforce changed to include a wider range of workers with more diverse needs, but also the nature and structure of jobs.

Second, what matters most to workers today is the ability to balance work and family. There have been several recent studies showing that a significant percentage of working adults are very concerned about spending more time with their families. In fact, many would prefer time over money. Workers want options that will allow them to make choices about spending more time with their families or pursuing interests outside of work.

Third, we heard from experts about the legal problems that private sector employers face when they attempt to respond to employee demands for greater flexibility. Clearly, the Fair Labor Standards Act, which is the primary federal law governing hours of work, fails to provide private sector workers with what they need and expect to have in terms of workplace flexibility.

This may or may not be as significant an issue for those in the public sector, particularly those in the Federal government, because as we will hear from our witnesses, current law already allows for increased flexibility in the public sector. I

now yield the balance of my time to my colleague, Judy Biggert, for any remarks that she wishes to make.

APPENDIX B - WRITTEN OPENING STATEMENT OF VICE CHAIR JUDY BIGGERT, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

The Honorable Judy Biggert
Subcommittee on Workforce Protections
Hearing on
"Flexibility in the Workplace:
Options for Public Sector Employees"

May 15, 2002

Thank you very much for yielding the time to me, Mr. Chairman. I commend you for holding this second hearing on workplace flexibility. I would also like to thank our witnesses for coming today. We know that all of you have busy schedules too and we appreciate that you have taken the time to provide us with your expertise in this area.

At the first hearing on workplace flexibility, we heard about the changes in job structure, workforce diversity, and education that have significant implications for workplace policies. As the Chairman noted, workers today have different needs and want more flexibility and choices in their work schedules. Without question, one of the most important changes has been the increase in the number of women, especially mothers, who work outside the home. With all of these changes has come the increased pressure that many working parents feel in trying to balance the needs and demands of their family and their work.

We will hear today about the public sector's lengthy track record with respect to comp time and other flexible work schedules. Since 1978, the Federal government has had a variety of options for the Federal workforce. In addition, we now have nearly two decades of experience with state and local government use of compensatory time.

Our witnesses will attest to the popularity of programs such as comp time, that allow for some degree of workplace flexibility. Of course, the concept behind comp time is simple: if workers have to work overtime, they should be allowed to choose how they want to be compensated – with more money or more time off. For some, time can be more valuable than money and most workers just want to be able to make the choice for themselves.

Thank you Mr. Chairman and I look forward to working with you and others to ensure that private sector workers are permitted the same degree of flexibility under the law as their public sector counterparts.

APPENDIX C - WRITTEN STATEMENT OF DONALD J. WINSTEAD, ACTING ASSOCIATE DIRECTOR FOR WORKFORCE COMPENSATION AND PERFORMANCE, U.S. OFFICE OF PERSONNEL MANAGEMENT, WASHINGTON, D.C.

STATEMENT OF DONALD J. WINSTEAD
ASSISTANT DIRECTOR FOR COMPENSATION ADMINISTRATION
OFFICE OF PERSONNEL MANAGEMENT

BEFORE THE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
COMMITTEE ON EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
ON
WORKFORCE FLEXIBILITY: OPTIONS FOR PUBLIC SECTOR WORKERS

MAY 15, 2002

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

GOOD MORNING. I AM DON WINSTEAD. I AM THE ACTING ASSOCIATE DIRECTOR FOR WORKFORCE COMPENSATION AND PERFORMANCE FOR THE OFFICE OF PERSONNEL MANAGEMENT (OPM). AMONG MY DUTIES IS MANAGEMENT OF THE FEDERAL GOVERNMENT'S PAY AND LEAVE ADMINISTRATION PROGRAMS, INCLUDING FLEXIBLE AND COMPRESSED WORK SCHEDULES.

I APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY TO DISCUSS TWO IMPORTANT WORK SCHEDULING OPTIONS AVAILABLE IN THE FEDERAL WORKPLACE -- FLEXIBLE WORK SCHEDULES AND COMPRESSED WORK SCHEDULES. UNDER TITLE 5, UNITED STATES CODE, A "FLEXIBLE WORK SCHEDULE" INCLUDES DESIGNATED CORE HOURS AND DAYS WHEN AN EMPLOYEE MUST BE PRESENT FOR WORK AND DESIGNATED HOURS DURING WHICH AN EMPLOYEE MAY ELECT TO WORK IN ORDER TO COMPLETE THE EMPLOYEE'S BASIC NON-OVERTIME WORK REQUIREMENT. A "COMPRESSED WORK SCHEDULE" IS A SCHEDULE UNDER WHICH AN EMPLOYEE'S BASIC WORK REQUIREMENT FOR EACH 2-WEEK PAY PERIOD IS SCHEDULED BY THE AGENCY FOR FEWER THAN 10 WORKDAYS. COMPRESSED WORK SCHEDULES ARE ALWAYS FIXED SCHEDULES. THESE TWO OPTIONS ARE OFTEN JOINTLY REFERRED TO AS ALTERNATIVE WORK SCHEDULES (AWS).

I WILL FIRST PROVIDE A SHORT LEGISLATIVE HISTORY OF THESE OPTIONS AND THEN DISCUSS THE EXTENT TO WHICH THEY ARE ACTUALLY BEING USED IN THE FEDERAL WORKPLACE. I WILL CONCLUDE BY DISCUSSING A FEW OF THE NUTS AND BOLTS ABOUT HOW THESE PROGRAMS ARE IMPLEMENTED.

THE GENESIS OF THE AWS PROGRAM DATES BACK TO 1974, WHEN THE GENERAL ACCOUNTING OFFICE RECOMMENDED THAT THE HOURS OF WORK AND PREMIUM PAY PROVISIONS OF TITLE 5 AND THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED (FLSA), BE AMENDED TO PERMIT ALTERNATIVES TO THE BASIC 8-HOUR WORKDAY AND 40-HOUR WORKWEEK. THE CIVIL SERVICE COMMISSION, NOW THE OFFICE OF PERSONNEL MANAGEMENT, SUBSEQUENTLY SUBMITTED LEGISLATION TO ESTABLISH A 3-YEAR GOVERNMENT-WIDE PROGRAM TO PERMIT EXPERIMENTATION WITH FLEXIBLE AND COMPRESSED WORK SCHEDULES. THE LEGISLATION, KNOWN AS THE "FLEXIBLE AND COMPRESSED WORK SCHEDULES ACT," WAS ENACTED AS PUBLIC LAW 95-390 IN SEPTEMBER 1978. THE 3-YEAR EXPERIMENT ESTABLISHED BY THIS ACT EVENTUALLY INCLUDED MORE THAN 1,500 ORGANIZATIONS WITH OVER 325,000 EMPLOYEES. IT COVERED THE ENTIRE SPECTRUM OF FEDERAL AGENCIES AND ACTIVITIES. GENERALLY, THE EXPERIMENTS WERE WELL RECEIVED BY EMPLOYEES AND PRODUCED POSITIVE RESULTS.

IN REPORTING THE RESULTS OF THE 3-YEAR EXPERIMENTAL PROGRAM TO THE PRESIDENT AND THE CONGRESS, OPM CONCLUDED THAT AWS COULD PRODUCE IMPROVEMENTS IN PRODUCTIVITY, GREATER SERVICE TO THE PUBLIC, AND SAVINGS IN COSTS. AT THE SAME TIME, IT WAS CLEAR THAT NOT ALL AWS OPTIONS ARE EQUALLY SUCCESSFUL IN ALL ORGANIZATIONAL SETTINGS.

IN 1982, CONGRESS EXTENDED AWS EXPERIMENTS FOR 3 MORE YEARS. THIS LEGISLATION PROVIDED THAT AGENCIES WOULD HAVE 90 DAYS TO REVIEW AND TERMINATE EXISTING SCHEDULES THAT HAD AN "ADVERSE AGENCY IMPACT." THIS WAS DEFINED AS A REDUCTION IN PRODUCTIVITY, A DROP IN SERVICES TO THE PUBLIC, OR INCREASED AGENCY COSTS. IN ADDITION, THE LAW PROVIDED THAT EMPLOYEES IN A BARGAINING UNIT WOULD BE COVERED BY AWS PROGRAMS ONLY TO THE EXTENT EXPRESSLY PROVIDED FOR UNDER A COLLECTIVE BARGAINING UNIT.

THESE AWS PROVISIONS WERE MADE PERMANENT IN 1985 BY PUBLIC LAW

99-190. TODAY, AWS IS WIDELY USED AND AN IMPORTANT FIXTURE IN THE FEDERAL WORKPLACE. A 1998 SURVEY CONDUCTED BY OPM FOUND THAT 92 PERCENT OF FEDERAL AGENCIES REPORTED OFFERING FLEXIBLE WORK SCHEDULES, AND 79 PERCENT REPORTED OFFERING COMPRESSED WORK SCHEDULES. SEVENTEEN PERCENT OF FEDERAL EMPLOYEES REPORTED USING COMPRESSED WORK SCHEDULES, AND 17 PERCENT REPORTED USING FLEXIBLE WORK SCHEDULES.

UNDER CURRENT LAW AND REGULATION, THE OPTION TO ESTABLISH AN AWS PROGRAM IS AT THE DISCRETION OF THE AGENCY HEAD. THIS DISCRETION IS SUBJECT TO THE OBLIGATION TO NEGOTIATE WITH THE EXCLUSIVE REPRESENTATIVES OF BARGAINING UNIT EMPLOYEES. AN AGENCY WISHING TO ESTABLISH FLEXIBLE OR COMPRESSED WORK SCHEDULES UNDER CHAPTER 61 OF TITLE 5, UNTIED STATES CODE, DOES NOT NEED OPM APPROVAL. IT IS THE AGENCY'S RESPONSIBILITY TO DETERMINE WHETHER TO ESTABLISH AWS PROGRAMS; TO NEGOTIATE WITH EXCLUSIVE REPRESENTATIVES WHEN APPROPRIATE; TO ADMINISTER THE PROGRAMS EFFICIENTLY; AND TO ENSURE THAT AWS PROGRAMS DO NOT CAUSE AN ADVERSE AGENCY IMPACT.

THE AUTHORITY TO SUSPEND THE PREMIUM PAY AND SCHEDULING PROVISIONS OF TITLE 5, UNITED STATES CODE, AND THE OVERTIME PAY PROVISIONS OF THE FLSA, AS SPECIFIED IN 5 U.S.C. 6123 AND 6128, APPLIES ONLY TO ORGANIZATIONAL UNITS PARTICIPATING IN AN AWS PROGRAM. ALL OTHER PROVISIONS OF TITLE 5 AND THE FLSA REMAIN IN EFFECT FOR NONPARTICIPATING ORGANIZATIONS.

FOR EMPLOYEES UNDER FLEXIBLE WORK SCHEDULE PROGRAMS, OVERTIME HOURS ARE ALL HOURS OF WORK IN EXCESS OF 8 HOURS IN A DAY OR 40 HOURS IN A WEEK WHICH ARE OFFICIALLY ORDERED IN ADVANCE BY MANAGEMENT. THE REQUIREMENT THAT OVERTIME HOURS BE OFFICIALLY ORDERED IN ADVANCE ALSO APPLIES TO NONEXEMPT EMPLOYEES UNDER THE FLSA. EMPLOYEES ON FLEXIBLE WORK SCHEDULES MAY NOT EARN OVERTIME PAY AS A RESULT OF INCLUDING "SUFFERED OR PERMITTED" HOURS (UNDER THE FLSA) AS HOURS OF WORK.

AGENCY AWS PLANS MAY ALSO PROVIDE FOR "COMPENSATORY TIME OFF." THIS IS TIME OFF ON AN HOUR-FOR-HOUR BASIS IN LIEU OF OVERTIME PAY. FOR EMPLOYEES UNDER FLEXIBLE WORK SCHEDULES, THE OVERTIME HOURS OF WORK MAY BE REGULARLY SCHEDULED OR IRREGULAR OR OCCASIONAL.

ANY AGENCY MAY GRANT COMPENSATORY TIME OFF IN LIEU OF OVERTIME PAY AT THE REQUEST OF THE EMPLOYEE (INCLUDING PREVAILING RATE EMPLOYEES AND FLSA-NONEXEMPT EMPLOYEES) UNDER A FLEXIBLE WORK SCHEDULE. COMPENSATORY TIME OFF, IN LIEU OF OVERTIME PAY, MAY NOT BE REQUIRED FOR ANY PREVAILING RATE EMPLOYEE, ANY FLSA-NONEXEMPT EMPLOYEE, OR ANY FLSA-EXEMPT EMPLOYEE WHOSE RATE OF BASIC PAY IS EQUAL TO OR LESS THAN THE RATE FOR GS-10, STEP 10.

THAT, IN A NUTSHELL, IS HOW ALTERNATIVE WORK SCHEDULES ARE ADMINISTERED IN THE FEDERAL GOVERNMENT. AWS IS GENERALLY

CONSIDERED TO BE A SUCCESSFUL PROGRAM AND IS A KEY COMPONENT OF THE FEDERAL GOVERNMENT'S STRATEGIC REWARDS ENVIRONMENT.

THIS CONCLUDES MY REMARKS. I WILL BE HAPPY TO ANSWER ANY QUESTIONS.

APPENDIX D - WRITTEN STATEMENT OF ANDY BRANTLEY, ASSOCIATE VICE PRESIDENT FOR HUMAN RESOURCES, UNIVERSITY OF GEORGIA, ATHENS, GA, TESTIFYING ON BEHALF OF THE COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES (CUPA-HR)

TESTIMONY OF ANDY BRANTLEY
ASSOCIATE VICE PRESIDENT FOR HUMAN RESOURCES
THE UNIVERSITY OF GEORGIA
ON BEHALF OF
THE COLLEGE AND UNIVERSITY ASSOCIATION FOR HUMAN RESOURCES
ON
"WORKPLACE FLEXIBILITY: OPTIONS FOR PUBLIC SECTOR WORKERS"
BEFORE THE
HOUSE EDUCATION AND WORKFORCE SUBCOMMITTEE ON WORKFORCE PROTECTIONS
UNITED STATES HOUSE OF REPRESENTATIVES

May 15, 2002

Good morning, Mr. Chairman and distinguished members of the Subcommittee. Thank you for the opportunity to testify today. I am Andy Brantley, Associate Vice President for Human Resources for the University of Georgia (UGA), in Athens, Georgia. Before my arrival at UGA in January of 2001, I was the Assistant Vice President for Business Administration and Director of Human Resources at Davidson College, a private college in Davidson, North Carolina. I am here today on behalf of the College and University Professional Association for Human Resources (CUPA-HR). CUPA-HR is the professional association representing nearly 6,500 human resource professionals at more than 1,750 public and private institutions of higher education. The Association is committed to the development of high quality professional human resources management programs in higher education. Currently, I serve on the Board of Directors of CUPA-HR as the Immediate Past-president.

Representing both public and private colleges and universities, CUPA-HR is in a unique position to discuss the use of compensatory time in the public, sector and we applaud the Chairmen and the Committee for holding this hearing. We also applaud the leadership of Representative Judy Biggert (R-IL), Chairman Charlie Norwood (R-GA), Representatives Cass Ballenger (R-NC), Lindsey Graham (R-SC), Johnny Isakson (R-GA), Bob Goodlatte (R-VA), Ric Keller (R-FL), and John Culberson (R-TX) of the Subcommittee for introducing the bipartisan H.R.1982, the *Working Families Flexibility Act of 2001*. As I understand it, H.R.1982, would give private employers, including private colleges and universities, the opportunity to offer nonexempt employees the choice of compensatory time off (compensatory time) instead of overtime pay in situations in which the employee is eligible for overtime.

As an entity, higher education institutions are extremely complex organizations. They may be comprised of teaching hospitals, research facilities, agricultural

operations, and more, all of which compliment extensive academic program offerings. As a result, colleges and universities are often not only the largest employers in many communities, but also the largest employer within a state; employing a very skilled, very diverse, workforce of faculty and staff. Most colleges and universities strive to be progressive employers, offering or attempting to offer generous benefits packages and innovative policies that make our campuses desirable places to work. In fact, they are often considered to be an employer of choice in a community.

To meet the diverse needs of our faculty and staff, colleges and universities strive to offer competitive welfare and health-care benefits to employees and to sponsor work-family/life programs that support employee needs away from the workplace. Educational institutions offer these work-family/life policies and welfare benefits as a way to recruit and retain a highly skilled, quality workforce. These policies and benefits constitute our leading, competitive edge over the for-profit sector for employees, since higher education institutions typically offer a lower compensation package than for-profit organizations. However, being very comprehensive organizations, colleges and universities realize that flexibility in the workplace is fundamental in trying to meet the needs of the employee and mission of the institution. This is especially true as employees try to balance the competing pressures of work, family, and personal needs.

Let me explain the situation on my own campus to illustrate this point. The University of Georgia was chartered in 1785 and has a current enrollment of more than 32,000 students. As a comprehensive land-grant and sea-grant institution, UGA offers baccalaureate, master's, doctoral, and professional degrees in the arts, humanities, social sciences, biological sciences, physical sciences, agricultural and environmental sciences, business, environmental design, family and consumer sciences, forest resources, journalism and mass communication, education, law, pharmacy, social work, and veterinary medicine. We have more than 17,000 faculty, staff, and students on the payroll each month to operate our programs and achieve our educational mission. Our workforce is diverse and the needs of our employees are also. We are the largest employer in Athens and one of the largest in the state.

The role of UGA's human resources department is to assist the University in achieving its mission through innovative management and through the delivery of high quality, employment-related services to the University's diverse workforce. To meet the needs of our employees, we provide a wide range of paid leave policies to all our employees. These policies include sick and vacation leave, as well as short- and long-term disability leave policies with pay. We also offer a number of unpaid leave policies where the employee may substitute accrued paid leave for unpaid leave. The University also offers its employees several alternative work arrangements that include flextime, compressed workweek, job sharing, 9- or 10-month work schedules, and telecommuting arrangements.

As UGA's chief HR Officer, I am pleased that we offer employees the choice of

receiving compensatory time or overtime pay for working in excess of 40 hours. As you are well aware, under the Fair Labor Standards Act (FLSA), public employers, including colleges and universities, have the ability to choose compensatory time or overtime pay to compensate employees for hours worked in excess of 40 hours per week. Each time an employee at UGA works more than 40 hours in a week, he or she has the option of receiving overtime pay, or with supervisor's approval, compensatory time off. According to university staff, compensatory time is an important and valued option.

While employees have used compensatory time in the past to deal with catastrophic occurrences or to deal with family crisis, more often than not, non-exempt employees at UGA use compensatory time to meet the everyday challenges presented in balancing work-family issues. One employee on our campus at the College of Veterinary Medicine, provided a recent example of how compensatory time is used at UGA. The employee uses compensatory time to do the "little errands" that often need to get done in balancing work-family, including visits to the doctor for her children. Although a visit to the doctor can be brief, to a parent who is working it requires picking the child up from daycare, taking the child to the doctor's office, getting a prescription filled at the pharmacy, returning the child to daycare, and then eventually, returning to the office. By using accumulated compensatory time, this employee is able to allow sick leave to accumulate and be used for those times when her children are not well enough to go daycare.

In 1996 the city of Atlanta hosted the Summer Olympics. Several of the Olympic events were held in and around Athens, which required the campus to be closed. With UGA closed, faculty and staff were unable to work and were forced to use their accrued leave time to avoid being in a leave without pay status. In the months preceding the Olympics, our non-exempt staff accumulated compensatory time to offset the time they would be unable to work because of the games. This allowed employees to keep their accrued leave intact and in some cases, prevented staff from having to go on leave without pay because they did not have much accumulated annual leave.

While neither of these examples is extraordinary in its application, each clearly demonstrates the flexibility that is provided through a compensatory time program. Unfortunately, only public sector colleges and universities can offer these programs. Private colleges and universities are prohibited from offering these programs to their employees. While private institutions offer a variety of work-life policies, situations arise on a campus in which the employee would benefit if the institution had the ability to offer compensatory time off instead of pay in overtime situations. I can recall several examples while at Davidson College where the use of compensatory time would have been extremely helpful to employees. Let me provide you with two examples:

The Davidson College admission office staff work long hours during December and January, earning overtime pay. On several occasions, non-exempt employees in the admissions office have asked about the possibility of receiving compensatory time

instead of overtime pay. Several members of the staff wished to accumulate compensatory time to use later during the Spring--after the completion of the stressful admission process. As Davidson's Director of Human Resources, I had no option but to instruct the Vice President of Admission to continue the payment of overtime.

During the 2000 calendar year, an extremely hard-working catering assistant who worked overtime on a weekly basis at the College was diagnosed with cancer. Time off for chemotherapy and then radiation treatments quickly consumed all of this employee's vacation and sick leave and forced the employee into a long-term disability status. If Davidson College had been permitted under the FLSA to offer this employee the choice of receiving pay or compensatory time for hours worked beyond 40, this particular individual, while still able to work, may have chosen to receive compensatory time to extend the period of time he was able to stay in a full pay status with the College.

This is just a sampling of the kinds of situations that arise on private campuses each week, cases in which the ability of someone to accumulate compensatory time would be beneficial to employees. I am not saying compensatory time will be the answer for everyone. But, while I was at Davidson, employees regularly requested greater flexibility in work arrangements to better cope with pressing family, personal, and professional development needs. Compensatory time use can provide that flexibility.

As the Associate Vice President for Human Resources at UGA, offering employees the choice of compensatory time or pay for overtime situations means some extra administrative duties for my staff and other departments of the university— keeping track of time earned; explaining to employees their option of choosing compensatory time versus overtime pay; and scheduling the time off. Even with the additional record keeping requirements and paperwork burden placed on the University's administrative staff, I am pleased that UGA gives employees the option to choose between accruing compensatory time or receiving overtime pay. As an employer we offer this choice not only for altruistic reasons, but just as importantly we believe it helps UGA meet its academic mission.

I also know that many employees still want to receive pay as opposed to compensatory time in overtime situations. While many employees of a public college or university have that option, employees at a private university do not. From my perspective having worked for both a public and a private university in human resources, I believe employees at private universities should be afforded the same flexibility that their public sector counterparts enjoy to help meet their own work-family needs by allowing all employees the opportunity to have the choice between compensatory time and overtime pay.

Mr. Chairman, thank you again for the opportunity to comment and offer CUPA-HR's support to The Working Families Flexibility Act. I will be happy to answer any questions from you or other members of the Committee.

APPENDIX E - WRITTEN STATEMENT OF THOMAS M. ANDERSON, JD, SPHR, HUMAN RESOURCES DIRECTOR, FORT BEND COUNTY, ROSENBERG, TX, TESTIFYING ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT (SHRM)

TESTIMONY
OF
THOMAS M. ANDERSON, JD, SPHR
HUMAN RESOURCES DIRECTOR
FORT BEND COUNTY, TEXAS
ON BEHALF OF
THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

BEFORE
THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS
OF
THE COMMITTEE ON EDUCATION AND THE WORKFORCE
UNITED STATES HOUSE OF REPRESENTATIVES

May 15, 2002

Good morning, Chairman Norwood, ranking minority member Owens and members of the subcommittee. My name is Tom Anderson. I am the Human Resources Director of Fort Bend County in the state of Texas. I am testifying this morning on behalf of the Society for Human Resource Management (SHRM). I have served in my current capacity for over two years. Prior to this role I worked for over 20 years in various Human Resources positions with Reynolds Metals Company and Tredegar Industries. In total, I have served the Human Resource profession for over 25 years. In addition to my experience and expertise in the HR field, I am also a certified mediator and attorney. Currently I am a member of the SHRM Legislative Action Committee (LAC), and serve as the Legislative Action Committee Co-Director for the state of Texas. Finally, I am proud to share with the subcommittee that Governor Perry has recently appointed me as a commissioner to the Texas Commission on Human Rights. Given that I have served both the public and private sectors of our nation's workforce, I believe that I will provide the subcommittee with a unique perspective.

Mr. Chairman, SHRM is the world's largest association devoted to human resource management. Representing more than 165,000 individual members, the Society serves the needs of HR professionals by providing the most essential and comprehensive set of resources available. As an influential voice, SHRM is committed to advancing the human resource profession to ensure that HR is an essential and effective partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 500 affiliated chapters within the United States and members in more than 120 countries. In addition to my role as HR Director for Fort Bend County, I am a volunteer leader with the national organization of SHRM.

The subject of today's hearing is to examine the use of compensatory time off in the

public sector of the federal government, as well as at the state and local level and its potential applicability to the private sector. In 1978, Congress passed the Federal Employees Flexible and Compressed Work Schedules Act, acknowledging the fact that flexible schedules would provide an essential benefit to federal employees. A goal of enactment of this measure was to provide a significant benefit to federal government employees. The program substantially increased employee productivity, reduced absenteeism, and allowed employees to personally choose between paid time off and overtime compensation. While the Federal Employees Flexible and Compressed Work Schedules Act was passed as a trial program, it was reauthorized in 1982 and made permanent in 1985. During that same year, the choice to select compensatory time off in lieu of overtime compensation was expanded to state and local agencies and their employees.

Mr. Chairman, it is troubling that the federal government has not extended this same benefit to hardworking private sector employees who contribute equally to this nation's workforce and economy. In light of the federal government's inaction, two states have recognized the importance of granting compensatory time off not only to public sector employees but to those working in private industry. Michigan and Washington have acknowledged the important role that compensatory time off plays in the workplace. These two states have recognized that compensatory time off programs contribute to the overall success of the individual as an employee both professionally and personally. Copies of the enacted proposals have been submitted with my written testimony.

One other state is preparing to act in this area as well, Mr. Chairman. The state of Rhode Island currently has a proposal pending before the state legislature that would allow an employer to offer compensatory time in lieu of overtime pay. An employee may elect to receive payment for overtime at the rate of time and one half (1/2) the employees regular rate of pay or compensatory time equal to one and one-half (1/2) hours for each hour of overtime work. No employee may accrue more than two hundred and forty (240) hours of compensatory time. The legislation provides for employee coercion protection and makes any employer violation of this legislation punishable by a fine.

I would like to applaud the United States House of Representatives for enacting H.R. 1, the Working Families Flexibility Act during the 105th Congress. Unfortunately, the measure was stalled in the United States Senate and was subsequently not considered by the full House during the 106th Congress.

SHRM commends Representative Judy Biggert (R-IL) for re-introducing the Working Families Flexibility Act as H.R. 1982. As the composition of our workforce continues to change, and as the desires or needs of the American family continues to change, now more than ever working men and working women require flexibility to manage work/family responsibilities. H.R. 1982 is the vehicle that will provide it. There is no reasonable explanation why the federal government has for nearly twenty years denied private sector employees the right to voluntarily accrue compensatory time off. This benefit continues to be enjoyed by public sector

employees at all levels throughout the nation. A portion of my testimony today will provide you with an overview of how compensatory time off programs are structured and administered and how employees are benefiting from this option. In addition I will comment on the benefits that I believe compensatory time off plans will have in the private sector should H.R. 1982 be enacted.

The Fair Labor Standards Act (FLSA) was passed in 1938, over 63 years ago. Since then the workplace and the workforce have changed dramatically. Regrettably the FLSA has remained relatively unaltered, making the act rigid in today's fast paced and continually fluctuating work environment. It has recently been argued by some on this committee that the Act is flexible enough to fit modern workplace and today's employee. I would submit that to the contrary, the Act is only flexible within a given work week, which does not allow or account for unforeseeable family or personal obligations or simply for time an employee requires away from work to manage personal responsibilities.

Time away from work to manage personal and family responsibilities is becoming increasingly important. The Employment Policy Foundation (EPF) reported during testimony before this subcommittee that women make up more than sixty (60) percent of our nation's labor force. EPF reported in April, 2002 that "Women devote considerably more time to household chores than men - 14.2 hours per week in 1997 compared to 7 hours for men." As women continue to rapidly advance professionally, it oftentimes requires them to make significant personal sacrifices. Similarly, Doctor Carl Van Horn of Rutgers University reported findings from a quarterly study titled *Work Trends* that "ninety-five percent of all working adults are concerned about spending time with immediate family." Testimony was also provided that "ninety-two (92) percent were concerned with having more flexibility in their working schedules to take care of family needs." These figures are significant, and lawmakers should acknowledge positive solutions that address work/life balance. Workers are pleading with their employers for increased flexibility at work, and private employers are unable to grant it to them due to constraints placed on the workplace by outdated federal laws such as the FLSA.

We can all agree that it is no small feat for a dual-income family to juggle work and family responsibilities. Compensatory time off as an option in the workplace provides a tremendous amount of control for the individual employee in terms of increased morale, increased productivity, and in addition, adds the element of employee choice for those public sector employees who choose to use the time instead of cash payments. While it is true that employers ultimately decide when an employee may take time off from work (there is no employer choice in the face of certain requests such as FMLA, military duty, jury duty witness duty etc.), that situation exists whether it involves any missed work from vacation requests or rescheduling of employee's work hours. There will be, for example, incidents where an employee requests to use comp time while one employee is off from work sick and another is on vacation. This is likely to be considered a circumstance where the request for taking comp time would "unduly disrupt" the workplace and consequently denial of the time off would be appropriate. However, from my

experience most employees understand that scenario and would not contest the supervisor's denial of the employee's comp time request. It has been my experience that most situations of comp time requests made by employees have been satisfactorily resolved between employees and their supervisors using seniority or other neutral criteria.

Compensatory time plans vary widely among public jurisdictions and agencies in the number of comp time hours that can be banked, the methods and deadlines for choosing an option, employee eligibility standards, and other variables, according to an article published by HR*Magazine*. Some systems require employees to declare a preference for comp time or pay before beginning a work period. Others allow employees to make their choice on time sheets. Most of the public-sector HR directors contacted by HR*Magazine* believe that if the arrangements work well for their agencies-with their often unusual requirements in emergency services, public safety, road work, snow removal and health care-the option would be just as workable and popular for the private sector. For example, in state capitals, large cities and other areas with many government jobs, private companies believe they are at a disadvantage when recruiting new employees by being unable to offer compensatory time off. Public employees are generally comfortable and satisfied with the compensatory time option, and they weigh that factor when considering job offers from the private sector.

While there is little doubt that compensatory time off proposals have significantly benefited public sector employees, this benefit has not gone unchallenged. In May of 2000, the United State Supreme Court handed down a decision in *Christensen v. Harris County, Texas* 529 U.S. 576. At issue was whether or not a public employer offering compensatory time off as an option to employees could prescribe when employees should utilize their accrued compensatory time off if a prior agreement does not exist.

In April 1994 employees of the Harris County, Texas Sheriffs' Department sued their employer, alleging a violation of the Fair Labor Standards Act (FLSA) for refusal to grant use of accumulated compensatory time off when certain employees petitioned its use, compelling employees to take compensatory time off when they did not request the time, and retaliating against them. The U.S. Court of Appeals for the Fifth Circuit held in favor of the county, stating that the county was within their rights by compelling employees to use banked compensatory time off. The employees of the Harris County Sheriffs' Department appealed the Fifth Circuit's decision and the United States Supreme Court granted certiorari.

The court held on May 1, 2002 that, nothing in the FLSA or its implementing regulations prohibits a public employer from compelling the use of compensatory time. Petitioners' claim that section 207(o)(5) of the Act implicitly prohibits compelled use of compensatory time in absence of an agreement was unpersuasive. The proposition that when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode. *Raleigh & Gaston R.* Co. v. *Reid*, 13 Wall. 269, 270, does not resolve this case in petitioners' favor. Section 207(o)(5) provides

that an employee who requests to use compensatory time must be permitted to do so unless the employer's operations would be unduly disrupted. The negative inference to be drawn is only that an employer may not deny a request for a reason other than that provided in Section 207(o)(5). Section 207(o)(5) simply requires that an employee receive some timely benefit for overtime work. The best reading of the FLSA is that it ensures liquidation of compensatory time; it says nothing about restricting an employer's efforts to *require* employees to use the time. Because the statute is silent on this issue and because the county's policy is entirely compatible with Section 207(o)(5), petitioners cannot, as Section 216(b) requires, prove that the county has violated Section 207.

The Supreme Court laid out explicitly in *Harris County* that public employers as well as public employees maintain protections under Section 207 of the FLSA. This is important to note during this discussion because many who oppose H.R. 1982 fear that private employers will not allow employees to draw on their accrued compensatory time off when the employee requires its use. H.R. 1982, as has been previously stated, is narrowly drawn, more so than the regulations that govern the public sector, which lays out that an employer cannot deny an employee's use of compensatory time off for reasons other than the undue disruption of an employer's operations.

The Supreme Court found that "an employer may not deny a request for a reason other than that provided in Section 207(o)(b)." FLSA regulations laid out the provision as follows: Section 7(o)(5) of the FLSA provides that any employee of a public agency who has accrued compensatory time and requested use of this compensatory time shall be permitted to use such time off within a "reasonable period" after making the request, if such use does not "unduly disrupt" the operations of the agency. (b) Compensatory time cannot be used as a means to avoid statutory overtime compensation. An employee has the right to use compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of his or her making a request for use of such time. (c) Reasonable period. (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff. (2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work. (See Sec. 553.23.) To the extent that the conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in Sec. 553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period". (d) Unduly disrupt. When an employer receives a request for compensatory time off, it shall be honored, unless to do so would be "unduly disruptive" to the agency's operations.

Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services. [52 FR 2032, Jan. 16, 1987; 52 FR 2648, Jan. 23, 1987].

H.R. 1982 also provides this protection similar to what is laid out in the regulations in Section 2(7)(B). Given that the "unduly disrupt" provision currently exists in the implementing regulations of the FLSA, should H.R. 1982 be adopted by Congress and ratified by the President, it is likely that private sector compensatory time off regulations, will at a minimum, be based on the regulations governing public sector use of compensatory time off.

Mr. Chairman, I would like to specifically comment on the structure of the Fort Bend County compensatory time off program and share with you some of the benefits in administering a program such as this in our workplace.

It is the policy of Fort Bend County that certain non-exempt employees are eligible to accrue compensatory time off in lieu of overtime pay. The Fort Bend County compensatory time off program is permissive in nature and is specifically laid out in county policy as such. There are however some job functions for which the policy makes exception, and allows those employees working within those specific job classifications to either choose overtime pay or compensatory time off. Non-exempt employees of Fort Bend County are eligible to accrue up to 240 hours of comp time. Should an employee accrue more than 240 hours, they will then be compensated at one-and-one-half times their regular rate of pay. As the FLSA specifies law enforcement officials may accrue up to 480 hours of comp time. This policy has been in place for seven 7 years and continues to be widely accepted and considered a proactive benefit among the employees of Fort Bend County, Texas. Accrual of comp time has been very positive for Fort Bend County employees because it allow employees and managers to work out time off in a regular and reasonable manner, just like any other scheduled time off; ie. vacation and certain scheduled sick time.

Although there is no immediate up front cost to the employer there is the possibility of unfunded liability. Unfunded liability occurs at the point when an employee terminates employment with the county. Any unused comp time is then cashed out at the wage level in which the employee was being compensated upon termination of employment, or the average of the previous three (3) years wage, whichever is higher. This is problematic in a situation in which an employee accrued the comp time at a lower hourly rate of pay but may be compensated at one-and-one-half times the ending regular rate of pay. In certain circumstances, this requirement has the potential to cause the employer to suffer a financial hardship. However, comp time cash out provisions can be handled like overtime payments, thus an employer should account for compensatory time off accruals in annual budgets based on what's legally permissible.

In general, my observations in terms of what comp time provides for a government entity and what it could do for private sector employers is that it is a consistent and effective means by which an employer can provide the flexibility in the workplace necessary to assist their employees with work/life balance. Comp time is a benefit to employees, for employees. For example, an employee who has 24 hours of banked comp time and would like to utilize 8 hours of comp time, that employee has the flexibility and the option to use that comp time as paid time off to attend a child's school activity, close on a new home or other personal activity. Remember, employees have the right to utilize comp time in most circumstances unless it "unduly disrupts" the operations of the political subdivision and/or business. On the other hand, there may be occasions where the employee opts for overtime pay. The point is at the present time public employees have that choice, and private sector employees do not have the same or similar options.

Now, more than ever, employees are in need of increased flexibility. Comp time goes a long way in making this necessity a reality for many public sector employees, not to mention that it takes pressure off of other federal laws such as the Family and Medical Leave Act (FMLA) in that comp time provides a paid leave program that compensates employees at their regular rate beyond an employer's paid leave policy (Non-exempt employees can not use comp time accruals for FMLA purposes). Comp time offers a paid time off (PTO) benefit to those employees who are currently not eligible to take FMLA leave whether it be for employer eligibility reasons (employer has less than 50 employees within a 75 mile radius) or the employee has not completed the requisite 1250 hours of service requirement in order to qualify for the unpaid FMLA leave.

Finally, Mr. Chairman, as I have previously stated, service in both the public and private sector has given me unique insight into what employees would like to see in terms of flexibility in the workplace. I cannot speak for all employees or even all employers but have found that many private sector employees are perplexed by the fact that they do not have the option to choose between compensatory time off and overtime pay. The fact that many employers are supportive of the comp time provision only adds to the misunderstanding. The federal government should permit private sector employees to make responsible decisions in choosing comp time pay versus overtime pay. Employees should be allowed to make work/life choices that make sense to themselves as employees and that make sense to their families. Employees deserve to make that choice for themselves. This debate hinges on the right of an individual to make a choice – a relatively simple choice. The federal government does not dictate how an employee chooses to spend their pay check, so why then does the federal government have the right to decide whether or not an employee needs overtime compensation in lieu of time off? It is a question of freedom to choose at no cost to the employer - an employee's choice, Mr. Chairman.

Mr. Chairman, this concludes my formal remarks to the subcommittee. A copy of my full statement has been included into the record for review. Thank you for the opportunity to appear before you today, and I will be pleased to answer any

questions that you or the other members of the committee may have for me.

Thank you.

APPENDIX F - WRITTEN STATEMENT OF DENNIS SLOCUMB, EXECUTIVE VICE PRESIDENT AND LEGISLATIVE DIRECTOR, THE INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO, (I.U.P.A.), ALEXANDRIA, VA

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORK FORCE
SUBCOMMITTEE OFWORKFORCE PROTECTION

TESTIMONY ON THE USE OF COMPENSATORY TIME
IN THE PUBLIC SECTOR UNDER FLSA §207(o)

DENNIS SLOCUMB
EXECUTIVE VICE PRESIDENT & LEGISLATIVE DIRECTOR
THE INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO

MAY 15, 2002

FLSA COMP TIME IN LAW ENFORCEMENT: A DOZEN YEARS EXPERIENCE

Introduction

I am Dennis Slocumb. For two years I've been the Executive Vice President of the International Union of Police Associations, AFL-CIO, ("I.U.P.A."). I serve as the second highest elected officer in the Union. I am also the I.U.P.A. Director of Legislation. More importantly, I am here today after 32 years in the Los Angeles County Sheriffs Department and as an officer of the Professional Peace Officers Association, I.U.P.A., AFL-CIO, which is the collective bargaining representative for the Los Angeles County's Supervisory Deputy Sheriffs. During my career in Los Angeles I worked virtually every law enforcement job from patrol officer in the high crime Firestone District, to a criminal investigator, kidnaping specialist and supervisor. I retired from the Sheriffs Department as a Lieutenant after thirty two years and was elected to the second highest officer in my International Union.

I.U.P.A.: The National Police Union

The I.U.P.A. is the fastest growing and most active law enforcement association in the United States. Our affiliates represent law enforcement in six of the dozen largest departments in the country -- Los Angeles, Houston, Dallas, Boston, Milwaukee, and Los Angeles County. That is more of the largest departments than any other national police organization, including the FOP and NAPO. We represent over 30% of the largest 50 law enforcement agencies in the United States. We represent state troopers in Florida, Ohio, Indiana, and trooper investigators in New York. Here in Washington, D.C. we represent officers of the Uniform Division of the Secret Service and those at National and Dulles Airport. Our affiliates included unions and police associations in over 500 law enforcement agencies. Many departments representing 20 to 200 officers. Our membership is composed of

between 80,000 and 100,000 working law enforcement officers. We estimate that is over one fifth of non-managerial officers of the job.

Support for Comp Time

I appreciate your inviting me today to talk about the use of compensatory time in law enforcement. It is an extremely important issue. Law Enforcement is a stress filled job. One of the most worrisome problems facing working police officers today is the need for some personal control over our personal work schedule. The pressure of more police working longer hours, on rotating shifts, in undermanned departments doing a job which every day is filled with periods of boredom followed by life threatened excitement. The work is rewarding but it is also filled with disappointment and lack of appreciation. The job is underpaid. It's rough on family life. Nearly every cop I know is motivated by the ideal of protecting and serving the public. Cops work hard, often alone; they die young, not only in the heroic tragedies of 9/11 but often in the late fifties alone and worn out a few years after retirement.

The most recent Census showed "protective services"-- which is the census term including all law enforcement jobs -- showed that for 2001 law enforcement officers "who usually work full time" work longer hours than all but one other occupation in the study. The average number of work hours worked by a police officer exceeds the FLSA public safety standard of 171 hours per 28 days by nearly 11.2 hours. During this post 9/11 period, it is not at all unusual for a law enforcement officer to work 20 to 30 hours per week above the FLSA standard. Many officers are required in a given week to work 50 to 60 hours. This is a situation in which the compensation of young law enforcement professionals is so low that a second job is the standard for a young officer raising a family. Again, it is not unusual for the young law enforcement family to have four jobs, with both the officer and the officer's spouse working two jobs and raising children. I've talked to officers whose pride is their law enforcement work to which they devote full time, whose spouse and second job both bring more income to the family than they are paid. This creates the situation in which time off and officer control of the his/her own schedule is an extremely high priority. Our members want, need, and appreciate the Congressional comp time provision. It allows them to work for compensatory time in lieu of cash overtime which then allows them some control over their schedule – time for family, relief of stress, a day of fishing, a PTA meeting or a ball game. Comp time is important to the survival of a street level cop. As you support law enforcement professionals, it could not be more important that the provisions of FLSA § 7(o), allowing comp compensatory time and prohibiting its abuse be maintained, improved and rigorously enforced.

I.U.P.A.'s FLSA Enforcement Program

One of the most important programs which I.U.P.A. provides involves the monitoring and enforcement of § 207(o). I have attached a series of materials explaining our FLSA auditing, monitoring and enforcement system – "Policing Your Pay Check: The FLSA for Law Enforcement" and questionnaire, which is an

FLSA audit guide for individual officers; a forthcoming South Dakota Law Review article by I.U.P.A. General Counsel Michael T. Leibig; a Department of Labor amicus brief setting forth their position on open access to the use of accrued comp time; and the judicial opinions arising out of three of the over 28 FLSA enforcement actions taken by the I.U.P.A. in federal court.

We are working closely with the Department of Labor on FLSA enforcement They have been helpful with advice and guidance. The DOL Wage and Hour Division is understaffed but its staff is professional, responsive, and helpful. DOL's Opinion Letters remain reliable and useful in settling disputes with employers informally. Their brief on access to comp time in the *DeBraska v. Milwaukee* case is attached. After the Supreme Court's ***Alden***/11th Amendment decision, DOL enforcement is the only enforcement allowed against state governments with FLSA violations. Even with their staff problems, the DOL has been helpful with this new task. The Boston office was responsive to our local in Massachusetts Environmental Police's need to seek enforcement of their overtime and hours of work rights. A successful enforcement effort is nearing completion there. There is a need for similar support in Florida, Indiana, South Carolina, Maryland , Colorado, Ohio, and New Mexico. FLSA enforcement with regard to state governments needs to be supported by sufficient funding.

I.U.P.A.'s FLSA enforcement program includes seminar and audit instructions to all of our over 500 affiliates. General Counsel Leibig appeared and argued each of the three public sector cases heard by the Supreme Court since the 1985 Amendments established coverage – ***Moreau,*** which dealt with the need for comp time agreements in states without collective bargaining, ***Auer,*** which dealt with standards for exempt police managers and the salary basis test and ***Christensen,*** which allowed employer forced use of accrued comp time. I.U.P.A.'s legal office and research staff have done more than 50 detailed departmental FLSA audits and conducted training conferences and seminars throughout the county on a regular basis. We've provided counsel in over 28 federal court cases to insure that where problems are found enforcement action occurs. "Policing Your Pay Check" is our publication in most demand. It is currently in its 4th edition, thousands of copies having circulated.

One thing is clear from all of this, our members like, want, and need compensatory time. The Congress' 1985 provision allowing it is extremely popular. It works well. Where problems have arisen, the Department of Labor courts have been open to enforcement.

1985 Comp Time Amendments Universally Supported

During the 1985 FLSA hearing on the 1985 Public Sector Amendments, I.U.P.A. Regional Director, then-President of the Milwaukee Police Association, Gary Brazgel, testified that "Compensatory time is vital to policing. Not only is it an important benefit to on the job police officers, but it is also an important tool of sound police management." House Hearings 99-67, 99th Cong. 1st Sess. at 155

(1985). The final version of §207(o) was supported by the National Association of Counties, the National Public Employer Relations Association, the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislatures, I.U.P.A., NAPO, IAFF, the AFL-CIO. Public Sector Management, Unions and Associations have universally endorsed §207(o). Compensatory time was popular then and remains so today.

Current Popularity & Importance of Comp Time

Compensatory time, when properly monitored and used in full compliance with the requirements of §207(o), greatly benefits police officers. It gives them some control over their schedules.

Problems

All of this is not to say that there are no problems in the use of compensatory time in the public sector. Those problems have been limited in large part to three:

(1) ***Forced Use*** - employer forced compensatory time off;

(2) ***Access*** - employer refusal to allow access to the use of accrued compensatory time on the basis of pre-set minimum staffing levels without establishing undue disruption or when the work need could be done simply by allowing a willing officer to work as a substitute even when the substitute would qualify for time and one half pay; and

(3) ***Remedies*** - ambiguity about the appropriate remedy when an employer has

been found to have operated a compensatory time system which violates the requirement of an agreement or the"undue disruption" rule.

Expansion to Private Sector

In the private sector compensatory time has not been allowed since 1935. There are special reasons for that which do not exist in the public sector. In 1985 when the Act was expanded to include the public sector comp time was common and had been adopted for reasons having nothing to do with avoiding premium pay for overtime. In 1935 comp time was unheard of in the private sector and after 1935 where it was used it was often use of avoid the paying premium overtime rates for work in excess of 40 hours a week. Private sector compensatory time raises special problems beyond those in the public sector. Any private sector provision would need to address those concerns. They include --

(1) All of the protection in § 207(o), including rigorous enforcement of a stricter, clearer "undue disruption rule," for example, a provision requiring the timely requests to use comp time must be granted unless (a) doing so would "cause substantial and grievous injury to the employer's operations," and (b) no alternative

or substitute worker can be found even at time and one-half pay;

(2) Clear remedial provisions against an employer who substitutes comp time for cash overtime without conforming to the statutory preconditions;

(3) Exclusion of part-time or seasonal employees;

(4) The exclusion of employees in the garment and construction industries;

(5) A definition of "representative" to include representatives other than certified collective bargaining representatives;

(6) An 80-hour maximum of accrual per year;

(7) Regular reports to the employees on hours used and remaining;

(8) A provision allowing employee cash out of comp time on fifteen days notice;

(9) Employee friendly coordination with the FMLA;

(10) Prohibit the substitution of comp time for sick, vacation or other leave which the employee receives;

(11) Count comp time hours of work for overtime eligibility and other benefits;

(12) Prohibit discrimination in allocation of overtime and comp time usage; and

(13) Provide that comp time would be treated as unpaid wages in Title 11 bankruptcy proceedings.

Many of these ideas were discussed at the time of earlier draft legislation. They are all important.

Any effort to expand the availability of compensatory time to the private sector would need to be particularly attentive to these problems. It should also correct the problems which have arisen in the public sector – forced use, impediments to access to the use of accrued comp time banks, and significant remedies when statutory pre-conditions to the use of comp time are ignored.

Forced Time Off

Currently, in most law enforcement agencies staffing levels are such that it is difficult to gain access to time off. However, in some agencies as a cost saving measure rules have been adopted which allow the agency to order people on very short notice to take the day off and burn off some of their accrued comp time. This is done on light days where more than minimum staffing is available. It requires law

enforcement officers to burn off comp time when the officer was planning to save it for another purpose designed to the officer's rather than the agencies needs. Such a

system was put into place in the Harris County (Texas) Sheriff's Office and was challenged by the deputies in ***Christensen v. Harris County***, 529 U.S. 576 (2000). The Department of Labor's position favored the deputies

in an amicus brief filed when the case reached the United States Supreme Court. I.U.P.A. General Counsel represented the deputies before the Court. In ***Christensen***, the majority of the Court ruled that since the Harris County situation dealt with giving deputies time off and not blocking their access to time off, and since the comp time rules in the FLSA were

designed to protect access to time off and not the right to work a preset schedule, section 207(o) did not expressly deal with the issue. Therefore, there was no basis for a deferral to DOL's view on the issue and, therefore, forced use of comp time was not prohibited under the 1985 compensatory time amendments. Law enforcement officers were upset with

the result, feeling naturally that it decreased the value of the accrued comp time and transferred control of use to a greater degree to management. I.U.P.A. feels strongly that the Congress in 1985 did not intend to authorize forced use. However, Justice Thomas found that, if that is the case, Congress has not been clear about it. The Congress should clarify the question to make it clear that comp time should be the value equivalent of cash overtime and not subject to forced use. A simple amendment to Section 207(o)(a)(5) that "An employer may not force an employee to use accrued compensatory time over the employee's objection" would correct the **Christensen** problem and restore what law enforcement officer's thought was the true value of their accrued banks of comp time.

Access To Compensatory Time

In *Christensen* Justice Thomas was very clear that while the DOL position on forced use need not be deferred to its position on access to the use of accrued compensatory time, Section 207(o)(5) does. In a number of agencies, especially those with serious staffing shortages, access the use of accrued compensatory time is extremely restricted so much so that most officers' compensatory time banks are at the limit when they retire and for years in advance of retirement. Comp time in those departments more reflects a retirement account than a checking account. Most agencies where this is a problem is due to a comp time system which denies comp time on the basis of a preset minimum staffing level. Requests made for time in which minimum staffing levels have been met as the basis of normal days off and sick days and the like, or even on the basis of a chronic staffing shortage are not available for comp time off. This is so even if the time off could be granted by use of a willing, available, qualified substitute where use of the substitute would require overtime pay. These department's violate §207(o)(a)(5)'s "undue disruption" rule, the DOL's interpretation of that rule and a series of federal district court decisions,

including those issued in Milwaukee, Brookline, MA., Raleigh, N.C., Long Beach, CA, and Alexandria, VA; cases in Birmingham, AL., Mobile, AL, Santa Ana, CA, and Los Angeles, CA. have been settled with replacement of the rule to allow access in accord with the DOL position. *See,* Leibig, "The Importance of Time Off: Valuing Restricted vs. Unrestricted Comp Time," ***South Dakota Law Review*** (Forthcoming) Attached. In 1989, a panel of the 6th Circuit Court of Appeals, without the benefit of the DOL position and over a strong dissent, ruled that the "timely request" rule in section 207(o) meant that a employer could deny a timely request for access on the basis of a rule set forth in a local comp time agreement and ignore the "undue disruption" rule. ***Aiken v. City of Memphis***, 190 F.3d 753 (6th Cir. 1989). Aiken has been followed in two other cases, **Beck v. Cleveland**, Case No. 1:99 CV 1271 (E.D. Ohio, June 19, 2001), a case in the 6th Circuit which remains in the district court on other issue but which will reach the 6th Circuit in a year or so providing an opportunity to look at the issue with the benefit of the DOL position, and ***Houston Police Offices Association v. City of Houston***, Civil Action No. H-000-2184 (S.D. Tex. September 20, 2001). That case is currently before the 5th Circuit and ready for argument to be scheduled soon. **Houston Police Offices Association v. Houston**, Case No. 01-21117 (5th Cir. 2002).

The Congress could make clear that the DOL interpretation of the "undue disruption" rule is the correct one and that the *Aiken* approach does not reflect its intent but the problem is likely to be resolved in light of Justice Thomas' discussion of the right to access as Congress would intend in any event.

It is extremely important to the value of comp time that the DOL position is upheld and the *Aiken* position rejected. Otherwise, comp time would so weaken the value of overtime as to transform it to a completely pro-employer dodge which would completely rob overtime of its premium value. I.U.P.A. has been extremely vigorous on the issue providing counsel in virtually every reported case.

Remedies for Violation

The final issue which remains troubling is the employer position that where it does operate a comp time system which does not meet the preconditions of Section 207 (o), including the need of an agreement prior to the use of comp time and restrictions on access to the use of accrued comp time under the rules in Section 207 (o)(5)(a) no monetary remedy is available but that law enforcement officers forced to work under such a system are entitled solely to a declaration and prospective correction. This was the position of the City of Los Angeles in *Kimpel v. Williams*, Case No. CV 93-3441 GHK (RHBx)(C.D.Calf. 1998) prior to its eventual settlement of the case for a back payment of $40 million dollars. It is the position of the employer in the damage phase of the *DeBraska v. Milwaukee* case discussed above. I.U.P.A.'s position is that where a comp time system does not meet all the preconditions set forth in the 1985 Public Sector Amendments, as interpreted by the applicable DOL regulations, a cash only system of overtime premium pay is allowed and each officer's pay must be recalculated using a cash only system with the result being the back pay award which in most cases would be doubled under

the liquidation provision of the statute.

However, the issue is complicated and unsettled is the subject of the law review article attached to this testimony. The language on damages for comp time violations could be clarified, particularly to leave no doubt that employers who ignore the preconditions to comp time must pay all overtime in cash, just as any other employer would.

The employer assertion that a no damages theory of comp time is justified by the legislative history of the 1985 Amendments is simply without foundation. The argument ignores the actual House Report No. 99-331, 99th Congress 1st Session (1985) at 19. Congress intended that the cost of compensatory time would be equal to that of cash overtime. The Report explains:

> "To do otherwise would permit public employers to enjoy the fruits of overtime labor of employees without having to pay the overtime premium required by the Act. Clearly, compensatory time is not envisioned as a means to avoid overtime expenditures. It is merely an alternative method of meeting that obligation."

Conclusion

Compensatory time is working well in the public sector. Congress' original intent could be achieved more clearly by amending §207(o) to clearly (a) outlaw forced comp time off, (b) protect access to the use of accrued comp time particularly when a substitute is available at time and one-half pay; and (c) clarifying the remedy available to officers who are working under comp time systems which do not meet the statutory requirements.

Table of Indexes