# THE FAIR LABOR STANDARDS ACT: IS IT MEETING THE NEEDS OF THE TWENTY-FIRST CENTURY WORKPLACE?

## HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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# C O N T E N T S

# THE FAIR LABOR STANDARDS ACT: IS IT MEETING THE NEEDS OF THE TWENTY–FIRST CENTURY WORKPLACE?

**Thursday, July 14, 2011**
**U.S. House of Representatives**
**Subcommittee on Workforce Protections**
**Committee on Education and the Workforce**
**Washington, DC**

The subcommittee met, pursuant to call, at 10:00 a.m., in room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, Bucshon, Woolsey, Payne, Kucinich, and Hirono.

Staff Present: Katherine Bathgate, Press Assistant/New Media Coordinator; Casey Buboltz, Coalitions and Member Services Coordinator; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Ryan Kearney, Legislative Assistant; Donald McIntosh, Professional Staff Member; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Aaron Albright, Minority Communications Director for Labor; Tylease Alli, Minority Clerk; John D'Elia, Minority Staff Assistant; Livia Lam, Minority Senior Labor Policy Advisor; Brian Levin, Minority New Media Press Assistant; Celine McNicholas, Minority Counsel; Megan O'Reilly, Minority General Counsel; Meredith Regine, Minority Labor Policy Associate; and Michele Varnhagen, Minority Chief Policy Advisor/Labor Policy Director.

Chairman WALBERG. Good morning. A quorum being present, the subcommittee will come to order.

I would like to extend a warm welcome to our guests and express appreciation to the witnesses for being with us this morning.

Since the start of the 112th Congress, the Education and Workforce Committee has actively examined Federal laws, rules, and regulations within our jurisdiction. The intent of our oversight has been to take a close look at Federal policies and their impact on the economy, job creation, and taxpayers, not the least of which are a great concern to us.

Just yesterday we advanced bipartisan legislation to modernize the Federal Worker's Compensation program, updating assistance for beneficiaries and promoting better use of taxpayer dollars. I

hope this hearing will build upon the success of yesterday's bipartisan initiative, and I certainly extend appreciation to my ranking member for her involvement in that success yesterday.

We all agree that the Fair Labor Standards Act affects the lives of millions of workers. In fact, according to the Department of Labor, the Act governs the employment of more than 130 million workers. The law was a significant expansion of the government's authority when it was created in the midst of the Great Depression, and it wields considerable influence over the workplaces of today's modern economy as well.

The law sets forth rules and regulations concerning minimum wage, the maximum number of hours worked in a week, and overtime pay. The law reflects our shared desire to see individuals receive fair compensation for their work. We all want, as the saying goes, to see a worker complete an honest day's work for an honest day's pay. The goal remains to this day, and it must be advanced in a manner that encourages economic growth and job creation.

However, as we have learned time and time again with Federal policies, good intentions can often lead to unintended consequences. It is hard to imagine a law intended for the workforce known to Henry Ford can serve the needs of a workplace shaped by the innovations of Bill Gates. Unfortunately, it is becoming increasingly clear that the current Federal labor standards have fallen short of the times.

In recent years, the law has caused a number of challenges for employers. A long history of regulations and judicial rulings has created ambiguity and uncertainty for employers who attempt to follow its every detail. This burden falls especially hard on small business owners who typically lack the expertise needed to understand the full scope of the law. As a result, an employer's good intentions could leave him or her susceptible to costly legal challenges.

That is why the explosion in wage and hour litigation is so disturbing. Private lawsuits filed under the Fair Labor Standards Act have skyrocketed over the past two decades, rising from roughly 1,500 in the early 1990s to nearly 7,000 last year. At a time when every employer should be focused on creating jobs and hiring new workers, this is unacceptable.

The law's unintended consequences also affect workers. As anyone who carries a smartphone knows, the advantages of modern technology have blurred the line between work and home. This has invited the opportunity for greater flexibility in the workplace and can encourage more family friendly work environments as well.

Unfortunately, the law can often stand in the way of this progress, creating more unknowns than opportunities for workplace flexibility and growth. As employers grapple with these complicated questions, they often institute defensive employment policies in order to better ensure full compliance with the law. As a result, workers are often kept to strict 40-hour work week requirements, even though they may welcome more work in exchange for additional income or a more flexible work schedule. Bonus payments and opportunities for after-hour job training can be limited. Employers may also curtail the use of certain technology that pro-

vides the very kind of flexible work schedules employees increasingly desire.

Last week, we learned unemployment continues to hover around 9 percent and more than 14 million are unemployed. Smart policies that encourage growth and worker freedom are desperately needed in today's economy. I look forward to today's discussion and to considering positive solutions that will encourage greater flexibility and certainty in the workplace.

I would now like to recognize the senior Democrat member of the subcommittee, Ms. Woolsey, our ranking member, for her opening remarks.

[The statement of Mr. Walberg follows:]

**Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Workforce Protections**

Good morning. I would like to extend a warm welcome to our guests and express my appreciation to the witnesses for being with us today.

Since the start of the 112th Congress, the Education and the Workforce Committee has actively examined federal laws, rules, and regulations within our jurisdiction. The intent of our oversight has been to take a close look at federal policies and their impact on the economy, job creation, and taxpayers. As a result of these efforts, just yesterday we advanced bipartisan legislation to modernize the federal workers' compensation program, updating assistance for beneficiaries and promoting better use of taxpayer dollars. I hope this hearing will build upon the success of yesterday's bipartisan initiative.

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The law sets forth rules and regulations concerning minimum wage, the maximum number of hours worked in a week, and overtime pay. The law reflects our shared desire to see individuals receive fair compensation for their work. We all want, as the saying goes, to see a worker complete an honest day's work for an honest day's pay. That goal remains to this day, and it must be advanced in a manner that encourages economic growth and job creation.

However, as we have learned time and again with federal policies, good intentions can often lead to unintended consequences. It is hard to imagine a law intended for the workforce known to Henry Ford can serve the needs of a workplace shaped by the innovations of Bill Gates. Unfortunately, it is becoming increasingly clear that current federal labor standards have fallen short of the times.

In recent years, the law has caused a number of challenges for employers. A long history of regulations and judicial rulings has created ambiguity and uncertainty for employers who attempt to follow its every detail. This burden falls especially hard on small business owners, who typically lack the expertise needed to understand the full scope of the law. As a result, an employer's good intentions could leave him susceptible to costly legal challenges.

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Ms. WOOLSEY. Thank you, Mr. Chairman.

Nearly 80 years ago, Franklin Roosevelt declared, and I quote, our Nation is so richly endowed that we should be able to devise ways and means of ensuring to all able-bodied working men and women a fair day's pay for a fair day's work.

Well, after that, the Fair Labor Standards Act, FLSA, was born of this guiding principle. The Act is our Nation's governing law covering wages and hours of work. Prior to its passage, there were no limits on how many hours an employer could require its employees to work or how little it paid them. The Fair Labor Standards Act gave us a minimum wage and the weekend, fundamental rights that have improved our standard of living. Today, more than 130 million American workers are covered by FLSA.

It is true that the modern workplace has changed from when the law was enacted. Today, for many, the workplace is driven by technology, allowing jobs to be performed from remote locations, actually. Still, the occupations predicted to experience the greatest growth over the next decade include primarily service-sector jobs—cashiers, maintenance workers, nursing aides, and office clerks—workers for whom the protections provided by FLSA are fundamental.

It is also true that there is nothing in the law that prevents employers from instituting family friendly scheduling changes that would lead to greater flexibility for workers. And they can do that without incurring overtime liability. We know that. It is being done all over this country and has been for the last 20 years.

For example, under the current law, an employer could allow an employee to shift hours to those that accommodate personal needs like arriving at work early in order to leave early to pick up or to do whatever is necessary in their life—go to school, pick up children, whatever.

In addition, an employer could allow for employees to work a compressed 4/10 schedule, 40 hours over 4 days, in order to manage family responsibilities or go to school or whatever their needs are. All of this is currently permitted under the law with no overtime liability.

The Fair Labor Standards Act litigation we see today, for the most part, is not the result of well-meaning employers attempting to offer greater flexibility to workers and violating the law in the process. Instead, many cases involve the incorrect classification of a worker as exempt from overtime, when, in fact, they do not meet the tests established in the regulations, tests that were updated under the Bush administration as recently as 2004. Responsible employers who comply with minimum wage and overtime laws are

placed at a disadvantage when we allow their lawbreaking competitors to undercut them on labor costs.

In addition, there is another abuse of the FLSA where workers are improperly classified as independent contractors instead of employees, exempting them from not only FLSA protections but also exempting them from Workers Compensation, Family and Medical Leave, and the right to organize and bargain collectively.

In the year 2005, a Bureau of Labor Statistics survey found that over 10 million U.S. workers, 7.4 percent of the workforce, had been misclassified as independent contractors, which cheats workers, cheats taxpayers, and employers who follow the law. According to a 2009 report by the Government Accountability Office, this classification has diminished Federal revenues by $2.72 billion, $2.72 billion just in the year 2006 alone.

As a result, I introduced the Employee Misclassification Prevention Act in last Congress which would make it a violation of the recordkeeping provisions of FLSA to make an inaccurate classification. It would also ensure workers have protections and benefits that they are entitled to. I am prepared to introduce this bill again later this session.

Lastly, I would like to remind the committee how important FLSA has been in promoting employment and helping the economy. The law provides a sound structure for the employment relationship and incentivizes the hiring of new workers by prohibiting others from being overworked. It provides the appropriate balance between the need of the business community to make profits and the basic rights that a worker deserves in an enlightened democracy. We must guard against any proposal that would undermine this carefully crafted balance.

I thank you, Mr. Chairman. I look forward to this hearing and the testimony of today's witnesses.

[The statement of Ms. Woolsey follows:]

**Prepared Statement of Hon. Lynn C. Woolsey, Ranking Minority Member, Subcommittee on Workforce Protections**

Nearly 80 years ago, Franklin Roosevelt declared, "Our nation so richly endowed * * * (that we) should be able to devise ways and means of insuring to all able-bodied working men and women a fair day's pay for a fair day's w work."

The Fair Labor Standards Act (F FLSA) was born of this guiding principle. The A Act is our nation's governing law covering wages and hours of work. Prior to its passage, there were no limits on how many hours an employer could require its employees to work or how little it paid o them. The FLSA gave us a minimum wage and the weekend—fundamental rights that have improved our standard of living. Today more than 130 million American workers are covered by the Fair Labor Standards Act.

It is true that the modern workplace has changed from when the law was enacted d. For many workers, the workplace is technology driven, allowing them to perform their job b from remote locations. Still, the occupations predicted to experience growth over the next decade include primarily service sector jobs—cashiers, maintenance workers, nursing aids, and office clerks—workers for whom the protection ns provided by the FLSA are fundamental.

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All of this is currently permitted under the law with no overtime liability.

The Fair Labor Standards Act litigation we see today, for the most part, is not the result of well meaning employers attempting to offer greater flexibility to workers and violating the law in the process. Instead, many cases involve the incorrect classification of a worker as exempt when in fact they do not meet the tests established in the regulations—tests that were "updated" under the Bush Administration as recently as 2004.

Responsible employers who comply with minimum wage and overtime laws are placed at a disadvantage when we allow their law breaking competitors to undercut them on labor costs.

In addition, there is another abuse outside of the reach of FLSA where even more workers are improperly classified as independent contractors instead of employees—exempting them from not only FLSA protections, but also workers' compensation, family and medical leave, and the right to organize and bargain collectively.

In 2005, a Bureau of Labor Statistics survey found that over 10 million U.S. workers—7.4 percent of the workforce—had been misclassified, rightly or wrongly, as independent contractors. Misclassification cheats workers and taxpayers. According to a 2009 report by the Government Accountability Office, misclassification cost federal revenues $2.72 billion in 2006.

As a result, I introduced the Employee Misclassification Prevention Act in the last Congress, which would make it a violation of the recordkeeping provisions of the Fair Labor Standards Act to make an inaccurate classification.

It would also ensure workers have the protections and benefits that they are entitled. I am preparing to introduce this bill again later this session.

Lastly, I'd like to remind the committee how important the FLSA has been in promoting employment and helping the economy. The law provides a sound structure for the employment relationship and incentivizes the hiring of new workers by prohibiting others from being overworked. It provides the appropriate balance between the need of the business community to make profits and the basic rights that a worker deserves in an enlightened democracy. We should guard against any proposal that would undermine this carefully crafted balance.

Thank you and I look forward to hearing testimony from today's witnesses.

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Chairman WALBERG. I thank the gentlelady.

Pursuant to committee rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record; and, without objection, the hearing record will remain open for 14 days to allow questions for the record, statements, and extraneous material referenced during the hearing to be submitted to the official hearing record.

It is now my pleasure to introduce our distinguished panel of witnesses.

Randy MacDonald is a Senior Vice President of Human Resources for IBM. Mr. MacDonald has been with IBM since 2000. His capacity with IBM includes a number of things. He is responsible for global human resource practices, policies, and operations.

Prior to joining IBM, Mr. MacDonald was the Executive Vice President of Human Resources and Administration for GTE, now Verizon Communications. Mr. MacDonald received his Bachelor's Degree in political science and a Master's Degree in industrial relations from St. Francis University. Mr. MacDonald is testifying on behalf of the H.R. Policy Association, for whom he serves as chairman of the board.

Welcome.

Richard Alfred is partner with Seyfart Shaw, LLP. Mr. Alfred's practice is focused on employment litigation, with a particular emphasis on wage and hour collective and class actions, complex litigation, high stakes discrimination, and wrongful termination cases and noncompetition matters.

Mr. Alfred is the chair of Seyfarth Shaw's National Wage and Hour Litigation Practice Group and the firm's Boston Office Labor and Employment Group. Mr. Alfred received his B.A. from Harvard College and his J.D. from the Harvard School of Law.

Welcome.

Judy Conti is the Federal Advocacy Coordinator with the National Employment Law Project, NELP. With NELP, Ms. Conti advocates on issues related to unemployment insurance, enforcement of workplace standards, and civil rights.

Prior to joining NELP, Ms. Conti was the co-founder and executive director of the D.C. Employment Justice Center, a non profit organization promoting workplace justice in the D.C. metropolitan area. Ms. Conti has served as adjunct professor at William and Mary Law School, George Washington University Law School, and Catholic University Law School. Ms. Conti is a 1991 graduate of Williams College and a 1994 graduate of the Marshall Wythe School of Law at the

College of William and Mary.

Welcome.

Nobumichi Hara—did I come close?

Mr. HARA. Yes, you did.

Chairman WALBERG. Thank you for being kind about that—is Senior Vice President of Human Capital with Goodwill of Central Arizona. Mr. Hara has been with Goodwill of Central Arizona for 4 years and has 20 years of experience as the head of human resources in various industries.

Mr. Hara also serves as President of the Senior Human Resources Executive Council and Vice President of the Arizona Total Rewards Association. Mr. Hara's previous nonprofit board memberships include the United Way and Physician Hospital Community Organization. He received both his undergraduate and graduate degrees from California State University, Long Beach, and he holds a Senior Professional Human Resources designation. Mr. Hara is testifying on behalf of the Society for Human Resource Managers.

I welcome you as well.

Before I recognize each of you to provide your testimony, let me briefly explain our lighting system, which is not complicated.

You will each have 5 minutes to present your testimony. When you begin, the light in front of you will turn green. When 1 minute is left, the light will turn yellow. And when your time has expired the light will turn red, at which point I ask you to wrap up your remarks as best you are able, as quickly as you are able as well.

After everyone has testified, members will each have 5 minutes to ask questions of the panel; and I will attempt to keep the same process of 5 minutes there as well.

I recognize myself for 5 minutes of questioning, and I would like to again thank the witnesses for being here.

I am jumping ahead. I have got the questions. You need to give the statements.

Mr. MacDonald, let's begin with you.

**STATEMENT OF J. RANDALL MACDONALD, SENIOR VICE PRESIDENT, HUMAN RESOURCES, IBM, ON BEHALF OF THE HR POLICY ASSOCIATION**

Mr. MACDONALD. I panicked for a second.

Good morning, Chairman Walberg, Ranking Member Woolsey, and members of the committee. My name is Randy MacDonald. I am Senior Vice President of Human Resources for the IBM Corporation.

I am also here as Chairman of the H.R. Policy Association, representing 325 chief human resource officers of the largest corporations doing best in the United States and around the world. We represent almost 10 million people in the United States.

The Association recently published a blueprint for jobs in the 21st century. The report gives a clear business view on how to restore growth and competitiveness within the United States. In direct contrast to the law at issue today, the report recommends workplace regulation premised on fair and equitable treatment in a contemporary workplace. The report's recommendations inform my testimony.

In my mind, the Fair Labor Standards Act is failing America. It is not employer friendly. It is not employee friendly. It yields advantages to global competitors without commensurate payback to the U.S. worker. It has become a break on employers' line to incent to hire, the use of technology, on employers' flexibility, and on employees' opportunity for good jobs.

In our mind, an entirely new model exists for how, where, and when work needs to be completed. In that context, professional employees who are being dramatically affected by the Fair Labor Standards Act have quite different expectations of how they should be treated. Simply put, the FLSA must be modernized and clarified or else jobs will not return and, even more terribly, new jobs will not materialize in the United States.

The Fair Labor Standards Act was enacted when Ford Motor Company, as somebody suggested previous to this, was making model A's on its production line with no substantial technology and when IBM created a room-sized calculator, which is now as small as the one I hold in my hand right now.

Meanwhile, there, in my mind, has been no meaningful change in the FLSA to contemporize its principles. Let me give you just a few examples.

Five years ago, we voluntarily reclassified 7,000 of our highly educated computer employees to nonexempt, because we could not be certain whether they met the 1990 criteria for the computer employee exemption. These workers had salaries averaging $77,000 per annum, some up to $150,000. We lowered their base salaries by 15 percent to account for the potential overtime and to maintain market-based competition with similar nonexempt jobs. Not surprisingly, half of them—nearly half of them contested their reclassification system within our appeal process.

Another example is one major retailer requires its delivery drivers to pick up and drop off their PDAs at the store every day for fear that they can't track or prevent them from using those after hours. So these employees, in my mind, waste time in traffic, burn energy, create pollution, and get to spend less time at home.

An aerospace company must limit the amount of discretion exercised by a highly educated entry level engineer due to security content of their jobs. Because discretion is the largest litmus test for the Act, they must be classified as nonexempt, totally at odds with their training and their compensation.

In a recent HR Policy Association survey, 56 percent of the companies said they impose restrictions on the use of PDAs outside the workplace, 44 percent impose limits on flexible work hours, and 32 percent restrict telecommuting by their nonexempt employees. Why these impositions? We believe it is because of the Fair Labor Standards Act.

This law even muddies our ability to accurately cost our U.S. labor. We can't cost with confidence, because we can't price with confidence. It becomes, if you will, a lottery.

How does this law give us a serious business person in the confidence of hiring a U.S. worker? It is a dilemma for all of us, and it gets worse.

Employers have experienced an explosion in litigation as plaintiffs' attorneys literally troll for companies to sue, taking advantage of, in my mind, outdated and nebulous provisions in an attempt to extort tens, if not hundreds of millions of dollars from dependents. Even the Department of Labor has been sued for Fair Labor Standard Act violations in their own house. If they can't get it right, who can?

These actions on this committee and the Congress can take to fix some of these problems. I respectfully request that the committee Act promptly on the five recommendations that we have put into our paper that are included in my written testimony.

Plain and simple, the U.S. leads in innovation. The U.S. leads through companies like IBM in the work practices. However, the U.S. doesn't lead in contemporary work rules. The Fair Labor Standards Act binds our business and our workers in a European-style regulatory knot that restrains growth, innovation, jobs, and work life flexibility. We aren't Europe. America fixes its problems, and we must fix this one.

Thank you, sir.

[The statement of Mr. MacDonald follows:]

Testimony of J. Randall MacDonald

Senior Vice President, Human Resources, IBM Corporation
&
Chairman, HR Policy Association

Before the Subcommittee on Workforce Protections
House Education and the Workforce Committee

July 14, 2011

Good morning, Chairman Walberg, Ranking Member Woolsey and Members of the Committee. My name is Randy MacDonald, and I am Senior Vice President, Human Resources, of the IBM Corporation. I am privileged to oversee more than 400,000 IBM employees in 170 countries. For a century, my company has pioneered not only science and technology, but also progressive workforce policies, such as flexible work/life balance arrangements and equal opportunity employment, long before it was law. I am proud to say that IBM's practices and innovations are changing the way the world works.

I also represent a broader segment of the U.S. business community as Chairman of the HR Policy Association (HRPA), the lead organization representing more than 325 Chief Human Resource Officers of the largest corporations doing business in the United States and around the world. Collectively, our companies employ more than ten million employees in the United States - nearly nine percent of the private sector workforce, and 20 million employees worldwide.

The Association recently published the *Blueprint for Jobs in the 21st Century*[1] -- that outlines the comprehensive vision of our many top human resource officers about how to restore job growth and competitiveness in the United States through changes in public policy, education, and public perceptions. That vision is directly relevant to the focus of this hearing, and several of its recommendations are included in my testimony. I encourage you to read the document in its entirety.

***Introduction***

I appreciate the Committee's invitation to discuss before a Committee of the 112th Congress several problems with the Fair Labor Standards Act (FLSA), originally passed in 1938 in the 75th Congress. I look forward to sharing my company's views and the views of the HR Policy Association, as well as those of the broader business community.

I would like to make 3 points today, Mr. Chairman:

1) First, the economy seen by the 112th Congress has changed drastically since 1938 and the economy confronted by the 75th Congress.

2) Second, this economy of the 112th Congress has an entirely new paradigm for how, where and when we work, as well as how professional employees want and expect to be treated.

3) Third, the Fair Labor Standards Act is failing America. It must be modernized, clarified and made relevant for our 21st century business environment and workforce if U.S. companies are to thrive and continue hiring U.S.-based workers.

Let me be clear from the outset. IBM recognizes the importance and role of the Fair Labor Standards Act in our nation's history. We understand that when the Act was

[1] Available at http://www.hrpolicy.org/initiatives_blueprint.aspx

created in 1938, the U.S. workplace was vastly different than it is today. Many employees not only experienced substandard working conditions but also were forced to work long hours for less than adequate wages for the hours they worked - let alone overtime. We appreciate that the Act established some boundaries to protect workers from unscrupulous employers.

However, let me assure you that as a proud American, and as a business leader, there are few issues about which I am more passionate than reform of the FLSA. With more than 40 years as a human resources executive for several leading companies, and having had the benefit of regular contact with peers across a wide range of industry sectors, I speak from experience when I say there are areas of major disconnect between this 70-year-old labor law and today's rapidly changing workplace environment. The business world of 2011 barely resembles that of the 1930's and 1940's, while our primary labor law is becoming ever more outdated, having barely changed in all that time.

Since testifying before this same Committee just over ten years ago, my fellow HR counterparts and I have watched with despair at Congress' inability to make critical fixes to this aging law. If we, as U.S. companies, are to continue hiring and employing the best and brightest workers in this country, it is critical that you, as the lawmakers with the authority to modernize and clarify this law, do so as soon as possible. It's an imperative if companies like mine, which just celebrated its centennial year in business, are going to be a major U.S. employer for another 100 years.

Simply put, this law is now a job killer. It yields advantages to global competitors without commensurate payback to U.S. workers. If nothing is done to make necessary reforms, we sustain a disincentive for job growth in America, hampering employees' opportunity and giving U.S. employers another reason to invest elsewhere. And, while we sit idly, other countries will continue racing ahead of the U.S., surpassing us in terms of education, innovation and job creation. The disconnect between the FLSA and the modern workplace will continue to grow, increasing tensions between employers, employees and regulators, with the only true beneficiary being the plaintiff's bar.

***The U.S. Economy Has Evolved Since 1938***

The health of the U.S. economy – and U.S. companies – depends on modern, clearly understandable, relevant and flexible labor laws and regulations. With over 95% of the world's population and about 80% of the world's purchasing power *outside* of the U.S., the intense pressures of global competition and the globally integrated nature of business allow for nothing less.

When the FLSA was first signed into law, manufacturing, not services, was the predominant business activity in the country. In the seventy years since then, many new industry sectors have been created. Companies large and small, manufacturing and service-based alike, have substantially changed their business models, hiring and employment practices, and they have embraced myriad technological tools, such as e-mail, smart phones, instant messaging, video conferencing, social media and more.

What may not be as obvious is that today's business environment is driven by new global economic forces that are transforming the way work is done, where it is done, by whom it is done, and the skills needed to get it done. America is no longer an economic island or fortress. Our companies, and therefore *our workforce*, must now compete against myriad economic powers throughout the world, who are marshalling their employers, educators, and government resources to match and surpass our past and present successes.[2]

Additionally, there is a blurring of the lines between manufacturing and service-oriented enterprises, and there has been a dramatic shift from goods to nearly 80% services as a percentage of U.S. GDP. This percentage likely will grow higher because even traditional industries, such as heavy equipment, automobiles, consumer products, energy and communications, are relying ever more on services-based innovations. The shift to services is fueled by the emergence of and reliance on smart technological tools and forward-thinking workforce practices to improve efficiencies and out-compete the competition.

***The New World of Work in the 21st Century***

So, what does the new world of work look like in a growing services-oriented technologically based economy? I can tell you that it looks nothing like what it did in 1938. And, it looks very different from 1947 – the year the Portal-to-Portal Act[3] was signed into law. A look at what my own company created at that time illustrates the point.

IBM Relay Calculator, 1944

In these decades, IBM supplied the systems required to implement the recently passed Social Security Act of 1935 to start building a pension system for senior citizens. We

[2] HR Policy Association's Blueprint for Jobs in the 21st Century, p. xxvii, 2011.
[3] The Act amended the FLSA to provide guidance about what is compensable time, and it exempted regular commute time from compensation.

created the time stamp, a room-size calculator, the first test scoring machine, and the vacuum tube. We also marketed the first commercially successful electric typewriter.

At IBM and in many other companies, the world of work is characterized by a philosophy that work is *something one does, not a place one goes*. It also is characterized by rapid changes in technology and dynamic markets and an imperative from our clients - federal defense agencies, major banks, large utilities and healthcare providers, among others - for 24/7 availability of their systems and services. Companies cannot turn back the clock on this dynamism. But in meeting these challenges, we do what we can, within the confines of the law, to create a better way of working that relieves some familial and personal pressures.

For many people in our current workplace model, fixed office locations are no longer essential for employees to work together and to communicate. Over 40% of IBM's global employee population works outside of a traditional office setting. This number climbs to 50% across our U.S. population. We are not the exception in these practices: Thousands of companies are moving in the same direction.

Recognizing the growing need to balance child or eldercare responsibilities, address medical conditions or work around commuting and other challenges, today's workers often desire, if not require, flexible work options. I am proud that my company has been at the forefront of offering these options to our employees, such as work-from-home, job sharing, compressed work weeks and other alternative work schedules. Workers just entering the job market tend to use technology as an integral part of their lives, giving them greater freedom and flexibility and the chance to work in ways that suit their lifestyle and that encourage their creativity. And many workers desire "exempt" status, a sign to them that they are recognized as skilled professionals and are trusted to manage their time in the manner that meets their needs, while still fulfilling their obligations to the employer.

Thus, the new economy is characterized by technological innovation, dynamic structural and market shifts, new business models, new workforce management models and changing labor pools. The result is dramatic change to workforce organization and culture, employees' expectations, career paths, and to the demands for skills and learning. This new world of work can only lead to the conclusion that we need fresh thinking in U.S. labor law.

***The FLSA's Failings***

I submit the following question for your consideration, "Why is it that a 70-year-old law, enacted in a different century, which was based on a different model of the U.S. economy, and at a time that pre-dates global competition and nearly all technology we use today, should not be modernized, clarified and made relevant for today's economic realities?"

Let me give you just a few examples of how wildly out-of-sync this law really is:

1) Five years ago, we voluntarily reclassified seven thousand of our highly educated computer employees to non-exempt because we could not be certain whether they met the 1990 criteria for the FLSA's computer employee exemption. These workers had salaries averaging $77,000 per annum (and some up to $150,000). We lowered their base salaries by 15% to account for potential overtime and to maintain market-based compensation for similar non-exempt jobs. Not surprisingly, **nearly half of them** contested their reclassification!
2) One major retailer requires its delivery drivers to pick up and drop off their PDAs at the store every day for fear they can't track or prevent their use after hours. So these employees waste time in traffic, burn energy, create pollution and get to spend less time at home.
3) An aerospace company must limit the amount of discretion exercised by highly-educated, entry-level engineers due to the security content of their jobs. Because discretion is a large litmus test in the FLSA, they must be classified as non-exempt – totally at odds with their training and compensation. A real kick in the guts for the self worth of these employees.
4) IBM has inside sales employees and outside sales employees, and both groups drive revenue by selling products and services. Both groups should have the opportunity to earn lucrative compensation. But inside sales workers feel like second class workers because they must be non-exempt. No trust. Lower status. Lower earning potential. What's mind-boggling is that everyone is selling the products or services – only one walks, while the other sits!

Let me address some of the FLSA's most onerous issues and consequences.

**Deciphering the Rules on Which White Collar Workers Must Be Paid Overtime is Confusing.** A considerable share of the friction with the FLSA by employers and managers alike arises from the "white collar" exemptions and corresponding regulations, which have created numerous difficulties for employers in determining which employees are non-exempt, and thus subject to overtime requirements, and which are exempt. The rules governing the exemptions are so riddled with ambiguities and imprecision that employers – and even the Department of Labor (DoL) – struggle when applying them to *today's* modern workplace. Meanwhile, employers cannot simply assume that because an employee is highly paid, he or she is exempt. Indeed, a survey of HR Policy member companies conducted in June of this year (with 151 companies responding) showed that almost half (48%) of the wage and hour claims settled by companies involved employees earning more than $50,000 per year, with 5% of the cases involving employees earning six figures. Examples of difficulties employers face in determining who does and who does not have to be paid overtime abound. Some of the more prominent examples include:

1. **Computer Employees**. The FLSA and its implementing regulations include an exemption for "computer employees," but the definition is rooted in the technology of the late 1980s, a time before many people had Internet access or email, let alone use of the sophisticated technologies of today.

IBM Personal Computer, 1980s

IBM Data Center, Present

While computer programming and systems design are explicitly exempted from overtime requirements, work performed by information security experts and people who manage huge networks or databases and earn nearly $100,000 a year, is not.

2. **Entry-level Degreed Engineers and Accountants**. The FLSA regulations state that, to be an exempt professional, an employee must perform "work requiring advanced knowledge in a field of science or learning" involving the "*consistent exercise of discretion and judgment*." Often, as new graduates start their first jobs, they exercise very little discretion or judgment. Instead, they follow the highly complicated rules and principles of the profession and/or directions from those to whom they report, until they acquire sufficient experience on the job. The quandary faced by employers is determining at what point new employees with sophisticated skills cross the threshold into the blurry FLSA definition of a professional. By every other standard, including lucrative starting salaries, these employees would clearly be considered professionals.

**Official Exemption Interpretations of the Same Workforce are Inconsistent.** Particularly nettlesome is determining what level of "discretion and independent judgment" employees must have to qualify for the Administrative Exemption. Sometimes, not even the Department of Labor's Wage and Hour Division (WHD) can make up its mind. For example, on September 8, 2006, the WHD determined that mortgage loan officers were bona fide administrative employees who are exempt from the FLSA's protections. Yet, on March 24, 2010, the WHD reversed itself and determined that they do not qualify as exempt. If the WHD cannot consistently determine who is a bona fide administrative employee, how are employers supposed to figure it out?

**Even DoL Gets Sued.** Meanwhile, the limitations on the Department's own ability to distinguish between who is and who is not exempt under the Administrative Exemption have been exposed. The example is a recent action brought against the Department

involving the exempt status of more than *1,900 of its own employees*, including the awarding of back pay to a number of them. In addition to a large number of administrative employees, those eligible included highly paid computer professionals, paralegals, litigation support specialists, pension law specialists, as well as highly paid Wage & Hour Division compliance specialists.[4]

**Exempt Status Does Not Govern the Amount of Compensation.** The absurdity of the struggle of who is and is not exempt is further highlighted by the fact that the ultimate determination does not necessarily determine *how much* employees get paid but rather *how* they get paid - hourly versus salaried. The amount an employee is paid is determined by a variety of factors, including market rates, education, experience, performance and so forth.

**Litigation is Exploding.** FLSA compliance problems are exacerbated by the fact that the statute not only provides for enforcement by the DoL, but also by private actions. As a result, the private bar has taken advantage of the law's lack of clarity by pursuing highly lucrative class actions against employers who struggle to ascertain what is required. The number of FLSA lawsuits has quadrupled from about 1,500 per year in the early 1990s to nearly 7,000 in 2010,[5] and this does not count the number of cases brought under state laws which often vary from the federal law. In the HR Policy Association survey, 56 per cent indicated they had been sued within the past 10 years, with 13 per cent being sued four or more times. Faced with the uncertainties of the law, companies often settle these cases, with a median settlement cost of $7.4 million for federal cases and $10 million for state cases.[6] My own company has not gone untouched in this area. Approximately five years ago, we were sued by computer professionals claiming they should have been non-exempt. While admitting no guilt, we settled the case for $65 million, approximately a third of which went to the plaintiffs' attorneys.

**There is No Federal Preemption of State Law.** On top of all the problems created by the federal wage and hour laws, additional inflexibilities and complexities are created by state laws, which are not preempted as long as they are more "protective."[7] For example, California has significantly narrower criteria for which employees are exempt from overtime. In order to be considered an exempt computer employee in California, an individual must perform duties involving the exercise of discretion more than 50 percent of the time in *each work week* and earn at least $79,050 annually.[8] In contrast, under federal law, there is no discretion requirement, the exemption is measured over a longer period of time and is not based on a hard-and-fast percentage test, and the employee needs to earn at least $455/week if paid on a salary basis or be paid a minimum of $27.63/hour if paid on an hourly basis.[9] Thus, two different employees performing the

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[4] Cf. http://www.sniderlaw.com/pages/FLSADOL.html
[5] U.S. Courts, Annual Report of the Director, Table C-2A. Year ending June 2010.
[6] Samuel Estreicher and Kristina Yost, "Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment, New York University School of Law, Working Paper No. 08-03, January 2008.
[7] 29 U.S.C. 218.
[8] California Labor Code Section 515.5.
[9] http://www.dol.gov/whd/regs/compliance/fairpay/fs17e_computer.pdf

same work for the same client in the same company, one working in California and another working in another state, may be scheduled and compensated completely differently as a result of the different threshold and minimum pay requirements.

In a different example, federal statute differs from that of certain states in defining a workweek and the threshold for hours that would necessitate overtime payments. In California, most employees must be paid overtime for any hours worked in excess of *eight in a single day*, regardless of how many hours he or she works the rest of the week. Federal law does not address a per-day hour limitation, instead defining 40 hours per work week as the threshold.

***"Professionals" Often Resent Hourly Status***

Contrary to popular belief, "professional," or white collar workers, often resent being classified as hourly employees. The feedback I have heard, both directly from employees and from my peers, is that employees aspire to be exempt, salaried workers as they grow through their careers. In fact, I have had an employee literally weeping on my shoulder when she was reclassified to non-exempt status. Exempt status is often viewed as a higher rung on the corporate ladder, compared with non-exempt status. Their focus is on getting the job done and doing it well, not simply on putting in hours at the office.

Significant to note is that exempt professionals often enjoy greater workplace and work time flexibility, allowing them to better meet their personal and professional obligations in ways that benefit both them and the employer. The legal burden, risk and administrative nightmare of tracking all time worked by non-exempt "professionals," requires inordinate time and monetary resources to manage. One way companies have dealt with this is to restrict non-exempts' ability to utilize flexible work alternatives because of the difficulty of verifying the actual working time of the mobile worker. In fact, the survey of HRPA members I mentioned previously found that in ensuring compliance with the FLSA for their non-exempt employee populations, 32 per cent of companies have imposed restrictions on telecommuting, 56 per cent restrict the use of PDAs, and 44 per cent impose restrictions on flexible scheduling.

Naturally, most "professional" non-exempts do not desire these restrictions, but they been necessitated by the outdated, unclear and inflexible statute which never contemplated the mobile work opportunities of today.

Contrary to non-exempt workers, exempt employees are paid a consistent and predictable salary, not subject to the uncertainties of never-guaranteed, inconsistent overtime. Also, overtime is not something every hourly worker is entitled to work, nor does every worker want to work overtime just to achieve financial parity with their exempt counterparts in related job classifications.

Exempt employees may be eligible for different promotion opportunities, compared to their non-exempt counterparts. This is the result of differences in professional band levels between exempts and non-exempts and different promotional tracks that

companies create for each population. Moreover, benefits based on base pay, such as corporate retirement contributions to 401(k) accounts or other fringe benefits, may be disparate between exempt and non-exempt employees as a result of differences in base pay rates between the populations.

***Suggested Fixes to the FLSA's 21st Century Failings***

There are several specific actions Congress can take to fix obvious problems with the FLSA right now. These fixes, listed below, would not only help restore the U.S. as a good place to invest and hire American workers, but they would be a strong signal of Congressional intent to spur job creation in the U.S.

**Modernize the Computer Employee Exemption.** The solution is to modernize the definition of computer employees by explicitly including the broader range of 21st century computer-related duties, such as securing, updating, maintaining and testing of existing applications without modifying code, that some professionals perform today.

*Explanation:* The Computer Employee exemption was first introduced 20 years ago to address the absence of any exemption for the developing computer industry. The exemption criteria, *defined narrowly and based on the state of technology 20 years ago*, do not align to modern IT jobs and have not kept up with changes in responsibilities of those professionals. Moreover, modern computer professionals require a higher level of independent thought and knowledge to perform their duties, and they are highly educated. They often have advanced degrees and must constantly study to keep up with changing technology. Despite this, many computer professionals must be classified as non-exempt under current law.

**Clarify the "De minimis" Exception to Paid Time.** The solution is to update and clarify the rules, such that insignificant IT-related activities are explicitly included in the "de minimis" exception and are not considered "time worked." Also, the law should make it clear that, even if engaging in insignificant IT-related activities does constitute time worked, these activities do not trigger the start of the work day or signify the end of the workday. Thus, "normal" commute would remain non-compensable time, as it is under current law.

*Explanation:* For non-exempt employees, all time worked must be recorded and compensated. However, the modern workplace gives rise to minor IT-related activities outside of the work day (e.g., checking email/calendar/voicemail before or after leaving for work, or using a PDA to check a schedule change). The "de minimis" exception addressing these circumstances is *not defined in the law*, leaving open to varying interpretations what activity is considered compensable, as well as what activity triggers the start of the work day or ends the work day. Unfortunately, there has been a lack of consistency in current interpretation of these issues. The result is legal uncertainty and risk; it also interferes with our ability to provide non-exempts workplace and time flexibility.

**Expand Exemption for Well-Compensated, Commissioned Inside Salespeople.** The solution is to eliminate this artificial and outdated distinction under the FLSA to account for 21st century communications, sales methods and customer buying habits. Inside sales employees (currently non-exempt) should be treated the same as their outside sales counterparts (exempt), provided they meet specific criteria. Under these arrangements, the compensation structure for sales roles will equitably support pay for performance based on sales targets and achievement.

*Explanation:* The Fair Labor Standards Act creates an artificial disparity between "inside" and "outside" sales employees. Specifically, sales employees who travel out of the office to a customer's place of business are exempt, while most employees who conduct sales from a *fixed office location* are non-exempt. In other words, inside sales employees must be paid on an hourly basis and be subject to strict record keeping requirements, rigid time schedules and more stringent monitoring of their work.

We and others across many industries believe these restrictions are out of sync with today's customer service needs, and the opportunities offered by technology, as well our sales employees' pursuit of and ability to enjoy greater workforce flexibility to balance both their work/family needs and their ability to increase their earnings. These restrictions create an artificial and outdated distinction between sales reps, although both have responsibility for the same territories, have the same accounts, have challenging sales quotas, work in partnerships on teams together and are paid off the same sales results. The legal limitations associated with non-exempt inside sales also make it hard for us to attract and retain the best talent for this critical element of how we approach the marketplace.

**Remove Disincentives for Performance-Based Bonuses.** The solution is to allow employers to exclude, from the "regular rate," payments rewarding employees for meeting or exceeding the productivity, quality, efficiency, or sales goals specified in an employer's gain-sharing, incentive bonus, commission, or performance contingent bonus plan.

*Explanation:* Employers are discouraged from paying bonuses and other forms of incentive pay to non-exempt employees because the law requires such amounts to be included in the employee's rate of pay for purposes of calculating overtime. For example, an employer may want to extend pay-for-performance incentives to non-exempt employees by offering annual incentive payments for achieving certain performance targets. However, payment of the incentive will require recalculation of overtime pay for the year. Moreover, when making the decision to provide such incentives, the employer often doesn't know how much overtime the employees will work, thus preventing an accurate projection of costs. To avoid this administrative complexity and potential legal exposure, some employers simply conclude that they are not going to extend incentive pay programs to non-exempt employees.

If anything, the law should encourage employers to reward their employees for achieving certain performance goals. Yet, the current law discourages this with the administrative

hurdle of requiring that those amounts be calculated into base pay for purposes of determining the overtime rate ("regular rate").

**Allow Preemption of State and Local Wage and Hour Laws.** The solution is either a broad preemption of state and local wage and hour laws, or at the very least, a safe harbor or irrebuttable presumption favoring any employer doing business in multiple states who is operating in compliance with the Fair Labor Standards Act.

*Explanation:* As is the case under the National Labor Relations Act and the Employee Retirement Income Security Act, there is a strong need for broad preemption under all federal employment laws, but it is particularly essential under the wage and hour laws. Multi-state employers should be able to achieve uniformity in how employees performing the same job for the same company are paid and the scheduling rules that apply to them regardless of what state or locality those employees happen to work in.

**Determine Where the Law's Protections and Resources Are Most Needed.** We propose that stakeholders should address the current exempt/nonexempt morass in a way that provides clarification to employers, employees, the Department of Labor and the federal courts, while also targeting the protections of the law to those who need it and avoiding the law's inherent inflexibilities for those who do not.

*Explanation:* The task most desperately needed in a comprehensive reform of the law is to identify the abuses that are to be addressed. This primarily involves identifying the occupations and situations where employees are most vulnerable. Making these determinations should be based on hard data, as well as industry and occupational profiles. Ultimately, empirical evidence will demonstrate the degree of wage and hour protections needed for certain groups of workers. The objective would be a consensus on a strategic overhaul of the FLSA that achieves the correct balance between protections against abuses and the flexibility employers and employees need to ensure the competitive enterprise.

***Conclusion:***

Plain and simple: The U.S. leads in innovation. The U.S. leads through companies like IBM in work practices. However, the U.S. doesn't lead in contemporary workplace rules. The FLSA binds our businesses and our workers in European-style regulatory knots that restrain growth, innovation, jobs and work/life flexibility. But, we aren't Europe. America fixes problems, and this is one we must fix.

Mr. Chairman and distinguished Members of the Committee, on behalf of IBM and the HR Policy Association, I would like to thank you again for the opportunity to testify before you today. We strongly encourage your leadership in accomplishing the immediate and longer-term goals, and we stand ready to work with you and your staff to draft legislation that provides the solutions outlined in my testimony.

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Chairman WALBERG. Thank you.
Mr. Alfred, I recognize you for your testimony.

## STATEMENT OF RICHARD L. ALFRED, PARTNER, SEYFARTH SHAW, LLP

Mr. ALFRED. Good morning, Chairman Walberg, Ranking Member Woolsey, and members of the subcommittee. My name is Richard Alfred, and I am a partner at the national law firm of Seyfarth Shaw. I am pleased to provide this testimony today to address the

substantial problems faced by employers in attempting to apply the Fair Labor Standards Act to the 21st century.

The Fair Labor Standards Act is an anachronism in today's economy. This has led to an explosion of litigation over the past decade that has imposed enormous—in some cases catastrophic—burdens on employers. The uncertainty and instability resulting from this increased litigation have harmful impact on employers' ability to maintain and create jobs and on economic growth.

Let me illustrate these points through two exhibits that are attached to my written testimony.

Exhibit 1 illustrates that between 2000 and 2010 the number of FLSA lawsuits filed in Federal courts throughout the country has increased by more than 300 percent. Approximately 40 percent of those lawsuits are collective and class actions involving claims by hundreds, thousands, and, in some instances, tens of thousands of employees.

Exhibit 2 lists the largest wage and hour collected in class-action settlements in the country since 2004, which range up to $135 million; and some employers are hit twice or more. The amounts shown on this chart for settlements are in lawsuits in which the worst-case exposure was many times these amounts. These megacases affect employers in many different industries, including insurance, financial services, retail, hospitality, technology, and employees in the public sector. This list does not include the many thousands of additional settlements and verdicts in smaller amounts.

To be sure, an employer that engages in unscrupulous practices or intentionally violates the law should be held accountable. However, in my experience defending and overseeing the defense of hundreds of wage and hour lawsuits, the overwhelming majority of employers make a good-faith effort to comply with the law.

Virtually all wage and hour cases today arise in the context of ambiguities and inconsistencies in the FLSA. Many involve statutory terms that have never been defined or have been interpreted in conflicting ways. Chief among these is the most fundamental of all of the FLSA's concepts, the term "work" itself.

Compounding those problems are the efforts of well-intentioned employers that are forced to shoehorn issues of today's workplace into a statutory framework designed to meet the needs of the vastly different Depression-era economy. As but one example, the key regulation that defines the workday describes it as encompassing roughly the period from whistle to whistle. Often, these cases concern practices that have previously been endorsed by the Department of Labor, or at least have never been challenged.

The absurdity of the litigation-festering atmosphere is exemplified in the currently ongoing legal battle over the classification of pharmaceutical sales representatives, who have, since the FLSA became law in 1938, been treated by the entire industry and by the Department of Labor, until very recently, as exempt. However, decisions in the more than 70 lawsuits brought against virtually every pharmaceutical company in the country by enterprising plaintiffs' lawyers challenging these employees' exempt status, while seeking millions of dollars in legal fees, in the past 5 years have reached dramatically different conclusions. As a result, a

pharmaceutical company today must treat its sales representatives in New York as nonexempt under Second Circuit law, while that same company may treat its sales representatives just 10 miles away, across the Hudson River in New Jersey, as exempt under Third Circuit law.

If our Federal courts can't agree on the correct interpretation of the FLSA, how can well-meaning employers be expected to do better?

Legal absurdities such as this—and there are many—hinder economic growth. Employers faced with payroll uncertainty and the inevitable risk of litigation are likely to hire conservatively. Even six figure exposure, relatively small compared to many FLSA collective actions, may be insufficient to drive small companies out of business entirely, adding to unemployment.

In addition to promoting job growth, greater clarity in the law would help employees as well. Employees would benefit from pay and classification decisions that are more clearly consistent with the law. This would reduce the need for litigation with its long delays and substantial attorneys' fees.

In addition, many employees, especially those with young children, want alternative work schedules. Technological advances have made telecommuting from home easier than ever. But the FLSA has not kept pace with these developments.

It is long past time for the FLSA to be updated to reflect our modern workplace, and these much-needed reforms would benefit the economy by providing additional clarity to employers and additional flexibility for employees.

I thank the subcommittee again for providing me this opportunity to testify, and I look forward to answering any questions you may have.

[The statement of Mr. Alfred follows:]

**Prepared Statement of Richard L. Alfred, Esq., Seyfarth Shaw LLP**

Good morning Chairman Walberg, Ranking Member Woolsey, and distinguished members of the subcommittee. My name is Richard Alfred, and I am pleased to provide this testimony to address the substantial problems faced by employers in attempting to apply the Fair Labor Standards Act to the twenty-first century workplace. I am a Partner with Seyfarth Shaw LLP, a national law firm with ten offices nationwide and one of the largest labor and employment practices in the United States. Nationwide, over 350 Seyfarth Shaw attorneys provide advice, counsel, and litigation defense representation in connection with wage and hour claims, as well as other labor and employment matters affecting both employers and employees in their workplaces.[1]

*I. Executive Summary*

This testimony addresses the explosion of litigation under the Fair Labor Standards Act ("FLSA") in recent years and the manner in which that litigation demonstrates the need for reform. First enacted in 1938, the FLSA has become an anachronism in today's workplace. The statute has not been comprehensively revised in more than sixty years. Likewise, the key regulations interpreting that statute maintain, for the most part, the same structure and content as they did when they were drafted more than half a century ago. Ambiguities that have existed in the statute since its inception, coupled with the fact that the statute has not kept pace with changes in the American workforce, have lead to inconsistent judicial and regulatory interpretations, increased litigation and unfairly exposed employers to potentially catastrophic results. Examples include litigation concerning what activities are included in compensable time, and application of the "white collar" exemptions from overtime to positions in virtually all industries and business sectors. Examples considered here include retail store managers, pharmaceutical sales representatives and mortgage loan officers. Clarification of employers' obligations is

needed to increase compliance and decrease the burdensome litigation that currently plagues even well intentioned employers. Employees would also benefit greatly from clarity in the law as a result of easier and more certain employer compliance in its pay practices and classification decisions, a reduction in prolonged and expensive litigation, and the ability to maintain flexible work schedules through alternative work schedules and locations.

*II. Introduction*

I am the Chairperson of Seyfarth Shaw's Labor and Employment Department's National Wage & Hour Litigation Practice Group consisting of about 70 of our lawyers from the firm's ten domestic offices. I have practiced in the areas of employment counseling and litigation defense for more than 32 years in Boston, Massachusetts. I am a member of both the Massachusetts and New York bars. Members of Seyfarth Shaw have written a number of treatises on employment laws, including a forthcoming first-of-its-kind treatise dedicated entirely to the defense of wage and hour collective and class action litigation to be published by Law Journal Press., a division of ALM Media, Inc.; defended many hundreds of wage and hour individual, collective and class actions under the FLSA and analogous state laws; and advised thousands of employers on wage and hour compliance issues. We have also conducted a great many workplace pay practices and exempt job classification assessments for our clients.

My personal practice for almost a decade has focused on the defense of wage and hour collective and class actions under federal and state laws. I have represented U.S. businesses—some as large as Fortune 50 companies and others much smaller—in dozens of wage and hour lawsuits primarily in federal courts in many jurisdictions throughout the country. I am a frequent lecturer and have published numerous articles on wage and hour topics.

*III. The Fair Labor Standards Act*

Enacted in 1938, the Fair Labor Standards Act generally requires covered employers to pay their nonexempt employees at least the federal minimum wage, currently set at $7.25, for all hours worked, and overtime premium pay of one-and-a-half times the employee's regular rate for hours worked in excess of forty in any workweek. The main substantive provisions of the Act have remained largely unchanged since they were enacted more than seventy years ago. In fact, recent Congressional action has been infrequent and has addressed such marginal (albeit important in certain circumstances) issues as whether stock options are included in the regular rate, or whether receiving food from a food kitchen might create an employment relationship.

The FLSA's most significant revision occurred in 1947, following a surge of litigation arising from the Supreme Court's decision in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), which held that the time spent by pottery factory workers traveling from the entrance of the plant to their work stations was compensable work time. The 1947 amendments, known as the "Portal-to-Portal Act," limited the Act's retroactive application; redefined its statute of limitations; substituted a "collective" action procedure for allowing "similarly situated" individuals to join a lawsuit as "parties plaintiffs" in place of a class action mechanism; and excluded "preliminary and postliminary activities" from compensable time, all in an effort to reduce the rising litigation under the statute.

In its findings in connection with the adoption of the 1947 statutory amendments, Congress stated: "[T]he Fair Labor Standards Act * * * has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation * * *." 29 U.S.C. § 251(a).

*IV. An Anachronistic Law Applied to Today's Workplace*

As they did in 1947, employers once again face immense, unexpected liability under the FLSA. The workplace of the twenty-first century has little resemblance to the manufacturing predominant workplace of decades ago. The FLSA and its lengthy regulations, always difficult to interpret because of the many ambiguities and technicalities built into the law, are almost impossible for employers to apply with any certainty in the context of today's very different workplace. Compounding this problem are the inconsistent and often conflicting court decisions that attempt to deal with this anachronistic legal framework. The result has been an explosion of lawsuits, with the resulting risks, expense, and potentially catastrophic exposure challenging well-intentioned decisions of businesses attempting in good faith to apply a pre-World War II statute in the context of a fast-paced technological world.

From 2000 through 2010, the number of FLSA lawsuits filed in the federal courts has increased by more than 300%. Last year, more than 6,000 lawsuits, affecting

virtually all industries and business sectors, were filed in the federal courts claiming violations of the Act.[2] This number excludes the thousands of additional wage and hour lawsuits filed in state courts under analogous state laws. See Exhibit 1, showing the growth in federal court wage and hour case filings since 2000.

About 40% of these federal wage and hour lawsuits are brought as collective actions, in which one or a few employees seek certification of a group of hundreds, thousands, or even tens of thousands of current and former "similarly situated" employees. Since 2004, reported verdicts and settlements in collective and class actions against businesses operating in the United States for alleged violations of the FLSA have reached as high as $210,000,000. While this staggering amount may be an outlier, there have been others in the nine figures, many in the eight figures and countless others in the seven and high six figures. See Attachment 2, listing the largest wage and hour collective/class settlements between 2004 and 2010.[3]

Of course, if an employer intentionally violates the law, cheats its employees out of pay or otherwise engages in unscrupulous practices aimed at exploiting employees or depriving them of earned compensation, one might conclude that it deserves the risk presented by a collective action. However, in my many years defending these lawsuits and monitoring the defense of hundreds of such lawsuits defended by other Seyfarth Shaw lawyers and colleagues at other law firms, I can testify that this is rarely the case. In fact, I can state without hesitation that, in my career, I have seen only a small handful of truly intentional wage and hour violations.

Virtually all of these cases involve ambiguous or technical requirements. In the private sector, they fall generally into four types: (1) those that challenge the exempt classification of a group of employees such as computer technicians, store managers, analysts, and sales representatives; (2) those that challenge a company's pay practices such as those that treat certain activities as noncompensable pre- and postliminary activities; (3) those that arise from company policies and practices that may run afoul of the strict salary basis requirement for exempt employees such as deductions from weekly pay because of employee absences; and (4) those that challenge the employer's computation of the "regular rate" used in calculating overtime pay. I will focus on the first two types—misclassification and "off-the-clock" claims.

Greater clarity in the law that gives rise to litigation under both of these types of claims would also be helpful to employees. First, through consistent and more predictable employer compliance, employees would benefit at the outset from pay and classifications decisions that are more clearly consistent with the law. Second, such consistency would reduce prolonged and expensive litigation that delays benefits to employees and requires them to pay a large portion of whatever recovery they may obtain in attorneys' fees and costs. Finally, employees, especially women with young children, want and seek alternative work schedules and locations that are possible today through arrangements such as telecommuting from home and working schedules that fit well with homecare obligations. Uncertainty in wage and hour obligations provides disincentives to employers to allow such practices. Federal law reform, on the other hand, could be a vehicle for providing an incentive to employers, without fear of litigation contesting off-the-clock and exempt misclassification claims, to adopt and expand flexible work programs.

*V. What is Work?*

Some of the most litigated ambiguities in the FLSA result from key terms that have never been defined. This has left the courts and the Department of Labor to decide to whom the Act's overtime provisions apply and the types of activities for which those employees must be compensated. Exacerbating this problem, the statute's provisions have never been comprehensively updated to conform with the requirements of today's technological workplace. The resulting patchwork of judicial and regulatory guidance is replete with inconsistencies and, in many instances, is badly out-of-date. For example, neither the statute nor the DOL regulations define the most basic term that is at the heart of the FLSA's requirements—"work."[4]

While leaving the definition of work unresolved, the DOL and courts apply what is known as the "continuous workday" to determine whether an employee's activities are compensable.[5] Under this principle, all time spent by an employee between the first and last "principal activity" of the day, other than actual break times of at least thirty minutes, is presumptively "work." While this doctrine may have made sense when the DOL devised it in 1947, it is anachronistic in a world where employees have 24-hour access to email through their blackberries and iPhones and can access their employer's computer systems from anywhere in the world, including their homes, via Citrix or VPN connections. The very language chosen by the DOL to describe the "workday"—"roughly * * * the period from 'whistle to whistle,'"—underscores the degree to which this concept is out of touch with the electronic workplace of this century.[6] 29 C.F.R. § 790.6(a).

It is easy to imagine the challenges that can arise in applying this framework to modern working conditions. If an administrative assistant spends five minutes each night and another five minutes each morning checking her smart phone for email before going to bed and after waking up, must she be paid for this time? If so, how does an employer track this time to determine how much she should be paid? Must a call center operator be paid for the time he spends drinking his coffee while waiting for his computer to boot in the morning?[7] The dramatically inconsistent case law bears out these difficulties in application.

For example, the Ninth Circuit Court of Appeals recently addressed a case involving technicians in California who install and repair car alarm systems at customers' locations. The court determined that these employees were not entitled to compensation for their time spent traveling to their first job site of the day, even though they first spent time at home retrieving assignments from a handheld computer, prioritizing jobs, and completing paperwork, because those activities are so minor as to be "de minimis." Rutti v. LoJack Corp., 596 F. 3d 1046 (9th Cir. 2010). This result seems sensible, but unfortunately it is at odds with decisions of courts in other jurisdictions. A court in Massachusetts, for example, decided that very similar activities to those at issue in Rutti performed by insurance adjusters—checking email and voicemail and preparing their computers for use during the day—were significant and triggered the beginning of the continuous workday, making their subsequent commute time compensable time. Dooley v Liberty Mutual Ins. Co., 307 F. Supp. 2d 234 (D. Mass. 2004). Thus, in the states of the Ninth Circuit—Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada and Oregon—checking your email before you drive to work probably will not make your commuting time compensable, but in Massachusetts it might. Other seemingly arbitrary distinctions also have come to have great significance in determining what is work time under the FLSA and what is not. For example, whether a commute to a job site in a company van is compensable work time may depend on whether the employees "must" or "may" take the company's van to the work site, and, thus, compensability may turn on the happenstance of the words used rather than on the substance of the policy, itself.[8]

Even the manufacturing industry, which features workplaces that are more similar to those envisioned by Congress in 1938, has been plagued by litigation concerning the meaning of "work." One particularly intense area of litigation has concerned the "donning and doffing" of protective clothing. In one case, for example, the Third Circuit Court of Appeals found that employees of a poultry processing plant in Pennsylvania must be paid for the time they spend putting on hair nets, beard nets, smocks, and safety glasses. DeAsencio v. Tyson Foods, Inc., 500 F.3d 361 (3d Cir. 2007). The Tenth Circuit Court of Appeals, on the other hand, found that employees at a meat-packing plant in Kansas do not need to be compensated for the time they spend changing into virtually identical gear. Reich v. IBC, Inc., 38 F.3d 1123 (10th Cir. 1994). The same company, Tyson Foods, Inc., owned both the Kansas and the Pennsylvania plants at issue in these cases, demonstrating the degree to which employers may face conflicting legal obligations based solely on geography. Such dilemmas are acute for companies that operate nationwide.

*VI. Exempt Classifications*

Similarly intense confusion surrounds the question of which employees are entitled to overtime under the FLSA. The Act exempts from overtime any "employee employed in a bona fide executive, administrative, or professional capacity * * * or in the capacity of outside salesman," but does not define those terms. 29 U.S.C. 213(a)(1). The Department of Labor's exempt status regulations, 29 C.F.R. § 541, which are intended to fill that void, were amended marginally in 2004. The 2004 revisions, for example, added a new regulation exempting "Computer Employees," but defined it so narrowly that, by its terms, it applies only to employees involved in system or software design, and does not apply to most information technology jobs. See 29 C.F.R. § 541.400(b).[9] The more commonly utilized "white collar" exemptions maintain the same basic structure that has been in effect for over half a century. This framework is complex, difficult to interpret, and hard to apply, leading to conflicting judicial interpretations of its provisions.

Retailers, for example, have faced a dramatic rise in litigation over the exempt status of store managers, positions that traditionally have been classified as exempt under the executive exemption.[10] Plaintiffs in these lawsuits challenge this classification and seek overtime pay for the many hours worked by these managers above 40 per week. Even where it is not disputed that the manager is "in charge" of the store and supervises all of its employees, some courts have found that insufficient to prove the applicability of the exemption. Rather, whether the manager is exempt turns on whether his "primary duty" is that management, which as a practical mat-

ter is often, but erroneously, equated by courts to the amount of time he spends day-to-day assisting the employees he supervises with "non-exempt" tasks.[11] Seemingly similar job positions have gone in opposite ways in this inquiry. The Sixth Circuit affirmed an Ohio court's ruling that gas station/convenience store managers were exempt. Thomas v. Speedway Superamerica, LLC, 506 F.3d 496 (6th Cir. 2006). The Eleventh Circuit held that managers of a dollar store with a comparable level of responsibility to those of the store managers at issue in the Sixth Circuit case are not exempt. Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233 (11th Cir. 2008).

Another highly publicized example of inconsistent guidance on an exempt classification issue involves the pharmaceutical industry. Pharmaceutical companies typically employ "sales representatives" or "detailers" whose job it is to visit prescribing physicians, educate them on the benefits of the company's products, and encourage them to prescribe those pharmaceuticals. They are paid handsomely for this work—it is not unusual for pharmaceutical sales representatives to earn in excess of $100,00 per year in salary, incentive payments, and benefits.[12] The pharmaceutical industry has long considered these individuals to be exempt from overtime under the administrative and outside sales exemptions, and the DOL has long acquiesced in this practice. As early as 1945, the Department of Labor issued an opinion letter stating that "medical detailists" whose job was "aimed at increasing the use of the [employer's] product in hospitals and through physicians' recommendations" met the requirements of the administrative exemption. Likewise, since 1940 the DOL had defined the outside sales exemption in a broad, non-technical manner that easily encompassed the work performed by pharmaceutical sales representatives, explaining that a "salesman [must] in some sense make a sale." Dep't of Labor, Executive, Administrative, Professional, Outside Salesman Redefined (Oct. 10, 1940) at 45-46 (emphasis added).

The application of these exemptions in the pharmaceutical industry, however, is now in a state of flux. More than seventy sales representative lawsuits against more than a dozen different pharmaceutical and life sciences companies have been filed in the past five years, each alleging an entitlement to overtime. These lawsuits have met with dramatically different and conflicting results. The Department of Labor weighed in on the issue in a case against Novartis Pharmaceuticals in the Second Circuit Court of Appeals, filing a friend-of-the-court brief arguing that sales representatives are not exempt. Amicus Brief of Secretary of Labor, In re Novartis Wage & Hour Litig., 611 F.3d 141, 149 (2d Cir. 2010). In so doing, the DOL not only reversed its sixty year-old position on sales representatives and advocated for a substantive change in the manner in which the administrative exemption is interpreted generally, but it did so in the context of a judicial briefing and not through actual rule-making.

The administrative exemption regulations include three requirements: the exempt employee must (1) meet certain salary requirements, (2) have a primary duty consisting office or non-manual work directly related to management or general business operations of the employer or the employer's customers, and (3) exercise discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200. Traditionally, this third requirement has been an either/or proposition—either an employee exercises discretion and independent judgment or she does not. The DOL, however, took the position that it is a quantitative requirement, and that an employee must exercise a sufficient level of independent judgment and discretion. The Second Circuit deferred to the DOL and ruled that Novartis's sales representatives must be paid overtime. The court also adopted the DOL's position that sales representatives are not exempt outside salespersons because FDA regulations prohibit them from directly selling pharmaceutical products to patients.

Other courts of appeals have ruled differently on these issues. In February of this year, the Ninth Circuit decided that pharmaceutical sales representatives for GlaxoSmithKline qualify for the outside sales exemption, rejecting the DOL's position in part because it conflicted with the Department's long-standing views. Christopher v. SmithKline Beecham Corp., 635 F.3d 383 (9th Cir. 2011). The Third Circuit ruled last year that sales representatives for Johnson & Johnson are administratively exempt. Smith v. Johnson & Johnson, 593 F.3d 280 (3d Cir. 2010). Thus, a sales representative assigned to a territory in New York, which is part of the Second Circuit, must receive overtime, but a sales representative for the same company assigned to a territory in New Jersey—a short commuter train ride away—is exempt. District courts in Illinois and Indiana have also reached opposite conclusions on this same issue.[13] For a nationwide employer, complying with these conflicting standards is fraught with the possibility of an inadvertent misclassification. There are hazards for the employees as well. As one pharmaceutical industry group has pointed out, many pharmaceutical sales representatives are attracted to the position because of its flexibility, and that flexibility is likely to diminish if sales representa-

tives must punch a clock or otherwise log their time so that their overtime pay may be calculated accurately. See Amicus Brief of Pharmaceutical Research and Manufacturers of America in Support of Petition for Certiorari, Novartis Pharmaceuticals Corp. v. Lopes, No. 10-460 (Nov. 5, 2010).

A similar pattern of shifting regulatory guidance emerges with respect to mortgage loan officers ("MLOs"). These individuals, who work for banks and mortgage companies and are responsible for guiding homebuyers through the mortgage application process, are often classified as administratively exempt. MLOs commonly receive incentive compensation based on the number of loans they close, and with these incentives may earn total annual compensation well within the six-figure range.[14] In 2006, the DOL issued an opinion letter stating that MLOs' typical job duties, including responding to customer inquiries and leads, collecting and analyzing financial information, and advising customers about the risks and benefits of various loan alternatives, meet the requirements of the administrative exemption.[15] Less than four years later, the DOL withdrew that guidance, issuing an "Interpretive Guidance," a newly created form of generalized administrative guidance, stating that loan officers are not exempt because their primary duty is not "directly related to the management or general business operations" of their employers or their employers' customers.[16] According to the DOL, MLOs' primary duty is sales, which makes them more like production workers than administrators.[17] Numerous class action lawsuits on behalf of loan officers seeking to capitalize on the DOL's sudden about-face are currently pending in the federal courts.[18]

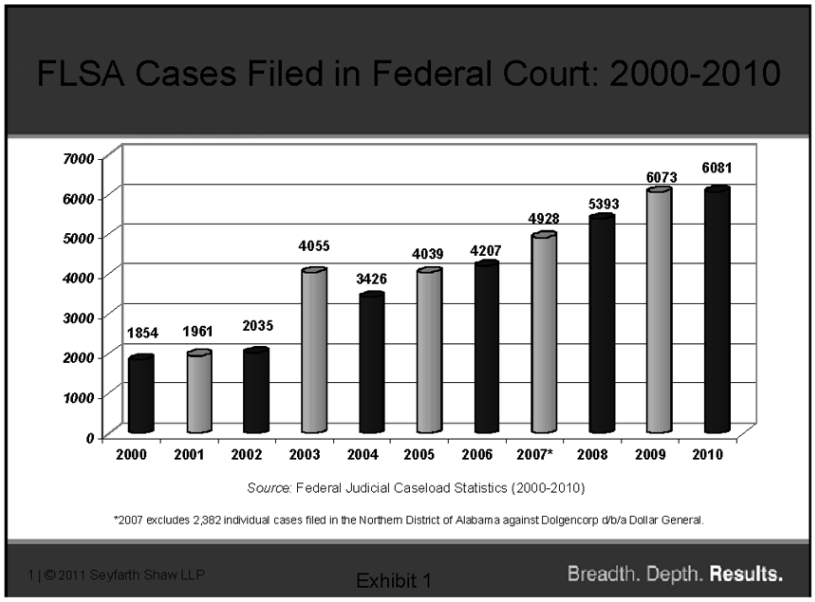
Lawsuits by securities brokers or "registered representatives" claiming to be overtime-eligible have also become increasingly common. Like MLOs, these employees claim to be salespersons, rather than true administrative employees. In addition, at least one Minnesota court has determined that the fact that these employees must have passed a Series 7 securities representative examination is not sufficient to make them exempt professionals. In re RBC Dain Rauscher Overtime Litig., 703 F. Supp. 2d 910, 926 (D. Minn. 2010). Citigroup and UBS have settled lawsuits by their brokers for huge amounts—$98 million and $89 million, respectively.[19]

These results are incongruous with the purpose of the white collar exemptions: "the section 13(a)(1) exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay." Preamble to Exempt Status Regulations, 69 Fed. Reg. 22122, 22123-24 (Apr. 23, 2004). The positions held by pharmaceutical sales representatives, mortgage loan officers, and stockbrokers are what most of us would think of as "good jobs." For the most part, they are highly paid, prestigious, and receive good benefits. If a mortgage loan officer earning $200,000 a year must receive time-and-a-half for his overtime hours, while a public school teacher scraping by on $20,000 a year is unquestionably exempt, we have strayed far from the FLSA's original intent.

*VII. Conclusion*

The current state of the FLSA has left employers in a quandary. Determination of the number of compensable hours worked, application of the white collar exemptions, and other important concepts in the statute have never been straightforward due to the statute's definitional gaps. Because the statue has never comprehensively been updated or clarified, employers now also must contend with the fact that the statute was designed to apply to a very different kind of workplace than exists for most American workers today. Unable to avoid liability in these highly technical lawsuits merely by paying their employees generously—many of the largest judgments and settlements under the statute have benefited highly paid employees—they are forced to wade through conflicting judicial decisions and rapidly shifting regulatory guidance to determine the contours of their obligations. Employers need a clear, comprehensible framework to allow them more easily to determine how their employees must be paid. Employees, likewise, would benefit from the consistency and increased compliance associated with clear rules, especially as litigation of an FLSA claim may take years to resolve.

Chairman Walberg, Ranking Member Woolsey, I thank you again for inviting me to testify. I am happy to answer any questions you may have.





ENDNOTES

[1] I would like to acknowledge Seyfarth Shaw attorney Jessica Schauer for her invaluable assistance in the preparation of this testimony.

[2] Federal Judicial Caseload Statistics (2000—2010).

[3] The settlements listed in Attachment 2 include some settlements of state law wage and hour cases, as well as several cases in which state and federal law claims were asserted simultaneously.

[4] Although the Supreme Court attempted in a 1944 case, Tennessee Coal, Iron & Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944), to put a gloss on the statute by defining work in terms of "physical or mental exertion," later cases have seemed to abandon that definition but have failed to provide a substitute. De Asencio v. Tyson Foods, Inc. 500 F.3d 361, 371

[5] The DOL's continuous workday regulations may be found at 29 C.F.R. § 790.6. The Supreme Court adopted the DOL's "continuous workday" approach in IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005).

[6] These regulations in Part 790, themselves, were written in 1947, and they have not been updated since 1970.

[7] Examples of lawsuits concerning this question include Gandhi v. Dell Inc., No. 08-248 (W.D. Tex.); Heaps v. Safelite Solutions LLC, No. 10-729 (S.D. Ohio); Antoine v. KPMG Corp., No. 08-6415 (D.N.J.); Thigpen v. Illinois Bell Telephone Co., No. 10-5589 (N.D. Ill.).

[8] Compare Johnson v. RGIS Inventory Specialists, 554 F. Supp. 2d 693 (E.D. Tex. 2007) (time spent on optional shuttle to worksite not compensable) with Gilmer v. Alamed-Contra Costa Transit District, 2010 WL 289299 (N.D. Cal. 2010) (required travel from end of bus route to starting location at conclusion of shift compensable).

[9] See also DOL Opinion Letter, FLSA2006-42 (October 26, 2006), (applying exemption to information technology support specialist position), available at *http://www.dol.gov/whd/opinion/FLSA/2006/2006—10—26—42—FLSA.htm.*

[10] The executive exemption requires that an employee (1) is compensated on a salary basis at a rate of not less than $455 per week; (2) has a primary duty of "management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;" (3) "customarily and regularly directs the work of two or more other employees;" and (4) has the authority to hire or fire other employees or make recommendations for such personnel actions that are "given particular weight." 29 C.F.R. § 541.100.

[11] While 29 C.F.R.§ 541.700(a) states that an employee's "primary duty" is to be determined based on "all the facts in a particular case," and the amount of time spent performing exempt work is but one factor, some courts have given that factor particular weight. See Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233 (11th Cir. 2008).

[12] In re Novartis Wage & Hour Litig., 611 F.3d 141, 148 (2d Cir. 2010) (average salary for Novartis sales representatives is $91,500, and the company pays more than half a billion dollars a year in total compensation to its representatives); Amendola v. Brystol-Myers Squibb Co., 558 F. Supp. 2d 459, 465 (S.D.N.Y. 2008) (remarking that each of the sales representatives who had submitted affidavits on Brystol-Myers Squibb's behalf earned in excess of $100,000 per year); Schafer-LaRose v. Eli Lilly & Co., 663 F. Supp. 2d 674 (S.D. Ind. 2009) (plaintiff sales representative earned $103,392 in 2005).

[13] Schaefer-LaRose v. Eli Lilly & Co., 663 F. Supp. 2d 674 (S.D. Ind. 2009) (pharmaceutical sales representatives qualify for both outside sales and administrative exemptions); Jirak v. Abbott Laboratories, Inc., 716 F. Supp. 2d 740 (N.D. Ill. 2010) (pharmaceutical sales representatives do not qualify for outside sales or administrative exemptions).

[14] In one pending case against Bank of America, some plaintiffs earned as much as $384,000 and $650,000 per year. See Brief in Opposition to Conditional Certification, Kelly v. Bank of America, N.A., No. 10-cv-05332 (N.D. Ill.).

[15] DOL Wage & Hour Division Opinion Letter FLSA 2006-31 (Sept. 8, 2006), available at *http://www.dol.gov/whd/opinion/FLSA/2006/2006—09—08—31—FLSA.htm.*

[16] Administrator's Interpretation 2010-1 (Mar. 24, 2010) available at *http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010—1.htm.*

[17] Although MLOs provide guidance and advice to their customers, the DOL takes the position that such duties are irrelevant to the administrative exemption criteria because MLOs' customers are generally individuals rather than organizations, and thus they do not have "business operations" for the MLO to help them manage.

[18] See, e.g., Greenberg v. The Money Source, Inc., No. 10-01493 (E.D.N.Y); Kelly v. Bank of America, N.A., No. 10-05332 (N.D. Ill.); Sliger v. Prospect Mortg., LLC, No. 11-465 (E.D. Cal.); McCauley v. First Option Mortg., LLC, No. 10-980 (E.D. Mo.); Garcia v. Freedom Mortg. Corp.,——F. Supp. 2d——, 2011 WL 2311870 (D.N.J.) (denying employer's motion for summary judgment on plaintiffs' overtime claims).

[19] Motion for Preliminary Approval of Class Action Settlement, Bahramipour v. Citigroup Global Markets Inc., No. 04-04440 (N.D. Cal. Feb. 16, 2007).

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Chairman WALBERG. Thank you.

I recognize Ms. Conti.

## STATEMENT OF JUDY CONTI, FEDERAL ADVOCACY COORDINATOR, NATIONAL EMPLOYMENT LAW PROJECT

Ms. CONTI. Thank you for inviting me and the National Employment Law Project here to testify today. We are a nonprofit organization that advocates for low-wage and unemployed workers. And, quite simply, we are big fans of the FLSA and its promise of a fair day's wage for a full day's work.

My varied experiences with the FLSA, counseling both large and small employers and workers, being an employer for 7 years, and

now as a policy advocate, leads me to one conclusion. The FLSA is a statute that is elegant in its simplicity and the basic guarantees of minimum wage, overtime protection, equal pay for equal work, and a prohibition on child labor.

Yes, the nature of work has changed since its passage, but people haven't. They still need decent wages. They still need protection from overwork. And make no mistake about it, the modern day sweatshop does exist and thrives. We still need to create conditions that spread jobs among appropriate numbers of people and, if not, we fuel a race to the bottom that hurts employer and employee alike.

My fellow witnesses have spoken about the workers they don't think should be covered by the FLSA. But let me tell you about the tens of millions that are and need much more vigorous enforcement.

In 2008, NELP and two other important national allies conducted an extensive survey of over 4,000 low-wage workers in New York City, L.A., and Chicago. The results spanned virtually all industries and occupations, and the results were shocking.

Sixty-eight percent of workers experienced some sort of wage and hour violation in the prior week. Twenty-six were not paid minimum wage, and 60 percent of them were underpaid by $1 or more, so it is not a small amount. Seventy-six percent of those who worked more than 40 hours were not paid overtime—76 percent. This translated to workers losing an average of $51 per week, over $2,600 a year, 15 percent of their yearly earnings.

Extrapolating further, in these three cities alone, workers lost over $56 million in 1 week in wages they were legally entitled to receive. Were we to get serious about wage theft and really crack down on it, that could be some of the best economic stimulus our recovery could hope for.

The other witnesses decry the rise of litigation and blame it on complexities and ambiguities in the FLSA and unscrupulous lawyers, but they ignore a few very simple facts.

First of all, with the exception of recession years, the number of workers and employers has been steadily growing, and it only stands to reason that FLSA violations will grow as well. And, additionally, over the past few decades, both Federal and State resources directed at wage and hour enforcement have continually declined in opposition to the growth of the workforce.

A series of GAO reports issued in 2009 talked about the atrocities of enforcement that were going on in the Department of Labor and how impossible it was, in most circumstances, to even get a case adequately investigated. This means two things. Low-road employers take advantage of declining enforcement and push the boundary's exemptions, misclassification, and flat-out refusal to pay wages as far as they can go. And absent effective public employment of the FLSA, of course we see more litigation, because the private bar steps in and acts as the private attorneys general that the FLSA explicitly contemplates.

Finally, the recession itself has driven more and more employers to the low road. The worst of the bunch simply cheat workers out of wages, knowing that the workers have few other options. And, desperate to compete, other normally compliant employers become

more likely to succumb to wage theft just to stay in business. And the rise in complaints made to DOL over the last few years amply demonstrates these trends.

So what do we do? We don't spend our time trying to exclude more and more workers. Instead, we get serious about enforcement. We pass laws to crack down on independent contractor misclassification. We eliminate outdated exemptions for home health care workers that keep this largely female and largely minority workforce trapped in poverty. We give the DOL the resources it needs to fight the wage theft that is so rampant across this country, and we increase penalties for those who willfully break the FLSA so to increase the disincentive for doing so.

I would like to add a final note on flexibility. It is true that the FLSA puts some very important and necessary prescriptions on comp time for private-sector workers. But the other rigidities described honestly seem more to me of employers' own creation, perhaps out of a misguided fear of litigation or maybe distrust of their own workers, not out of any legitimate interpretation of the FLSA.

As much as my fellow witnesses talk about the modern technology that allows such flexibility, they don't seem to allow their workforces to make much use of it. There is no reason why people can't track hours when they telecommute. Lawyers do it all the time. If someone spends 10 to 15 minutes a day or more checking smartphones at home, reduce the hours they spend in the office. Odds are if they are checking their phones that much there is probably unspoken or spoken pressure to do so. Involve more workers in their own scheduling and trust them to help the employer find the best arrangement.

In my 7 years as an employer, I was routinely faced with the same kind of challenges; and when the employee and I sat down, we always came up with a solution that worked for both of us and complied with the law.

In summary, as much as the workforce may have changed, the fact is people haven't. Workers still need to be protected against base instincts of low-road employers and work needs to be spread out among a reasonable number of people, especially in times like now when job creation is so important. Employers need to have some protection against the low-road employers that would compete and drive them out of business as well. The FLSA provides these protections in a way that is every bit as relevant and vital now as it was on the day of its enactment.

Thank you.

[The statement of Ms. Conti follows:]

**Prepared Statement of Judith M. Conti, Federal Advocacy Coordinator, National Employment Law Project**

Good morning Chairman Walberg, Representative Woolsey, and members of the Subcommittee on Workforce Protections. My name is Judith M. Conti, and I'm the Federal Advocacy Coordinator for the National Employment Law Project (NELP). NELP is grateful for the opportunity to address the Subcommittee today and share our views of how vitally important the Fair Labor Standards Act (FLSA) and its vigorous enforcement is to today's workforce, particularly for low-wage workers.

NELP is a non-profit organization that for over 40 years has fought for the rights and needs of low-income and unemployed workers. We seek to ensure that work is an anchor of economic security and a ladder of economic opportunity for all working families. In partnership with state, local and national allies, we promote policies

and programs that create good jobs, strengthen upward mobility, enforce hard-won worker rights, and help unemployed workers regain their economic footing.

One of NELP's priority issues is enforcement of the protections of the FLSA. As a nation that strives to create fair and moral conditions in workplaces, under which both workers and employers can mutually thrive and succeed, there is no more basic underpinning to the social contract of employment than "a fair day's pay for a full day's work." If we cannot enact and enforce basic wage and hour protections, we can never hope to remedy the other abuses such as discrimination and unsafe working conditions that go on in far too many workplaces. So the heart and center of worker protections is the FLSA and its promises of minimum wages, proper hourly payment, overtime premiums, and prohibitions against child labor. And as anyone who has ever represented low-wage workers can tell you, when employers don't respect the basic mandates of the FLSA, other violations of labor and employment laws are virtually guaranteed to follow.

My experience with the FLSA is deep and varied. I analyzed it as a law clerk to a judge in the United States Court of Appeals for the Seventh Circuit. While in private practice, I counseled large and small employers on how to comply with its mandates as well as litigated on behalf of many workers, both individually and in collective actions, who were denied their rights under the FLSA. I spent seven years as an employer and was tasked with applying and enforcing the FLSA with regard to my organization's workforce. During that same period of time, I supervised hundreds of staff and volunteer attorneys who prosecuted FLSA violations. Most recently, as a policy advocate with NELP, I have worked with our allies throughout the country to ensure the vigorous enforcement and defense of the FLSA.

All of those experiences and perspectives lead me to two conclusions about the FLSA: 1) it's vital for the protection of hourly workers in this country; and 2) it's a relatively simple and straightforward statute and regulatory scheme to administer. So much of law is very gray in its application, yet the FLSA offers the closest to black-and-white that exists, at least with respect to labor and employment law.

At the start, I also wish to make clear that I am not here to suggest that a majority or even a substantial minority of employers do not follow the FLSA. Indeed, given the clarity of the law, numerous employers quite willingly comply, and where there are judgment calls to be made, they do their best to make the right judgment. There is a thriving management-side bar that ably advises employers and human resources professionals across the country as to compliance with the FLSA and by and large they do a very good job.

But we cannot ignore the fact that there are low-road employers, both big and small, who to varying degrees push the boundaries of the FLSA beyond reason, who misclassify workers as independent contractors in order to avoid their legal responsibilities under the FLSA, who wrongfully classify workers as exempt from coverage of the FLSA, and who flat-out do not pay their workers minimum wage and/or overtime. It is these employers, and their employees, for whom the vigorous enforcement of the FLSA is most important, for not only do they cheat workers out of their wages, but they gain an unfair competitive edge over honest employers. Neither outcome should be tolerated.

You will likely hear the other witnesses speak today about the great lengths to which they go to comply with the FLSA; how much time and money it takes them to do so and how they could better spend those resources on other things that could lead to more hiring, for example. I suggest that compliance with the FLSA is not nearly so time consuming or expensive. More importantly, given the realities I will discuss below about how wide-spread violations of the most basic provisions of this law are, now is not the time to think about weakening the FLSA in a misguided notion of lessening employer burdens, but rather, to redouble our efforts to enforce this vital law.

Thus, as we discuss whether the FLSA is suitable for the 21st century, we must all remember that the employers you have invited here today do NOT represent all employers out there. Rather, low-road employers who do not even follow the very clearest mandates of the FLSA exist in more than sufficient number. In order to eradicate their behavior, our task must be to look for ways to increase vigorous enforcement of the wage and hour laws that are already on the books, and to craft better solutions to the common schemes of wage theft that are so rampant in this country. If we do those things, we not only make conditions better for workers in this country, but we simultaneously level the playing field for high-road employers who strive to do the right thing by their workforces.

*Enactment and Purpose of the FLSA*

At its core, the FLSA was aimed at eliminating subpar jobs, sweatshops and the subcontracting (including independent contractor abuses) that were going on in the

US economy in the early 1900's. And sadly, many of those structures and persistent low-wage jobs are still in existence today, making the statute as relevant and important now as it was when enacted in 1938.

As a society, we agree that there should be a wage floor, below which employers cannot go,[1] and overtime premiums for those who work more than 40 hours per week.[2] These baseline laws ensure not just that we prevent people from being unfairly overworked, but that we spread out employment among workers. Indeed, as Justice Reed noted in 1941, job creation was at the core of the enactment of the overtime premium, a goal as important and laudable in the Great Depression as it is now in the Great Recession and its aftermath:

By this requirement although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours of the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of extra work.[3]

Finally, the FLSA included essential child labor prohibitions to eliminate the particular evil of child labor in the days when young children lost their youth to long hours and horrific conditions in the garment and other industries.[4]

The FLSA is a statute that is intended to protect workers and to dissuade unfair competition by unscrupulous employers who flout its rules to the disadvantage of those employers who do play by the rules.[5] As the Supreme Court stated:

This Act seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation. The purpose is to raise living standards. This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in costs based upon substandard labor conditions. Otherwise the Act will be ineffective, and will penalize those who practice fair labor standards as against those who do not.[6]

Thus, as with all remedial statutes, the FLSA should be read broadly, and doubts about coverage should be construed in favor of coverage, not exemption.

*Current Conditions for Hourly Workers*

For the last few decades, anecdotal evidence indicated that with changing workforce demographics and sectoral shifts within the economy, there had been a persistent rise in the incidence of wage theft, particularly among low-wage workers, though they are by no means the exclusive victims of this practice.[7] While the Department of Labor and its state counterparts kept records of complaints and investigations, and lawsuits alleging wage theft are matters of public record, there was no rigorous, methodical study documenting just how wide-spread this practice was.

That changed in 2008 when researchers specializing in the low-wage workforce joined together to conduct the first-ever comprehensive survey of low paid hourly workers to get a precise measure of the nature and incidence of the problem. Together with researchers from the Center for Urban Economic Development at the University of Illinois at Chicago and the UCLA Institute for Research on Labor and Employment, NELP surveyed more than 4000 hourly workers in low-wage industries in Chicago, Los Angeles and New York City. Using findings generated by a detailed and structured questionnaire that was carefully administered and analyzed by surveyors, the survey produced the first valid snapshot into the nature of exploitation by unscrupulous employers, and just how widespread abuses are. The results of the survey, published in the 2009 report Broken Laws: Unprotected Workers, included the following key findings:

- An astounding 68% of those surveyed experienced at least one pay-related violation in the work week preceding the survey.
- More than one-fourth (26%) of workers were paid less than the legally required minimum wage in the previous work week, and 60% of these workers were underpaid by more than $1 per hour.
- Among those working overtime (more than 40 hours in the previous work week), a whopping 76% were not paid the legally required overtime rate by their employers.
- Nearly a quarter of workers came in early or stayed late on the job, and 70% of these workers received no compensation for this "off the clock" work.
- Three-in-ten tipped workers surveyed were not paid the tipped worker minimum wage, and 12% of tipped workers experienced tip stealing by their employer or supervisor.
- The majority of workers never complained about any of these violations for fear that they would experience retaliation, and indeed, of those who did complain, 43% did experience illegal employer retaliation.

• The cost of wage theft is enormous: The typical worker experiencing wage theft lost $51 per week out of average weekly earnings of $339. On a full-time year-round basis, this translates into lost annual earnings of $2,634 (15% of total earnings of $17,616).[8]

Extrapolating from these findings, the research team estimated that in these three cities alone, low-wage workers lose more than $56.4 million per week as a result of employment and labor law violations. At a moment when our economy continues to suffer from lack of demand (consumer purchasing), these findings suggest that one important key to economic recovery is more vigorous enforcement of wage and hour protections—so workers are paid what they earn, and can pump money back into their local economics. It goes without saying that wage theft of this magnitude also contributes to the phenomenon of working poverty.

The 2008 survey was broad, encompassing twelve different industries: apparel and textile manufacturing; personal and repair services; private households; retail and drug stores; grocery stores; security, building and grounds services; food and furniture manufacturing, transportation and warehousing; restaurants and hotels; residential construction; home health care; social assistance and education; and other industries such as finance and other health care. Workers from employers of all sizes were part of the survey, and while employers with less than 100 employees had markedly higher rates of violations of basic wage and hour laws, employers with more than 100 employees still had shockingly high rates of violations.[9]

A few other important findings are worth noting:

• Women are more likely to be victims of wage theft than men are.[10]

• Minimum wage violations are most common in three industries: apparel and textile manufacturing; personal and repair services; and private households.[11]

• In each of the following occupations, more than 50% of the workers surveyed experienced overtime violations:[12]

• Child care workers (90.2%)
• Stock/office clerks & cashiers (86%)
• Home health care workers (82.7%)
• Beauty/dry cleaning & general repair workers (81.9%)
• Car wash workers/ parking attendants & drivers (77.9%)
• Waiters/cafeteria workers/ bartenders (77.9%)
• Retail salespersons and tellers (76.2%)
• Building services & grounds workers (71.2%)
• Sewing & garment workers (69.9%)
• Cooks, dishwashers & food preparers (67.8%)
• General construction (66.1%)
• Cashiers (58.8%)

As this brief overview makes clear, the most basic and bright-line rules of the FLSA are being routinely ignored with impunity. These violations are not occurring because of complex determinations of whether or not someone is an exempt professional or a legitimate independent contractor. Rather, they are flagrant abuses of very straight-forward and relevant provisions of our basic federal and state wage and hour laws.

These findings highlight just how important the FLSA still is and how we need to dramatically increase our enforcement of wage and hour laws throughout the country, across every industry and occupation.[13]

*Decline of Enforcement of the FLSA and State Wage and Hour Laws*

Over the same period that worker advocates have sounded alarms over the rise of wage theft, employers and their advocates have decried an increase in the rise of lawsuits claiming FLSA violations. The sheer increase in the number of employers and workers is obviously responsible for some of each of these trends, but declining enforcement by the Department of Labor and its state counterparts also is a significant factor in both trends. In the face of such decline, the private bar increasingly stepped into the enforcement void, where the low-hanging fruit of such basic violations of law was too obvious to ignore. And they've had their work cut out for them in recent years as the financial pressures of the recession that have driven low-road employers to engage in even more wage theft, and have pressured other employers who are barely hanging on to conform to those illegal practices simply to survive.

Indeed, USDOL has seen a recent uptick in complaints and investigations, which they have been better able to handle because of recent increases to Wage and Hour Division (WHD) staff to get it closer to pre-2001 staffing levels.[14] In FY 2010, WHD registered 31,824 complaints and closed 26,486 cases. As the economy has worsened, the number of complaints registered with WHD has continued to rise:

• FY 2008—23,845

- FY 2009—26,311
- FY 2010—31,824

Of particular concern is the rise in the number minimum wage complaints where violations were found. For example, in FY 2009, WHD found violations in 9,176 minimum wage cases. In comparison, in FY 2010, that number increased to 10,529.[15]

USDOL's WHD has a very full plate. It has responsibility not just for enforcing the FLSA, but also the Family and Medical Leave Act (FMLA), the Migrant and Seasonal Agricultural Worker Protection Act (AWPA or MSPA), the Service Contract Act, and the Davis-Bacon Act, among others. Between FY 1975 to FY 2004, the number of WHD investigators declined from 921 to 788 in spite of the fact that the Division was given responsibility for the FMLA during the same time, the covered US workforce grew by 55% and the number of covered employers grew by 112%. These 788 investigators were responsible for protecting the rights of over 135 million workers in over 7.3 million establishments, a staggering average of 245,000 workers for each investigator.[16]

Statistics from the Solicitor's Office from FY 1992 to FY 2008 paint a similar picture. During that time, the total staff of the Solicitor's Office (attorneys, paralegals, secretaries, etc.) declined by 25% from 786 to 590.[17] During this same period of declining staff, the Solicitor's Office gained responsibility for litigation under both the FMLA, and under substantial amendments to the Mine Safety and Health Act (known as the Mine Improvement and New Emergency Response Act, or MINER Act) in 2006.[18] As recently as FY 1987, the Solicitor's Office filed 705 FLSA lawsuits, representing 48% of all FLSA lawsuits filed.[19] In FY 2007, the Solicitor's office filed only 151 FLSA lawsuits, representing only 2% of all FLSA lawsuits filed.[20]

A current snapshot of Wage and Hour offices throughout the country is similarly bleak. According to a 2010 survey conducted by Policy Matters Ohio, 43 states and the District of Columbia also have wage and hour investigatory staff—a total of 659.5 investigators across the country, responsible to ensure compliance on behalf of 96.9 million workers covered by state wage and hour laws. This means there is approximately one investigator for every 146,000 workers, but it should be noted that these investigators have responsibility for many laws other than basic wage and hour laws, and that distribution of these staff within and across states is neither equal nor proportionate. Some states like New York and California have relatively robust cadres of investigators, while others devote paltry to non-existent resources wage and hour enforcement. For example, Florida has no staff whatsoever to enforce its wage and hour laws. Indiana has only one investigator for the entire state.[21] Virginia has four investigators and a grand total of one attorney who prosecutes wage and hour violations in the state. None of this is meant to criticize any of these state agencies; rather, it points to how important it is to maintain a strong federal statute with an agency that's adequately resourced to enforce it.

*Flexibility for the Modern Workforce*

Some employers complain that they feel restricted by the FLSA—that the law hampers them in providing the flexibility that the modern workforce and worker demand. This is a fallacy. The fact is that the FLSA provides ample opportunity for flexibility on terms that both benefit and protect workers as well as employers.

A frequent complaint is that under the FLSA, employers are not allowed to offer workers compensatory time in lieu of overtime pay. This is an overstatement of the law that ignores the existing ability to give compensatory time off within the same workweek as overtime was performed. Moreover, it neglects to take into account the very important reasons that the ability to offer compensatory time is appropriately circumscribed in the private sector. I testified before this Subcommittee about this very issue on March 6, 2002, and the substance of my comments remains unchanged. I ask that my previous testimony be resubmitted for the record.[22]

The issue of workplace flexibility has become a very pressing and well-discussed issue in recent years. Recent publications have focused on all the ways in which modern technology allows employers to be increasingly flexible with their workforces, even low-wage workforces. It is a fact that there are certain jobs that require precise hours at a precise location, such as a receptionist, and there's little if anything that can be done to alter those realities. It is equally true that sometimes, jobs demand unscheduled overtime and employees must comply, and employers must pay the premium. But there are increasing options and opportunities for creativity that employers can take advantage of for the mutual benefit of themselves and their employees. The full reports that contain these suggestions are cited below,[23] and I submit them as part of the official record. A brief summary of ideas follows:

• For workforces that have variable scheduling from week to week, or month to month, employers can use scheduling software that allows them to ensure that their needs are covered, and allows workers to have meaningful input into what hours and shifts they will work;
• Allow telecommuting to the maximum extent possible;
• Allow work-sharing among teams of employees;
• Allow workers to shift their hours to those that accommodate their personal needs (such as child-care pick up) whenever possible;
• Allow workers to opt for compressed work-weeks whenever possible;
• Allow workers to swap shifts with ease as long as the employer needs are met;
• Allow a reasonable amount of paid sick leave;
• Implement leave banks at the workplace to accommodate emergency needs of workers;
• Assign overtime work on a voluntary basis to the maximum extent possible;
• Cross train employees to do different jobs so that there's more choice in accepting overtime and accommodating workers' needs for time off.

None of these practices is prohibited by the FLSA. Of course, they require employers to engage and trust their workers, but in my seven years of experience as an employer, I learned one lesson loud and clear—the more you trust your employees and allow them to balance their personal and professional needs, the harder they work for you and the more trustworthy they become. There may be a few along the way who abuse the trust, and they should be dealt with appropriately. But the many should not suffer because of the scant few, and the goodwill and hard work that flows from such a relationship is rewarding for both the employer and the employees.

*Necessary Modernizations to the FLSA and its Implementing Regulations*

Although the FLSA's current protections should remain untouched and vigorously enforced, it is true that there are some improvements that could be made, which would make the statutory scheme more sensible, aid in enforcement, and respond to popular ways to evade the FLSA's mandates, as well as other mandates of federal and state labor, employment and tax law.

First, NELP enthusiastically supports The Employee Misclassification Act (EMPA) that was introduced in Congress last term by Congresswoman Woolsey and Senator Sherrod Brown. This bill would amend the FLSA to require employers to keep records of independent contractors engaged to work, provide notice to those workers of their status as an "employee" or "independent contractor," require the USDOL to create an "employee rights website," and impose a penalty for employer misclassification of employees.

If enacted, EMPA would be an important step toward greater transparency in employment relationships. If workers know about their employment classification and the impacts of that status, they will be better prepared to report any violations. USDOL will be better equipped to determine whether there is compliance if the employers maintain the basic records of their contractors. Indeed, doing so would certainly be a "best practice" for a smart business, so that it could keep track of payments and the labor or services that were the basis for those payments. Equally important, these practices would also help law-abiding employers that play by the rules but that are undercut by misclassifying firms. They would likewise provide the information needed to recover much-needed tax and payroll revenues lost when workers are misclassified as independent contractors. Finally, should an employer be subjected to investigation or litigation, it will be more readily able to defend and justify its practices, or minimize time spent assessing damages in the case of erroneous classification, if these records are kept.[24]

Second, in its last two budgets, the Administration sought $25 million for the USDOL's misclassification initiative to target misclassification with additional enforcement personnel and competitive grants to state unemployment insurance programs to address independent contractor misclassification. These efforts, which would ultimately yield much needed revenue to state and federal treasuries, not to mention much needed dollars to workers' pockets, should be supported.

Third, if we wanted to get serious about wage theft, we could also consider amending the FLSA to increase the penalties against employers who steal wages from their employees. Presently, the FLSA allows workers to collect double back wages for two years, three years in the case of "willful" violations. Many states have mandated treble damages and longer statutes of limitations, which are very effective strategies to reduce wage theft, made it much less profitable for employers to engage in these practice, and have proven a successful tool in speeding settlement in cases where violations are clear-cut.

Fourth, the USDOL also should update the regulations governing the so-called "white collar" exemptions. Specifically, the salary threshold for exemption is only $455 per week, which translates into a full-time salary of $23,660 per year, an unreasonably low figure today. The salary threshold should be set at a sufficiently high level that it realistically reflects expected earnings of a professional and it should be indexed to inflation on a yearly basis. In addition, as written, the current regulations allow workers to be considered exempt professionals when, in fact, they spend only extremely small amounts of their time doing job tasks that truly qualify as exempt work. A worker should not be considered an exempt professional unless the majority of his or her time is spent on tasks that require independent judgment and discretion.[25]

Finally, Congress should pass the Direct Care Job Quality Improvement Act of 2011 (H.R. 2341), introduced last month by Representative Linda T. Sanchez. This bill would remedy a serious flaw in current DOL regulations, that harken back to a time when home care workers were usually friends or relatives of an ailing adult, who spent but a few hours a day helping them with menial tasks around the house. As the population has aged and the home care industry has grown, the role of home care aides has also changed significantly. Home health care workers today are trained and devoted professionals, who deliver skilled health care to many of our nations' seniors and ailing adults in a highly professional manner. They work long hours, often performing back-breaking work, and are invested with significant responsibility. Whatever the merits of their original exclusion from minimum wage and overtime protections, this archaic exemption has failed to keep up with the evolution of the industry and the workers who have built. It is long past time for Congress to remedy this inequity by extending minimum wage and overtime protections to home health care workers. The USDOL can also remedy this injustice with appropriate regulations. It is on the Department's Regulatory Agenda and NELP urges swift issuance of proposed regulations.

*Conclusion*

The FLSA is a vitally important law, designed to protect hourly workers from substandard wages, unduly long hours, and child labor abuses. It promotes an equitable distribution of work among workers, and it protects employers from being undercut by low-road employers who seek unfair competitive advantages. While some applications of exemptions require a nuanced analysis, by and large, the protections accorded by the FLSA are clear and simple to understand and administer. Improvements should be made to protect against growing abuses of low-wage workers and those misclassified as independent contractors, but current protections should not and must not be diluted nor enforcement weakened. To do so might seem at first blush to be beneficial to our nation's employers, but in fact, that harm it will do to workers and high-road employers is something we cannot and should not tolerate.

ENDNOTES

[1] 29 U.S.C. §206.
[2] Id. at §207.
[3] Overnight Motor Transport. V. Missel, 316 U.S. 527, 577-78 (1941).
[4] 29 U.S.C. §212.
[5] Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 36 (1987); see also Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 299 (1985) ("*P+ayment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of 'unfair method of competition' that the Act was intended to prevent." (citation omitted)); Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1332, 1334 (9th Cir.1991) (Nelson, J., dissenting) (discussing the FLSA's effort to protect law-abiding employers against unfair competition from businesses paying substandard wages).
[6] Roland Elec. Co. v. Walling, 326 U.S. 657, 669-70 (1946).
[7] "Wage theft" refers to a range of practices that reflect employers' failure to pay workers the wages they have earned. These include the failure or refusal to pay some or all of wages promised, requiring workers to put in unpaid time off the clock, denial of minimum wage and overtime pay, and misclassification of employees as independent contractors.
[8] Annette Bernhardt, et al. Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (2009), *http://www.nelp.org/page/-/Justice/BrokenLawsPresentation2010.pdf?nocdn=1.*
[9] For those workers who were employed by a company with more than 100 employees, 15.2% experienced minimum wage violations, 52.8% were victims of overtime violations, 64.9% were made to work off the clock, and 63.8% had a meal break violation. Those who worked for smaller companies experienced minimum wage violations at a rate of 28.5%, overtime violations at a rate of 82.4%, off the clock work at 73.6%, and meal break violations at a rate of 73.5%. Id. at 30.
[10] Id. at 42.
[11] Id. at 31.
[12] Id. at 34.

[13] For an excellent summary of the abuses rampant in agricultural labor, please see "Weeding Out Abuses: Recommendations by Farmworker Justice and Oxfam America.: *http://www.farmworkerjustice.org/files/immigration-labor/weeding-out-abuses.pdf.*

[14] See *http://www.dol.gov/wecanhelp/presentation/1.htm* (slide 3 of the presentation). WHD began hiring new investigators in the summer of 2009, and, by the end of FY 2010, WHD had hired over 300 new investigators, taking the agency to a total of 1,035 investigators.

[15] *http://ogesdw.dol.gov/.*

[16] Brennan Center for Justice, Economic Policy Brief, No. 3, September 2005, available on-line at www.brennancenter.org/dynamic/subpages/download—file—8423.pdf. The 788 investigators in FY 2004 were only part of Wage-Hour's total staff, which numbered 1,442 employees; the other staff included supervisors, analysts, technicians, and administrative employees. (Department of Labor FY 2009 Performance Budget, www.dol.gov/dol/budget/2009/PDF/CBJ-2009-V2-03.pdf, pp. ESA-35 and ESA-36.)

[17] U.S. Department of Labor Budget Submission to Congress for Fiscal Year 1993; "Legal Services" in volume 3 of the U.S. Department of Labor's FY 2008 Detailed Budget Documentation, pp. DM-26 to DM-28, available at www.dol.gov/dol/budget/2008/PDF/CRJ-V3-02.pdf. Although the Solicitor's office had 590 employees in January 2007, it had funding to pay for only 551 employees. Id. at DM-28.

[18] The Solicitor's Office litigation responsibilities encompass not just FLSA cases, but many other laws as well, such as the Occupational Safety and Health Act (OSH Act), the Mine Safety and Health Act (MSH Act), the Employee Retirement Income Security Act (ERISA), and the Black Lung Benefits Act (BLBA).

[19] Administrative Office of the United States Courts, Judicial Business of the United States Courts, 1987 Annual Report, Table C-2 (Washington, D.C., 1987). The FLSA authorizes lawsuits not only by DOL handled by Solicitor's Office attorneys, but also by aggrieved employees represented by private attorneys. Until 1987, nearly 50 percent, and in most years far more, of all FLSA lawsuits were handled by DOL attorneys, but more recently employee lawsuits have represented a much higher percentage of all FLSA cases.

[20] Administrative Office of the United States Courts, Judicial Business of the United States Courts, 2007 Annual Report, Table C-2 (Washington, D.C., 2007), available at *http://www.uscourts.gov/judbus2007/appendices/c2.pdf.*

[21] Investigating Wage Theft: A Survey of the States. A Report from Policy Matters Ohio. Zach Schiller and Sarah DeCarlo, November 2010. *http://www.policymattersohio.org/pdf/InvestigatingWageTheft2010.pdf.*

[22] *http://www.dcejc.org/app/docs/Judy—Testimony%5B1%5D.pdf.*

[23] *http://www.worklifelaw.org/pubs/ImprovingWork-LifeFit.pdf; http://workplaceflexibility2010.org/images/uploads/whatsnew/Flexible%20Workplace%20Solutions%20for%20Low-Wage%20Hourly%20Workers.pdf.*

[24] A complementary bill, the Taxpayer Responsibility, Accountability and Consistency Act of 2009 (s. 2882) was introduced by Senator Kerry. This bill would amend the Internal Revenue Code's safe harbor exemption for employers who misclassify employees as independent contractors, which currently allows workers to pretty much misclassify with near impunity with no consequences. See 26 U.S.C. 7436, It would also, in appropriate cases, allow the IRS to issue guidance on the subject and collect unpaid taxes owed the government. These reforms are vital to combatting misclassification abuses.

[25] *http://nelp.3cdn.net/112fc23c9ce271ff77—ppm6bnkya.pdf.*

APPENDIX

*Snapshot of Current and Recent Wage and Hour Suits Brought on Behalf of Workers*

The following is by no means an exhaustive or methodical survey of current wage and hour lawsuits, but it is a representative sampling of what attorneys throughout the United States are litigating or have litigated. These examples come from the Just Pay group that NELP convenes. This "virtual table" of wage and hour practitioners and worker advocates includes attorneys in private practice, legal services organizations, government agencies, and policy organizations across the country, all devoted to the fair and vigorous enforcement of the nation's and states' wage and hour laws.

1. A large national employer makes its employees incur most of its business expenses as a condition of employment. The business expenses regularly result in the employees being paid less than the minimum wage. (There is no claim that the workers are independent contractors.) In addition to the expense shifting, branches were shaving time records to reduce overtime liability. The corporate offices knew it was happening, but decided not to audit the offices unless a complaint was raised and pressed by employees. The case was recently certified as a national collective action and a class action in 14 states that allow for wage and hour class actions.

2. Workers were regularly required to work more than 100 hours a week and paid under the fluctuating workweek rule. The inspectors were actually paid a declining hourly wage, i.e., the more they worked, the lower their hourly pay, a result directly contrary to the policy of the FLSA. Due to litigation in federal court, the industry has changed its practices.

3. A fish market/restaurant in a major metropolitan area that employs 30-40 workers requires many employees to work 15 hours a day, five days a week. It pays

straight time for all hours worked. In order to appear as if it is complying with the law, the employer issued paychecks that have a lower hourly rate than the employees are actually paid, and a few "overtime" hours at 1.5 times the incorrect rate. The remainder of the pay is in cash, which also means that the employer is avoiding paying social security/medicare taxes, and is evading most of its obligation to the state and federal unemployment funds.

4. An individual was employed to take care of disabled people who need 24-hour care. She would start at 3 pm at the home where the disabled clients lived, and was required to care for them until 8 am the next morning. The company for which she worked advertised on its website that it provided "round-the-clock, 24-hour care" to its clients, and received state and federal funds to pay for their care. However, the employee was only paid for the 3 pm to 9 pm and 6 am to 8 am hours, even though she was on-duty the entire time, had to take care of people during the night and did not have separate sleeping quarters.

5. At the start of the day, before they are "on the clock" and being paid, call center workers who are employed by a national IT company are required to boot up their computers, initialize programs, and read internal emails regarding services/client offers and other business so that they are ready to take calls at "the start of the shift," when they begin being paid. This practice means that employees usually lose 15+ minutes of pay each work day.

6. A group of construction workers are required to report to the company's warehouse/yard at the start of each day. They pick up orders and then load trucks with equipment and supplies they will need when they drive out into the field to work. The company does not pay them for that time, for the time that it takes to drive the truck and materials to the worksite in the morning, for the time to drive the truck back to the yard in the afternoon. As a result, the workers are performing work "off the clock" for up to two hours per day.

7. One employer, when the minimum wage increased, would pay its employees the higher wage and then require the workers to repay the difference between the higher rate and the previous rate.

8. A restaurant made its workers sign a "VOLUNTARY AGREEMENT" to work only for tips and pledge that they never expected nor would they accept a penny from the employer as compensation. The agreement also had the workers waive all rights to any legal recourse.

9. A large group of construction/home repair workers with limited English proficiency were paid with checks that had the word "VOID" written in the subject line on the bottom.

10. Over 100 men who worked as "chicken catchers" for Perdue Farms on the Eastern Shore of Maryland, Virginia and Delaware. These men, using equipment provided solely by Perdue Farms, and transported in Perdue Farms vehicles, travel from chicken farm to chicken farm, scooping up full grown chickens in their bare hands, and loading them into Perdue cages and trucks so they can be transported to processing plants for slaughter. In the early 1990's, Perdue, and other major chicken processors, decided to misclassify these workers as independent contractors, all so that they could increase their profits at the expense of the workers, who had previously received overtime, health and retirement benefits, and the protections of workers' compensation and unemployment compensation laws. A federal judge ruled that this scheme was willfully illegal and ordered millions of dollars in back-pay to these workers, who thanks to intervention from the Federal Department of Labor, are now all, on a nationwide basis, properly classified as employees and receive all the pay and protections to which they are entitled. Perdue never appealed the case and settled for the full measure of damages, as established by plaintiffs' expert witness.

11. Restaurant workers who earn tips, particularly delivery workers, are required to work 6 days per week, between 10 and 12 hours per day without breaks. They are paid a monthly salary of $300-$600, which equates to an hourly salary of between $1.30 and $2.00 per hour. Although they earn tips, they are sometimes required to give a portion of their tips to non-tipped workers. They also must spend a portion of their day doing non-tipped work (e.g., cleaning bathrooms, stocking supplies). The delivery workers also must buy and repair their own bikes, which further reduces their take home earnings.

12. Restaurant and Grocery baggers who are not paid any wage at all, but are required to work for tips only. In the case of grocery baggers, tip income may be $2.00 per hour.

13. Low-road employers often pay employees under two names so that they can avoid paying overtime. Some create false records of work hours to show the DOL in case of an investigation. Others pay workers partly in cash and partly by check, with checks showing an hourly rate that is more than the workers actually get paid

(e.g., showing that someone worked 20 hours and got paid $5.00 even though the employee worked 60).

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Chairman WALBERG. Thank you.

Mr. Hara, I recognize you for your testimony.

**STATEMENT OF NOBUMICHI HARA, SENIOR VICE PRESIDENT, HUMAN CAPITAL, GOODWILL OF CENTRAL ARIZONA, ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT**

Mr. HARA. Good morning, Chairman Walberg, Ranking Member Woolsey, and distinguished members. My name is Nobu Hara, Senior Vice President of Human Capital for Goodwill Industries of Central Arizona, one of 165 autonomous Goodwills. I appear before you today on behalf of the Society for Human Resource Management, or SHRM.

Thank you for the opportunity to appear before the subcommittee to discuss the relevance of the Fair Labor Standards Act to the 21st century workplace. We believe the FLSA prevents employers from providing the workplace flexibility that nonexempt employees want and need.

In 2010, Goodwill of Central Arizona served over 30,000 individuals with barriers to employment by assisting job seekers through 10 career centers, job fairs, and by providing workforce development of jobs skills training, work experience, and case-managed assistance through a variety of programs. In the same year, we placed 9,200 of those we served into jobs.

To be sure, the FLSA has been a cornerstone of employment and labor law since 1938. The FLSA was enacted to ensure an adequate standard of living for working Americans, and it covers virtually all recognizable businesses. But the FLSA reflects the realities of the industrial workplace of the '30s, not the workplace of 2011. It has remained relatively unchanged in the more than 70 years since its enactment, despite the dramatic changes that have occurred in the workplace. Most notably, advances in information technology have transformed how businesses operate, communicate, and make decisions.

The outmoded FLSA presents challenges for organizations wanting to implement flexible work arrangements for their employees. Flexible work arrangements can alter the time and place that work is conducted to better meet the work life balance needs of workers.

For example, I was recently approached by a group of Goodwill employees who wanted to work a biweekly, compressed work week. Under the FLSA, employers are permitted to allow a nonexempt employee to work four 10-hour days for a total of 40 hours in a week without the employer incurring any overtime obligations. Our employees proposed working five 9-hour days on the first week, for a total of 45 hours, and 35 hours the second week, having alternate Fridays off. Working 10 hours in 1 day was too physically difficult for them and did not comport to their work family obligations. Since they are nonexempt employees, however, their proposed schedule would require Goodwill to pay overtime for the additional hours over 40 hours in the first week.

Another example involves requests received by nonexempt employees to make up time and pay for missed work because of family obligations, illnesses, and other reasons. Most of the time the make-up work involves a second week to provide enough latitude to complete the work. That again involves working more than 40 hours in a week and thus incurring overtime pay. As you might imagine, Mr. Chairman, we operate on a tight budget and could not grant the request.

Keep in mind that several case have overtime requirements for work beyond an 8-hour day, which further complicates employer attempts at flexible work arrangements.

To promote workplace flexibility under current law, SHRM has formed a multiyear partnership with the Families and Work Institute. The primary goal of this partnership is to educate HR professionals about the importance of effective and flexible workplaces and facilitate employers adopting flexible work arrangements for their employees.

Mr. Chairman, one component of the partnership is called When Work Works to promote effective workplace policies. This initiative is a Statewide initiative in Michigan, where the Michigan Council of the Society for Human Resource Management and the Detroit Regional Chamber serve as our community partners.

As part of the initiative, Motawi Tileworks, Incorporated, based in Ann Arbor, in your congressional District, was awarded a Sloan Award for Business Excellence in Workplace Flexibility. Motawi won the Sloan Award for giving their employees great freedom in determining their schedules.

Many employers would like to provide the workplace flexibility that both employees and employers desire in current and future work environments. SHRM believes the FLSA hinders the ability of employers to provide such flexibility to their nonexempt employees and, in its current form, decreases morale, work engagement, and work life balance.

We look forward to working with you to modernize the outmoded FLSA in a manner that balances the essence of the law with the changing needs of the workforce.

Thank you very much.

[The statement of Mr. Hara follows:]

**Prepared Statement of Nobumichi Hara, Senior Vice President, Human Capital, Goodwill Industries of Central Arizona, on Behalf of the Society for Human Resource Management**

Chairman Walberg, Ranking Member Woolsey, and distinguished members of the Subcommittee, my name is Nobumichi Hara, Senior Vice President of Human Capital for Goodwill Industries of Central Arizona. I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I am a member. On behalf of our approximately 260,000 members in over 140 countries, I thank you for this opportunity to appear before the Committee to discuss the relevance of the Fair Labor Standards Act (FLSA) to the 21st century workplace.

SHRM is the world's largest association devoted to human resource management. The Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

Goodwill Industries of Central Arizona is one of 163 autonomous Goodwills served by a member services organization, Goodwill Industries International. In 2010, Goodwill of Central Arizona provided career services to over 30,000 individuals by assisting job seekers through career centers, job fairs, and by providing job skills training, work experience, and case managed programs in vocational rehabilitation.

Those programs were administered under the Work Incentives Improvement Act, Senior Community Service Employment Program, Summer Youth Work Experience Program, and other government grants and contracts.

In essence, our mission is about workforce development. Last year, we placed 9,200 people in jobs in the greater Phoenix, Yuma and Prescott communities. In carrying out our mission we employ nearly 2,000 employees; the majority of whom are people with barriers to employment. We offer a competitive pay and compensation package to our employees and offer flexible work options, including flexible scheduling, telecommuting, and compressed work programs. Our employees work very hard with one goal in mind: putting people to work.

In my testimony, I will explain the key issues posed by the FLSA to our nation's employers and employees; demonstrate how the FLSA prohibits employers from providing workplace flexibility that today's employees want; and share SHRM's efforts to promote these benefits to employees.

*The Fair Labor Standards Act*

The Fair Labor Standards Act of 1938 (FLSA) has been a cornerstone of employment and labor law since 1938. The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments. The FLSA was enacted to ensure an adequate standard of living for all Americans by guaranteeing the payment of a minimum wage and overtime for hours worked in excess of 40 in a workweek.

The U.S. Department of Labor's Wage and Hour Division (WHD) administers and enforces the FLSA with respect to private employers and state and local government employers. Special rules apply to state and local government employment involving fire protection and law enforcement activities, volunteer services, and compensatory time off instead of pay in overtime situations.

Virtually all organizations are subject to the FLSA. A covered enterprise under the FLSA is any organization that "has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and has $500,000 in annual gross volume of sales; or engaged in the operation of a hospital, a preschool, an elementary or secondary school, or an institution of higher education." [1]

Employees of firms that are not covered enterprises under the FLSA still may be subject to its minimum wage, overtime pay, recordkeeping, or child labor provisions if they are individually engaged in interstate commerce or in the production of goods for interstate commerce.

*Employee Classification Determinations under the FLSA*

The FLSA provides exemptions from both the overtime pay and minimum wage provisions of the Act. Employers and HR professionals use discretion and independent judgment to determine whether employees should be classified as exempt or non-exempt and, thus, whether they qualify for the overtime pay provisions or the minimum wage provisions of the FLSA. Generally speaking, classification of employees as either exempt or non-exempt is made on whether the employee is paid on a salary basis with a fixed rate of pay, and their duties and responsibilities.

The FLSA provides exemptions from both the overtime pay and minimum wage provisions for:

1. Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and employees in certain computer-related occupations (as defined in Department of Labor regulations) known as the "White Collar" provisions.
2. Employees of certain seasonal amusement or recreational establishments, employees of certain small newspapers, seamen employed on foreign vessels, employees engaged in fishing operations, and employees engaged in newspaper delivery.
3. Farm workers employed by anyone who used no more than 500 "man-days" of farm labor in any calendar quarter of the preceding calendar year.
4. Casual babysitters and persons employed as companions to the elderly or infirm.

In addition, the FLSA provides additional exemptions from only its overtime pay provisions for the following positions:

1. Certain commissioned employees of retail or service establishments; auto, truck, trailer, farm implement, boat, or aircraft sales-workers, or parts-clerks and mechanics servicing autos, trucks, or farm implements, who are employed by non-

[1] 29 U.S.C. 203(s)(1)(A)

manufacturing establishments primarily engaged in selling these items to ultimate purchasers.

2. Employees of railroads and air carriers, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans.

3. Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations.

4. Domestic service workers living in the employer's residence.

5. Employees of motion picture theaters.

6. Farm workers.

The FLSA also provides partial exemptions from only overtime pay in the following instances:

1. For employees engaged in certain operations involving agricultural commodities and to employees of certain bulk petroleum distributors.

2. Hospitals and residential care establishments may adopt, by agreement with their employees, a 14-day work period instead of the usual seven-day workweek, if the employees are paid at least time-and-one-half their regular rates for hours worked over eight in a day or 80 in a 14-day work period, whichever is the greater number of overtime hours.

3. For employees who lack a high school diploma, or who have not attained the educational level of the 8th grade, who can be required to spend up to 10 hours in a workweek engaged in remedial reading or training in other basic skills without receiving time-and-one-half overtime pay for these hours. However, the employees must receive their normal wages for hours spent in such training and the training must not be job-specific.

4. Public fire departments and police departments may establish a work period ranging from seven to 28 days in which overtime need only be paid after a specified number of hours in each work period.[2]

As shown by the above descriptions of the various types of FLSA exemptions, classification decisions for many positions are not black-and-white. It can be easy for an employer to mistakenly misclassify employees as exempt who, in reality, should be non-exempt, or vice-versa.

Despite the ambiguity of many employment situations, the stakes in "improperly" classifying employees are high. The U.S. Department of Labor (DOL) frequently audits employers and penalizes those that misclassify employees, awarding up to three years of back pay for overtime for those employees, plus attorneys' fees, if applicable. Predictably, audit judgments can be subjective, since two reasonable people can disagree on a position's proper classification. Employers also face the threat of class-action lawsuits challenging their classification decisions.

*FLSA—a 20th Century Statute*

The FLSA was enacted toward the end of the Great Depression and reflects the realities of the industrial workplace of the 1930s, not the workplace of the 21st century. The Act itself and its implementing regulations have remained relatively unchanged in the more than 70 years since its enactment, despite the dramatic changes that have occurred in where, when and how work is done. Information technology and advances in communication have clearly transformed how businesses operate, communicate and make decisions. Cell phones, tablets, BlackBerries, and other technology allow many employees to perform job duties when and where they choose.

As a result, minimum wage policies and overtime exemption requirements which may have been appropriate in the 1930s are out of step with current knowledge and a technology-based economy, creating unnecessary regulatory burdens for employers and restricting employers' ability to be flexible and address contemporary employee needs.

We believe the FLSA makes it difficult if not impossible in many instances for employers to provide workplace flexibility to millions of non-exempt employees. While non-exempt employees can receive time-and-a-half pay, they cannot be afforded the same workplace flexibility benefits as exempt employees.

*Workplace Flexibility and the Fair Labor Standards Act*

The increased diversity and complexity within the American workforce—combined with global competition in a 24/7 economy—suggests the need for more "workplace flexibility." C-suite executives, for example, say the biggest threat to their organiza-

[2] Society for Human Resource Management (2008). Fair Labor Standards Act (FLSA) of 1938.

tions' success is attracting and retaining top talent.[3] Human resource professionals believe the best way to attract and retain the best people is to provide workplace flexibility.[4] Moreover, a large majority of employees—87 percent—report that flexibility in their jobs would be "extremely" or "very" important in deciding whether to take a new job.[5]

To be clear, workplace flexibility is defined as giving employees some level of control over how, when and where work gets done. Altering how, when and where work gets done in today's modern workplace, however, also raises compliance concerns with the FLSA.

Although both employers and employees identify the need for greater flexibility, the outdated FLSA presents challenges for organizations wanting to implement flexible work arrangements (FWAs). Flexible work arrangements alter the time and/or place that work is conducted on a regular basis; must work for both the employer and employee; and must be voluntary for employees. Employers, however, encounter challenges under the FLSA in offering some FWAs.

For example, I was recently approached by a group of Goodwill employees in Central Arizona who wanted to work a bi-weekly compressed workweek. Under the FLSA, employers are permitted to allow a non-exempt employee to work four, 10-hour days Monday through Thursday for a total of 40 hours in a week, and take every Friday off without the employer incurring any overtime obligations. However, our employees proposed working a nine-hour day Monday through Friday of the first week for a total of 45 hours, and work three, nine-hour days and one eight-hour in the second week and take Friday off, because working 10 hours was physically too difficult for them and did not comport to their work-family obligations. This schedule, however, would require the employer to pay overtime for the additional hours over 40 hours in the first week. In addition, several states have daily overtime requirements for more than an eight-hour day, further complicating employer efforts to provide this type of flexible work arrangement.

Another example of a FWA that raises compliance concerns under the FLSA is a Results-Oriented Work Environment or (ROWE). Very simply a ROWE allows employees to set their own schedules to produce required results. Providing this type of flexible option to non-exempt employees may put the employer at risk of overtime obligations under the FLSA and also raises unfair labor practice concerns under the National Labor Relations Act.

The statute also prohibits private sector employers from offering non-exempt employees time off in lieu of compensation, even though all public sector employees are offered this type of flexibility. We have non-exempt employees who request make-up time when they miss work to deal with illness, family matters, or personal matters. Newer employees and employees who have used up their sick and/or vacation benefits cannot receive pay for missed time. However, if they cannot make-up their missed time reasonably within the same work week, we are unable to meet their requested need. If we allow employees to make-up their time into their following week, we will incur overtime pay as the time they work in that second week would be in addition to their normal 40-hour work. As a non-profit organization, we have to control our expenses in order to maximize value derived from donated goods to pay for programs and growth.

I have also faced a challenge under the FLSA with individuals classified as non-exempt inside sales employees in our call center. Formerly, these employees were classified as outside sales employees who were exempt from the FLSA's overtime requirements and frequently were on the road making sales calls to customers. Because of the advances in technology, these employees are hardly ever required to visit a customer in person and do most of their sales work through e-mail, web-based demonstrations, the phone and other electronic mediums.

At INVESTools Inc., an investor education products and services company, these employees' compensation is based on an hourly rate of pay and a commission that is designed to give them an incentive for closing sales of sophisticated products and services ranging from $5,000 to $30,000 in price. These employees often want to work long hours to earn these commissions, some bringing home over $100,000 per year. However, we were required to pay overtime based on the weighted average of their hourly pay and commissions, which would significantly increase their hourly rate, making their overtime pay fiscally unaffordable to my organization. As a result, we have had to limit their working time or pay overtime. That curtailed their

[3] Company of the Future Survey (2010). Society for Human Resource Management and the Economist Intelligence Unit.

[4] Challenges Facing Organizations and HR in the Next 10 Years (2010). Society for Human Resource Management.

[5] National Study of the Changing Workforce (2008). Families and Work Institute.

motivation, increased expenses and decreased profitability, and limited our ability to remain successful.

These are a few examples of how the Fair Labor Standards Act fails to recognize the changing characteristics of the workforce.

*A 21st Century Workplace Flexibility Policy*

As noted above, a growing number of employers recognize the benefits of workplace flexibility and are implementing effective and flexible workplace practices as a key business strategy. At the same time, complex, and sometimes overlapping federal, state and local laws do little to support employer creativity and innovation in responding to the flexibility needs of the 21st century workforce. That is why SHRM has advocated a comprehensive workplace flexibility policy that, for the first time, responds to the diverse needs of employees and employers and reflects different work environments, union representation, industries and organizational size.

SHRM released a set of "Principles for a 21st Century Workplace Flexibility Policy" in 2009 to help guide policymakers in the development of public policy that meets the needs of both employees and employers. I have included a copy of these principles at the end of my written statement (Appendix A).

*Workplace Flexibility Educational Efforts*

In addition to advocating for a new approach to workplace flexibility public policy, SHRM has also engaged in a significant effort to educate HR professionals and their organizations about the importance of effective and flexible workplaces. On February 1, 2011, SHRM formed a multi-year partnership with the Families and Work Institute (FWI), the preeminent work-family think-tank known for rigorous research on workplace flexibility issues.

The primary goal of this partnership is to transform the way employers view and adopt workplace flexibility by combining the research and expertise of a widely respected organization specializing in workplace effectiveness with the influence and reach of the world's largest association devoted to human resource management. By highlighting strategies that enable people to do their best work, the partnership promotes practical, research-based knowledge that helps employers create effective and flexible workplaces that fit the 21st century workforce and ensures a new competitive advantage for organizations.

Although FWI is an independent non-advocacy organization that does not take positions on these matters, and the position of SHRM should not be considered reflective of any position or opinion of FWI, I'd like to briefly mention one of the key elements of the SHRM/FWI partnership, the When Work Works program, because it seeks to educate and showcase employers who are meeting the needs of our 21st century workforce. When Work Works is a nationwide initiative to bring research on workplace effectiveness and flexibility into community and business practice. Since its inception in 2005, When Work Works has partnered with an ever-expanding cohort of communities from around the country to:

1. Share rigorous research and employer best practices on workplace effectiveness and flexibility.
2. Recognize exemplary employers through the Alfred P. Sloan Awards for Business Excellence in Workplace Flexibility,
3. Inspire positive change so that increasing numbers of employers understand how flexibility can benefit both business and employees, and use it as a tool to create more effective workplaces.

As a proud resident of Arizona, I am particularly pleased that When Work Works is a statewide initiative in my state under the direction of the Chandler Chamber of Commerce. In fact, 40 Arizona employers are highlighted in the SHRM/FWI publication, "2011 Guide to Bold New Ideas." as recipients of the coveted Sloan Award.

Mr. Chairman, I would also note that When Work Works is a statewide initiative in Michigan, where the Michigan Council of the Society for Human Resource Management and the Detroit Regional Chamber serve as our community partners. In fact, Sloan Award winner Motawi Tileworks, Inc. (www.motawi.com) is located in Michigan's 7th Congressional District. The 22 employees that are hand-crafting tiles from this Ann Arbor shop have great freedom in determining their schedules. No one cares when they start, stop or schedule their breaks, and overtime is forbidden. This is just one example of innovative workplace strategies we are uncovering through the When Work Works initiative.

*Conclusion*

The Fair Labor Standards Act is a cornerstone among America's workplace statutes. SHRM educates its membership and their organizations about all wage and hour issues under the FLSA. But the FLSA was crafted in a bygone era, and it

should be re-evaluated to ensure it still encourages employers to hire, grow, and better meet the needs of their employees.

We believe the FLSA hinders employer's ability to provide the flexibility that millions of non-exempt employees want. SHRM and its members, who are located in every congressional district in the nation, are committed to working with this subcommittee and other members of Congress to modernize the outmoded FLSA in a manner that balances the needs of both employees and employers and does not produce unnecessary and counterproductive requirements.

Now more than ever, there is a compelling need for workplace flexibility that benefits both employers and employees. Going forward, SHRM will continue to highlight workplace flexibility as a key business imperative, conduct and share research with HR professionals on how effective and flexible workplaces can benefit the bottom-line, and provide information and resources that will help employers successfully implement workplace strategies that enable employees to manage their work-life fit.

Thank you. I welcome your questions.

APPENDIX A

*Principles for a 21st Century Workplace Flexibility Policy*

The Society for Human Resource Management (SHRM) believes the United States must have a 21st century workplace flexibility policy that meets the needs of both employees and employers. It should enable employees to balance their work and personal needs while providing predictability and stability to employers. Most importantly, any policy must encourage—not discourage—the creation of quality new jobs.

Rather than a one-size-fits-all government approach, where federal and state laws often conflict and compliance is determined under regulatory silos, SHRM advocates a comprehensive workplace flexibility policy that, for the first time, responds to the diverse needs of employees and employers and reflects different work environments, union representation, industries and organizational size.

For a 21st century workplace flexibility policy to be effective, SHRM believes that all employers should be encouraged to provide paid leave for illness, vacation, and personal days to accommodate the needs of employees and their family members. In return, employers who choose to provide paid leave would be considered to have satisfied federal, state and local leave requirements. In addition, the policy must meet the following principles:

Shared Needs—Workplace flexibility policies must meet the needs of both employees and employers. Rather than an inflexible government-imposed mandate, policies governing employee leave should be designed to encourage employers to offer a paid leave program (i.e., illness, vacation, personal days or a "paid time off" bank) that meets baseline standards to qualify for a statutorily defined "safe harbor." For example, SHRM envisions a "safe harbor" standard where employers voluntarily provide a specified number of paid leave days for employees to use for any purpose, consistent with the employer's policies or collective bargaining agreements. In exchange for providing paid leave, employers would satisfy current and future federal, state and local leave requirements. A federal policy should:

- Provide certainty, predictability and accountability for employees and employers.
- Encourage employers to offer paid leave under a uniform and coordinated set of rules that would replace and simplify the confusing—and often conflicting—existing patchwork of regulations.
- Create administrative and compliance incentives for employers who offer paid leave by offering them a safe harbor standard that would facilitate compliance and save on administrative costs.
- Allow for different work environments, union representation, industries and organizational size.
- Permit employers that voluntarily meet safe harbor leave standards to satisfy federal, state and local leave requirements.

Employee Leave—Employers should be encouraged to voluntarily provide paid leave to help employees meet work and personal life obligations through the safe harbor leave standard. A federal policy should:

- Encourage employers to offer employees with some level of paid leave that meets minimum eligibility requirements as allowed under the employer's safe harbor plan.
- Allow the employee to use the leave for illness, vacation, personal and family needs.
- Require employers to create a plan document, made available to all eligible employees, that fulfills the requirements of the safe harbor.

• Require the employer to attest to the U.S. Department of Labor that the plan meets the safe harbor requirements.

Flexibility—A federal workplace leave policy should encourage maximum flexibility for both employees and employers. A federal policy should:

• Permit the leave requirement to be satisfied by following the policies and parameters of an employer plan or collective bargaining agreement, where applicable, consistent with the safe harbor provisions.

• Provide employers with predictability and stability in workforce operations.

• Provide employees with the predictability and stability necessary to meet personal needs.

Scalability—A federal workplace leave policy must avoid a mandated one-size-fits-all approach and instead recognize that paid leave offerings should accommodate the increasing diversity in workforce needs and environments. A federal policy should:

• Allow leave benefits to be scaled to the number of employees at an organization; the organization's type of operations; talent and staffing availability; market and competitive forces; and collective bargaining arrangements.

• Provide pro-rated leave benefits to full- and part-time employees as applicable under the employer plan, which is tailored to the specific workforce needs and consistent with the safe harbor.

Flexible Work Options—Employees and employers can benefit from a public policy that meets the diverse needs of the workplace in supporting and encouraging flexible work options such as telecommuting, flexible work arrangements, job sharing, and compressed or reduced schedules. Federal statutes that impede these offerings should be updated to provide employers and employees with maximum flexibility to balance work and personal needs. A federal policy should:

• Amend federal law to allow employees to balance work and family needs through flexible work options such as telecommuting, flextime, part-time, job sharing and compressed or reduced schedules.

• Permit employees to choose either earning compensatory time off for work hours beyond the established workweek, or overtime wages.

• Clarify federal law to strengthen existing leave statutes to ensure they work for both employees and employers.

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Chairman WALBERG. Thank you, Mr. Hara; and, on behalf of Motawi, thank you and SHRM for recognizing their excellent efforts in Ann Arbor.

Without objection, I will recognize myself for questions if that is okay, now that it is the proper time, with fear as well. I think I was concerned that I may be called for a subpoena vote in another committee down the hall. So let me begin questioning here.

Mr. Alfred, just in reviewing some of what you stated in the statistics about FLSA lawsuits and the alarming rise over the last decade, you indicated that, from 2000 to 2010, the number of lawsuits has risen more than 300 percent, with more than 6,000 lawsuits filed last year alone. You indicated in your testimony, even more alarming, is that about 40 percent of these suits are brought as collective actions, sometimes involving tens of thousands of current and former employees. What would you indicate to be the root problem behind the astonishing growth of this legal action?

Mr. ALFRED. Two things, Chairman Walberg.

First, the ambiguities and inconsistencies in the statute itself and the regulations, the Department of Labor regulations. Those ambiguities and inconsistencies provide fodder for enterprising plaintiffs' lawyers who seek to bring large cases, not necessarily because, unfortunately, of the rights that they seek to vindicate of employees but because of the financial motive of the settlements that derive from those lawsuits.

And that brings us to the second point. These lawsuits are tremendously lucrative. They pose risks, first of all, to employers that

employers can't assess. As Mr. MacDonald testified, employers looking at a risk and a potential exposure in large lawsuits when they are brought oftentimes make a business determination that, rather than take the risk and spend the large sums of money to defend these cases, compounded by what is often even more burdensome, which is the internal time that has to be spent by companies that are sued, they choose to settle these cases for some percentage of the total risk or exposure.

Those settlements result in large windfalls, oftentimes, for plaintiffs counsel. That, unfortunately, has fueled and been the cause of many of these lawsuits.

So I think if you take the inconsistencies and ambiguities, which, as I also testified, is much worse when applying an old law to a new economy, add that to the financial incentives of plaintiffs' counsel in those cases, you have a very dangerous mix and you see the rise in the litigation that is shown on my graph.

Chairman WALBERG. I assume with those incentives the precedents are set as well that increase the incentive.

Mr. ALFRED. Well, the precedents of the settlements. The court precedents are all over the place; and that, again, is part of the inconsistent treatment of these laws.

Chairman WALBERG. Okay. Thank you.

Mr. MacDonald, in light of the increase in FLSA lawsuits, what modernizations do you think could be made to FLSA in order to bring them in line with the 21st century—as you indicated, it is way out of date—reducing confusion, lawsuits, and also, in the process, of empowering employees?

Mr. MACDONALD. Chairman Walberg, I think that it is pretty clear that the standards by which overtime pay is supposed to be administered are clear, so that is not an issue here. I want to try to make that clarification up front.

The issue that we are looking for is how do you define some of the work that is now being done that the law did not anticipate 60, 70, even 20 years ago? The ability to use technology has dramatically changed the workplace. So, for instance, in my industry, the computer exemption piece is clear for one role. We think those roles have to be expanded now, so that the roles are more clarified, that we can decide where that work gets done.

Secondly, the concept of de minimis. While I don't have a silver bullet on a definition of de minimis, we would like to work with both sides to figure out how we can define that. De minimis work, does it mean that if somebody opens their BlackBerry—for argument's sake—to check their assistant's calendar or the supervisor's calendar and begin to do some work and then start to go to work, is that portal-to-portal compensation? Those types of things have not been had.

Inside versus outside sales. The same person in IBM can be selling a software product on the outside and another person could be in the inside. One is nonexempt and one is exempt. It doesn't make sense. Yet they are selling the same product.

It is those types of things that a matter of definition of clarification will help employers ultimately decide what to do.

Chairman WALBERG. Thank you.

I see my time has ended. I recognize the ranking member for her questions.

Ms. WOOLSEY. Well, for the record, I think we all—I need to tell everybody that my professional background before I was elected to Congress in 1992 was that of being a human resources manager for an electronic startup company, very high-tech company in the telecommunications industry in Marin County, California, where we started with 13 employees. My employee number was six, and I was there for 10 years. And when I left, we had over 800 employees. So over that 10-year period, you know, I hired, set policy, and certainly had to deal with FLSA. Well, we never had one suit, ever, on any level, actually, that had to do with employer-employee relations.

And then I started my own HR consulting firm and helped my client companies learn how to treat their employees and not worry about going around the law but understanding what the law is. And we always had flexible schedules. And that was in 1969. That was before people even talked about flexible schedules. We knew how to do it because we wanted to. If there is a will, there is a way. You can take care of your employees without taking advantage of them. And we knew the difference between exempt and nonexempt, believe me.

So I am going to ask you a question, Ms. Conti. Mr. Alfred uses Walmart as one of his examples of this poor corporation that gets picked on in the courts and by their employees. Well, Walmart is currently facing more than 80 lawsuits at various stages of the legal process. And, after an audit, some of the methods that have been cited in the lawsuit used by the Walmart managers that Walmart is challenging in the courts is to hold down labor costs that would include forcing employees to work off the clock, requiring workers to skip lunch and rest breaks, and manipulating time and wage records. Just for example.

And then, of course, they have settled four of their cases between 2004 and 2010. So you know they were guilty or they never would have settled.

So could you tell us if you think that that is unfairly picking on Walmart and how you see this?

Ms. CONTI. Well, in all candor, there is nobody in the workers' rights movement that would ever complain about unfairly picking on Walmart. The wage practices are well known. They are creative. There have been many court decisions very clearly stating that the practices they have engaged in have been illegal.

And in spite of the settlements that they have had to pay, in spite of the judgments they have had to pay, they keep having record profits year after year. Their CEOs, their high-ranking officials keep making wonderful salaries that grow each year, while their workforce's salaries don't really grow each year. So it is nothing that I am going to feel too sorry about right now.

For the handful of multimillion dollar settlements that my fellow witness has talked about, he also ignores that the vast, vast, vast majority of these cases are for workers that maybe, in the case of low-wage workers, are complaining over hundreds or maybe mere thousands of dollars and need the remedies of the FLSA so that they can eat, they can pay their mortgage, they can get medicine

for their kids and send them to the doctors when they are sick. And we are overlooking that very important purpose of the FLSA here.

Ms. WOOLSEY. So after almost 80 years of existence, could you very quickly tell us what is work so that everybody is not confused? What is work?

Ms. CONTI. What is work? Work is the labor that you produce for your employer. It is the time you spend doing that which is for your employer's benefit.

Ms. WOOLSEY. Thank you.

And, also, how does exempt/nonexempt differ? If you can say that quickly.

Ms. CONTI. Sure. Exempt workers are generally people who are considered some degree of a white-collar professional, who exercise independent judgment and discretion, who don't simply follow a well-set guideline of procedures and steps, who have additional education and training that means that they are more likely to be a professional, and that make a certain sufficiently high salary that indicates that they are professional as well. There are a host of other exemptions in various fields, but the main exemptions that are usually the source of much debate are the so-called white-collar professional exemptions.

Ms. WOOLSEY. Thank you.

Chairman WALBERG. Thank you.

Recognize chairman of the full committee, the member from Minnesota, Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman.

Thank the witnesses for their testimony, for being with us today, help us to look into to the Fair Labor Standards Act, which has been discussed is indeed an old Act. And we are exploring its application in, not in 1969, which was a very good year, as I recall, the year I graduated college, but in 2011, '12 and '13, going forward.

The gentlelady from California, the ranking member, said, quote, we know Walmart was guilty or they never would have settled, close quote.

Mr. Alfred, is it your observation that you only settle if you are guilty, or are there other factors here that might be taken? Can you talk about that? You mentioned that there were settlements because it is less costly as a business decision. Could you expand on that, please?

Mr. ALFRED. Yes, thank you.

With all due respect to Ranking Member Woolsey, that statement is inaccurate in my experience and in common sense.

If one were to examine the way a collective action works under the Fair Labor Standards Act, one would quickly see that the risks to employers may be enormous. That doesn't mean that employers did anything wrong. Oftentimes, the analysis is that they did not. The problem is, in a collective action, the case may be what is called conditionally certified at the very beginning of the lawsuit with a very low burden. Almost all cases are. That then triggers legal mechanisms that allow the hundreds, thousands, and more people to join the case.

The litigation continues; and as the litigation continues, depending on what court you are in, depending on what judge you are before who is going to be interpreting the ambiguous terms in the

statute, such as the administrative exemption, whether or not an employee is exercising the degree of discretion and independent judgment required to meet the standards of that exemption, and also know under what rule book we are playing, depending on where the Department of Labor is at the time.

The Department of Labor has recently changed its view through amicus briefs filed in cases on what exactly it thinks the proper degree of discretion and independent judgment is. So when you look at the threat of these lawsuits and you understand the risks of going to trial, decisions are made on a business level to make payments that are dramatic compromises perhaps, but they do not represent what Ms. Woolsey terms guilt or innocence. They are business decisions and hard business decisions.

Mr. KLINE. Thank you.

So, in short, it is cheaper, it is less expensive for the business to settle, rather than to carry the case forward and take a risk, depending upon the interpretation in a particular court or a particular jury. So it is a business decision, not necessarily in any way an admission of guilt.

Ms. WOOLSEY. Would the gentleman yield?

Mr. KLINE. I would be happy to yield.

Ms. WOOLSEY. Thank you, Mr. Chairman.

I did make a mistake. I don't know that they are guilty. You never, as a member, ever supposed to admit you made an error. But because the decision is sealed and so there is no way for me to know.

Mr. KLINE. Exactly. Reclaiming my time.

Ms. WOOLSEY. Okay. But you have to know what the four—what they paid: $86 million, $65 million, $55 million, $40 million.

Mr. KLINE. Thank you.

Reclaiming my time, I saw those numbers as well; and who knows how many hundreds of millions might have been at stake.

I want to—my time is rapidly disappearing here, and I want to get at the issue of flexible time. We have had multiple testimony on that; and Ms. Conti had testified that, within the same work week, there was already flexibility and comp time could be provided. But in the public sector, as we know, it is greatly prized. Because you can accrue comp time. You can choose to work in December and take time in August, for example.

Could you, Mr. MacDonald—my time has expired, but I am going to beg the indulgence of the chair because of the little colloquy that we had. Could you comment on the difficulty in providing compensatory time, flexible time, and the impact that has on the workplace today in 2011?

Mr. MACDONALD. If we are recognizing the time issue that you have stated, this is exactly what is wrong, for instance, in the municipalities and government public sector, is the accrual of all of this is liability that sits there forever. And, frankly, that is not something that we want to accrue on our books. We have no problem paying people. That is not the issue. The issue is trying to get to decide where they should be classified.

So creating systems of having to account for all that time and when they can get it, we have people who are having problems get-

ting their vacation time; and to then talk about having further accrual just doesn't make sense in the business liability.

In addition to that, how do you accrue for that? If that time is carried over for 2 or 3 years, at what rate is it carried to?

So it is an administrative burden that is cost ineffective.

Chairman WALBERG. I recognize Ms. Hirono for her questioning.

Ms. HIRONO. Thank you, Mr. Chairman.

I note that two of our testifiers really railed against the plaintiff's bar, plaintiff's lawyers; and I take it, Mr. Alfred, that you are speaking for the defense side of the table.

Mr. ALFRED. I am today, although at the beginning of my career I was a plaintiff's lawyer as well.

Ms. HIRONO. I am sure that if we had a plaintiff's lawyer representing some of these workers in class-action suits we probably would have heard a different narrative, and I wish that they were present here so that we could hear both sides.

With regard to the 7,000 lawsuits and the explosion of lawsuits, as Ms. Conti mentioned, that many of these are—a lot of these are not class-action lawsuits being settled for millions and millions of dollars, that they are individual claims, are they not, Ms. Conti.

Ms. CONTI. They are.

Ms. HIRONO. I don't know what the average of settlement value or——

Ms. CONTI. There are no statistics. I can tell you from my 15 years as a plaintiff's attorney that the cases that we handled, by and large—when I was doing strictly legal services on behalf of low-wage workers, the settlements and verdicts usually ranged somewhere between $500 to $3,000 or $4,000. There were some that were more substantial, but not much more.

In a collective action that I worked on against Purdue Farms that had misclassified its chicken catchers as independent contractors, the average plaintiff received somewhere between $5,000 and $10,000. There were some that received as much as $25,000, but that was because they were working over 80 hours a week and not being compensated any overtime for it.

Ms. HIRONO. I think, considering the FLSA was really intended to provide a support for really the low-wage workers, the people who otherwise would be facing a really difficult job situation vis-a-vis their employers, I think that we should keep in mind that the vast majority of these complaints are coming from individual complainants.

And I should mention as an aside, it is getting a lot tougher with this U.S. Supreme Court to pursue class action claims. In the most recent decision being the Walmart decision wherein they decided that, practically out of the blue, in my opinion, that suddenly common questions of law and fact that affect the class would be a lot tougher hurdle for the class to pursue its claims. So it is really getting a lot tougher.

And I would like to focus this committee on the fact that most of the complaints are coming from individual workers.

I have a question for Mr. MacDonald. Because you do make some recommendations in changing the current FLSA. You call it a job killer, and I take it that your changes would really allow you to ex-

empt more workers. That would be an accurate characterization, wouldn't it?

Mr. MACDONALD. I think what the statement is is that we believe that the clarifications would be more reflective of their training and their income. My fellow panelists talked about white-collar workers earning substantial income.

Ms. HIRONO. Which would mean basically that there would be more exempt workers and, therefore, the requirement to pay overtime would not apply. So you could have a scenario where, if we accept your suggestion, which basically would allow more workers to be more exempt, that employers won't have to pay overtime, and it therefore could actually be a job killer.

Mr. MACDONALD. What I would give you as a perfect example of that is, when we reclassified 7,000 people who were earning between $77,000 and $150,000, they took a 15-percent reduction in their base to offset the overtime that they might work. Thirty-four percent of those people in the next year earned less money. So it wasn't a matter of saving money. It is just—because we would have glady kept the pace as it was as exempt.

Those persons also when it is argued about——

Ms. HIRONO. Thank you. That is one scenario, and I think we can envision other scenarios where we are going to open the doors to a lot of workers being exempt and therefore overtime not being paid, and it could very well result in a lot of employers requiring these exempt workers to work much longer hours without hiring more people to do that work. So it could actually have a job-killing impact.

Mr. MACDONALD. This is not France and trying to reduce work hours to 35 hours.

Ms. HIRONO. We know that the corporations who are making a lot of money these days and holding on to literally billions and trillions of dollars and they are not creating jobs. That is because we don't have demand. I would say that is one of the major reasons. And if we are going to start paying people less or hiring fewer people because they are exempt, I don't think we are really helping our economy.

And I did want to note that since we don't have—I don't feel as though the panel is balanced, except for Ms. Conti, to speak up for the underlying reasons for this law. I don't want to—it is not as if I am picking on you all, but I really think if we are going to do something as dramatic as changing the FLSA that we need to keep in mind what the underlying purposes of this law is, and we should deal with facts that relate to the millions of people who are being impacted by the kind of changes that you are proposing.

I yield back.

Chairman WALBERG. The gentlelady's time has expired.

I will recognize the fact that the minority always has an opportunity to request the witness that they would desire, and I am glad that you have chosen well.

I recognize the gentleman from Ohio, Mr. Kucinich, for his questioning.

Mr. KUCINICH. Thank you, Mr. Chairman.

I would just like to go down the line for a brief question to each witness.

The Federal minimum wage is $7.25 right now, Mr. MacDonald. Do you believe it should be decreased, stay the same, or raised.

Mr. MACDONALD. I am not quite sure of the nature of the question.

Mr. KUCINICH. Okay. Next person. Mr. Alfred.

Mr. ALFRED. I am from the Commonwealth of Massachusetts where it is $8.

Mr. KUCINICH. So should the Federal minimum wage be raised?

Mr. ALFRED. I don't mean to be smart about this——

Mr. KUCINICH. Okay. Next question. You don't want to be smart. We will take the next question.

Ms. Conti.

Ms. CONTI. I emphatically believe the minimum wage should be higher. If we had it restored to its historical rate in the 1960s when it was as high as it was relative to inflation and wages, it would be between $9.50 and $10 an hour right now. I think that is the right place to set it, and it should be indexed to inflation after that so it goes up every year.

Mr. KUCINICH. Thank you.

Mr. Hara.

Mr. HARA. I don't really have an opinion on that.

Mr. KUCINICH. Okay. Thank you. That is all I wanted to know.

Here is a very clear example here. When you are talking about someone who is advocating their cause of economic justice, you can be very clear. But we can't get a straight answer out of any of the witnesses, who have excellent backgrounds, on really a very simple question: What do you think the minimum wage should be? That question is as clear as anything: What should the minimum wage be?

Now, let's look at something right here, because this is a good opportunity to make an important point. JP Morgan, one of the largest financial institutions, just issued a report pointing out that corporate profit margins have reached levels not seen in decades, that U.S. labor compensation is now at a 50-year low relative to both company sales and U.S. GDP, that reductions in wages and benefits—this is JP Morgan—reduction in wages and benefits explain the majority of the net improvement in corporate profit margins.

Why is U.S. labor compensation so low, the report asks. Well, the analysts at JP Morgan state that the lingering excess labor supply from the recession is one reason, but the 2 billion people in Asia joining the global labor force over the last two decades is another. They talk about wages for production workers and emerging markets remain well below U.S. levels.

The information helps to put the subject matter of today's hearing in perspective. Because the unemployment rate is not just a number. It is not just that 9.2 percent are unemployed. It is not just that 14 million or more are unemployed and that several million more are underemployed. You have to look at the unemployment rates are hitting African Americans 16.2 percent, Hispanics 11.8 percent, teenagers 24.5 percent.

So you have to look at this economic context that we are in. The rich are getting richer, and the poor are getting poorer, and the

middle class is getting destroyed because they cannot hold on to a good wage level.

So you have the representatives here of these big financial interests. They are not satisfied. They want more profits, even if it means driving down wages or making workers work time and a half and not getting paid for it.

I want to thank the witnesses for being here, because your presence here proves what is wrong in this country today and that is that you are here advocating for a financial system that is manifestly unfair. And I appreciate you being here to be able to help clarify that and your unwillingness to be able to answer a simple question.

But it is very clear from these market reports that you have wages and benefits going down while profits are going up. And there is a direct relationship between that, and we ought to start thinking about what that means about our country. When you have corporations able to make larger profits because they keep knocking down workers' wages and benefits, that is not right; and, frankly, it is not even American.

I yield back.

Chairman WALBERG. I thank the gentleman.

I recognize the gentleman from Indiana, Mr. Bucshon.

Mr. BUCSHON. I will yield back my time to the chairman of the subcommittee, Mr. Walberg.

Chairman WALBERG. Thank you. That is a pleasant surprise.

Mr. BUCSHON. I yield my time.

Chairman WALBERG. I appreciate that.

Let me return to Mr. MacDonald.

In Michigan, unemployment has just risen not far, because it didn't go far down, but risen to 10.3 percent again this month. We haven't seen it below 10 percent for years in Michigan. We are not seeing any relief really in sight.

The finding task of this Congress is to get our country back to work, not to establish social policy that destroys jobs and destroys incentives and makes it more difficult for employers to hire, to make a profit, which ultimately expands the opportunity for all of us, as I understand, and I would respectfully disagree with my colleague from Ohio.

The purpose of the private sector is to create an economy, and we should make sure that a playing field is in place to do that.

As one of the country's major employers, has FLSA prevented you from hiring employees from around the United States.

Mr. MACDONALD. Let me give you a real-life example; and I think it would be helpful to my panelists if—Ms. Conti—to think about how we could use enforcement even better for the Fair Labor Standards Act.

IBM about 2½ half years ago announced that we were putting an additional 1,000 jobs in Iowa. These were high-paying jobs. These are significant jobs. They were technology jobs. These are people who have bachelor's degrees and great training like that. We put those thousand jobs in Iowa, and we have been subjected to two audits already with no findings.

I really have to question, you know, when I think about the reality of some of the abuses that were suggested by Ms. Conti. I un-

derstand those. I am very aware of those myself in smaller industries. But here we are creating jobs in the United States, and no good deed goes unpunished. Right away, we have to be subjected to the audits. And we did it right. But it is complicated, and there is a lack of clarification, and we are now erring on the side of nonexempt if we—even keeping the employment here.

I mean, this is a global economy. We can talk about the fact that other countries are doing other things. The reality of it is we didn't have the global economy in 1938 or 1960. We have it now. It is a reality. Competitors are coming from everywhere. It is just not the U.S. competitors competing against each other. It is a global competitor.

We are going to think about our business in the context of labor costs. We are going to make investments where investments are appropriate to make.

We made investments in technology of $5 billion last year. That had enormous impact around the world and for this economy. But we have to make investments where we can be cost competitive.

Chairman WALBERG. Thank you.

I would turn to Mr. Hara as well. I mean, Goodwill is filled with goodwill and the employment that you provide to a specific group of employees and the services that come from that are unique, special, and important. Has FLSA prevented you from hiring employees from around the United States?

Mr. HARA. Well, we don't hire from throughout the United States. We are located in central Arizona.

However, we are challenged by the current way the FLSA is structured. Because one of the issues that we are dealing with, especially because our employee base is predominantly individuals with barriers to employment, they have special needs. We have a lot of single families, we have a lot of broken families, we have individuals that have special needs that are all hourly employees working for us. We have approximately 2,000 employees working for our particular Goodwill.

One of the biggest concerns that we have is that when employees come to us asking for special privileges like taking time off and then being able to make that up because they can't afford not to go without pay, that is when we start running into problems with flexibility. I understand that there are times where you can make everything work within the 40-hour work week and you can work some extra hours 1 day and not the next because you are trying to take care of things. But, oftentimes, that is not the case, and it runs into the following week. And when we run into overtime issues, it really taxes our expenses, because we are on a very tight budget.

So some of the provisions on the Fair Labor Standards Act as they relate to flexibility is an area that we really need some help on. And, for example, public employees have the opportunity to trade time for pay situations. And, right now, the private sector, which we are one of, does not have that opportunity.

So those are some of the areas that I think can be worked on, without taking away the essence of the Fair Labor Standards Act, to improve.

Chairman WALBERG. Thank you, and thank you, Mr. Bucshon, for yielding your time.

I would recognize Mr. Payne for any questions that you might have of the witnesses.

Mr. PAYNE. Thank you very much.

My time is not that good right now. However, I would just like to say I think that the issue is certainly very important.

I will not ask any questions at this time, but what I would say is that I think that we need to take a look at the policies. In many instances, we have to streamline them. Of course, we also have to be careful that we don't start to set the clock back like we have been hearing in some of our hearings. We have made a lot of progress in this country, and I hope that we don't start to regress.

But what I will do at this time is to yield to the ranking member, Ms. Woolsey, my time.

Ms. WOOLSEY. Thank you very much.

Mr. MacDonald, I have a question for you about your statement of how FLSA has sent jobs overseas. Could you give us an example of how IBM—just even only one—or where and how IBM has had to send jobs overseas as a result of FLSA regulations.

Mr. MACDONALD. Well, as an enterprise that is managed on a global basis, we look at where we are going to make investments and we look at where those investments can yield. We represent shareholders. That is what the capitalistic system is about. And when we look at those labor costs, we think about it in terms of how we will be competitive against competitors that do not exist on these shores. So our ability to make those decisions is driven off of the opportunity to control costs——

Ms. WOOLSEY. So it would be okay with you that we move to the very lowest rung of the ladder in order to pay our workers, because the overseas companies don't pay overtime, don't have wage and hour laws, don't have—actually, don't even have environmental laws. I mean, so is that okay with you? Is that what we want to do here in the United States?

Mr. MACDONALD. That is what you suggested. I said—I never said anything to the contrary. IBM has very high standards of ethical and moral behavior around the world.

If you want to paint IBM was a sweatshop——

Ms. WOOLSEY. I don't. I am talking to you about why having a Fair Labor Standards Act would send jobs overseas.

Mr. MACDONALD. Because I said to you right now I cannot have clarification about what people are classified. I need a level of definition about making decisions around cost competitiveness. That is business reality. That is not theory. That is not philosophy. It is how you make decisions in business.

Ms. WOOLSEY. Okay. I wish I was still an H.R. consultant. I would love to work with you. All of my clients knew what it was.

Mr. MACDONALD. I would have to know what your rates were.

Ms. WOOLSEY. You could afford me. Believe me. I was not expensive.

Mr. MACDONALD. I don't know. It is labor cost competitiveness.

Ms. WOOLSEY. Well, Mr. Hara, aren't there exceptions for workers with disabilities so their hours—I mean, for Goodwill? Can't you make decisions for your disabled workers?

Mr. HARA. Well, actually, all of our employees fall under the same rules as they relate to the Fair Labor Standards Act. And unless you may be talking about a different set of rules that is not a part of this discussion, I don't think, but——

Ms. WOOLSEY. You are using your employees at Goodwill as your example, not just employees in general through the association.

Mr. HARA. I am sorry. Could you repeat that?

Ms. WOOLSEY. You were using your Goodwill employees as an example.

Mr. HARA. Yes. Our employees are still bound by the Fair Labor Standards Act. If they work overtime, we are required to pay overtime.

Ms. WOOLSEY. Overtime. But we do make exemptions for disabled workers under the Americans for Disability Act.

Mr. PAYNE. Can I reclaim my time?

Ms. WOOLSEY. Yes, you may.

Mr. PAYNE. Mr. MacDonald, in the little time I have left, you were saying about competitiveness and we just pay too much. What is your prognostication of America 50 years from now? Is it that we are going to have a rush to the bottom? How do we compete?

Mr. MACDONALD. If we continue, in my opinion—I have been in H.R. for 40 years. I graduated in 1970, not 1969. That was a good year as well. The reality of it is—you want to know what we are looking at in 50 years? I will tell you in 20 years. Go look at Europe. That is what we are going to be.

Mr. PAYNE. So our salvation is that we should have the rush to the bottom. If we are going to compete I guess just on wages, as you mentioned as one of the areas, we are never going to be able to——

Mr. MACDONALD. Sir, it is not a rush to the bottom. Because if you think about all of the things we have done—Look, I am a global executive and an American citizen. I am proud of that.

Mr. PAYNE. You are talking about the past. I am talking about the future. I know what we have done. That is why we are number one. A rush to the bottom is not going to keep us number one.

Mr. MACDONALD. We have been able to innovate in this country, and I am suggesting to you that technology will become a major player in thinking about how we think about labor law reform and how labor will be done in the United States. Technology becomes a big part of how you think about the Fair Labor Standards Act going forward.

Chairman WALBERG. The gentleman's time has expired.

I appreciate the testimonies, the answers as well as the questions that have been given. And we never come to the end of a discussion on this, and we won't. We will be continuing on. But this is a good first step in the process. I am sure we will have other opportunities.

So thank you for being with us today.

I would recognize the ranking member for any closing comments.

Ms. WOOLSEY. Thank you, Mr. Chairman. Thank you for holding this hearing.

And I would conclude that the purpose of the private sector is to create a U.S. workforce that benefits from the riches and the bounty of this amazing country, the United States of America, and if it

could be shared more equitably than it is being shared today. And that has to be one of our goals.

And I would like you to know that I would very much like to work with you on cracking down on this employee misclassification. Because I am going to have a bill—I would love it if you would support it. Because misclassification cheats workers and taxpayers. It incorrectly classifies workers as independent contractors. And when that happens, for instance, we prevent those workers from enjoying the protections most Americans take for granted such as family medical leave, workers' compensation, collective bargaining.

More than 10 million workers are misclassified, and that costs taxpayers $2.7 billion annually, and it prevents employers from—actually, preventing employers from abusing the law and recouping an estimated $27 billion in revenue over the next 10 years should be our goal. And I think it should be a goal that you and I share in common, and I really want to work with you before I introduce this.

So I see this as part of strengthening the Fair Labor Standards Act. It benefits workers. It levels the playing field for our employers that follow the law so they aren't paying more and competing with those who cheat.

It is essential that the protections established under the Fair Labor Standards Act are extended to every worker that it is meant to cover. And if we need some clarification on the Fair Labor Standards Act without weakening it, I am sure we can do that and do that together.

Thank you very much.

Chairman WALBERG. I thank the gentlelady, and I certainly would concur with your thoughts that we encourage the amazing workforce that we have here in the United States.

The exceptionalism that is America and its people is something that I think we can both agree with. We live with those people. We have raised those people. I want my sons and daughters, now grandchildren, to be amazing workers in an amazing country with opportunity to expand, with opportunity to be challenged.

I understand work from a theological background, that there is an actually theology of work, that God designed work to be wonderful for us. And in fact gave a day of the week—in my Judeo Christian ethic gave a day of the week to be set aside so we won't overwork because we like to work so much. It disappoints me so often to see people that don't enjoy their work.

I am in my sweet spot. Some of my constituents don't think I should be in that sweet spot, but that is the way it is. But I think we ought to encourage work, but I also think we ought to encourage our employers as well. I think we can do that. Because, frankly, capitalism is a wonderful thing. It gives us the opportunity to expand. It gives us the opportunity to lead in the world, which we do. And I think that we should not be involved in a race to the bottom, but, rather, we should be involved in a race to innovate to the top.

America's psyche, America's history, America's pattern has always been that of innovation, of moving forward, of aggressively moving forward, of having cycles, yes, cycles that sometimes we expand rapidly and other times where we just plod along, but we

move forward. And I don't think a time when now we are recognizing a global challenge that is unparalleled to what we have seen at other times in our history, a global challenge of people who are striving to achieve the same thing that America has become accustomed to—and I applaud them for that, though I may disagree with some of their approaches and tactics. Yet that should encourage us in working with our employees and FLSA to make sure that there is fairness for employees and employer, that there is justice for all in the process, but that we come out on top here in America—both our industry, our small businesses, and the employees who make it all happen.

So we will continue to work to that direction, understanding that the cycles sometimes are frustrated by what government does or doesn't do. And my efforts—and I will commit to my ranking member and the rest of this subcommittee that my efforts will be not to hold back either the employer or the employee but to make sure that we have incentives for both to achieve with excellence so that this country moves forward.

Thank you. Now I refrain from preaching.

I will recognize the fact that there is no further business to come before this committee. So, with that, I adjourn the committee.

[Additional submission from Ms. Woolsey follows:]

**Prepared Statement of Debra L. Ness, President, National Partnership for Women & Families**

The National Partnership for Women & Families is a non-profit, non-partisan advocacy group dedicated to promoting fairness in the workplace, access to quality health care and policies that help women and men meet the dual demands of work and family.

The National Partnership strongly urges members of Congress to support public policies that help working women and men meet the dual demands of work and family while preserving the vital worker protections offered by the Fair Labor Standards Act. The Fair Labor Standards Act of 1938 (FLSA) provides a baseline of required employee protections for more than 130 million workers. The FLSA does not prevent employers from implementing flexible workplace policies. The types of flexibility consistent with the FLSA's purpose and provisions include shift swapping, alternative start and end times, compressed workweeks (spanning only one week), team scheduling, part-time work, job sharing and scheduling at multiple locations.

America's workplaces are out of sync with 21st century society. Children get sick, parents age and health emergencies arise—but many workplaces offer little flexibility to help working women and men care for their families and still succeed at their jobs. Workers in this country need greater flexibility and control over scheduling, alternative schedules and overtime, parity for those working part time, more telecommuting opportunities, paid sick days, paid family and medical leave, and support to meet after-school, child and elder care needs.

Workers want and need flexibility at work. Over the last year, the National Partnership for Women & Families interviewed workers in California, New York, Illinois, Wisconsin and Texas. The message they sent was clear: All workers, regardless of where they live and what jobs they have, need flexibility.[1] Flexibility is critical for workers who are managing child care and elder care responsibilities or dealing with their own health problems. Some workers, particularly salaried professionals, are likely to have more flexibility, but lower-wage and hourly workers are often left behind. Workers need and value flexible work arrangements that allow them to vary their work hours and work locations, as well as the security that comes with being

[1] National Partnership for Women & Families and Family Values @ Work. Dallas Workers Speak: The Employee Case for Flexibility (2010, October), Los Angeles Workers Speak: The Employee Case for Flexibility in Hourly, Lower-Wage Jobs (2011, February), Midwest Workers Speak: The Employee Case for Flexibility in Manufacturing Jobs. (2011, April). New York City Workers Speak: The Employee Case for Flexibility among Professional Workers (2011, June). Retrieved 22 July 2011, from *http://www.nationalpartnership.org/site/PageServer?pagename=issues—work—Library—workflex*

able to take paid time away from work without fear of retribution or termination. They report feeling resentful and undervalued when employers provide flexibility for some workers but not others, and when workplace policies are unclear or fail to acknowledge workers' needs.

Hourly, lower-wage workers are much less likely to have workplace flexibility. Most of the 38.5 million lower-wage workers in the United States do not have access to even the most basic flexibility policies.[2] Many are required to work in shifts that are unpredictable and constantly changing. They may be asked to work overtime with little notice, and they seldom have leeway to arrive late, leave early, or take time mid-day to deal with family or medical emergencies.[3] These workers typically risk workplace discipline or job loss for taking time off when they are sick or need to care for a sick child.[4] Lower-wage workers say that any flexibility they have is often at an individual supervisor's discretion and provided on an inconsistent basis. Because these workers have so little control over their schedules, they say they struggle to make quality child care arrangements and meet other family commitments.

Workplace flexibility has big payoffs for business. Flexible workplaces promote greater job satisfaction, stronger job commitment and higher rates of worker retention[5]—outcomes that boost productivity and profits. The turnover rate among hourly workers is notoriously high—80 to 500 percent in some industries[6]—in part because their jobs offer little or no flexibility. Replacing workers can cost anywhere from 25 to 200 percent of annual compensation.[7] Businesses that don't provide flexibility pay for it when they have to pay to hire, train and retain a constantly revolving workforce.

Public policies set a standard for all businesses and workers to follow, so that no business is put at a disadvantage or penalized in the short or long term for doing the right—and ultimately profitable—thing. Leading employers have already instituted innovative practices because they recognize the role that flexibility can play in fostering a loyal, productive workplace and improving worker retention. These businesses allow hourly workers more control over their schedules and their work, and provide the flexibility that workers need to succeed on the job. Some of these practices include flexible schedules, self-scheduling, cross-training workers to fill in when a team member is out, and supporting work from home. Even though some employers and industries voluntarily adopt flexibility policies for all of their workers, only a small fraction of the lower-wage workforce is employed in these businesses. That is why public policies are critical to changing the culture, leveling the playing field and helping both working families and employers.

Congress took an important step toward improving workplace standards for working families last year when it provided millions of nursing moms the support and protection they need. The Affordable Care Act amended the FLSA to give covered female employees the right to reasonable break times and a private location, other than a bathroom, to express milk at work. The law is an important step in making sure the nation's workplaces meet the needs of working women and their families. We hope that Congress will look for other opportunities to strengthen our nation's laws to meet the needs of a 21st century workforce.

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[2] This is the number of civilian workers whose wages fell in the lowest quartile (less than $11.11 per hour) in 2009. U.S. Department of Labor, Bureau of Labor Statistics. (2010, March). National Compensation Survey: Employee Benefits in the United States, March 2010 (p. 527). Retrieved 26 January 2011, from *http://www.bls.gov/ncs/ebs/benefits/2010/ebbl0046.pdf;* and U.S. Census Bureau. Table 584. Civilian Population—Employment Status: 1970 to 2009. Retrieved 26 January 2011, from *http://www.census.gov/compendia/statab/2011/tables/11s0585.pdf*

[3] Watson, L., & Swanberg, J. (2011, May). Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation. Workplace Flexibility 2010, Georgetown Law Publication. Retrieved on 25 July 2011, from *http://www.uky.edu/Centers/iwin/LWPolicyFinal.pdf*

[4] Galinsky, E., & Bond, J. (2011). Workplace Flexibility and Low-Wage Employees. Families and Work Institute Publication. Retrieved on 25 July 2011, from *http://www.familiesandwork.org/site/research/reports/WorkFlexAndLowWageEmployees.pdf*

[5] Bond, J.T., & Galinsky, E. (2006, November). What workplace flexibility is available to entry-level, hourly employees? Families and Work Institute Publication. Retrieved 26 January 2011, from *http://www.familiesandwork.org/site/research/reports/brief3.pdf*

[6] Williams, J., & Huang, P. (2011). Improving Work-Life Fit in Hourly Jobs. Work Life Law, U.C. Hastings College of Law Publication. Retrieved 26 January 2011, from *http://www.worklifelaw.org/pubs/ImprovingWork-LifeFit.pdf*

[7] Sasha Corporation. (2007, January). Compilation of Turnover Cost Studies. Retrieved 13 December 2010, from *http://www.sashacorp.com/turnframe.html*

With public policies that help workers meet the dual demands of work and family, both businesses and workers in the United States will get the support and protection they need to ensure healthy and productive workplaces. Such policies include:

• Paid Sick Days—The Healthy Families Act (H.R. 1876/S. 984) would complement businesses' existing family friendly practices while establishing a minimum paid sick days standard for all employers. This standard would level the playing field by making paid sick days a universal practice, while also ensuring enough flexibility for employers to continue offering more generous benefits. Businesses already providing basic paid sick days protections would not need to change their practices. The result: healthier workplaces, reduced turnover, more satisfied and productive workers, and better bottom lines.

• Paid Family and Medical Leave—Paid family and medical leave has a big impact at little cost. Yet only 11 percent of workers in the United States have access to paid family leave through their employers, and less than 40 percent have access to personal medical leave through a private temporary disability insurance program provided by their employers.[8] Laws providing paid family and medical leave allow workers to continue to earn a portion of their pay while they take time away from work to: address a serious health condition (including pregnancy); care for a family member with a serious health condition; or care for a newborn, newly adopted child or newly placed foster child. When provided through a public insurance system, the cost of paid family and medical leave programs is shared between employer and employee, which allows even the smallest businesses to offer leave to all of their employees. In fact, existing paid family and medical leave programs in California and New Jersey are funded solely through employee contributions with no direct costs to businesses.

• FLSA Coverage for Home Care Workers—Millions of home care workers are currently denied basic wage and hour protections. These workers provide invaluable care that enables people who are sick, elderly and disabled to live with dignity and independence in their own homes. Yet, without fair pay for their hard work, many of these hardworking caregivers and their families struggle to put food on the table. This loophole in FLSA coverage reinforces gender and race based pay gaps, because more than 90 percent of home care workers are women, and more than half are African Americans and Latinas. The Direct Care Job Quality Improvement Act (H.R. 2341) would remedy a serious flaw in FLSA coverage that excludes home care workers from minimum wage and overtime protections.

The National Partnership for Women & Families strongly urges members of Congress to support proposals that give workers paid sick days, paid family leave, and greater control over the time, place and duration of their work. Model employers have recognized the importance of making flexibility available to all workers—including lower-wage workers—and they have taken steps to establish fair and flexible workplace policies. When all businesses adhere to a standard of basic workplace flexibility, including paid sick days and paid family and medical leave, the result will be healthier, more reliable and more productive workers at every wage level—and employers that reap the benefits of more profitable businesses.

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[Additional submissions from Ms. Conti follow:]

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[8] U.S. Department of Labor, Bureau of Labor Statistics. (2010, March). Employee Benefits in the United States National Compensation Survey: Employee Benefits in the United States, March 2010 (p. 120). Retrieved 13 December 2010, from *http://www.bls.gov/ncs/ebs/benefits/2010/ebbl0046.pdf*

Written Testimony Submitted by
Judith Conti, Co-Founder and Executive Director, Legal Services and Administration
of the D.C. Employment Justice Center
to
the Subcommittee on Worker Protection of the House Committee
on Education and the Workforce:
Hearing on Flexibility in the Workplace: Does the Fair Labor Standards Act Accommodate
Today's Workers?
March 6, 2002

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

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

My perspective on the importance of preserving the FLSA's cash overtime requirement stems from serving the needs of hundreds of low-wage workers in the D.C. metropolitan area. Now, just as the many decades ago when Congress first enacted the FLSA, workers remain vulnerable to the most basic of exploitations, including the failure of employers to pay them correctly for their work. And, those workers who remain particularly vulnerable are women and minorities. Last year, the EJC advised and counseled over 900 individual workers. Over half of them - 56% were women. A combined 90% of our clients were either African American (69%) or Latino (21%). Fourteen percent of our cases involved inadequate compensation for hours worked. Over one-quarter of the cases we handled involved termination, and a similar number involved claims of illegal discrimination. A striking percentage of cases in these last two categories – termination and discrimination – involved workers' rights to take protected, unpaid leave to care for themselves or for a family member with a serious medical condition. Time and time again, we find ourselves trying to enforce this nation's bedrock employment protections on behalf of workers who still face rank economic exploitation and a loss of dignity on the job. To be sure, these same workers want time with their families and time to make contributions to their communities. But not at the expense of their paychecks.

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

It is important to recall the purposes of Section 7. By requiring employers to pay their workers time and one-half for every hour worked in excess of 40, Congress intended both to spread

employment and to compensate workers for the burden of additional work. By penalizing employers who required excessive hours from their employees at exploitative wages, the Act sought to take away the advantage of producing goods "under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being." [1] As President Roosevelt said, these objectives are designed to "protect workers unable to protect themselves from excessively low wages and excessively long hours."[2]

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

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

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1 *U.S. v. Darby*, 312 U.S. 100, 109 (1941).

2 82 Cong. Rec. 9,11 (1937).

American workers consistently reject the trade-off between wages and time off that the comp time revisions to the FLSA would offer. In 1995, at a hearing on the very topics we are discussing today, economist Edith Rasell cited a then-current study showing that the public strongly opposed a policy that would allow employers to schedule compensatory time off in lieu of overtime pay for those who worked more than 40 hours per week.[3] Indeed, 64% of all workers, regardless of their political ideology, opposed this revision to the FLSA. As recently as 18 months ago, the Bureau of National Affairs reported that "the percentage of Americans who prefer receiving more money over other workplace perks is rising."[4]

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[3] The Fair Labor Standards Act: Hearings before the Subcomm. on Workforce Protection of the House Comm. on Economic and Educational Opportunities, 104th Cong. 204 (1995) (testimony of M. Edith Rasell).

[4] "Survey Finds U.S. Workers Prefer Raises Over Flexible Hours, Training, Other Perks," Daily Labor Report (BNA), at A-8 (July 26, 2000) (citing a survey conducted by California-based recruiting firm BridgeGate).

The reluctance of working people to trade pay for time off follows inevitably from our workforce demographics. Over the last 30 years, a new picture of American families has come into focus, which shows that incomes are down, the gap between the top fifth of families and the rest of us continues to grow, and working hours are on the rise. In fact, inequality between the shop floor and the executive suite is at an all-time high, despite the nation's strong economic growth. According to Business Week, the average CEO made 42 times more than the average blue-collar worker in 1980, 85 times more in 1990, and a staggering 531 times more in 2000.[5] Real wages, particularly those computed on an hourly basis, "have slid or remained stagnant since the mid 1970's," and "family income has also suffered, with median family income falling .5% in the period from 1989-1995."[6] At the EJC, we have seen firsthand how September 11 has exacerbated these problems. Those tragic events have caused a dramatic rise in both unemployment and underemployment, as restaurant workers, hotel employees, taxicab drivers, and others struggle to make ends meet while working reduced hours, often so that their co-workers can also keep their jobs.

This leads me to two additional and important points that must inform the debate over comp time. Employees are working increasingly long hours[7] and lack real flexibility over their schedules.

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[5] These statistics were cited in the AFL-CIO's Executive Paywatch website at http://www.aflcio.org/paywatch/ceopay.htm.

[6] David J. Walsh, The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?, 20 Berkeley J. Emp. & Lab. L. 74, 90 n.82 (1999). Walsh also notes that one of the results of the decline in wages has been the dramatic rise in consumer debt. Id.

[7] Indeed, the evidence shows that between 1969 and 1987, average annual hours of work increased by 138, and between 1989 and 1994 workers logged in an average of 26 more hours a year. Walsh, supra note 61 at 85.

Longer hours affect workers at all income levels, not just the ones we represent at the EJC. Only a law that gives them the right to exercise genuine choice over their schedules, without at the same time forcing them to lengthen their workweek, will truly benefit them. The many proposals we have seen in recent years that would allow employers to substitute comp time for overtime pay undermine both of these objectives.

The overtime provisions of the Act were intended to promote a national "hours of work" rule. Despite the fact that Americans already work longer hours than their counterparts in most industrialized nations,[8] Section 7 of the Act is an effective brake on further increases in the length of the workweek for covered workers today. According to a recent study, those workers exempt from the FLSA's overtime protections work over twice a many overtime hours as those who are non-exempt. A full 44% of workers exempt from the premium pay requirement (most executives and supervisors, certain administrative and professional employees, and outside salespeople) work in excess of 40 hours per week, while only 20% of those employees who are covered by the statute's mandatory overtime pay provisions work longer than 40 hours.[9]

Thus, allowing employers to substitute comp time off for cash overtime frees them from the pressures to adhere to a 40-hour week and can only result in an increase of forced overtime. This is compounded by the fact that In virtually every comp time proposal we have seen in recent years, employers maintain substantial discretion over when employees can actually use their earned time off. The fact that in many instances, employers can simply require co-workers to absorb the job

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[8] Walsh, supra.

[9] Golden, L. and Jorgensen, H., "Time after Time: Mandatory overtime in the U.S. economy," Washington, D.C., Economic Policy Institute (Issue Brief), at 2 (2002).

responsibilities of the absent employee compounds that discretion. For all of these reasons, comp time, unlike cash overtime, costs little or nothing to the employer. It is a safe bet that we will see an increase in the number of hours employers will require their employees to work if Congress amends the FLSA to provide for comp time in lieu of overtime, a result that makes a mockery of the claimed rationale for this change.

I would argue, in fact, that comp time is all about doing away with the overtime disincentive, and with imposing additional burdens on employees. That is surely the point for small, poorly capitalized businesses that cannot now afford to pay -- and therefore require -- overtime. In fact, during the debates five years ago on this very same issue, the National Federation of Independent Businesses candidly acknowledged that many of small businesses supported a comp time bill because it gave them "something . . . [to] offer in exchange" for forced overtime. And it was certainly the principal reason why Congress amended the FLSA in 1985 to allow compensatory time in the public sector. As the National Association of Counties reported, the "financial impact" of the FLSA's overtime provisions on county governments" would have been "enormous" because counties could not "afford time and a half."[10] Estimates like these led to the enactment of the comp time exception for the public sector, to protect public employers from the "impossible financial burdens" of the FLSA's overtime provisions.[11] Thus, history shows us that comp time, with its

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[10] Impact of the Supreme Court's Garcia Decision Upon States and their Political Subdivisions: Hearings Before the Subcomm. on Economic Goals and Intergovernmental Policy of the Joint Economic Comm., 99th Cong. 75, 76 (1985).

[11] 131 Cong. Rec. S14095 (Oct. 24, 1985) (statement of Sen. Dole).

attendant promotion of overtime hours, responds to the economic needs of employers, and has little or nothing to do with the needs of employees.[12]

[12] Despite many proponents' views to the contrary, the existence of comp time in the public sector does not provide a strong argument for extending it to the private sector. First, it is not at all clear that comp time in the public sector has worked to the benefit of employees. In fact, evidence several years ago suggested that public employees were "'loaning' hours to their employers interest free." Lonnie Golden, "Family Friend or Foe?: Working Time, Flexibility and the Fair Labor Standards Act," Economic Policy Institute, Washington, D.C. (Briefing Paper) (1997), at 2. Moreover, even if comp time in the public sector could be considered a success, it does not follow that extending it to the private sector makes sense. As then-Governor Ashcroft explained in 1985, when the Senate was considering whether to permit comp time in the public sector, "State and local governments are qualitatively different in structure and in function from private business"; public employees "serve under exceptional circumstances," the "most significant characteristic" of which is "the protection that public servants enjoy because they work in government." Fair Labor Standards Amendments of 1985: Hearings Before the Subcomm. on Labor of the Sen. Comm. on Labor and Human Resources, 99th Cong. 51 (1985). Moreover, public employees generally have the protections of a union contract, as well as the constitutional due process protections afforded to those in the civil service. Public employees can challenge abuses of comp time within the context of these protections, whereas most private employees cannot.

Indeed, it is significant that employers have not, in the main, begun to implement the types of scheduling changes already available under the FLSA without incurring overtime liability, despite their clamor for flexibility on their workers' behalf. A recent study cites Bureau of Labor Standards statistics showing that "only a little more than a quarter (27.6%) of workers have flexible schedules which allow them to vary the time that they begin or end their work days." However, managerial and professional employees -- those exempt from the FLSA's overtime provisions were the primary beneficiaries of such schedules. In those categories, 42.6% had such flexibility, compared to a paltry 14.6% of "operators, fabricators, and laborers." [13] Statistics about the provision of paid leave, sick time to care for oneself or for someone else, the carryover of various forms of leave from year to year, as well as estimates about the availability of such alternatives as compressed time, indicate that "there is little evidence . . . that employers are using the flexibility available to them under existing law in scheduling work without incurring overtime liability."[14] This too calls into serious question the real motivation for the push to substitute comp time for overtime.

This leads me to my next point: Workplace flexibility benefits workers only if they have genuine choice in the matter. But the workers who pass through the EJC's doors, like thousands of workers across the country who have no designated representative, simply have no free choice in a matter as fundamental as how they will get paid for their work.

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[13] Walsh, supra at 93, citing BLS data from the May 1997 Current Population Survey.

[14] Walsh, supra at 94-97.

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

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

Finally, as one commentator has aptly stated, "employers stand to benefit considerably from comp time because it would transform the overtime system from one of mandatory payment to one

where employees must enforce their own rights and employers possess certain veto powers over those rights."[15] A swift, effective enforcement scheme would act as a partial check on the coercive nature of the comp time proposals that we have seen. However, such a scheme does not exist. A study by the General Accounting Office over two decades ago found that in 1978-1979, willful and repeat violations of the FLSA's wage and overtime provisions were common and that the Department of Labor's enforcement efforts were "inadequate."[16] Several follow-up studies showed the persistence of most problems, combined with a reduction in DOL's resources to address them.[17] Data now shows that both compliance with, and enforcement of, the FLSA's overtime requirements "remain highly problematic."[18] Quite simply, allowing employers to substitute comp time for cash overtime will create additional enforcement needs that cannot possibly be addressed without substantial increases in the Wage and Hour Division's budget and resources, thus making employees even more powerless to secure their "choices."

Our experience at the EJC shows us that low-wage workers who insist upon being paid what they are owed face an overlooked, but very real, hurdle. An individual wage claim may amount to no more than $500 or $1000, or one or two days off. This money due and owing represents

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15 Walsh supra at 109.

16 Walsh supra at 106-110.

17 Walsh supra.

18 Walsh supra at 107, 109 ("precipitous decline" in compliance actions over time).

something substantial to the worker. It is highly unlikely, however, that she will find many advocates willing to bring her case, or that she will find a government agency stretched for resources very responsive to her single claim. Imposing a comp time system on top of this would provide even greater license to employers to feel that they could violate the Act with little or no consequences.

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

1. Exclusions for garment and construction industries, as well as other vulnerable, part-time, temporary, or seasonal employees;

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

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

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

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

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

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

8. prompt payment of cash to employees upon request;

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

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

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

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

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

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

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

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

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

18. establishing a sunset provision.[19]

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

But flexibility from the perspective of workers is not simply the choice between money and time. Instead, it involves more fundamental changes in the structure of work that will enable

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[19] See Walsh, supra n.256.

workers to meet their commitments outside of the workplace. Flexibility is not, as I have discussed above, a substitute for additional pay, but rather, a complementary measure.

As Lonnie Golden has stated in his recent article, "The Time Bandit: What U.S. workers surrender to get greater flexibility in work schedules:"[20]

> A major first step toward creating a more family-friendly workplace would be to foster more flexibility and less volatility in the timing of work hours. Today's time-crunched families would benefit greatly from more work-hour flexibility (the ability of employees to adjust the length or timing of their work week), and less work-schedule volatility (the degree to which the length or schedule of work hours varies unpredictably at the employer's discretion). These changes will require a fundamental restructuring of workplaces, managerial practices, and labor markets in order to allow the 21st century workers to better balance the competing demands on their time.

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

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[20] Washington, D.C., Economic Policy Institute (Issue Brief), at 1 (2000).

According to Golden, current access to flexible work schedules among full-time workers is more likely to occur 1) among those who work no less than 50 hours per week rather than those who work the standard 40 hours, and 2) in conjunction with more scheduling volatility. [21] Indeed, Golden concludes that in the absence of "fundamental changes in the way the number and timing of work hours are determined in workplaces," substituting comp time for overtime pay "would be more apt to increase rather than reduce the average overtime for affected workers and overemployment of the already most-overburdened workers."[22]

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

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21 Golden, supra at 2-3.

22 Golden, supra at 4.

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

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

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

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

Salary Basis Test

The success of the overtime premium in discouraging excessive hours has also created incentives for employers to evade those requirements. One way is for employers to claim that their employees are covered by the so-called "white collar" exemptions for professional, executive, or administrative employees,[23] since exempt employees may be paid a fixed salary regardless of the number of hours worked. Congress clearly intended very limited use of these exemptions and empowered the Department of Labor to formulate regulations [24] to protect employees from misclassifications that would deny them the right to overtime.

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

This enforcement scheme worked well for nearly four decades, in large part because the salary level test alone automatically placed a high percentage of the workforce outside the reach of the exemptions, that is, outside of the Act's overtime requirements. However, since 1975, this regulatory scheme has been crippled. Since that date, the government has failed to adjust the salary

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[23] Section 13(a)(1) of the FLSA, 29 U.S.C. § 213(a)(1), sets forth the exemption for employees employed "in a bona fide executive, administrative, or professional capacity."

[24] The Department of Labor has promulgated regulations at 29 C.F.R. Part 541.

levels for inflation so that today, they are close to or below minimum wage. In the GAO's words, these tests have been "effectively eliminated." Salary levels must be raised account for inflation and to more accurately capture the realities of the modern workplace. This would mean that more workers would automatically be covered by the FLSA's overtime protections; and more workers would be protected under the long version of the duties test.

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

Bonus test

Current law requires employers to include "non-discretionary" performance bonuses in the "regular rate of pay" for purposes of calculating overtime.[25] A number of proposed amendments to the FLSA would eliminate this requirement, allowing the employer to pay overtime based on a

[25] 29 U.S.C. § 207(e); see 29 C.F.R. §§ 778.208 - 778.215.

regular rate that does not include bonus payments, thereby reducing overtime compensation to workers.

These are significant sums of money to many workers, as I've discussed. These workers depend on the 40-hour work week and overtime payments to maintain their standard of living and still have time to care for their families. The last thing they need right now is a Congressionally-mandated pay cut. The ill effects of this amendment are much more insidious and potentially far damaging than this. If employers could exclude bonus payments from overtime pay, they could easily design their compensation systems to avoid paying any premium for overtime work, thereby removing disincentives to work employees over 40 hours per week.[26]

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

Second, proponents claim that current law makes it difficult for employers to give bonuses to salaried employees that are equal to those given hourly employees who work overtime. While this might be true, what is not explained is how this result could possibly adversely affect productivity for salaried workers. To the contrary, productivity would seem to be enhanced by awarding

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[26] *See Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 425-26 (1945) (allowing exclusion of bonus plans from overtime would "nullify[] the purposes of the Act.").

additional pay to those employees who work more hours. At any rate, this completely speculative effect hardly justifies an amendment that would effectively gut the 40-hour week and slash pay for non-salaried workers who work overtime.

Conclusion

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



[The policy paper, "Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation," may be accessed at the following Internet address:]

*http://www.uky.edu/Centers/iwin/LWPolicyFinal.pdf*

[The policy paper, "Improving Work-Life Fit in Hourly Jobs: An Underutilized Cost-Cutting Strategy in a Globalized World," may be accessed at the following Internet address:]

*http://www.worklifelaw.org/pubs/ImprovingWork-LifeFit.pdf*

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[Additional submission from Mr. McDonald follows:]

*August 9, 2011.*

Chairman JOHN KLINE,
*Education & the Workforce Committee, U.S. House of Representatives, Washington, D.C. 20515.*

DEAR MR. CHAIRMAN: Additional Information for the Record re: July 14 Hearing, "The Fair Labor Standards Act: Is It Meeting the Needs of the Twenty-First Century Workplace?"

I am writing to provide additional information to the Committee with respect to your question about the difficulty in providing flexible work options to today's workforce. I ask that this be added to the hearing record.

The IBM Corporation is committed to creating a supportive and flexible work environment for its employees. Giving employees more flexibility and control over when and where they do their work is an important means by which they achieve greater work/life integration and enhanced productivity. This is done in the context of a pay-for-performance work environment.

As I noted in my testimony, we believe that work is something one does—not a place one goes. However, the universe of IBM's flexible work options is more widely available to exempt employees than non-exempt employees in the U.S. IBM's policy is shaped by several outdated and unclear Fair Labor Standards Act (FLSA) provisions that date back to the 1938 passage of the law.

These and other FLSA provisions have not been updated to reflect our 21st century economy. They were enacted prior to the prevalence of compressed or flexible work weeks, reduced work schedules, job sharing, mobile/remote working, part-time work, etc. They also predate computers, e-mail, Internet, voicemail and smart phones!

One example relates to the administrative requirement to track and account for all time worked by non-exempt workers, despite the fact that the very term "work" has never been defined. In an environment in which nearly half of all U.S.-based IBM employees work remotely, tracking and verifying all time worked by well-paid, highly skilled non-exempt employees is challenging.

The legal risks and liabilities resulting from law suits and claims of alleged non-payment for time worked—regardless of whether or not management was knowledgeable of or had authorized the time worked—add an even greater disincentive for employers. Instead of running the risk of expensive litigation, employers often, but reluctantly, elect to limit the flexibility given to employees as to when and where they work.

As an employer, it is far easier in practice to offer—without the threat of litigation—flexible work options to exempt workers in our country. However, if additional clarity were added to the FLSA addressing which activities are compensable and which ones are not; if the duties of well-paid and well-educated computer employees were modernized in the statute; and if the exemption status of well-paid, commissioned salespeople were expanded to include more inside salespeople, more U.S. workers could enjoy a greater range of flexible work options. In turn, these workers could better balance their personal and professional needs. With these changes, we can turn a lose-lose situation into a win-win situation for employees and employers.

Sincerely,

J. RANDALL MACDONALD,
*Senior Vice President, Human Resources.*

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[Whereupon, at 11:30 a.m., the subcommittee was adjourned.]