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FLEX-TIME FOR FAMILIES: WHAT WORKS FOR THE GOVERNMENT CAN WORK FOR THE PRIVATE SECTOR

Mark Wilson
Rebecca Lukens Fellow in Labor Policy

Creating family-friendly schedules for American workers is one of the top legislative priorities for the leadership of the 105th Congress. Now that more families have both parents in the workforce, American workers need more control over their work schedules. They need flexible schedules and compensation packages, but their employers are bound by the Fair Labor Standards Act (FLSA), which does not allow such flexibility. Providing choices like whether to receive overtime pay as cash or as paid time off will enable workers to juggle more effectively the demands of the workplace with the needs of their children. And, ironically, the way Congress can make this happen is to give private-sector workers and employers the same flexibility enjoyed by federal workers and agencies.

Senator John Ashcroft (R-MO) recently introduced legislation to give this flexibility. His Family-Friendly Workplace Act (S. 4) would provide workers with a choice of flexible work schedules and paid-leave options to suit their families' needs. On the other hand, President Clinton is among those who have suggested an approach that does not give the flexibility workers need, and could force them to choose between family needs and a full paycheck. He has proposed amending the Family and Medical Leave Act (FMLA) so that workers could take additional *unpaid* leave for various reasons. Simply amending the FMLA, however, does not completely meet the need that most workers with families have—taking time off without losing pay. The flex-time proposals in Senator Ashcroft's bill are a far better solution for today's families than incrementally expanding unpaid leave under the FMLA because they will provide families with the time off they need without crimping their budgets.

Since 1938, the Fair Labor Standards Act has determined the national standards for the wage, hour, and overtime requirements with which American employers must comply. While it was created with good intentions, today the FLSA prevents private employers from providing the kinds of flexible work schedules that families need. Updating the FLSA to allow freedom to take paid time off for any reason instead of cash for overtime is long overdue. The foundation for tomorrow's

family-friendly workplace should be built on flexibility and freedom, not on additional federal mandates.

In 1978, Congress recognized the benefit of flexible schedules when it passed the Federal Employees Flexible and Compressed Work Schedules Act. This act allows federal employees the choice of taking overtime pay as either cash or paid time off. Because of this, federal workers are more productive, less absent, and have a greater sense of personal control and autonomy over both their time and money. The need for flexible work schedule options like those available to federal workers is greater now than ever; and given the success of the federal program, Congress should strongly consider extending the same opportunity to all American workers that federal employees have enjoyed for nearly 20 years. Senator Ashcroft's bill will accomplish this by allowing employers to create a variety of voluntary flexible work schedule options for their employees while protecting workers from coercion and abuse. The Family-Friendly Workplace Act (S. 4) will enable workers to bank their overtime hours for future use, thereby enabling families to enjoy paid time off when they need it.

WHY TODAY'S FAMILIES NEED FLEXIBLE WORK SCHEDULES

Over the past 25 years, the U.S. economy has moved from a manufacturing base to a global service work environment. More American women, especially mothers, and single parents are working than ever before. Workers need more flexibility in hours, working conditions, and compensation packages than current laws and regulations allow. America's economy, labor conditions, and labor/management relations have changed dramatically since the FLSA was passed in 1938, yet few provisions of the act have been updated to reflect those changes. For example:

- Women account for over 46 percent of the labor force today, up from 29 percent in 1950. The labor force participation rate for married mothers with children under 6 years of age has increased from 11 percent in 1950 to over 47 percent today. In 1995, over 68 percent of all mothers with children under the age of 18 were in the labor force.¹
- In 1995, only 5.2 percent of all families mirrored the traditional "Ozzie and Harriet" family structure of a married couple (a wage-earning father and a stay-at-home mother) with two children.²
- In 1995, almost 70 percent of single women and 55 percent of single men headed families with children.³
- In 1995, almost 75 percent, or 18.4 million, of married families with children had both parents working. In over 38 percent of these families, the women were working full time year-round.⁴
- According to recent national polls, 65 percent of Americans favor changes in labor laws that would allow for more flexible work schedules, and 58 percent would choose paid time off more often than overtime wages.⁵

Concerns over the well-being of the family often forces parents to leave jobs that do not fit their families' schedules, or to forego jobs that better suit their talents but would put additional strain on their families. Such scenarios would not be as frequent if flexibility in the work schedule were an

1 Data from various press releases of the Bureau of Labor Statistics.

2 Bureau of the Census, "Money Income in the United States: 1995," September 1996.

3 *Ibid.*

4 *Ibid.*

5 Princeton Survey Research Associates, "Worker Representation and Participation Survey, Top-Line Results," October 1994; Penn & Schoen Associates, Inc., "Flexible Scheduling and Compensatory Time Poll," conducted for the Employment Policy Foundation, October 27, 1995.

option in the private sector. The FLSA as it is now written can impede an employer's ability to accommodate such employee requests for greater worktime flexibility. For example, a worker might want to work 44 hours one week in order to take a half-day off the next month to attend a parent/teacher conference, and avoid using accumulated leave time or losing pay. But the FLSA requires that the employer pay the employee for those extra hours worked. Workers, therefore, frequently are forced to use available leave time (usually vacation leave) to take care of their children's schooling needs or even to care for children who are ill. The Department of Labor has even prosecuted employers for violating the FLSA when their offense was offering their employees the same flexible schedule options that federal government employees enjoy under the Federal Employees Flexible and Compressed Work Schedules Act.⁶

The concept of flexible work schedules is not new, nor is it untested.⁷ Flexible work schedules were first introduced in Germany 1967 as a means of relieving commuting problems. Shortly thereafter, employers in Switzerland began to offer flexible schedules to attract women with family responsibilities into the labor force. The Hewlett-Packard Company was the first company to introduce flex-time in the United States in 1972.⁸ Since then, the number of private-sector workers taking advantage of flexible schedules or some form of compressed workweek in the United States has grown relatively slowly because of the rigid overtime provisions of the FLSA.⁹

Primarily in response to the heavy traffic congestion around Washington, D.C., during rush hours, Congress enacted in 1978 the Federal Employees Flexible and Compressed Work Schedules Act as a trial program. For the first time, federal workers were able to arrange alternative work schedules to meet their families' needs and to reduce commuting time. The "trial" was so successful—in that agencies saw increases in productivity and decreases in tardiness and absenteeism¹⁰—that Congress reauthorized the program in 1982 and made it permanent in 1985.¹¹ In 1985, Congress extended to state and local workers the flexibility to use compensatory time in lieu of overtime pay.

President Clinton has acknowledged the benefit of flexible scheduling in a memorandum dated July 11, 1994, in which he directed all executive branch departments and agencies to expand their use of flexible, family-friendly work arrangements.¹² When he issued the memorandum, the President stated, "broad use of flexible work arrangements to enable Federal employees to better balance their work and family responsibilities can increase employee effectiveness and job satisfaction, while decreasing turnover rates and absenteeism." Studies have also suggested that flexible working schedules improve customer service, expand employee skills, and reduce commuting time.¹³

6 Craig E. Richardson and Geoff C. Ziebart, *Red Tape in America: Stories from the Front Line* (Washington, D.C.: The Heritage Foundation, 1995), p. 109.

7 Flexible work schedules include flexible arrival and departure times, flexible credit hour programs (flex-time), compensatory time (comp-time), and compressed workweeks.

8 Barney Olmsted and Suzanne Smith, *Creating a Flexible Workplace* (New York, N.Y.: American Management Association, 1989).

9 By 1991, nearly 20 years after flex-time was first introduced in the U.S., only 15.3 percent of all private full-time employees were working on flexible schedules compared to 27 percent of federal government employees. See Bureau of Labor Statistics, "Workers on Flexible and Shift Schedules," August 14, 1992.

10 Simcha Ronen, *Flexible Working Hours: An Innovation in the Quality of Work Life* (New York, N.Y.: McGraw-Hill, 1981). Surveys conducted in 17 federal agencies strongly suggest that the effectiveness of the agencies was improved through increases in productivity and decreases in tardiness and absenteeism. Employee attitudes toward their jobs and the work environment also improved, carpooling increased, and commuting time declined.

11 Bureau of National Affairs, "The Changing Workplace: New Directions in Staffing and Scheduling," *Special Report* (1986). This special report summarizes some of the Office of Personnel Management studies that were required by the 1982 extension of the federal program.

12 Office of the Press Secretary, "Expanding Family-Friendly Work Arrangements in the Executive Branch," The White House, July, 11, 1994.

Flexible work schedules benefit families in a way the FMLA does not—with paid time off. Working a few extra hours one week in order to take paid time off later provides families with the time they need when they need it, without crimping their budgets. Currently, most workers can take advantage of short-term unpaid leave for family responsibilities, but at a cost—their lost pay.¹⁴ Flexible work schedules, therefore, can also increase a family's sense of personal control over both their time and their money.¹⁵

FOUR MAJOR TYPES OF FLEXIBLE WORK SCHEDULES

Although the terms “flex-time” and “comp-time” often are used interchangeably, they are distinctly different types of flexible work schedules. Moreover, flex-time may refer to flexible arrival and departure times, or it can mean flexible credit hour programs. Adding to the confusion is the fact that some of these forms of flexible schedules are prohibited by the FLSA (flexible credit hour programs) while others are allowed (flexible arrival and departure times).¹⁶ As the debate in Congress begins on extending flexible work schedules to all workers, legislators must have an accurate understanding of the kinds of flexible schedules that are legal and who will benefit from them.

There are four major types of flexible work schedules currently in use in the United States: flexible arrival and departure times; flexible credit hour programs (flex-time); compensatory time (comp-time); and compressed workweeks.

- **Flexible arrival and departure times** allow employees to alter the time they arrive at their workplace and when they leave. To beat the morning and afternoon rush hours, a worker may elect to arrive at 7:00 a.m., work for eight hours, and leave at 3:30 p.m. (with a half-hour break for lunch); a co-worker may elect to arrive at 10:00 a.m. and leave at 6:30 p.m. The FLSA currently allows this type of flexible work schedule for all workers.
- **Flexible credit hour (flex-time) programs** allow workers at their own request to work additional hours one week in order to be able to take a certain number of hours off, with pay, in another week. For example, federal workers are allowed to work an extra hour each day during one week and “bank” those five credit hours to use when they want to take paid time off, whether they do so the following week, the following pay period, or the next month. Flex-time even applies to part-time federal workers.¹⁷ Private-sector workers, full-time or part-time, do not have such an option. Currently, the FLSA allows private-sector workers to shift hours within a pay period, but they can not bank the credit hours across pay periods.¹⁸ Private-sector employees have no choice: they must be paid cash for the overtime they work in a pay period.

13 Bureau of National Affairs, “The Changing Workplace.”

14 Most employers already grant unpaid time off for such things as doctor visits and school functions at the request of the employee.

15 Ronen, *Flexible Working Hours*.

16 Section 7(b)(1) and (2) of the Fair Labor Standards Act enables unions to bargain collectively for a variety of flexible working schedules, but it does not allow private employers to offer them to their nonunion workers.

17 According to the Office of Personnel Management, flexible credit hours are hours that employees elect to work—in addition to the basic work requirement—to vary the length of the workweek or workday. For example, part-time workers that usually work 25 hours per week but happen to work 30 hours would have the option to bank those 5 extra hours to use in a later pay period as paid time off.

18 The pay period (how often workers are paid) for most workers is two weeks. Under the FLSA, a worker can work 44 hours one week and 34 hours the next week and still be paid for 80 hours during the two-week pay period (overtime pay accounts for the other 2 hours). Private-sector workers cannot, however, work 45 hours one week, 40 hours the next week, “bank” five credit hours, be paid for 80 hours during the two-week pay period, and use the banked credit hours the next month. The FLSA currently requires private-sector workers be paid cash for the 85 hours they worked in the pay period.

However, under the Federal Employees Flexible and Compressed Work Schedules Act, federal employees can bank up to 24 flexible credit hours to use as paid time off in the future.

- **Compensatory time, or comp-time**, allows employees who work more than 40 hours in one week to take overtime pay as cash or as comp-time hours that can be used later as paid time off. Comp-time hours accrue at the same rate as traditional overtime pay—one-and-a-half hours for each hour worked over 40.¹⁹ Like flex-time, the FLSA allows private-sector workers to shift comp-time hours within a pay period, but they may not carry comp-time hours across pay periods. They must be paid cash at the end of the pay period. Since 1986, state and local workers have been able to accrue up to 480 hours of comp-time and carry over those hours for use at a later date.²⁰ Federal managers can both grant, at the employee's request, or require federal workers to take compensatory time off for irregular or occasional overtime work.²¹
- **Compressed, or biweekly, workweeks** allow employees to choose whether to work four 10-hour days with a three-day weekend, or some other compressed workweek schedule. Hours worked over the 40-hour base are paid as overtime. Under the Federal Employees Flexible and Compressed Work Schedules Act, federal agencies may establish a four-day workweek or another compressed schedule for their employees. While the FLSA allows employers to establish compressed workweeks, the overtime worked must be paid as cash at the end of the pay period.

THE FAMILY-FRIENDLY WORK SCHEDULE PROPOSALS

The House of Representatives in the 104th Congress passed compensatory time legislation (H.R. 2391) on July 30, 1996, by a vote of 225 to 195. President Clinton submitted his own proposal on September 27, 1996, but it was never introduced. The Senate never acted on the House passed bill and the legislation died at the conclusion of the 104th Congress.

Two bills that would update the FLSA to provide flexible work schedules for private-sector workers have been reintroduced in the 105th Congress. They range from comp-time legislation introduced in the House (H.R. 1) to a more comprehensive flexible schedules bill introduced in the Senate (S. 4). To date, President Clinton has not resubmitted his comp-time proposal to Congress. Both the House and Senate held hearings in February on comp-time and flex-time; committee mark-up and floor debate of legislation will follow shortly thereafter.

The Working Families Flexibility Act (H.R. 1). Representative Cass Ballenger (R-NC) has introduced the Working Families Flexibility Act to enable private employers to offer their employees the choice between taking overtime pay as either cash or time off. Workers, at their option, could accrue 240 hours a year in compensatory time (comp-time) that they could use as paid time off for any reason. One hour of overtime worked would be worth 1.5 hours in pay, or 1.5 hours in paid time off. H.R. 1 would apply only to workers that are paid by the hour and work more than 40 hours per week.

Under penalty of law, no employer could coerce an employee to choose time off or overtime pay. Any accrued time not used or compensated would be automatically paid to the employee as cash on an annual basis, and employees could cash out accrued time with only 30-days notice. A similar bill (H.R. 2391) passed the House last year by a 225 to 195 vote.

19 Because flex-time is available to part-time workers, federal employees accrue flexible credit hours on a one-to-one basis. Comp-time, like overtime, accumulates on an hour - to hour-and-a-half basis.

20 Fair Labor Standards Amendments of 1985, Public Law 99-150, November 13, 1985.

21 Office of Personnel Management, "Negotiating Flexible and Compressed Work Schedules," *Labor-Management Relations Guidance Bulletin*, July 1995.

The Family-Friendly Workplace Act (S. 4). Senator Ashcroft's bill includes the comp-time provisions of H.R. 1, but it also enables employers to offer flexible credit hour programs and biweekly work schedules similar to those available to federal workers. While the comp-time proposal in H.R. 1 will help employees that work more than 40 hours per week on one job, the flexible credit hour program in the Family-Friendly Workplace Act will provide flexible schedules to the millions of Americans that do not work overtime hours yet would benefit from having access to a bank of hours to use as paid time off when needed.

Under biweekly schedules, a worker may want to work 80 hours over a two-week period in any combination (i.e., an employee may want to work nine 9-hour days and take every other Friday off). Any accrued time not used or compensated for would be automatically paid to the employee as cash on an annual basis and employees could cash out accrued time with 30 days notice. The bill also defines the accrued compensatory hours as unpaid monetary overtime compensation to make it clear that when a company files for bankruptcy protection, such accrued hours will be given priority along with the company's other back wages obligations. While H.R. 1 offers only comp-time, the Family-Friendly Workplace Act enables employers to offer a greater variety of flexible work schedules even to part-time employees.

The President's Proposal. In 1996, President Clinton proposed permitting private-sector employers to offer their employees a choice between taking overtime pay as either cash or extra time off.²² The President's proposal is similar to H.R. 1 except it would allow workers to accrue just 80 hours a year in comp-time. Part-time workers would not be eligible for any comp-time program offered by their employers to full-time employees.²³ Temporary and seasonal employees, and workers in the construction and garment industries, are also excluded. The Secretary of Labor could further restrict comp-time use by issuing regulations limiting the number of comp-time hours that employees can accrue or by exempting additional industries. The President also proposed to sunset this legislation after four years and establish a commission to study the impact of comp-time on public- and private-sector workers.

KEY PRINCIPLES FOR REFORM

As the 105th Congress begins its debate over flex-time, legislators should consider four important principles to ensure that both workers and employers receive the greatest benefit from flexible working schedule programs. These principles should form the foundation of effective FLSA reform: There should be a variety of flexible schedules from which to choose; the options should be voluntary, not mandated by government; the options should be flexible and revocable; and legislation should provide reasonable protections for both workers and employers. Of all the flex-time proposals under consideration, Senator Ashcroft's bill is the only one that embodies all four principles.

- **Give private-sector workers the benefits that federal employees enjoy.** Congress should extend to private-sector workers the same variety of flexible schedule choices that federal, state, and local employees enjoy, including flexible credit hours, compensatory time, and compressed workweeks. Employers should be able to provide a comprehensive set of options to their employees beyond comp-time. Part-time workers should also be able to bank flex-time hours. A variety of flexible work schedule choices will empower workers to select the option that best meets the specific needs of their families.
- **Ensure the voluntary nature of the options.** Congress should ensure that flexible work schedules are voluntary for both employer and worker. The available options should not be mandated

22 The Bureau of National Affairs, "Daily Labor Report," October 15, 1996, E-1.

23 Part-time is defined in the Presidents proposal as less than 35 hours per week.

by government. Each employer should have the option to offer, or not to offer, flexible work schedules²⁴ because each workplace is unique. While comp-time may work well in some businesses, compressed workweeks may work better in others. Workers should also be able to choose between continuing to work a standard workweek with overtime pay or accruing paid time off to use in the future.

- **Ensure the flexibility of options.** Congress should ensure that flexible work schedules are genuinely *flexible*. Both employers and workers should be able to revoke the use of flexible schedules at any time and cash out accrued leave. Congress and the Department of Labor should not attempt to micromanage the flexible schedule options by writing unnecessary legislative or regulatory requirements. Employers are in the best position to design programs that suit their employees' needs, within broad guidelines. Burdensome regulations will only discourage employers from offering such flexible schedule options to their workers.
- **Provide reasonable protections to both workers and employers.** Employers should be prohibited from coercing an employee into using comp-time instead of being paid in cash for overtime work. Employees should be fully informed before agreeing to a flexible plan about how flexible schedules work and the options available. Employees should be permitted to use comp-time within a reasonable period of time as long as it does not unduly disrupt the operations of the employer—the same standard that federal, state, and local managers follow. Finally, employers should be able to discontinue offering flexible schedules at any time if they unduly disrupt the business.

Updating the Fair Labor Standards Act in this way will make it possible for employers to create a more family-friendly workplace for American workers. This flexibility will help to increase employee effectiveness and job satisfaction while decreasing turnover rates and absenteeism. New federal mandates are not necessary in this process; Congress can accomplish the intended reform of FLSA simply by freeing employers and workers from the inflexible requirements of the law that was written almost 60 years ago.

WEIGHING THE BENEFITS OF FLEX-TIME AND FAMILY MEDICAL LEAVE

Flex-time is a far better solution for today's families than incrementally expanding the Family and Medical Leave Act. Yet President Clinton and others have proposed expanding the Family and Medical Leave Act (FMLA) to enable workers to take additional unpaid leave. Representative William Clay (D-MO) introduced the Family and Medical Leave Improvements Act of 1997 (H.R. 109) to expand coverage of the FMLA to businesses with 25 or more workers, and to add another three working days (24 hours) of unpaid leave that can be used on an intermittent basis for school functions and routine doctor visits. Other proposals are likely to follow that will expand the eligible reasons that *unpaid* family and medical leave can be taken.²⁵

Expanding the FMLA in this way, however, is imposing another inflexible federal mandate on employers that does little to address the needs of their workers. FMLA was never intended to be used for short-term leave. It is used by employees as a last resort after all other *paid* leave options have been exhausted. Comp-time and flex-time, on the other hand, are choices that allow paid time off. They are specifically designed to be used for short-term, intermittent leave. Senator Ashcroft's Family-Friendly Workplace Act will encourage employers to create a variety of flexible work schedules so that they can offer workers with families paid time off when they need it most.

24 Federal, state, and local agencies currently have the same option.

25 Some of the other bills that have been introduced are S. 183, S. 280, H.R. 191, and H.R. 234. More information on these bills can be found at the Library of Congress World Wide Web Internet site at <http://thomas.loc.gov/>.

There are other reasons why flexible work schedules are better than unpaid family and medical leave. For example:

- Flex-time and comp-time can be used for any reason, including three-day or four-day weekend vacations or personal business. Use of family and medical leave, on the other hand, is restricted. Under expanded family and medical leave, the government may require workers to provide proof that the leave was used for approved reasons.
- Expanding the FMLA will involve the government ever more deeply in the creation of leave options when such policies are best left to the employers and employees. Mandated requirements, such as FMLA, add to the cost of hiring and managing workers, and directly affect an employer's decisions about whether and when to hire a worker, which worker to hire, how much cash to pay the worker, and how long to keep that worker. The rise in non-wage labor costs is one of the most important forces leading employers to lay off workers, as well as to utilize part-time, temporary, and contract labor.²⁶
- Expanding the FMLA will not offer single employees or married but childless employees the flexibility and options of work schedules that are available with comp-time or flex-time programs. Comp-time and flex-time can be used by any worker.
- Expanding the FMLA by mandating that employees must be allowed to take short-term unpaid leave is unnecessary. Currently, most employers allow workers to take unpaid leave for family responsibilities.

Organized labor has been vocal in opposition to any legislation that enables private-sector employers to offer flexible schedules, particularly compressed workweeks, outside the context of collective bargaining. Like President Clinton, their solution for helping families is to expand the FMLA. Curiously enough, the federal employee unions recognize the value that their members place on flexible work schedules, and support those programs despite testimony from leaders of the AFL-CIO who "strongly" oppose flexible schedules.²⁷

In 1976, members of the oldest and largest independent union of government workers, the National Federation of Federal Employees, mandated their leadership to "seek flexitime work schedules," and the American Federation of Government Employees voiced "support for the concept of flexitime and [proposed] its broader implementation."²⁸ By 1992, 528 federal union collective bargaining agreements contained provisions on flexible work schedules,²⁹ and in 1996 more than 52 percent of federal employees were taking advantage of flexible scheduling arrangements.³⁰

Although expanding the FMLA is politically appealing, mandating such leave takes away the freedom of the employer and employee to craft the benefits package they want. Flex-time and comp-time, on the other hand, provide workers with a choice of flexible work schedules that empowers them to select a paid leave option that will best suit their families' needs. The foundation for tomorrow's family-friendly workplace should be flexibility and freedom, not additional federal mandates.

26 Jack A. Meyer, "The Impact of Employee Benefit Costs on Future Job Growth," *Manufacturers Alliance Policy Review* No. PR-133, March 1995.

27 In testimony before Congress in 1977, 1978, and 1997, the AFL-CIO "strongly" urged the rejection of the Federal Employees Flexible and Compressed Work Schedules Act. See *Part-time Employment And Flexible Work Hours*, Committee on Post Office and Civil Service, U.S. House of Representatives, 95th Cong., 1st Sess., May 24, 1977, pp. 167. *Flexitime and Part-time Legislation*, Committee on Governmental Affairs, U.S. Senate, 95th Cong., 2nd Sess., June 29, 1978, pp. 217. Testimony of Karen Nussbaum before the Senate Committee on Labor and Human Resources, Subcommittee on Employment and Training, February 4, 1997.

28 See *Part-time Employment And Flexible Work Hours*.

29 Office of Personnel Management, "Negotiating Flexible and Compressed Work Schedules."

30 Office of the Press Secretary, *Conference on Corporate Citizenship Panel I*, The White House, May 16, 1996.

UNDERSTANDING THE MYTHS AND REALITIES OF FLEX-TIME

In 1938, the Fair Labor Standards Act set the standard workweek at 40 hours and required employers, for the first time, to pay overtime for any hours worked over 40 in one workweek. For organized labor it was a great political victory—one of their crowning achievements. Since then, any effort to reform the FLSA has been derided by opponents as destroying the 40-hour workweek and benefiting employers at the expense of workers. Federally mandated leave, it is argued, is the “appropriate” solution. Proponents of flexible work schedules, on the other hand, argue that today’s families need flex-time to help raise their families on limited budgets, and that the FLSA prohibits employers from offering it. With appropriate protections for workers, flex-time and comp-time options can be provided to families without coercion or exploitation.

Although there is wide public support for flexible work schedules, some of the arguments and rhetoric advanced by opponents is based on a number of myths. For example:

Myth #1: There is no need to change the FLSA because employers can already offer flex-time and comp-time to their workers under current law.

The Reality: While some limited flexibility is allowed under current law, the FLSA prohibits private-sector employers from offering workers the same comprehensive flex-time and comp-time options available to federal, state, and local workers. Private-sector workers can alter arrival and departure times and shift working hours around within a pay period, but the FLSA prohibits them from banking flex-time or comp-time across pay periods. Private-sector workers must be paid cash for any overtime worked at the end of each pay period. They cannot bank that time to use as paid time off in the future, as federal employees can.

Myth #2: Flex-time or comp-time will destroy the 40-hour workweek when Americans are working longer hours every week.

The Reality: The AFL-CIO and others forcefully claim that comp-time and flex-time will destroy the 40-hour workweek.³¹ Yet unions frequently negotiate contracts that contain flex-time provisions. In 1992, 528 federal union collective bargaining agreements contained provisions on flexible work schedules.³² Flex-time or comp-time will not change the 40-hour workweek standard. Both the Ballenger and Ashcroft bills will require employers to pay workers time-and-a-half for any overtime they ask their employees to work. Flexible working schedules empower the employees, at their own request, to take overtime pay as cash or as future paid time off from work. Nothing changes for those employees who want to work a standard schedule and be paid cash for overtime worked. Moreover, workers can, at their option, be paid cash for any accrued comp-time that they have worked.

Americans generally are not working longer hours. The average workweek declined from 40 hours in 1948 to 34.4 hours in 1996.³³ From 1965 to 1985, the amount of free time of American workers have available to use has increased by almost 5 hours per week.³⁴

Myth #3: Employers will coerce workers to take comp-time instead of overtime so they can effectively abolish overtime pay.

The Reality: Both House and Senate bills contain employee protections against coercion. Employers are prohibited from attempting to directly or indirectly intimidate, threaten, or coerce any

31 *Part-time Employment And Flexible Work Hours*. See also other entries in Footnote 27

32 Office of Personnel Management, "Negotiating Flexible and Compressed Work Schedules."

33 Bureau of Labor Statistics, "Employment and Earnings," various issues.

34 John P. Robinson and Geoffrey Godbey, "Are Average Americans Really Overworked?" *The American Enterprise*, September 1995, p. 43.

employee to take comp-time instead of cash as pay for overtime. Any employer that does would be subject to the civil and criminal penalties already established in the FLSA.³⁵

Both bills also contain employee protections not available to federal workers. Employers must obtain prior written approval from each employee that chooses to receive comp-time in lieu of cash pay for overtime. Employees can withdraw their request to receive comp-time and go back to receiving cash pay at any time.

Moreover, there are no incentives for an employer to force workers into taking comp-time. Both comp-time and overtime are paid at the same rate—1.5 hours for each overtime hour worked. In fact, under both bills, workers that accrue comp-time hours and then receive a raise can cash out the comp-time at the higher rate of pay.

Myth #4: Comp-time provides flexibility only to the employer because workers will be able to take comp-time leave only when their employers say they can, not when they want to take it.

The Reality: Both House and Senate bills require employers to permit the use of comp-time within a reasonable period as long as it does not unduly disrupt the operations of the employer. This is the same employee protection clause in the Federal Employees Flexible and Compressed Work Schedules Act for federal workers. Both bills also provide additional protections for private-sector workers that are not available to federal workers. Under H.R. 1 and S. 4 employees who are unable to use their comp-time hours can, for any reason, cash out their accrued hours as regular overtime pay. Employers automatically have to pay their workers cash for any unused comp-time at the end of each year. Moreover, employers who fail to accommodate their workers' comp-time requests within a reasonable period of time run the risk of significant legal and litigation costs associated with enforcement inspections and lawsuits.

Myth #5: Comp-time fails to protect workers because comp-time will be used to diminish retirement or unemployment benefits.

The Reality: Under the Employee Retirement Income Security Act, any accrued comp-time must be included in the determination of retirement benefits. Since unemployment benefits replace only a portion (50 percent to 70 percent) of a worker's weekly earnings, unemployed workers who cash out their comp-time hours (at time-and-a-half) will benefit because they will receive their full salary for any accrued comp-time as they begin their search for a new job.

Myth #6: Comp-time fails to prevent workers from losing sick leave and vacation leave.

The Reality: Employers use a variety of benefits to attract workers. With a low unemployment rate and many employers struggling to find both skilled and unskilled workers, businesses are not about to eliminate benefits that appeal to job applicants such as sick leave and paid vacations. Rather, employers will be more likely to add a flex-time option as another incentive to attract potential workers.

Myth #7: Postponed pay is at a much greater risk in the private sector, where thousands of establishments go out of business annually.

The Reality: Private-sector employees may not accrue more than 240 hours of comp-time. If an employee suspects that the place of employment may close, he or she can cash out the comp-time immediately. In addition, all employers must pay cash at the end of each year for any unused comp-time accrued. Upon voluntary or involuntary termination of employment, all accrued comp-time must be paid to the employee, or civil and criminal penalties can be imposed on the

35 The penalties in sections 16(a) and (b) of the Fair Labor Standards Act include a fine of up to \$10,000 and/or imprisonment for up to 6 months. Civil penalties include all overtime compensation, and an additional amount of liquidated damages.

employer. The Family-Friendly Workplace Act (S. 4) also defines the accrued compensatory hours as unpaid monetary overtime compensation to make it clear that when a company files for bankruptcy protection, such accrued hours will be given priority along with the company's other back-wages obligations.

Myth #8: Flex-time and compressed schedules would seriously jeopardize any possibility of realistically enforcing the basic 40-hour workweek. There is no funding in either bill to enforce the new provisions.

The Reality: Since 1990, the number of complaints filed by workers for violation of the FLSA wage and hour standards has fallen by almost 46 percent. The vast majority of employers are complying with the law and will continue to do so. The number of complaints received by the Department of Labor from workers in 1996 amounted to less than 0.2 percent of total employment, while the budget for handling those complaints increased 18 percent from 1995 to 1996. The Department of Labor has more than enough resources to enforce the FLSA.

CONCLUSION

The Fair Labor Standards Act was enacted to protect unskilled, low-pay workers. But today, when the parents of more and more families are working and the need for flexibility in work schedule is so great, the rigid and inflexible provisions of the FLSA hurt American workers more than they help. The FLSA is effectively depriving families of the ability to organize their lives both on and off the job so they can better meet the responsibilities of work and home.

Flex-time and comp-time options can benefit American families in a way that the Family and Medical Leave Act does not—with *paid* time off. The ability to work a few extra hours one week in order to take paid time off later gives employees the time they need to take care of their families' personal needs without sacrificing financial stability and affecting budgets. Flexible work schedules provide all families with the greater personal control and independence that federal employees currently enjoy.

Congress should follow four basic principles when seeking to update the outmoded FLSA and extend flexible work options to the private-sector. First, there needs to be a variety of scheduling and compensation options for employers beyond the use of comp-time. Second, the choice of flexible work option should be voluntary for both employers and employees. Third, neither Congress nor the Department of Labor should micromanage the flexible scheduling programs by enacting unnecessary legislative or regulatory requirements. And finally, any legislation or regulation put forth must provide reasonable protection for both workers and employers.

Senator Ashcroft's Family-Friendly Workplace Act is the only proposal that embodies all four of these principles. By enabling employers to create a variety of voluntary flexible work schedule options for their employees while protecting workers from coercion and abuse, the Family-Friendly Workplace Act will provide families with what they need most—paid time off when they want it.

