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COMP TIME BILLS OFF TARGET

Existing labor law already allows the flexibility that employers say they want for their workers

by Lonnie Golden

The Fair Labor Standards Act of 1938 is the principal federal law that regulates work hours and limits the expansion of the work week. By requiring employers to pay a 50% wage premium for work beyond 40 hours in a week, the act successfully made a 40-hour work week the norm, both legally and culturally. It is, in fact, the original and maybe the most important "family-friendly" law enacted by the federal government, since it established the principle that employees should have a normal work week short enough to leave ample time for leisure, rest, and family.

Yet employer organizations, which generally opposed enactment of the FLSA and have sought to limit or weaken it for more than 60 years, now allege that the law itself is somehow an impediment to family-friendly work schedules. Since 1995, legislation has been introduced in the U.S. Congress to "modernize" the FLSA by changing the standard work week, overtime pay rules, and classifications of exemptions, on the presumption that the FLSA has become "outdated" (Finegold 1998; Abbott 1999; Wilson 2001; Bird 2000). In particular, bills have been introduced (S. 317, the Working Families Flexibility Act, and H.R. 1119, the Family Time Flexibility Act) that would legalize the substitution of compensatory time off for overtime pay in the private sector. The Senate bill also proposes establishing an 80-hour standard over a two-week work period.

If the true aim is to benefit working families, such legislation is inadequate, poorly targeted, and likely to prove counterproductive. Options already exist within the time-honored FLSA that permit employees the kind of flexibility in schedules they increasingly need—flextime, other time-banking schemes such as the

compressed work week, and the use of comp time within the week—without having to first put in long, overtime hours. Truly family-friendly amendments to the FLSA would bring more workers under its protection, reduce hours of work, expand minimum paid-leave times, and limit if not ban mandatory overtime.

Reducing the daily, weekly, and annual hours of those workers who prefer shorter working times should be the focus of public policy, including FLSA reform. But legalizing compensatory time in lieu of pay is more likely to heighten the incidence and severity of overemployment, for three reasons. First, such a system intensifies the economic incentives for employers to lengthen the number of overtime hours scheduled per week (Golden 1997, 1998). By paying no cash at all for employees' overtime work, and being legally permitted to deny use of comp time for a year or more, employers will lower the marginal cost of scheduling overtime. Cheapening overtime work guarantees that there will be more demanded—to the detriment of those workers agreeing to the substitution of comp time for pay. Employers would effectively receive an interest-free loan from their employees, while workers who gave up premium pay would get shortchanged by devalued banked comp time (Leibig 2002). Second, if some fraction (one-third or more) of the employees' banked comp time hours earned are either unused or unusable, the employees are likely to wind up working longer annual hours than they would have without a comp time program. Third, workers' schedules will become more volatile and less predictable as they work more overtime without gaining additional control over their time off.

The problems of overemployment and inflexible hours in America

The continuing rise of family work hours and dual-income households (Mishel, Bernstein, and Boushey 2003) intensifies the need for more family-friendly work schedules. Unfortunately, however, the spread of flexible work schedules and voluntary work-at-home arrangements has recently stalled (Appelbaum and Golden 2002). And increasingly, the work day is spilling over into evenings and weekends (Hamermesh 2000). Much of this is uncompensated or unclaimed overtime work (Employment Law Alliance 2002).

A small but growing proportion of workers in the U.S. consistently expresses in polls a need for more time for their personal and family needs, that is, less time at work. Estimates of the rate of overemployment (i.e., working longer hours than the employee desires) in the U.S. labor force are scarce and imprecise, but an upward trend is discernable from snapshots provided by periodic surveys asking people if they are willing to reduce proportionately both their work hours and income. The rate of overemployment appears to have risen from the levels of 6-9% observed in the 1980s (Shank 1986; Lang and Kahn 2001). A Work-in-America Institute (2002) poll found that as many as 22% of nonunion (16% of union) workers would accept 90% of their current pay for 10% fewer hours. The most credible indicator of change comes from the federal government's General Social Survey, which found that the percentage preferring fewer hours, even though earning less money, rose from 5.7% in the 1988-91 period to 10.3% in 1998. All of the estimates cited above might be exaggerations: when push comes to shove, an expressed preference for reduced hours might not be acted upon once the opportunity arrives, when the reality of a reduction in income sinks in. But despite the elusiveness in measurement, the salient point is that a significant share of workers lacks the flexibility to shorten its work hours.

The reasons these workers increasingly feel overworked no doubt include the fact that Americans, on average, are working longer hours both as individuals and, especially, as families. Total weeks worked annually by two-income, married-couples have increased from 78 in 1979 to 98 in 1999. On average, wives in prime-age, married-couple families with children worked almost 400 hours more per year in 2000 than they did in 1979. One contributor to these longer hours is the increasing number of workers who are excluded from the FLSA's overtime protections. The share of the workforce exempt from the overtime provisions of the FLSA has risen from about 32% in 1978 to 40% in the late 1990s (Hamermesh 2000). According to the Department of Labor, 74 million workers were covered by the FLSA's overtime provisions in the year 2000, leaving about 50 million uncovered and unprotected. Only 20% of covered workers exceed 40 hours a week, while 44% of exempt workers work more than 40 hours a week (U.S. GAO 1999). As employers succeed in exempting more and more of their employees, average work hours and the resulting time pressures on workers and their families can be expected to increase even further. Such exemptions promise only to widen under the Department of Labor's recent recommendations to change the longstanding "part 541" regulations, which will make it easier for employers to exempt as administrative, executive, or professional various employees currently covered by FLSA overtime requirements.

In many industries, including transportation, agriculture, communications, and mining, more than a quarter of all workers work more than 40 hours a week, and they generally work very long hours. In 10 industries, the average work hours are greater than 40 hours a week, even accounting for part-time workers. In all industries, the workers who do work overtime tend to work excessive amounts, averaging more than 11 hours of overtime a week. In effect those workers, about 20% of the workforce, work six-and-a-half days a week, leaving little free time for themselves or their families.

When these long hours of work are added to the problems of longer and longer commutes to and from work, the time squeeze becomes even tighter. From 1990 to 2000, the average commute time to and from work increased more than 13% and now exceeds 50 minutes a day.

The most extreme case of overemployment is that of working mandatory (forced, compulsory) overtime. A significant number of U.S. workers cannot refuse overtime work, often required with little or no advance notice, without facing some sort of reprisal, such as disciplinary action, demotion, or even discharge. Estimates of its incidence are wide-ranging and sensitive to survey wording. The best available recent estimate is that about 18% of the workforce performs involuntary overtime work, since a third of the 60% of overtime workers in a representative survey reported being compelled by their supervisor to work more overtime than they preferred (Cornell University Institute of Workplace Studies 1999). Workers employed in transportation and emergency health services face more employer pressure than others. Another recent survey found that 45% of workers reported having to work overtime on little or no notice (Heldrich Center for Workforce Development 1999). In the late 1970s, about 16% of workers reported that overtime was mainly up to their employer and that they would suffer a penalty if they refused it. Involuntary overtime was found to be relatively higher among men, blue-collar and non-union workers, and workers with medical or pension plans (Ehrenberg and Schumann 1984). Finally, a small but non-negligible 1.4% of the workforce is "involuntarily working full time," usually employed part-time but actually working a full-time work week. Such workers are more likely to be women or college students, and working in non-managerial, sales, service, or laborer occupations (Golden 2002).

Comp time is not designed to reduce hours worked

If employers want to reduce their employees' work hours, they can do so now, without changes in the law, by hiring more employees and spreading the work or by better managing the flow of work and getting greater productivity from their workers within a 40-hour week. But employers have instead been lengthening their employees' hours of work over the past decades, even while more and more women have entered the workforce and productivity has risen dramatically. This process has occurred in government, where various forms of comp time are permitted, just as surely as it has in the private sector. In fact, despite the comp time option, the average employee worked 40.3 hours per week in public administration in 2000, longer than the 39.1-hour average for all employment.

The motivating force for these longer hours is that it is generally cheaper to require overtime work—even with a 50% premium—than it is to add new employees. The FLSA overtime premium is calculated on the employee's wage alone, rather than on the total cost of compensation. Since social insurance taxes, health benefits, pension and 401(k) costs, and other compensation expenses are such a major part of total compensation today, the 50% wage premium is much less potent than it was in 1938.

The only sure way to reduce hours would be to set a legal maximum, such as 45 hours a week, and enforce it. Another, less-certain solution to long overtime hours would be to increase the overtime premium and reduce the number of exempt workers. Finally, giving workers the right to refuse to work unwanted overtime would reduce its prevalence and lead to better compensation of workers who choose to accept overtime work.

Comp time as provided in S. 317 and H.R. 1119 does none of these things; it would also do little or nothing to reduce overtime work and could actually increase it. The fundamental problem with comp time as provided for in the congressional bills is that it requires employees to work overtime first in order to have any chance of earning comp time off. Moreover, rather than discouraging employers from assigning overtime by penalizing it with the overtime premium, the bills encourage overtime work by making it free.

If comp time proposals became law—alternative scenarios

The best way to understand the ramifications of changing the FLSA is to compare likely scenarios under the current and proposed systems of overtime regulation in terms of their ultimate impact on both worker time off (in number of hours) and worker income. Suppose an employee works an extra two hours past his or her regular shift times both on Monday and Wednesday, thus putting in 44 hours per week, with *four hours of overtime*:

Extra hours under current FLSA

A conscientious employer could pay the overtime that week and then, to reward the employee for giving up personal time, could schedule future unpaid leave time off, perhaps during slow times. Result: total annual hours worked and income received could be the same as under the proposed bills, but employees

would not have to wait indefinitely to be paid for the overtime hours (when they do, they in effect are making an interest-free loan to the employer). This arrangement can be offered today, with no new rights, duties, paperwork, recordkeeping, causes of action, or oversight.

Alternatively, to avoid having to pay overtime at all, the employer could limit the employee's hours to 40 for the week by giving the employee the afternoon off on Friday.

Extra hours under congressionally proposed FLSA reforms

The worker sacrifices premium pay, and the net change in hours worked over the year is ambiguous—it could go down or up. Indeed, longer hours are more likely. Take the case of an employee who works the four hours of overtime on a weekly basis. On an annual basis (with two weeks paid vacation standard) the employee will work 200 hours of overtime (OT). This means that he or she will bank up to 300 hours of comp time (CT) over the course of the year. If at the end of the year, half of these hours (150) are actually taken in time off (TO) and the other half remain in the leave bank, the employee will have worked 50 more hours than if he or she were not assigned overtime at all. For an employee to actually work fewer hours *net*, the ratio TO_t / OT_t must be greater than 1.0, or, put differently, *TO* must be greater than 2/3 *CT.*

Any employee who has an unused comp time balance *in excess of one-third* of their total comp time credits actually *gains no additional time off* in the year under the proposed comp time program. Even without reliable, systematic records of comp time banks, anecdotal evidence suggests that, among public sector non-exempts or private sector exempts, average annual balances among employees often exceed one-third of the comp time allotment. In the public sector experience, it is precisely the large comp time accruals that lead so many government employers to push the use of comp time in order to avoid end-of-the-year cash payments for overtime.

Because overtime work would become both a deferred compensation program and an underfunded liability, the deterrent effect of the immediate premium payment for overtime would surely be weakened. Employers will become more apt to schedule overtime work generally, postponing new hiring. Moreover, those workers who opt for comp time are precisely the ones who would be the most attractive to place on overtime, in particular for short-term-minded employers who are looking to restrain costs and boost profits in the current quarter. Furthermore, without the current pay premium the supply inducement would be weakened, undercutting the willingness of many workers to put in overtime. Thus, allowing substitution of comp time for overtime threatens to make overtime work both longer and more involuntary.

Comp time for overtime pay in state and local government

Proponents of comp time in lieu of overtime pay argue that this practice is an employee benefit enjoyed by public sector employees but "denied" to private sector employees. Unfortunately, a lack of data, recordkeeping, documentation, or surveys regarding the use of and experience with comp time in state and local governments precludes verification of the alleged advantages. The purpose of the FLSA amendments in 1986 that permitted the public sector to substitute comp time for overtime pay (following the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority)* was largely to protect public sector budgets and, ultimately, taxpayers from large overtime pay obligations. Indeed, the court, in

AFSCME vs. State of Louisiana (1998) declared that the purpose of the comp time option was to alleviate the financial burden of owing overtime pay.

Public employers' large cash liabilities, when comp time credits build up for various state, county, or municipal employees, have led to pressures on employees to use or lose their comp time. Court decisions have swung back and forth regarding the legality of employers forcing employees to use accumulated comp time. In *Heaton v. Moore* (1994), a court struck down the Missouri Department of Corrections' policy compelling comp time use, deciding that the FLSA amendment implies that "time off must be consumable by the worker on the worker's terms," unless an employee's use of requested compensatory time would disrupt the employer's operations.

In *Collins v. Lobdell* (1999), however, a California court ruled that the FLSA did not prohibit a public employer, again for budgetary reasons, from requiring employees to use accrued comp time, even though the Spokane Valley firefighters did not want to use it. The right of employers to compel their employees to use their comp time accruals, even without the employees' approval, was solidified by the Supreme Court's reasoning in *Christensen* (originally, *Moreau*) *v. Harris County, Texas* (2000) (Barnes 2001). Sheriffs' deputies complained that they had been denied use of their accumulated compensatory time when they requested it, forced to use it when they did not request it, and suffered retaliation. As the deputies accumulated ever more comp time by being scheduled for overtime, the county feared the mounting fiscal obligation both to employees who worked overtime after reaching the statutory cap on compensatory time accrual and to those with sizable reserves of accrued time. The county adopted a policy requiring all employees who had accrued a large bank of comp time to schedule time off. Justice Clarence Thomas, writing for the majority, saw nothing in the FLSA that explicitly prohibits employers from scheduling and compelling the use of comp time.

Problems with exporting public sector comp time to the private sector

Neither the House nor the Senate bill provides any guarantee that the worker who chooses comp time will ever be able to take it. But the many differences between the private sector and public sector make comp time riskier for private sector employees. First, there is the real danger of losing comp time accruals in the event of a business failure. The U.S. Small Business Administration reports that even in the business boom year of 2000, 550,000 employer businesses closed, and more than 200,000 were business failures. Employees will have a hard time finding lawyers to bring suits against closed businesses; they will find it impossible to recover anything from failed businesses. Employees will also risk the loss of accrued comp time in the event of their employer's merger, fraud, or bankruptcy, particularly in the case of small and thinly capitalized enterprises.

Second, because enforcement of the FLSA is so sporadic, the relative absence of unions in the private sector leaves employees vulnerable to employer abuse. Fewer than 1,000 wage-and-hour inspectors are responsible for enforcing the FLSA and a score of other statutes in more than 7 million workplaces across the entire nation. To make matters worse, there is substantial non-compliance with the existing FLSA overtime rules and regulations. In 2001, the Department of Labor investigated 31,772 cases of alleged employer violations and ordered $134 million in back wages paid to 219,195 employees who had worked

uncompensated overtime (Bigler 2002). Violations are highest in sectors such as construction and nursing homes and residential facilities. The third factor making comp time riskier for private sector employees is the fact that private sector employers are not required by law to provide any paid leave for vacations or sick days. Nothing would prevent an employer from reducing or eliminating the paid leave it provides now and substituting comp time in its place. To earn paid leave, an employee could first be required to work overtime. At a Senate hearing in 1997, an employer testifying on behalf of the U.S. Chamber of Commerce admitted that he assigns overtime to employees on weekends and, if they refuse, forces them to use their vacation leave. Fourth, with no civil service protection, private employees will be unable to challenge employer denials of comp time use on grounds of "undue disruption," an employer defense that will be far more common in the private sector where work loads are more volatile. Fifth, private employers will inevitably be tempted to try to increase profits by implementing a comp time system. They will discriminate in the assignment of overtime, favoring employees who are willing to forego their right to premium pay. Public employers, by contrast, have no profit motive to game the system or pressure employees to accept comp time.

Existing comp time in the private sector

Some private sector organizations already make comp time available for some of their exempt staff. The arrangement is instituted largely as an employee benefit and reward for going above and beyond the understood, albeit informally defined, work week norm for a particular job. For example, an employer may have a policy that an employee required to return to the workplace or work offsite an extra day on the weekend may qualify for a future day off with pay, provided that a supervisor determines that such time worked was beyond the normal job function. As such, it is at the discretion of the employer to determine how many hours employees must work in a work week before they are eligible to earn comp time, whether to cap the total amount of comp time that an employee can accrue, and whether unused comp time will expire after some time limit (such as six months or a year). Notably, most such comp time plans do not permit use or cashout of comp time credits upon severing of the employment relationship or even transfer, so unused comp time is uncompensated. Indeed, South Carolina law actually prohibits cash payments to exempt employees for comp time earned, and this rule led to problems for one university implementing a comp time program. For employees who resigned having accrued compensatory time, supervisors had to delay filling vacancies until after comp time credits were used up. For terminated employees, unused comp time credits were not granted at all. Eventually, the university abandoned its formal comp time program *(Inside Clemson* 1997).

Conclusions

The overtime provisions of the FLSA were designed, it is widely agreed, to prevent the tendency toward overwork and to spread job opportunities by promoting an eight-hour day, five-day work week for a traditional household breadwinner. However, the disappearance of the breadwinner model, the rise of dual-

income households, more diverse preferences regarding work weeks, and crumbling boundaries between the workplace and other aspects of life suggest the need to re-evaluate the FLSA overtime regulations.

Creating a truly more family-friendly FLSA means pursuing reforms that will unambiguously promote a net reduction in worker hours, not just an employer-friendly shift in the timing of work with "family" and "flexibility" on the label. By this measure, the congressional comp time bills, S. 317 and H.R. 1119, are not "family friendly" and will not yield more flextime, flexible scheduling, paid time off, or worker control of work schedules, despite proponents' attempts to market them as such (Furtchgott-Roth 1998; Finegold 1998; Abbott 1999; Bird 2000). Critics have pointed out that the current bill's requirements and remedies are far too weak to provide employees any real protection from employer coercion, from being forced to take comp time in lieu of overtime pay, from discrimination in the allocation of overtime toward those who select the comp time option and away from those who prefer pay—and from preferential hiring of those applicants who prefer comp time over those who prefer overtime pay (Clark 1996; Golden 1997; Walsh 1999; Henke 1999; Linder 2002; Vance 2002; Conti 2002; Leibig 2002). Given recent court interpretations, the bills inadequately protect the right of employees to use the comp time they have earned when they need to, since employers are given the right to refuse comp time use if the employer deems it an "undue disruption" of business or operations.

The Senate's proposed legislation does create opportunities for employers to more closely match employee hours with the annual flow of work volume. This may be a worthy objective, but promoting a more unstable work week, which allows greater escape from overtime compensation, merely reinforces the cost incentive for employers to schedule overtime and further erodes the deterrent effect of overtime pay.

Finally, the FLSA comp time bills are not only too one-sided to deliver a more family-friendly work week or workplace, they are also poorly targeted. Working longer-than-standard hours is concentrated among white-collar workers (U.S. GAO 1999) and non-traditional shift workers, 72% of whom work at least 100 hours of overtime per year and 27% of whom work at least 300 hours (Circadian Learning 2002).

Without pilot programs and empirically gained knowledge of how well such a new system might work in terms of delivering shorter average hours to workers risking a comp time option, the current system is better left alone. A more comprehensive and effective way of delivering a truly more family-friendly FLSA would be to incorporate or adopt:

- a protected right to refuse assignment of overtime (see Golden and Jorgensen 2002), with a minimum advance notice time for requested overtime work;
- extension of the pay premium regulation to work day length, evening/night/weekend work, and annual hours (Hamermesh 2002);
- coverage extending to those currently exempted, such as certain managers and professionals (Jacobs and Gerson 1998; Schor 1994);
- annual hours limits for "salaried non-exempts";
- creative work-sharing and work-spreading practices (see Appelbaum et al. 2001);

- incentives for employers to offer and workers to accept various reduced-hours options (see Bailyn, Drago, and Kochan 2001);
- prorated benefits by hours worked and reduced bias toward longer hours per employee (Golden 1998; Jacobs and Gerson 1998);
- coverage of currently exempt vehicle drivers, covered at present only by Department of Transportation hours-of-service regulations that set a maximum of 60 hours per week (and that are widely considered to be commonly disregarded);
- rights to a shorter standard work week, such as 35 hours, for workers claiming younger dependents, with a daily overtime premium after seven hours.

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