

WORKING FAMILIES FLEXIBILITY ACT OF 2017

APRIL 28, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Ms. FOXX, 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. 1180]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 1180) 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 2017”.

**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) 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 an employee who is not represented by a labor organization that has been certified or recognized as the representative of such

employee 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 employee 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 an employee 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 earned by such employee when the compensatory time was accrued; or

“(ii) the regular rate earned by such employee at the time such employee received payment of such compensation, 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. GAO REPORT.

Beginning 2 years after the date of enactment of this Act and each of the 3 years thereafter, the Comptroller General of the United States shall submit a report to Congress providing, with respect to the reporting period immediately prior to each such report—

(1) data concerning the extent to which employers provide compensatory time pursuant to section 7(s) of the Fair Labor Standards Act of 1938, as added by this Act, and the extent to which employees opt to receive compensatory time;

(2) the number of complaints alleging a violation of such section filed by any employee with the Secretary of Labor;

(3) the number of enforcement actions commenced by the Secretary or commenced by the Secretary on behalf of any employee for alleged violations of such section;

(4) the disposition or status of such complaints and actions described in paragraphs (2) and (3); and

(5) an account of any unpaid wages, damages, penalties, injunctive relief, or other remedies obtained or sought by the Secretary in connection with such actions described in paragraph (3).

#### SEC. 6. SUNSET.

This Act and the amendments made by this Act shall cease to be in effect on the date that is 5 years after the date of enactment of this Act.

## H.R. 1180, WORKING FAMILIES FLEXIBILITY ACT OF 2017

### PURPOSE

The purpose of H.R. 1180, the *Working Families Flexibility Act of 2017*, is to amend the *Fair Labor Standards Act of 1938* (FLSA) to provide compensatory time for employees in the private sector.

### COMMITTEE ACTION

#### 104TH CONGRESS

#### *Subcommittee hearing on Voluntary Compensatory Time Off*

The Committee on Economic and Educational Opportunities' (now known as the Committee on Education and the Workforce) consideration of legislation allowing compensatory time for private-sector employees began during the 104th Congress. As part of a se-

ries of oversight hearings on the FLSA, the Subcommittee on Workforce Protections held a hearing on June 8, 1995, on amending the FLSA to provide private-sector employers with the option of allowing their employees to voluntarily choose to take compensatory time off. 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.

*Subcommittee hearing on H.R. 2391, Working Families Flexibility Act of 1996*

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

*Full Committee and House passage of H.R. 2391, Working Families Flexibility Act of 1996*

On December 13, 1995, the Subcommittee on Workforce Protections approved H.R. 2391, as amended, by voice vote, and ordered the bill favorably reported. 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 to 16. The U.S. House of Representatives (House) passed H.R. 2391, as amended, on July 30, 1996, but the Senate did not act on it prior to the adjournment of the 104th Congress.

105TH CONGRESS

*Introduction of and Subcommittee hearing on H.R. 1, Working Families Flexibility Act*

On January 7, 1997, Rep. 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: Rep. Kay Granger (R-TX); Rep. Tillie Fowler (R-FL); Representative Sue Myrick (R-NC); 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 Enter-

prise 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.

*House passage of H.R. 1, Working Families Flexibility Act*

On March 5, 1997, the Committee on Education and the Workforce (Committee) 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 to 17. The House passed H.R. 1, as amended, on March 19, 1997, but the Senate did not act on it prior to the adjournment of the 105th Congress.

106TH CONGRESS

*Introduction of H.R. 1380, Working Families Flexibility Act*

On April 13, 1999, Rep. Ballenger introduced H.R. 1380, the *Working Families Flexibility Act*, and it was referred to the Committee; however, there was no action taken on the legislation.

107TH CONGRESS

*First Session—Introduction and legislative action*

On May 24, 2001, Rep. Judy Biggert (R–IL) introduced H.R. 1982, the *Working Families Flexibility Act*.

*Second Session—Subcommittee hearings*

While there was no action taken on H.R. 1982 in the 107th Congress, 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 Di-

rector, International Union of Police Associations, AFL–CIO, Alexandria, Virginia.

108TH CONGRESS

*Introduction and Subcommittee hearing on H.R. 1119, Family Time Flexibility Act*

On March 6, 2003, Rep. Biggert introduced H.R. 1119, the *Family Time Flexibility Act*. 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.

*Committee activity on H.R. 1119, Family Time Flexibility Act*

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

110TH CONGRESS

*Introduction of H.R. 6025, Family-Friendly Workplace Act*

On May 13, 2008, Rep. Cathy McMorris Rodgers (R–WA) introduced H.R. 6025, the *Family-Friendly Workplace Act*, which was referred to the Committee on Education and Labor (now known as the Committee on Education and the Workforce); however, no action was taken on the legislation.

111TH CONGRESS

*Introduction of H.R. 933, Family-Friendly Workplace Act*

On February 10, 2009, Rep. McMorris Rodgers introduced H.R. 933, the *Family-Friendly Workplace Act*, which was referred to the Committee on Education and Labor; however, no action was taken on the legislation.

113TH CONGRESS

*Introduction of and Subcommittee hearing on H.R. 1406, Family-Friendly Workplace Act of 2013*

On April 9, 2013, Rep. Martha Roby (R–AL) introduced H.R. 1406, the *Working Families Flexibility Act of 2013*, which was referred to the Committee. 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, Di-

rector 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.

*Full Committee markup and House passage of H.R. 1406, Family-Friendly Workplace Act of 2013*

On April 17, 2013, the Committee considered H.R. 1406. Rep. Roby offered an amendment in the nature of a substitute to make technical changes to the legislation. The Committee favorably reported H.R. 1406, as amended, to the House by a roll call vote of 23 to 14. On May 8, 2013, during Floor consideration by the House, Rep. Chris Gibson (R-NY) offered an amendment that was adopted by a roll call vote of 384 to 42. The amendment would have required the Government Accountability Office (GAO) to submit a report to Congress, two years after enactment of the legislation, regarding private-sector use of compensatory time. H.R. 1406 passed the House, as amended, by a roll call vote of 223 to 204. The bill was not acted on by the Senate prior to the adjournment of the 113th Congress.

115TH CONGRESS

*Introduction of H.R. 1180, Working Families Flexibility Act of 2017*

On February 16, 2017, Rep. Roby introduced H.R. 1180, the *Working Families Flexibility Act of 2017*, which was identical to H.R. 1406 as passed by the House during the 113th Congress. The bill was referred to the Committee.

*Subcommittee hearing on H.R. 1180, Working Families Flexibility Act of 2017*

On April 5, 2017, the Subcommittee on Workforce Protections held a hearing on H.R. 1180. The following individuals testified at the hearing: Ms. Leslie-Jo Boyd Christ, Chief Resource Officer, WellStone Behavioral Health, Huntsville, Alabama; Mr. Leonard Court, Esquire, Director, Crowe & Dunlevy, Oklahoma City, Oklahoma, testifying on behalf of the U.S. Chamber of Commerce; Ms. Crystal Frey, Vice President of Human Resources, Continental Realty Corporation, Baltimore, Maryland, testifying on behalf of SHRM; and Ms. Vicki Shabo, Vice President, National Partnership for Women & Families, Washington, D.C.

*Full Committee markup of H.R. 1180, Working Families Flexibility Act of 2017*

On April 26, 2017, the Committee considered H.R. 1180.<sup>1</sup> Rep. Bradley Byrne (R-AL), Chairman of the Subcommittee on Workforce Protections, offered an amendment in the nature of a substitute making technical changes to the introduced bill. The Committee voted to adopt the amendment in the nature of a substitute by voice vote. The bill was favorably reported to the House, as amended, by a roll call vote of 22 to 16.

<sup>1</sup>H.R. 1180, *Working Families Flexibility Act of 2017*: Markup Before the H. Comm. on Educ. and the Workforce, 115th Cong. (Apr. 26, 2017).

## SUMMARY OF H.R. 1180

H.R. 1180 gives private-sector employers and employees an option under the FLSA that federal, state, and local governments have had for many years. H.R. 1180 does not affect the compensatory time provisions already applicable to employees of federal, state, and local governments. The bill permits private-sector employers to offer their employees the option of selecting compensatory time off or cash overtime wages. An employee will be able to choose, based upon a voluntary agreement with his or her employer, to have his or her overtime compensated with paid time off.

The bill does 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 will continue to receive overtime compensation at a rate of 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, the paid time off will accrue at the rate of not less than one and one-half hours for each hour of overtime worked.

H.R. 1180 provides new employee protections, in addition to those contained in current law, in order to protect against the coercive use of compensatory time. The bill requires any arrangement for the use of compensatory time to be an expressly mutual agreement between the employer and the employee. In the case of employees who are represented by a recognized or certified labor organization, the agreement must be between the employer and the labor organization. In other cases, the agreement is with 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 that the employee has chosen to receive compensatory time off in lieu of cash compensation. The agreement must be made, kept, and preserved in accordance with the recordkeeping requirements under Section 11(c) of the FLSA.<sup>2</sup>

An employee can 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 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. An employee may also request in writing that monetary compensation be provided, at any time, for accrued compensatory time that has not yet been used. In all cases, the compensatory time would be cashed out at the regular rate of pay earned by the employee when the compensatory time was accrued, or at the regular rate earned by the employee when the employee cashed out, whichever is higher.

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<sup>2</sup>29 U.S.C. § 211(c).

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

A private-sector employer must provide an employee with 30 days' notice prior to cashing out an employee's accrued, unused compensatory time. However, an employer may only cash out unused 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, unused 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 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. 1180 contains a sunset provision whereby the legislation ceases 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>3</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>4</sup> Certain exceptions to the “40 hour workweek” are permitted, under Sections 7 and 13 of the FLSA,<sup>5</sup> for a variety of specific types and places of employment where 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>6</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 the employee’s 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 their employees compensatory time at a rate not less than one and one-half hours for each hour of employment for which overtime compensa-

<sup>3</sup>*Id.* §§ 201–219.

<sup>4</sup>*Id.* § 207.

<sup>5</sup>*Id.* § 207, 213.

<sup>6</sup>*Id.* § 213.

tion is required, subject to regulatory requirements administered by the Department of Labor.<sup>7</sup> While federal government employees may also earn compensatory time off, 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>8</sup>

This difference in treatment between the private and public sectors is explained by the fact that 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 included a recognition that 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 had led many state and local governments and their employees, prior to their being covered by the FLSA,<sup>9</sup> to mutually agree upon forms of compensatory time. As the Senate Committee on Labor and Human Resources explained in including 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>10</sup>

The Committee is certain that compensatory time can provide “mutually satisfactory solutions” in the private sector no less than is the case in the public sector. The Committee has heard compelling testimony from employees in the private sector who are covered by the overtime protections of the FLSA and who believe that a change in the law to allow compensatory time would be of great benefit to them.

Ms. Arlyce Robinson, an Administrative Support Coordinator for Computer Services Corporation and an hourly non-exempt employee, described to the Subcommittee 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

<sup>7</sup> *Id.* § 207(o); 29 C.F.R. §§ 553.20–553.28.

<sup>8</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 5 U.S.C. § 5543.

<sup>9</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.

<sup>10</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.

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 D.C. 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 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>11</sup>

Ms. Sandie Moneypenny, a process technician for the 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

<sup>11</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.

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>12</sup>

Ms. Deborah McKay, an administrative specialist, with PRC, Inc. testified about why she would like to have the option of selecting compensatory time off:

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 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>13</sup>

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

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>14</sup>

Ms. Linda M. Smith, a medical staff credentialing coordinator and secretary at the Bascom Palmer Eye Institute, expressed her “wholehearted support” for the development of a program that would enable her to have 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

<sup>12</sup>*Id.* at 186.

<sup>13</sup>*Id.* at 416–17.

<sup>14</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.

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>15</sup>

Ms. Christine Korzendorfer, an hourly employee with TRW, told the Subcommittee how important it would be for her to be able to choose compensatory time:

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

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>16</sup>

Ms. Terri Martell, an electrician with the Eastman Kodak Company, 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

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<sup>15</sup>*Id.* at 22.

<sup>16</sup>*Id.* at 10–11.

employees to choose between working and taking time off without pay to address family needs.<sup>17</sup>

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

While the law was intended to protect us—and maybe 50 years ago it did—in today’s business world it has had the effect of creating the illusion of two classes of workers. The term non-exempt is often misinterpreted to mean “less than professional.”<sup>18</sup>

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>19</sup>

Ms. Crystal Frey, vice president of human resources for a real estate business, shared how compensatory time would help employees better manage their work and family life:

I was recently approached by a non-exempt leasing consultant who was facing numerous life-changing events at one time, including the birth of her child, her upcoming marriage, and the completion of her college degree . . . [I]f comp time had been an option available to her, I believe it would have given her even more access to paid leave.<sup>20</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 wanting the increased flexibility provided by the *Working Families Flexibility Act*.

<sup>17</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.

<sup>18</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>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, Serial No. 113–13 at 16.

<sup>20</sup>Hearing on H.R. 1180, *Working Families Flexibility Act*, before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 115th Congress, First Session (oral testimony of Crystal Frey, Continental Realty Corporation).

As Ms. Juanita Phillips, Director of Human Resources at Intuitive Research and Technology Corporation, 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>21</sup>

Most recently, Ms. Leslie-Jo Boyd Christ, chief resource officer at a nonprofit focused on behavioral health, detailed the effects of denying workers the opportunity to choose compensatory time:

Many [of our] employees work side by side with Huntsville Police Department officers, who do benefit from the option of receiving overtime pay or comp time—it is difficult for employees to understand why the rules are different for public or governmental agencies when they work so hard for our community.<sup>22</sup>

Mr. Leonard Court testified before the Subcommittee about how the protections under the *Working Families Flexibility Act of 2017* would help ensure employee choice and control over their selection of compensatory time:

The bill is carefully drafted to ensure that employees retain maximum flexibility in being able to choose whether to take the comp time option, whether to continue exercising it, when they may seek a cash out of their banked time, and to protect them from any coercion or undue influence from the employer as to whether they exercise the comp time option.<sup>23</sup>

*H.R. 1180, Working Families Flexibility Act of 2017*

H.R. 1180 amends the FLSA to permit employers in the private sector to offer their employees the voluntary option to receive overtime pay in the form of 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 more than 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

<sup>21</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, Serial No. 113–13 at 11.

<sup>22</sup> Hearing on H.R. 1180, *Working Families Flexibility Act*, before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 115th Congress, First Session, Apr. 5, 2017 (oral testimony of Leslie Christ, WellStone Behavioral Health).

<sup>23</sup> *Id.* (oral testimony of Mr. Leonard Court, Esq., Crowe & Dunlevy).

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

H.R. 1180 does not alter current use of compensatory time in the public sector in any way. Rather, the legislation extends the option of compensatory time off to private-sector employees, which is the same option that federal, state, and local government employees have had for many years, and which has the support of private-sector employees who have testified before the Committee. The legislation includes numerous protections for employees to assure that employees' choice and use of compensatory time are truly voluntary. Compensatory time, as provided in H.R. 1180, is not a mandate on employers or employees. H.R. 1180 simply gives employees and employers the opportunity to agree to this arrangement, an opportunity that is now denied to them by the FLSA.

#### *Compensatory time agreement*

Under H.R. 1180, 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. 1180 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 that any such agreement between the employer and an individual employee must be entered into knowingly and voluntarily by the employee, and it may not be a condition of employment.

The bill also requires that, with regard to agreements between employers and individual employees, the agreement on compensatory time between the employer and the employee must be affirmed in a written or otherwise verifiable statement. The latter is intended to allow computerized and other similar payroll systems to include this information, so long as the employee's agreement to take the overtime in the form of compensatory time is verifiable. The Committee does not intend that the agreement could be purely oral with no contemporaneous record kept. To further assure compensatory time agreements are authentic, H.R. 1180 provides that, pursuant to the general recordkeeping authority of the FLSA, the

Secretary of Labor has authority to prescribe the information which the records of such agreements must include and the period of time the records should be maintained by the employer.<sup>24</sup>

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

Just as is the case with compensatory time as it operates in the public sector, H.R. 1180 does not require that the same agreement be made with every employee, or that the employer agree to offer compensatory time to all employees.<sup>25</sup> Opponents of compensatory time claim this allows an employer to unfairly single out employees and to 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), prohibits 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>26</sup>

The opponents of compensatory time have argued that compensatory time should be denied to employees in the private sector, but if it is allowed, then "low-wage" workers and certain occupations (e.g., temporary, seasonal, or part-time occupations) should be excluded. The Committee believes that many workers who likely would be included in a national definition of "low-wage" want to have the option of compensatory time off—and are perfectly capable of making that decision themselves. Indeed, some of the most forceful and compelling testimony before the Subcommittee 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. 1180.<sup>27</sup> Further, the requirement for mutual agreement by the employer and the employee and the employee protections in the bill ensure that 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 be a matter of agreement between employers and employees and, to that end, the law should permit employers and employees some flexibility in

<sup>24</sup> 29 U.S.C. § 211(c).

<sup>25</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>26</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.

<sup>27</sup> *Id.* at 17-18.

structuring compensatory time arrangements. H.R. 1180 provides certain parameters for such compensatory time arrangements, primarily in order 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. 1180. To the extent that any provision of an agreement is in violation of H.R. 1180, the provision would be superseded by the requirements of the FLSA.<sup>28</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 the employer during the 12-month period preceding the date the employee agrees to receive or receives compensatory time. Under 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 that the phrase “period of continuous employment with the employer” will be construed to encompass an unbroken period of time in which an employee is maintained on the payroll of a single employer (or, as applicable, its successor) on active status, or on inactive status where the employer has a reasonable expectation that the employee will return to duty (e.g., an employee on paid or unpaid leave whom the employer reasonably expects will return to duty will generally be considered to be in a “period of continuous employment” with the employer).

*Compensatory time accrual limit*

H.R. 1180 provides that an employee may accrue no more than 160 hours of compensatory time. This is in contrast to the public-sector provisions in current law that allow most employees to accrue 240 hours of compensatory time (in some occupations, employees may 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 that 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 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.

<sup>28</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).

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 that is in excess of 80 hours.

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

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

In all cases in which accrued compensatory time is cashed out, the rate of cash out must be the employee's regular rate of pay when the compensatory time was accrued or the employee's regular rate when the employee cashed out, whichever is higher. Thus, for

example, if compensatory time is accrued during the course of a year and the employee has received an increase in his or her hourly rate of pay during the year after the compensatory time is accrued, the cash out rate at the end of the year would be the employee's regular rate of pay at the end of the 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. 1180 requires the Secretary of Labor to revise the posting requirements under the regulations of the FLSA to reflect the compensatory time provisions of the bill. This will help to ensure that employees are informed of the circumstances under which compensatory time may be offered by an employer, the employees' right to accept or decline such offer, and the employees' rights regarding the use of compensatory time. The Secretary of Labor may, of course, promulgate such regulations as necessary in order to implement the provisions of H.R. 1180.

*Compensatory time and employment benefits*

Opponents of H.R. 1180 have raised the unfounded claim that compensatory time would reduce an employee's pension benefits. 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>29</sup>

Obviously, in some cases the employee also has 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 off 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 wish, which is not available to employees who elected to receive cash wages.

Similarly, opponents have suggested compensatory time disadvantages an employee's eligibility for unemployment benefits or the amount of unemployment benefits to which the employee would be entitled. H.R. 1180 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 ter-

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

minated may, depending on state law on “disqualifying income,” defer receipt of unemployment benefits, but it would not diminish the total benefits to which the employee may be entitled. However, to suggest, as some have, that compensatory time payments should not be considered as wages in any unemployment benefit determination would be to turn existing federal policy on “disqualifying income” on its head, by dictating to the States how this form of employee wages should be treated.

*Employee use of accrued compensatory time*

Under H.R. 1180, an employee who has accrued compensatory time may generally use the time whenever he or she so desires. The only limitations the bill puts on the use of compensatory time is that the employee’s request to use compensatory time off be made a reasonable time in advance of using it, and employee’s use of time off does not “unduly disrupt” the employer’s operations. 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 public-sector use of compensatory time under Section 7(o) of the FLSA.<sup>30</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>31</sup>

Court decisions regarding public-sector compensatory time have also shown that 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 that 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 em-

<sup>30</sup> 29 U.S.C. § 207(o)(5).

<sup>31</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 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.”).

ployee, unless doing so would cause undue disruption.<sup>32</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>33</sup>

Similarly, in *Beck v. City of Cleveland*, the Sixth Circuit Court of Appeals found that "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>34</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>35</sup>

The Committee also notes that the "unduly disrupt" standard included in H.R. 1180 is similar to the standard in the *Family and Medical Leave Act (FMLA)* that limits an employee's ability 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>36</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 the opponents of private-sector use of compensatory time to claim that H.R. 1180 allows the employer to control when compensatory time off is used. The employer's ability to deny compensatory time off under H.R. 1180 is very limited. But the employer must be able to maintain its operations. 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 to have this flexibility will be of no effect. Furthermore, providing for an employee's use of compensatory time off without any regard to workload or business demands is simply unfair to the employee's coworkers, who in many cases would have to handle the workload of the absent employee. Just as was the case in 1985 when workers in the public sector were permitted to choose compensatory time. H.R. 1180 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>37</sup>

<sup>32</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>33</sup> *Heitmann*, 560 F.3d at 647.

<sup>34</sup> 390 F.3d 912, 925 (6th Cir. 2005).

<sup>35</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>36</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).

<sup>37</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.

*Enforcement and remedies*

As an amendment to the FLSA, the compensatory time provisions in H.R. 1180 are 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. 1180 would be a part.<sup>38</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>39</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>40</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 of Labor may also sue the employer for damages on behalf of the employee or employees whose rights were violated, or may also seek injunctive relief.<sup>41</sup> Section 16(e) also authorizes the Secretary of Labor to seek civil penalties of up to \$1,925 per violation against an employer who “willfully or repeatedly” violates Section 7.<sup>42</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>43</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 that he or she was in compliance with the FLSA.<sup>44</sup> In any action brought by an employee, the employee may also be paid for his or her attorneys’ fees and costs.<sup>45</sup>

To be clear, H.R. 1180 retains all of the enforcement mechanisms and remedies that currently exist under the FLSA. H.R. 1180 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 off in lieu of cash overtime, or to use accrued compensatory time. Curiously, opponents of compensatory time have claimed that H.R. 1180 would allow employers to force employees to take compensatory time against their will or to use accrued compensatory time at the employer’s convenience. Those claims are contrary to the plain language of the bill.

The language of H.R. 1180 prohibiting intimidation, threats, and coercion, or attempts thereto, is identical to prohibitory language applicable to federal employees under the FMLA<sup>46</sup> and the *Federal Employees Flexible and Compressed Work Schedules Act*.<sup>47</sup> The

<sup>38</sup> 29 U.S.C. § 215(a)(2).

<sup>39</sup> *Id.* § 215(a)(3).

<sup>40</sup> *Id.* § 216(b).

<sup>41</sup> *Id.* § 217.

<sup>42</sup> *Id.* § 216(e).

<sup>43</sup> *Id.* § 216(b).

<sup>44</sup> *Id.* § 260.

<sup>45</sup> *Id.* § 216(b).

<sup>46</sup> 5 U.S.C. § 6385.

<sup>47</sup> *Id.* § 6132.

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>48</sup> Thus, H.R. 1180 prohibits an employer, for example, from forcing employees to take compensatory time off 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. 1180 provides that an employer who violates the anti-coercion provision shall be liable to the employee for the employee’s rate of compensation for each hour of compensatory time 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 that, while it may be prohibited conduct under H.R. 1180, there is no sanction in H.R. 1180 for an employer who either forces an employee to take compensatory time off or denies the employee the right to use accrued compensatory time. In both cases these claims are wrong. An employee who is unlawfully 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 that the Department of Labor will make use of the regulatory process to clarify the application of the remedies provisions contained in H.R. 1180 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 where necessary, there are effective sanctions under the bill and the FLSA for employers who violate the employee protections and other provisions of H.R. 1180.

#### *GAO report*

As detailed above, an amendment offered by then-Rep. Gibson passed the House during Floor debate in the 113th Congress on H.R. 1406. Language from the amendment was included in H.R. 1180 as introduced, which requires GAO to report two years after the bill’s enactment, and each of the three years thereafter, on the use of compensatory time in the private sector. GAO must provide information on the extent to which employers are providing compensatory time and the extent to which employees voluntarily select compensatory time. In addition, the report will include an accounting of the number of complaints alleging compensatory time violations filed with the Secretary of Labor, enforcement actions commenced by the Secretary, the status of such complaints and actions, and an account of any unpaid wages, damages, penalties, in-

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<sup>48</sup>*Id.* § 6385.

junctive relief, or other remedies obtained or sought by the Secretary, in connection with such actions. This information will assist Congress in evaluating the private-sector's use of compensatory time and further inform oversight of the rules related to such use.

### *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 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. 1180 removes this obstacle in federal law.

Opponents of H.R. 1180 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 their accrued compensatory time; and workers choose when to use their paid time off so long as they follow the same guidelines public employees do. The *Working Families Flexibility Act of 2017* is commonsense, pro-worker legislation that helps American workers 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 2017.

### *Section 2. Compensatory time*

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

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

continuous employment with the employer in the 12-month period prior to the date of the agreement or receipt of compensatory time.

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

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

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.

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 that has not yet been used. Within 30 days of receipt of the written request, the employer shall provide the employee with the monetary compensation at a rate received when the compensatory time was accrued or at the regular rate when the monetary compensation was provided, whichever is higher.

An employer that 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 earned by an employee when the compensatory time was accrued or the regular rate earned by such employee when the monetary compensation was provided, 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 pe-

riod 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 that violates the anti-coercion provisions (Section 7(s)(4)) of this Act 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 an additional equal amount as liquidated damages, reduced by the amount of such rate of compensation for each hour of compensatory time used by the employee.

### *Section 4. Notice to employees*

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

### *Section 5. GAO report*

Beginning two years after the date of enactment of this Act, the Comptroller General of the United States shall submit a report to Congress providing data concerning the extent to which employers provide compensatory time and the extent to which employees opt to receive compensatory time; the number of complaints alleging a violation of the Act's provisions; the number of enforcement actions commenced by the Secretary or initiated by the Secretary on behalf of any employee for alleged violations of the Act; the disposition or status of such complaints and actions; and an account of any unpaid wages, damages, penalties, injunctive relief, or other remedies obtained or sought by the Secretary in conjunction with such actions.

### *Section 6. 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. 1180 amends the *Fair Labor Standards Act of 1938* to provide 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. 1180 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 26, 2017

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

Roll Call: 1 Bill: H.R. 1180 Amendment Number: 2

Disposition: Defeated by a vote of 16 yeas and 22 nays

Sponsor/Amendment: Ms. Blunt Rochester - Limits comp time to employees who have at least 7 paid sick days

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)			X
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Mr. RUSSELL (OK)		X		Ms. BLUNT ROCHESTER (DE)	X		
Ms. STEFANIK (NY)		X		Mr. KRISHNAMOORTHY (IL)	X		
Mr. ALLEN (GA)		X		Ms. SHEA-PORTER (NH)	X		
Mr. LEWIS (MN)		X		Mr. ESPAILLAT (NY)	X		
Mr. ROONEY (FL)		X					
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
vacancy							

TOTALS: Aye: 16 No: 22 Not Voting: 1

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: April 26, 2017**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**Roll Call: 2 Bill: H.R. 1180 Amendment Number: 4Disposition: Defeated by a vote of 16 yeas and 22 naysSponsor/Amendment: Ms. Shea Porter - Ensures overtime work is not preferentially assigned

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)			X
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Mr. RUSSELL (OK)		X		Ms. BLUNT ROCHESTER (DE)	X		
Ms. STEFANIK (NY)		X		Mr. KRISHNAMOORTHY (IL)	X		
Mr. ALLEN (GA)		X		Ms. SHIEA-PORTER (NH)	X		
Mr. LEWIS (MN)		X		Mr. ESPAILLAT (NY)	X		
Mr. ROONEY (FL)		X					
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
vacancy							

TOTALS: Aye: 16 No: 22 Not Voting: 1

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: April 26, 2017

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

Roll Call: 3 Bill: H.R. 1180 Amendment Number: 5

Disposition: Defeated by a vote of 16 yeas and 22 nays

Sponsor/Amendment: Ms. Bonamici - Places any deferred overtime payments into an interest bearing account

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)			X
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Mr. RUSSELL (OK)		X		Ms. BLUNT ROCHESTER (DE)	X		
Ms. STEFANIK (NY)		X		Mr. KRISHNAMOORTHY (IL)	X		
Mr. ALLEN (GA)		X		Ms. SHEA-PORTER (NH)	X		
Mr. LEWIS (MN)		X		Mr. ESPAILLAT (NY)	X		
Mr. ROONEY (FL)		X					
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
vacancy							

TOTALS: Aye: 16 No: 22 Not Voting: 1

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: April 26, 2017

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

Roll Call: 4 Bill: H.R. 1180 Amendment Number: 7

Disposition: Defeated by a vote of 16 yeas and 22 nays

Sponsor/Amendment: Mr. Espallat - Prohibits willful and repeated FLSA violators from offering comp time

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)			X
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Mr. RUSSELL (OK)		X		Ms. BLUNT ROCHESTER (DE)	X		
Ms. STEFANIK (NY)		X		Mr. KRISHNAMOORTHY (IL)	X		
Mr. ALLEN (GA)		X		Ms. SHEA-PORTER (NH)	X		
Mr. LEWIS (MN)		X		Mr. ESPAILLAT (NY)	X		
Mr. ROONEY (FL)		X					
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
vacancy							

TOTALS: Aye: 16 No: 22 Not Voting: 1

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: April 26, 2017**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**Roll Call: 5 Bill: H.R. 1180 Amendment Number: 8Disposition: Defeated by a vote of 16 yeas and 22 naysSponsor/Amendment: Ms. Wilson - Exempt workers who earn less than 2.5 times the minimum wage

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)			X
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Mr. RUSSELL (OK)		X		Ms. BLUNT ROCHESTER (DE)	X		
Ms. STEFANIK (NY)		X		Mr. KRISHNAMOORTHY (IL)	X		
Mr. ALLEN (GA)		X		Ms. SHEA-PORTER (NH)	X		
Mr. LEWIS (MN)		X		Mr. ESPAILLAT (NY)	X		
Mr. ROONEY (FL)		X					
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
vacancy							

TOTALS: Aye: 16 No: 22 Not Voting: 1

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: April 26, 2017

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

Roll Call: 6 Bill: H.R. 1180 Amendment Number: 9

Disposition: Defeated by a vote of 15 yeas and 22 nays

Sponsor/Amendment: Ms. Adams - Exempts comp time arrangements from mandatory arbitration agreements

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)			X
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Mr. RUSSELL (OK)		X		Ms. BLUNT ROCHESTER (DE)			X
Ms. STEFANIK (NY)		X		Mr. KRISHNAMOORTHY (IL)	X		
Mr. ALLEN (GA)		X		Ms. SHEA-PORTER (NH)	X		
Mr. LEWIS (MN)		X		Mr. ESPAILLAT (NY)	X		
Mr. ROONEY (FL)		X					
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
vacancy							

TOTALS: Aye: 15 No: 22 Not Voting: 2

Total: 40 / Quorum: 14 / Report: 21

Date: April 26, 2017**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**Roll Call: 7 Bill: H.R. 1180 Amendment Number: \_\_\_\_\_Disposition: Ordered favorably reported to the House, as amended, by a vote of 22 yeas and 16 nays.Sponsor/Amendment: Mr. Wilson - 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
Mrs. FOXX (NC) (Chairwoman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mrs. DAVIS (CA)		X	
Mr. HUNTER (CA)	X			Mr. GRIJALVA (AZ)		X	
Mr. ROE (TN)	X			Mr. COURTNEY (CT)		X	
Mr. THOMPSON (PA)	X			Ms. FUDGE (OH)		X	
Mr. WALBERG (MI)	X			Mr. POLIS (CO)			X
Mr. GUTHRIE (KY)	X			Mr. SABLAN (MP)		X	
Mr. ROKITA (IN)	X			Ms. WILSON (FL)		X	
Mr. BARLETTA (PA)	X			Ms. BONAMICI (OR)		X	
Mr. MESSER (IN)	X			Mr. TAKANO (CA)		X	
Mr. BYRNE (AL)	X			Ms. ADAMS (NC)		X	
Mr. BRAT (VA)	X			Mr. DeSAULNIER (CA)		X	
Mr. GROTHMAN (WI)	X			Mr. NORCROSS (NJ)		X	
Mr. RUSSELL (OK)	X			Ms. BLUNT ROCHESTER (DE)		X	
Ms. STEFANIK (NY)	X			Mr. KRISHNAMOORTHY (IL)		X	
Mr. ALLEN (GA)	X			Ms. SHEA-PORTER (NH)		X	
Mr. LEWIS (MN)	X			Mr. ESPAILLAT (NY)		X	
Mr. ROONEY (FL)	X					X	
Mr. MITCHELL (MI)	X						
Mr. GARRETT (VA)	X						
Mr. SMUCKER (PA)	X						
Mr. FERGUSON (GA)	X						
vacancy	X						

TOTALS: Aye: 22 No: 16 Not Voting: 1

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

## STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House rule XIII, the goal of H.R. 1180 is provide compensatory time for employees in the private sector.

## DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 1180 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. 1180 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. 1180 from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, April 27, 2017.*

Hon. VIRGINIA FOXX,  
*Chairwoman, Committee on Education and the Workforce,  
House of Representatives, Washington, DC.*

DEAR MADAM CHAIRWOMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1180, the Working Families Flexibility Act of 2017.

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

Sincerely,

KEITH HALL, *Director.*

Enclosure.

*H.R. 1180—Working Families Flexibility Act of 2017*

H.R. 1180 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 of 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 bill also would require the Government Accountability Office (GAO) to report to the Congress about the extent to which employers provide such compensatory time as well as the number of complaints alleging violations of the provisions and the disposition of those complaints, including any enforcement actions. The changes would be effective for five years after enactment of the bill. Based on the cost of similar activities by GAO, CBO estimates that implementing the bill would cost less than \$500,000 annually; such spending would be subject to the availability of appropriated funds.

CBO estimates enacting H.R. 1180 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 1180 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 1180 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 H. Samuel Papenfuss, Deputy 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. 1180. 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*):

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

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italics*,

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 workweek 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 guaran-

teed 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 reimburseable 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 regula-

tions 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 sub-

section (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 agen-

cy 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) 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 an employee who is not represented by a labor organization that has been certified or recognized as the representative of such employee 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 employee 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 an employee shall not directly or indirectly intimidate, threaten, or coerce or attempt to intimidate, threaten, or coerce any employee for the purpose of—

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

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

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

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

(6) RATE OF COMPENSATION.—

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

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

(ii) the regular rate earned by such employee at the time such employee received payment of such compensation,

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.*

\* \* \* \* \*

## MINORITY VIEWS

Committee Democrats oppose H.R. 1180. This legislation would amend the Fair Labor Standards Act (FLSA) to allow private sector employers to enter into voluntary arrangements with their employees to “compensate” them with compensatory time off (“comp time”) in lieu of overtime pay. Instead of paying workers overtime (time-and-a-half for every hour that they work beyond forty in a week), this legislation permits employers to pay employees in comp time (one and one-half hours of paid time off for every hour that they work over forty at the employee’s regular rate). The legislation provides no guarantee, however, that workers can take the time off when they actually need it.

H.R. 1180 undermines the vital protections in the Fair Labor Standards Act (FLSA) by making it cheaper for employers to require their employees to work excessive hours and legal for employers to deny workers their overtime pay. It also undermines enforcement of our wage and hour laws. Yet H.R. 1180 is being advanced by House Republicans as a “pro-family, pro-worker proposal.”<sup>1</sup> Unfortunately, rather than presenting this Committee with legislation that would actually benefit working families, the Majority has championed legislation that provides a way for employers to give their employees a pay cut. H.R. 1180 has been rejected in many previous Congresses, and it has never advanced beyond the House.

Instead of considering H.R. 1180, Congress should pass legislation that both protects workers’ overtime pay and promotes needed flexibility in the workplace. Democrats have proposed legislation that would raise the minimum wage, ensure equal pay for equal work, guarantee paid sick days and paid family and medical leave, and provide flexible and predictable schedules. These are the solutions that would make a real difference in the lives of working Americans, rather than a proposal that undermines bedrock worker protections and costs workers much-needed overtime compensation.

### THE FAIR LABOR STANDARDS ACT

In the 1930s, Congress recognized 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 still stands as one of the crowning achievements of the New Deal. This crucial law establishes a federal minimum wage, restricts the use of child

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<sup>1</sup>Fact Sheet: Working Families Flexibility Act of 2017, United States House of Representatives, Committee on Education and the Workforce—Republicans (Apr. 24, 2017), *available at* <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=401576>.

<sup>2</sup>29 U.S.C. § 202(a).

labor, and sets standards for when employers must pay workers overtime.<sup>3</sup>

Seventy-nine 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>4</sup>

The maximum hours and overtime provisions are set out in Section 7 of the FLSA. Currently, the law requires employers to compensate all covered employees 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 times their regular wage rate.<sup>5</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.

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 "intolerable" number of hours in a given week.<sup>6</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.

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>7</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>8</sup> As applied to federal employees, the 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>9</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>10</sup>

<sup>3</sup> 29 U.S.C. §§ 201–217.

<sup>4</sup> 29 U.S.C. §§ 201–219.

<sup>5</sup> 29 U.S.C. § 207(a).

<sup>6</sup> President Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1938), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=15517>.

<sup>7</sup> Pub. L. No. 99–150.

<sup>8</sup> 29 U.S.C. § 207.

<sup>9</sup> Fact Sheet: Compensatory Time Off, Office of Personnel Management, *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>10</sup> Ross Eisenbrey, *The Naked Truth About Comp Time*, Economic Policy Institute, at 5–6 (Mar. 31, 2003), *available at* <http://www.epi.org/page/-/old/issuebriefs/ib190/ib190.pdf>.

## PAST EFFORTS TO REPLACE OVERTIME WITH COMP TIME

The ideas presented by the Majority in H.R. 1180 are not new. Committee Republicans have sponsored numerous virtually identical bills, 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 1995, Republicans introduced H.R. 2391, the *Working Families Flexibility Act of 1996*. This bill was reported out of Committee and passed the House on a nearly party-line vote. It was not considered by the Senate.
- 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 House and was not considered by the Senate.<sup>11</sup>
- In 1999, Republicans introduced, H.R. 1380, the *Working Families Flexibility Act* and no further action was taken.
- In 2001, Republicans introduced H.R. 1982, the *Working Families Flexibility Act*, and the Subcommittee on Workforce Protections held two hearings on the issue.
- 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 was reported out of Committee and no further action was taken.<sup>12</sup>
- In 2008, Republicans introduced H.R. 6025, the *Family Friendly Workplace Act*, a nearly identical comp time bill. No further action was taken.<sup>13</sup>
- In 2009, Republicans introduced H.R. 933, which was a re-introduction of the 2008 *Family Friendly Workplace Act*. No further action was taken.<sup>14</sup>
- In 2013, Republicans introduced H.R. 1406, the *Working Families Flexibility Act of 2013*, the first version of the bill introduced by Rep. Martha Roby.<sup>15</sup> This bill passed the House on a nearly party-line vote, and it was not considered by the Senate.
- In 2015, Republicans introduced H.R. 465, the *Working Families Flexibility Act of 2015*. No further action was taken.<sup>16</sup>
- In 2017, Republicans introduced H.R. 1180, the *Working Families Flexibility Act of 2017*. This bill was reported out of Committee on a party-line vote, with all Democrats opposing the legislation.<sup>17</sup>

Each comp time bill has met firm opposition from worker advocates and women's organizations that recognized the harm these proposals would inflict upon working families. The following orga-

<sup>11</sup> H.R. 1, available at <https://www.gpo.gov/fdsys/pkg/BILLS-105hr1eh/pdf/BILLS-105hr1eh.pdf>.

<sup>12</sup> H.R. 1119, available at <http://www.gpo.gov/fdsys/pkg/BILLS-108hr1119rh/pdf/BILLS-108hr1119rh.pdf>.

<sup>13</sup> H.R. 6025, available at <http://www.gpo.gov/fdsys/pkg/BILLS-110hr6025ih/pdf/BILLS-110hr6025ih.pdf>.

<sup>14</sup> H.R. 933, available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr933ih/pdf/BILLS-111hr933ih.pdf>.

<sup>15</sup> H.R. 1406, available at <https://www.congress.gov/bill/113th-congress/house-bill/1406/related-bills>.

<sup>16</sup> H.R. 465, available at <https://www.congress.gov/bill/114th-congress/house-bill/465?q= %7B %22search %22 %3A %5B %22Working+Families+Flexibility+Act+of+2015 %22 %5D%7D&r=1>.

<sup>17</sup> H.R. 1180, available at <https://www.congress.gov/bill/115th-congress/house-bill/1180?q= %7B %22search %22 %3A %5B %22Working+Families+Flexibility+Act+of+2017 %22 %5D %7D&r=3>.

nizations sent letters to the Committee in opposition to H.R. 1180: 9–5, the American Federation of State, County and Municipal Employees (AFSCME), the Center for Law and Social Policy (CLASP), the Economic Policy Institute (EPI), Family Values @ Work, the Leadership Conference on Civil and Human Rights (LCCR), the National Employment Law Project (NELP), the National Women’s Law Center (NWLC), the Service Employees International Union (SEIU), the International Brotherhood of Teamsters, the United Food and Commercial Workers (UFCW), and the United Steelworkers (USW). The National Partnership for Women & Families led a letter with signatures from 85 organizations.

#### THE REAL IMPACT OF H.R. 1180 ON WORKING FAMILIES

H.R. 1180 forces working people to choose between their hard-earned pay and time with their families, when they need both. Democrats have real solutions to the challenges facing working families that would not force them to make this impossible choice. Hardworking Americans should have access to basic benefits such as paid sick days, family leave and fair schedules. But H.R. 1180 does nothing to increase workers’ access to these important benefits. Meanwhile, it creates significant uncertainty for workers.

#### *H.R. 1180 undermines workers’ ability to earn overtime pay*

H.R. 1180 makes it less likely that workers who need overtime pay will be able to get it. Some workers count on overtime pay to meet their expenses—including putting children through college, buying a home or saving for retirement. Among workers paid less than \$22,500 a year, for example, roughly 40 percent report working some overtime in the previous month voluntarily.<sup>18</sup> Nothing in the legislation prohibits employers from preferentially assigning overtime hours to employees who agree to accept comp time. Since providing comp time is cheaper than providing overtime pay, employers are extremely likely to allocate overtime hours first to those employees who agree to accept comp time.

While the legislation states that employees are free to choose whether to accept comp time, in practice, the power differential between employers and employees, particularly in non-union workplaces, would make it far more likely that some employees would feel obligated to accept comp time even when they would much rather get paid for their overtime in their next scheduled paycheck. While the legislation provides anti-retaliation protections for employees who do not accept comp time, proving retaliation is extremely difficult and enforcing these provisions takes time and money that most overtime-eligible employees do not have.

#### *H.R. 1180 will lead to longer work hours and less flexibility for overworked Americans*

For many working families, time is a precious commodity. In families where both parents work, being forced to spend more time at work in order to earn time with one’s family imposes a significant hardship. But under H.R. 1180, an employee who needs to

<sup>18</sup>Lonnie Golden, *Flexibility and Overtime Among Hourly and Salaried Workers* (Sept. 30, 2014), available at <http://www.epi.org/publication/flexibility-overtime-hourly-salaried-workers/>.

take a day off because she has caregiving responsibilities, school obligations, a health condition, or for any other reason, must first log overtime hours.<sup>19</sup>

More than 20 percent of the workforce currently reports working overtime on a mandatory basis.<sup>20</sup> When workers are required to stay late at work, this can mean not being able to pick up a child from a child care center or administer a parent's dose of evening medications. Because this legislation makes it cheaper for employers to require employees to work overtime, it is likely to leave many workers with less control over their schedules and more mandatory overtime hours at work.<sup>21</sup>

As discussed in further detail below, H.R. 1180 provides no guarantee that an employee can take comp time when she needs it—such as when she is sick, on a snow day when schools are closed, or to take a child to a doctor's appointment. To the contrary, H.R. 1180 provides significant discretion to employers to determine when comp time may be used. This uncertainty about whether and when an employee may take comp time would significantly constrain employees' ability to plan their lives outside of work.

Contrary to the Majority's assertions, nothing in the FLSA prevents employers from providing flexibility to workers. Under current law, employers may provide workers with paid or unpaid leave, as well as flexible and predictable schedules. Yet, four in ten workers do not have a single paid sick day. And among early career-workers, more than 40 percent report getting their schedules less than one week in advance. The only constraint on employers' ability to offer paid time off or fair work schedules is their willingness to do so.

*H.R. 1180 undermines enforcement of existing wage and hour laws*

Workers are cheated out of their overtime pay all too frequently. In a survey of low-wage workers, 76 percent of those who reported working overtime said that they were not paid time-and-a-half for their work.<sup>22</sup> This legislation would greatly increase the complexity of enforcing overtime protections. It will be more difficult to determine if an overtime violation has occurred where an employer asserts that comp time was granted in lieu of overtime pay. Yet, the bill provides no new resources to ensure compliance even though DOL's resources to remedy wage theft are already woefully inadequate. Furthermore, while the legislation provides a private right of action, most employees who are denied overtime pay do not have the financial resources to hire a lawyer to bring suit.

<sup>19</sup> At the same time, for some workers, working overtime is not even a possibility. A significant share of the workforce does not have access to overtime work. Four percent of the workforce—amounting to six million workers—worked part-time involuntarily in 2015. Lonnie Golden, *Still Falling Short on Hours and Pay: Part-time Work Becoming New Normal* (Dec. 5, 2016), available at <http://www.epi.org/publication/still-falling-short-on-hours-and-pay-part-time-work-becoming-new-normal/>.

<sup>20</sup> Lonnie Golden, *Flexibility and Overtime Among Hourly and Salaried Workers* (Sept. 30, 2014), available at <http://www.epi.org/publication/flexibility-overtime-hourly-salaried-workers/>.

<sup>21</sup> Lonnie Golden, *Flexibility and Overtime Among Hourly and Salaried Workers* (Sept. 30, 2014), available at <http://www.epi.org/publication/flexibility-overtime-hourly-salaried-workers/>.

<sup>22</sup> Annette Bernhardt, et al., *Broken Laws, Unprotected Workers, Fair Warning* (Apr. 2014), available at <https://www.fairwarning.org/wp-content/uploads/2014/04/Link3Shorter.pdf>.

*H.R. 1180 puts workers' paychecks at risk unnecessarily*

H.R. 1180 creates additional, unnecessary risk for employees, because if an employer goes bankrupt before it has paid its employees the comp time they are owed, the employee may never recover her unpaid wages. Workers also risk losing up to 160 hours of overtime pay (the limit on overtime hours a worker can bank as comp time 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. In 2013 alone, 400,000 small businesses closed.<sup>23</sup> If an employer chooses, the employer may also cash out comp time earned in excess of 80 hours, scuttling an employee's planned surgery or parental leave. Finally, an employer can also make the unilateral decision to discontinue a comp time program, derailing an employee's planned time off.

*H.R. 1180 provides an unsecured interest-free loan for employers*

Agreeing to be paid in comp time is tantamount to providing an employer with a zero-interest loan. While banking comp time with her employer, the employee is loaning her employer her wages, repayable only when the employer decides it's convenient, not when the employee actually needs the money or the time off from work. Meanwhile, the employer is free to invest the employee's withheld wages to the employer's advantage.

In contrast, if workers were paid for their overtime hours in their next scheduled paycheck, they could put that money in an interest-earning bank account where it would grow. Workers would be better off getting paid for their overtime hours, setting that money safely aside in an interest-earning account, and self-funding leave at some point in the future, rather than using comp time.

## THE MAJORITY'S FLAWED PUBLIC-SECTOR ARGUMENT

Proponents of H.R. 1180 argue that the legislation simply provides flexibility already available in the public sector to private sector workers. However, this argument ignores profound differences between public and private sector employers. Moreover, state and municipal employees only became eligible for comp time as a cost-saving policy that afforded employers the value of their employees' labor without being required to pay for it.

H.R. 1180 extends all the benefits of employer-controlled comp time arrangements to private sector employers, yet makes no effort to achieve parity for private sector workers in terms of job protection or other benefits. At the same time, public sector workers generally enjoy many more employment protections than their private sector counterparts, and they are far more likely to have benefits like paid sick leave and vacation. In contrast to the job security that is often afforded to public sector workers, private sector workers are employed at-will and can be terminated for any reason other than race, gender or retaliation for exercising rights protected by employment laws such as the National Labor Relations Act.

<sup>23</sup>U.S. Small Business Administration, "Frequently Asked Questions," (Jun. 2016), available at [https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016\\_WEB.pdf](https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf).

Union density in the public sector is also five to six times greater than in the private sector.<sup>24</sup> This means that while public sector workers are likely to have some bargaining power, workers in the private sector are far more likely to feel coerced to accept comp time in lieu of overtime pay, and that the failure to do so would put their jobs at risk. Furthermore, workers represented by a union can get help if they feel that their employers are not implementing comp time fairly. Private sector workers without union representation will have no recourse other than going to court, a costly and time-consuming process with a very uncertain outcome.

Finally, the litigation over the use of comp time in the public sector provides significant cause for concern about the potential for employer abuse of comp time in the private sector. The language in the FLSA permitting employers to provide comp time to public sector employees provides that the employer must permit the employee “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. This language is mirrored in H.R. 1180.

Litigation over the interpretation of this provision has yielded unfavorable results for employees. For example, the United States Court of Appeals for the Ninth Circuit interpreted the law to give an employer absolute power to deny compensatory time requests on particular dates and to delay the use of compensatory time for up to one full year.<sup>25</sup> Courts’ deference to the employer’s definition of “reasonable period” and when time off would “unduly disrupt” business operations suggests that under H.R. 1180 employers may prohibit employees from taking comp time when they need it—such as when they are sick, or a parent in need of help has a scheduled surgery.

APRIL 5, 2017 LEGISLATIVE HEARING ON H.R. 1180 IN THE  
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

Employer representatives testified that they provided a wide range of workplace flexibility options to their employees, which are all permissible under the FLSA. Despite the extensive workplace flexibility options that are already consistent with the FLSA, they contended that the FLSA was outdated, and that it should be amended to permit comp time.

The Democratic witness, Ms. Vicki Shabo, explained that H.R. 1180 does nothing to increase or guarantee flexibility for working people and it diminishes their ability to earn much-needed overtime pay. As Ms. Shabo noted, while there are many businesses that voluntarily provide workplace flexibility options for their employees, there are still far too many workers who lack access to basic benefits like paid sick days, paid family leave, and flexible and predictable schedules. Ms. Shabo provided examples of how a typical worker would not benefit from comp time. She also explained that despite substantial gains in productivity over the past

<sup>24</sup> Economic News Release: Union Members Summary, Bureau of Labor Statistics (Jan. 26, 2017), available at <https://www.bls.gov/news.release/union2.nr0.htm>.

<sup>25</sup> See *Mortensen v. County of Sacramento*, 368 F.3d 1082 (9th Cir. 2004) (citing *Houston Police Officers’ Union v. City of Houston*, 330 F.3d 298 (5th Cir.2003) (cert. denied, 540 U.S. 879 (2003))).

four decades, the typical worker's wages have barely grown. To guarantee workplace flexibility and fair pay for all working people, Ms. Shabo urged the committee to consider legislation such as the *Healthy Families Act*, the *FAMILY Act*, the *Paycheck Fairness Act*, the *Schedules that Work Act*, and legislation to raise the minimum wage.

APRIL 26, 2017 FULL COMMITTEE MARKUP ON H.R. 1180

*Full committee markup of H.R. 1180*

On April 26, 2017 the full committee marked up H.R. 1180, the *Working Families Flexibility Act of 2017*. Committee Democrats offered amendments that would provide real solutions to the challenges facing working families.

Rep. Blunt Rochester offered an amendment limiting the workers who are eligible for comp time under H.R. 1180 to those who have at least 7 days of paid sick leave. Permitting workers to take guaranteed paid time off when they are sick or to care for a sick family member is a critical solution to meet the needs of struggling families. Committee Democrats support the *Healthy Families Act* which, unlike H.R. 1180, would allow workers to earn and accrue sick days without compromising their overtime pay. However, this amendment was rejected by the Majority on a party-line vote. Two substitute amendments were also offered. Rep. DeSaulnier offered the *Schedules that Work Act*, which provides workers with flexible and predictable schedules, and Rep. Takano offered an amendment that would expand access to overtime pay for over 13 million working people. Unfortunately, Committee Republicans voted unanimously to block consideration of these amendments.

Democrats also offered amendments designed to strengthen the protections for workers in H.R. 1180. These included an amendment offered by Rep. Adams to exempt compensatory time arrangements from mandatory arbitration clauses, an amendment offered by Rep. Wilson to exempt low-wage workers from comp time agreements, an amendment offered by Rep. Espaillat to exempt unscrupulous employers who have violated the FLSA willfully and repeatedly from comp time agreements, an amendment offered by Rep. Bonamici requiring that employers keep employees' comp time pay in an interest-bearing account, and an amendment offered by Rep. Shea-Porter to deter employers from coercing employees to accept comp time in lieu of overtime pay and prevent employers from cashing out employees' comp time in excess of 80 hours. Republicans rejected all of Democrats' efforts to strengthen the protections for working people in H.R. 1180.

At the markup, Republican members contended that former President William Jefferson Clinton was supportive of comp time legislation. In fact, as Democrats noted, President William Jefferson Clinton issued a Statement of Administration Policy on March 15, 1997 opposing the legislation, which stated, in part:

"H.R. 1 purports to give working families greater flexibility. In reality, it grants employers more rights at the expense of working people:

- H.R. 1 fails to offer workers real choice. In particular, H.R. 1 would allow an employer to decide when a worker could use

his or her compensatory time-off by disapproving such time-off if the employer claims it would “unduly disrupt” its operations. In addition, H.R. 1 would permit an employer to “cash out” a worker’s earned compensatory time over 80 hours.

- H.R. 1 fails to protect workers against employer abuse. For example, H.R. 1 offers inadequate protections for vulnerable workers and part-time, seasonal, and temporary employees, including garment and construction workers and those who are employed in industries with histories of Fair Labor Standards Act violations. H.R. 1 also fails to prohibit employers from substituting compensatory time-off for paid vacation or sick leave benefits. Furthermore, H.R. 1 lacks meaningful remedies for workers when employers penalize them for electing to receive overtime pay in lieu of compensatory time-off. In addition, H.R. 1 contains inadequate worker safeguards in cases where an employer goes bankrupt or out-of-business.

- H.R. 1 fails to preserve workers’ rights. Workers who take compensatory time-off can be forced to work additional overtime in the same week—even on the weekend—without being paid overtime premium pay.”<sup>26</sup>

These arguments apply with equal force to H.R. 1180, which is substantially similar to H.R. 1, the comp time bill proposed in 1997.

#### POLICY SOLUTIONS THAT WORKING FAMILIES NEED

Workers depend on the wage and overtime protections in the FLSA, and they should not have to sacrifice their paychecks to take time off from work. Committee Democrats support an agenda for working families that would raise pay for hardworking Americans and help them juggle work and family life.

##### *Working families need a raise*

Workers in 21 states still earn the federal minimum wage of \$7.25 an hour which leaves a person who works full-time year-round and has only one child living below the poverty threshold.<sup>27</sup> In the coming weeks, Democrats will introduce legislation to raise the minimum wage to \$15 by 2024. It’s been nearly ten years since the last legislated increase to the minimum wage. Raising the minimum wage to \$15 by 2024 would directly lift wages for 22.5 million workers.

##### *Working families need strengthened overtime protections*

One of the reasons workers’ wages have been stagnant for far too long is the failure to update the overtime threshold below which salaried workers are automatically eligible for overtime pay. In 1975, the overtime threshold covered 62 percent of salaried workers, but today only 8 percent of workers are covered. The Department of Labor’s overtime rule would have increased the salary threshold under which most workers are automatically eligible

<sup>26</sup> Statement of Administration Policy on H.R. 1, *Working Families Flexibility Act* (March 15, 1997), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=74919>.

<sup>27</sup> Center for Poverty Research, University of California, Davis, “What are the annual earnings for a full-time minimum wage worker?” (Updated Aug. 30, 2016), available at <http://poverty.ucdavis.edu/faq/what-are-annual-earnings-full-time-minimum-wage-worker>.

from for overtime pay from \$23,660 to \$47,476. This would make 4.2 million more workers eligible for overtime pay and strengthen overtime protections for 8.9 million more. This rule would ensure that low-paid assistant managers could no longer be forced to work 50, 60, or 70 hours per week—the extra 10, 20, or 30 hours for free. Yet, Republicans introduced legislation in the last Congress to roll back this rule, and held a Committee hearing that was critical of the rule. The rule was blocked by a federal court before it took effect, and President Trump’s Department of Labor sought repeated extensions of time to file its reply brief in the litigation, further delaying the rule.

*Working families need paid sick leave*

*The Healthy Families Act* (H.R. 1286) 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 for reasons related to domestic violence. This is critical for the four in ten private sector workers who do not have access to a single paid sick day.<sup>28</sup> Workers would earn one hour of paid sick time for every 30 hours worked. State and local laws that provide employees with paid sick days are also vitally important to working families. But no matter where they live, every worker should have the right to take a paid sick day for his own illness or to care for a family member. That is why Committee Democrats strongly support the *Healthy Families Act*.

*Working families need paid family and medical leave*

Only 14 percent of the workforce has paid family leave through their employers, and less than 40 percent have personal medical leave through an employer-provided short-term disability program. H.R. 1439, the *Family and Medical Insurance Leave Act (the FAMILY Act)* would provide employees with up to 12 weeks of partial income replacement when they take time off for their own serious health conditions, including pregnancy and childbirth recovery; the serious health condition of a child, parent, spouse or domestic partner; the birth or adoption of a child; and/or for particular military caregiving and leave purposes. The *FAMILY Act* permits workers to earn up to 66 percent of their wages, and it is paid for through a joint payroll tax on employers and employees with payroll contributions in the amount of two-tenths of one percent (or two cents per \$10 in wages).<sup>29</sup>

*Working families need flexible and predictable schedules*

Inflexible and unpredictable schedules can make it extremely difficult for workers to both do their jobs and care for their families. Lack of control over schedules is a particular problem for low-wage workers. About half of low-wage workers report having little say in

<sup>28</sup> Fact Sheet: The Healthy Families Act, National Partnership for Women and Families (Apr. 2013), *available at* [http://go.nationalpartnership.org/site/DocServer/HFA\\_Expanded\\_Overview.pdf?docID=10741](http://go.nationalpartnership.org/site/DocServer/HFA_Expanded_Overview.pdf?docID=10741).

<sup>29</sup> Fact Sheet: The Family and Medical Insurance Leave Act, National Partnership for Women and Families (Feb. 2017), *available at* <http://www.nationalpartnership.org/research-library/work-family/paid-leave/family-act-fact-sheet.pdf>.

their schedules.<sup>30</sup> And more than 40 percent of early career workers say they get their schedules only a week or less in advance.<sup>31</sup> The *Schedules that Work Act* gives employees a say in when they work by creating a right to request a particular schedule, and protecting workers from retaliation for making scheduling requests.<sup>32</sup> For workers in restaurant, retail, and building cleaning jobs—where schedules are most unpredictable—the legislation provides additional protections. The *Schedules That Work Act* would require employers to provide these employees with at least four hours of pay if they report to work but are sent home early without working their scheduled shift. The legislation also requires an additional hour of pay for employees assigned to work a split shift (a shift with an unpaid break of more than one hour). Finally, the legislation requires employers to provide two weeks’ advance notice of work schedules to employees, and disclose the number of hours an employee can expect to be assigned to work when she is hired. If an employer makes changes to this work schedule with notice of only 24 hours or less in advance of the employee’s shift, the bill requires the employer to provide one extra hour of pay.

*Working families need equal pay*

The *Paycheck Fairness Act*, H.R. 1869, would strengthen the tools available to both identify and remedy pay discrimination which is still an all too persistent problem. Today, women working full-time year round are typically paid 80 cents for every dollar paid to their male counterparts.<sup>33</sup> Black women are typically paid 63 cents and Latinas are paid just 54 cents for every dollar paid to white, non-Hispanic men.<sup>34</sup> The *Paycheck Fairness Act* builds on 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 also prohibits employer retaliation for sharing salary information with coworkers. Under current law employers can sue and punish employees for sharing such information. The legislation also prohibits employers from asking job applicants questions about their salary history for the purpose of making a salary offer, which is important to prevent pay discrimination from accompanying women from job to job. In addition, it strengthens remedies for pay discrimination by increasing the compensation women can seek, allowing them to not only seek back pay, but also punitive damages for pay discrimination.

<sup>30</sup>“Collateral Damage: Scheduling Challenges for Workers in Low-Wage Jobs and Their Consequences,” National Women’s Law Center (Apr. 2017), available at <https://nwlc.org/wp-content/uploads/2015/06/Collateral-Damage.pdf>.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>Resource: Women and the Lifetime Wage Gap: How Many Woman Years Does it Take to Equal 40 Man Years?, National Women’s Law Center (Mar. 28, 2017), available at <https://nwlc.org/resources/women-and-the-lifetime-wage-gap-how-many-woman-years-does-it-take-to-equal-40-man-years/>.

<sup>34</sup>Fact Sheet: America’s Women and the Wage Gap, National Partnership of Women and Families (Apr. 2017), available at <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf>.

## CONCLUSION

H.R. 1180 does not create any meaningful new rights for employees. Employees can already take time off without pay, if they get permission from their employer. The bill does, however, create a new right for employers to withhold employees' overtime pay. Democrats have offered real solutions to the challenges facing working families that would not force them to make an impossible choice between money and time—when they need both. This Committee should bring up for consideration the legislation being offered by Democrats that would both raise workers' pay and help them better juggle work and family life.

ROBERT C. "BOBBY" SCOTT,  
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