

107TH CONGRESS
1ST SESSION

S. 624

To amend the Fair Labor Standards Act of 1938 to provide to private sector employees the same opportunities for time-and-a-half compensatory time off and biweekly work programs as Federal employees currently enjoy to help balance the demands and needs of work and family, to clarify the provisions relating to exemptions of certain professionals from minimum wage and overtime requirements of the Fair Labor Standards Act of 1938, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 27, 2001

Mr. GREGG (for himself and Mrs. HUTCHISON) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Fair Labor Standards Act of 1938 to provide to private sector employees the same opportunities for time-and-a-half compensatory time off and biweekly work programs as Federal employees currently enjoy to help balance the demands and needs of work and family, to clarify the provisions relating to exemptions of certain professionals from minimum wage and overtime requirements of the Fair Labor Standards Act of 1938, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Workplace Flexibility
3 Act”.

4 **SEC. 2. WORKPLACE FLEXIBILITY OPTIONS.**

5 (a) COMPENSATORY TIME OFF.—Section 7 of the
6 Fair Labor Standards Act of 1938 (29 U.S.C. 207) is
7 amended by adding at the end the following:

8 “(r)(1)(A) Except as provided in subparagraph (B),
9 no employee may be required under this subsection to re-
10 ceive compensatory time off in lieu of monetary overtime
11 compensation. The acceptance of compensatory time off
12 in lieu of monetary overtime compensation may not be a
13 condition of employment or of working overtime.

14 “(B) In a case in which a valid collective bargaining
15 agreement exists between an employer and the labor orga-
16 nization that has been certified or recognized as the rep-
17 resentative of the employees of the employer under appli-
18 cable law, an employee may only be required under this
19 subsection to receive compensatory time off in lieu of mon-
20 etary overtime compensation in accordance with the agree-
21 ment.

22 “(2)(A) An employee may receive, in accordance with
23 this subsection and in lieu of monetary overtime com-
24 pensation, compensatory time off at a rate not less than
25 one and one-half hours for each hour of employment for

1 which monetary overtime compensation is required by this
 2 section.

3 “(B) In this subsection:

4 “(i) The term ‘employee’ means an individual—

5 “(I) who is an employee (as defined in sec-
 6 tion 3);

7 “(II) who is not an employee of a public
 8 agency; and

9 “(III) to whom subsection (a) applies.

10 “(ii) The term ‘employer’ does not include a
 11 public agency.

12 “(3) An employer may provide compensatory time off
 13 to employees under paragraph (2)(A) only pursuant to the
 14 following:

15 “(A) The compensatory time off may be pro-
 16 vided only in accordance with—

17 “(i) applicable provisions of a collective
 18 bargaining agreement between the employer
 19 and the labor organization that has been cer-
 20 tified or recognized as the representative of the
 21 employees under applicable law; or

22 “(ii) in the case of an employee who is not
 23 represented by a labor organization described in
 24 clause (i), a written agreement arrived at be-
 25 tween the employer and employee before the

1 performance of the work involved if the agree-
2 ment or understanding was entered into know-
3 ingly and voluntarily by such employee and was
4 not a condition of employment.

5 “(B) The compensatory time off may only be
6 provided to an employee described in subparagraph
7 (A)(ii) if such employee has affirmed, in a written
8 statement that is made, kept, and preserved in ac-
9 cordance with section 11(c), that the employee has
10 chosen to receive compensatory time off in lieu of
11 monetary overtime compensation.

12 “(C) No employee may receive, or agree to re-
13 ceive, the compensatory time off unless the employee
14 has been employed for at least 12 months by the
15 employer, and for at least 1,250 hours of service
16 with the employer during the previous 12-month pe-
17 riod.

18 “(D) An employee shall be eligible to accrue
19 compensatory time off if such employee has not ac-
20 crued compensatory time off in excess of the limit
21 applicable to the employee prescribed by paragraph
22 (4).

23 “(4)(A) An employee may accrue not more than 160
24 hours of compensatory time off.

1 “(B) Not later than January 31 of each calendar
2 year, the employer of the employee shall provide monetary
3 compensation for any unused compensatory time off ac-
4 crued during the preceding calendar year that was not
5 used prior to December 31 of the preceding calendar year
6 at the rate prescribed by paragraph (8). An employer may
7 designate and communicate to the employees of the em-
8 ployer a 12-month period other than the calendar year,
9 in which case the compensation shall be provided not later
10 than 31 days after the end of the 12-month period.

11 “(C) The employer may provide monetary compensa-
12 tion for an employee’s unused compensatory time off in
13 excess of 80 hours at any time after providing the em-
14 ployee with at least 30 days’ written notice. The com-
15 pensation shall be provided at the rate prescribed by para-
16 graph (8).

17 “(5)(A) An employer that has adopted a policy offer-
18 ing compensatory time off to employees may discontinue
19 the policy for employees described in paragraph (3)(A)(ii)
20 after providing 30 days’ written notice to the employees
21 who are subject to an agreement or understanding de-
22 scribed in paragraph (3)(A)(ii).

23 “(B) An employee may withdraw an agreement or un-
24 derstanding described in paragraph (3)(A)(ii) at any time,
25 by submitting a written notice of withdrawal to the em-

1 ployer of the employee. An employee may also request in
 2 writing that monetary compensation be provided, at any
 3 time, for all compensatory time off accrued that has not
 4 been used. Within 30 days after receiving the written re-
 5 quest, the employer shall provide the employee the mone-
 6 tary compensation due in accordance with paragraph (8).

7 “(6)(A)(i) An employer that provides compensatory
 8 time off under paragraph (2) to an employee shall not di-
 9 rectly or indirectly intimidate, threaten, or coerce, or at-
 10 tempt to intimidate, threaten, or coerce, any employee for
 11 the purpose of—

12 “(I) interfering with the rights of the employee
 13 under this subsection to request or not request com-
 14 pensatory time off in lieu of payment of monetary
 15 overtime compensation for overtime hours;

16 “(II) interfering with the rights of the employee
 17 to use accrued compensatory time off in accordance
 18 with paragraph (9); or

19 “(III) requiring the employee to use the com-
 20 pensatory time off.

21 “(ii) In clause (i), the term ‘intimidate, threaten, or
 22 coerce’ has the meaning given the term in section
 23 13A(c)(2).

24 “(B) An agreement or understanding that is entered
 25 into by an employee and employer under paragraph

1 (3)(A)(ii) shall permit the employee to elect, for an appli-
 2 cable workweek—

3 “(i) the payment of monetary overtime com-
 4 pensation for the workweek; or

5 “(ii) the accrual of compensatory time off in
 6 lieu of the payment of monetary overtime compensa-
 7 tion for the workweek.”.

8 (b) REMEDIES AND SANCTIONS.—Section 16 of the
 9 Fair Labor Standards Act of 1938 (29 U.S.C. 216) is
 10 amended by adding at the end the following:

11 “(f)(1) In addition to any amount that an employer
 12 is liable under subsection (b) for a violation of a provision
 13 of section 7, an employer that violates section 7(r)(6)(A)
 14 shall be liable to the employee affected in an amount equal
 15 to—

16 “(A) the product of—

17 “(i) the rate of compensation (determined
 18 in accordance with section 7(r)(8)(A)); and

19 “(ii)(I) the number of hours of compen-
 20 satory time off involved in the violation that
 21 was initially accrued by the employee; minus

22 “(II) the number of such hours used by
 23 the employee; and

24 “(B) as liquidated damages, the product of—

25 “(i) such rate of compensation; and

1 “(ii) the number of hours of compensatory
2 time off involved in the violation that was ini-
3 tially accrued by the employee.

4 “(2) The employer shall be subject to such liability
5 in addition to any other remedy available for such violation
6 under this section or section 17, including a criminal pen-
7 alty under subsection (a) and a civil penalty under sub-
8 section (e).”.

9 (c) CALCULATIONS AND SPECIAL RULES.—Section
10 7(r) of the Fair Labor Standards Act of 1938 (29 U.S.C.
11 207(r)), as added by subsection (a), is further amended
12 by adding at the end the following:

13 “(7) An employee who has accrued compensatory
14 time off authorized to be provided under paragraph (2)
15 shall, upon the voluntary or involuntary termination of
16 employment, be paid for the unused compensatory time
17 off in accordance with paragraph (8).

18 “(8)(A) If compensation is to be paid to an employee
19 for accrued compensatory time off, the compensation shall
20 be paid at a rate of compensation not less than—

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

23 “(ii) the final regular rate received by such em-
24 ployee;

25 whichever is higher.

1 “(B) Any payment owed to an employee under this
 2 subsection for unused compensatory time off shall be con-
 3 sidered unpaid monetary overtime compensation.

4 “(9) An employee—

5 “(A) who has accrued compensatory time off
 6 authorized to be provided under paragraph (2); and

7 “(B) who has requested the use of the accrued
 8 compensatory time off;

9 shall be permitted by the employer of the employee to use
 10 the accrued compensatory time off within a reasonable pe-
 11 riod after making the request if the use of the accrued
 12 compensatory time off does not unduly disrupt the oper-
 13 ations of the employer.

14 “(10) The terms ‘monetary overtime compensation’
 15 and ‘compensatory time off’ shall have the meanings given
 16 the terms ‘overtime compensation’ and ‘compensatory
 17 time’, respectively, by subsection (o)(7).”.

18 (d) NOTICE TO EMPLOYEES.—Not later than 30 days
 19 after the date of enactment of this Act, the Secretary of
 20 Labor shall revise the materials the Secretary provides,
 21 under regulations contained in section 516.4 of title 29,
 22 Code of Federal Regulations, to employers for purposes
 23 of a notice explaining the Fair Labor Standards Act of
 24 1938 (29 U.S.C. 201 et seq.) to employees so that the

1 notice reflects the amendments made to the Act by this
2 section.

3 **SEC. 3. BIWEEKLY WORK PROGRAMS.**

4 (a) IN GENERAL.—The Fair Labor Standards Act of
5 1938 is amended by inserting after section 13 (29 U.S.C.
6 213) the following:

7 **“SEC. 13A. BIWEEKLY WORK PROGRAMS.**

8 “(a) VOLUNTARY PARTICIPATION.—

9 “(1) IN GENERAL.—Except as provided in para-
10 graph (2), no employee may be required to partici-
11 pate in a program described in this section. Partici-
12 pation in a program described in this section may
13 not be a condition of employment.

14 “(2) COLLECTIVE BARGAINING AGREEMENT.—
15 In a case in which a valid collective bargaining
16 agreement exists between an employer and the labor
17 organization that has been certified or recognized as
18 the representative of the employees of the employer
19 under applicable law, an employee may only be re-
20 quired to participate in such a program in accord-
21 ance with the agreement.

22 “(b) BIWEEKLY WORK PROGRAMS.—

23 “(1) IN GENERAL.—Notwithstanding section 7,
24 an employer may establish biweekly work programs
25 that allow the use of a biweekly work schedule—

1 “(A) that consists of a basic work require-
2 ment of not more than 80 hours, over a 2-week
3 period; and

4 “(B) in which more than 40 hours of the
5 work requirement may occur in a week of the
6 period, except that no more than 10 hours may
7 be shifted between the 2 weeks involved.

8 “(2) CONDITIONS.—An employer may carry out
9 a biweekly work program described in paragraph (1)
10 for employees only pursuant to the following:

11 “(A) AGREEMENT OR UNDERSTANDING.—
12 The program may be carried out only in accord-
13 ance with—

14 “(i) applicable provisions of a collec-
15 tive bargaining agreement between the em-
16 ployer and the labor organization that has
17 been certified or recognized as the rep-
18 resentative of the employees under applica-
19 ble law; or

20 “(ii) in the case of an employee who
21 is not represented by a labor organization
22 described in clause (i), a written agreement
23 arrived at between the employer and em-
24 ployee before the performance of the work
25 involved if the agreement or understanding

1 was entered into knowingly and voluntarily
2 by such employee and was not a condition
3 of employment.

4 “(B) STATEMENT.—The program shall
5 apply to an employee described in subparagraph
6 (A)(ii) if such employee has affirmed, in a writ-
7 ten statement that is made, kept, and preserved
8 in accordance with section 11(c), that the em-
9 ployee has chosen to participate in the program.

10 “(C) MINIMUM SERVICE.—No employee
11 may participate, or agree to participate, in the
12 program unless the employee has been em-
13 ployed for at least 12 months by the employer,
14 and for at least 1,250 hours of service with the
15 employer during the previous 12-month period.

16 “(3) COMPENSATION FOR HOURS IN SCHED-
17 ULE.—Notwithstanding section 7, in the case of an
18 employee participating in such a biweekly work pro-
19 gram, the employee shall be compensated for each
20 hour in such a biweekly work schedule at a rate not
21 less than the regular rate at which the employee is
22 employed.

23 “(4) COMPUTATION OF OVERTIME.—All hours
24 worked by the employee in excess of such a biweekly
25 work schedule or in excess of 80 hours in the 2-week

1 period, that are requested in advance by the em-
 2 ployer, shall be overtime hours.

3 “(5) OVERTIME COMPENSATION PROVISION.—

4 The employee shall be compensated for each such
 5 overtime hour at a rate not less than one and one-
 6 half times the regular rate at which the employee is
 7 employed, in accordance with section 7(a)(1), or re-
 8 ceive compensatory time off in accordance with sec-
 9 tion 7(r) for each such overtime hour.

10 “(6) DISCONTINUANCE OF PROGRAM OR WITH-
 11 DRAWAL.—

12 “(A) DISCONTINUANCE OF PROGRAM.—An
 13 employer that has established a biweekly work
 14 program under paragraph (1) may discontinue
 15 the program for employees described in para-
 16 graph (2)(A)(ii) after providing 30 days’ writ-
 17 ten notice to the employees who are subject to
 18 an agreement or understanding described in
 19 paragraph (2)(A)(ii).

20 “(B) WITHDRAWAL.—An employee may
 21 withdraw an agreement or understanding de-
 22 scribed in paragraph (2)(A)(ii) at the end of
 23 any 2-week period described in paragraph
 24 (1)(A), by submitting a written notice of with-
 25 drawal to the employer of the employee.

1 “(c) PROHIBITION OF COERCION.—

2 “(1) IN GENERAL.—An employer shall not di-
3 rectly or indirectly intimidate, threaten, or coerce, or
4 attempt to intimidate, threaten, or coerce, any em-
5 ployee for the purpose of interfering with the rights
6 of the employee under this section to elect or not to
7 elect to work a biweekly work schedule.

8 “(2) DEFINITION.—In paragraph (1), the term
9 ‘intimidate, threaten, or coerce’ includes promising
10 to confer or conferring any benefit (such as appoint-
11 ment, promotion, or compensation) or effecting or
12 threatening to effect any reprisal (such as depriva-
13 tion of appointment, promotion, or compensation).

14 “(d) DEFINITIONS.—In this section:

15 “(1) BASIC WORK REQUIREMENT.—The term
16 ‘basic work requirement’ means the number of
17 hours, excluding overtime hours, that an employee is
18 required to work or is required to account for by
19 leave or otherwise.

20 “(2) COLLECTIVE BARGAINING.—The term ‘col-
21 lective bargaining’ means the performance of the
22 mutual obligation of the representative of an em-
23 ployer and the labor organization that has been cer-
24 tified or recognized as the representative of the em-
25 ployees of the employer under applicable law to meet

1 at reasonable times and to consult and bargain in a
2 good-faith effort to reach agreement with respect to
3 the conditions of employment affecting such employ-
4 ees and to execute, if requested by either party, a
5 written document incorporating any collective bar-
6 gaining agreement reached, but the obligation re-
7 ferred to in this paragraph shall not compel either
8 party to agree to a proposal or to make a conces-
9 sion.

10 “(3) COLLECTIVE BARGAINING AGREEMENT.—
11 The term ‘collective bargaining agreement’ means an
12 agreement entered into as a result of collective bar-
13 gaining.

14 “(4) EMPLOYEE.—The term ‘employee’ means
15 an individual—

16 “(A) who is an employee (as defined in
17 section 3);

18 “(B) who is not an employee of a public
19 agency; and

20 “(C) to whom section 7(a) applies.

21 “(5) EMPLOYER.—The term ‘employer’ does
22 not include a public agency.

23 “(6) OVERTIME HOURS.—The term ‘overtime
24 hours’, when used with respect to biweekly work pro-
25 grams under subsection (b), means all hours worked

1 in excess of the biweekly work schedule involved or
 2 in excess of 80 hours in the 2-week period involved,
 3 that are requested in advance by an employer.

4 “(7) REGULAR RATE.—The term ‘regular rate’
 5 has the meaning given the term in section 7(e).”.

6 (b) REMEDIES.—

7 (1) PROHIBITIONS.—Section 15(a)(3) of the
 8 Fair Labor Standards Act of 1938 (29 U.S.C.
 9 215(a)(3)) is amended—

10 (A) by inserting “(A)” after “(3)”;

11 (B) by adding “or” after the semicolon;

12 and

13 (C) by adding at the end the following:

14 “(B) to violate any of the provisions of section
 15 13A;”.

16 (2) REMEDIES AND SANCTIONS.—Section 16 of
 17 the Fair Labor Standards Act of 1938 (29 U.S.C.
 18 216), as amended in section 2(b), is further
 19 amended—

20 (A) in subsection (c)—

21 (i) in the first sentence—

22 (I) by inserting after “7 of this
 23 Act” the following: “, or of the appro-
 24 priate legal or monetary equitable re-

1 lief owing to any employee or employ-
 2 ees under section 13A”; and

3 (II) by striking “wages or unpaid
 4 overtime compensation and” and in-
 5 serting “wages, unpaid overtime com-
 6 pensation, or legal or monetary equi-
 7 table relief, as appropriate, and”;

8 (ii) in the second sentence, by striking
 9 “wages or overtime compensation and”
 10 and inserting “wages, unpaid overtime
 11 compensation, or legal or monetary equi-
 12 table relief, as appropriate, and”; and

13 (iii) in the third sentence—

14 (I) by inserting after “first sen-
 15 tence of such subsection” the fol-
 16 lowing: “, or the second sentence of
 17 such subsection in the event of a vio-
 18 lation of section 13A,”; and

19 (II) by striking “wages or unpaid
 20 overtime compensation under sections
 21 6 and 7 or” and inserting “wages, un-
 22 paid overtime compensation, or legal
 23 or monetary equitable relief, as appro-
 24 priate, or”;

25 (B) in subsection (e)—

1 (i) in the second sentence, by striking
 2 “section 6 or 7” and inserting “section 6,
 3 7, or 13A”; and

4 (ii) in the fourth sentence, in para-
 5 graph (3), by striking “15(a)(4) or” and
 6 inserting “15(a)(4), a violation of section
 7 15(a)(3)(B), or”; and

8 (C) by adding at the end the following:

9 “(g)(1) In addition to any amount that an employer
 10 is liable under the second sentence of subsection (b) for
 11 a violation of a provision of section 13A, an employer that
 12 violates section 13A(c) shall be liable to the employee af-
 13 fected for an additional sum equal to that amount.

14 “(2) The employer shall be subject to such liability
 15 in addition to any other remedy available for such violation
 16 under this section or section 17.”.

17 (c) NOTICE TO EMPLOYEES.—Not later than 30 days
 18 after the date of enactment of this Act, the Secretary of
 19 Labor shall revise the materials the Secretary provides,
 20 under regulations contained in section 516.4 of title 29,
 21 Code of Federal Regulations, to employers for purposes
 22 of a notice explaining the Fair Labor Standards Act of
 23 1938 (29 U.S.C. 201 et seq.) to employees so that the
 24 notice reflects the amendments made to the Act by this
 25 section.

1 **SEC. 4. PROTECTIONS FOR CLAIMS RELATING TO COMPEN-**
 2 **SATORY TIME OFF IN BANKRUPTCY PRO-**
 3 **CEEDINGS.**

4 Section 507(a)(3) of title 11, United States Code, is
 5 amended—

6 (1) by striking “for—” and inserting the fol-
 7 lowing: “on the condition that all accrued compen-
 8 satory time off (as defined in section 7 of the Fair
 9 Labor Standards Act of 1938 (29 U.S.C. 207)) shall
 10 be deemed to have been earned within 90 days be-
 11 fore the date of the filing of the petition or the date
 12 of the cessation of the debtor’s business, whichever
 13 occurs first, for—”; and

14 (2) in subparagraph (A), by inserting before the
 15 semicolon the following: “or the value of unused, ac-
 16 crued compensatory time off (as defined in section
 17 7 of the Fair Labor Standards Act of 1938 (29
 18 U.S.C. 207))”.

19 **SEC. 5. CONGRESSIONAL COVERAGE.**

20 Section 203 of the Congressional Accountability Act
 21 of 1995 (2 U.S.C. 1313) is amended—

22 (1) in subsection (a)—

23 (A) in paragraph (1), by striking “and sec-
 24 tion 12(c)” and inserting “section 12(c), and
 25 section 13A”; and

26 (B) by striking paragraph (3);

1 (2) in subsection (b)—

2 (A) by striking “The remedy” and insert-
3 ing the following:

4 “(1) IN GENERAL.—Except as provided in para-
5 graphs (2) and (3), the remedy”; and

6 (B) by adding at the end the following:

7 “(2) COMPENSATORY TIME.—The remedy for a
8 violation of subsection (a) relating to the require-
9 ments of section 7(r) of the Fair Labor Standards
10 Act of 1938 (29 U.S.C. 207(r)) shall be such rem-
11 edy as would be appropriate if awarded under sub-
12 section (b) or (f) of section 16 of such Act (29
13 U.S.C. 216).

14 “(3) BIWEEKLY WORK PROGRAMS.—The rem-
15 edy for a violation of subsection (a) relating to the
16 requirements of section 13A of the Fair Labor
17 Standards Act of 1938 shall be such remedy as
18 would be appropriate if awarded under sections 16
19 and 17 of such Act (29 U.S.C. 216, 217) for such
20 a violation.”; and

21 (3) in subsection (c), by striking paragraph (4).

1 **SEC. 6. TERMINATION.**

2 The authority provided by this Act and the amend-
3 ments made by this Act terminates 5 years after the date
4 of enactment of this Act.

