later today and tomorrow, and perhaps in the future, on the so-called marriage penalty. I want to respond to two points that several of our Republican colleagues have made with respect to the Finance Committee bill, the majority bill.

The first claim is that the Finance Committee bill, the majority bill, eliminates the marriage penalty. Not true. It does reduce the marriage penalty for some people, to some extent, but it does not eliminate the marriage penalty.

Why do I say that? Well, first, let me show you this chart. This chart basically shows, in the main, that there are 65 provisions in the Tax Code that create a marriage tax penalty; 65 different provisions in the code create the so-called marriage tax penalty, the inequity that married people pay. The Republican bill, the Finance Committee bill, addresses some of them. How many? Out of the total of 65, how many do you suppose the Finance Committee addresses? A grand total of three. So 62 of the provisions in the Internal Revenue Code that cause a marriage tax penalty are not addressed by the Finance Committee bill.

Let me give you an example. One is the deduction for interest on student loans. The phaseout for this begins at $40,000 for unmarried individuals and about $60,000 for joint return filers. So if two young people each earn $35,000 and they marry, they get hit harder by the phaseout. In other words, they pay a marriage tax penalty. It is not covered by the Finance Committee bill. It is covered by the alternative to be offered by Senator MOYNIHAN.

Another example in the Finance Committee bill is not covered. A marriage tax penalty that is not taken care of is Social Security for seniors. The tax threshold for Social Security for seniors is $25,000 for individuals and $32,000 for couples. Again, a marriage tax penalty. What does the Republican bill, the Finance Committee bill, do about these provisions? Nothing. They are not among the three penalties the Republican bill addresses. The Democratic proposal, in contrast, addresses all 65 marriage tax penalty provisions—all of them. Not 3, not 4, not 5, but all of them, all 65.

So, again, the Finance Committee bill does not eliminate the marriage tax penalty. The Democratic alternative does.

There is a second point made on the floor today that I would like to address. About half of the relief in the Finance Committee bill goes to people who don't pay a marriage tax penalty today. They get a so-called bonus, or they get neither a penalty nor a bonus. That is this chart. This chart shows that less than half of the relief in the majority bill goes to the marriage tax penalty; that is, more than half goes to people who don't have a marriage tax penalty, who are already in a bonus situation.

Some argue, well, gee, we should not penalize couples, such as those with a stay-at-home spouse, by denying them the same tax cut we provide to couples who face a marriage tax penalty. Frankly, that is a red herring, as lawyers say. That is totally beside the point. Obviously, we have nothing against people who receive a tax bonus. Nobody wants to penalize them. But let's be honest. If we are providing half the relief to people who don't pay a marriage tax penalty, it is simply not a marriage tax penalty bill anymore; it is a tax cut bill, and we should evaluate the bill on that basis.

Let's talk about singles, for example. The marriage tax penalty relief bill that we are talking about is going to proportionally put more burden on individuals, single taxpayers, on widows who are not heads of households, widowers. They are going to be hit indirectly because of the action that will probably be taken at a later date on this floor. In the main, this is not a marriage tax penalty bill out of the Finance Committee; it is primarily a tax cut bill.

That kind of tax cut compared with other priorities may or may not make sense. What about prescription drugs, long-term care, retirement security? I don't think we have addressed those issues enough on this floor; that is, trying to determine what our priorities should be, given the limited number of dollars we have in the budget surplus.

Another thing. Viewed as a tax cut, the majority bill is completely arbitrary. There is no particular rhyme or reason to it. If you are married and pay a marriage tax penalty, you get a tax cut. If you are married and pay no marriage tax penalty, you get a tax cut. That is what the Finance Committee bill does, in the main. If you are married and get a tax bonus, you still get a tax cut. That is what the committee bill does.

If you are single, you get no tax cut. In fact, the disparity between married and single taxpayers widens to where it was before 1969.

Think about this for a moment. If you are married, have no children, you are receiving the so-called marriage bonus, you get a tax cut. If, on the other hand, you are a single mom and you have three kids, you get zero tax cut. Is that what we want to do?

So the Finance Committee bill doesn't eliminate the marriage penalty. It simply does not. Sixty-two of the marriage penalties in the code are not addressed by the Finance Committee bill. Only three are.

There are many others I have not mentioned which are very big and have a very big effect.

In addition, the majority committee bill provides a large tax cut unrelated to the marriage tax penalty. It is a large tax cut which has nothing to do with the marriage tax penalty.

I am saying briefly, because my time is about to expire, that there are some major flaws in the majority bill. I have only touched on a couple of them. There are many more which will be brought out later in the debate.

I urge my colleagues, people around the country watching this on C-SPAN, other offices, and the press to take a good look at the majority bill because there are some real problems with it. I hope we can straighten them out and fix them very soon.

I yield the floor.

WORKER ECONOMIC OPPORTUNITY ACT

The PRESIDING OFFICER. The clerk will report S. 2323 by title.

The bill clerk read as follows:

A bill (S. 2323) to amend the Fair Labor Standards Act of 1938 to clarify the treatment of stock options under the Act.

The Senate proceeded to consider the bill.

Mr. BAUCUS. Mr. President, I suggest the absence of a quorum, and I ask unanimous consent that the quorum call not be charged against either side.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. McCONNELL. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The distinguished Senator from Kentucky, Mr. MCCONNELL, is recognized.

Mr. McCONNELL. Mr. President, I want to speak on behalf of the pending measure, the Worker Economic Opportunity Act, which the Senate will pass shortly.

This bipartisan bill will ensure that American workers can receive lucrative stock options from their employers—once considered the exclusive perk of corporate executives.

Senator DODD and I have worked closely with Senators JEFFORDS and ENZI, ABRAHAM, BENNETT, and LIEBERMAN, the Department of Labor, and others to develop this critical bill.

We have the support of groups representing business and workers, as well as Secretary Alexis Herman. In short, everybody wins with this proposal.

All over the country today, forward-thinking employers are offering new financial opportunities—such as stock options—to hourly employees.

Unfortunately, it appears that our 1930's vintage labor laws might not allow the normal workers of the 21st century to reap these benefits.

When we realized this, we decided to fix this problem. It would be a travesty for us to let old laws steal this chance for the average employee to share in his or her company's economic growth.

The Workers Economic Opportunity Act is really very simple. It says that it makes no difference if you work in the corporate boardroom or on the factory floor—everyone should be able to share in the success of the company.

In sum, the bill would amend the Fair Labor Standards Act to ensure that employer-provided stock option programs are allowed, just like employee bonuses already are.

Also, this legislation includes a broad ''safe harbor'' that specifies that employers have no liability because of any stock options or similar programs that they have given to employees in the past.

I hope that this bill will be the first of many commonsense efforts to drag old labor and employment laws into the new millennium.

Mr. President, we need to pass this law. The Federal Reserve Board of Governors recently estimated that 17 percent of firms have introduced stock option programs.

They went on to say that over the last two years, 37 percent of these employers have broadened eligibility for their stock option programs—allowing even more American workers to share in their employers' prosperity.

The Employment Policy Foundation estimates between 9.4 million and 25.8 million workers receive benefits through some type of equity participation program.

This trend is growing, and given the current state of the economy, it is likely to continue to grow.

However, we have one last thing we have to do to make sure that American workers can have this incredible opportunity—we have to pass this bill.

Without it, our ''New Deal'' labor laws will strangle the benefits our ''New Economy'' offers to American workers.

Mr. President, I ask unanimous consent that a letter of support from the United States Chamber of Commerce be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Washington, DC, April 7, 2000.

Hon. MITCH MCCONNELL,
U.S. Senate,
Washington, DC.

DEAR SENATOR MCCONNELL: I am writing to express the support of the United States Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector and region, for S. 2323, the Worker Economic Opportunity Act.

Last year the U.S. Department of Labor issued an advisory letter stating that companies providing stock options to their employees must include the value of those options in the base rate of pay for hourly workers. Employers must then recalculate overtime pay over the period of time between the granting and exercise of the options. This costly and administratively complex process will cause many employers to refrain from offering stock options and similar employee equity programs to their nonexempt workers.

Clearly, the Fair Labor Standards Act needs to be modernized to reflect the fact that many of today's hourly workers receive stock options. For this reason, the Chamber strongly supports S. 2323, which would exempt stock options, stock appreciation rights, and employee stock purchase plan programs from the regular rate of pay for nonexempt workers. This carefully crafted legislation will provide certainty to employers who want to increase employee ownership and equity building by offering stock options and similar programs to their hourly workers. We commend you for negotiating a bill that is broadly supported and look forward to working with you to ensure its passage as soon as possible in this legislative session.

Again, thank you for your leadership in introducing S. 2323, legislation that is important to millions of American workers and employers.

Sincerely,

R. BRUCE JOSTEN.

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the sponsors' statement of legislative intent be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

JOINT STATEMENT OF LEGISLATIVE INTENT BY THE SPONSORS OF S. 2323, THE WORKER ECONOMIC OPPORTUNITY ACT

I. INTRODUCTION AND PURPOSE

The purpose of S. 2323, the Worker Economic Opportunity Act, is to allow employees who are eligible for overtime pay to continue to share in workplace benefits that involve their employer's stock or similar equity-based benefits. More working Americans are receiving stock options or opportunities to purchase stock than ever before. The Worker Economic Opportunity Act updates the Fair Labor Standards Act to ensure that rank-and-file employees and management can share in their employer's economic well being in the same manner.

Employers have provided stock and equity-based benefits to upper level management for decades. However, it is only recently that employers have begun to offer these programs in a broad-based manner to non-exempt employees. Historically, most employees had little contact with employer-provided equity devices outside of a 401(k) plan. But today, many employers, from a broad cross-section of industry, have begun offering their employees opportunities to purchase employer stock at a modest discount, or have provided stock options to rank and file employees; and they have even provided outright grants of stock under certain circumstances.

The Federal Reserve Board of Governors recently estimated that 17 percent of large firms have introduced a stock options program and 37 percent have broadened eligibility for their stock option programs in the last two years.[1] The Employment Policy Foundation estimates between 9.4 million and 25.8 million workers receive benefits through some type of equity participation program.[2] The trend is growing, and given the current state of the economy, it is likely to continue.

The tremendous success of our economy over the last several years has been largely attributed to the high technology sector. One of the things that our technology companies have succeeded at is creating an atmosphere in which all employees share the same goal: the success of the company. By vesting all employees in the success of the business, stock options and other equity devices have become an important tool to create businesses with unparalleled productivity. The Worker Economic Opportunity Act will encourage more employers to provide opportunities for equity participation to their employees, further expanding the benefits that inure from equity participation.

II. BACKGROUND AND NEED FOR LEGISLATION

A. Background on stock options and related devices

Employers use a variety of equity devices to share the benefits of equity ownership with their employees. As the employer's stock appreciates, these devices provide a tool to attract and retain employees, an increasingly difficult task during a time of record economic growth and low unemployment in the United States. These programs also foster a broader sense of commitment to a common goal—the maintenance and improvement of the company's performance—among all employees nationally and even internationally, and thus provide an alignment between the interests of employees with the interests of the company and its shareholders. They can also reinforce the evolving employer-employee relationship, with employees viewed as stakeholders.

Employer stock option and stock programs come in all different types and formats. The Worker Economic Opportunity Act focuses on the most common types: stock option, stock appreciation right, and employee stock purchase programs.

Stock Option Programs.—Stock options provide the right to purchase the employer's securities for a fixed period of time. Stock option programs vary greatly by employer. However, two main types exist: nonqualified and qualified option programs.[3] Most programs are nonqualified stock option programs, meaning that the structure of the program does not protect the employee from being taxed at the time of exercise. However, the mechanics of stock option programs are very similar regardless of whether they are nonqualified or qualified. Some of these characteristics are described below.

Grants. An employer grants to employees a certain number of options to purchase shares of the employer's stock. The exercise price may be around the fair market value of the stock at the time of the grant, or it may be discounted below fair market value to provide the employee an incentive to participate in the option program.

Vesting. Most stock option programs have some sort of requirement to wait some period after the grant to benefit from the options, often called a vesting period. After the period, employees typically may exercise their options by exchanging the options for stock at the exercise price at any time before the option expires, which is typically up to ten years. In some cases, options may vest on a schedule, for example, with a third of the options vesting each year over a three-year period. In addition to vesting on a date certain, some options may vest if the company hits a certain goal, such as reaching a certain stock price for a certain number of days. Some programs also provide for accelerated or automatic vesting in certain circumstances such as when an employee retires or dies before the vesting period has run, where there is change in corporate control or when an employee's employment is terminated.

Exercise. Under both qualified and nonqualified stock option programs, an employee can exchange the options, along with sufficient cash to pay the exercise price of the options, for shares of stock. Because many rank-and-file employees cannot afford to pay the cost of buying the stock at the option price in cash, many employers have given their employees the opportunity for ''cashless'' exercise, either for cash or for stock, under nonqualified option plans. In a cashless exercise for cash, an employee gives options to a broker or program administrator, this party momentarily ''lends'' the employee the money to purchase the requisite number of shares at the grant price, and then immediately sells the shares. The employee receives the difference between the market price and the exercise price of the stock (the profit), less transaction fees. In a cashless exercise for stock, enough shares are sold to cover the cost of buying the

Footnotes at end of article.

shares the employee will retain. In either case, the employee is spared from having to provide the initial cash to purchase the stock at the option price.

An employee's options usually expire at the end of the option period. An employee may forfeit the right to exercise the options, in whole or in part, under certain circumstances, including upon separation from the employer. However, some programs allow the employee to exercise the options (sometimes for a limited period of time) after they leave employment with the employer.

Stock Appreciation Rights.—Stock appreciation rights (SARs) operate similarly to stock options. They are the rights to receive the cash value of the appreciation on an underlying stock or equity based security. The stock may be publicly traded, privately held, or may be based on valued, but unregistered, stock or stock equivalent. The rights are issued at a fixed price for a fixed period of time and can be issued at a discount, carry a vesting period, and are exercisable over a period of time. SARs are often used when an employer cannot issue stock because the stock is listed on a foreign exchange, or regulatory or financial barriers make stock grants impracticable.

Employee Stock Purchase Plans.—Employee stock purchase plans (ESPPs) give employees the opportunity to purchase employer stock, usually at up to a 15 percent discount, by either regularly or periodically paying the employer directly or by having after-tax money withdrawn as a payroll deduction. Like option programs, ESPPs can be qualified or nonqualified.

Section 423 of the Internal Revenue Code[4] sets forth the factors for a qualified ESPP. The ability to participate must be offered to all employees, and employees must voluntarily choose whether to participate in the program. The employer can offer its stock to employees at up to a 15 percent discount off of the fair market value of the stock, determined at the time the option to purchase stock is granted or at the time the stock is actually purchased. The employee is required to hold the stock for one or two years after the option is granted to receive capital gains treatment. If the employee sells the stock before the requisite period, any gain made on the sale is treated as ordinary income.

Nonqualified ESPPs are usually similar to qualified ESPPs, but they lack one or more qualifying features. For example, the plan may apply only to one segment of employees, or may provide for a greater discount.

B. The Fair Labor Standards Act and stock options

The Fair Labor Standards Act of 1938[5] (FLSA) establishes workplace protections including a minimum hourly wage and overtime compensation for covered employees, record keeping requirements and protections against child labor, among other provisions. A cornerstone of the FLSA is the requirement that an employer pay its nonexempt employees overtime for all hours worked over 40 in a week at one and one-half times the employee's regular rate of pay.[6] The term ''regular rate'' is broadly defined in the statute to mean ''all remuneration for employment paid to, or on behalf of, the employee.''[7]

Section 207(e) of the statute excludes certain payments from an employee's regular rate of pay to encourage employers to provide them, without undermining employees' fundamental right to overtime pay. Excluded payments include holiday bonuses or gifts,[8] discretionary bonuses,[9] bona fide profit sharing plans,[10] bona fide thrift or savings plans,[11] and bona fide old-age, retirement, life, accident or health or similar benefits plans.[12] By excluding these payments from the definition of ''regular rate,''[13] Congress recognized that certain kinds of benefits provided to employees are not within the generally accepted meaning of compensation for work performed.

Thus, by excluding these payments from the regular rate in section 207(e) of the FLSA, Congress encouraged employers to provide these payments and benefits to employees. The encouragement has worked well—employees now expect to receive from their employer at least some of these benefits (i.e., healthcare), which today, on average, comprise almost 30 percent of employees' gross compensation./14/ For similar reasons, Congress decided that the value and income from stock option, SAR and ESPP programs should also be excluded from the regular rate, because they allow employees to share in the future success of their companies.

C. The Department of Labor's opinion letter on stock options

The impetus behind the Worker Economic Opportunity Act is the broad dissemination of a February 1999 advisory opinion letter[15] regarding stock options issued by the Department of Labor's Wage and Hour Division, the agency charged with the administration of the FLSA. The letter involved an employer's stock option program wherein its employees would be notified of the program three months before the options were granted, and some rank-and-file employees employed by the company on the grant date would receive options. The options would have a two-year vesting period, with accelerated vesting if certain events occurred. The employer would also automatically exercise any unexercised options on behalf of the employees the day before the program ended.[16]

The opinion letter indicated that the stock option program did not meet any of the existing exemptions to the regular rate under the FLSA, although it did not explain the reasons in any detail. Later, the Administration's testimony before the House Workforce Protections Subcommittee explained that the stock option program did not meet the gift, discretionary bonus, or profit sharing exceptions to the regular rate because, among other reasons, it required employees to do something as a condition of receiving the options—to remain employed with the company for a period of time.[17] Such a condition is not allowed under the current regular rate exclusions. The testimony also noted that the program was not excludable under the thrift or savings plan exception because the employees were only allowed to exercise their options using a cashless method of exercise, and thus the employees could not keep the stock as savings or an investment.[18]

The opinion letter stated that the employer would be required to include any profits made from the exercise of the options in the regular rate of pay of its nonexempt employees. In particular, the profits would have to be included in the employee's regular rate for the shorter of the time between the grant date and the exercise date, or the two years prior to exercise.[19]

Section 207(e)'s exclusions to the regular rate did not clearly exempt the profits of stock options or similar equity devices from the regular rate, and thus from the overtime calculation. Thus, the Department of Labor's opinion letter provided a permissible reading of the statute. A practical effect of the Department of Labor's interpretation was stated by J. Randall MacDonald, Executive Vice President of Human Resources and Administration at GTE during a March 2 House Workforce Protections Subcommittee hearing on the issue: ''[i]f the Fair Labor Standards Act is not corrected to reverse this policy, we will no longer be able to offer stock options to our nonexempt employees.''[20]

As the contents of the letter became generally known in the business community and on Capitol Hill, it became clear that the letter raised an issue under the FLSA that previously had not been contemplated. It further became clear that an amendment to the FLSA would be needed to change the law specifically to address stock options.

A legislative solution was not only supported by employers at the House hearing, it was also supported by employees and unions. Patricia Nazemetz, Vice President of Human Resources for Xerox Corporation, read a letter from the Union of Needlework, Industrial and Textile Employees (UNITE), the union that represents many Xerox manufacturing and distribution employees, in which the International Vice President stated:

''Xerox's UNITE chapter would strongly urge Congress to pass legislation exempting stock options and other forms of stock grants from the definition of the regular rate for the purposes of calculating overtime. . . . It is only recently that Xerox has made bargaining unit employees eligible to receive both stock options and stock grants. Without a clarification to the FLSA, we are afraid Xerox may not offer stock options or other forms of stock grants to bargaining unit employees in the future.''[21]

At the House hearing, the Administration also acknowledged that the problem needed to be fixed legislatively in a flexible manner, ''Based on the information we have been able to obtain, there appears to be wide variations in the scope, nature and design of stock option programs. There is no one common model for a program, suggesting the need for a flexible approach. Given the wide variety and complexity of programs, we believe that the best solution would be to address this matter legislatively.''[22]

The general agreement on the need to fix the problem among these diverse interests led to the development of the Worker Economic Opportunity Act.

III. EXPLANATION OF THE BILL AND SPONSORS' VIEWS

Congress worked closely with the Department of Labor to develop this important legislation. The sections below reflect the discussions between the sponsors and the Department of Labor during the development of the legislation, and the sponsors' intent and their understanding of the legislation.

A. Definition of bona fide ESPP

For the purposes of the Worker Economic Opportunity Act, a bona fide employee stock purchase plan includes an ESPP that is (1) a qualified ESPP under section 423 of the Internal Revenue Code;[23] or (2) a plan that meets the criteria identified below.

1. Qualified employee stock purchase plans

Qualified ESPPs, known as section 423 plans, comprise the overwhelming majority of stock purchase plans. Thus, the intent of the legislation is to deem ''bona fide'' all plans that meet the criteria of section 423.

2. Nonqualified employee stock purchase plans

As described above, section 423 plans are considered bona fide ESPPs. Further, those ESPPs that do not meet the criteria of section 423, but that meet the following criteria also qualify as bona fide ESPPs:

(a) the plan allows employees, on a regular or periodic basis, to voluntarily provide funds, or to elect to authorize periodic payroll deductions, for the purchase at a future time of shares of the employer's stock;

(b) the plan sets the purchase price of the stock as at least 85% of the fair market value of the stock at the time the option is granted or at the time the stock is purchased; and

(c) the plan does not permit a nonexempt employee to accrue options to purchase stock at a rate which exceeds $25,000 of fair market value of such stock (determined either at the time the option is granted or the time the option is exercised) for each calendar year.

The sponsors note that many new types of ESPPs are being developed, particularly by

companies outside the United States, and that many of these companies may also intend to apply them to their U.S.-based employees. These purchase plans have several attributes which make them appear to be more like savings plans than traditional U.S. stock purchase plans, such as a period of payroll deductions of between three and five years, or an employer provided ''match'' in the form of stock or options to the employee.

Further many companies are developing plans that are similar to section 423 plans. The sponsors believe that it is in the best interests of employees for the Secretary of Labor to review these and other new types of plans carefully in the light of the purpose of the Worker Economic Opportunity Act—to encourage employers to provide opportunities for equity participation to employees—and to allow section 7(e), as amended, to accommodate a wide variety of programs, where it does not undermine employees' fundamental right to overtime pay. It is the sponsors' vision that this entire law be flexible and forward-looking and that the Department of Labor apply and interpret it consistently with this vision.

B. ''Value or Income'' is defined broadly

The hallmark of the Worker Economic Opportunity Act is that section 7(e)(8) provides that any value or income derived from stock option, SAR or bona fide ESPP programs is excluded from the regular rate of pay. For this reason, the phrase ''value or income'' is construed broadly to mean any value, profit, gain, or other payment obtained, recognized or realized as a result of, or in connection with, the provision, award, grant, issuance, exercise or payment of stock options, SARs, or stock issued or purchased pursuant to a bona fide ESPP program established by the employer.

This broad definition means, for example, that any nominal value that a stock option or stock appreciation right may carry before it is exercised is excluded from the regular rate. Similarly, the value of the stock or the income in the form of cash is excluded after options are exercised, as is the income earned from the stock in the form of dividends or ultimately the gains earned, if any, on the sale of the stock. The discount on a stock option, SAR or stock purchase under a ESPP program is likewise excludable.

C. The act preserves programs which are otherwise excludable under existing regular rate exemptions

The Worker Economic Opportunity Act recognizes two ways that employer equity programs may be excluded from the regular rate. Such equity programs may be excluded if they meet the existing exemptions to the regular rate pursuant to Section 7(e)(1)–(7), which apply to contributions and sums paid by employers regardless of whether such payments are made in cash or in grants of stock or other equity based vehicles, and provided such payment or grant is consistent with the existing regulations promulgated under Section 7(e). Employer equity plans also may be excluded under new section 7(e)(8) added by the Worker Economic Opportunity Act.

This is reaffirmed in new section 207(e)(8), which makes clear that the enactment of section 7(e)(8) carries no negative implication about the scope of the preceding paragraphs of section (e). Rather, the sponsors understand that some grants and rights that do not meet all the requirements of section 7(e)(8) may continue to qualify for exemption under an earlier exclusion. For example, programs that grant options or SARs that do not have a vesting period may be otherwise excludable from the regular rate if they meet another section (7)(e) exclusion. This would be true even if the option was granted at less than 85% of fair market value. This language was not intended to prevent grants or rights that meet some but not all of the requirements of an earlier exemption in 7(e) from being exempt under the newly created exemption.

D. Basic communication to employees required because it helps ensure a successful program

For grants made under a stock option, SAR or bona fide ESPP program to qualify for the exemption under new section 7(e)(8), their basic terms and conditions must be communicated to participating employees either at the beginning of the employee's participation in the program or at the time of grant. This requirement was put into the legislation to recognize that when employees understand the mechanics and the implications of the equity devices they are given, they can more fully participate in exercising meaningful choices with respect to those devices. As discussed below, this is a simple concept, it is not intended to be a complicated or burdensome requirement.

1. Terms and conditions to be communicated to employees

Employers must communicate the material terms and conditions of the stock option, stock appreciation right or employee stock purchase program to employees to ensure that they have sufficient information to decide whether to participate in the program. With respect to options, these terms include basic information on the number of options granted, the number of shares granted per option, the grant price, the grant date or dates, the length of any applicable vesting period(s) and the dates when the employees will first be able to exercise options or rights, under what conditions the options must be forfeited or surrendered, the exercise methods an employee may use (such as cash for stock, cashless for cash or stock, etc.), any restrictions on stock purchased through options, and the duration of the option, and what happens to unexercised options at the end of the exercise period. Pending issuance of any regulations, an employer who communicated the information in the prior sentence is to be deemed to have communicated the terms and conditions of the grant. Similar information should be provided regarding SARs or ESPPs.

2. The mode of communications

The legislation does not specify any particular mode of communication of relevant information, and no particular method of communication is required, as long as the method chosen reasonably communicates the information to employees in an understandable fashion. For example, employers may notify their employees of an option grant by letter, and later provide a formal employee handbook, or other method such as a link to a location on the company Intranet. Any combination of communications is acceptable. The intent of the legislation is to ensure that employees are provided the basic information in a timely manner, not to mandate the particular form of communication.

3. The timing of communications

The legislation specifies that the employer is to communicate the terms and conditions of the stock option, SAR and ESPP programs to employees at or before the beginning of the employee's participation in the program or at the time the employee receives a grant. It is acceptable, and perhaps even likely, that the relevant information on a program will be disseminated in a combination of communications over time. This approach allows flexibility and acknowledges that types of participation vary greatly between stock option and SAR programs, on the one hand, and ESPPs on the other.

For example, under an ESPP, an employee may choose to begin payroll deductions in January, but not actually have the option to purchase stock until June. By contrast, with an option or SAR program, employees are given the options or rights at the outset, but those rights may not vest until some year in the future.

The timing of the communication is flexible, because often it is difficult to have materials ready for employees at the beginning of a stock option or stock appreciation right program, immediately following approval by the Board of Directors, because of confidentiality requirements. Thus, within a reasonable time following approval of a stock option grant by the Board of Directors, the employer is required to communicate basic information about the grant employees have received. For example, an initial letter may notify the employees that they have received a certain number of stock options and provide the basic information about the program. More detailed information about the program may precede or follow the grant in formats such as an employee handbook, options pamphlet, or an Intranet site that provides options information.

E. Exercisability criteria applicable only to stock options and SARs

As discussed above, a common feature in grants of stock options and SARs is a vesting or holding period, which under current practice may be as short as a few months or as long as a number of years. For a stock option or SAR to be excluded from the regular rate pursuant to the Worker Economic Opportunity Act, new section 7(e)(8) requires that the grant or right generally cannot be exercisable for at least six months after the date of grant.

For stock option grants that include a vesting requirement, typically an option will become exercisable after the vesting period ends. Some option grants vest gradually in accordance with a schedule. For example, a portion of the employee's options may vest after six months, with the remaining portion vesting three months thereafter. Options may also vest in connection with an event, such as the stock reaching a certain price or the company attaining a performance target.

In addition, the sponsors recognize that a grant that is vested may not be currently exercisable by the employee because of an employer's requirement that the employee hold the option for a minimum period prior to exercise. In other words, there may be an additional period of time after the vesting period during which the option remains unexerciseable. An option or SAR may meet the exercisability requirements of the bill without regard to the reason why the right to exercise is delayed.

Further, if a single grant of options or SARs includes some options exercisable after six months while others are exercisable earlier, then those exercisable after the six month period will meet the exercisability requirement even if the others do not. The determination is made option by option, SAR by SAR. In addition, if exercisability is tied to an event, the determination of whether the six-month requirement is met is based on when the event actually occurs. Thus, for example, if an option is exercisable only after an initial public offering (IPO) and the IPO occurs seven months after grant, the option shall be deemed to have met the provision's exercisability requirement.

However, section 7(e)(8)(B) specifically recognizes that there are a number of special circumstances when it is permissible for an employer to allow for earlier exercise to occur (in less than 6 months) without loss of the exemption. For example, an employer or plan may provide that a grant may vest or

otherwise become exercisable earlier than six months because of an employee's disability, death, or retirement. The sponsors encourage the Secretary to consider and evaluate other changes in employees' status or circumstances.

Earlier exercise is also permitted in connection with a change in corporate ownership. The term change in ownership is intended to include events commonly considered changes in ownership under general practice for options and SARs. For example, the term would include the acquisition by a party of a percentage of the stock of the corporation granting the option or SAR, a significant change in the corporation's board of directors within 24 months, the approval by the shareholders of a plan of merger, and the disposition of substantially all of the corporation's assets.

The sponsors believe it important to allow employers the flexibility to construct plans that allow for these earlier exercise situations. However, this section is not intended to in any way require employers to include these or any other early exercise circumstances in their plans.

F. Stock option and SAR programs may be awarded at fair market value or discounted up to and including 15%

Stock options and SARs generally are granted to employees at around fair market value or at a discount. New section 7(e)(8)(B) recognizes that grants may be at a discount, but that the discount cannot be more than a 15% discount off of the fair market value of the stock (or in the case of stock appreciation rights, the underlying stock, security or other similar interest).

A reasonable valuation method must be used to determine fair market value at the time of grant. For example, in the case of a publicly traded stock, it would be reasonable to determine fair market value based on averaging the high and low trading price of the stock on the date of the grant. Similarly, it would be reasonable to determine fair market value as being equal to the average closing price over a period of days ending with or shortly before the grant date (or the average of the highs and lows on each day). In the case of a non-publicly traded stock, any reasonable valuation that is made in good faith and based on reasonable valuation principles must be used.

The sponsors understand that the exercise price of stock options and SARs is sometimes adjusted in connection with recapitalizations and other corporate events. Accounting and other tax guidelines have been developed for making these adjustments in a way that does not modify a participant's profit opportunity. Any adjustment conforming with these guidelines does not create an issue under the 15% limit on discounts.

G. Employee participation in equity programs must be voluntary

New section (8)(C) of the Worker Economic Opportunity Act states that the exercise of any grant or right must be voluntary. Voluntary means that the employee may or may not choose not to exercise his or her grants or rights at any point during the stock option, stock appreciation right, or employee stock purchase program, as long as that is in accordance with the terms of the program. This is a simple concept and it is not to be interpreted as placing any other restrictions on such programs.

It is the intent of the sponsors that this provision does not restrict the ability of an employer to automatically exercise stock options or SARs for the employee at the expiration of the grant or right. However, an employer may not automatically exercise stock options or SARs for an employee who has notified the employer that he or she does not want the employer to exercise the options or rights on his or her behalf.

Stock option, SARs and ESPP programs may qualify under new section 7(e)(8) even though the employer chooses to require employees to forfeit options, grants or rights in certain employee separation situations.

H. Performance based programs

The purpose of new section 7(e)(8)(D) is to set out the guidelines employers must follow in order to exclude from the ''regular rate'' grants of stock options, SARs, or shares of stock pursuant to an ESPP program based on performance. If neither the decision of whether to grant nor the decision as to the size of the grant is based on performance, the provisions of in new section 7(e)(8)(D) do not apply. For example, grants made to employees at the time of their hire, and any value or income derived from these grants, may be excluded provided they meet the requirements in new sections 7(e)(8)(A)–(C).

New section 8(D) is divided into two clauses. The first, clause (i), deals with awards of options awarded based on pre-established goals for future performance, and the second, clause (ii), deals with grants that are awarded based on past performance.

1. Goals for future performance

New section 7(e)(8)(D)(i) provides that employers may tie grants to future performance so long as the determinations as to whether to grant and the amount of grant are based on the performance of *either* (i) any business unit consisting of at least ten employees *or* (ii) a facility.

A business unit refers to all employees in a group established for an identifiable business purpose. The sponsors intend that employers should have considerable flexibility in defining their business units. However, the unit may not merely be a pretext for measuring the performance of a single employee or small group of fewer than ten employees. By way of example, a unit may include any of the following: (i) a department, such as the accounting or tax departments of a company, (ii) a function, such as the accounts receivable function within a company's accounting department, (iii) a position classification, such as those call-center personnel who handle initial contacts, (iv) a geographical segment of a company's operations, such as delivery personnel in a specified geographical area, (v) a subsidiary or operating division of a company, (vi) a project team, such as the group assigned to test software on various computer configurations or to support a contract or a new business venture.

With respect to the requirement to have ten or more employees in a unit, this determination is based on all of the employees in the unit, not just those employees who are, for example, non-exempt employees.

A facility includes any separate location where the employer conducts its business. Two or more locations that would each qualify as a facility may be treated as a single facility. Performance measurement based on a particular facility is permitted without regard to the number of employees who are working at the facility. For example, a facility would include any of the following: a separate office location, each separate retail store operated by a company, each separate restaurant operated by a company, a plant, a warehouse, or a distribution center.

The definitions of both a business unit and a facility are intended to be flexible enough to adapt to future changes in business operations. Therefore, the examples of business units set forth above should be viewed with this in mind.

Options may be excluded from the regular rate in accordance with new section 7(e)(8)(D)(i) under the following circumstances:

Example 1—Employer announces that certain employees at the Wichita, Kansas plant will receive 50 stock options if the plant's production reaches a certain level by the end of the year (note that in order to fit within this subsection, the grant does not have to be made on a facility wide basis);

Example 2—Employer announces that it will grant employees working on the AnyCo. account 50 stock options each if the account brings in a certain amount of revenue by the end of the year, provided that there are at least 10 employees on the AnyCo. account.

Employer 3—Employer announces that certain employees will receive stock options if the company reaches specified goal.

New section 7(e)(8)(D)(i) also makes clear that otherwise qualifying grants remain excludable from the regular rate if they are based on an employees' length of service or minimum schedule of hours or days of work. For example, an employer may make grants only to employees: (i) who have a minimum number of years of service, (ii) who have been employed for at least a specified number of hours of service during the previous twelve month period (or other period), (iii) who are employed on the grant date (or a period ending on the grant date), (iv) who are regular full-time employees (i.e., not part-time or seasonal), (v) who are permanent employees, or (vi) who continue in service for a stated period after the grant date (including any minimum required hours during this period). Any or all of these conditions, and similar conditions, are permissible.

2. Past performance

New section 7(e)(8)(D)(ii) clarifies that employers may make determinations as to existence and amount of grants or rights based on past performance, so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract. Thus, employers have broad discretion to make grants as rewards for the past performance of a group of employees, even if it is not a facility or business unit, or even for an individual employee. The determination may be based on any performance criteria, including hours of work, efficiency or productivity.

Under new section 7(e)(8)(D)(ii), employers may develop a framework under which they will provide options in the future, provided that to the extent the ultimate determination as to the fact of and the amount of grants or rights each employee will receive is based on past performance, the employer does not contractually obligate itself to provide the grant or rights to an employee. Thus, new section 7(e)(8)(D)(ii) would allow an employer to determine in advance that it will provide 100 stock options to all employees who receive ''favorable'' ratings on their performance evaluations at the end of the year, and it would allow the employer to advise employees, in employee handbooks or otherwise, of the possibility that favorable evaluations may be rewarded by option grants, so long as the employer does not contractually obligate itself to provide the grants or in any other way relinquish its discretion as to the existence or amount of grants.

Similarly, the fact that an employer makes grants for several years in a row based on favorable performance evaluation ratings, even to the point where employees come to expect them, does not mean in itself that the employer may be deemed to have ''contractually obligated'' itself to provide the rights.

Some examples of performance based grants that fit within new section7(e)(8)(D)(ii) are as follows:

Example A—Company A awards stock options to encourage employees to identify with the company and to be creative and innovative in performing their jobs. Company A's employee handbook includes the following: ''Company A's stock option program is a long-term incentive used to recognize the potential for, and provide an incentive for, anticipated future performance and contribution. Stock option grants may be awarded to employees at hire, on an annual basis, or both. All full-time employees who have been employed for the appropriate service time are eligible to be considered for annual stock option grants.''

Company A provides stock options to most nonexempt employees following their performance review. Each employee's manager rates the employee during a review process, resulting in a rating of from 1 to 5. The rating is based upon the manager's objective and subjective analysis of the employee's performance. The rating is then put into a formula to determine the number of options an employee is eligible to receive, based on the employee's level within the company, the product line that the employee works on, and the value of the product to the company's business. Employees are aware a formula is used. The Company then informs the employee of the number of options awarded to him or her.

Managers make it clear to employees that the options are granted in recognition of prior performance with the expectation of the employee's future performance, but no contractual obligation is made to employees. This process is repeated annually, with employees eligible for stock options each year based on their annual performance review. Most employees receive options annually based upon their performance review rating and their level in the company.

Example B—Company B manages its program similarly to company A, with some notable exceptions. Company B has a very detailed performance management system, under which all employees successfully meeting the expectations of their job receive options. The employee's job expectations are more clearly spelled out on an annual basis than under Company A's plan. Once a year, the employee undergoes a formal, written, performance review with his or her manager. If work is satisfactory, the employee receives a predetermined but unannounced number of options. Unlike Company A, which provides different amounts of options to employees based upon a numeric performance rating, Company B provides the same number of options to all employees who receive satisfactory employment evaluations. Over 90 percent of Company B's employees receive options annually, and in many years, this percentage exceeds 95 percent.

In both Example A and Example B, the employers set up in advance the formula under which option decisions are made; however, the decisions as to whether an individual employee would receive options and how many options he or she would receive was made based on past performance at the end of the performance period, but not pursuant to a prior contractual obligation made to the employees. The fact that the employer determines a formula or program in advance does not disqualify these examples from new section 7(e)(8).

I. Extra compensation

The Worker Economic Opportunity Act also amends section 7(h) of the FLSA (29 U.S.C. § 207(h)) to ensure that the income or value that results from a stock option, SAR or ESPP program, and that is excluded from the regular rate by new section 7(e)(8), cannot be credited by an employer toward meeting its minimum wage obligations under section 6 of the Act or overtime obligations under section 7 of the Act. The language divides section 7(h) into two parts, 7(h)(1) and 7(h)(2). Section 7(h)(1) states that an employer may not credit an amount, sum, or payment excluded from the regular rate under existing sections 7(e)(1–7) or new section 7(e)(8) towards an employer's minimum wage obligation under section 6 of the Act. When section 7(h)(1) is read together with section 7(h)(2), it states that an employer may not credit an amount excluded under existing sections 7(e)(1–4) or new section 7(e)(8) toward overtime payments. However, consistent with existing 7(h), extra compensation paid by an employer under sections 7(e)(5–7) may be creditable towards an employer's overtime obligations. This change shall take effect on the effective date but will not affect any payments that are not excluded by section 7(e) and thus are included in the regular rate.

J. The legislation includes a broad pre-effective date safe harbor and transition time

In drafting the Worker Economic Opportunity Act, the sponsors hoped to create an exemption that would be broad enough to capture the diverse range of broad-based stock ownership programs that are currently being offered to non-exempt employees across this nation. However, in order to reach a consensus, the new exemption had to be tailored to comport with the existing framework of the FLSA. The result is a series of requirements that stock option, SAR and ESPP programs must meet in order for the proceeds of those plans to fit within the newly created exemption.

Because of the circumstances that give rise to this legislation, the pre-effective date safe harbor is intentionally broader than the new exemption. The sponsors did not want to penalize those employers who have been offering broad-based stock option, SAR and ESPP programs simply because these programs would not meet all the new requirements in section 7(e)(8). Thus, the safe harbor in section 2(d) of the Act comprehensively protects employers from any liability or other obligations under the FLSA for failing to include any value or income derived from stock option, SAR and ESPP programs in a non-exempt employee's regular rate of pay. The safe harbor applies to all grants or rights that were obtained under such programs prior to the effective date, whether or not such programs fit within the new requirements of section 7(e)(8). If a grant or right was initially obtained prior to the effective date, it is covered by the safe harbor even though it vested later or was contingent on performance that would occur later. In addition, normal adjustments to a pre-effective date grant or right, such as those that are triggered by a recapitalization, change of control or other corporate event, will not take the grant or right outside the safe harbor.

On a prospective basis, the sponsors realized that many employers would need time to evaluate their programs in light of the new law and to make the changes necessary to ensure that the programs will fit within the new section 7(e)(8) exemption. Consequently, the sponsors adopted a broad transition provision to apply to stock option, SAR and ESPP programs without regard to whether or not they meet the requirements for these plans set forth in the legislation. Specifically, section 2(c) of the legislation contains a 90-day post enactment delayed effective date. The sponsors believe that the vast majority of employers who offer stock option, SAR and ESPP programs to non-exempt employees will be able to use the transition period in section 2(d)(1) to modify their programs to conform with the requirements of the legislation.

In addition, the sponsors felt that there were two circumstances where a further extension of this broad transition relief was appropriate. First, the legislation recognizes that some employers would need the consent of their shareholders to change their plans. Section 2(d)(2) provides an additional year of transition relief to any employer with a program in place on the date this legislation goes into effect that will require shareholder approval to make the changes necessary to comply with the new requirements of section 7(e)(8). Second, the legislation extends the transition relief to cover situations wherein an employer's obligations under a collective bargaining agreement conflict with the requirements of this Act. Section 2(d)(3) eliminates any potential conflict by allowing employers to fulfill their pre-existing contractual obligations without fear of liability.

V. REGULATORY IMPACT STATEMENT

The sponsors have determined that the bill would result in some additional paperwork, time and costs to the Department of Labor, which would be entrusted with implementation of the Act. It is difficult to estimate the volume of additional paperwork necessitated by the Act, but the sponsors do not believe that it will be significant.

VI. SECTION-BY-SECTION ANALYSIS

Sec. 2. (a) Amendments to the Fair Labor Standards Act—The legislation amends Section 7(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 207(e)) by creating a new subsection, 7(e)(8), which will exclude from the definition of the regular rate of pay any income or value nonexempt employees derive from an employer stock option, stock appreciation right, or bona fide employee stock purchase program under certain circumstances. Specifically, the legislation adds the following provisions to the end of Section 7(e) of the Fair Labor Standards Act:

(8) The new exclusion provides that when an employer gives its employees an opportunity to participate in a stock option, stock appreciation right or a bona fide employee stock purchase program (as explained in the Explanation of the Bill and Sponsor's Views), any value or income received by the employee as a result of the grants or rights provided pursuant to the program that is not already excludable from the regular rate of pay under sections 7(e)(1–7) of the Act (29 U.S.C. § 207(e)), will be excluded from the regular rate of pay, provided the program meets the following criteria—

(8)(A) The employer must provide employees who are participating in the stock option, stock appreciation right or bona fide employee stock purchase program with information that explains the terms and conditions of the program. The information must be provided at the time when the employee begins participating in the program or at the time when the employer grants the employees stock options or stock appreciation rights.

(8)(B) As a general rule, the stock option or stock appreciation right program must include at least a 6 month vesting (holding) period. That means that employees will have to wait at least 6 months after they receive stock options or a stock appreciation rights before they are able to exercise the right for stock or cash. However, in the event that the employee dies, becomes disabled, or retires, or if there is a change in corporate ownership that impacts the employer's stock or in other circumstances set forth at a later date by the Secretary in regulations, the employer has the ability to allow its employees to exercise their stock options or stock appreciation rights sooner. The employer may offer stock options or stock appreciation rights to employees at no more than a 15 percent discount off the fair market value of the

stock or the stock equivalent determined at the time of the grant.

(8)(C) An employee's exercise of any grant or right must be voluntary. This means that the employees must be able to exercise their stock options, stock appreciation rights or options to purchase stock under a bona fide employee stock purchase program at any time permitted by the program or to decline to exercise their rights. This requirement does not preclude an employer from automatically exercising outstanding stock options or stock appreciation rights at the expiration date of the program.

(8)(D) If an employer's grants or rights under a stock option or stock appreciation right program are based on performance, the following criteria apply.

(1) If the grants or rights are given based on the achievement of previously established criteria, the criteria must be limited to the performance of any business unit consisting of 10 or more employees or of any sized facility and may be based upon that unit's or facility's hours of work, efficiency or productivity. An employer may impose certain eligibility criteria on all employees before they may participate in a grant or right based on these performance criteria, including length of service or minimum schedules of hours or days of work.

(2) The employer may give grants to individual employees based on the employee's past performance, so long as the determination remains in the sole discretion of the employer and not according to any prior contract requiring the employer to do so.

(b) Extra Compensation—The bill amends section 7(h) of the Fair Labor Standards Act (29 U.S.C. 207(h) to make clear that the amounts excluded under section 7(e) of the bill are not counted toward an employer's minimum wage requirement under section 6 of the Fair Labor Standards Act and that the amounts excluded under sections 7(e)(1)–(4) and new section 7(e)(8) are not counted toward overtime pay under section 7 of the Act.

(c) Effective Date—The amendments made by the bill take effect 90 days after the date of enactment.

(d) Liability of Employers—

(1) No employer shall be liable under the FLSA for failing to include any value or income derived from any stock option, stock appreciation right and employee stock purchase program in an non-exempt employee's regular rate of pay, so long as the employee received the grant or right at any time prior to the date this amendment takes effect.

(2) Where an employer's pre-existing stock option, stock appreciation right, or employee stock purchase program will require shareholder approval to make to the changes necessary to comply with this amendment, the employer shall have an additional year from the date this amendment takes effect to change its plan without fear of liability.

(3) Where an employer is providing stock options, stock appreciation rights, or an employee stock purchase program pursuant to a collective bargaining agreement that is in effect on the effective date of this amendment, the employer may continue to fulfill its obligations under that collective bargaining agreement without fear of liability.

(e) Regulations—the bill gives the Secretary of Labor authority to promulgate necessary regulations.

Submitted April 12, 2000 by the Sponsors of S. 2323.

MITCH MCCONNELL.
CHRISTOPHER J. DODD.
JAMES M. JEFFORDS.
MICHAEL B. ENZI.

FOOTNOTES

[1] David Lebow et al., Recent Trends in Compensation Practices, Board of Governors of the Federal Reserve System, Fin. and Econ. Discussion Series, No. 1999–32, July 1999.

[2] Anita U. Hattiangadi, Taking Stock: $470,000 at Risk for Hourly Workers, Employment Policy Foundation, Mar. 2, 2000, at 4, and Fig. 2.

[3] Any stock option program that meets the criteria under section 422 of the Internal Revenue Code (called an Incentive Stock Option) is considered a qualified option. 26 U.S.C. § 422.

[4] 26 U.S.C. § 423.

[5] 29 U.S.C. §§ 201, et seq.

[6] 29 U.S.C. § 207(a)(1).

[7] 29 U.S.C. § 207(e).

[8] 29 U.S.C. § 207(e)(1).

[9] 29 U.S.C. § 207(e)(3).

[10] Id.

[11] Id.

[12] 29 U.S.C. § 207(e)(4).

[13] See e.g., Conference Report on H.R. 5856, H. Rept. No. 1453.

[14] U.S. Dept of Lab, Bureau of Lab. Statistics, Employer Costs For Employee Conpensation—March 1999, available at ftp://146.142.4.23/pub/news.release/ecec.txt.

[15] A wage-hour opinion letter responds to a request for the Department of Labor's view of how the law applies to a given set of facts. The letters are available to the public upon request or through commercial reporting services. Opinion letters have significant practical effects: ''[T]he Administrator's interpretation . . . has the characteristic not only of securing 'expected compliance' . . . but of possibly stimulating double damage suits by employees who need not fear that they would be at odds with the Government Officials involved.'' *National Automatic Laundry & Cleaning Council* v. *Shultz,* 143 U.S. App. D.C. 274 (D.C. Cir. 1971).

[16] Letter from Daniel F. Sweeney, Office of Enforcement Policy, Fair Labor Standards Team, Wage & Hour Division, Feb. 12, 1999.

[17] Hearing on the Treatment of Stock Options and Employee Investment Opportunities Under the Fair Labor Standards Act before the House Committee on Education and the Workforce, Subcommittee on Employment and Training, 106th Cong. 2d Sess. Mar. 2, 2000 (Statement of T. Michael Kerr, at 4–5).

[18] Id. at 5. The testimony also noted that the program's automatic exercise feature prevented the employees' participation from being voluntary, as required under the Division's rules for thrift savings programs.

[19] Letter from Daniel F. Sweeney, Office of Enforcement Policy, Fair Labor Standards Team, Wage & Hour Division, Feb. 12, 1999.

[20] Hearing on the Treatment of Stock Options and Employee Investment Opportunities Under the Fair Labor Standards Act before the House Committee on Education and the Workforce, Subcommittee on Employment and Training, 106th Cong. 2d Sess. Mar. 2, 2000 (Statement of J. Randall MacDonald, at 2).

[21] Id. (addendum to statement of Patricia Nazemetz, Letter from Gary J. Bonadonna, Director & International Vice President, UNITE, February 22, 2000).

[22] Id. (statement of T. Michael Kerr, at 7).

[23] 26 U.S.C. § 423.

Mr. MCCONNELL. Mr. President, I yield the floor.

The PRESIDING OFFICER. The distinguished Senator from Connecticut, Mr. DODD, is recognized.

Mr. DODD. Mr. President, I appreciate how the Chair pronounces that name so well. I am very grateful to the Chair.

I am deeply pleased to be joining my good friend and colleague from Kentucky in authoring this legislation, along with several of our other colleagues. Senator MCCONNELL mentioned several of them. But certainly Senator ENZI, Senator BENNETT, Senator ROBB, Senator MURRAY, Senator BINGAMAN, Senator REED, Senator KERREY, among others are also cosponsors of this bill.

I am also pleased to inform this body that the Clinton-Gore administration is a strong backer of the Worker Economic Opportunity Act, which is presently before us.

We have one of those unique opportunities that is not always available to us in this Congress of the United States; that is, we are actually going to do something this afternoon that couldn't have any rancor associated with it. It will make a difference in the lives, we think, of millions of people who would like to share in the remarkable prosperity we are enjoying.

We are backed by the administration. It is a bipartisan effort in this body. I am told that a similar version of this bill has been introduced in the other Chamber, the House of Representatives.

This is actually something we may accomplish, and we are not packing the galleries. It is not going to be a headline story tomorrow, but it will make a difference in people's lives.

We are in a period of sustained economic growth, almost unprecedented, if not unprecedented, in the 210-year history of our Nation. The unemployment rate today at 4.1 percent is the lowest it has been in 30 years. More than 21 million jobs have been created since 1993.

I see my colleague and good friend from Wyoming here. He is one of the cosponsors of this bill as well. I mentioned him earlier. We are pleased he is with us.

We are enjoying almost unprecedented prosperity in the country along with the remarkable results of low unemployment, the lowest in some three decades. More than 21 million new jobs have been created in the last 7 years in our Nation. Inflation is down, and real wages are rising and have grown in 5 consecutive years; again, almost an unprecedented record in our Nation's history.

For the first time in 50 years, the country posted three consecutive surpluses. Think of that. For the first time in decades, we are watching the deficit clock run in the opposite direction. Instead of how much debt we are accumulating every minute and every second, we are now reducing the national debt with the prospect of eliminating it by the year 2013.

What greater gift could we give to the next generation than to burn the national mortgage, if you will. The economy is roaring. It is producing a prosperity in the confidence which very few people could have imagined a few short years ago.

Factory workers, secretaries, and other nonexempt workers form the backbone of companies, large and small, that are also making a difference. These individuals have been driving our economy. It is the view of those who sponsor this bill since they are driving so much of this economy, they ought not to have to take a back seat to anyone in sharing in the prosperity this economy has produced.

In today's new economy, many companies look for creative ways to recruit, train, and reward employees. The Federal Reserve Board of Governors estimated approximately 17 percent of large firms in the United States introduced a stock option program and 37

percent have broadened eligibility for the stock option programs in the previous 2 years.

Ten years ago these options were a perk for the chief executive officer and other corporate executives in the corporation. Less than 1 million people received stock options in the early 1990s. Today, between 7 and 10 million people across this country are offered stock options. According to the National Center for Employee Ownership, more than 6 million workers receiving options are nonexecutives. In a 1997 survey, NECO reported that the average option grant value was $37,000 for professional employees, $41,000 for technical employees, and $12,500 for administrative employees.

This is very good for the long-term economic prospects in this country.

Clearly, the trend is that a broad cross section of companies offers stock option programs. In these changing times, I am concerned, as is my colleague from Kentucky and others, about laws working for businesses and employees. We need to work with them to find new ways to reward working people. As the economy changes, it is only fitting we update our laws, as well. That is why I join with my colleagues, and why others have joined, why the administration has joined, to change the 1938 Fair Labor Standards Act.

The Fair Labor Standards Act of 1938 is the benchmark of worker protection laws. I want to make very clear that the bill that is before the Senate today, S. 2323, does absolutely nothing to undermine the foundation of that critical and important piece of legislation.

My colleagues in the administration determined that the 1938 law needed to be amended in order to incorporate the emergence of stock option programs being offered to hourly employees. Our bill amends the Fair Labor Standards Act to clarify that the gains from stock options do not need to be included in the calculation of overtime pay. That is what the 1938 law said. That is where a lot of the confusion arose.

Our legislation strikes a balance between protecting employee rights and offering flexibility to employers. This bill excludes from the regular rate stock options, stock appreciation rights or bona fide stock purchase programs that meet specific vesting, disclosure and determination requirements. A safe harbor is in effect to protect those companies that already had established stock option programs for nonexempt employees, including those programs provided under a collective bargaining agreement or requiring shareholder approval.

I would like to commend the staff for their hard work on this bill—Sheila Duffy of my staff, Denise Grant with Senator MCCONNELL, and Leslie Silverman and Elizabeth Smith with the HELP Committee.

This proposal has broad bipartisan, bicameral support between the executive and legislative branches.

I ask unanimous consent two letters, one from the Union of the Needletrades, industrial and textile employees, and one from the ERISA Industry Committee, be printed in the RECORD.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES, ROCHESTER REGIONAL JOINT BOARD,
Rochester, NYC, February 22, 2000.

TO WHOM IT MAY CONCERN: I am writing on behalf of UNITE and its approximately 5,300 United States bargaining unit employees covered by a contract with Xerox Corporation. It is our understanding that Congress is currently considering legislation to clarify the Fair Labor Standards Act (FLSA) treatment of stock options and other forms of stock grants in computing overtime for non-exempt workers Xerox' UNITE chapter would strongly urge Congress to pass legislation exempting stock options and other forms of stock grants from the definition of the regular rate for the purpose of calculating overtime.

It is only recently that Xerox has made bargaining unit employees eligible to receive both stock options and stock grants. Without a clarification to the FLSA, we are afraid Xerox may not offer stock options or other forms of stock grants to bargaining unit employees in the future. In addition, without such a change in the law if options are granted there could be tremendous differentials in the amount of overtime each individual employee received based on what he or she decides to exercise an option or sell stock. However, our position that stock options should be exempt from the regular rate for purposes of overtime in no way diminishes our position that bargaining unit employees must have the right to receive overtime pay for actual hours.

As we begin the 21st century, UNITE hopes more companies will begin to provide all their employees with stock options and other forms of stock. It is a great way to assure that when the company does well the employees share the reward through employee ownership. Thank you for your consideration of this matter.

Sincerely,

GARY J. BONADONNA,
Director,
International Vice President.

THE ERISA INDUSTRY COMMITTEE,
Washington, DC April 10, 2000.

DEAR SENATOR: The ERISA Industry Committee (ERIC) strongly urges you to support S. 2323, the "Worker Economic Opportunity Act." S. 2323 is expected to come before the Senate for a vote during the week of April 10. Timely enactment of this legislation is critical to the continued viability of broad-based stock options and other similar programs that provide employees with equity ownership in the companies for which they work.

Introduced March 29 by Senator Mitch McConnell, the "Worker Economic Opportunity Act" enjoys strong bipartisan and bicameral support. The bill is the result of a cooperative effort between congressional leaders, the Department of Labor, and the business community.

Stock options increasingly are available to a broad range of employees, not just executives. A recent survey by William M. Mercer, Inc. reports a better than twofold increase since 1993 in the percentage of major industrial and service corporations that have a broad-based stock option plan.

In spite of the growing enthusiasm for employee equity ownership among employers and employees, an advisory letter interpreting current law issued by the Department of Labor's Wage and Hour Division has effectively stopped this movement in its tracks.

According to the Department's interpretation of the Fair Labor Standards Act (FLSA) of 1938, any gains from the exercise of stock options recognized by rank and file workers must be included in their "regular rate of pay" for purposes of computing overtime wages. Thus, in order to comply with the Wage and Hour Division's interpretation of the FLSA, employers would be required to track stock options granted to rank and file employees and recalculate their overtime payments once the options have been exercised.

No rational employer will subject itself to this impracticable burden. As a result, rank and file workers will be denied the valued opportunity to become a stakeholder in their employer's future.

S. 2323 is narrowly tailored to directly address the issues raised by the Wage and Hour Division's advisory letter without compromising any long-standing worker protections under FLSA. Most important, this legislation will benefit millions of working Americans by facilitating the continued expansion of equity-based compensation programs. It should be enacted without delay.

Thank you for considering our views. Please feel free to call on us if you have any questions or need additional information.

Very truly yours,

MARK J. UGORETZ,
President.

Mr. DODD. Mr. President, this bill is about fundamental fairness. I urge our colleagues to support this Worker Economic Opportunity Act to give working Americans a chance to share in our Nation's prosperity.

I ask further unanimous consent that during the remainder of this debate and the remainder of the day the bill be left open for additional cosponsorships. We have 20 or 30, but I suspect there may be others who would like their names associated with this bill. I ask unanimous consent cosponsorship of the bill be left open for the remainder of today's legislative business.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DODD. I yield the floor.

The PRESIDING OFFICER (Mr. ROBERTS). The distinguished Senator from Vermont is recognized.

Mr. JEFFORDS. Mr. President, I commend the Senator from Connecticut and the Senator from Kentucky for their work on the bill being presented today. We are here today because we believe that all workers should have the opportunity to share in the success of their companies and it is incredibly important we do all we can to make sure that this legislation gets passed with the vote it deserves.

More and more employers are providing equity ownership opportunities to all of their employees and we are here today because we want to foster this trend which is good for our workers and for our nation's economic growth. The Worker Economic Opportunity Act will encourage this trend by changing the Fair Labor Standards Act

to address the needs of the 21st century.

Over the last ten years, we have witnessed tremendous change in the structure of our Nation's economy in large part due to the birth of the internet and e-commerce. The vitality of our economy is a tribute to the creative and entrepreneurial genius of thousands of individual business people and the indispensable contribution of the American workforce.

As legislators during this exciting time, we are challenged to maintain an environment that will foster the continued growth of our economy. We must work to ensure that our laws are in sync with the changing environment. However, many of the laws and policies governing our workplace have fallen out of sync with the information age and there has been particular resistance to changing our labor laws. As chairman of the Senate Committee with jurisdiction over workplace issues, I believe it is time to examine and modify these laws to meet the rapidly evolving needs of the American workforce.

The Fair Labor Standards Act (FLSA), for example, was enacted in the late 1930s, to establish basic standards for wages and overtime pay. While the principles behind the FLSA have not changed, its rigid provisions make it difficult for employers to accommodate the needs of today's workforce. In early January, we discovered the problem that we are addressing here today. It is extremely important. We learned that the sixty-year old law actually operates to deter employers from offering equity participation programs, such as stock options, to hourly employees.

These programs are most prevalent in the high tech industry, yet increasingly employers across the whole spectrum of American industry have begun to offer them. And, while these programs used to be reserved for executives, recent data shows that they are making their way down the corporate ladder. A recent Federal Reserve Board of Governors study found that 17% of firms have introduced stock options programs within the last two years and 37% have broadened eligibility for their stock option programs in the last two years.

Broad-based equity programs prove valuable to both employers and employees. For employers, these programs have become a key tool for employee recruitment, motivation and retention. Employees seek out companies offering these programs because they enable workers to become owners and reap the benefits of their company's growth.

When I first heard about the FLSA's application to stock options, I became very concerned about its impact on our workforce. I was pleased to discover that Senators MCCONNELL, DODD, and ENZI shared similar concerns and that the Department of Labor also recognized that we had a problem on our hands that would require a legislative solution. Together we crafted the legislation we are debating here today.

We have also worked together on a Joint Statement of Legislative Intent on S. 2323 which is intended to reflect the discussions the sponsors had with the Department of Labor during the drafting of the legislation, and the sponsors' intent and understanding of this legislation.

I urge all my colleagues to join me in supporting this important legislation. It is a symbolic first step in the process of aligning our labor laws with the new economy.

I commend the Senator from Wyoming who is one of the initial people who understood the importance of this issue and who came forward to help other Members understand the dangers of the present situation and to bring about the bill we have before the Senate. I am happy to yield the floor to my wonderful Senator from Wyoming.

The PRESIDING OFFICER (Mr. GREGG). The distinguished Senator from Wyoming is recognized.

Mr. ENZI. Mr. President, I commend the chairman of the Health, Education, Labor, and Pensions Committee, the jurisdictional committee, for this very important piece of legislation. I appreciate his allowing me to be the subcommittee chairman for the labor portion of that committee, which is referred to as the Employment, Safety and Training Subcommittee. We get to work on these kinds of issues on a regular basis. In the past, it has been known as one of the more contentious committees. But I recommend people take a look and note it is one of the more reasonable committees now, where we are reaching bipartisan solutions to problems for people in the workplace. That has always been our intent. We are actually having some confidence in each other now and are able to achieve those sorts of things.

I am pleased to be able to rise today to speak in favor of S. 2323, the Worker Economic Opportunity Act. The large number of bipartisan cosponsors on this bill says a great deal for both its importance and its balanced, fair nature. I commend the hard work of my colleagues, Senator JEFFORDS, Senator MCCONNELL, and Senator DODD, both in crafting a solution on the issue and in garnering the bipartisan support for the bill.

Elizabeth Smith, the legal counsel for the Employment, Safety and Training Subcommittee, has been one of the coordinators of the bill and has helped us to bring it all together. That is not only coordination between the House and Senate, between Republicans and Democrats, but it is also with the administration. A few days ago we had an opportunity to gather and talk about this bill and Secretary Herman was there, and she has played a role in getting this done.

The problem was brought to us from where it should come, and that is the workers. Workers were being told that because of the labor laws, their employers may have to stop giving them stock options.

That is an important factor because stock options are seen as a way for people throughout this country, workers throughout this country, to own a share of the company. The better the company does, the better they do. It is a way that from their job, and the risk they take having that job, employees get to benefit from the productivity and returns they put into the business.

And, boy, some of these businesses are really doing well; millionaires are being created overnight—and we want hourly workers to be able to take advantage of those stock options.

A little flaw, because of the amount of time that has gone by since fair labor standards passed, said you will have to do some calculating so the value of that stock option shows up as a direct payment.

Nobody really knows what the value of those stock options are, particularly at the time they receive them. They do know sometime down the road, when they take advantage of them, and probably even further down the road when they actually get to sell them, but there is a huge change, hopefully, in the value of that stock between the time it is awarded to them and the time there is some value to it. So how do you calculate that back in years, to the time they received it, to calculate it into overtime? The difficulty of calculating it led the companies to say: We can't figure out a formula for doing it. The Department has a formula for doing it, but we can't possibly process that through so we can avoid court action. So what we are going to do is we are going to end stock options. That is when the workers said to Congress: Solve this problem for us.

That is what brings everybody together for a solution, the people at the far end asking that they be allowed to continue participating in the prosperity of this country. That is what has happened in this instance. We are here today because the workplace has changed for the better, but the labor statutes have not. Many employers now give stock options, not only to the executives and the managers, they give it to secretaries, factory workers, janitors, mailroom clerks—everybody. Those are the hourly employees who provide the critical support on which a company's success is built.

I am proud of those employers who give stock options to those employees. They recognize the value of giving workers a stake in the company's business. They are leading the charge to move workplaces into a new, modern era of better employer-employee relations. In fact, the line is dimming on who is the employer and who is the employee.

Unfortunately, the decades-old Fair Labor Standards Act has not kept pace. This statute, drafted during a very different time in the history of the American workplace, threatened to prevent employers from giving hourly employees stock options. S. 2323 removes this threat and ensures that

companies can continue to give stock options to hourly employees so they can share in the success of their employer and this country's economic growth.

This legislation takes an important step toward bringing an outdated labor statute up to date with the modern workplace. I am very concerned there are many other examples of problems such as the one we are solving today, examples of other obsolete restrictions in the 30- to 60-year-old labor statutes that are stifling the development of the new creative ways to benefit employees, such as the stock options program and telecommuting arrangements. We should be encouraging these advances in employer-employee relations, not stifling them. By passing this Worker Economic Opportunity Act we can provide encouragement. I hope we can continue to look for ways to solve similar problems.

I am particularly pleased the Department of Labor has worked with us in this bipartisan group. As chairman of the Employment, Safety and Training Subcommittee, I firmly believe cooperation between lawmakers and agency is the best way to develop practical solutions that benefit both the employees and the businesses.

I want to mention we have been doing that for about 2 years now. We passed the first changes in OSHA in 27 years, a year and a half ago; little incremental changes that will make a difference to the workers, that will make the workplace safer. That is what we are trying to do.

Recently we worked together on home inspections. OSHA, through a letter, had suggested they were going to go into the homes and check and see how telecommuters were operating. Home is the least safe place there is. It worried a lot of companies about how they were going to do the inspections without imposing on the privacy of their employees. Employees were worried about companies coming into their homes. The Department and OSHA and Congress saw the error of that. The Department withdrew the letter. Both OSHA and congress agreed that OSHA should not be a threat to people working in their home offices. People who work in their homes really enjoy doing that. There are a lot of benefits to them, many of which people who work in the District would understand because of the parking and the traffic problems. I was very pleased that the agency and congress agreed on this.

Last week we had agreement on a funding proposal, a sense-of-the-Senate proposal that would have been on the budget agreement except for a parliamentary move that was done at the last moment. But there was agreement on both sides that there needs to be not only enforcement of OSHA—which does get attention—but justification by OSHA of how it is reducing workplace illnesses and injuries and a discussion of the value of compliance assistance activities, which are extremely important.

There are 12,000 pages of OSHA regulations. It is difficult for a small businessman to make it through that many pages of that kind of rhetoric. So we have been trying to make it more incentive-based, so the agency would participate more in telling them what they need to do instead of beating them over the head for what they did not do. We think, with a more cooperative program, there will be more safety in the workplace; that employers will not live in fear of OSHA, but rather in anticipation of help from OSHA and an understanding of the way they can keep their employees safe.

Those are a few of the things we are working together on to have a better workplace. This legislation is a key piece and a key beginning to a number of changes we can make to affect the workers of this country. I look forward to working together on similar measures in the future as we move toward the shared goal of better matching our Federal laws to the needs of the modern workplace.

I yield the floor.

Mr. JEFFORDS. Mr. President, I commend the Senator from Wyoming for his work not only on this bill but on the other legislation he discussed. I also commend him for his help in the review of existing labor laws. The Senator understands the import of bringing our labor laws in line with the needs into the 21st Century. I depend upon him, and he produces.

Mr. ABRAHAM. Mr. President, I rise today to express my support for the Worker Economic Opportunity Act. This bipartisan legislation, also supported by the Department of Labor, will encourage employers to provide stock options to all employees, not just executives, ensuring that all of our workers will continue to have the opportunity for an ownership stake in their company.

In recent years, there have been revolutionary changes in the workplace, creating new opportunities for our working families—opportunities, which for a long time, frequently existed only for a select privileged few. One of the most positive developments has been the significant increase in the availability of stock option plans for workers, specifically hourly workers.

The decades-old employment laws do not accommodate newer workplace innovations and their application would unfairly punish hourly workers by making their stock-option programs disproportionately expensive and complex for employers. Subsequently, recent Department of Labor legal interpretations and policies have threatened the availability of stock option plans for hourly employees.

Mr. President, it is imperative that Congress send a clear message that the positive developments taking hold around the country should be encouraged, not thwarted.

The Worker Economic Opportunity Act would send just a message, ensuring that all employees will continue to have the opportunity to share in the economic growth and success of their company formerly enjoyed only by corporate executives. Moreover, companies, especially smaller companies with high capital costs in development, will be able to maintain the capital resources necessary to compete in the rapid evolving global economy and, at the same time, reward and retain highly qualified and valued employees.

Finally, Mr. President, I would like to take a moment to thank Senator MCCONNELL for his work and dedication toward this legislation and the Department of Labor for recognizing the need to accommodate today's employee and workplace innovations.

I yield the floor.

Ms. COLLINS. Mr. President, I rise today to express my strong support for S. 2323, the Worker Economic Opportunity Act. I am pleased to be a cosponsor of this legislation, which has broad bipartisan support in both the Senate and the House of Representatives.

In recent years, we have seen substantial growth in the use of employee equity programs such as stock options, stock appreciation rights, and employee stock purchase plans. This growth has not only been in the number of companies which offer such plans, but also in the employees to whom such plans are available. While long used as a form of incentive for corporate executives, equity programs are now available to more employees than ever. In fact, a 1998 survey by Hewitt Associates found that in excess of two-thirds of large U.S. companies offered stock options to non-executive employees, and more than a quarter of these companies make such plans available to their entire workforce.

Unfortunately, the Fair Labor Standards Act, which was enacted in 1938, does not recognize the importance of stock options as an employee benefit. Thus, when asked how to deal with stock options when calculating overtime pay for hourly-wage employees, the Department of Labor ruled that the options would have to be included in the calculations.

The end result of this decision left employers with two options: One, go through the burdensome task of recalculating an employee's regular pay rate, retroactively, based on the change in the value of the stock from the time the option was granted until it was exercised; or, two, do not offer any form of equity program to any employee who is not exempt from the Fair Labor Standards Act.

Since complying with the Department of Labor's onerous ruling would not likely be worth the benefit of offering an equity plan, the vast majority of companies would be left to face option two, thus eliminating the use of a benefit that is popular with both employers and employees.

Recognizing the need to remedy this matter, for the good of companies and workers alike, a bipartisan group of

legislators worked to craft the bill we have before us today, the Worker Economic Opportunity Act. This legislation would exempt employee equity programs from the overtime requirements of the Fair Labor Standards Act, just as profit sharing and holiday bonus plans are exempted. In addition, the bill protects employers who offered employee equity programs prior to the date this legislation is enacted.

This legislation will allow employers to offer the kind of benefits which will allow them to attract a quality workforce, while providing employees with a benefit they truly want. It is all too rare for Congress to come up with a win-win solution to a problem, but in this case we certainly have.

Mr. President, I urge my colleagues to support this important legislation.

Mr. KENNEDY. Mr. President, since its enactment in 1938, the Fair Labor Standards Act has played a fundamental role in ensuring a fairer standard of living for all American workers. The act created basic rights for workers by establishing a federal minimum wage, a 40 hour work week and overtime pay for additional hours. It also protects children from abusive working conditions and helps ensure that women and men receive equal pay. Throughout its existence, the act has been indispensable in improving the standard of living for vast numbers of Americans.

The Department of Labor has effectively carried out its responsibility to interpret the law with this purpose in mind. Given the high value of the act in protecting workers' rights to a fair workplace, Congress must remain vigilant to ensure that any changes in this important law do not undermine the wage and hour protections guaranteed to workers under the act.

I support the current bill because it helps ensure that employers cannot misuse the act as an excuse to exclude rank and file workers from the stock option plans, stock appreciation rights, and stock purchase plans they provide to higher paid employees.

I commend Senator DODD, Senator JEFFORDS, Senator ENZI, and Senator MCCONNELL for developing this narrow, but important, clarification of the act. It is a needed modernization of the law, and it arose from unique circumstances. I am confident that the Secretary of Labor will promulgate regulations interpreting this bill in a way that protects the fundamental right of workers to receive overtime pay and not be forced to work overtime to participate in stock plans. It is of the utmost importance that any change in the act serves to strengthen the protections for workers, not weaken them.

Ms. SNOWE. Mr. President, I rise today to express my support for the Worker Economic Employment Opportunity Act. Mr. President, every time we turn around it seems that we hear about how strong our nation's economy is right now—and how America's workers are daily facing new-found employment opportunities. We are in a period of almost unprecedented prosperity and sustained economic growth. And the bill we are voting on today is a direct consequence of that growth.

It wasn't long ago that benefits such as stock options were available only to the upper levels of management. Companies are now offering stock options as a way not only to attract, but to retain quality employees at all levels. This is a way of providing fairness to our nations workers—the ones who manage the daily ins-and-outs of the business, the ones who have quite literally built today's economy.

S. 2323 will clarify that providing stock options will not be counted toward overtime pay for hourly employees. The vitality of our economy is a tribute to the hard work and creativity of these workers. Accordingly, it is unacceptable that the Fair Labor Standards Act would be interpreted in a manner that would effectively preclude the offering of this valuable benefit to hourly employees who form the backbone of American business.

The Fair Labor Standards Act already exempts some employee benefits such as discretionary bonuses, health insurance, and retirement savings plans from overtime calculations. We do this to encourage employers to provide these critically needed benefits and incentives for their employees—stock options should be no different.

We should not hinder the ability of our nation's workers to participate in the economic success of the companies they are helping to building. If employers choose to offer profit-sharing options, they should not be penalized when calculating over-time wages.

Mr. President, I support this critical clarification of the Fair Labor Standards Act and I urge my colleagues to vote for the bill. Thank you, Mr. President, I yield the floor.

Mr. BENNETT. Mr. President, I rise today to support Senator MCCONNELL's stock options legislation, S. 2323, and commend him for his hard work on this issue. This legislation allows companies who currently offer non-salaried employees a stock options program to continue to incentivize their work force without the threat of sanctions of the U.S. Department of Labor.

This is an easy one to support. The United States is unique in the world with regard to how our stock options and the wealth generated in our companies are shared with those who significantly participate in their creation. As in most of the rest of the world, it used to be that only our top executives received stock options from their companies. Today, many high tech companies offer stock options to all of their employees, from the clerk to the CEO. Particularly with regard to an individual's retirement needs, stock options are a tremendous financial opportunity for all workers and their families. We must do everything in our power to preserve these positive wealth- and risk-sharing developments in our economy.

Employees at every level should be allowed to reap the rewards of the success of their company. All throughout the United States, it has become common place for employees to quit their job and go to work for progressive companies who allow them to share in the wealth that their corporations generate. I hear repeatedly from industrial companies whose compensation structure is often very different, that they are losing their most talented and valuable employees to these new, often high-tech, corporations. And Mr. President, that kind of competition for employees benefits all Americans and it's a positive development.

The Department of Labor's ill-considered advisory opinion, threatened this development, and would have resulted in the cessation of often generous stock option plans for non-managerial and non-professional employees in many of America's most progressive corporations. It is critical that we recognize the importance of these wealth- and risk-sharing developments to the health of the American economy and carefully weigh each new regulation, interpretation, and law before we rashly risk the financial health and well-being of the hard-working families who have everything to do with the level of productivity our economy enjoys.

Mr. LEVIN. Mr. President, I will vote in favor of the Worker Economic Opportunity Act, S. 2323. Stock options have traditionally been distributed only to highly salaried executives, used as an incentive to promote hard work on behalf of the company. As a company's bottom line improves due in part to the executive's efforts, the value of the company's stock increases, eventually rewarding the executive when he or she ultimately exercises the option and later sells the stock. I have long maintained that stock options ought be provided to all types of employee—whether hourly or salaried, management or clerica—and not just the top brass. That is why I introduced the Ending the Double Standards for Stock Options Act last Congress, which would have encouraged corporations to adopt plans in which a minimum of 50% of all options would go to non-management employees. After all, a company's success depends on the efforts of more than just its executives.

I am hopeful that the Worker Economic Opportunity Act will encourage the growth of broad-based employee stock option plans in corporate America. The Act excludes stock options from overtime pay calculations for hourly employees. Current law also excludes benefits like discretionary bonuses, employer-provided health insurance, and retirement benefits from overtime pay rates. But current law doesn't address stock options. Last year, the Department of Labor indicated that, without action by Congress, companies would likely have to include the value of stock options when figuring an hourly employee's overtime

pay rate. Corporate America has argued that the administrative and financial burdens associated with such inclusion, given a huge number of different employees having different amounts of options with different exercise dates and strike prices, outweigh the benefits of having a broad-based stock option plan.

This legislation is not inconsistent with my proposal to require the reporting of stock options as an expense on a company's financial statements, a key part of the Ending the Double Standards for Stock Options Act. Therefore, I support the Worker Economic Opportunity Act to remove a potential barrier to workers' participation in the prosperous American economy they helped create.

Mr. JEFFORDS. Mr. President, I ask unanimous consent that for the next 5 minutes the time be held open, and then at 2:05 p.m. I will yield back all the time on the measure, and I ask unanimous consent that there be a period for morning business from 2:05 p.m. until 2:30 p.m., with the time equally divided.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. JEFFORDS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. JEFFORDS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. JEFFORDS. Mr. President, what is the order of business?

The PRESIDING OFFICER. Before the Senate is S. 2323.

The bill is before the Senate and open to amendment. If there be no amendment to be proposed, the question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading and was read the third time.

Mr. JEFFORDS. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is on the passage of the bill.

The clerk will call the roll.

The bill clerk called the roll.

Mr. NICKLES. I announce that the Senator from Delaware (Mr. ROTH) and the Senator from Maine (Ms. SNOWE) are necessarily absent.

Mr. REID. I announce that the Senator from Massachusetts (Mr. KERRY), the Senator from New York (Mr. MOYNIHAN), the Senator from West Virginia (Mr. ROCKEFELLER) are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 95, nays 0, as follows:

[Rollcall Vote No. 81 Leg.]

YEAS—95

Abraham	Edwards	Lincoln
Akaka	Enzi	Lott
Allard	Feingold	Lugar
Ashcroft	Feinstein	Mack
Baucus	Fitzgerald	McCain
Bayh	Frist	McConnell
Bennett	Gorton	Mikulski
Biden	Graham	Murkowski
Bingaman	Gramm	Murray
Bond	Grams	Nickles
Boxer	Grassley	Reed
Breaux	Gregg	Reid
Brownback	Hagel	Robb
Bryan	Harkin	Roberts
Bunning	Hatch	Santorum
Burns	Helms	Sarbanes
Byrd	Hollings	Schumer
Campbell	Hutchinson	Sessions
Chafee, L.	Hutchison	Shelby
Cleland	Inhofe	Smith (NH)
Cochran	Inouye	Smith (OR)
Collins	Jeffords	Specter
Conrad	Johnson	Stevens
Coverdell	Kennedy	Thomas
Craig	Kerrey	Thompson
Crapo	Kohl	Thurmond
Daschle	Kyl	Torricelli
DeWine	Landrieu	Voinovich
Dodd	Lautenberg	Warner
Domenici	Leahy	Wellstone
Dorgan	Levin	Wyden
Durbin	Lieberman	

NOT VOTING—5

Kerry	Rockefeller	Snowe
Moynihan	Roth	

The bill (S. 2323) was passed, as follows:

S. 2323

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Worker Economic Opportunity Act''.

SEC. 2. AMENDMENTS TO THE FAIR LABOR STANDARDS ACT OF 1938.

(a) EXCLUSION FROM REGULAR RATE.—Section 7(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(e)) is amended—

(1) in paragraph (6), by striking ''or'' at the end;

(2) in paragraph (7), by striking the period and inserting ''; or''; and

(3) by adding at the end the following:

''(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.''.

(b) EXTRA COMPENSATION.—Section 7(h) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(h)) is amended—

(1) by striking ''Extra'' and inserting the following:

''(2) Extra''; and

(2) by inserting after the subsection designation the following:

''(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.''.

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date that is 90 days after the date of enactment of this Act.

(d) LIABILITY OF EMPLOYERS.—No employer shall be liable under the Fair Labor Standards Act of 1938 for any failure to include in an employee's regular rate (as defined for purposes of such Act) any income or value derived from employer-provided grants or rights obtained pursuant to any stock option, stock appreciation right, or employee stock purchase program if—

(1) the grants or rights were obtained before the effective date described in subsection (c);

(2) the grants or rights were obtained within the 12-month period beginning on the effective date described in subsection (c), so long as such program was in existence on the date of enactment of this Act and will require shareholder approval to modify such program to comply with section 7(e)(8) of the Fair Labor Standards Act of 1938 (as added by the amendments made by subsection (a)); or

(3) such program is provided under a collective bargaining agreement that is in effect on the effective date described in subsection (c).

(e) REGULATIONS.—The Secretary of Labor may promulgate such regulations as may be necessary to carry out the amendments made by this Act.

Mr. LOTT. I move to reconsider the vote.

Mr. JEFFORDS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

ORDER OF PROCEDURE

Mr. LOTT. Mr. President, I had hoped we would be able to announce a unanimous consent agreement at this time as to how we will proceed on eliminating the marriage tax penalty and what amendments would be in order and how much time. I have now received a list of amendments from Senator DASCHLE, but we have had only a couple of minutes to review that. We need a little time. I understand several of the amendments actually have been filed. There may be one or two on which we don't actually have access to an amendment. For instance, Senator TORRICELLI may have an amendment