

# Book Review

*“Moments are the Elements of Profit”*: Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act, Linder, Marc  
(Fanpihua Press, 2000, pp. 524, \$15.00)

*reviewed by Stephen Fogdall*†

Marc Linder has produced an impressively detailed study of the overtime provisions of the Fair Labor Standards Act (“FLSA”).<sup>1</sup> Indeed, the book has many virtues. Clearly undaunted by the sheer enormity of his task, Linder demonstrates an encyclopedic knowledge of the historical context of the FLSA. His writing is perspicuous and unpretentious. While the book could be improved at points (it is in some places less systematic and explicit than one would like), it should at once prove educational for practicing labor and employment attorneys, as well as theoretically interesting to law professors and academics in the fields of labor studies and industrial relations.

According to Linder, the FLSA “is profoundly flawed by an enormous number of exclusions and exemptions.”<sup>2</sup> This diagnosis guides the structure of the book. The first chapter describes the historical development of the overtime provisions of the FLSA (the familiar central requirement being that hours worked in excess of a 40-hour week must be compensated at time and a half).<sup>3</sup> The second chapter focuses on the exclusion from these provisions of so-called “executive employees.” The third chapter analyzes the provisions of the FLSA that render

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1. See MARC LINDER, “MOMENTS ARE THE ELEMENTS OF PROFIT”: OVERTIME AND THE DEREGULATION OF WORKING HOURS UNDER THE FAIR LABOR STANDARDS ACT (2000).

2. *Id.* at xvii.

3. 29 U.S.C. § 207 (1994). As Linder points out, this provision does not limit the number of hours an employee is permitted to work in a given week. It merely requires the employer to pay a premium for work in excess of forty hours.

noncompensable a significant amount of time that employees spend (in excess of the 40-hour week) in activities incidental to the work for which they are paid that inure to the benefit of their employers. The fourth chapter offers a compelling critique of the rationale underlying the FLSA's small-business exemption.

Some readers may already be acquainted with Linder's work in this area. Earlier versions of the second, third, and fourth chapters have appeared in various journals in the past ten years.<sup>4</sup> But the historically oriented first chapter, which occupies close to half the book, is entirely new and by itself justifies a reader's attention to the book.<sup>5</sup>

The heart of Linder's critique is the "inversion of industrial policy" that he claims has occurred since the FLSA was enacted in 1938.<sup>6</sup> According to Linder, the original purpose of the FLSA was to save firms from the "withering competition of unfair labor standards."<sup>7</sup> In the absence of the FLSA, firms would be free to cut wages or extend the workweek in an effort to lower costs and thereby gain an advantage over competing firms. Congress enacted the FLSA because it felt that the Great Depression was caused (or at least aggravated) by just this sort of competition.<sup>8</sup> The FLSA was thus enacted at least in part to halt this downward spiral of wage rates and other conditions of employment.

Ironically, since its inception, the FLSA has been criticized for hindering the ability of firms to compete. This hostility led in 1989 to the expansion of the so-called "small business exemption" to the FLSA, reflecting a Congressional judgment that new small firms needed to be free of the minimum wage and overtime requirements of the FLSA in order to compete and survive.<sup>9</sup> Perversely, Linder maintains, this exemption

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4. See, e.g., *Closing the Gap Between the Reich and Poor: Which Side Is the Department of Labor On?*, 21 N.Y.U. REV. L. & SOC. CHANGE 1 (1993); *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53 (1991); *The Small Business Exemption Under the Fair Labor Standards Act: The "Original" Accumulation of Capital and the Inversion of Industrial Policy*, 6 J.L. & POL'Y 403 (1998).

5. In addition, the earlier articles have been significantly revised and updated, so that readers familiar with them would benefit from a review of their new incarnations in Linder's book.

6. Although this aspect of Linder's critique is left to the final chapter, it is really at the heart of his argument because it seems to be implicit in much of the analysis of the rest of the book as well.

7. LINDER, *supra* note 1, at 511.

8. *Id.* at 506 (citing H.R. REP. NO. 95-521, at 15 (1977) (testimony of Maurice Tobin)).

9. The Act exempts from its provisions any firm doing less than \$500,000 of business in a year. 29 U.S.C. § 203(s)(1)(A)(ii) (1994). Linder questions whether this "volume of business test" is truly a small business exemption, since it bears no necessary relationship to the size of a firm. LINDER, *supra* note 1, at 471-76. "Without any doubt," says Linder, "Congress knows how to write small-business exemption into a labor-protective statute when it so desires." *Id.* at 471. Oddly, in his view, Congress chose not to do so with the

subjects small firms to the very “withering competition” the FLSA was intended to avert.<sup>10</sup>

In Linder’s view, the FLSA’s small business exemption suffers from two principle defects. First, it rests on what he terms a “flawed theory of capital accumulation.”<sup>11</sup> The assumption, apparently, is that “the smallest firms grow into large ones and provide the bulk of new employment in the United States.”<sup>12</sup> But this, says Linder, is merely “unproven, ideologically driven speculation.”<sup>13</sup>

Second, Linder asserts that the small business exemption presupposes a “dual economy” picture according to which firms small enough to qualify for the exemption do not compete with the larger firms that are covered by the Act.<sup>14</sup> But Linder provides evidence that this assumption is false, showing that exempt firms “exert a wage-depressing competitive impact on covered employers . . . .”<sup>15</sup>

Strangely, Linder chooses not to develop an additional powerful argument at his disposal. As Linder recognizes, the basic policy judgment underlying all exemptions and limitations to fair labor standards is that the “public interest” is in maximizing productivity and profits, and not in preserving the labor force from overwork.<sup>16</sup> But the fallacy here is that the “public” whose interest supposedly lies in maximizing productivity is a nation of workers. There is thus a fundamental incoherence in a regulatory scheme that purports to benefit the public at the expense of employees. Unfortunately, this assessment is left largely implicit in Linder’s analysis.

After studying Linder’s extensive catalogue of the defects of the FLSA’s overtime provisions, the reader might well wonder if there is a solution. Here one might be disappointed with the book. Including a final chapter, detailing explicitly Linder’s suggestions for improving the current regime of federal overtime regulation, might well have been helpful.<sup>17</sup> For there would seem to be two basic responses to the problems Linder raises. On the one hand, one might conclude that Congress ought to enact stricter overtime regulations (e.g., limiting the small business exemption, providing

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FLSA, opting instead for the \$500,000 threshold.

10. LINDER, *supra* note 1, at 511.

11. *Id.* at 407.

12. *Id.* at 478.

13. *Id.*

14. *Id.* at 506-11.

15. *Id.* at 507.

16. *Id.* at xii (citing *The Eight Hour Day*, N.Y. TIMES, July 2, 1912, at 10).

17. There are other places in which the book might benefit from more explicitness. For example in Chapter 3 Linder discusses the Portal-to-Portal Act, which amended the FLSA to render uncompensable certain activities incidental to employment (such as traveling from the plant gate to one’s workstation, which in large factories can sometimes take several minutes). But Linder does not describe these amendments in a systematic way, and the reader is forced to piece them together from various places in the chapter.

a cap on the number of overtime hours an employee can work in a given week, and so on). On the other hand, one might think instead that the best course would be to strengthen and encourage collective bargaining, so that employees (through their bargaining representative) can decide for themselves what overtime regime should govern their own workplace. Linder seems to lean toward this second option, since he speaks approvingly of a regulatory model based on "democratic codetermination of the length of the workday" in his preface.<sup>18</sup> Whether this is indeed his position is left unclear.

This however is a minor criticism. After all, Linder might reply that it was never his intention to offer an alternative regulatory scheme. Indeed, he may feel that any such scheme would be a mere fantasy. As he says, "it is chastening to realize that nothing remotely approaching a congressional majority exists for shortening the workweek or increasing the overtime penalty, let alone for protection against forced overwork even hedged with exceptions for employer emergencies."<sup>19</sup> Furthermore, in his view organized labor seems unable to deal effectively with the situation. "The pendulum has swung so far to capital's side that the labor movement considers itself fortunate if it can stave off attempts to repeal the FLSA's existing overtime pay provisions."<sup>20</sup> Thus, Linder may well believe (and perhaps rightly) that the only worthwhile endeavor at this point is to detail the problems with the FLSA's overtime provisions, and leave to a more favorable time the task of charting solutions. Certainly, in this project Linder has succeeded admirably.

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18. LINDER, *supra* note 1, at xii.

19. *Id.* at 205.

20. *Id.* at 206.