108TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
108–127

FAMILY TIME FLEXIBILITY ACT

MAY 22, 2003.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BOEHNER, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 1119]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 1119) to amend the Fair Labor Standards Act of 1938 to provide compensatory time for employees in the private sector, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of H.R. 1119, the Family Time Flexibility Act, is to amend the Fair Labor Standards Act of 1938 to allow compensatory time for all employees.

COMMITTEE ACTION

104th Congress

The Committee's consideration of allowing compensatory time for private sector employees began during the 104th Congress. As part of a series of oversight hearings on the Fair Labor Standards Act, the Subcommittee on Workforce Protections held a hearing on June 8, 1995, on amending the Fair Labor Standards Act to provide private sector employers with the option of allowing employees to voluntarily choose to take paid compensatory time off in lieu of overtime pay. The following individuals testified at the hearing: Ms. Arlyce Robinson, Administrative Support Coordinator, Computer

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Sciences Corporation, Falls Church, Virginia; Ms. Kathleen M. Fairall, Senior Human Resource Representative, Timken Company, Randolph County, North Carolina; Ms. Sandie Moneypenny, Process Technician, Timken Company, Randolph County, North Carolina; Dr. M. Edith Rasell, Economist, Economic Policy Institute, Washington, D.C.; and Mr. Michael T. Leibig, Attorney-at-Law, Zwerdling, Paul, Leibig, Kahn, Thompson & Wolly, P.C., Fairfax, Virginia.

On November 1, 1995, the Subcommittee on Workforce Protections held a hearing on H.R. 2391, a bill introduced by Representative Cass Ballenger to amend the Fair Labor Standards Act to allow compensatory time for all employees. The following witnesses testified on H.R. 2391: Mr. Pete Peterson, Senior Vice President of Personnel, Hewlett-Packard Company, Palo Alto, California; Ms. Debbie McKay, Administrative Specialist, PRC, Inc., McLean, Virginia; and Mr. Michael T. Leibig, Attorney-at-Law, Zwerdling, Paul, Leibig, Kahn, Thompson & Wolly, P.C., Fairfax, Virginia.

On December 13, 1995, the Subcommittee on Workforce Protections approved H.R. 2391, as amended, by voice vote, and ordered the bill favorably reported to the Full Committee. On June 26, 1996, the Committee on Economic and Educational Opportunities approved H.R. 2391, as amended, by voice vote, and ordered the bill favorably reported by a rollcall vote of 20 yeas and 16 nays. H.R. 2391 was passed by the House, as amended, on July 30, 1996 by a rollcall vote of 225 yeas to 195 nays, but was not acted on by the Senate prior to the adjournment of the 104th Congress.

105th Congress

On January 7, 1997, Representative Cass Ballenger introduced H.R. 1, the Working Families Flexibility Act, with 40 original cosponsors. The Subcommittee on Workforce Protections held a hearing on H.R. 1 on February 5, 1997. The following individuals testified at the hearing: the Honorable Kay Granger, Member of Congress representing the 12th district of Texas; the Honorable Tillie Fowler, Member of Congress representing the 4th district of Florida; the Honorable Sue Myrick, Member of Congress representing the 9th district of North Carolina; Ms. Christine Korzendorfer, Manassas, Virginia; Mr. Peter Faust, Clear Lake, Iowa; Ms. Linda M. Smith, Miami, Florida; Dr. Roosevelt Thomas, Vice President of Human Resources and Affirmative Action at the University of Miami, testifying on behalf of the College and University Personnel Association, Washington, D.C.; Ms. Diana Furchtgott-Roth, Resident Fellow at the American Enterprise Institute for Public Policy Research, Washington, D.C.; Mr. Robert D. Weisman, Attorney-at-Law, Schottenstein, Zox, & Dunn, Columbus, Ohio; Mr. Russell Gunter, Attorney-at-Law, testifying on behalf of the Society for Human Resource Management (SHRM), Alexandria, Virginia; Ms. Karen Nussbaum, Director of the AFL–CIO Working Women's Project, Washington, D.C.; and Ms. Helen Norton, Director of Equal Opportunity Programs at the Women's Legal Defense Fund, Washington, D.C.

On March 5, 1997, the Committee on Education and the Workforce discharged the Subcommittee on Workforce Protections from further consideration of the bill and favorably reported H.R. 1, as amended, by a rollcall vote of 23 yeas and 17 nays. H.R. 1 was

passed by the House, as amended, on March 19, 1997 by a rollcall vote of 222 yeas to 210 nays, but was not acted on by the Senate prior to the adjournment of the 105th Congress.

106th Congress

On April 13, 1999, Representative Cass Ballenger introduced H.R. 1380, the Working Families Flexibility Act, which was identical to H.R. 1 as passed by the House during the 105th Congress. The bill was referred to the Committee on Education and the Workforce; however, there was no action taken on the legislation.

107th Congress

On May 24, 2001, Representative Judy Biggert introduced H.R. 1982, the Working Families Flexibility Act, with 33 original cosponsors. The bill was identical to H.R. 1 as passed by the House during the 105th Congress. While there was no action taken on H.R. 1982, the Subcommittee on Workforce Protections held two hearings focusing on the issue of increasing workplace flexibility under the Fair Labor Standards Act of 1938.

On March 6, 2002, the following individuals testified before the Subcommittee on Workforce Protections: Mr. Ronald Bird, Chief Economist, Employment Policy Foundation, Washington, D.C.; Dr. Carl E. Van Horn, Professor and Director, John J. Heldrich Center for Workforce Development, Rutgers, the State University of New Jersey, New Brunswick, New Jersey; Mr. William J. Kilberg, Senior Partner, Gibson, Dunn & Crutcher, LLP, Washington, D.C., testifying on behalf of the U.S. Chamber of Commerce; and Ms. Judith M. Conti, Co-founder and Director, Legal Services and Administration, D.C. Employment Justice Center, Washington, D.C.

On May 15, 2002, the following individuals testified before the Subcommittee on Workforce Protections: Mr. Donald J. Winstead, Acting Associate Director for Workforce Compensation and Performance, U.S. Office of Personnel Management, Washington, D.C.; Mr. Andy Brantley, Associate Vice President for Human Resources, University of Georgia, Athens, Georgia, testifying on behalf of the College and University Professional Association for Human Resources (CUPA—HR); Mr. Thomas M. Anderson, J.D., SPHR, Human Resources Director, Fort Bend County, Rosenberg, Texas, testifying on behalf of the Society for Human Resource Management (SHRM); and Mr. Dennis Slocumb, Executive Vice President and Legislative Director, the International Union of Police Associations (IUPA), AFL–CIO, Alexandria, Virginia.

108th Congress

On March 6, 2003, Representative Judy Biggert introduced H.R. 1119, the Family Time Flexibility Act, with 72 original cosponsors. The provisions in the Family Time Flexibility Act were identical to the provisions of H.R. 1, as passed by the House during the 105th Congress.

The Subcommittee on Workforce Protections held one hearing on the legislation on March 12, 2003. The following individuals testified at the hearing: Mr. Houston L. Williams, Chairman and CEO, PNS, Inc., San Jose, California, testifying on behalf of the U.S. Chamber of Commerce; Ms. Terri Martell, Electrician, Eastman Kodak Company, Wayland, New York; Ms. Ellen Bravo, National

Director, Nine to Five: National Association of Working Women, Milwaukee, Wisconsin; and Mr. John A. Dantico, SPHR, CCP, Principal of Compensation/HR Consulting for the HR Group, Northbrook, Illinois, testifying on behalf of the Society for Human Resource Management (SHRM).

On April 3, 2003, the Subcommittee on Workforce Protections favorably reported H.R. 1119, without amendment, to the Full Committee by a rollcall vote of 8 yeas and 6 nays. On April 9, 2003, the Committee on Education and the Workforce approved H.R. 1119, without amendment, and ordered the bill favorably reported to the House by a rollcall vote of 27 yeas and 22 nays.

COMMITTEE STATEMENT AND VIEWS

Background

The Fair Labor Standards Act (FLSA)[1] was enacted in 1938. Among its provisions is the requirement that hours of work by "non-exempt employees" beyond 40 hours in a seven day period must be compensated at a rate of one-and-one-half times the employee's regular rate of pay.[2] Certain exceptions to the "40 hour work week" are permitted, under sections 7 and 13 of the FLSA,[3] for a variety of specific types and places of employment whose circumstances have led Congress, over the years, to enact specific provisions regarding maximum hours of work for those types of employment. In addition, the "overtime pay" requirement does not apply to employees who are exempt as "executive, administrative, or professional" employees.[4]

Under the overtime pay requirement in the FLSA, overtime pay for employees in the private sector must be in the form of cash wages paid to the employee in the employee's next paycheck. This is contrary to the overtime pay provision for employees in the public sector. Section 7(o) of the FLSA[5] provides that public agencies may provide paid compensatory time off in lieu of overtime compensation, so long as the employee or his or her collective bargaining representative has agreed to this arrangement and the compensatory time off is given at a rate of not less than one-and-one-half hours for each hour of employment for which overtime compensation is required.

The difference in treatment between the private and public sectors under the FLSA is explained by the fact that the provisions applying the FLSA to the public sector were added in 1985 and therefore included a recognition that the workplace and work force had changed greatly since the 1930s when the private sector provision was written.[6] In 1985, Congress recognized that changes in the work force and the workplace had led many employers in the public sector to make compensatory time available and for their employees to choose compensatory time. As the Senate Labor Com-

[1] 29 U.S.C. § 201–219.
[2] 29 U.S.C. § 207.
[3] 29 U.S.C. §§ 207, 213.
[4] 29 U.S.C. § 213.
[5] 29 U.S.C. § 207(o).
[6] The changes to the FLSA authorizing compensatory time for public employees generally were preceded by legislation authorizing greater flexibility for federal employees. The Federal Employees Flexible and Compressed Work Schedules Act was passed in 1978, reauthorized in 1985, and made permanent in 1985.

mittee explained in including compensatory time for the public sector in the 1985 amendments:

> The Committee also is cognizant that many state and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements-frequently the result of collective bargaining—reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, we wish to accommodate such arrangements.[7]

The Committee is certain that paid compensatory time off in lieu of overtime pay for hours worked beyond 40 in a week can provide "mutually satisfactory solutions" in the private sector no less than is the case in the public sector. The Committee has heard compelling testimony over the past several years from individuals who are covered by the overtime protections of the FLSA and who believe that a change in the law to allow paid compensatory time would be of great benefit to them.

Ms. Arlyce Robinson, an Administrative Support Coordinator for Computer Services Corporation and an hourly non-exempt employee, described to the Subcommittee on Workforce Protections how she would like to be able to use compensatory time:

> I am here this morning to share with you my feelings about the impact of a law that was created over 50 years ago to protect many of us in the workplace, the Fair Labor Standards Act. I know that under this law, as a non-exempt employee I am eligible for overtime if I work more than 40 hours in a work week. And, while I never turned down an opportunity to earn more money, there have been times when I would have gladly given up the additional pay to enjoy flexibility in planning my work schedule, the same flexibility that my exempt colleagues have had for some time. Let me give you an example.
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> In a few months, as all of you know, the weather around Washington DC will become much colder. We are likely to see some snow and ice. And if we have a winter like the one we had two years ago, we will likely see a great deal of snow and ice. If it snows on a Monday or Tuesday—at the beginning of my workweek—and I can't get to work on one of those days, I know that I can make up the hours that I missed by working extra hours later in that same week—say on Thursday or Friday. However, if it snows at the end of my workweek, we have a different issue. Although my company would like to allow me to make up the work during the following workweek, the fact is that they can't allow it without incurring additional costs. You see, if I only worked 4 eight hour days—or 32 hours—the first week, I would have to work 48 hours the following week in order to have a full 80 hour paycheck for the two week period. But right now under the Fair Labor Standards Act,

[7] Report on S. 1570, Committee on Labor and Human Resources, U.S. Senate, 99th Congress, First Session, Senate Report No. 99–159, p. 8.

> each one of the 8 hours worked over 40 in the second week would have to be paid on an overtime basis. That's just too expensive for my company, given the number of non-exempt employees that we have. So since I can't make up the time in the second week, I have to take vacation leave which keeps my paycheck whole but gives me less vacation to use later—when I would like to use it. My only other alternative is to take leave without pay, which keeps my vacation intact, but results in my losing money in my paycheck. And I do need my paycheck!!
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> * * * For the first 20 years of my career, I worked in the public sector as a secretary and as an administrative assistant in the DC public school system and for the DC Office of Personnel. When I worked for these agencies, I was able to earn and use compensatory time. I can't earn that now * * * This lack of flexibility is especially difficult for parents of young children, both mothers and fathers, and, particularly, for single parents. Doctor appointments and school conferences can often only be scheduled during work hours. For non-exempt employees, this often means having to take sick leave or vacation leave to have a few hours off to take care of family responsibilities.[8]

Ms. Sandie Moneypenny, a process technician for Timken Company and an hourly non-exempt employee, described how having the option of choosing compensatory time could help her as a working mother:

> Compensatory time off for a working mother like myself would be very helpful. If I had to leave work because of a sick child, wanted to attend a teachers conference, needed to take my child to the dentist or just wanted time off to be with my family, I would have the option without it affecting my pay.
>
> Today I can only use compensatory time in the week it occurs, but as most of you know, life doesn't seem to work that way. If I could bank my overtime, I wouldn't have to worry about missing work if my child gets sick on Monday or Tuesday. I also would only be postponing valuable time off with my family when I have a busy work week, because I could always take the time off at a later date.[9]

Ms. Deborah McKay, an Administrative Specialist, with PRC, Inc. testified about why she would like to have the option of selecting compensatory time in lieu of cash overtime:

> Under this proposal, an employee would be given the option to use overtime compensatory time at a later date when these family emergency type situations occur. Personally, I would find this time useful in working on term papers and projects for school as well as waiting for the repairman. There is nothing more frustrating than having to take a whole day of leave to have a scheduled repairman

[8] Hearings on the Fair Labor Standards Act before the Subcommittee on Workforce Protections, Committee on Economic and Educational Opportunities, U.S. House of Representatives, 104th Congress, First Session, Serial No. 104–46, pp. 180–181.

[9] Id., p. 186.

> show up—supposed to show up at 9 a.m. and then not show up until 3 or 4 in the afternoon. * * *
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> * * * [W]hat I am recommending is simple * * * [H]ave the FLSA amended by giving non-exempt and exempt employees the option of time and a half pay or time and a half of equal value off.[10]

Mr. Peter Faust of Clear Lake, Iowa, an hourly employee at a nonprofit facility for individuals who are mentally and/or physically disabled, related the difficulty that he and his wife have when struggling to balance family responsibilities with work schedules and the importance that additional time off would have for him and his coworkers:

> This amendment is a win-win for working families and employers * * * Everyone I've talked to, without exception, would like the choice of getting overtime or comp time, and almost everyone I've asked preferred comp time rather than overtime. * * *
>
> There are a lot of ways to make money in this country and lots of ways to spend it, but there's only one way to spend time with yourself, family or friends, and that's to have the time to spend.
>
> In this country of choice, can the working families have a choice? Some already do. Federal employees have had the choice to save comp time since 1978. State and local employees can save it too. Does our government value the private working families in this country enough to give us the same choice?[11]

Ms. Linda M. Smith, a medical staff credentialing coordinator and secretary at the Bascom Palmer Eye Institute in Miami, Florida, expressed her "wholehearted support" for the development of a program which would enable her to have the option of comp time:

> With the implementation of the banked comp time program, I could use my overtime hours to create time for pregnancy leave for a second child, furthering my education, taking care of a debilitated parent, or, closest to my heart, creating special days with my daughter. A goal of mine is to obtain my degree. My employer allows me to take one class during working hours, without pay. With accrued comp time, I could take the class during working hours, with pay. Accrued comp time would also allow me to take time off for doctors' appointments, teachers conferences, or to care for a sick child without having to use accrued sick time. In this way, sick time could be saved for catastrophic or long-term illnesses.[12]

Ms. Christine Korzendorfer, an hourly employee with TRW in Manassas, Virginia, told the Subcommittee how important it would be for her to be able to have the choice between compensatory time and overtime wages:

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[10] Id., pp. 416–417.

[11] Hearing on H.R. 1, the working Families Flexibility Act, before the Subcommittee on workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 105th Congress, First Session, February 5, 1997, Serial No. 105–1, pp. 17–18.

[12] Id., p. 22.

> This schedule as a hourly employee provides me with a lot of overtime pay. This pay is important to me. However, the time with my family is more important. If I had a choice there are times when I would prefer to take comp time in lieu of overtime. What makes this idea appealing is that I would have a choice with the legislation you are considering.
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> Just recently, my son was ill and I had to stay at home with him. I took a day of vacation which I would have preferred to use for vacation! But I did not want to take unpaid leave. * * * If I had the choice, I would have used comp time in lieu of overtime for that day off from work. Besides, I would have only had to use about five and one-half hours of comp time to cover that eight hour day.[13]

Ms. Terri Martell, an electrician with the Eastman Kodak Company in New York, told the Subcommittee about the increased flexibility that compensatory time would provide to her and her co-workers:

> Another example of needing flexibility with overtime pay and how it is paid is when the children are sick. I remember when my 10–year old Eric was born, I used up eleven of my twenty vacation days to stay home with him or take him to the doctor just that first year. Being a first time mom and needing to nurture him while he was sick was very important to him and to me. As a working mother, it is very stressful to be at work when your children are in someone else's care. In 1993, I could have used that [comp] time during those emergencies.
>
> I have heard from co-workers who feel strongly about the need for the more flexible schedules—the kind that comp time would allow. These are employees who are caregivers of their aging parents. One colleague in particular told me of her need to balance work and family. For her, comp time would mean allowing more flexibility in spending more time with her ill parent. The ability to save overtime as comp time and use it in times of need is crucial when crisis occurs but also to cope with day-to-day challenges. Also, someone who has used up annual vacation hours may have a need for extra time later in the year. Banking comp time could offer options instead of requiring employees to choose between working and taking time off without pay to address family needs.[14]

Ironically, employees who are classified as exempt under the FLSA are not so restricted by law and often are permitted by their employers to have much more flexibility in their schedules than non-exempt employees. But for non-exempt employees, the law has denied them the flexibility that they need and want. As Ms. Robinson summarized it:

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[13] Id., pp. 10–11.

[14] Hearing on H.R. 1119, the Family Time Flexibility Act, before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, March 12, 2003, (to be published).

> While the law was intended to protect us—and maybe 50 years ago it did—in today's business world it has had the effect of creating the illusion of two classes of workers. The term non-exempt is often misinterpreted to mean "less than professional."[15]

There is ample support for concluding that Ms. Robinson, Ms. Moneypenny, Ms. McKay, Mr. Faust, Ms. Smith, Ms. Korzendorfer, and Ms. Martell are not alone in wanting the increased flexibility that would be provided by the Family Time Flexibility Act. As Dr. Carl E. Van Horn, Professor and Director of the John J. Heldrich Center for Workforce Development at Rutgers University told the Subcommittee:

> 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 * * * said this is the most important issue. They rate this higher than job security, salary, quality of working environment, and relationships with co-workers.[16]

As Ms. Martell put it most simply:

> Today in my private sector job, I am not given the choice of paid time off instead of paid overtime compensation. The compensation I receive now is only of monetary value. Money is very important and the main reason I work. But money does not solve all the needs of my children. If I were given the choice to take paid overtime, I could do so for my family when I want or need to take time. I might then be able to make up some of those lost "family time days," or care for my sick child or parent. The decision to permit comp time instead of overtime pay should be left to me and my employer to decide—not the federal government.[17]

COMMITTEE VIEWS

H.R. 1119 amends the FLSA to permit employers in the private sector to offer their employees the voluntary option to receive overtime pay in the form of paid compensatory time in lieu of cash wages. The legislation does not change the employer's obligation to pay overtime at the rate of one-and-one-half times the employee's regular rate of pay for any hours worked over 40 in a seven day period. The bill simply allows overtime compensation to be given in the form of paid compensatory time off, at the rate of one-and-one-half hours of compensatory time for each hour of overtime worked, and only if the employee and employer agree on that form of over-

[15] Hearings on the Fair Labor Standards Act before the Subcommittee on Workforce Protections, Committee on Economic and Educational Opportunities, U.S. House of Representatives, 104th Congress, First Session, Serial No. 104–46, p. 181.

[16] Hearings on the Fair Labor Standards Act before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, Serial No. 107–48, p. 8.

[17] Hearing on H.R. 1119, the Family Time Flexibility Act, before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, March 12, 2003, (to be published).

time compensation. As is the case where compensatory time is already used in the public sector, the employee would be paid, at the employee's regular hourly rate of pay, when the compensatory time is used.

H.R. 1119 would not alter current public sector use of compensatory time in any way. Rather, the legislation seeks to extend the option of paid compensatory time in lieu of overtime compensation to private sector employees, which is the same option that federal, state, and local government employees have had for many years under the FLSA, and which private sector employees overwhelmingly support. The legislation includes numerous protections for employees to assure that employees' choice and use of compensatory time is voluntary. Compensatory time, as provided in H.R. 1119, is not a mandate on employers or employees. H.R. 1119 simply gives employees and employers the opportunity to agree to this arrangement, an opportunity which is now denied to them by law.

Agreement

Under H.R. 1119, an employer and employee must reach an express mutual agreement that overtime compensation will be in the form of paid compensatory time. If either the employee or the employer does not so agree, then the overtime pay must be in the form of cash compensation.

The agreement between the employer and employee must be reached prior to the performance of the work for which the compensatory time off would be given. The agreement may be specific as to each hour of overtime, or it may be a blanket agreement covering overtime worked within a set period of time.

The bill allows two types of employer-employee agreements on compensatory time. Where the employee is represented by a recognized or certified labor organization, the agreement must be in the collective bargaining agreement between the employer and the recognized or certified labor organization. By referring to a labor organization which has been recognized or certified under applicable law, H.R. 1119 includes any law providing for recognition or certification of labor organizations representing private sector workers in collective bargaining, including, at the federal level, the National Labor Relations Act and the Railway Labor Act.

Where the employees are not represented by a recognized or certified labor organization, the agreement must be made between the employer and the individual employee. The bill specifies that any such agreement between the employer and an individual employee must be entered into knowingly and voluntarily by the employee, and may not be a condition of employment.

In order to be eligible to choose compensatory time, an employee must have worked at least 1000 hours in a period of continuous employment with the employer during the 12-month period preceding the date that the employee agrees to receive or receives compensatory time. Under the language of the bill, this 1000 hour requirement is assessed on a "rolling" basis, such that to be eligible to enter an agreement to receive compensatory time, or to actually receive such time in lieu of cash compensation for overtime, an employee must have worked at least 1000 hours in a period of continuous employment with the employer in the 12-month period prior to either entering such an agreement or actually receiving compen-

satory time. The Committee expects that the phrase "period of continuous employment with the employer" will be construed to encompass an unbroken period of time in which an employee is maintained on the payroll of a single employer (or, as applicable, its successor) on active status, or on inactive status where the employer has a reasonable expectation that the employee will return to duty (e.g., an employee on paid or unpaid leave whom the employer reasonably expects will return to duty will generally be considered to be in a "period of continuous employment" with that employer).

The bill also requires that, with regard to agreements between employers and individual employees, the agreement on compensatory time between the employer and the employee must be affirmed in a written or otherwise verifiable statement. The latter is intended to allow computerized and other similar payroll systems to include this information, so long as the employee's agreement to take the overtime in the form of compensatory time is verifiable. The Committee does not intend that an agreement to take compensatory time could be purely oral with no contemporaneous record kept. To further assure that such agreements are authentic, H.R. 1119 provides that, pursuant to the general recordkeeping authority of the FLSA,[18] the Secretary of Labor has authority to prescribe the information which the records of such agreement must include and the period of time the records should be maintained by the employer.

The assurance that the individual employee's agreement to take compensatory time in lieu of cash overtime pay is voluntary is further protected by provisions in the bill which allow an employee who has entered into such an agreement to withdraw it at any time. Thus an employee who agrees that all or a portion of the overtime hours he or she works will be compensated in this form may at any point withdraw from that arrangement, in which case any subsequent hours of overtime worked by the employee must be compensated in the form of cash compensation.

Just as is the case with compensatory time as it has been approved and operates in the public sector,[19] H.R. 1119 does not require that the same agreement be entered with every employee, or that the employer agree to offer compensatory time to all employees. Opponents of compensatory time have claimed that this allows an employer to unfairly single out employees and to force them to take compensatory time in lieu of cash overtime against the employee's wishes. However, the bill's express prohibition on "direct or indirect coercion" and attempted coercion of employees (see discussion below) would prohibit an employer from conferring any benefit or compensation for the purpose of interfering with an employee's right to request or not request compensatory time. Thus, an employer may not single out employees for overtime work for the purpose of rewarding or punishing employees for their willingness or unwillingness to take compensatory time.[20]

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[18] 29 U.S.C. § 211(c).

[19] 29 C.F.R. § 553.23(c).

[20] Obviously an employer also may not use any overtime policy, including compensatory time, to discriminate among employees for any reason prohibited by law. See testimony of Mr. Robert Weisman, Hearing on H.R. 1, the Working Families Flexibility Act before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 105th Congress, First Session, February 5, 1997.

The opponents of compensatory time have argued that compensatory time should be denied to everyone, but if it is allowed at all, then "low-wage" workers and certain occupations should be excluded. The Committee believes that the requirement for mutual agreement by the employer and the employee and the employee protections in the bill ensure that compensatory time is voluntary.

Furthermore, there are a great many workers who likely would be included in a national definition of "low wage" who want to have the option of paid compensatory time—and who feel perfectly capable of making that decision themselves. Indeed, some of the most forceful and compelling testimony before the Subcommittee on Workforce Protections in support of allowing workers the option of paid compensatory time was given by a "low wage worker," Mr. Peter Faust, who likely would be denied that option if all such workers were excluded from H.R. 1119.[21] The Committee sees no reason to deny certain employees the option of compensatory time, based solely upon their level of income or their occupation.

Conditions on compensatory time

The Committee intends that compensatory time be a matter of agreement between employers and employees and to that end, the law should permit employers and employees some flexibility in structuring compensatory time arrangements. H.R. 1119 provides certain parameters for such compensatory time arrangements, primarily in order to assure that employees are fully protected, which apply whether the compensatory time agreement is with a labor organization or with an individual employee (see discussion above). The agreement between the employer and employee may include other provisions governing the preservation, use or cashing out of compensatory time, so long as these provisions are consistent with the Family Time Flexibility Act. To the extent that any provision of an agreement is in violation of the Family Time Flexibility Act, the provision would be superseded by the requirement of the Act.[22]

H.R. 1119 provides that an employee may accrue no more than 160 hours of compensatory time. This is in contrast to the public sector provisions in current law which allow most employees to accrue 240 hours of compensatory time. The lower limit for private sector employees is designed to protect both employers and employees against accrual of excessive amounts of compensatory time liability. The Committee emphasizes that this 160-hour limit is the legal maximum that may be accrued. Employers may establish a lower limit for compensatory time accrual for their employees, and employees, of course, may agree to fewer hours of compensatory time, or decline compensatory time as the payment for overtime altogether.

The bill also requires an annual "cash out" of all accrued compensatory time. Such annual cash out also protects both employers and employees against accrual of excessive amounts of compensatory time liability. Unless an alternative date is established by the employer, the annual cash out date is the end of the calendar

[21] Testimony of Mr. Peter Faust, Hearing on H.R. 1, the Working Families Flexibility Act before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 105th Congress, First Session, February 5, 1997.

[22] This relationship between the agreement and the parameters stated in law is the same as applies to public sector compensatory time. See 29 C.F.R. § 553.23(a)(2).

year (December 31) and the employee must be paid for the accrued compensatory time not later than the following January 31. The employer may establish an alternative annual cash out date, in which case the employer must pay the employee for any accrued and unused compensatory time within 31 days of the end of the 12-month period. Subject to continued agreement between the employer and employee, the employee may begin to accrue compensatory time anew after the cash out date.

An employer may cash out some accrued compensatory time more frequently than annually. However, the employer must provide an employee with 30 days notice prior to cashing out the employee's accrued, unused compensatory time, and may only cash out accrued compensatory time which is in excess of 80 hours.

An employee may also choose to cash out his or her accrued compensatory time at any time. The employee may submit a written request to such effect to the employer, upon which request the employer must cash out the employee's accrued compensatory time within 30 days of receiving the request. There is no hour limit on the employee's ability to cash out accrued compensatory time.

As described above, an employee who has an individual agreement with the employer regarding compensatory time may withdraw that agreement at any time. Similarly, an employer who offers compensatory time to employees may discontinue such policy upon giving employees 30 days notice, except where a collective bargaining agreement provides otherwise. In the event an employer does discontinue offering compensatory time, any hours of compensatory time already accrued by employees remain the employees' hours and must be so recognized by the employer.

The bill provides that upon the voluntary or involuntary termination of employment, an employee's unused compensatory time must be cashed out by the employer, and is to be treated as a wage payment due and owing the employee. The bill further provides that any payment owed to an employee or former employee (whether by operation of the annual cash out of all accrued compensatory time, because of the employee's request to cash out accrued compensatory time, because of the employer's decision to cash out certain accrued compensatory time as described above, or because of the voluntary or involuntary termination of employment) shall be considered unpaid overtime compensation to the employee. In addition to making explicit that the remedies for unpaid overtime compensation under the FLSA apply, this provision also assures that any unpaid, accrued compensatory time is treated as unpaid employee wages in the event of the employer's bankruptcy. Thus any unpaid, accrued compensatory time would have the same priority claim and legal status as other employee wages under both the FLSA and the Bankruptcy Code. As described above, the payment for accrued compensatory time is owed to the employee or former employee when the claim for payment is made, and takes the same priority as other wages of that date.

In all cases in which accrued compensatory time is cashed out, the rate of cash out must be the employee's regular rate when the compensatory time was earned or the employee's current regular rate, whichever is higher. Thus, for example, if compensatory time is accrued during the course of a year and the employee has received an increase in his or her hourly rate during the year, the

cash out rate at the end of the year would be the employee's final regular rate of pay for that year, reflecting the employee's increase in pay, even if the compensatory time was accrued prior to the pay increase.

Opponents of H.R. 1119 have raised concerns that compensatory time would reduce an employee's pension benefits. These concerns are unfounded. The overtime hours for which the employee receives compensatory time are hours "for which the employee is paid or entitled to pay for the performance of duties for the employer." They are therefore defined as "hours of service" under the Employee Retirement Income Security Act (ERISA),[23] for which the employee would be credited for purposes of accrual, participation, and vesting of benefits. Obviously in some cases the employee has also not worked hours that he or she otherwise would have when the employee uses (as compared to accrues) paid compensatory time. Thus the employee's total hours worked may be reduced, not by the earning of compensatory time but by substituting the paid compensatory time off for other hours of work. If as a result, the employee works less total hours, the employee's total monetary earnings and credits for benefits may be less. But that effect is no different than any other decision by the employee (for example, refusing optional overtime work) that reduces the total number of hours actually worked by the employee. Of course, employees who choose to take compensatory time off have gained an advantage which enables them to spend more paid time off with their family or for whatever purpose they wish, which is not available to employees who choose cash wages.

Similarly, opponents have raised concerns that compensatory time disadvantages an employee's eligibility for unemployment benefits, or the amount of unemployment benefits. H.R. 1119 clearly treats compensatory time as employee wages and any payments for accrued compensatory time would be treated as are other employee wages under state laws, for purposes of eligibility for unemployment benefits and determination of the amount of benefits. Receipt of compensation for accrued compensatory time when an employee's employment is terminated may, depending on state law on "disqualifying income," defer receipt of unemployment benefits but would not diminish the total benefits to which the employee may be entitled. Furthermore, to attempt to dictate that compensatory time payments should not considered in any unemployment benefit determination, as some have suggested, would be to turn existing federal policy on "disqualifying income" on its head, by dictating to the States how this form of employee wages should be treated and by dictating that these wages should not be considered as wages.

Finally, H.R. 1119 requires the Secretary of Labor to revise the posting requirements under the regulations of the FLSA to reflect the compensatory time provisions of the bill. This will help to ensure that employees are informed of the circumstances under which compensatory time may be offered by an employer, the employees' right to accept or decline such offer, and the employees' rights regarding the use of compensatory time. The Secretary of Labor may, of course, promulgate such regulations as necessary in order to implement the provisions of H.R. 1119.

[23] C.F.R. § 2530.200b–2.

Employee use of accrued compensatory time

Under H.R. 1119, an employee who has accrued compensatory time may generally use the time whenever he or she so desires. The only limitations which the bill puts on the use of compensatory time is that the employee's request to use compensatory time be made a reasonable time in advance of using it, and that the employer may deny the employee's request if the employee's use of the compensatory time would "unduly disrupt" the operations of the employer. It is the Committee's intent that an employer shall grant the employee's request to use accrued compensatory time on the date and/or time requested by the employee, if the use on such date and/or time does not "unduly disrupt" the employer's operation, and if the employee has requested use of the accrued compensatory time within a reasonable period in advance of the date and/or time requested.

These conditions on the use of accrued compensatory time are the same as those in current law which apply to compensatory time for public sector employees.[24] Regulations issued by the Department of Labor define "unduly disrupt" as follows:

> 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. 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.[25]

Court decisions regarding public sector compensatory time have also shown that the "unduly disrupt" standard is narrow and does not allow the employer to control the employee's use of compensatory time. In *Heaton* v. *Missouri Department of Corrections,* 43 F.3d 1176, 1180 (8th Cir. 1994), the Court of Appeals determined that banked compensatory time "essentially is the property of the employee." The court held that the "unduly disrupt" limitation on the employee's right to use compensatory time does not allow the employer to control the use of the employee's compensatory time or to force the employee to use compensatory time when the employee does not want to use it.

Similarly, in *Moreau* v. *Harris County,* D.C. S. Tex., (No. H–94–1427, Nov. 25 1996) the District Court held that the employer's policy of forcing employees to use accrued compensatory time at the employer's convenience in order to reduce compensatory time balances was illegal. Regarding the employee's control of the use of accrued compensatory time, the Court said:

> A public employer may exercise control over an employee's use of compensatory time only when the employee's requested use of that time would disrupt the employer's operations. An employee could attempt to extort concessions

[24] 29 U.S.C. § 207(o).
[25] 29 C.F.R. § 553.25.

> from her employer by taking compensatory time at a time when her presence is critical to the operation, but no suggestion has been made that the sheriff's office has been the victim of abusive workers * * * Although an employer may establish reasonable restrictions on vacations, sick leave, and other time-off forms of compensation, it cannot evade its statutory obligation for extra pay for overtime work, even when the statute allows the extra pay to be in the form of time off. Compensatory time is far less amenable to management adjustment than the others because the time off is in place of cash pay required by statute.

Finally, the Committee notes that the "unduly disrupt" standard contained in H.R. 1119 is similar to the standard employed under the Family Medical Leave Act that limits an employee's right to take leave for medical treatments for the employee or a member of his or her family ("* * * the employee shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer * * *").[26]

Given the long history of this language in the FLSA with regard to compensatory time in the public sector and the adoption of similar language in the Family and Medical Leave Act, it is simply dishonest for the opponents of private sector use of compensatory time to claim that H.R. 1119 allows the employer to control when compensatory time is used. The employer's right to deny compensatory time off under H.R. 1119 is very limited. But the employer must have some ability to maintain the operations of the business. If that is not recognized in the law, then no employer will ever offer compensatory time as an option for employees and the Committee's efforts to respond to employees' desires to have this flexibility will be of no effect. Furthermore, providing a right to an employee to use compensatory time without any regard to workload or business demands is simply unfair to coworkers, who in many cases would have to handle the workload of the absent employee. Just as was the case in 1985 when workers in the public sector were allowed to use compensatory time, the Committee bill seeks "to balance the employee's right to make use of comp time that has been earned and the employer's need for flexibility in operations."[27]

Enforcement and remedies

As an amendment to the FLSA, the compensatory time provisions in H.R. 1119 would be subject to the applicable enforcement and remedies of the FLSA. Section 15(a)(2) of the FLSA makes it unlawful for any person to violate any provision of section 7,[28] of which the compensatory time provisions of H.R. 1119 would be a part. In addition, section 15(a)(3) makes it unlawful to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to

[26] 29 U.S.C. § 2612(e). As one district court recently said in construing these provisions of the Family and Medical Leave Act, "The FMLA also does not give employees the unfettered right to take time off subject only to their own convenience without any consideration of its effect upon the employer." *Kaylor* v. *Fannin Regional Hospital,* 946 F.Supp. 988, 999 (N.D. Ga. 1996).

[27] Report on S. 1570, Committee on Labor and Human Resources, U.S. Senate, 99th Congress, First Session, Senate Report No. 99-159, p. 11.

[28] 29 U.S.C. § 215(a)(2).

be instituted any proceeding under or related to" the employee's rights under the FLSA.[29]

Section 16(b) of the FLSA authorizes an action by an employee against his or her employer for any violations of section 7.[30] The suit may be filed in any federal or state court. An employee may also file a complaint with the U.S. Department of Labor. The Department of Labor generally attempts to resolve such complaints; however, the Department of Labor may also sue the employer for damages on behalf of the employee or employees whose rights were violated, or may also seek injunctive relief.[31] Section 16(e)[32] also authorizes the Secretary of Labor to seek civil penalties of up to $1,000 per violation against an employer who "willfully or repeatedly" violates section 7. In any action in which the employee has been wrongfully denied overtime compensation, the FLSA authorizes damages equal to the amount of the unpaid compensation required by the FLSA and an equal amount as liquidated damages;[33] liquidated damages may be reduced or eliminated if the court finds that the employer acted in good faith and had reasonable grounds for believing that he or she was in compliance with the FLSA.[34] In any action brought by an employee, the employee may also be paid for his or her attorney's fees and costs.[35]

In short, H.R. 1119 maintains and applies all of the protections in current law to employees choosing to opt for compensatory time. Moreover, H.R. 1119 adds a prohibition to those already applicable under the FLSA. The bill prohibits an employer from directly or indirectly intimidating, threatening, coercing, or attempting to intimidate, threaten, or coerce any employee for purposes of interfering with the employee's right to take or not take compensatory time in lieu of cash overtime, or to use accrued compensatory time. Opponents of compensatory time have claimed that H.R. 1119 would allow employers to force employees to take compensatory time against their will or to use accrued compensatory time at the employer's convenience. Those claims are contrary to the plain language of the bill.

The language of H.R. 1119 prohibiting intimidation, threats and coercion, or attempts thereto, is identical to prohibitory language protecting federal employees under the Family and Medical Leave Act,[36] and the Federal Employees Flexible and Compressed Work Schedules Act.[37] The term "intimidate, threaten, or coerce" has been defined under those laws as "promising to confer or conferring any benefit (such as appointment, promotion, or compensation), or taking or threatening to take any reprisal (such as deprivation of appointment, promotion, or compensation)."[38] Thus, H.R. 1119 prohibits an employer, for example, from forcing employees to take compensatory time in lieu of monetary compensation by offering

[29] 29 U.S.C. § 215(a)(3).
[30] 29 U.S.C. § 216(b).
[31] 29 U.S.C. § 217.
[32] 29 U.S.C. § 216(e).
[33] 29 U.S.C. § 216(b).
[34] 29 U.S.C. § 260.
[35] 29 U.S.C. § 216(b).
[36] 5 U.S.C. § 6385.
[37] 5 U.S.C. § 6132.
[38] 5 U.S.C. § 6385.

overtime hours only to employees who ask for compensation in the form of compensatory time.

The bill also creates a new remedy under the FLSA for employers who violate the anti-coercion language just described. Section 3 of H.R. 1119 provides that an employer who violates the anti-coercion provision shall be liable to the employee for the employee's rate of compensation for each hour of compensatory time and an equal amount as liquidated damages. If the employee has already used some or all of the compensatory time, the amount to be paid as damages is reduced by that amount.

Opponents of compensatory time have claimed that, while it may be prohibited conduct under H.R. 1119, there is no sanction in H.R. 1119 for an employer who either forces an employee to take compensatory time or denies the employee the right to use accrued compensatory time. In both cases they are wrong. An employee who is forced to take compensatory time may receive the amount of the employee's compensation for each hour of compensatory time plus an equal amount of liquidated damages, less the amount of compensation the employee has already received for those hours of compensatory time. Similarly, where an employee has been wrongfully denied use of accrued compensatory time, the employee or the Department of Labor may if necessary, seek injunctive relief and the employer who refuses to comply may be subject to civil penalties. The Committee expects that the Department will make use of the regulatory process to clarify the application of the remedies provisions contained in H.R. 1119 to these and other potential scenarios.

In addition, there is a "self-policing" aspect: the employee retains his or her compensation and can demand to cash out at the employee's current rate of pay or the rate when the time was earned, whichever is higher. In short, the employer does not benefit by denying the employee the use of his or her compensatory time, and where necessary, there are effective sanctions under the bill and the FLSA for employees who violate the employee protections and other provisions of H.R. 1119.

SUMMARY

H.R. 1119 would give private sector employers and employees an option under the Fair Labor Standards Act which federal, state, and local governments have had for many years. H.R. 1119 would not affect the compensatory time provisions already applicable to employees of federal, state and local governments. The bill would permit private sector employers to offer their employees the option of selecting paid compensatory time off in lieu of receiving cash overtime wages. Employees would be able to choose, based upon an agreement with the employer, to have their overtime compensated with paid time off.

The bill would not change the 40-hour work week to affect the manner in which overtime is calculated. "Non-exempt" employees who work more than 40 hours within a seven day period would continue to receive overtime compensation at a rate not less than one and one-half times the employee's regular rate of pay. If the employer and the employee agree on compensatory time, then the paid time off would be granted at the rate of not less than one and one-half hours for each hour of overtime worked.

H.R. 1119 would provide new employee protections, in addition to those contained in current law, in order to protect against the coercive use of compensatory time. The bill requires any arrangement for the use of paid compensatory time to be an express mutual agreement between the employer and the employee. In the case of employees who are represented by a recognized or certified labor organization, the agreement must be between the employer and the labor organization. In other cases, the agreement is with the individual employee, and must be entered into knowingly and voluntarily by the employee, and may not be a condition of employment.

In order to be eligible to choose compensatory time, an employee must have worked at least 1,000 hours in a period of continuous employment with the employer during the 12-month period preceding the date that the employee agrees to receive or receives compensatory time off. Under the language of the bill, this 1,000 hour requirement is assessed on a "rolling" basis, such that to be eligible to enter an agreement to receive compensatory time, or to actually receive such time in lieu of cash compensation for overtime, an employee must have worked at least 1,000 hours in a period of continuous employment with the employer in the 12 month period prior to either entering such an agreement or actually receiving compensatory time. The Committee expects that the phrase "period of continuous employment with the employer" will be construed to encompass an unbroken period of time in which an employee is maintained on the payroll of a single employer (or, as applicable, its successor) on active status, or on inactive status where the employer has a reasonable expectation that the employee will return to duty (e.g., an employee on paid or unpaid leave whom the employer reasonably expects will return to duty will generally be considered to be in a "period of continuous employment" with that employer).

The agreement for the use of compensatory time by an individual employee must be affirmed by a written or otherwise verifiable statement that the employee has chosen to receive compensatory time in lieu of overtime compensation. The agreement must be made, kept, and preserved in accordance with the recordkeeping requirements under section 11(c) of the Fair Labor Standards Act.[39]

An employee could accrue up to 160 hours of compensatory time each year. Any accrued compensatory time which has not been used by the employee by the end of each year (or the alternative 12-month period as designated by the employer) must be paid for by the employer to the employee in the form of monetary compensation. Likewise, any unused, accrued compensatory time would be cashed out at the end of an employee's employment with the employer at the average regular rate received by the employee during the time period in which the compensatory time was accrued; or the final regular rate received by the employee; whichever is higher. An employee shall, upon the voluntary or involuntary termination of employment, be paid for the unused compensatory time at a rate of compensation not less than the average regular rate received by the employee during the time period in which the com-

[39] 20 U.S.C. § 211(c).

pensatory time was accrued, or the final regular rate received by the employee, whichever is higher.

An employee may, at any time, withdraw from a compensatory time agreement with the employer. An employee may also request in writing that monetary compensation be provided, at any time, for accrued compensatory time which has not yet been used. Within 30 days of receiving such a written request, the employer shall provide the employee with monetary compensation for the unused, accrued compensatory time.

An employer must provide an employee with 30 days notice prior to cashing out an employee's accrued, unused compensatory time. However, the employer may only cash out unused compensatory time accrued by an employee in excess of 80 hours, unless the cash out is employee-initiated. An employer must also provide employees with 30 days notice prior to discontinuing a policy of offering compensatory time to employees.

For the purposes of enforcement, any unused compensatory time would be considered to be the same as wages owed to the employee. As with any other violation of the Fair Labor Standards Act, all of the remedies under the Act would apply. Any employer who directly or indirectly intimidates, threatens, or coerces any employee into selecting compensatory time in lieu of cash compensation, or who forces an employee to use accrued compensatory time would be liable to the employee for the cash value of the accrued compensatory time, plus an additional equal amount as liquidated damages, reduced by the amount of such rate of compensation for each hour of compensatory time used by the employee.

Finally, H.R. 1119 contains a sunset provision whereby the legislation would cease to exist five years after the date of its enactment. This will allow Congress to review the use of compensatory time by private sector employers and employees and, if need be, to make adjustments in the legislation authorizing its use.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This Act may be cited as the "Family Time Flexibility Act."

Section 2. Compensatory time

Any employee may receive in lieu of monetary overtime compensation, compensatory time off at a rate not less than one-and-one-half hours for each hour of overtime worked.

For the purposes of this subsection, the term "employee" does not include an employee of a public agency.

An employer may provide compensatory time to employees only if such time is in accordance with the applicable provisions of a collective bargaining agreement between the employer and the labor organization which has been certified or recognized as the representative of the employees under applicable law.

In the case of employees who are not represented by a labor organization which has been certified or recognized as the representative of such employees under applicable law, there must be an agreement arrived at between the employer and employee before the performance of the work and affirmed by a written or otherwise verifiable record maintained in accordance with section 11(c) of the

Fair Labor Standards Act in which the employer has offered and the employee has chosen to receive compensatory time in lieu of monetary overtime compensation; such agreement must be entered into knowingly and voluntarily by such employee and not as a condition of employment. An employee may not agree to receive compensatory time unless that employee has worked 1,000 hours in continuous employment with the employer in the 12-month period prior to the date of the agreement or receipt of compensatory time.

An employee may accrue not more than 160 hours of compensatory time. Not later than January 31 of each calendar year, the employee's employer shall provide monetary compensation for any unused compensatory time accrued during the preceding calendar year, which was not used prior to December 31 of the preceding year. Monetary compensation must be provided at the regular rate received when the compensatory time was earned or at the final regular rate, whichever is higher. An employer may designate and communicate to the employees a 12-month period other than the calendar year, in which case compensation shall be provided not later than 31 days after the end of the 12-month period.

An employer may provide monetary compensation for an employee's unused compensatory time in excess of 80 hours at any time after giving the employee at least 30 days notice. The compensation shall be provided at the regular rate received when the compensatory time was earned or the final regular rate, whichever is higher.

Except where a collective bargaining agreement provides otherwise, an employer which has adopted a policy offering compensatory time to employees may discontinue such policy upon giving employees 30 days notice.

An employee may withdraw from an agreement or understanding to accrue compensatory time at any time. An employee may also request in writing that monetary compensation be provided, at any time, for all compensatory time accrued which has not yet been used. Within 30 days of receipt of the written request, the employer shall provide the employee with the monetary compensation at a rate received when the compensatory time was earned or at the final regular rate, whichever is higher.

An employer which provides compensatory time to employees shall not directly or indirectly intimidate, threaten, or coerce or attempt to intimidate, threaten, or coerce any employee for the purpose of interfering with such employee's rights to request or not request compensatory time off in lieu of payment of monetary overtime compensation for overtime hours; or requiring any employee to use such compensatory time.

An employee who has accrued compensatory time off shall, upon the voluntary or involuntary termination of employment, be paid for such unused compensatory time.

If compensation is to be paid to an employee for accrued compensatory time off, the compensation will be paid at a rate not less than the regular rate received by an employee when the compensatory time was earned or the final regular rate received by such employee, whichever is higher.

Any payment owed to an employee for unused compensatory time shall be considered to be unpaid overtime compensation.

An employee who has accrued compensatory time off and has requested the use of such compensatory time shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the employer.

The terms "overtime compensation" and "compensatory time" shall have the meanings given by subsection (o)(7) of the Fair Labor Standards Act.

Section 3. Remedies

An employer which violates the anti-coercion provisions (section 7(r)(4)) of this bill shall be liable to the employee affected in the amount of the rate of compensation (determined in accordance with section 7(r)(6)(A)) for each hour of compensatory time accrued by the employee and an additional equal amount as liquidated damages, reduced by the amount of such rate of compensation for each hour of compensatory time used by the employee.

Section 4. Notice to employees

Not later than 30 days after the date of the enactment of this Act, the Secretary of Labor shall revise the materials provided to employers for purposes of a notice explaining the Fair Labor Standards Act of 1938 to employees so that the notice reflects the amendments made by this bill to the Act.

Section 5. Sunset

This Act and all amendments made by this Act shall expire five years after its enactment.

EXPLANATION OF AMENDMENTS

The bill was ordered reported without amendment.

ROLLCALL VOTES

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 1 **BILL** H.R. 1119 **DATE** April 9, 2003

AMENDMENT NUMBER 1 **DEFEATED 21 – 26**

SPONSOR/AMENDMENT Mr. Andrews / amendment codifying 29 C.F.R. Part 541 as in effect April 9, 2003

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. BOEHNER, Chairman		X		
Mr. PETRI, Vice Chairman		X		
Mr. BALLENGER		X		
Mr. HOEKSTRA		X		
Mr. McKEON		X		
Mr. CASTLE		X		
Mr. JOHNSON		X		
Mr. GREENWOOD		X		
Mr. NORWOOD		X		
Mr. UPTON		X		
Mr. EHLERS		X		
Mr. DeMINT		X		
Mr. ISAKSON		X		
Mrs. BIGGERT		X		
Mr. PLATTS		X		
Mr. TIBERI		X		
Mr. KELLER		X		
Mr. OSBORNE		X		
Mr. WILSON		X		
Mr. COLE		X		
Mr. PORTER		X		
Mr. KLINE		X		
Mr. CARTER		X		
Mrs. MUSGRAVE		X		
Mrs. BLACKBURN		X		
Mr. GINGREY				X
Mr. BURNS		X		
Mr. MILLER	X			
Mr. KILDEE	X			
Mr. OWENS	X			
Mr. PAYNE	X			
Mr. ANDREWS	X			
Ms. WOOLSEY	X			
Mr. HINOJOSA				X
Mrs. McCARTHY	X			
Mr. TIERNEY	X			
Mr. KIND	X			
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
Mrs. DAVIS	X			
Ms. McCOLLUM	X			
Mr. DAVIS	X			
Mr. CASE	X			
Mr. GRIJALVA	X			
Ms. MAJETTE	X			
Mr. VAN HOLLEN	X			
Mr. RYAN	X			
Mr. BISHOP	X			
TOTALS	21	26		2

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 2 **BILL** H.R. 1119 **DATE** April 9, 2003

H.R. 1119 was ordered favorably reported by a vote of 27 - 22

SPONSOR/AMENDMENT Mr. Petri / motion to report the bill to the House and with the recommendation that the bill do pass

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. BOEHNER, Chairman	X			
Mr. PETRI, Vice Chairman	X			
Mr. BALLENGER	X			
Mr. HOEKSTRA	X			
Mr. McKEON	X			
Mr. CASTLE	X			
Mr. JOHNSON	X			
Mr. GREENWOOD	X			
Mr. NORWOOD	X			
Mr. UPTON	X			
Mr. EHLERS	X			
Mr. DeMINT	X			
Mr. ISAKSON	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. TIBERI	X			
Mr. KELLER	X			
Mr. OSBORNE	X			
Mr. WILSON	X			
Mr. COLE	X			
Mr. PORTER	X			
Mr. KLINE	X			
Mr. CARTER	X			
Mrs. MUSGRAVE	X			
Mrs. BLACKBURN	X			
Mr. GINGREY	X			
Mr. BURNS	X			
Mr. MILLER		X		
Mr. KILDEE		X		
Mr. OWENS		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KIND		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. DAVIS		X		
Ms. McCOLLUM		X		
Mr. DAVIS		X		
Mr. CASE		X		
Mr. GRIJALVA		X		
Ms. MAJETTE		X		
Mr. VAN HOLLEN		X		
Mr. RYAN		X		
Mr. BISHOP		X		
TOTALS	27	22		

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act (CAA), requires a description of the application of this bill to the legislative branch. H.R. 1119 amends the Fair Labor Standards Act of 1938 to provide compensatory time for all employees. Section 203(a) of the CAA applies the rights and protections of subsections (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act, 29 U.S.C. Sec. 206(a)(1) and (d), 207, 212(c), to covered employees and employing offices of the legislative branch. Therefore, the changes made by H.R. 1119 to section 7 of the Fair Labor Standards Act, 29 U.S.C. Sec. 207. The Committee intends to make compensatory time available to legislative branch employees in the same way as it is made available to private sector employees under this legislation.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of Rule XIII and clause (2)(b)(1) of Rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget & Impoundment Control Act requires a statement of whether the provisions of the reported bill include unfunded mandates. The Committee received a letter regarding unfunded mandates from the Director of the Congressional Budget Office and as such the Committee agrees that the bill does not contain any unfunded mandates. See infra.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 3(c)(3) of rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 1119 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 25, 2003.

Hon. JOHN A. BOEHNER,
Chairman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1119, the Family Time Flexibility Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Sadoti.

Sincerely,

ROBERT A. SUNSHINE
(For Douglas Holtz-Eakin, Director).

Enclosure.

H.R. 1119—Family Time Flexibility Act

H.R. 1119 would amend the Fair Labor Standards Act of 1938 to provide compensatory time for employees in the private sector. In lieu of overtime pay, employees could receive compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime pay would otherwise be required. Such compensatory time could be provided only in accordance with a collective bargaining agreement or with the consent of the affected employees. The changes would be effective for five years after enactment of the bill.

Enactment of H.R. 1119 could result in a change in enforcement costs of the Department of Labor, which would be subject to appropriation actions. CBO estimates that any federal costs or savings that would result from implementing H.R. 1119 would be insignificant.

H.R. 1119 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Christina Hawley Sadoti. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House rule XIII, the goal of H.R. 1119 is to amend the Fair Labor Standards Act of 1938 to allow compensatory time for all employees. The Committee expects the Department of Labor to implement the changes to the law in accordance with these stated goals.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by H.R. 1119. The Fair Labor Standards Act of 1938 has been determined, by the Supreme Court, to be within Congress' Constitutional authority. In *United States* v. *Darby,* 312 U.S. 100 (1941) and *OPP Cotton Mills, Inc., et al.* v. *Administrator of Wage and Hour Division of Department of Labor,* 312 U.S. 126 (1941), the Supreme Court found that the regulation of hours and wages of work to be within the scope of Congressional powers under Article 1, Section 8, Clause 3 of the Constitution of the United States. In addition the Supreme Court has ruled that the Fair Labor Standards Act of 1938 does not violate the First or Fifth Amendments. H.R. 1119, the Working Families Flexibility Act, amends the Fair Labor Standards Act of 1938. Because the Working Families Flexibility Act modifies but does not extend the federal regulation of overtime hours, the Committee believes that

the Act falls within the same scope of Congressional authority as the Fair Labor Standards Act of 1938.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 1119. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

FAIR LABOR STANDARDS ACT OF 1938

* * * * * * *

MAXIMUM HOURS

SEC. 7. (a) * * *

* * * * * * *

(r) COMPENSATORY TIME OFF FOR PRIVATE EMPLOYEES.—

(1) GENERAL RULE.—

(A) COMPENSATORY TIME OFF.—An employee may receive, in accordance with this subsection and in lieu of monetary overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(B) DEFINITION.—For purposes of this subsection, the term "employee" does not include an employee of a public agency.

(2) CONDITIONS.—An employer may provide compensatory time to employees under paragraph (1)(A) only if such time is provided in accordance with—

(A) applicable provisions of a collective bargaining agreement between the employer and the labor organization which has been certified or recognized as the representative of the employees under applicable law; or

(B) in the case of employees who are not represented by a labor organization which has been certified or recognized as the representative of such employees under applicable law, an agreement arrived at between the employer and employee before the performance of the work and affirmed by a written or otherwise verifiable record maintained in accordance with section 11(c)—

(i) in which the employer has offered and the employee has chosen to receive compensatory time in lieu of monetary overtime compensation; and

(ii) entered into knowingly and voluntarily by such employees and not as a condition of employment.

No employee may receive or agree to receive compensatory time off under this subsection unless the employee has worked at least 1000 hours for the employee's employer during a period of continuous employment with the employer in the 12-month period before the date of agreement or receipt of compensatory time off.

(3) HOUR LIMIT.—

(A) MAXIMUM HOURS.—An employee may accrue not more than 160 hours of compensatory time.

(B) COMPENSATION DATE.—Not later than January 31 of each calendar year, the employee's employer shall provide monetary compensation for any unused compensatory time off accrued during the preceding calendar year which was not used prior to December 31 of the preceding year at the rate prescribed by paragraph (6). An employer may designate and communicate to the employer's employees a 12-month period other than the calendar year, in which case such compensation shall be provided not later than 31 days after the end of such 12-month period.

(C) EXCESS OF 80 HOURS.—The employer may provide monetary compensation for an employee's unused compensatory time in excess of 80 hours at any time after giving the employee at least 30 days notice. Such compensation shall be provided at the rate prescribed by paragraph (6).

(D) POLICY.—Except where a collective bargaining agreement provides otherwise, an employer which has adopted a policy offering compensatory time to employees may discontinue such policy upon giving employees 30 days notice.

(E) WRITTEN REQUEST.—An employee may withdraw an agreement described in paragraph (2)(B) at any time. An employee may also request in writing that monetary compensation be provided, at any time, for all compensatory time accrued which has not yet been used. Within 30 days of receiving the written request, the employer shall provide the employee the monetary compensation due in accordance with paragraph (6).

(4) PRIVATE EMPLOYER ACTIONS.—An employer which provides compensatory time under paragraph (1) to employees shall not directly or indirectly intimidate, threaten, or coerce or attempt to intimidate, threaten, or coerce any employee for the purpose of—

(A) interfering with such employee's rights under this subsection to request or not request compensatory time off in lieu of payment of monetary overtime compensation for overtime hours; or

(B) requiring any employee to use such compensatory time.

(5) TERMINATION OF EMPLOYMENT.—An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon the voluntary or involuntary termi-

nation of employment, be paid for the unused compensatory time in accordance with paragraph (6).

(6) RATE OF COMPENSATION.—

(A) GENERAL RULE.—If compensation is to be paid to an employee for accrued compensatory time off, such compensation shall be paid at a rate of compensation not less than—

(i) the regular rate received by such employee when the compensatory time was earned; or

(ii) the final regular rate received by such employee, whichever is higher.

(B) CONSIDERATION OF PAYMENT.—Any payment owed to an employee under this subsection for unused compensatory time shall be considered unpaid overtime compensation.

(7) USE OF TIME.—An employee—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1); and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the employer.

(8) DEFINITIONS.—The terms "overtime compensation" and "compensatory time" shall have the meanings given such terms by subsection (o)(7).

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PENALTIES

SEC. 16. (a) * * *

[(b) Any employer] *(b) Except as provided in subsection (f), any employer* who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or the unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employees shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action

under section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this act by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3).

* * * * * * *

(f) An employer which violates section 7(r)(4) shall be liable to the employee affected in the amount of the rate of compensation (determined in accordance with section 7(r)(6)(A)) for each hour of compensatory time accrued by the employee and in an additional equal amount as liquidated damages reduced by the amount of such rate of compensation for each hour of compensatory time used by such employee.

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MINORITY VIEWS

INTRODUCTION

The most important employment protection in the day-to-day life of millions of workers is the family-friendly overtime provisions of the Fair Labor Standards Act (FLSA). At least 63 million private sector workers are required to be paid time-and-a-half for hours worked in excess of 40 hours a week. Millions of these workers depend on overtime pay to make ends meet. All of these workers and, because of the custom established, millions more who are not entitled overtime pay depend upon the overtime law to provide them with fixed work schedules and time off to spend with their families. There is no single change that Congress could make to our labor laws that would do more to undermine the standard of living for Americans than to weaken or eliminate the FLSA overtime requirement.

H.R. 1119 undermines the 40-hour workweek and harms working families at the time when workers are working harder for less. On April 26, 2003, the New York Times reported that the inflation-adjusted weekly pay of a median worker fell 1.5 percent from early last year—the biggest drop since the mid-1990s. H.R. 1119 reduces the income of workers at a time when they are already struggling to make ends meet. Since March 2001, private sector payrolls have declined by 2.6 million. In March 2003, the economy lost 108,000 jobs and in January and February 2003, the economy lost 456,000 jobs. By reducing overtime costs, H.R. 1119 encourages employers to schedule more overtime and hire fewer workers at a time when the economy is already losing jobs.

H.R. 1119 puts workers wages at risk, and constitutes an interest free loan to employers

The majority justifies H.R. 1119 on the basis that workers need and desire more time off in order to better balance personal and family needs and work.[1] We do not dispute that working families

[1] The majority also contends that comp time should be extended to the private sector because it has been extended to the public sector. The primary argument put forth by the proponents of H.R. 1119, however, is that comp time will benefit private sector employers. However, Congress permitted comp time in the public sector for the primary benefit of private sector employers, not their employees. Until 1985, most public sector employers had never been required by federal law to pay time-and-a-half. Comp time was permitted in the public sector because it would mitigate the cost of compliance with the FLSA that public employers would otherwise face and because in the absence of FLSA coverage, many public employers had developed comp time systems and the Congress did not want to disrupt them. Private sector employers, however, are not facing new costs as a result of having to comply with the FLSA, they have been covered by the Act since 1938; nor are there existing comp time systems in the private sector to preserve. Further, obvious and important differences between the private sector and the public sector clearly indicate that comp time is likely to be far more difficult to administer in a manner that protects private sector workers than is the case in the public sector. More than 40 percent of the public sector is organized and protected by collective bargaining agreements and bargaining representatives. In addition, most public sector employees, whether or not a union rep-

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are facing increasing difficulties or that they desire greater flexibility in meeting family and work needs. Unfortunately, H.R. 1119 doesn't do anything at all to promote greater flexibility for working families. In fact, it does just the opposite. If enacted, this legislation will exacerbate rather than alleviate these problems. An analysis by the Economic Policy Institute of H.R. 1119 concludes the following:

"The compensatory or "comp," time bill (H.R. 1119) proposed by Rep. Judy Biggert (R–Ill.) would upset that balance by eroding protections for workers' rights and creating a strong financial incentive for employers to lengthen the workweek. A clear-headed look reveals that there is nothing in the proposed bill for workers but rhetoric and slick marketing. Contrary to what the bill's proponents say, H.R. 1119 doesn't create employee rights—it takes them away. It does, however, create a dangerous new employer right—the right to delay paying any wages for overtime work for as long as 13 months."[2]

H.R. 1119 simply permits employers to delay paying for overtime work, while doing nothing to make work schedules more flexible. In effect, employees are being asked to give a no-interest loan to their employer until the comp-time is taken or payment is made, up to 13 months later. And of course, if a company goes belly up—or closes—which happened to more than 500,000 businesses last year—the employee may never get paid for thousands of dollars of overtime pay.

H.R. 1119 does not increase employee flexibility in any way: Employers may already liberally grant time off

Employers may already liberally grant the equivalent of comp-time. Under current law the employee is paid up-front when the overtime is worked. The only change that H.R. 1119 makes is that the worker is not compensated for overtime work until some indefinite point in the future. For example, assume an employee works 60 hours of overtime in January earning $900, and wants two weeks off in July. Under current law, the employer may grant the two weeks off in July, but must pay the $900 after the overtime work is done in January. Under H.R. 1119, the employer grants the employee the two weeks off in July, but is excused from paying the $900 wages owed the employee for work done in January, until July. Thus, the employee gets the same amount of time off in both cases, but under H.R. 1119 must wait until July to get paid for overtime work completed in January. Clearly it is the employer, not employees, who are the principal beneficiaries of H.R. 1119. It also explains why every organization representing employees, including the AFL–CIO and over a dozen women's groups, such as The National Organization for Women (NOW), 9 to 5—National As-

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resents them, are protected by civil service laws from arbitrary or unfair treatment. By contrast, only approximately 10 percent of private sector employees have union representation. Ninety percent of the private sector workers are "at will" employees who may be terminated for any reason, except those statutorily prohibited, or no reason at all. Finally, as presumably our Republican colleagues would be the first to agree, private sector employers are under much stronger market pressures, both in terms of personal profit and in terms of competitive pressure, to reduce costs, including labor costs, than are public sector employers.

[2] "The Naked Truth About Comp Time—Current proposal is like emperor's new clothes: there's nothing for workers," Ross Eisenbrey, Economic Policy Institute, Issue Brief #190, March 31, 2003.

sociation of Working Women, and The National Partnership for Women and Families are opposed to the bill.[3]

H.R. 1119 gives employers—not employees—the right to control comp-time

H.R. 1119 does not give any employee the right to control comp-time. The employer decides whether to offer any comp-time. Even if the employer decides to offer comp-time, the employer may arbitrarily decide to only offer comp-time to some employees while denying it to others; or an employer can arbitrarily deny comp-time to a worker on some occasions, while offering it on others. Rather than increasing a worker's control over his or her own life, H.R. 1119 increases the employer's control over the worker's life.

Finally, even if the employer does offer comp-time, and the employee request it, the bill gives the employer total control over when comp-time can be taken. The employer may deny an urgent request for comp-time from an employee if it is inconvenient for the employer. For example, assume a worker wants to use three days of accrued comp-time to care for a spouse who is undergoing life-threatening surgery. Regardless of how much notice the employee provides of the intent to take leave, and notwithstanding the fact that the employee would have a statutory right to take leave under the Family and Medical Leave Act, the employer may still deny the employee the right to use the comp-time the employee has earned.[4]

H.R. 1119 would further undermine enforcement of overtime laws

Given the longstanding history of non-compliance with the overtime laws in many industries, the concern about potential abuse of

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[3] Employers take little advantage of the flexibility that the Fair Labor Standards Act already permits. Very few employers offer time off based on overtime hours worked. Overtime is generally required after an employee has worked in excess of 40 hours over a seven-day period. The number of hours a worker works in a particular day or whether the employer or worker chose what hours to work is immaterial to the determination of overtime liability under the federal law. There is no requirement that employees must work five eight-hour days. An employer may allow employees to work four 10-hour days without incurring overtime liability, but few do. An employer may allow workers to vary when they begin or end work around a core set of hours without incurring overtime liability, but few do. By starting the schedule at the end rather than the beginning of the week, an employee can work eight nine-hour days and one eight-hour day and have a three-day weekend every other week without incurring overtime, but few employers allow such schedules.

[4] The majority contends "that the 'unduly disrupt' standard contained in H.R. 1119 is similar to the standard employed under the Family [and] Medical Leave Act that limits an employee's right to take leave for medical treatments for the employee or a member of his or her family ('* * * the employee shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer * * *')," As was stated in the minority views accompanying H.R. 1, a bill essentially identical to H.R. 1119:

"[A] simple comparison of H.R. 1 to the FMLA (the Family and Medical Leave Act) reveals striking dissimilarities. Under the FMLA, an employee of a covered employer has an absolute right to take up to 12 weeks of leave in the event of certain family or medical emergencies. An employer may not deny an employee such leave nor terminate an employee for exercising the right to take such leave. The FMLA further provides, in the case of planned medical treatment, that it is the duty of the employee to make a reasonable effort to schedule leave in a manner that does not disrupt unduly the operations of the employer. If, despite that reasonable effort, the employee cannot schedule leave at a time that does not disrupt unduly the operations of the employer, the employer has no right to deny employee leave. Further, even where the leave under FMLA may be scheduled at a time that does not disrupt unduly the operations of the employer, it may only be done so subject to the approval of the Health care provider. If the health care provider is unable to accommodate a treatment schedule more convenient to the employer, the employer may not infringe upon the employee's right. By contrast, under H.R. 1, an employer may deny the use of earned compensatory time to the employee whenever the leave would 'unduly disrupt' the employer's operations; it is that plain."

Under FMLA an employee has a right to take leave; under H.R. 1119 the employer has right to deny leave to the employee. These provisions are "similar" only to the extent that one ignores the context in which the terms "unduly disrupt" and "disrupt unduly" are used.

comp-time is well founded.[5] In 1994, a random check of 69 garment contractors in Southern California found that 73 percent maintained improper payroll records (without which, fair administration of comp-time would be impossible), 68 percent were not paying overtime in accordance with current law, and 51 percent were not even paying minimum wage. Recent targeted enforcement efforts in the nursing home and poultry industries also found widespread noncompliance with the overtime provisions.[6] The Wage and Hour Division of the Department of Labor has fewer than 1,000 inspectors with which to regulate a labor force of 150 million workers and 7 million workplaces.

H.R. 1119 would greatly increase the complexity of enforcing the law by making it more difficult to determine whether an overtime violation has occurred. It would greatly increase the number of violations that occur as employers seek to keep pace with competitors and the temptation to defer payment for overtime work grows. Finally, it would inevitably result in more workers receiving no compensation at all for their overtime work.[7]

CONCLUSION

H.R. 1119 appears to be a part of an overall, broad-ranged attack against the 40-hour workweek. In the Senate, the comp-time legislation also includes flextime provisions that replace the 40–hour workweek with an 80-hour, two-week period that makes it substantially easier and cheaper for employers to require employees to work longer hours at the expense of working families.

On March 31, 2003, the Bush Administration proposed regulations that represent the broadest and most serious threat to the overtime law since its enactment in 1938. The proposed regulations redefine the overtime exemptions in a manner that may result in millions of middle-class Americans losing their right to overtime pay. This amounts to a massive transfer of wealth directly from the pockets of middle-class workers to the pockets of employers.

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[5] See "The FLSA Comp-Time Controversy: Fostering Flexibility or Diminishing Worker Rights?" David J. Walsh, 20 Berkeley Journal of Employment and Labor Law 74, at 103–104. The overtime law is among the most commonly violated laws in the country. The most extensive study of compliance with the Fair Labor Standards Act was conducted by the Minimum Wage Study Commission. For the Commission's Work, compliance audits were conducted in 1979 of randomly selected companies. The Commission found that 21 percent of the establishments where overtime work had been performed violated the overtime provisions in the week in which the audit was conducted. Of the employees who had worked overtime in the study week, 4.2 percent did not receive full overtime pay. Over a two-year period, almost half, 43 percent, of the establishments audited committed at least one overtime violation. Employees were owed $11 million in back wages for overtime during the audit week and $811 million over the two-year period. The Commission also concluded that only one-fifth of the back wages owed to workers would have been detected through the Department of Labor's normal enforcement procedures.

[6] Id., at 104–110.

[7] The majority contends that comp time is protected in bankruptcy proceedings because the legislation specifies "any payment owed to an employee under this subsection for unused compensatory time shall be considered unpaid overtime compensation." As stated in majority views of this report, * * * this provision also assure that any unpaid, accrued compensatory time is treated as unpaid employee wages in the event of the employer's bankruptcy." In the first instance, the statement is false. We are not amending the bankruptcy code; we are amending the Fair Labor Standards Act. While it is to be hoped that the bankruptcy court would give deference to the FLSA and the Committee's intent, without amending the bankruptcy code, we cannot be "assured" of the fact. More importantly, according to the Small Business Administration, even in 2000—a boom year, 550,000 businesses folded. In the case of most of those failures, workers would be lucky to receive anything for their unused comp-time regardless of whether the bankruptcy court consider comp-time to be unpaid wages.

The Administration is not only proposing to diminish the wages of working families, they are stealing time as well. We already have a family time flexibility act—it is called the Fair Labor Standards Act. The requirement that employers pay overtime is the only enforcement mechanism for the 40-hour workweek. It is the overtime requirement that ensures that workers have predictable schedules and time off to meet family needs. Undermining this requirement—as H.R. 1119 does—or limiting the number of workers covered by overtime—as seems to be the intention of the Administration's regulations—results in workers having less time for personal and family needs and less money with which to meet those needs.

We urge our colleagues to reject H.R. 1119.

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