

WORKING FAMILIES FLEXIBILITY ACT OF 2013

APRIL 30, 2013.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 1406]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 1406) to amend the Fair Labor Standards Act of 1938 to provide compensatory time for employees in the private sector, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Working Families Flexibility Act of 2013”.

**SEC. 2. COMPENSATORY TIME.**

Section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) is amended by adding at the end the following:

“(s) COMPENSATORY TIME OFF FOR PRIVATE EMPLOYEES.—

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

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

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

“(B) in the case of employees who are not represented by a labor organization that has been certified or recognized as the representative of such

employees under applicable law, an agreement arrived at between the employer and employee before the performance of the work and affirmed by a written or otherwise verifiable record maintained in accordance with section 11(c)—

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

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

No employee may receive or agree to receive compensatory time off under this subsection unless the employee has worked at least 1,000 hours for the employee’s employer during a period of continuous employment with the employer in the 12-month period before the date of agreement or receipt of compensatory time off.

“(3) HOUR LIMIT.—

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

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

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

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

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

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

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

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

“(5) TERMINATION OF EMPLOYMENT.—An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon the voluntary or involuntary termination of employment, be paid for the unused compensatory time in accordance with paragraph (6).

“(6) RATE OF COMPENSATION.—

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

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

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

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

“(7) USE OF TIME.—An employee—

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

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

“(8) DEFINITIONS.—For purposes of this subsection—

- “(A) the term ‘employee’ does not include an employee of a public agency; and  
 “(B) the terms ‘overtime compensation’ and ‘compensatory time’ shall have the meanings given such terms by subsection (o)(7).”.

**SEC. 3. REMEDIES.**

Section 16 of the Fair Labor Standards Act of 1938 (29 U.S.C. 216) is amended—

- (1) in subsection (b), by striking “(b) Any employer” and inserting “(b) Except as provided in subsection (f), any employer”; and  
 (2) by adding at the end the following:

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

**SEC. 4. NOTICE TO EMPLOYEES.**

Not later than 30 days after the date of enactment of this Act, the Secretary of Labor shall revise the materials the Secretary provides, under regulations published in section 516.4 of title 29, Code of Federal Regulations, to employers for purposes of a notice explaining the Fair Labor Standards Act of 1938 to employees so that such notice reflects the amendments made to such Act by this Act.

**SEC. 5. SUNSET.**

This Act and the amendments made by this Act shall expire 5 years after the date of enactment of this Act.

**H.R. 1406, WORKING FAMILIES FLEXIBILITY ACT OF 2013,  
 COMMITTEE REPORT**

**PURPOSE**

The purpose of H.R. 1406, the *Working Families Flexibility Act of 2013*, is to amend the *Fair Labor Standards Act of 1938* to provide compensatory time for employees in the private-sector.

**COMMITTEE ACTION**

**104TH CONGRESS**

The committee’s consideration of policies to allow compensatory time for private-sector employees began during the 104th Congress. As part of a series of oversight hearings on the *Fair Labor Standards Act of 1938* (FLSA), the Subcommittee on Workforce Protections held a hearing on June 8, 1995 on amending the FLSA to provide private-sector employers the option of allowing their employees to voluntarily choose to take compensatory time off in lieu of overtime pay. The following individuals testified at the hearing: Ms. Arlyce Robinson, Administrative Support Coordinator, Computer Sciences Corporation, Falls Church, Virginia; Ms. Kathleen M. Fairall, Senior Human Resource Representative, Timken Company, Randolph County, North Carolina; Ms. Sandie Money Penny, Process Technician, Timken Company, Randolph County, North Carolina; Dr. M. Edith Rasell, Economist, Economic Policy Institute, Washington, D.C.; and Mr. Michael T. Leibig, Attorney-at-Law, Zwerdling, Paul, Leibig, Kahn, Thompson & Wolly, P.C., Fairfax, Virginia.

On November 1, 1995 the Subcommittee on Workforce Protections held a hearing on H.R. 2391, a bill introduced by Representative Cass Ballenger to amend the FLSA to provide compensatory time for private-sector employees. The following witnesses testified at the hearing: Mr. Pete Peterson, Senior Vice President of Per-

sonnel, Hewlett-Packard Company, Palo Alto, California; Ms. Debbie McKay, Administrative Specialist, PRC, Inc., McLean, Virginia; and Mr. Michael T. Leibig, Attorney-at-Law, Zwerdling, Paul, Leibig, Kahn, Thompson & Wolly, P.C., Fairfax, Virginia.

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

#### 105TH CONGRESS

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

On March 5, 1997 the Committee on Education and the Workforce discharged the Subcommittee on Workforce Protections from further consideration of the bill and favorably reported H.R. 1, as amended, by a roll call vote of 23 yeas and 17 nays. H.R. 1 was passed by the House, as amended, on March 19, 1997 but was not acted on by the Senate prior to the adjournment of the 105th Congress.

#### 106TH CONGRESS

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

## 107TH CONGRESS

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

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

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

## 108TH CONGRESS

On March 6, 2003 Representative Judy Biggert introduced H.R. 1119, the *Family Time Flexibility Act*, which was identical to H.R. 1 as passed by the House during the 105th Congress.

The Subcommittee on Workforce Protections held one hearing on the legislation on March 12, 2003. The following individuals testified at the hearing: Mr. Houston L. Williams, Chairman and CEO, PNS, Inc., San Jose, California, testifying on behalf of the U.S. Chamber of Commerce; Ms. Terri Martell, Electrician, Eastman Kodak Company, Wayland, New York; Ms. Ellen Bravo, National Director, Nine to Five: National Association of Working Women, Milwaukee, Wisconsin; and Mr. John A. Dantico, SPHR, CCP, Principal of Compensation/HR Consulting, The HR Group, Northbrook, Illinois, testifying on behalf of SHRM.

On April 3, 2003 the Subcommittee on Workforce Protections favorably reported H.R. 1119, without amendment, to the full committee by a roll call vote of 8 yeas and 6 nays. On April 9, 2003 the Committee on Education and the Workforce approved H.R. 1119, without amendment, and ordered the bill favorably reported to the House by a roll call vote of 27 yeas and 22 nays. However, the House did not act on H.R. 1119 prior to the adjournment of the 108th Congress.

## 110TH CONGRESS

On May 13, 2008 Representative Cathy McMorris Rodgers introduced H.R. 6025, the *Family-Friendly Workplace Act*, which was identical to H.R. 1 as passed by the House during the 105th Congress. The bill was referred to the Committee on Education and Labor; however, no action was taken on the legislation.

## 111TH CONGRESS

On February 10, 2009 Representative Cathy McMorris Rodgers reintroduced the *Family-Friendly Workplace Act*, H.R. 933, which was identical to H.R. 1 as passed by the House during the 105th Congress. The bill was referred to the Subcommittee on Workforce Protections; however, no action was taken on the legislation.

## 113TH CONGRESS

On April 9, 2013 Representative Martha Roby introduced H.R. 1406, the *Working Families Flexibility Act of 2013*, which was identical to H.R. 1 as passed by the House during the 105th Congress. The bill was referred to the Committee on Education and the Workforce.

On April 11, 2013 the Subcommittee on Workforce Protections held a hearing on H.R. 1406. The following individuals testified at the hearing: Mr. Andy Brantley, President and Chief Executive Officer, CUPA–HR, Knoxville, Tennessee; Ms. Karen DeLoach, Montgomery, Alabama; Ms. Juanita Phillips, Director of Human Resources, Intuitive Research and Technology Corporation, Huntsville, Alabama, testifying on behalf of SHRM; and Ms. Judith Lichtman, Senior Advisor, National Partnership for Women & Families, Washington, D.C.

On April 17, 2013 the Committee on Education and the Workforce considered H.R. 1406. Representative Roby offered an amendment in the nature of a substitute, which made technical changes to the legislation. The committee favorably reported H.R. 1406, as amended, to the House of Representatives by a roll call vote of 23 yeas and 14 nays.

## SUMMARY

H.R. 1406 would give private-sector employers and employees an option under the FLSA that federal, state, and local governments have had for many years. H.R. 1406 would not affect the compensatory time provisions already applicable to employees of federal, state, and local governments. The bill would permit private-sector employers to offer their employees the option of selecting compensatory time off in lieu of receiving cash overtime wages. An employee would be able to choose, based upon an agreement with his or her employer, to have his or her overtime compensated with paid time off.

The bill would not change the 40-hour workweek to affect the manner in which overtime is calculated. “Non-exempt” employees who work more than 40 hours within a seven-day period would continue to receive overtime compensation at a rate not less than one and one-half times an employee’s regular rate of pay. If an employer and an employee agree on compensatory time, then the paid

time off would be granted at the rate of not less than one and one-half hours for each hour of overtime worked.

H.R. 1406 would provide new employee protections, in addition to those contained in current law, to prevent the coercive use of compensatory time. The bill requires any arrangement for the use of compensatory time to be an express mutual agreement between the employer and the employee. In the case of employees represented by a recognized or certified labor organization, the agreement must be between the employer and the labor organization. In other cases, the agreement is with an individual employee, must be entered into knowingly and voluntarily by the employee, and may not be a condition of employment.

To be eligible to choose compensatory time, an employee must have worked at least 1,000 hours in a period of continuous employment with the employer during the 12-month period preceding the date the employee agrees to receive or receives compensatory time.

An agreement for the use of compensatory time between an individual employee and his or her employer must be affirmed by a written or otherwise verifiable statement. The agreement must be made, kept, and preserved in accordance with the recordkeeping requirements under Section 11(c) of the *Fair Labor Standards Act*.<sup>1</sup>

An employee could accrue up to 160 hours of compensatory time each year. Any accrued compensatory time that has not been used by the employee by the end of each year (or an alternative 12-month period as designated by the employer) must be paid for by the employer to the employee in the form of monetary compensation. Likewise, any unused accrued compensatory time would be cashed out at the end of an employee's employment with the employer, whether voluntary or involuntary. At any time, an employee may also submit a written request to receive monetary compensation for accrued compensatory time. In all cases, the compensatory time would be cashed out at either the regular rate received by the employee when the compensatory time was earned or at the final regular rate received by the employee, whichever is higher.

An employee may submit a written request to withdraw from a compensatory time agreement with his or her employer at any time. Within 30 days of receiving such a request, the employer shall provide the employee with monetary compensation for the accrued compensatory time.

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

Any accrued compensatory time would be considered to be the same as wages owed to the employee. For the purposes of enforcement, as with any other violation of the FLSA, all of the remedies under the law would apply. In addition, any employer who directly or indirectly intimidates, threatens, or coerces any employee into selecting compensatory time off in lieu of cash compensation, or who forces an employee to use accrued compensatory time would

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<sup>1</sup> 29 U.S.C. § 211(c).

be liable to the employee for the cash value of the accrued compensatory time, plus an additional equal amount as liquidated damages, reduced by the amount of compensatory time already used by the employee.

Finally, H.R. 1406 contains a sunset provision whereby the legislation would cease to exist five years after the date of its enactment. This will allow Congress to review the use of compensatory time by private-sector employers and employees and, if need be, to make adjustments in the legislation authorizing its use.

## COMMITTEE VIEWS

### BACKGROUND

The FLSA was enacted in 1938.<sup>2</sup> Among its provisions is the requirement that hours of work by “non-exempt employees” beyond 40 hours in a seven-day period must be compensated at a rate of one and one-half times the employee’s regular rate of pay.<sup>3</sup> Certain exceptions to the “40-hour workweek” are permitted, under Sections 7 and 13 of the FLSA,<sup>4</sup> for a variety of specific types and places of employment whose circumstances have led Congress, over the years, to enact specific provisions regarding maximum hours of work for those types of employment. In addition, the “overtime pay” requirement does not apply to employees who are exempt as “executive, administrative, or professional” employees.<sup>5</sup>

Under the FLSA’s overtime requirements, overtime pay for employees in the private-sector must be in the form of cash wages paid to the employee in his or her next paycheck. This is different than overtime requirements for employees in the public-sector. Section 7(o) of the FLSA, added to the law in 1985, provides that state and local government employers may offer compensatory time at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required, subject to regulatory requirements administered by the Department of Labor.<sup>6</sup> While federal government employees may also earn compensatory time in lieu of overtime pay, their use of compensatory time is governed by the *Federal Employees Flexible and Compressed Work Schedules Act of 1978* and subject to regulatory requirements administered by the Office of Personnel Management.<sup>7</sup>

This difference in treatment between the private- and public-sectors occurs because the public-sector compensatory time provisions were added nearly 50 years after the FLSA was originally written. As a result, the public-sector compensatory time provisions recognized the workplace and workforce had changed greatly since 1938. Specifically, in adding Section 7(o) to the FLSA in 1985, Congress recognized that changes in the workplace and workforce led many state and local governments and their employees, prior to their being covered by the FLSA,<sup>8</sup> to mutually agree upon forms of com-

<sup>2</sup> 29 U.S.C. §§ 201–219.

<sup>3</sup> 29 U.S.C. § 207.

<sup>4</sup> 29 U.S.C. §§ 207, 213.

<sup>5</sup> 29 U.S.C. § 213.

<sup>6</sup> 29 U.S.C. § 207(o); 29 C.F.R. §§ 553.20–553.28.

<sup>7</sup> See 5 U.S.C. 5543, 6123; 5 C.F.R. 550.114, 551.531. Of particular note, federal government employees may generally earn one hour of compensatory time for each hour of overtime worked. See *id.* 5543.

<sup>8</sup> In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Supreme Court held that state and local government employees were covered by the FLSA.



pensatory time. As the Senate Labor Committee explained regarding the inclusion of compensatory time for state and local governments in the 1985 amendments to the FLSA:

The Committee also is cognizant that many state and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements—frequently the result of collective bargaining—reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, we wish to accommodate such arrangements.<sup>9</sup>

The committee is certain that compensatory time can provide “mutually satisfactory solutions” in the private-sector as well. Since the 104th Congress, the committee has heard compelling testimony from employees in the private-sector covered by the overtime protections of the FLSA who believe a change in the law to allow compensatory time would be beneficial.

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

I am here this morning to share with you my feelings about the impact of a law that was created over 50 years ago to protect many of us in the workplace, the Fair Labor Standards Act. I know that under this law, as a non-exempt employee I am eligible for overtime if I work more than 40 hours in a work week. And, while I never turned down an opportunity to earn more money, there have been times when I would have gladly given up the additional pay to enjoy flexibility in planning my work schedule, the same flexibility that my exempt colleagues have had for some time. Let me give you an example.

In a few months, as all of you know, the weather around Washington, DC will become much colder. We are likely to see some snow and ice. And if we have a winter like the one we had two years ago, we will likely see a great deal of snow and ice. If it snows on a Monday or Tuesday—at the beginning of my workweek—and I can’t get to work on one of those days, I know that I can make up the hours that I missed by working extra hours later in that same week—say on Thursday or Friday. However, if it snows at the end of my workweek, we have a different issue. Although my company would like to allow me to make up the work during the following workweek, the fact is that they can’t allow it without incurring additional costs. You see, if I only worked 4 eight hour days—or 32 hours—the first week, I would have to work 48 hours the following week in order to have a full 80 hour paycheck for the two week period. But right now under the Fair Labor Standards Act, each one of the 8 hours worked over 40 in the second week

<sup>9</sup>Report on S. 1570, Committee on Labor and Human Resources, U.S. Senate, 99th Congress, First Session, Senate Report No. 99-159 at 8.

would have to be paid on an overtime basis. That's just too expensive for my company, given the number of non-exempt employees that we have. So since I can't make up the time in the second week, I have to take vacation leave which keeps my paycheck whole but gives me less vacation to use later—when I would like to use it. My only other alternative is to take leave without pay, which keeps my vacation intact, but results in my losing money in my paycheck. And I do need my paycheck!!

. . . For the first 20 years of my career, I worked in the public-sector as a secretary and as an administrative assistant in the DC public school system and for the DC Office of Personnel. When I worked for these agencies, I was able to earn and use compensatory time. I can't earn that now . . . This lack of flexibility is especially difficult for parents of young children, both mothers and fathers, and, particularly, for single parents. Doctor appointments and school conferences can often only be scheduled during work hours. For non-exempt employees, this often means having to take sick leave or vacation leave to have a few hours off to take care of family responsibilities.<sup>10</sup>

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

Compensatory time off for a working mother like myself would be very helpful. If I had to leave work because of a sick child, wanted to attend a teachers conference, needed to take my child to the dentist or just wanted time off to be with my family, I would have the option without it affecting my pay.

Today I can only use compensatory time in the week it occurs, but as most of you know, life doesn't seem to work that way. If I could bank my overtime, I wouldn't have to worry about missing work if my child gets sick on Monday or Tuesday. I also would only be postponing valuable time off with my family when I have a busy work week, because I could always take the time off at a later date.<sup>11</sup>

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

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

<sup>10</sup>Hearings on the Fair Labor Standards Act before the Subcommittee on Workforce Protections, Committee on Economic and Educational Opportunities, U.S. House of Representatives, 104th Congress, First Session, Serial No. 104-46 at 180-81.

<sup>11</sup>*Id.* at 186.

show up—supposed to show up at 9 a.m. and then not show up until 3 or 4 in the afternoon . . . .  
 . . . [W]hat I am recommending is simple . . . [H]ave the FLSA amended by giving non-exempt and exempt employees the option of time and a half pay or time and a half of equal value off.<sup>12</sup>

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

This amendment is a win-win for working families and employers. . . . Everyone I've talked to, without exception, would like the choice of getting overtime or comp time, and almost everyone I've asked preferred comp time rather than overtime. . . .

There are a lot of ways to make money in this country and lots of ways to spend it, but there's only one way to spend time with yourself, family or friends, and that's to have the time to spend.

In this country of choice, can the working families have a choice? Some already do. Federal employees have had the choice to save comp time since 1978. State and local employees can save it too. Does our government value the private working families in this country enough to give us the same choice?<sup>13</sup>

Ms. Linda M. Smith, a medical staff credentialing coordinator and secretary at the Bascom Palmer Eye Institute in Miami, Florida, expressed “wholehearted support” for the development of a program that would allow the option of compensatory time:

With the implementation of the banked comp time program, I could use my overtime hours to create time for pregnancy leave for a second child, furthering my education, taking care of a debilitated parent, or, closest to my heart, creating special days with my daughter. A goal of mine is to obtain my degree. My employer allows me to take one class during working hours, without pay. With accrued comp time, I could take the class during working hours, with pay. Accrued comp time would also allow me to take time off for doctors' appointments, teachers conferences, or to care for a sick child without having to use accrued sick time. In this way, sick time could be saved for catastrophic or long-term illnesses.<sup>14</sup>

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

<sup>12</sup>*Id.* at 416–17.

<sup>13</sup>Hearing on H.R. 1, Working Families Flexibility Act, before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 105th Congress, First Session, Serial No. 105–1 at 17–18.

<sup>14</sup>*Id.* at 22.

This schedule as an hourly employee provides me with a lot of overtime pay. This pay is important to me. However, the time with my family is more important. If I had a choice there are times when I would prefer to take comp time in lieu of overtime. What makes this idea appealing is that I would have a choice with the legislation you are considering.

Just recently, my son was ill and I had to stay at home with him. I took a day of vacation which I would have preferred to use for vacation! But I did not want to take unpaid leave. . . . If I had the choice, I would have used comp time in lieu of overtime for that day off from work. Besides, I would have only had to use about five and one-half hours of comp time to cover that eight hour day.<sup>15</sup>

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

Another example of needing flexibility with overtime pay and how it is paid is when the children are sick. I remember when my 10-year old Eric was born, I used up eleven of my twenty vacation days to stay home with him or take him to the doctor just that first year. Being a first time mom and needing to nurture him while he was sick was very important to him and to me. As a working mother, it is very stressful to be at work when your children are in someone else's care. In 1993, I could have used that [comp] time during those emergencies.

I have heard from co-workers who feel strongly about the need for the more flexible schedules—the kind that comp time would allow. These are employees who are caregivers of their aging parents. One colleague in particular told me of her need to balance work and family. For her, comp time would mean allowing more flexibility in spending more time with her ill parent. The ability to save overtime as comp time and use it in times of need is crucial when crisis occurs but also to cope with day-to-day challenges. Also, someone who has used up annual vacation hours may have a need for extra time later in the year. Banking comp time could offer options instead of requiring employees to choose between working and taking time off without pay to address family needs.<sup>16</sup>

Ironically, employees classified as exempt under the FLSA are not so restricted by law and often are permitted by their employers to have more flexibility in their schedules than non-exempt employees. But, the law has denied non-exempt employees this much-needed flexibility. As Ms. Robinson summarized:

While the law was intended to protect us—and maybe 50 years ago it did—in today's business world it has had the effect of creating the illusion of two classes of workers.

<sup>15</sup> *Id.* at 10–11.

<sup>16</sup> Hearing on H.R. 1119, Family Time Flexibility Act, before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, Serial No. 108–7 at 50.

The term non-exempt is often misinterpreted to mean “less than professional.”<sup>17</sup>

Recently, Ms. Karen DeLoach, a bookkeeper from Montgomery, Alabama, shared her personal insight into the importance of allowing employees to choose between compensatory time and cash wages:

You may wonder why compensatory time could matter to an empty-nester who seems to be in pretty good health. Why would I need more time off from work than the paid sick and vacation time that my employer agreed to allow annually? Well, I’ve learned in the last several years that there can still be many unforeseen needs in addition to any planned break from the routine.

In the last three years, my mother, my brother, my father-in-law and one of my sons-in-law have all passed away, some at relatively early ages. I am not getting any younger, and neither is the rest of the world so yes, I say again, time is precious to me. I would greatly appreciate the option at work to *choose* between being compensated in dollars or days.<sup>18</sup>

There is ample support for concluding that Ms. Robinson, Ms. Money Penny, Ms. McKay, Mr. Faust, Ms. Smith, Ms. Korzendorfer, Ms. Martell, and Ms. DeLoach are not alone in their desire for the increased flexibility that would be provided by the *Working Families Flexibility Act of 2013*. As Ms. Juanita Phillips, Director of Human Resources at Intuitive Research and Technology Corporation in Huntsville, Alabama, testified before the subcommittee:

The increased diversity and complexity within the American workforce—combined with global competition in a 24/7 economy—is driving the need for more workplace flexibility. C-suite executives, for example, say the biggest threat to their organizations’ success is attracting and retaining top talent. Human resource professionals believe the best way to attract and retain the best people is to provide workplace flexibility. 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.<sup>19</sup>

As Ms. DeLoach put it most simply to the subcommittee:

Right now, committee members, you have the ability to empower families across the nation with the freedom of choice. You could afford me the freedom to choose to use my overtime as leave time, while my coworker can still choose overtime pay, if she likes.<sup>20</sup>

<sup>17</sup>Hearings on the Fair Labor Standards Act before the Subcommittee on Workforce Protections, Committee on Economic and Educational Opportunities, U.S. House of Representatives, 104th Congress, First Session, Serial No. 104-46 at 181.

<sup>18</sup>Hearing on H.R. 1406, Working Families Flexibility Act of 2013, before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 113th Congress, First Session, April 11, 2013 (to be published) (emphasis in original).

<sup>19</sup>Hearing on H.R. 1406, Working Families Flexibility Act of 2013, before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 113th Congress, First Session, April 11, 2013 (to be published).

<sup>20</sup>*Id.*

## H.R. 1406, WORKING FAMILIES FLEXIBILITY ACT OF 2013

H.R. 1406 amends the FLSA to permit employers in the private-sector to offer employees the voluntary option to receive overtime pay in the form of compensatory time off in lieu of cash wages. The legislation does not change the employer's obligation to pay overtime at the rate of one and one-half times the employee's regular rate of pay for any hours worked over 40 in a seven-day period. The bill simply allows overtime compensation to be given in the form of paid time off, at the rate of one and one-half hours of compensatory time for each hour of overtime worked, and only if the employee and employer agree on that form of overtime compensation. As is already the case when compensatory time is used in the public-sector, the employee would be paid at his or her regular hourly rate of pay when the compensatory time is used.

H.R. 1406 would not alter current use of compensatory time in the public-sector. Rather, the legislation seeks to extend the option of compensatory time in lieu of overtime compensation to private-sector employees (the same option federal, state, and local government employees have had for many years), which private-sector employees overwhelmingly support. The legislation includes numerous protections to ensure employees' choice and use of compensatory time are truly voluntary. Compensatory time, as provided in H.R. 1406, is not a mandate on employers or employees. H.R. 1406 simply gives private-sector employees and employers the opportunity to agree to this arrangement, an opportunity currently unavailable under the FLSA.

## COMPENSATORY TIME AGREEMENT

Under H.R. 1406, an employer and his or her employee must reach an express mutual agreement that overtime compensation will be in the form of compensatory time. If either the employee or the employer does not so agree, then the overtime compensation must be in the form of cash wages.

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

The bill allows two types of employer-employee agreements on compensatory time. Where the employee is represented by a recognized or certified labor organization, the agreement must be in the collective bargaining agreement between the employer and the recognized or certified labor organization. By referring to a labor organization that has been recognized or certified under applicable law, H.R. 1406 includes any law providing for recognition or certification of labor organizations representing private-sector workers in collective bargaining, including, at the federal level, the *National Labor Relations Act* and the *Railway Labor Act*.

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

The bill also requires the agreement on compensatory time between the employer and the individual employee be affirmed in a written or otherwise verifiable statement. The latter is intended to allow computerized and other similar payroll systems to include this information, so long as the employee's agreement to take the overtime in the form of compensatory time is verifiable. The committee does not intend that the agreement could be purely oral with no contemporaneous record kept. To further ensure compensatory time agreements are authentic, H.R. 1406 provides, pursuant to the general recordkeeping authority of the FLSA, the Secretary of Labor has authority to prescribe the information that the records of such agreements must include and the period of time the records should be maintained by the employer.<sup>21</sup>

An individual employee's voluntary agreement to choose compensatory time in lieu of cash overtime pay is further protected by provisions in the bill allowing an employee to withdraw from such an agreement at anytime. Thus, an employee who agrees all or a portion of the overtime hours he or she works will be compensated in this form may at any point withdraw from that arrangement, in which case any subsequent hours of overtime worked by the employee must be compensated in the form of cash wages.

As is the case with public-sector compensatory time, H.R. 1406 does not require the same agreement be entered with every employee, or that the employer agree to offer compensatory time to all employees.<sup>22</sup> Opponents of compensatory time have claimed this allows an employer to unfairly single out employees and force them to take compensatory time in lieu of cash wages against the employee's wishes. However, the bill's express prohibition on "direct or indirect coercion" and attempted coercion of employees (see discussion below), would prohibit an employer from conferring any benefit or compensation for the purpose of interfering with an employee's right to request or not request compensatory time. Thus, an employer may not single out employees for overtime work for the purpose of rewarding or punishing employees for their willingness or unwillingness to take compensatory time.<sup>23</sup>

The opponents of compensatory time have argued it should be denied to employees in the private-sector, but if compensatory time must be allowed, then "low-wage" workers and certain occupations (e.g., temporary, seasonal, or part-time occupations) should be excluded. The committee believes many workers who likely would be included in a national definition of "low-wage" want the option of compensatory time—and feel perfectly capable of making that decision themselves. Indeed, some of the most forceful and compelling testimony before the Subcommittee on Workforce Protections in support of allowing workers the option of compensatory time was given by a "low-wage worker," Mr. Peter Faust, who likely would be denied that option if all such workers were excluded from H.R.

<sup>21</sup> 29 U.S.C. § 211(c).

<sup>22</sup> 29 C.F.R. § 553.23(c) ("An employer need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all employees.")

<sup>23</sup> Obviously an employer also may not use any overtime policy, including compensatory time, to discriminate among employees for any reason prohibited by law. See Testimony of Mr. Robert Weisman, Hearing on H.R. 1, Working Families Flexibility Act, before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 105th Congress, First Session, Serial No. 105-1.

1406.<sup>24</sup> Further, the requirement for mutual agreement by the employer and the employee and the employee protections in the bill ensure compensatory time is voluntary. The committee sees no reason to deny certain employees the option of compensatory time, based solely upon their level of income or their occupation.

#### CONDITIONS ON COMPENSATORY TIME

The committee intends that compensatory time to be a matter of agreement between employers and employees. To that end, the law should permit employers and employees some flexibility in structuring compensatory time arrangements. H.R. 1406 provides certain parameters for such compensatory time arrangements, primarily to ensure employees are fully protected. These parameters apply whether the compensatory time agreement is with a labor organization or with an individual employee (see discussion above). The agreement between the employer and employee may include other provisions governing the preservation, use, or cashing out of compensatory time, so long as these provisions are consistent with H.R. 1406. To the extent any provision of an agreement is in violation of H.R. 1406, the provision would be superseded by the requirements of the FLSA.<sup>25</sup>

#### *Employee eligibility requirements*

To be eligible to choose compensatory time, an employee must have worked at least 1,000 hours in a period of continuous employment with his or her employer during the 12-month period preceding the date the employee agrees to receive or receives compensatory time. Under the language of the bill, this 1,000 hour requirement is assessed on a “rolling” basis, such that to be eligible to enter an agreement to receive compensatory time, or to actually receive compensatory time in lieu of cash compensation for overtime, such employee must have worked at least 1,000 hours in a period of continuous employment with the employer in the 12-month period prior to either entering such an agreement or actually receiving compensatory time.

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

#### *Compensatory time accrual limit*

H.R. 1406 provides an employee may accrue no more than 160 hours of compensatory time. This is in contrast to the public-sector provisions in current law that allow most employees to accrue 240 hours of compensatory time (in some occupations, employees may

<sup>24</sup> See Testimony of Mr. Peter Faust, Hearing on H.R. 1, the Working Families Flexibility Act, before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 105th Congress, First Session, Serial No. 105-1.

<sup>25</sup> This relationship between the agreement and the parameters stated in law is the same as applies to public-sector compensatory time. See 29 C.F.R. § 553.23(a)(2).



accrue up to 480 hours). The lower limit for private-sector employees is designed to protect both employers and employees against accrual of excessive amounts of compensatory time liability.

The committee emphasizes this 160-hour limit is the legal maximum that may be accrued. Employers and employees may establish a lower limit for compensatory time accrual, and employees, of course, may decline compensatory time as payment for overtime altogether.

*Monetary compensation for unused compensatory time*

The bill requires an annual “cash out” of all accrued compensatory time. Such annual cash out protects both employers and employees against accrual of excessive amounts of compensatory time liability. Unless an alternative date is established by the employer, the annual cash out date is the end of the calendar year (December 31) and the employee must be paid for the accrued compensatory time not later than the following January 31. The employer may establish an alternative annual cash out date, in which case the employer must pay the employee for any accrued and unused compensatory time within 31 days of the end of the 12-month period. Subject to continued agreement between the employer and employee, the employee may begin to accrue compensatory time anew after the cash out date.

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

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

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

Upon the voluntary or involuntary termination of employment, the bill provides an employee’s unused compensatory time must be cashed out by the employer, and is to be treated as a wage payment due and owed to the employee. The bill further provides any payment owed to an employee or former employee (whether because of the annual cash out of all accrued compensatory time, the employee’s request to cash out accrued compensatory time, the employer’s decision to cash out certain accrued compensatory time as described above, or the voluntary or involuntary termination of employment) shall be considered unpaid overtime compensation owed to the employee. In addition to making explicit that the remedies for unpaid overtime compensation under the FLSA apply, this pro-

vision also assures any unpaid, accrued compensatory time is treated as unpaid employee wages in the event of the employer's bankruptcy. Thus, any unpaid, accrued compensatory time would have the same priority claim and legal status as other employee wages under both the FLSA and the Bankruptcy Code. As described above, the payment for accrued compensatory time is owed to the employee or former employee when the claim for payment is made, and takes the same priority as other wages as of that date.

In all cases of cashed out accrued compensatory time, the rate of cash out must be the employee's regular rate when the compensatory time was earned or the employee's final regular rate, whichever is higher. For example, if compensatory time is accrued during the course of a year and the employee has received an increase in his or her hourly rate during the year after the compensatory time is accrued, the cash out rate at the end of the year would be the employee's final regular rate of pay for that year, reflecting the employee's increase in pay, even if the compensatory time was accrued prior to the pay increase.

#### NOTICE TO EMPLOYEES

H.R. 1406 requires the Secretary of Labor to revise the posting requirements under the regulations of the FLSA to reflect the compensatory time provisions of the bill. This will help ensure employees are informed of the circumstances under which compensatory time may be offered by an employer, as well as the employees' right to accept or decline such offer, and the employees' rights regarding the use of compensatory time. The Secretary of Labor may also promulgate such regulations as necessary in order to implement the provisions of H.R. 1406.

#### COMPENSATORY TIME AND EMPLOYMENT BENEFITS

Opponents of H.R. 1406 have raised concerns that compensatory time would reduce an employee's pension benefits. These concerns are unfounded. The overtime hours for which an employee receives compensatory time are hours for which the employee is paid or entitled to pay for the performance of duties for the employer. Therefore, they would fall within the definition of "hours of service" under the *Employee Retirement Income Security Act*, for which the employee would be credited for purposes of accrual, participation, and vesting of benefits.<sup>26</sup>

Obviously, in some cases the employee has also not worked hours that he or she otherwise would have when the employee uses (as compared to accrues) compensatory time off. Thus, the employee's total hours worked may be reduced, not by the earning of compensatory time, but by substituting the compensatory time for other hours of work. If, as a result, the employee works fewer total hours, the employee's total monetary earnings and credits for benefits may be less. But that effect is no different than any other decision by the employee (for example, refusing optional overtime work) that reduces the total number of hours actually worked by the employee. Of course, employees who choose to take compensatory time off have elected to receive a benefit that enables them to spend more time with their family or for whatever purpose they

<sup>26</sup> 29 C.F.R. § 2530.200b-2.

wish, which is not available to employees who elected to receive cash wages.

Similarly, opponents are concerned that compensatory time could limit an employee's eligibility for unemployment benefits, or the amount of unemployment benefits to which the employee would be entitled. H.R. 1406 clearly treats compensatory time as employee wages and any payments for accrued compensatory time would be treated the same as other employee wages under state laws for purposes of eligibility for unemployment benefits and determination of the amount of benefits. Receipt of compensation for accrued compensatory time when an employee's employment is terminated may, depending on state law on "disqualifying income," defer receipt of unemployment benefits, but would not diminish the total benefits to which the employee may be entitled. However, to suggest, as some have, compensatory time payments should not be considered as wages in any unemployment benefit determination would turn existing federal policy on "disqualifying income" on its head by dictating to states how to treat this form of employee wages.

#### EMPLOYEE USE OF ACCRUED COMPENSATORY TIME

Under H.R. 1406, an employee who has accrued compensatory time may generally use the time whenever he or she so desires. However, the legislation does require an employee to provide his or her employer with a reasonable amount of notice prior to using compensatory time, and the employer is permitted under H.R. 1406 to deny the employee's request if the use of time off would "unduly disrupt" the operations of the business. It is the committee's intent that an employer shall grant the employee's request to use accrued compensatory time off on the date and/or time requested by the employee if the use on such date and/or time does not "unduly disrupt" the employer's operations, and if the employee has requested use of the accrued compensatory time within a reasonable period in advance of the date and/or time requested.

These conditions on the use of accrued compensatory time are the same as those in current law for the public-sector under Section 7(o) of the FLSA.<sup>27</sup> Regulations issued by the Department of Labor under Section 7(o) define "unduly disrupt" as follows:

When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.<sup>28</sup>

<sup>27</sup> 29 U.S.C. § 207(o)(5).

<sup>28</sup> 29 C.F.R. § 553.25(d); *see also* Department of Labor, Wage and Hour Opinion Letter, 1994 DOLWH LEXIS 71 (Aug. 19, 1994) ("It is our position, notwithstanding [a collective bargaining agreement to the contrary], that an agency may not turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability

Court decisions regarding public-sector compensatory time have also shown the “unduly disrupt” standard is narrow and does not allow an employer to control an employee’s use of compensatory time off. In *Heitmann v. City of Chicago*, the Seventh Circuit Court of Appeals found Section 7(o) of the FLSA and the Department of Labor’s corresponding regulations require an employer to grant compensatory time off on the date and time requested by an employee, unless doing so would cause undue disruption.<sup>29</sup> The court noted that requiring an employer to honor an employee’s specific request for compensatory time off, absent undue disruption of the employer’s operations, appropriately “makes compensatory leave more attractive to workers and hence a more adequate substitute for money, the *Fair Labor Standards Act’s* principal response to overtime work.”<sup>30</sup>

Similarly, in *Beck v. City of Cleveland*, the Sixth Circuit Court of Appeals found “to grant the City the unlimited discretion to deny compensatory leave requests relieves the City of establishing the undue disruption requirement imposed by Congress.”<sup>31</sup> As a result, the court held that the plaintiffs-police officers’ “compensatory leave requests must be granted absent ‘clear and affirmative evidence’ of an undue disruption of the City’s provision of police services for its citizens.”<sup>32</sup>

The committee also notes the “unduly disrupt” standard included in H.R. 1406 is similar to the standard in the *Family and Medical Leave Act* (FMLA) limiting an employee’s right to take leave for medical treatments for the employee or a member of his or her family (“ . . . the employee shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer . . .”).<sup>33</sup>

Given the long history of this language in the FLSA with regard to compensatory time in the public-sector and the inclusion of similar language in the FMLA, it is simply dishonest for opponents of private-sector use of compensatory time to claim H.R. 1406 allows the employer to control when compensatory time is used. The employer’s right to deny compensatory time under H.R. 1406 is very limited. But the employer must have some ability to maintain the operations of the business. If that ability is not reflected in the law, then no employer will offer compensatory time as an option for employees, and the committee’s efforts to respond to employees’ desires for flexibility will be in vain. Furthermore, providing for an employee’s use of compensatory time without any regard to work-

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to provide service of acceptable quality and quantity for the public during the time requested without the use of the employee’s service. The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for an employer to claim that the compensatory time off request is unduly disruptive.”)

<sup>29</sup> 560 F.3d 642, 646 (7th Cir. 2009). *But see Mortensen v. County of Sacramento*, 368 F.3d 298 (9th Cir. 2004) (finding that the public-sector compensatory time provisions require only that an employee be allowed to use compensatory time off within a “reasonable period” of the date requested for such leave, unless doing so would “unduly disrupt” the agency’s operations); *Houston Policy Officers Union v. City of Houston*, 330 F.3d 298 (5th Cir. 2003) (same).

<sup>30</sup> *Heitmann*, 560 F.3d at 647.

<sup>31</sup> 390 F.3d 912, 925 (6th Cir. 2005).

<sup>32</sup> *Id.* at §926; *see also DeBraska v. City of Milwaukee*, 131 F. Supp. 2d 1032 (E.D. Wis. 2000) (deferring to the Department of Labor’s interpretation of its regulations as requiring that an employee’s specific compensatory time off requested must be granted absent undue disruption of the employer’s operations).

<sup>33</sup> 29 U.S.C. §2612(e). As one district court said in construing these provisions of the FMLA, “The FMLA also does not give employees the unfettered right to take time off subject only to their own convenience without any consideration of its effect upon the employer.” *Kaylor v. Fannin Regional Hospital*, 946 F.Supp. 988, 999 (N.D. Ga. 1996).

load or business demands is simply unfair to the employee's co-workers, who in many cases would have to handle the workload of the absent employee. Just as in 1985 when public-sector workers were permitted to use compensatory time in lieu of overtime pay, H.R. 1406 seeks "to balance the employee's right to make use of comp time that has been earned and the employer's need for flexibility in operations."<sup>34</sup>

#### ENFORCEMENT AND REMEDIES

As an amendment to the FLSA, the compensatory time provisions in H.R. 1406 would be subject to the applicable enforcement and remedies of the FLSA. Currently under the FLSA, Section 15(a)(2) makes it unlawful for any person to violate any provision of Section 7, of which the compensatory time provisions of H.R. 1406 would be a part.<sup>35</sup> In addition, Section 15(a)(3) makes it unlawful to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to" the employee's rights under the FLSA.<sup>36</sup>

Section 16(b) of the FLSA authorizes an action by an employee against his or her employer for any violations of Section 7.<sup>37</sup> The suit may be filed in any federal or state court. An employee may also file a complaint with the Department of Labor. The Department of Labor generally attempts to resolve such complaints; however, the department may also sue the employer for damages on behalf of the employee or employees whose rights were violated, or may also seek injunctive relief.<sup>38</sup> Section 16(e) also authorizes the Secretary of Labor to seek civil penalties of up to \$1,100 per violation against an employer who "willfully or repeatedly" violates Section 7.<sup>39</sup> In any action in which the employee has been wrongfully denied overtime compensation, the FLSA authorizes damages equal to the amount of the unpaid compensation required by the FLSA and an equal amount as liquidated damages;<sup>40</sup> liquidated damages may be reduced or eliminated if the court finds that the employer acted in good faith and had reasonable grounds for believing he or she was in compliance with the FLSA.<sup>41</sup> In any action brought by an employee, the employee may also be paid for his or her attorneys' fees and costs.<sup>42</sup>

To be clear, H.R. 1406 retains all of the enforcement mechanisms and remedies that currently exist under the FLSA. H.R. 1406 also includes a provision prohibiting an employer from directly or indirectly intimidating, threatening, coercing, or attempting to intimidate, threaten, or coerce any employee for purposes of interfering with the employee's right to take or not take compensatory time in lieu of cash overtime, or to use accrued compensatory time. Curiously, opponents of compensatory time have claimed H.R. 1406 would allow employers to force employees to take compensatory

<sup>34</sup> Report on S. 1570, Committee on Labor and Human Resources, U.S. Senate, 99th Congress, First Session, Senate Report No. 99-159 at 11.

<sup>35</sup> 29 U.S.C. § 215(a)(2).

<sup>36</sup> *Id.* § 215(a)(3).

<sup>37</sup> *Id.* 216(b).

<sup>38</sup> *Id.* § 217.

<sup>39</sup> *Id.* § 216(e).

<sup>40</sup> *Id.* § 216(b).

<sup>41</sup> *Id.* § 260.

<sup>42</sup> *Id.* § 216(b).

time against their will or to use accrued compensatory time at the employer's convenience. Those claims contradict the direct language of the bill.

The language of H.R. 1406 prohibiting intimidation, threats, and coercion, or attempts thereto, is identical to prohibitory language applicable to federal employees under the FMLA<sup>43</sup> and the *Federal Employees Flexible and Compressed Work Schedules Act*.<sup>44</sup> The term "intimidate, threaten, or coerce" has been defined under those laws as "promising to confer or conferring any benefit (such as appointment, promotion, or compensation), or taking or threatening to take any reprisal (such as deprivation of appointment, promotion, or compensation)."<sup>45</sup> Thus, H.R. 1406 prohibits an employer, for example, from forcing employees to take compensatory time in lieu of monetary compensation by offering overtime hours only to employees who ask for compensation in the form of compensatory time.

The bill also creates a new remedy under the FLSA applicable to employers who violate the anti-coercion language just described. Section 3 of H.R. 1406 provides an employer who violates the anti-coercion provision shall be liable to the employee for the employee's rate of compensation for each hour of compensatory time accrued and an equal amount as liquidated damages. If the employee has already used some or all of the compensatory time, the amount to be paid as damages is reduced by that amount.

Opponents of compensatory time have claimed, while it may be prohibited conduct under H.R. 1406, there is no sanction in H.R. 1406 for an employer who either forces an employee to take compensatory time or denies the employee the right to use accrued compensatory time. In both cases, the opponents are wrong. An employee who is forced to take compensatory time off may receive the amount of the employee's compensation for each hour of compensatory time plus an equal amount of liquidated damages, less the amount of compensation the employee has already received for those hours of compensatory time. The committee expects the department will make use of the regulatory process to clarify the application of the remedies provisions contained in H.R. 1406 to these and other potential scenarios.

In addition, there is a "self-policing" aspect: the employee retains his or her compensation and can demand to cash out at his or her current rate of pay or the rate when the time was earned, whichever is higher. In short, the employer does not benefit by denying the employee the use of his or her compensatory time, and when necessary, there are effective sanctions under the bill and the FLSA for employers who violate the employee protections and other provisions of H.R. 1406.

#### CONCLUSION

For many Americans, balancing the demands of family and work can be difficult. Each worker faces a unique set of challenges and responsibilities, be it caring for an aging relative, attending a parent-teacher conference, or seeing a son or daughter deploy overseas. Government employees have long been able to choose and ac-

<sup>43</sup> 5 U.S.C. § 6385.

<sup>44</sup> *Id.* § 6132.

<sup>45</sup> *Id.* § 6385.

crue paid time off as compensation for working overtime hours, allowing these public-sector employees greater flexibility to meet family obligations. However, the federal government prohibits private-sector workers from enjoying this same benefit. H.R. 1406, the *Working Families Flexibility Act of 2013*, would remove this obstacle in federal law.

Opponents of H.R. 1406 continue to ignore the legislation's basic principle: worker choice. Under the legislation, workers choose whether to accept compensatory time; workers choose when to withdraw from a compensatory time agreement; workers choose when to cash out accrued compensatory time; and workers choose when to use their paid time off so long as they follow the same guidelines as public employees do. The *Working Families Flexibility Act of 2013* is commonsense, pro-worker legislation that will help Americans better balance the needs of family and the workplace.

#### SECTION-BY-SECTION ANALYSIS

##### SECTION 1. SHORT TITLE

This Act may be cited as the "*Working Families Flexibility Act of 2013*."

##### SECTION 2. COMPENSATORY TIME

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

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

In the case of employees who are not represented by a labor organization certified or recognized as the representative of such employees under applicable law, there must be an agreement arrived at between the employer and employee before the performance of the work and affirmed by a written or otherwise verifiable record maintained in accordance with Section 11(c) of the *Fair Labor Standards Act* in which the employer has offered and the employee has chosen to receive compensatory time in lieu of monetary overtime compensation. Such agreement must be entered into knowingly and voluntarily by such employee and not as a condition of employment. An employee may not agree to receive compensatory time unless that employee has worked 1,000 hours in continuous employment with the employer in the 12-month period prior to the date of the agreement or receipt of compensatory time.

An employee may accrue not more than 160 hours of compensatory time. No later than January 31 of each calendar year, the employee's employer shall provide monetary compensation for any unused compensatory time accrued during the preceding calendar year and not used prior to December 31 of the preceding year. Monetary compensation must be provided at the regular rate received when the compensatory time was earned or at the final regular rate, whichever is higher.

An employer may designate and communicate to the employees a 12-month period other than the calendar year, in which case com-

compensation shall be provided not later than 31 days after the end of the 12-month period.

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

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

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

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

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

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

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

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

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

For the purposes of this subsection, the terms "overtime compensation" and "compensatory time" shall have the meanings given by Section (7)(o)(7) of the *Fair Labor Standards Act*.

### SECTION 3. REMEDIES

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



ages, reduced by the amount of such rate of compensation for each hour of compensatory time used by the employee.

#### SECTION 4. NOTICE TO EMPLOYEES

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

#### SECTION 5. SUNSET

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

#### EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the body of this report.

#### APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 1406 provides for compensatory time for employees in the private-sector.

#### UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the CBO letter.

#### EARMARK STATEMENT

H.R. 1406 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House Rule XXI.

#### ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: April 17, 2013**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**Roll Call: 1 Bill: H.R.1406 Amendment Number: \_\_\_\_\_Disposition: Adopted by a vote of 22 yeas and 14 nays.Sponsor/Amendment: Mr. Roe - Motion to table the appeal of the ruling of the chair.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)	X			Mr. MILLER (CA) (Ranking)		X	
Mr. PETRI (WI)	X			Mr. ANDREWS (NJ)		X	
Mr. McKEON (CA)	X			Mr. SCOTT (VA)		X	
Mr. WILSON (SC)	X			Mr. HINOJOSA (TX)			X
Mrs. FOXX (NC)	X			Mrs. McCARTHY (NY)		X	
Mr. PRICE (GA)	X			Mr. TIERNEY (MA)		X	
Mr. MARCHANT (TX)			X	Mr. HOLT (NJ)			X
Mr. HUNTER (CA)	X			Mrs. DAVIS (CA)		X	
Mr. ROE (TN)	X			Mr. GRIJALVA (AZ)			X
Mr. THOMPSON (PA)	X			Mr. BISHOP (NY)		X	
Mr. WALBERG (MI)	X			Mr. LOEBSACK (IA)		X	
Mr. SALMON (AZ)	X			Mr. COURTNEY (CT)		X	
Mr. GUTHRIE (KY)	X			Ms. FUDGE (OH)		X	
Mr. DesJARLAIS (TN)	X			Mr. POLIS (CO)		X	
Mr. ROKITA (IN)	X			Mr. SABLAN (MP)			X
Mr. BUCSHON (IN)	X			Mr. YARMUTH (KY)		X	
Mr. GOWDY (SC)	X			Ms. WILSON (FL)		X	
Mr. BARLETTA (PA)	X			Ms. BONAMICI (OR)		X	
Mrs. ROBY (AL)	X						
Mr. HECK (NV)	X						
Mrs. BROOKS (IN)	X						
Mr. HUDSON (NC)	X						
Mr. MESSER (IN)	X						

TOTALS: Aye: 22 No: 14 Not Voting: 5

Total: 41 / Quorum: 14 / Report: 21

Date: April 17, 2013**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**Roll Call: 2 Bill: H.R.1406 Amendment Number: 3Disposition: Defeated by a vote of 15 yeas and 23 nays.Sponsor/Amendment: Ms. Wilson - retains the right to overtime pay and comp time.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)		X		Mr. MILLER (CA) (Ranking)	X		
Mr. PETRI (WI)		X		Mr. ANDREWS (NJ)	X		
Mr. McKEON (CA)		X		Mr. SCOTT (VA)	X		
Mr. WILSON (SC)		X		Mr. HINOJOSA (TX)			X
Mrs. FOXX (NC)		X		Mrs. McCARTHY (NY)	X		
Mr. PRICE (GA)		X		Mr. TIERNEY (MA)	X		
Mr. MARCHANT (TX)		X		Mr. HOLT (NJ)			X
Mr. HUNTER (CA)		X		Mrs. DAVIS (CA)	X		
Mr. ROE (TN)		X		Mr. GRIJALVA (AZ)	X		
Mr. THOMPSON (PA)		X		Mr. BISHOP (NY)	X		
Mr. WALBERG (MI)		X		Mr. LOEBSACK (IA)	X		
Mr. SALMON (AZ)		X		Mr. COURTNEY (CT)	X		
Mr. GUTHRIE (KY)		X		Ms. FUDGE (OH)	X		
Mr. DesJARLAIS (TN)		X		Mr. POLIS (CO)	X		
Mr. ROKITA (IN)		X		Mr. SABLAN (MP)			X
Mr. BUCSHON (IN)		X		Mr. YARMUTH (KY)	X		
Mr. GOWDY (SC)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mrs. ROBY (AL)		X					
Mr. HECK (NV)		X					
Mrs. BROOKS (IN)		X					
Mr. HUDSON (NC)		X					
Mr. MESSER (IN)		X					

TOTALS: Aye: 15 No: 23 Not Voting: 3

Total: 41 / Quorum: 14 / Report: 21

Date: April 17, 2013

**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**Roll Call: 3 Bill: H.R.1406 Amendment Number: 4Disposition: Defeated by a vote of 14 yeas and 23 nays.Sponsor/Amendment: Ms. Bonamici - require overtime wages be put in interest-bearing account.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)		X		Mr. MILLER (CA) (Ranking)	X		
Mr. PETRI (WI)		X		Mr. ANDREWS (NJ)	X		
Mr. McKEON (CA)		X		Mr. SCOTT (VA)	X		
Mr. WILSON (SC)		X		Mr. HINOJOSA (TX)			X
Mrs. FOXF (NC)		X		Mrs. McCARTHY (NY)	X		
Mr. PRICE (GA)		X		Mr. TIERNEY (MA)	X		
Mr. MARCHANT (TX)		X		Mr. HOLT (NJ)			X
Mr. HUNTER (CA)		X		Mrs. DAVIS (CA)	X		
Mr. ROE (TN)		X		Mr. GRIJALVA (AZ)	X		
Mr. THOMPSON (PA)		X		Mr. BISHOP (NY)	X		
Mr. WALBERG (MI)		X		Mr. LOEBSACK (IA)	X		
Mr. SALMON (AZ)		X		Mr. COURTNEY (CT)	X		
Mr. GUTHRIE (KY)		X		Ms. FUDGE (OH)			X
Mr. DesJARLAIS (TN)		X		Mr. POLIS (CO)	X		
Mr. ROKITA (IN)		X		Mr. SABLAN (MP)			X
Mr. BUCSHON (IN)		X		Mr. YARMUTH (KY)	X		
Mr. GOWDY (SC)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mrs. ROBY (AL)		X					
Mr. HECK (NV)		X					
Mrs. BROOKS (IN)		X					
Mr. HUDSON (NC)		X					
Mr. MESSER (IN)		X					

TOTALS: Aye: 14 No: 23 Not Voting: 4

Total: 41 / Quorum: 14 / Report: 21

Date: April 17, 2013

**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**

Roll Call: 4 Bill: H.R.1406 Amendment Number: 5

Disposition: Defeated by a vote of 14 yeas and 23 nays.

Sponsor/Amendment: Mr. Bishop - require same workplace protections as public sector.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)		X		Mr. MILLER (CA) (Ranking)	X		
Mr. PETRI (WI)		X		Mr. ANDREWS (NJ)	X		
Mr. McKEON (CA)		X		Mr. SCOTT (VA)	X		
Mr. WILSON (SC)		X		Mr. HINOJOSA (TX)			X
Mrs. FOXX (NC)		X		Mrs. McCARTHY (NY)	X		
Mr. PRICE (GA)		X		Mr. TIERNEY (MA)	X		
Mr. MARCHANT (TX)		X		Mr. HOLT (NJ)			X
Mr. HUNTER (CA)		X		Mrs. DAVIS (CA)	X		
Mr. ROE (TN)		X		Mr. GRIJALVA (AZ)	X		
Mr. THOMPSON (PA)		X		Mr. BISHOP (NY)	X		
Mr. WALBERG (MI)		X		Mr. LOEBSACK (IA)	X		
Mr. SALMON (AZ)		X		Mr. COURTNEY (CT)	X		
Mr. GUTHRIE (KY)		X		Ms. FUDGE (OH)			X
Mr. DesJARLAIS (TN)		X		Mr. POLIS (CO)	X		
Mr. ROKITA (IN)		X		Mr. SABLAN (MP)			X
Mr. BUCSHON (IN)		X		Mr. YARMUTH (KY)	X		
Mr. GOWDY (SC)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mrs. ROBY (AL)		X					
Mr. HECK (NV)		X					
Mrs. BROOKS (IN)		X					
Mr. HUDSON (NC)		X					
Mr. MESSER (IN)		X					

TOTALS: Aye: 14 No: 23 Not Voting: 4

Total: 41 / Quorum: 14 / Report: 21

Date: April 17, 2013**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**Roll Call: 5 Bill: H.R. 1406 Amendment Number: \_\_\_\_\_Disposition: Ordered favorably reported to the House, as amended, by a vote of 23 yeas and 14 nays.Sponsor/Amendment: Mr. Petri - motion to report the bill to the House with an amendment and with the recommendation that the amendment be agreed to, and the bill as amended do pass.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)	X			Mr. MILLER (CA) (Ranking)		X	
Mr. PETRI (WI)	X			Mr. ANDREWS (NJ)		X	
Mr. McKEON (CA)	X			Mr. SCOTT (VA)		X	
Mr. WILSON (SC)	X			Mr. HINOJOSA (TX)			X
Mrs. FOXX (NC)	X			Mrs. McCARTHY (NY)		X	
Mr. PRICE (GA)	X			Mr. TIERNEY (MA)		X	
Mr. MARCHANT (TX)	X			Mr. HOLT (NJ)			X
Mr. HUNTER (CA)	X			Mrs. DAVIS (CA)		X	
Mr. ROE (TN)	X			Mr. GRIJALVA (AZ)		X	
Mr. THOMPSON (PA)	X			Mr. BISHOP (NY)		X	
Mr. WALBERG (MI)	X			Mr. LOEBSACK (IA)		X	
Mr. SALMON (AZ)	X			Mr. COURTNEY (CT)		X	
Mr. GUTHRIE (KY)	X			Ms. FUDGE (OH)			X
Mr. DesJARLAIS (TN)	X			Mr. POLIS (CO)		X	
Mr. ROKITA (IN)	X			Mr. SABLAN (MP)			X
Mr. BUCSHON (IN)	X			Mr. YARMUTH (KY)		X	
Mr. GOWDY (SC)	X			Ms. WILSON (FL)		X	
Mr. BARLETTA (PA)	X			Ms. BONAMICI (OR)		X	
Mrs. ROBY (AL)	X						
Mr. HECK (NV)	X						
Mrs. BROOKS (IN)	X						
Mr. HUDSON (NC)	X						
Mr. MESSER (IN)	X						

TOTALS: Aye: 23 No: 14 Not Voting: 4

Total: 41 / Quorum: 14 / Report: 21

## STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c) of House Rule XIII, the goal of H.R. 1406 is to provide for compensatory time for employees in the private-sector. The Committee expects the Department of Labor to comply with these provisions and implement the changes to the law in accordance with this stated goal.

## DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 1406 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

## DISCLOSURE OF DIRECTED RULE MAKINGS

The committee estimates that enacting H.R. 1406 does not specifically direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF  
THE COMMITTEE

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

## NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 1406 from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, April 19, 2013.*

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1406, the Working Families Flexibility Act of 2013.

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

Sincerely,

DOUGLAS W. ELMENDORF, *Director.*

Enclosure.

*H.R. 1406—Working Families Flexibility Act of 2013*

H.R. 1406 would amend the Fair Labor Standards Act of 1938 to provide compensatory time for employees in the private sector. In lieu of overtime pay, employees could receive compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime pay would otherwise have been required. Such compensatory time could be provided only in accordance with a collective bargaining agreement or with the consent of affected employees. The changes would be effective for five years after enactment of the bill.

Enacting H.R. 1406 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. Implementing the bill also would not affect spending subject to appropriation.

H.R. 1406 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

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

## COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 1406. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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

**FAIR LABOR STANDARDS ACT OF 1938**

\* \* \* \* \*

## MAXIMUM HOURS

SEC. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such work-



week is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks, or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than \$1,000,000 exclusive of excise taxes.

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale;

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(e) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to any employee which are not made as compensation for his hours of employment;

(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulations which he shall issue, having due regard among other relevant facts, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of

such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Secretary of Labor as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h)(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(i) No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on

the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate of not less than one and one-half times the regular rate at which he is employed.

(k) No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days;

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a).

(m) For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer—

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours

worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

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

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

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

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

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if—

(A) such employee is paid at a per-page rate which is not less than—

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p)(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is—

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

(r)(1) An employer shall provide—

(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and



(B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

(3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

(s) *COMPENSATORY TIME OFF FOR PRIVATE EMPLOYEES.*—

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

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

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

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

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

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

*No employee may receive or agree to receive compensatory time off under this subsection unless the employee has worked at least 1,000 hours for the employee's employer during a period of continuous employment with the employer in the 12-month period before the date of agreement or receipt of compensatory time off.*

(3) *HOURLY LIMIT.*—

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

(B) *COMPENSATION DATE.*—*Not later than January 31 of each calendar year, the employee's employer shall provide monetary compensation for any unused compensatory time off accrued during the preceding calendar year that was not used prior to December 31 of the preceding year at the rate prescribed by paragraph (6). An employer may des-*

ignate and communicate to the employer's employees a 12-month period other than the calendar year, in which case such compensation shall be provided not later than 31 days after the end of such 12-month period.

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

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

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

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

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

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

(5) *TERMINATION OF EMPLOYMENT.*—An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon the voluntary or involuntary termination of employment, be paid for the unused compensatory time in accordance with paragraph (6).

(6) *RATE OF COMPENSATION.*—

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

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

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

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

(7) *USE OF TIME.*—An employee—

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

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use

*of the compensatory time does not unduly disrupt the operations of the employer.*

(8) *DEFINITIONS.—For purposes of this subsection—*

*(A) the term “employee” does not include an employee of a public agency; and*

*(B) the terms “overtime compensation” and “compensatory time” shall have the meanings given such terms by subsection (o)(7).*

\* \* \* \* \*

### PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

[(b) Any employer] (b) *Except as provided in subsection (f), any employer* who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or the unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employees shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this act by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3).

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee

of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) In any action or proceeding commenced prior to, on, or after the date of enactment of this subsection, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 13(f) is applicable, (2) with respect to work performed in Guam, the Canal Zone, or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 6(a)(3) at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e)(1)(A) Any person who violates the provisions of sections 12 or 13(c), relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed—

(i) \$11,000 for each employee who was the subject of such a violation; or

(ii) \$50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term “serious injury” means—

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

- (ii) permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or
- (iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates section 6 or 7, relating to wages, shall be subject to a civil penalty not to exceed \$1,100 for each such violation.

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be—

- (A) deducted from any sums owing by the United States to the person charged;
- (B) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or
- (C) ordered by the court, in an action brought for a violation of section 15(a)(4) or a repeated or willful violation of section 15(a)(2), to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, United States Code, and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of section 12, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 2 of the Act entitled “An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof and for other purposes” (29 U.S.C. 9a). Civil penalties collected for violations of section 12 shall be deposited in the general fund of the Treasury.

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

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## MINORITY VIEWS

H.R. 1406, “THE WORKING FAMILIES FLEXIBILITY ACT”

113TH CONGRESS, 1ST SESSION

APRIL 30, 2013

Committee Democrats oppose H.R. 1406. This bill would amend the Fair Labor Standards Act (FLSA) to allow private sector employers to “compensate” hourly workers with compensatory (“comp”) time off in lieu of overtime pay. By forcing workers to compromise their paycheck in order to have more time off work, with no guarantee that they would actually receive the time off when they need it, this bill would jeopardize the economic well-being of millions of Americans who depend on overtime wages to make ends meet.

H.R. 1406 does nothing to provide working families with meaningful flexibility. Instead, it rolls back the clock on vital gains that working people achieved with the passage of the FLSA in 1938. It cuts wages for middle class and low-income Americans at a time when they are already facing overwhelming financial stress. It gives employers—*not employees*—flexibility in setting working hours. It impedes enforcement of overtime laws. In short, it undermines one of the most important, hard-fought legal protections that workers currently depend upon.

This bill is being pushed through by House leadership as part of rebranding campaign to soften the majority’s image with a supposedly “family friendly” agenda.<sup>1</sup> Unfortunately, rather than presenting this Committee with a proposal that would actually benefit working families, the majority has simply reintroduced a proposal that would let employers pay workers less. The bill forces workers into an unnecessary choice between earned overtime pay and family-friendly scheduling. Congress ought to pass legislation that both protects earned overtime pay and promotes needed flexibility in the workplace. H.R. 1406 simply rehashes a worn-out decades-old idea that has been rejected multiple times in the past, and it will meet the same fate this time around by never advancing beyond the House.

Instead of H.R. 1406, what working families really need is legislation that would raise the minimum wage, ensure equal pay for equal work, provide paid sick leave to workers, provide *paid* family & medical leave for more workers and expand the Family and Medical Leave Act to include more employees. These are the kinds of changes that would make a real difference in the lives of working

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<sup>1</sup> See Eric Cantor, “Making Life Work” Remarks for the AEI, February 5, 2013. Available at <http://www.aei.org/article/politics-and-public-opinion/legislative/house/remarks-by-majority-leader-eric-cantor-as-prepared-for-delivery>.

Americans, not a rushed proposal that undermines bedrock employment law and costs workers much needed overtime compensation.

THE FAIR LABOR STANDARDS ACT

*Background on the FLSA's wage and hour protections*

In the 1930s, Congress saw the need for legislation to address the widespread “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”<sup>2</sup> This concern ultimately led to the passage of the FLSA in 1938, which to this day stands as one of the crowning achievements of the New Deal. This crucial law establishes a federal minimum wage, restricts the use of child labor, and sets standards for when employers must pay workers overtime.<sup>3</sup> President Harry Truman, who served in the Senate when Congress was considering the FLSA, would later describe it as “[o]ne of the most important bills for which I voted. . . . [It was one of the] fundamental New Deal measures . . . intended to help the little people in labor who had no lobby and no influence.”<sup>4</sup>

Seventy-five years after its enactment, the FLSA remains the nation’s basic law governing wages and hours of work. There are three main protections afforded to workers under this critical law: (1) a basic minimum wage, (2) a limit on the number of hours an employer may require from an employee before being subject to an overtime premium, and (3) a prohibition on most forms of child labor.<sup>5</sup>

The maximum hours and overtime provisions are set out in Section 7 of the FLSA. Currently, the law requires that all covered employees be compensated for any time that they work in excess of forty hours in a week at a rate of no less than one-and-a-half their regular wage rate.<sup>6</sup> Although the limit on hours compensable at the regular wage rate is firmly set at forty, there is nonetheless substantial flexibility in how these hours are allotted over the course of a week. In the implementing regulations, a week is defined as a “fixed and regularly recurring 168-hour period,”<sup>7</sup> and there is no overtime premium for hours worked on weekends.<sup>8</sup> Accordingly, the Wage and Hour Division (WHD) of the Department of Labor (DOL) states that a workweek “need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees.”<sup>9</sup>

There are two primary purposes behind setting a maximum hour limit and subjecting further hours to an overtime premium: discouraging overwork and spreading employment. Congress sought to lessen the burden on workers that comes from working an “intoler-

<sup>2</sup> 29 U.S.C. § 202(a).

<sup>3</sup> 29 U.S.C. §§ 201–217.

<sup>4</sup> Memoirs by Harry S. Truman, Year of Decisions (Vol. 1) (1955), at 153.

<sup>5</sup> 29 U.S.C. §§ 201–219.

<sup>6</sup> 29 U.S.C. § 207(a).

<sup>7</sup> 29 C.F.R. § 778.105.

<sup>8</sup> 29 C.F.R. § 778.102.

<sup>9</sup> US Department of Labor, Wage and Hour Division, Fact Sheet #23: Overtime Pay Requirements of the FLSA, <http://www.dol.gov/whd/regs/compliance/whdfs23.pdf>. See also 29 C.F.R. §§ 778.102, 778.103.

able” number of hours in a given week.<sup>10</sup> By charging a premium for extra work hours, employers are discouraged from overworking their employees. The other purpose behind the overtime wage premium is economic in nature spreading employment, thereby spurring hiring and reducing the unemployment rate. President Roosevelt argued this point in a 1937 message to Congress: “Reasonable and flexible use of the long established right of government to set and to change working hours can, I hope, decrease unemployment in those groups in which unemployment today principally exists.”<sup>11</sup>

As originally enacted, the FLSA contained no provisions allowing employers to offer comp time in lieu of overtime wages. However, Congress changed this when it passed the Fair Labor Standards Amendments of 1985, which introduced a limited system of comp time for public-sector employees.<sup>12</sup> Section 7(o) of the FLSA now provides that state and federal public sector workers are eligible for comp time in lieu of overtime wages, with the comp time to accumulate at a rate of one and half times the number of hours worked.<sup>13</sup> As applied to federal employees, implementing regulations require that accrued comp time be used by the end of the 26th pay period (one year) after the pay period during which the overtime hours were worked.<sup>14</sup> Congress’s intention in adding this provision was to provide cost savings in government budgets, as the overtime wage premium was more expensive than providing workers with compensatory time off.<sup>15</sup>

#### PAST EFFORTS TO REPLACE OVERTIME WITH COMP TIME

The ideas presented by the majority in H.R. 1406 are nothing new. Since the 1990s, Committee Republicans have sponsored numerous virtually identical bills in previous Congresses, each of which would have weakened overtime protections through the use of comp time. None of these bills have come close to being enacted into law.

- In 1997, Republicans introduced H.R. 1, the “Working Families Flexibility Act of 1997,” which sought to amend the FLSA to extend comp time to the private sector. This bill passed the Republican-controlled House and was not considered by the Senate.<sup>16</sup>

<sup>10</sup> President Franklin D. Roosevelt, Annual Message to Congress, January 3, 1938. Available at <http://www.presidency.ucsb.edu/ws/index.php?pid=15517>.

<sup>11</sup> President Franklin D. Roosevelt, Message to Congress on Establishing Minimum Wages and Maximum Hours, May 24, 1937. Available at <http://www.presidency.ucsb.edu/ws/index.php?pid=15405&st=wage&st1=/>. Former Secretary of Labor Frances Perkins would later say the maximum hour provisions of the FLSA were key to achieving both of these goals—and this was especially important to the war effort during World War II:

The Wage and Hour Act has been a success, and Roosevelt took comfort in the fact. Its principal objectives were accepted. The spread of employment by shorter hours started. The shorter hours have made a more humane schedule. The fact that excess hours are penalized by overtime costs has proved sufficient to keep hours at reasonable levels and yet flexible enough to make it possible to work more than forty hours when necessary, as it was during [World War II].

Frances Perkins, *The Roosevelt I Knew* (1946), at 266.

<sup>12</sup> Pub. Law 99-150.

<sup>13</sup> 29 U.S.C. § 207.

<sup>14</sup> Office of Personnel Management. “Fact Sheet: Compensatory Time Off.” Available at <http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/compensatory-time-off>. See also 5 C.F.R. § 550.114.

<sup>15</sup> Ross Eisenbrey, “The Naked Truth About Comp Time” Economic Policy Institute (March 31, 2003), at 5-6. Available at <http://www.epi.org/page/-old/issuebriefs/ib190/ib190.pdf>

<sup>16</sup> Available at: <http://www.gpo.gov/fdsys/pkg/BILLS-105hr1eh/pdf/BILLS-105hr1eh.pdf>.



- In 2003, Republicans introduced H.R. 1119, the so-called “Family Time Flexibility Act,” which again proposed extending comp time to the private sector. This bill did not come up for a vote on the House floor.<sup>17</sup>

- In 2008, Republicans introduced H.R. 6025, the “Family Friendly Workplace Act,” a nearly identical comp time bill. This bill was never reported out of this Committee.<sup>18</sup>

- In 2009, Republicans introduced H.R. 933, which was a re-introduction of the 2008 “Family Friendly Workplace Act.” This bill was also never reported out of this Committee.<sup>19</sup>

Each comp time bill met firm opposition from worker advocates and women’s organizations, who recognized the harm these proposals would inflict upon working families. Opponents of comp time legislation include: the AFL–CIO, the National Women’s Law Center, the National Organization for Women, 9 to 5—National Association of Working Women, SEIU, International Brotherhood of Teamsters, Communication Workers of America, Interfaith Worker Justice, National Employment Law Project, Center for Law and Social Policy, American Sustainable Business Council and the National Partnership for Women and Families.

#### THE REAL IMPACT OF H.R. 1406 ON WORKING FAMILIES

*H.R. 1406 reduces wages and constitutes an unsecured, interest-free loan to employers*

At its core, the basic intent behind comp time legislation is to force workers to compromise their pay in order to receive time off.<sup>20</sup> This is an unacceptable deal for workers, particularly in an era of stagnant wages and rising income inequality. Since 2000, the hourly wage of the median worker rose just 0.5 percent.<sup>21</sup> In 2012, corporate profits as a share of the economy reached their highest point since World War II, while overall labor compensation fell to a 57-year low.<sup>22</sup>

Nothing in H.R. 1406 requires that workers’ comp time credits earn interest on their wages, though employers are free to commingle the funds or invest unpaid overtime to their advantage. This amounts to a zero-interest loan from workers to their employers. Further, the delay in payment under this bill is excessively long. When an employee is compensated for unused comp time, the employer would not actually be required to pay the employee until January 31 of the following year. For a worker who puts in extra hours in January of the previous year, this could mean he or she misses out on wages, plus over a year of interest on their unpaid wages, while the employer keeps one hundred percent of the gains. That is an unjustifiable cut in pay for the worker.

<sup>17</sup> Available at: <http://www.gpo.gov/fdsys/pkg/BILLS-108hr1119rh/pdf/BILLS-108hr1119rh.pdf>.

<sup>18</sup> Available at: <http://www.gpo.gov/fdsys/pkg/BILLS-110hr6025ih/pdf/BILLS-110hr6025ih.pdf>.

<sup>19</sup> Available at: <http://www.gpo.gov/fdsys/pkg/BILLS-111hr933ih/pdf/BILLS-111hr933ih.pdf>.

<sup>20</sup> Ross Eisenbrey, “The Naked Truth About Comp Time” Economic Policy Institute (March 31, 2003), at 2. Available at <http://www.epi.org/page/-/old/issuebriefs/ib190/ib190.pdf>

<sup>21</sup> Economic Policy Institute. “Fact Sheet: Wages” The State of Working America Available at <http://stateofworkingamerica.org/fact-sheets/wages/>

<sup>22</sup> Jeffrey Bartash, “U.S. corporate profits soar in 2012. Workers get little of it.” MarketWatch, The Wall Street Journal (March 28, 2013) Available at <http://blogs.marketwatch.com/thetell/2013/03/28/u-s-corporate-profits-soar-in-2012-workers-get-little-of-it/>

Furthermore, H.R. 1406 also does nothing to protect workers in the event that their employer goes out of business or declares bankruptcy. Workers risk losing up to 160 hours of overtime pay (the limit on overtime hours a worker can bank under this legislation) because their overtime is not put into escrow or a trust fund and could be lost if the employer goes out of business or declares bankruptcy.<sup>23</sup> This is especially troubling given the hundreds of thousands of businesses that close each year—over 690,000 in 2010 alone.<sup>24</sup>

*H.R. 1406 discourages hiring new employees*

One of the key goals Congress had in requiring employers pay an overtime premium was to discourage employers from working their employees for long hours in lieu of hiring more people.<sup>25</sup> Even with this wage premium, it is still often cheaper to work an employee longer hours rather than hiring an additional employee.<sup>26</sup> Introducing comp time into the equation would make this problem worse, as it would be even cheaper to provide comp time than it is to pay overtime wages. This is exactly the wrong course in today's economic climate, in which the unemployment rate is 7.6 percent, and over 11.7 million Americans are looking for work.<sup>27</sup>

*H.R. 1406 gives employers—not employees—the right to control comp time*

Nothing in the FLSA prevents employers from providing flexibility to workers. Under current law, employers already may liberally grant paid or unpaid time off to workers. Under H.R. 1406, it is the employer who has control over whether an employee is paid in overtime wages or is provided comp time. Despite language paying lip service to flexibility for workers, there is no actual guarantee that a worker will ever be permitted to take the comp time when she wishes to access it. Instead, an employer is permitted to deny a worker's request for comp time if it "unduly disrupts the operations of the employer." Moreover, case law interpreting similar comp time language in the public sector indicates that an employer need not give the employee the specific day off requested, even if that specific day off would not have been unduly disruptive. Rather than increasing a worker's control over her life, this legislation increases the employer's control over the worker's life.

Ostensibly, H.R. 1406 provides workers with the choice between comp time and overtime pay. However, this bill gives employers control over who has access to overtime wages and comp time. Because providing comp time off is cheaper for an employer than paying the overtime premium, the bill creates an incentive for employers to preferentially assign overtime to workers who elect to receive

<sup>23</sup> Ross Eisenbrey, "The Naked Truth About Comp Time" Economic Policy Institute (March 31, 2003) Available at <http://www.epi.org/page/-/old/issuebriefs/ib190/ib190.pdf>

<sup>24</sup> U.S. Census Bureau, Business Dynamic Statistics Data Tables: Establishment Characteristics, Available at [http://census.gov/ces/dataproducts/bds/data\\_estab.html](http://census.gov/ces/dataproducts/bds/data_estab.html)

<sup>25</sup> Wage and Hour Division, U.S. Department of Labor, "Fact Sheet: Proposed Rule Changes Concerning In-Home Care Industry under the Fair Labor Standards Act (FLSA)" Available at <http://www.dol.gov/whd/flsa/whdfs-NPRM-companionship.htm>

<sup>26</sup> Ross Eisenbrey, "The Naked Truth About Comp Time" Economic Policy Institute (March 31, 2003), at 4. Available at <http://www.epi.org/page/-/old/issuebriefs/ib190/ib190.pdf>

<sup>27</sup> Bureau of Labor Statistics, United States Department of Labor. (2013). *The Employment Situation—March 2013*. Retrieved from: <http://www.bls.gov/news.release/pdf/empst.pdf>

comp time in lieu of overtime. Nothing in H.R. 1406 prohibits this. Workers who choose not to receive comp time in lieu of overtime pay could be penalized with fewer scheduled work hours and loss of overtime work. Hourly workers in a struggling economy are often desperate to keep their jobs; if they understand that their employers prefer comp time arrangements, they may feel as if they have no choice but to give up earned overtime pay in exchange for comp time. As a result, workers whose families most rely on overtime pay could struggle to make ends meet because they would lose access to a vital source of extra income. H.R. 1406's enforcement provision does not provide a remedy for such violations.

*H.R. 1406 would further undermine enforcement of overtime laws*

This bill would greatly increase the complexity of enforcing overtime protections by making it more difficult for DOL to determine whether an overtime violation has occurred when an employer asserts that comp time was granted in lieu of overtime pay. The bill does not provide any additional resources to the Department of Labor in order to ensure compliance. Currently, the enforcement capabilities of the Wage and Hour Division are stretched thin, with only about 1,000 inspectors who regulate a labor force of over 150 million people. Adding additional complexity to the process without providing additional resources is a recipe for rampant under-enforcement.

Furthermore, H.R. 1406 does not include meaningful penalties for employers who fail to comply with the legislation and does nothing to protect a worker who is discriminated against for choosing not to work for comp time. As a result, an employer could deny payment of overtime, deny a worker access to earned comp time, fire a worker for refusing to work for comp time and would only be liable for the amount of compensation he failed to pay and an amount equal to those wages as liquidated damages. A worker who is fired for refusing to agree to a comp time arrangement would have no right of reinstatement—and no unpaid accrued comp time from which to calculate any damages.

THE MAJORITY'S FLAWED PUBLIC-SECTOR ARGUMENT

Proponents of H.R. 1406 argue that the legislation simply provides flexibility already available in the public sector to private sector workers. However, state and municipal employees only became eligible for comp time versus overtime as a cost-saving policy that afforded employers the value of their employees' labor without being required to pay for it. At the same time, public sector workers generally enjoy many more employment protections than their private sector counterparts. As a result, public sector workers, who are also more likely to have union representation, are in a far more secure position to be able to negotiate equitable comp time arrangements. H.R. 1406 extends all the benefits of employer-controlled comp time arrangements to private sector employers, yet makes no effort to engender job protection parity for private sector workers.

LEGISLATION THAT WORKING FAMILIES REALLY NEED

Workers depend on the wage and overtime protections in the FLSA. They should not have to sacrifice earned wages to have

more time off from work. Nothing in the *Working Families Flexibility Act* improves wage protections or promotes workplace flexibility. There are many Democratic proposals that the Committee ought to consider that would increase workers' wages and improve working conditions.

*Working families need a raise—raise the minimum wage*

*H.R. 1010* will raise the federal minimum wage to \$10.10 by 2015, in three 95 cent increments. It will adjust the minimum wage each year to keep pace with the rising cost of living starting 2016. It will also raise the minimum wage for tipped workers—which has been frozen at a meager \$2.13 per hour for more than twenty years—to 70% of the minimum wage. A majority of workers' rights organizations enthusiastically support this bill, including: AFL-CIO, SEIU, National Partnership for Women and Families, National Employment Law Project, National Women's Law Center, NAACP, and the National Disability Rights Network.

*Working families need equal pay*

*The Paycheck Fairness Act* would address discriminatory pay practices, an important source of the wage gap. Women working full-time, year-round are paid 77 cents for every dollar paid to their male counterparts, translating into over \$10,000 less per year in median earnings.<sup>28</sup> This bill builds upon the landmark *Equal Pay Act* signed into law in 1963 by closing loopholes that have kept it from achieving its goal of equal pay. The bill would require employers to show pay disparity is truly related to job-performance—not gender. It prohibits employer retaliation for sharing salary information with coworkers. Under current law employers can sue and punish employees for sharing such information. In addition, it strengthens remedies for pay discrimination by increasing compensation women can seek, allowing them to not only seek back pay, but also punitive damages for pay discrimination. This bill is supported by many workers' rights organizations, such as the AFL-CIO, ACLU, National Partnership for Women and Families, and the National Women's Law Center.

*Working families need paid sick leave*

*The Healthy Families Act* would allow workers to earn paid sick leave to use when they are sick, to care for a sick family member, to obtain preventive care, or to address the impacts of domestic violence. Workers would earn one hour of paid sick time for every 30 hours worked. Employers that already provide paid sick time will not have to change their current policies, as long as their existing time can be used for the same purposes. Employers can also require workers to provide documentation supporting any request for leave longer than three consecutive days. This bill would let 30 million more workers earn paid sick days, expanding access to 90 percent of the workforce.<sup>29</sup> Hundreds of state and national organiza-

<sup>28</sup> National Women's Law Center. "FAQ About the Wage Gap" (September 2012). Available at [http://www.nwlc.org/sites/default/files/pdfs/wage\\_gap\\_faqs\\_sept\\_2012.pdf](http://www.nwlc.org/sites/default/files/pdfs/wage_gap_faqs_sept_2012.pdf)

<sup>29</sup> National Partnership for Women and Families (March 2013) *citing to* Joint Economic Committee of the U.S. Congress (March 2010). "Expanding Access to Paid Sick Leave: The Impact of the Healthy Families Act on America's Workers." Available at [http://jec.senate.gov/public/index.cfm?a-Files.Serve&File\\_id-abf8aca7-6b94-4152-b720-2d8d04b81ed6](http://jec.senate.gov/public/index.cfm?a-Files.Serve&File_id-abf8aca7-6b94-4152-b720-2d8d04b81ed6)

tions support this bill, including: AFL-CIO, ACLU, SEIU, NAACP, National Women's Law Center, National Employment Law Project, National Partnership for Women and Families, The Partnership for Working Families, 9 to 5—National Association for Working Women, and American Rights at Work.

During the markup of H.R. 1406, Rep. Courtney offered the *Healthy Families Act* as a substitute amendment. Unfortunately, Committee Republicans voted unanimously to block consideration of this amendment.

*Working families need paid family & medical leave*

Congress expanded the Family Medical Leave Act to provide greater protections for active duty service members, military caregivers, and family members of service members and covered veterans. Several other bills have been introduced to expand and improve the reach of the Family Medical Leave Act including the number of employers covered, types of circumstances covered and increased access to paid leave.

Expanding the coverage of FMLA is an important step but Congress must also ensure workers have access to paid family and medical leave. Only 11 percent of workers in the U.S. have access to paid family leave through their employers. We must expand work-family policies to include wage replacement when workers must take time away from work to address their own serious health condition, care for a family member with a serious health condition, or care for a newborn or newly adopted child. Currently, the states of California and New Jersey provide paid family leave through their temporary disability insurance systems. Congress should build upon this model and move to a national commitment to paid family & medical leave.

GEORGE MILLER, *Senior  
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