

# Comments

## TO PAY OR NOT TO PAY: MODERNIZING THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT

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When Franklin Delano-Roosevelt took the oath of office on March 4, 1933, the United States economy wavered on the brink of collapse. In the three and a half years since the great stock market crash of 1929, unemployment had skyrocketed from four percent to nearly twenty-five percent. Farm income had fallen by one-half and the value of stocks and bonds had dropped by seventy-five percent.<sup>1</sup> On the morning of Roosevelt's inauguration, the governors of New York and Illinois closed the banks in New York City and Chicago, bringing the nation's financial transactions to a halt.<sup>2</sup> In response to this crisis, Roosevelt spent the first two years of his presidency promoting industrial and agricultural recovery, shifting his focus from recovery to reform in 1935.<sup>3</sup> What followed was the culmination of the "New Deal" legislation which was aimed at reducing unemployment and improving working conditions.<sup>4</sup>

Only three major employment laws from this period remain in force today, the most influential of which is the Fair Labor Standards Act of 1938 (FLSA).<sup>5</sup> The FLSA regulates both wages and hours in nearly every

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1. See PAUL F. BOLLER, JR. & RONALD STORY, *A MORE PERFECT UNION: DOCUMENTS IN U.S. HISTORY* 172 (1988).

2. See ARTHUR M. SCHLESINGER, JR., *THE CRISIS OF THE OLD ORDER: 1919-1933* 481 (1957).

3. See 2 ROBERT A. DIVINE, ET AL., *AMERICA: PAST AND PRESENT* 779 (1991).

4. See *id.* at 779-84.

5. See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1994). The other surviving acts are the Davis-Bacon Act, requiring "prevailing wages" on federal construction contracts, and the National Labor Relations Act (NLRA), protecting collective

workplace in the United States.<sup>6</sup> Nonetheless, various groups and particularly members of Congress have attacked the assumptions underlying the FLSA and sought to amend the Act's provisions.<sup>7</sup> One such attack is evident in the Working Families Flexibility Act of 1996 (WFFA) proposed by Representative Cass Ballenger (R-NC).<sup>8</sup> The WFFA would amend the FLSA to permit employers to provide compensatory time off to employees in lieu of monetary compensation for overtime hours worked.<sup>9</sup>

Part I of this Comment will examine the socioeconomic conditions which prompted the passage of the FLSA, including the representative family structure of the period, the relevant working conditions, and the state of the economy. It will also discuss the legislative history of the FLSA as well as the current scope of the Act, focusing on the provisions of the FLSA that regulate deviations from the standard forty-hour work week and prescribe monetary compensation to hourly (wage) employees for any hours worked above this standard.<sup>10</sup>

Part II will address current socioeconomic factors and emerging workplace trends and will contrast contemporary conditions with those of the 1930s. It will further argue that the WFFA is a more efficient and fair approach to both the contemporary labor market and family structures.

## I. THE FAIR LABOR STANDARDS ACT OF 1938

### A. *Socioeconomic Context of the FLSA*

The family structure typical of the depression era differs radically from that which exists today. In 1930, six percent of married couples lived in extended-family households.<sup>11</sup> Female-headed households comprised

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bargaining rights. See Daniel V. Yager & Sandra J. Boyd, *Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace*, 11 LAB. LAW. 321, 321 (1996).

6. See Yager & Boyd, *supra* note 5, at 321. The overtime provisions of the FLSA do not regulate those employees covered by collective bargaining agreements that are certified by the NLRB. The FLSA also exempts employers in several specific industries and businesses such as local petroleum distributors. See 29 U.S.C. § 207(b) (1994).

7. For example, a Senate bill introduced by John Ashcroft (R-MO) in 1995 would redefine the work period to which overtime would apply by allowing workers to work 160 hours in a given four week period without incurring overtime pay. In addition, employees could credit up to 48 hours of time worked in excess of the 160 hours to a future work period. See S. 1129, 104th Cong. § 13A (1995).

8. See H.R. 2391, 104th Cong. (1995).

9. See *id.*

10. Critics in both the government and the private sector currently assail other FLSA provisions such as those governing entitlement to overtime benefits. Suggested revisions in these areas, however, are beyond the scope of this Comment.

11. See U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES:

only 12.7% of the total number of households, and only 1.2% of these households were headed by a female between the ages of twenty-five and thirty-four.<sup>12</sup> Of married households which included a wage earner, the wage earner was most often the husband.<sup>13</sup> Females comprised only 27.4% of the labor force, and only eleven percent of married women were employed outside the home.<sup>14</sup>

Persons who did work often faced inhospitable working conditions and low pay. Poor conditions were most problematic in manufacturing industries which dominated the non-agricultural economy of the time,<sup>15</sup> but also were pervasive in industries across the country.<sup>16</sup> Such conditions had long been a concern of reformers and state legislatures.<sup>17</sup> President Roosevelt's Secretary of Labor, Frances Perkins, targeted the elimination of child labor and sweatshop conditions and the establishment of reasonable wages and hours as legislative goals.<sup>18</sup> The idea of a sweatshop conjures up images of an unsafe and unclean working environment. In economic terms, however, "sweated" work is defined simply as that work performed for wages which are "inadequate to provide a full-time worker with income necessary to achieve a minimum standard of living."<sup>19</sup> Although sweatshop conditions were not unique to manufacturing, work environments in the manufacturing industry were particularly conducive to exploitation because they were "hierarchical and highly authoritarian."<sup>20</sup>

Even more pressing than the working conditions of American laborers

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COLONIAL TIMES TO 1970, Pt. I, 41 (1975). Extended-family households are those households in which married couples live with one or both of one spouse's parents. By 1970, the number of married couples living in extended-family households had dropped to 1.4%.

12. *See id.* at 41-42.

13. *See id.* at 133.

14. *See id.*

15. *See id.* at 139. Manufacturing was second only to agriculture as a primary source of employment.

16. For example, a study commissioned by the National Consumers' League in 1915 revealed that full-time construction workers on the New York subway project received approximately one-half of the \$900 yearly salary necessary to support an average family. *See Willis J. Nordlund, A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 717 (1988).

17. Several states' efforts to enact minimum wage laws (essentially precursors to the FLSA) were met with judicial resistance. In *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), the Supreme Court held that a District of Columbia minimum wage law unconstitutionally violated employers' and employees' freedom to contract. Consequently, many states reacted by modifying their laws. Eventually, the Court found laws fixing a minimum wage to be constitutional. *See West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

18. *See Nordlund, supra* note 16, at 719.

19. *Id.*

20. Susan R. Hobbs, *Employment Laws Should Be Revised For 21st Century*, *Chamber Forum Says*, DAILY LAB. REP. (BNA) May 6, 1996 (quoting former Labor Secretary William Brock).

was the high unemployment rate. Unemployment rose from 3.2% in 1929 to 8.7% in 1930. By 1933, it had soared to 24.9%, and nearly thirteen million persons were unemployed.<sup>21</sup> As the number of unemployed grew, local sources of relief proved unable to meet the demand.<sup>22</sup> To make matters worse, businesses and banks continued to fail at astronomical rates, rendering opportunities for employment even more scarce. In 1932, the peak year for such bankruptcies, nearly thirty-two million businesses failed<sup>23</sup> and the Gross National Product had fallen by forty-four percent in three years.<sup>24</sup> In the three years between the stock market crash and Roosevelt's inauguration, over 5,000 banks closed<sup>25</sup> and eighty percent of American families were left without any savings.<sup>26</sup> In response to these conditions, Congress enacted the FLSA.

### B. Legislative History

The stated purpose of the FLSA is to protect workers from "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for [the] health, efficiency, and general well-being of workers . . . ."<sup>27</sup>

Congress intended the Act to be a "compulsory share the work" program, functioning to force employers to add more employees to their payrolls.<sup>28</sup> Supporters of the FLSA cited three primary goals:

- 1) protecting workers from the pressure of wage competition;
- 2) checking "downward spirals of wage-cutting with an attendant demoralization of market prices and a proportionate increase in the relative weight of fixed charges;" and
- 3) increasing the "total quantity of effective purchasing power" as well as the demand for mass production goods and services.<sup>29</sup>

To achieve these goals, the FLSA established a minimum wage.<sup>30</sup> It

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21. See FREDERICK E. HOSEN, *THE GREAT DEPRESSION AND THE NEW DEAL* 257 (1992).

22. See Schlesinger, *supra* note 2, at 171-72.

23. See Hosen, *supra* note 21, at 286.

24. See *id.* at 268.

25. See Schlesinger, *supra* note 2, at 171.

26. See Robert S. McElvaine, *Who Was Roaring in the Twenties?: Origins of the Great Depression*, in *CONFLICT AND CONSENSUS IN AMERICAN HISTORY* 310, 314 (Allen F. Davis & Harold D. Woodman eds., 1992).

27. 29 U.S.C. § 202(a) (1994).

28. See Paul H. Douglas & Joseph Hackman, *Fair Labor Standards Act of 1938 I*, 53 *POL. SCI. Q.* 491, 491 (1938).

29. *Id.*

30. See Paul H. Douglas & Joseph Hackman, *The Fair Labor Standards Act of 1938 II: The Act as Finally Passed*, 54 *POL. SCI. Q.* 29, 37 (1939).

also set the standard hours of work for a given week at forty-four. This number was gradually lowered to forty hours a week over the next three years.<sup>31</sup> An employer was required to compensate an hourly worker for any hours worked beyond standard at a rate of one and a half hours.<sup>32</sup> Congress reasoned that such an overtime provision would encourage companies to hire additional workers at straight pay rather than giving current employees overtime pay for extended hours, thereby stimulating the labor market and reducing unemployment.<sup>33</sup> Finally, the Act raised the minimum age for employment from fourteen years to sixteen years.<sup>34</sup>

The FLSA is generally applicable to businesses engaged in interstate commerce. At the time of its passage, the Act affected approximately eleven to twelve million workers,<sup>35</sup> primarily by reducing the number of hours worked. At the inception of the FLSA, about 1,380,000 workers were laboring beyond the statutorily defined work week.<sup>36</sup> In contrast, about 300,000 wage earners were receiving less than the twenty-five cents per hour minimum wage mandated by the Act. Affected industries included manufacturing, mining, quarrying, and forestry.<sup>37</sup>

The FLSA contains several important exclusions. One of the most controversial provisions pertains to the exemption from coverage of executive, administrative, supervisory, and professional employees.<sup>38</sup> The Act further exempts most agricultural workers for purposes of the wage and hour provisions.<sup>39</sup> In addition to these broad exclusions, the Act exempts employers in several highly specific industries.<sup>40</sup> Most

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31. *See id.* at 33.

32. 29 U.S.C. § 207(a)(1) (1994).

33. *See* Garrett Reid Krueger, *Straight-Time Overtime and Salary Basis: Reform of the Fair Labor Standards Act*, 70 WASH. L. REV. 1097, 1099 (1995). The Act was also intended to promote workers' "physical and economic well-being." *Id.*

34. *See* Douglas & Hackman, *supra* note 30, at 48.

35. *See id.* at 32.

36. *See id.* at 33.

37. *See id.* at 29. Most litigation involving the FLSA concerns whether an employee or class of employees is exempt from the wage and hour provisions. *See, e.g.,* Freeman v. National Broad. Co., 846 F. Supp. 1109 (S.D.N.Y. 1993)(holding that professional newswriters were not exempt from the overtime provisions of the FLSA). Applying the Act is particularly problematic in the computer industry. For a discussion of the difficulties in applying the FLSA's professional exemption to computer programmers, see Berne C. Kluber, Note, *FLSA Exemptions and the Computing Workforce*, 33 HOUS. L. REV. 859 (1996).

38. *See* 29 U.S.C. § 213(a)(1) (1994).

39. *See* 29 U.S.C. § 213(a)(6) (1994).

40. These exemptions testify to the success of special-interest lobbying groups. Some examples of exempted employees are: seasonal recreational establishments; persons employed in the catching, cultivating, or first canning of fish or shellfish; employees of local newspapers with circulations of less than four thousand; any individual employed as an outside buyer of poultry, eggs, cream, or milk in their natural state; employees engaged

importantly, the Act as passed did not apply to public-sector employees. In 1974, however, Congress amended the Act to include public employees.<sup>41</sup> The amendment faced immediate opposition. In 1976, the Supreme Court held that the extension of FLSA protection to public-sector employees was incompatible with state sovereignty.<sup>42</sup> The Court subsequently overruled its decision, and in 1985 it extended FLSA protection to state, city, county, and municipal government employees.<sup>43</sup> Yet, regulation of the public sector differs in an important way from regulation of private employers: public employees benefit from the option of electing to receive compensatory time off in lieu of overtime pay.<sup>44</sup>

## II. THE CONTEMPORARY WORKPLACE

### A. *The Working Families Flexibility Act of 1996*

#### 1. A Brief History

On September 21, 1995, Representative Cass Ballenger (R-NC) introduced in the House of Representatives what is now known as the Working Families Flexibility Act<sup>45</sup> (WFFA). The bill was referred to the Committee on Economic and Educational Opportunities. In May 1995, the House Republican leadership attempted to attach the bill to the then-pending minimum-wage bill, but Democratic opponents prevented this attempt.<sup>46</sup> In response to opposition by both House Democrats and President Clinton, the House amended the bill.<sup>47</sup> Education Committee Chairman Rep Representative William Goodling (R-Pa.) introduced the most relevant amendment. Goodling sought to ease opposition by excluding employees who did not work 1,000 hours with the same employer in a year. This exclusion would eliminate most seasonal and

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in the processing of maple sap into sugar or syrup; and taxicab operators. *See* 29 U.S.C. § 213(a), (b) (1994).

41. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259; 29 U.S.C. § 203(d) (1994).

42. *See* National League of Cities v. Usery, 426 U.S. 833 (1976).

43. *See* Garcia v. San Antonio Metro. Transit Auth., 69 U.S. 528 (1985) (holding that federal imposition of wage and hour requirements for state employees does not interfere with traditional state concerns).

44. *See* 29 U.S.C § 207(o)(2)(A)(ii) (1994).

45. H.R. 2391, 104th Cong. (1995). The bill was initially referred to as the "Compensatory Time for All Workers Act of 1995."

46. *See* John P. Furfaro & Maury B. Josephson, *Compensatory Time Off*, N.Y.L.J., Sept. 6, 1996, at 3.

47. *See id.* H.R. 2391, 104th Cong. (1995).

some construction workers, employees who Democrats contend are the most vulnerable to employer exploitation. The final version passed in the House on March 19, 1997, by a 222-210 vote.<sup>48</sup> Despite the amendments, President Clinton has threatened to veto the House version.<sup>49</sup> The Senate has yet to take action on the bill.<sup>50</sup>

## 2. Content of the Bill

The WFFA amends the FLSA to afford private employers the option of providing compensatory time off at a rate of not less than one and a half hours in lieu of monetary compensation for each hour of employment constituting overtime.<sup>51</sup> An employer may choose whether to offer a compensatory time-off program but may not condition employment on participation.<sup>52</sup> An employee who chooses to participate in a compensatory time-off program is allowed to accumulate up to 240 hours of compensatory time.<sup>53</sup> The employer must provide monetary reimbursement for any time not used within a twelve month period. Additionally, an employer may provide monetary compensation for unused compensatory time in excess of eighty hours upon thirty days written notice to the employee.<sup>54</sup> Employees may request monetary compensation for unused compensatory time whenever they wish.<sup>55</sup> The use of accrued time is taken at the request of the employee, provided it does not “unduly disrupt the operations of the employer.”<sup>56</sup>

Finally, the bill establishes remedies for employer non-compliance. An employer that provides a compensatory time-off program may not “directly or indirectly intimidate, threaten, or coerce . . . any employee for the purpose of interfering with such employee’s rights . . . to request or not request compensatory time off in lieu of payment of overtime compensation . . . or requiring any employee to use such compensatory time.”<sup>57</sup> Violation of this provision renders an employer liable to the employee in the amount of all relevant overtime compensation plus an

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48. The voting was largely along party lines: 13 Democrats voted for the bill and 18 Republicans voted against it. *See* H.R. 1, 105th Cong. (1997).

49. *See* Melissa Healy, *House OKs Bill Allowing Time Off in Lieu of Pay*, L.A. TIMES, Mar. 20, 1997, at A21.

50. *See id.*

51. *See* H.R. 2391, 104th Cong., at 2 (1995).

52. *See id.* at 4.

53. *See id.*

54. *See id.* at 5.

55. *See id.*

56. *Id.* at 7.

57. *Id.* at 4.

equal amount as liquidated damages.<sup>58</sup>

### B. *Social Issues: Modern Family Structures*

The American family has experienced a profound demographic transformation since the passage of the FLSA. One of the most radical features of this transformation is the increase in female-headed households. By 1990, the median age at which persons first married was the highest it has been in this century,<sup>59</sup> and the rate of extra-marital births had increased dramatically.<sup>60</sup> The number of such births totaled 2.2 million between 1985 and 1989, an amount triple the number from just twenty-five years earlier.<sup>61</sup> Because of this increase in extra-marital births and a rise in divorce rates, the number of single-parent households has increased. In 1990, twenty-five percent of American children lived with one parent who was most often their mother. For black children the rate was fifty-five percent.<sup>62</sup>

As the structure of the American family changed so did participation in the labor force. The percentage of married women in the labor force who were mothers of preschool-age children rose to fifty-nine percent in 1990.<sup>63</sup> In seventy percent of married couples with children, both parents work outside the home.<sup>64</sup> Only twenty-one percent of U.S. families in 1990 were "traditional" families in which only the husband worked.<sup>65</sup> Seventy-six percent of women ages twenty-five to fifty-four are currently employed.<sup>66</sup> As a group, women are more likely to hold low-wage hourly jobs<sup>67</sup> and, therefore, are more likely to be subject to the wage and hour

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58. *See id.* at 8.

59. *See* U.S. Census Bureau Statistical Report § 16 (1992)(available in LEXIS-NEXIS, CENDATA database). The rate of women between the ages of 20 and 24 who had never married had increased 35% from 1960. The rate for men in the same age group increased by 26%.

60. *See id.*

61. In the latter half of the 1980s, the percentage of white women whose first births occurred before marriage increased from nine percent in the early 1960s to 22%. Similar births to black women rose from 42% to 70%. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See* Randolph E. Schmid, *Women Gaining in Workplace*, PHILA. INQUIRER, Jan. 3, 1997, at C1.

67. Sixty-seven percent of low-wage jobs are held by women. *See* Donald L. Barlett & James B. Steele, *The Burden of the Working Woman*, PHILA. INQUIRER, Sept. 12, 1996, at A1, A20. Barlett and Steele also note that "[s]ix of the 10 occupations that the U.S. government says will provide the largest number of jobs for America's high-tech future are in fields paying women annual wages that would qualify a family of four for the earned-income tax credit." *Id.*



provisions of the FLSA. Changes in employment and family patterns since the Depression have rendered the FLSA obsolete. Its provisions no longer protect the contemporary worker. In fact, the FLSA hinders the development of emerging employment practices that are highly desired by employees.<sup>68</sup> Today's dual-income families face severe time constraints which are exacerbated by rigid work schedules. Typically, the female bears the greater burden of such inflexibility.<sup>69</sup> Although working mothers comprise a substantial and active portion of the work force, they are still primary caregivers to children and elderly parents. The situation is worse for single mothers who may not have a partner or an extended family upon which to rely. Unlike the current FLSA, the WFFA meets the needs of modern working families by facilitating a balance between work and family responsibilities and accommodating diverse employee preferences regarding allocation of work time.<sup>70</sup> For example, if a parent needed to attend a parent-teacher conference or stay at home to care for an ill child, he or she could use compensatory time earned the week or even the month before. The Act would also allow employees to deviate from the standard forty-hour week by working overtime in some weeks in exchange for an extended weekend in another. Current law does not allow overtime compensation to carry over from week to week.

Employers do have some limited options under current law. For example, TRW, Inc. (TRW), a national employer, recently instituted a program that permits employees to substitute eight hours of overtime pay over a two-week period with a Friday off every other week.<sup>71</sup> At its

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68. A 1996 Employment Policy Foundation study found that 75% of workers polled would favor having a choice between monetary payments and compensatory time for overtime hours worked. A total of 81% of women polled favored such a choice. See David R. Sands, *Challenging the 40-Hour Week: Search For More Flexibility Puts Scrutiny on Labor*, WASH. TIMES, Feb. 11, 1996, at A12.

69. For example, a comprehensive study of D.C. Circuit employees revealed that 43% of female employees had "sometimes" or "often" requested time off to care for a family member compared to 21% of male employees. *Report of the Special Committee on Gender to the Gender, Race, and Ethnic Bias Task Force Project in the D.C. Circuit*, 84 GEO. L.J. 1657, 1846 (1996).

70. When designing employment legislation, it is important to remember that a person is defined by various roles (such as spouse, child, student, parent, senior citizen, and employee) and operates within a broad framework of goals, some of which may actually conflict with profit maximization. See, e.g., Lonnie Golden, *The Economics of Work Time Length, Adjustment, and Flexibility: A Synthesis of Contributions From Competing Models of the Labor Market*, 54 REV. SOC. ECON. 1, 18 (1996)(workers "desire an optimal, weighted bundle of income, stability, and autonomy").

71. See Sana Siwolop, *Overtime vs. Time Off: A Debate Over a Choice*, N.Y. TIMES, Aug. 18, 1996, Sec. 3, at 10. See also Opinion Letter No. 1715, Wage & Hour Administrator (July 25, 1990)(permitting employees to adopt a "Time Off Plan" under which the "employer controls earnings by controlling the number of hours an employee is permitted to work"). However, the Opinion Letter acknowledges that workloads cannot

inception, the program received approval from eighty-four percent of hourly employees and has continued to be highly successful.<sup>72</sup> Federal and state labor laws (including the FLSA), however, necessitated that TRW redefine its work week to begin at noon on Fridays and precluded TRW from instituting a long-term compensatory-time program.<sup>73</sup>

The WFFA would provide employers with a much broader framework in which to construct programs such as TRW's that meet the needs of employees. Rather than necessitating employer management of time-off arrangements, the WFFA shifts control to the employee. Compensatory time off could be "banked" for months, permitting employees to utilize it according to their own needs and schedules. For example, a parent with a child involved in a sport or other school-related activity could reserve his or her compensatory time to attend such events. Under the FLSA's current forty-hour week presumption, even the most accommodating and creative employer must force its employees to use time off within a given pay period.

### C. *Economic Issues*

The WFFA would also benefit employers and the general economy. Ironically, the FLSA may be so outdated that it actually defeats its intended legislative purpose. As previously discussed, the FLSA's framers designed the Act to encourage employers to hire more workers by rendering overtime pay cost-prohibitive. Today, however, full-time workers are entitled to more than the regular work week's pay. Employers must also provide health care, fringe benefits,<sup>74</sup> and unemployment insurance premiums for new hires.<sup>75</sup> These added costs make a unit of overtime pay less expensive than the cost of compensating a new employee. For example, in 1993, the average steel-industry worker earned \$15.78 per hour of straight time and \$23.67 per hour of overtime.<sup>76</sup> Yet the average hourly cost to an employer for a new worker was \$31.73.<sup>77</sup> Thus, the employer could save twenty-five percent per unit by utilizing a current employee.

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always be anticipated and that such arrangements can place too much control in the hands of the employer.

72. Employee turnover at TRW has been reduced by one-half in the year that the program has been in effect. *See id.*

73. *See id.*

74. The cost of employer-provided fringe benefits has risen from 17% of an employee's salary in 1955 to 36.2% in 1987. *See* Michael L. Smith, Note, *Mandatory Overtime and Quality of Life in the 1990s*, 21 J. CORP. L. 599, 600 (1996).

75. *See id.*

76. *See id.*

77. *See id.*

Allowing employers to provide compensatory time off would better accomplish the original goals of the FLSA. Assuming that an employer does not adjust its output requirements as workers utilize their time off, employers will hire additional workers to meet their personnel needs. Furthermore, reduced labor costs would translate into more capital for expansion, improvements, and job creation.<sup>78</sup> When Congress amended the FLSA to provide compensatory time off for public-sector employees, one of its primary concerns was the cost of complying with the Act's overtime provisions. The Senate's stated justification for the amendment was to protect the public sector from "assum[ing] additional financial responsibilities which in at least some instances could be substantial."<sup>79</sup>

In today's global economy, many American industries compete directly with foreign corporations. Labor-intensive organizations will be able to improve their ability to compete globally if they are able to reduce the marginal cost of employment. Reduced employment costs could also encourage global corporations to utilize American labor.<sup>80</sup> As businesses engaged in global competition lose the ability to control the nature and direction of their respective industries, the need for adaptive strategies of human-resource management becomes increasingly important.<sup>81</sup> The WFFA would be a first step in providing such flexibility and improving the ability of the American labor pool to compete in the international market.<sup>82</sup>

In addition to increased international competition, the United States also must contend with a domestic economy that is no longer manufacturing-based. Today most jobs are in "high-technology, service, and information-based operations,"<sup>83</sup> and the contemporary economy is

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78. Changes in federal welfare laws may make job creation more important than ever because of an influx of low-skilled workers into the labor market.

79. S. Rep. No. 99-159, at 8 (1985), *reprinted in* 1985 U.S.C.A.N. 651, 655-56. The senate report notes that arrangements providing for compensatory time off "reflect mutually satisfactory solutions that are both fiscally and socially responsible." *Id.* at 656.

80. For a discussion of the problem of international labor competition, see William Cunningham & Segundo Mercado-Llorens, *The North American Free Trade Agreement: The Sale of U.S. Industry to the Lowest Bidder*, 10 HOFSTRA LAB. L.J. 413 (1993).

81. See Stephen E. Tallent, *A Few Observations About Changes in the Workplace* (Oct. 5-6, 1995), in LABOR LAW DEVELOPMENTS § 3.03, at 3-3 (Carol J. Holgren ed., 1996).

82. Other countries are moving towards the changes proposed in the WFFA. For example, the French metalworking industry has recently negotiated a scheme similar to that of the WFFA with its unions. The plan allows employees who work more than 94 hours of overtime in a 12 month period to request compensatory time off. The union's stated rationale was to "giv[e] companies the flexibility they need to strengthen their competitiveness while respecting the living conditions of employees . . ." However, legislative amendments are necessary to permit the "banking" of compensatory time across pay periods. *Metalworking Working Time Deal Under Attack*, EUR. INDUS. REL. REV., June 1996, at 16, 17.

83. Robert D. Lipman et al., *A Call for Bright-Lines to Fix the Fair Labor Standards*

marked by cyclical downswings.<sup>84</sup> In such environments employers must rapidly adjust labor input hours in order to “boost organizational productivity and reduce personnel costs.”<sup>85</sup> The ability of an employer to adapt to employee needs also significantly increases long-run efficiency and productivity.<sup>86</sup>

The need for flexibility becomes even more essential as the nature of the job itself changes. Commentators argue that the workplace, and consequentially the job, as it has existed since the Industrial Revolution will soon cease to exist. Rapid advances in technology have made it less necessary to “assemble large groups of people on a daily basis in one place.”<sup>87</sup> An argument has been advanced that the “job” is a social artifact which is too rigid to manage work in today’s fast-paced economy and that modern work-organization trends such as project teams, flex-time, telecommuting, and job sharing foretell an even more radical metamorphosis in the division of labor.<sup>88</sup> In the future an individual’s work will not be defined by a job description, but will be fluid and consist of multiple projects that require “keeping different schedules, being in various places, and performing a number of different tasks.”<sup>89</sup> Such workplaces will necessitate daily scheduling flexibility that is unavailable under the constraints of the FLSA. The WFFA would expand employers’ opportunities to adjust to and compete in rapidly changing markets and to manage a work force in the post-industrial world.

Finally the WFFA would benefit the economy in general. First, it would lead to a reduction in the “contingent work force.”<sup>90</sup> Employers constrained by the FLSA currently utilize contingent workers to maximize flexibility through “strategies that facilitate rapid hiring and firing of workers.”<sup>91</sup> The use of temporary workers has more than doubled since 1982. The consequences of this dramatic increase include historically unsurpassed income inequality, severance of a direct contractual relationship between employer and employee, and disparate treatment of permanent and temporary workers performing the same functions.<sup>92</sup> The

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*Act*, 11 HOFSTRA LAB. L.J. 357, 377 (1994).

84. See Golden, *supra* note 70, at 1.

85. *Id.* at 9 (arguing that the fixed standard work week does not minimize unit labor costs in the long run).

86. Forty to fifty percent of employers who adopted even a limited form of flexible scheduling experienced an increase in productivity. See *id.* at 26.

87. Tallent, *supra* note 81, § 3.04.

88. See William Bridges, *The End of the Job*, FORTUNE, Sept. 19, 1994, at 62, 68.

89. *Id.*

90. Contingent workers are temporary, often part-time workers who usually have no benefits beyond wages. See Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1528 (1996).

91. *Id.* at 1530.

92. See *id.* at 1533-35.

WFFA can restore some of these peripheral workers to the core by making labor costs more affordable and allowing employers to make labor adjustments within their internal labor force.

In addition, flexible work schedules can "help further larger national goals, particularly in energy conservation and productivity growth."<sup>93</sup> Shortened work weeks, for example, could reduce energy consumption. In fact, such flexibility may become essential. The Clean Air Act of 1990 will soon require that employers of 100 or more employees within severely polluted areas ensure that the occupancy of the vehicles used by their employees for commuting exceeds the local average by twenty-five percent.<sup>94</sup>

#### D. *Some Problems and Critiques of The WFFA*

Opponents of the WFFA focus primarily on the disparity of power between employer and employee. They argue that the bill does not adequately protect the worker who may desire pay over compensatory time.<sup>95</sup> Concerns focus on employer coercion, intimidation, and the favoring of employees who choose compensatory time. Opponents, citing studies revealing the tendency of private-sector employers to violate wage and hour laws, dismiss the provisions in the Act that forbid the coercion of opting either to accrue compensatory time or to use accumulated time.<sup>96</sup>

These objections, however, fall short. Power imbalances are as inherent in the employer-employee relationship today as they were in 1938. But this imbalance, though often tilted toward the employer, may actually favor the employee depending on the "absence of competing groups; scarcity of firm-specific skills and knowledge; and low costs of [job] search, training and strike relative to that of the employer."<sup>97</sup> Furthermore, the potential for employer abuse of power exists independently of any law that regulates this abuse. Although employers can and do violate the current wage and hour provisions,<sup>98</sup> employees have

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93. Lipman et al., *supra* note 83, at 380.

94. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §182 (d)(1)(B), 1990 U.S.C.A.N. (104 Stat.) 2399. See also Yager & Boyd, *supra* note 5, at 322.

95. See Furfaro & Josephson, *supra* note 46, at 3.

96. See *id.*

97. Golden, *supra* note 70, at 14 n.35.

98. U.S. District Senior Judge Donald Alsop recently reported that employment disputes predominate in federal courts, comprising 20% of pending cases and 25% of incoming civil complaints. See Jill Hodges, *Employment Disputes Balloon to Nearly 20% of Pending Civil Cases*, STAR-TRIB. (MINNEAPOLIS-ST. PAUL), June 11, 1995, at D3. Also, it is important to note that many violations are inadvertent and stem from the ambiguity of exempt classifications. See, e.g., *Freeman v. NBC, Inc.*, 846 F. Supp. 1109 (S.D.N.Y. 1993)(holding that network's violations of overtime compensation requirements under the FLSA was not willful given that the network reasonably viewed application of the FLSA to

recourse against such violations.<sup>99</sup> It is unclear whether the changes proposed in the WFFA would be any more susceptible to abuse by unscrupulous employers.

An example from the public-sector model which permits the use of compensatory time is relevant to the problem of employer coercion. *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), concerned a class action suit filed by Missouri law-enforcement officers in reaction to the Department of Corrections' forced scheduling of accrued time off. The court held that an employer cannot force an employee to use accrued compensatory time off and must wait until the time has been requested to make a determination that it will be disruptive.<sup>100</sup> Ultimately, the employer-employee relationship is necessarily interdependent. Legislation should focus on policies that work toward balancing this interdependence for the mutual benefit of each party.

Opponents also assert that the bill will amount to a pay cut for non-exempt employees,<sup>101</sup> particularly unskilled low-wage earners who often rely on overtime. In 1995, for example, overtime accounted for fifteen percent of the pay of the typical manufacturing worker<sup>102</sup> who worked an average of 4.4 overtime hours each week.<sup>103</sup> This objection ignores both the substance of the WFFA and worker preference. Although an employee who opts for compensatory time will certainly receive less monetary pay, that reduction would be voluntary, and various studies show that the option is one that many would select. One such study revealed that two-thirds of parents employed in large corporations indicated that they would accept a reduction in salary in exchange for more time with their children.<sup>104</sup> Sixty-four percent of women and forty-five percent of men would reject a promotion that would affect their family time.<sup>105</sup> Forty-eight percent of adults with income under \$20,000 a year would exchange time off for less

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journalists as a close question).

99. For example, under current law, about 8.5 million employees were found to be owed back pay resulting from overtime violations between 1951 and 1987. Between 1946 and 1987, employers paid over \$2.5 billion in back pay. See Nordlund, *supra* note 16, at 727-28.

100. See *Heaton*, 43 F.3d at 1179. The court noted that a fundamental purpose of the FLSA is to "distribute work among a larger number of employees" and instructed the Department of Corrections either to schedule less overtime or to hire more officers. *Id.* at 1181.

101. See Furfaro & Josephson, *supra* note 46, at 3.

102. See Siwolop, *supra* note 71.

103. See U.S. Dep't of Labor, *The Employment Situation: August 1996*, available in LEXIS, Legis Library, News File. This average is up from 2.5 hours in 1960. See Siwolop, *supra* note 71.

104. See Golden, *supra* note 70, at 30.

105. See *id.*

pay.<sup>106</sup> Again, the success of the compensatory-time option for public-sector employees is illustrative. Three-quarters of federal workers have reported that the option to substitute time off has given them greater time to spend with their families and increased their job satisfaction.<sup>107</sup>

### III. CONCLUSION

When passed the FLSA was a revolutionary piece of legislation. Never before had the government taken such an active role in protecting the stability of the work force and the general well-being of employees. In the contemporary socioeconomic environment, however, the FLSA can no longer fulfill the primary objectives of its overtime pay requirements: decreasing unemployment levels and providing leverage to workers with little bargaining power. The American economy is witnessing the transformation of both the structure and substance of the workplace. The manufacturing-based industry and assembly-line mode of production which dominated the Industrial Revolution no longer define the economic landscape. The individual worker is no longer the basic component around which the labor market is structured. Today's workplace is based on task-oriented teamwork, and the United States industry must rapidly adapt to competitive pressures which require greater flexibility than current law affords.

Contemporary working families are also unduly constrained by the FLSA. Single-parent households and dual-income families are now the norm rather than the exception. Employees in such situations walk a delicate line between provider and caregiver. The outdated presumption of a forty-hour work week hinders the flexibility in scheduling necessary to maintain a balance between these two roles. The WFFA would give working families the flexibility they need to manage both home and career.

The future of the FLSA remains to be seen. Although current socioeconomic reality requires some change, legislators hotly contest the form of that change. Given the WFFA's narrow passage along party lines in the House, it will undoubtedly undergo modification in the Senate to accommodate dissenting Democrats and forestall a presidential veto.

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106. *See id.*

107. *See* Sen. John Ashcroft (R-Mo.), *Relief for American Families*, WASH. TIMES, May 6, 1996, at A21.