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FAMILY FRIENDLY WORKPLACE ACT

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Mr. JEFFORDS, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 4]

The Committee on Labor and Human Resources, to which was referred the bill (S. 4) to amend the Fair Labor Standards Act of 1938 to provide to private sector employees the same opportunities for time-and-a-half compensatory time off, biweekly work programs, and flexible credit hour programs as Federal employees currently enjoy to help balance the demands and needs of work and family, to clarify the provisions relating to exemptions of certain professionals from the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

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39–010

I. Introduction and Purpose

The purpose of S. 4, the Family Friendly Workplace Act, is to ensure that the evolving needs of America's work force are reflected in our Nation's laws. Today, there are more working, single parents and dual income families in America than ever before. S. 4 updates the Fair Labor Standards Act of 1938 in order to assist working people to balance the growing demands of the workplace with the needs of families. S. 4 provides men and women working in the private sector the opportunity to voluntarily choose compensatory time off in lieu of overtime pay, as well as to voluntarily participate in biweekly and flexible credit hour programs.

The U.S. Congress has endorsed the benefits of flexible scheduling on numerous occasions. Unfortunately, public sector employees have thus far been thus far the only beneficiaries of this enlightenment. S. 4 is intended to change this by making flexible scheduling options available to 80 million employees working in America's private sector. This legislation will give hard working men and women the ability to design their work schedules around their family situations. Employers will benefit from more productive and satisfied employees.

In recent polls, Americans have overwhelmingly supported amending the Fair Labor Standards Act to allow for more flexible scheduling options. The American people are not alone in their belief that it is time for a change. President Clinton acknowledged the importance of workplace flexibility, at least for Federal employees, in a July 11, 1994 Presidential Memorandum. The President decreed that "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." In his 1997 State of the Union Address, the President also recognized that it is time for broader change in the private sector when he proclaimed: "We should pass flex-time, so workers can choose to be paid overtime in income, or trade it in for time off to be with their families." S. 4 is the impetus to that much needed change. This legislation will enable Americans to participate in flexible work schedules so that they can better cope with the challenges of the 21st century.

II. Background and Need for Legislation

A. BACKGROUND

The Fair Labor Standards Act (FLSA)[1] was enacted in 1938. It established standards for minimum wage, overtime, record keeping, child labor and other workplace issues. As originally passed, the FLSA did not extend to public sector employers. The FLSA was amended in 1966 to extend coverage to certain State and local employers and again in 1974 so as to cover all state and local government activities.

[1] 29 U.S.C. §§ 201–209.

X. MINORITY VIEWS

INTRODUCTION

The majority report goes to great lengths to make the case that employees want more control over their work schedules. In the second sentence, the majority correctly points out: "Today, there are more working, single parents and dual families in America than ever before." The report goes on to note that women now account for 46% of the labor force, and that in 62% of the two parent families with children, both parents are working outside the home. These workers need more opportunity to take time off from their work to be with their children.

We agree wholeheartedly with that description of the needs of today's workforce. In fact, this portion of the report makes a compelling case for expansion of the Family and Medical Leave Act (FMLA). However, when Senator Dodd and Senator Murray offered amendments to expand the number of employees covered by the FMLA and to increase the leave opportunities provided for by the Act, the majority unanimously voted against them. These amendments would have provided workers with a genuine choice to take time off when they needed it the most.

The very employee witnesses whom the majority cites in its report—Christine Korzendorfer and Sandie Moneypenny—emphasized the importance of employee choice in their testimony. Ms. Korzendorfer told the Employment and Training Subcommittee: "What makes this idea appealing is that I would be able to choose which option best suits my situation." But those who brought Ms. Korzendorfer to testify failed to advise her that, under S. 4, it is her employer alone who will determine what scheduling flexibility is available in her workplace.

Similarly, Ms. Moneypenny testified that "if I could 'bank' my overtime, I wouldn't have to worry about missing work if my child gets sick on a Monday or Tuesday." The problem is that S. 4 will not assure her that opportunity. Her employer will have no obligation to let her use the accrued comp time on the days when her child becomes ill.

It is for these reasons that the minority opposes S. 4—it offers only the appearance of employee choice, not the reality. A close reading of the bill reveals the flaws at its heart. Although the minority offered amendments that highlighted these deficiencies, the majority refused to adopt a single one. Smoke and mirrors may be acceptable to the proponents of this bill, but not to the minority on this Committee. We unanimously oppose this legislation, applaud the President's promise to veto it, and urge our colleagues in the Senate to reject it outright.

No real employee choice

There is significant interest in the idea of legislation that would allow an employee to make a truly voluntary choice to be compensated for overtime work in time off rather than in pay. The essence of a genuine comp time bill is the creation of new options for employees, not employers. This is not such a bill. S. 4 contains four major provisions, each of which is designed not to help employees, but to allow employers to reduce the amount of money they must pay their workers.

While the legislation purports to let employees make the choice between overtime pay and comp time, it does not contain the protections that are necessary to insure that employees are free to choose and are free from reprisal.

Under S. 4, it is the employer, not the employee, who decides what forms of comp time and flex time will be available at the workplace. There is no freedom of choice for the worker.

There is nothing in this bill that prevents an employer from discriminating against a worker who refuses to take comp time instead of overtime pay. Under S. 4, an employer could lawfully deny all overtime work to those employees who want to be paid and give overtime exclusively to workers who will accept comp time in lieu of pay. This is not freedom of choice for the worker.

An employee may want a particular day off so that she can accompany her child to a special school event or to an appointment with the pediatrician. However, nothing in this legislation requires the employer to give the employee the day she requests. This bill gives the employer virtually unreviewable discretion to determine when a worker can use her accrued comp time. Here, too, there is no freedom of choice for the worker.

The failure of the Majority's bill to provide freedom of choice for the worker on these crucial issues cannot be excused an unintentional. Senator Kennedy offered an amendment which would have expressly made it unlawful for an employer to discriminate in awarding overtime based upon an employee's willingness to accept compensatory time instead of overtime pay. It was defeated 8 to 10 on a party line vote. Senator Wellstone offered an amendment affording employees the right to determine when they would take the time off which they had earned. It would have required an employer to permit employees to use accrued compensatory time for any of the reasons set forth in the FMLA, and for any other reason if the time off was requested more than two weeks in advance and the absence would not cause substantial and grievous injury to the employer's business. This, too, was rejected 8 to 10 on a party line vote. On these critical points, S. 4 does not empower workers to decide, it empowers their bosses.

S. 4 contains much more than a badly flawed comp time provision. It contains a section entitled "Biweekly Work Program" which abolishes the 40 hour workweek. The bill substitutes a provision that would allow an employer to work employees up to 80 hours in a single week without paying a cent of overtime as long as the employer gave them the next week off. Similarly, the employer could schedule employees for 60 hours one week and 20 the next—all paid at the employee's regular hourly rate. This provision gives workers nothing extra for overtime hours. Moreover, irregular and

shifting schedules are the antithesis of a family-friendly proposal. Obviously the majority has not considered the difficulties of arranging child care for such an erratic schedule.

The bill also contains a provision entitled "Flexible Credit Hours." Under this provision, an employee who works hours that are "in excess of the basic work requirement" would no longer be entitled to overtime. Instead, the employee would get an equivalent amount of hours off at a later unspecified time. Under existing law, the employee would be paid time and a half for such excess hours. Under comp time, the employee would at least receive one and one half hours of time off for every excess hour worked. However, "flexible credit hours" purports to offer the employee a new alternative—work the extra hours but receive only one hour off for each such hour worked. It is difficult to believe that any employee would choose to participate in such a plan unless he or she was given no alternative.

The last feature of this bill applies to salaried employees. Under current law, they do not receive overtime when they work extra hours and their pay cannot be cut for an absence of less than a full day. S. 4 proposes to change that rule. Salaried employees would still receive no overtime, but they could be subject to deductions in their pay if they were absent. The fact that such an employee could have pay deducted if he missed five hours of work in one week could no longer be used to prove that he was an hourly employee entitled to overtime if he worked 5 hours extra another week. This is patently unfair, and in no way enhances workers' freedom of choice.

A careful analysis of S. 4 demonstrates that its title ought to be "The Pay Reduction Act of 1997." The inevitable result of its enactment would be to require employees to work longer hours for less pay. As the acting Secretary of Labor has stated, S. 4 would "obliterate the principle of time-and-a-half for overtime" and would "destroy the 40 hour workweek."

Under this bill, employers would no longer be required to pay time and a half to hourly employees who work overtime. In fact, employers would no longer be required to pay anything for overtime work. Instead, employers could simply give an hourly employee who works overtime an IOU, promising the employee additional time off at some indeterminate time in the future. Employers would even be allowed to allocate time off at the straight time rate: an hour off for each overtime hour worked. This is not family friendly—it is a pay cut, pure and simple.

Those who earn overtime include the most vulnerable workers

The majority claims that none of these potential abuses will occur because employees must consent to any of the flexible arrangements provided in S. 4. This assertion ignores the reality that, in many workplace, employees lack of any bargaining power. They can be discharged at will by their employers and easily replaced. Employees in such workplaces—and there are millions of them across the country—cannot say "no" when they are asked to accept comp time in place of overtime pay. Indeed, the very workers who currently rely most heavily on overtime pay are the em-

ployees most vulnerable to coercion and retaliation by their employer.

Thus, to understand the real world impact of this bill, we must look at the workers who are currently depending on overtime pay to make ends meet. Overwhelmingly, they are working for low wages. Department of Labor statistics reveal that one-fourth of workers earning overtime earn under $12,000 per year. 44 percent of workers who depend on overtime earn $16,000 per year or less, and 61 percent earn $20,000 per year or less. More than 80 percent of overtime recipients have annual earnings of less than $28,000 per year. And, according to the Bureau of Labor Statistics, nearly 8 million of them are already holding more than one job just to make ends meet. 400,000 Americans, more than half of them women, are working two jobs in the food service industry. Nearly 200,000 men and women with multiple jobs work in cleaning and maintaining buildings. These are classic low-wage jobs, where workers need every dollar of pay they can earn. Furthermore, overtime pay makes up a significant percentage of many hourly workers' take-home pay. When they work overtime, manufacturing workers find that an average of nearly 15 percent of their take-home pay is attributable to the extra hours.

The workers who will be affected by this bill are hard-working, productive members of American families. They are also among the least-educated workers in the country. 43 percent of workers earning overtime have only a high school diploma. An additional 14 percent have not graduated from high school. These are people who need every dollar they can earn just to survive in today's economy. They are men and women who are supporting families. If this bill becomes law, many of them will lose overtime pay that they depend on to pay the rent, buy food, and provide clothing for their children. If this bill passes, employers will give all the overtime work to employees who agree to take comp time instead of overtime pay. There will be no overtime work for those who insist on being paid. Under S. 4, such discrimination in awarding overtime is perfectly legal.

Millions of those who rely on overtime earn only the minimum wage. By and large, these are not teenagers working jobs after school for pocket money. About 60 percent of minimum wage workers are married. They earn an average of 51 percent of their families' earnings. One-third of minimum wage earners are the sole breadwinners in their families. 60 percent are women. 2.3 million children rely on parents who earn the minimum wage—parents who hope their children don't get sick because they can't afford a doctor.

The vulnerable nature of workers who earn overtime is not a theoretical or patronizing concept. Employers violate current overtime provisions at an alarming rate. The Department of Labor conducted over 42,000 investigations under the Fair Labor Standards Act in 1996. One-third of those investigations, 13,687, disclosed overtime violations. The Department ordered over $100 million in back pay for 170,000 workers who were victims of these overtime violations. These figures do not even take into account a backlog of 16,000 unexamined complaints pending at the Department at the end of 1996.

In testimony before the Employment and Training Subcommittee on February 13, 1997, the President of the United States Chamber of Commerce characterized these 170,000 victimized employees as a "microdot" on the economy. In contrast, most of us, Republicans and Democrats alike, were shocked at the magnitude of these numbers, and the suffering they represent.

The comp time provisions of S. 4 will apply to industries where these noncompliance problems have become endemic, but S. 4 authorizes no additional funds for wage and hour enforcement. Garment workers, seasonal employees and temporary workers are all covered by this bill. Yet Department of Labor enforcement efforts find that more than half of the garment shops in the United States unlawfully pay less than the minimum wage, fail to pay overtime, or use child labor. If S. 4 becomes law, employers in these industries will use its provisions to coerce workers into accepting compensatory time instead of overtime wages.

Abuse of the overtime provisions is not restricted to fly-by-night garment shops and undocumented workers. The Employment Policy Foundation, an employer-supported research group, estimates that workers would receive an additional $19 billion each year if all employers complied with the law. The resources of the Department of Labor are already inadequate to police all the violations. Those resources certainly are not equal to the task of ensuring compliance with a far more complex set of comp time provisions.

Current law permits many flexible work schedules

According to the majority, the FLSA itself "prevents employers from accommodating employee requests for greater flexibility in scheduling." In fact, however, it is American employers, and not the law, which prevents flexible scheduling.

If employers want to provide family-friendly work schedules, they can do so today. The key is the 40-hour workweek. While employees normally work five eight-hour days a week, many more flexible arrangements are possible. A February 11, 1997 letter from the Department of Labor to Senator Kennedy provides compelling evidence of the many flexible arrangements available under current law. For example, the FLSA permits employers to schedule workers for four ten hours days a week with the fifth day off, and pay them the regular hourly rate for each hour. Under these circumstances, according to the Department of Labor, "no overtime premium pay would be due for that week." Similarly, employers can arrange a work schedule of four nine-hour days plus a four-hour day on the fifth day. Once again, states the Department of Labor, "the FLSA would not require payment of any overtime premium pay for that workweek." In addition, under current law, some employees could choose to vary their hours enough to have a three day weekend every week or every other week.

Employers also can offer genuine "flex time." This allows employers to schedule an 8-hour day around "core" hours of 10:00 A.M. to 3:00 P.M., and let employees decide whether they want to work 7:00 A.M. to 3:00 P.M. or 10:00 A.M. to 6:00 P.M. This too, costs employers not a penny more.

But the record is clear. Only a tiny fraction of employers use these or the many other flexible arrangements available under cur-

rent law. A 1991 study conducted by the Bureau of Labor Statistics found that only 10% of hourly employees are permitted to use flexible schedules. Current law offers a host of family-friendly, flexible schedules—yet few employers provide them. It is not the FLSA that prevents employers from offering employee flexibility. The problem workers confront lies not in the inflexibility of the law, but rather in the inflexibility of too many employers.

The false analogy to the public sector

To buttress their claim that S. 4 would simply enhance employee free choice, the majority relies on a supposed analogy to the public sector, where comp time has been permitted for more than a decade. The majority asserts that comp time has worked well for public employees, and then assumes that the same would be true in the private sector.

There is no evidence before this Committee as to how comp time is working in the public sector. A recent report by Professor Lonnie Golden for the Economic Policy Institute finds that, in fact, "many [public] employees carry a large number of banked comp time hours" and "have difficulty obtaining their employers' permission to use their comp time hours when they need them." As a result, Professor Golden concludes, public employees are "'loaning' hours to their employers interest free."[1]

But even if the majority's premise were sound, it would not follow that extending comp time and flexible credit hours to the private sector makes sense. For as then-Governor John Ashcroft explained in 1985, when the Senate was considering whether to permit comp time in the public sector, "State and local governments are qualitatively different in structure and in function from private business."[2] He continued, "A key distinction is that state governments do not compete with each other or the private sector. State and local government workers also are set off from their private-sector colleagues by the protection they enjoy through the government process itself. * * * An inherent distinction exists between state and local governments and private business with regard to the vital public functions state and local governments serve and the legal constraints under which they operate." Senate Labor Subcommittee Hearings at 57, 64.

Most public sector employees have some form of civil service protection, and can only be discharged or demoted for cause established at an adversarial hearing. The job security they enjoy is far greater than an employee in the private sector, who can be terminated at will by his or her employer. In addition, some 60% of public sector employees are protected by the dispute resolution procedures of collective bargaining agreements, while only about 14% of private sector workers enjoy such benefits.

Thus, even if it were true that comp time is working successfully in the public sector—and that is far from clear—it would not follow that the same would be true in the public sector.

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[1] Golden, *Family Friend or Foe? Working Time, Flexibility and the Fair Labor Standards Act* at 2 (1997).

[2] *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources on the Fair Labor Standards Amendments of 1985,* 99th Cong. 1st Sess. 51 (1985).

The real motivation

Further, the FLSA was amended in 1985 to allow public sector comp time principally to allow state and local governments to avoid the costs of overtime pay. Historically, state and local governments had not been subject to the overtime provisions of the Fair Labor Standards Act. When that was reversed by a Supreme Court decision, those governments were faced with substantial new costs. They immediately sought relief from Congress so that they could avoid the costs of overtime pay. For example, the National League of Cities claimed at the time that, without relief, "the cost of complying with the overtime provisions of the FLSA * * * will be in excess of $1 billion for local governments."[3] The National Association of Counties reported that "It will cost States and localities in the billions of dollars to maintain current service levels under this ruling. * * * *We need flexibility to use compensatory time and volunteers as alternatives* to meeting the public's demand for increased services when we are faced with budget shortfalls." *Id.* at 204 (emphasis added). That estimate—and similar dire warnings from the States and counties—led to the enactment of comp time legislation in order, as Senator Hatch put it, "to prevent the taxpayers in every single city in America from suffering reduced services and higher taxes."[4] These candid remarks belie the pious claims now being heard that comp time is being extended to the private sector to benefit employees' families, rather than employers' balance sheets.

The real impetus for S. 4 was inadvertently betrayed by a representative of the National Federation of Independent Businesses in testimony at the Employment and Training Subcommittee hearing on February 13, 1997: "Real small businesses * * * our members cannot afford to pay their employees overtime. This is something that they can offer in exchange that gives them a benefit." Once more, the intended beneficiary is the employer, not the employee.

SECTION-BY-SECTION ANALYSIS

The majority argues that our opposition to the comp time provisions of S. 4 is unreasonable. They argue that most employers get along well with their employees, and that employers will work in a spirit of cooperation to implement a positive and non-discriminatory comp time program, even if this bill provides no explicit protections for employees rights. We agree that many employers get along well with their employees. Further, we assume that many employers desire flexible scheduling options in order to help their employees meet family obligations without putting careers at risk.

However, Congress must not make major changes in the nations' labor laws without considering their impact on all workers. Our first duty is to protect the sizable minority of employees whose rights are threatened with violation. A careful analysis of S. 4

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[3] *Hearing Before the Subcommittee on Labor Standards of the House Committee on Education and Labor on the Fair Labor Standards Act,* 99th Cong. 1st Sess. at 83 (testimony of then-Mayor Voinovich) (1985).

[4] ___ Cong. Rec. 28988 (Oct. 24, 1985).

shows that it is unacceptable because it fails to include a full range of critically important protections.

COMP TIME

No guarantee that comp time will be voluntary

Supporters of S. 4 claim that the bill provides a truly voluntary system of compensatory time: a system in which comp time can only be provided when an employee agrees to accept time off instead of overtime pay. But the bill in fact provides very few safeguards to ensure that comp time programs will be truly voluntary, no language protecting employees against discrimination on the basis of their decision to earn overtime pay instead of comp time, and inadequate provisions giving employees a right to use their comp time when they actually need it.

The bill states that, for workers not represented by a union pursuant to section 9(a) of the National Labor Relations Act,[5] comp time can only be offered pursuant to "an agreement or understanding arrived at between the employer and employee," if this agreement or understanding was entered into "knowingly and voluntarily" by the employee. The bill further states that the employee must affirm in a "written or otherwise verifiable statement" that he or she has chosen to receive comp time in lieu of overtime pay.

However, the bill does not require that a comp time agreement must be provided to employees in writing, and it does not require that an employee's voluntary request to earn comp time must also be in writing. The absence of a requirement for written documentation opens a real possibility for abuse. First, if comp time agreements are not written down, employees will not be able to enforce them. The agreements will become "moving targets" that can be reinterpreted at the employer's convenience, and applied inconsistently to different employees who have substantially the same duties. Second, if an employee's voluntary request for comp time does not have to be documented in writing, then an employer can claim that an employee has requested comp time, even if the employee prefers overtime pay.

This bill is unacceptable because it cannot provide even minimal assurances that employees will enter into comp time agreements only with a complete understanding of their terms and an honest willingness to do so. At a minimum, written documentation of comp time requests and agreements must be required. Better still, the Department of Labor should be given the authority to issue regulations specifying the content of written comp time agreements. In the absence of either protective mechanism, the majority's construct is totally inadequate.

No exemption for airline, railroad or construction union contracts

As drafted, S. 4 does not apply to workforces represented by "a labor organization recognized as provided in section 9(a) of the National Labor Relations Act." This exclusion applies to many unionized workplaces, but fails to acknowledge the existence of collective

[5] As drafted, S. 4 permits employers to offer comp time programs even when doing so conflicts with existing collective bargaining agreements. See section entitled "No exemption for airline, railroad or construction unions."

bargaining relationships in many others. For example, employees in the railroad and airline industries are heavily organized—but they are covered by the Railway Labor Act, 45 U.S.C. sections 151 (railroad employees) and 182 (airline employees), and therefore are expressly excluded from coverage under the National Labor Relations Act. See 29 U.S.C. section 152(3) (excluding "any individual employed by an employer subject to the Railway Labor Act" from definition of "employee" covered under National Labor Relations Act).

Similary, workers in the construction industry have a long tradition of unionization. However, building trades unions do not typically seek or obtain recognition under section 9(a) of the National Labor Relations Act. Instead, such unions negotiate contracts with employers under section 8(f) of the NLRA, 29 U.S.C. section 158(f) (entitled "Agreement covering employees in the building and construction industry").

By its terms, this bill would permit an employer unilaterally to impose a comp time program on workers in the airline, railroad and construction industries—even if those workers were represented by a union that had negotiated a collective bargaining agreement on their behalf. An employer could bypass the union, create and implement a comp time system for employees whose collective bargaining agreement expressly prohibited such a system, and nothing in S. 4 would make this unlawful. The hundreds of thousands of workers represented by unions in these sectors should not be subjected to inconsistent and inequitable treatment, yet that is precisely what S. 4 would permit.

No bar on discriminatory practices

The bill does not include a bar on such discriminatory practices as assigning overtime work only to employees who choose comp time off instead of time-and-a-half pay. Absent a strong statutory deterrent against discrimination, many employers will distribute overtime hours only to workers who agree to take comp time instead of insisting on overtime pay. Even assuming, arguendo, that those employees who choose comp time do so voluntarily, many other employees who desire overtime pay will never get the opportunity to earn it. They will lose the overtime that they are currently earning and relying upon to support their families. For them, the freedom of choice allegedly offered by S. 4 will be in fact a cruel joke.

No exemption for vulnerable workforces

The bill does not exempt classes of employees, occupations, or industries that have the highest incidences of, and are most susceptible to, overtime violations. Nor does it allow the Government to exempt specific employers from the bill who are guilty of violating the law. This is a major flaw.

In certain industries, such as the garment industry, abuse is entrenched. The Labor Department has found that over half of the garment shops in the U.S. fail to pay overtime, use child labor, or pay less than the minimum wage. In just six months in 1996, the Labor Department assessed more than $1.5 million in back wages for labor law violations by garment firms. More than $345,000 in

civil damages were also assessed during this period. No one would reasonably suggest that the garment industry is ready for the flexibilities provided by this bill. Why isn't this industry exempted?

The National Federation of Independent Businesses testified before the Employment and Training Subcommittee that America's small businesses "can't afford to pay overtime," but that S. 4 "is something they can offer in exchange that gives [employees] a benefit." The inference could not be clearer: small business owners will pressure their employees to accept comp time instead of overtime pay. This is not an employee benefit, but rather a way for employers to cut costs.

The bill does not even exclude the most notorious employers—those with records of serious and repeated FLSA violations—from offering comp time. For those employers, S. 4 will constitute an open invitation to enage in new forms of employee abuse. This is shameful public policy.

No right to use comp time when employees need it

S. 4 provides that an employee who requests the use of comp time off shall be permitted to use the comp time "within a reasonable period," if it "does not unduly disrupt the operations of the employer." Nowhere in the bill are the terms "reasonable period" and "unduly disrupt" defined. In practice, an employee could give his employer two weeks notice of his intent to take comp time off to see his daughter's school play, and have his request denied on grounds of insufficient notice. Similarly, if an employee plans to take her child to a dentist appointment during a school vacation, her employer could claim that her use of comp time would "unduly disrupt" business operations, without even explaining why.

Compensatory time is a form of earned, accrued compensation. Employees should be able to use it on demand with a reasonable period of notification, unless its use would cause substantial and grievous injury to the employer's operations. Clearly, an employee should be able to use comp time for any of the same reasons that qualify for leave under the Family and Medical Leave Act.

This bill establishes a comp time program for hourly wage workers, who typically have little bargaining power vis-a-vis their employers. The bill fails to acknowledge this critical fact, and fails to vest employees with an express right to use comp time that they have earned at the time of their choice. The bill does not even provide that employee requests made with reasonable notice shall be granted by employers. In practice, S. 4 will result in time off being scheduled at the employer's convenience, not the employee's.

The majority clearly errs in stating that "this portion of the bill is strikingly similar to the provisions of the FMLA and the relevant regulations." The FMLA recognizes two types of medical leave—unforeseen, serious illnesses for which the employee need make no effort to accommodate the employer, and foreseeable medical treatment. In the latter situation, the employee must make a "reasonable effort" to schedule treatment at a time that doesn't "unduly disrupt" the employer's operations. If the employee's reasonable efforts fail, he or she can still take the leave despite the resulting inconvenience to the employer. The employer is expressly prohib-

ited from taking any punitive action against the employee based upon the leave.

Under the FMLA, the ultimate decision on the timing of the leave rests with the employee. In marked contrast, under S. 4, the decision rests with the employer. Management determines what is "reasonable" and when time off would be "unduly disruptive." The employee has little recourse. To claim that S. 4 is "strikingly similar" to the FMLA is grossly inaccurate.

No penalties for denying comp time

Under S. 4, if an employee gives reasonable notice that he or she intends to use comp time, and if the comp time would not disrupt the employer's operations, the employer is supposed to allow the comp time to be used. Unfortunately, the bill provides no penalties to ensure that an employer will honor reasonable requests for comp time. An employer can deny comp time for any reason, and there is nothing that the employee can do about it—even though the comp time belongs exclusively to the employee.

This is irrational, and it is inconsistent with the enforcement provisions of laws such as the Family and Medical Leave Act. If an employer denies an employee's reasonable request to take FMLA leave, the employee can recover damages, including money expended on child care and compensatory damages. The FMLA improves employee morale and productivity only because it is both credible and enforceable. This bill, by contrast, is misleading and non-enforceable.

Too many hours of comp time can be accrued

Given the danger of employer insolvency, a ceiling of 240 hours is far too high. That is six full weeks of work. For an employee earning $10 an hour, 240 hours means $2,400. That would constitute some fifteen percent of the employee's annual earnings. Even the Republicans in the House of Representatives recognized that 240 hours was unacceptably high, when they amended H.R. 1 to provide a cap of 160 hours of bankable comp time. The administration has proposed a limit of 80 hours for accrued comp time. Given the wholly inadequate safeguards in S. 4, the level of financial risk to employees must be minimized to the greatest extent possible.

No protection of accrued comp time during business failure or job loss

Accumulated compensatory time is an earned benefit, accepted instead of overtime pay. It belongs exclusively to the employee. But S. 4 does not contain sufficient protections to ensure that workers whose employers go bankrupt will have some claim on their unpaid comp time.

In 994, 845,300 American businesses filed for bankruptcy, according to the Administrative Office of the U.S. Courts. In each of the three preceding years, the number of bankruptcies was even higher: 918,700 in 1993; 972,500 in 1992; and 880,400 in 1991. Some industries are unusually susceptible to business failure. In 1994, the rate of business failure in the garment industry was 146

per 10,000 firms: twice the national average. In construction, the rate of business failure was 91 per 10,000 firms.

Since S. 4 allows employees to "bank" up to 240 hours of comp time, some workers could lose up to six weeks of pay when their companies go out of business. That's $1,440 for a worker earning $6 per hour: money for rent, food, and school clothing for the children. If a financial institution goes out of business, its customers' accounts are protected by Federal Depositors' Insurance. People who deposit their overtime earnings into a "comp time bank" deserve the same level of protection when their companies go out of business. It is unacceptable not to treat employees' accumulated compensatory time as unpaid wages during a bankruptcy.

BIWEEKLY WORK PROGRAMS AND FLEXIBLE CREDIT HOURS

Under S. 4, it is up to the employer to decide whether to offer comp time to employees. Many will opt not to do so, given that the bill also authorizes employers, in lieu of paying for overtime, to offer "biweekly work programs" and "flexible credit hour programs."

Like the comp time sections, the provisions authorizing biweekly work programs and flexible credit hours would free employers from any obligation to pay employees who work overtime. Like comp time, these programs would permit employers to substitute IOUs instead, promising time off the following week (in the case of a biweekly work program) or at some future point in time (in the case of flexible credit hour programs). But unlike comp time, employees who work overtime as part of a biweekly work program or a flexible credit hour program would earn only one hour of future time off for each overtime hour worked. In other words, these sections would effectively repeal the guarantee of premium pay—time and one-half—for overtime work. A clearer provision for cutting worker pay is difficult to imagine.

The threat that these provisions pose to the 40 hour workweek—and to stable work hours—is self-evident. The biweekly work program would permit an employer to work an employee 50, 60 or even 70 or more hours in a single week without paying a dime in overtime. The employer's only obligation would be, for every extra hour worked, to give the employee an hour off the following week. The flexible credit hour program would permit the same sort of variability in hours, and require the employer only to promise a future hour off for each overtime hour worked. There are few employees anywhere who will view such on-again, off-again work schedules as advantageous—or family friendly.

To be sure, the biweekly work programs and flexible credit hour programs purport to require employee agreement, just as comp time does. But the provisions supposedly protecting free choice suffer from all of the flaws of the provisions relating to comp time.

It bears repeating that under S. 4 it is up to the employer to decide in the first instance which types of so-called "family friendly" policies to implement. And it is difficult to understand why any employer would offer comptime—with the requirement of time-and-a-one-half off—when the employer can offer biweekly work weeks and flexible credit hours and provide only one hour off for each overtime hour worked. Thus, these provisions of the bill would, in

practice, trump the comp time provisons—and trump the requirement of time and one half for overtime work.

PAY DOCKING FOR SALARIED EMPLOYEES

The FLSA requires overtime pay only for covered ("non-exempt") employees. The Act exempts workers employed in a "bona fide executive, administrative or professional capacity." 29 U.S.C. 213(a)(1). As of 1990, the Labor Department estimated that there were 21.9 million exempt workers.[6]

For at least four decades, the Department of Labor—through Republican and Democratic administrations alike—has held the view that the FLSA exemption excludes only salaried, as distinguished from hourly, employees. The Department has likewise held the view, for over 40 years, that a salaried employee is, by definition, one who "regularly receives * * * a predetermined amount * * * which amount is not subject to reduction because of variations in the * * * quantity of the work performed."

In practical terms, this means that while salaried employees do not receive overtime when they work extra hours, they are entitled to take part of a day off, without loss of pay, when pressing family needs arise. Just a few weeks ago, the United States Supreme Court sustained the DOL's regulations and held that employees are not exempt if their pay is subject to reduction for missing part of a day's work.[7] Under current law, then, salaried employees—in lieu of receiving overtime pay—at least enjoy the flexibility that the majority claims to value so highly as a means of balancing work and family.

Remarkably, however, this so-called Family Friendly Workplace Act would take away this very flexibility for these salaried employees. S. 4 would create a new "heads-I-win, tails-you-lose" world in which a salaried employee would have no right to overtime for extra work, but could be subject to having her pay docked if the employee took an hour off to bring her child to the doctor, or to meet with the child's teacher. Indeed, under the majority's bill, an employee who worked 60, 70 or even 80 hours in a week could still suffer a pay reduction if on one day in that week the employee worked less than a full day.

Once again, then, the majority's bill turns out to be employer-friendly, but family-hostile.

DEMOCRATIC AMENDMENTS

Family and Medical Leave Act amendments—Senators Dodd and Murray

S. 4 does not solve the problems of working families. Although it purports to offer more time for employees to spend time with their families, it would actually help only a small group of employees who would qualify for compensatory time: employees who are not exempt from the FLSA; who work overtime; whose employers voluntarily agree to offer comp time; and who themselves agree to participate in the comp time program. Most importantly, S. 4 offers no guarantees to employees: it provides no meaningful penalty for

[6] Employment Standards Administration, supra n. ____, at Table 7.
[7] *Auer* v. *Robbins*, 65 U.S. L.W. 4136 (Feb. 19, 1997).

employers who deny employees' requests for comp time, and it fails to ensure that employees can use comp time when they need it.

Unlike S. 4, the FMLA expansion amendments offered by Senators Dodd and Murray would guarantee more employees more time to spend with their families. Senator Dodd's amendment would lower the threshold of the FMLA to apply to employers of at least 25 employees. Senator Murray's amendment would provide 24 hours leave per year, within the 12 weeks currently guaranteed by the FMLA, for employees to participate in children's schools activities or literacy training under a family literacy program.

Since its enactment in 1993, the FMLA has proven by a successful track record that it provides real flexibility to American employees. The FMLA guarantees covered employees 12 weeks unpaid leave each year to care for a newborn or newly adopted child or a seriously ill family member, or to recover from their own serious health conditions. It applies to employers of at least 50 employees, covering more than 57% of this country's private workforce, or more than 55 million private employees, and 66% of the entire workforce, including government employees. More than 12 million working Americans have taken family or medical leave since the FMLA became law.

Businesses have found it easy and inexpensive to comply with the FMLA. According to the bipartisan Family Leave Commission, 93.3% of covered worksites experienced no or only small increases in benefit costs; 94.8% experienced no or only small increases in hiring and training costs; 89.2% experienced no or small increases in administrative costs; and 98.5% experienced no or only small increases in other costs. In addition, 92% of covered worksites found it very or somewhat easy to determine employee eligibility; 76% found it very or somewhat easy to maintain additional records. The FMLA's success for both employees and employers is reflected in the overwhelming bipartisan support the law has received: according to the LA Times, 82% of Americans support the FMLA. However, the FMLA is not working for everyone: due to the 50-employee threshold, more than 41 million private employees—almost 43% of the private workforce—are not protected by FMLA.

By lowering the threshold to 25 employees, Senator Dodd's amendment would cover 71% of the private workforce, adding more than 13 million private employees for a total of more than 68 million private employees across the United States.

This amendment, which would provide a job-guaranteed leave to more working Americans, would not hurt businesses. The FMLA already covers small worksites that have fewer than 50 employees if those worksites are part of a larger company with at least 50 employees within a 75-mile radius. In fact, according to the Family Leave Commission, the majority of the 58,000 covered worksites of 25–49 employees found it easier to comply with the FMLA than larger employers. 93% of these worksites found it very or somewhat easy to determine worksite coverage, and 98% of these worksites found it very or somewhat easy to determine employee eligibility.

Senator Murray's amendment, which would allow employees to take leave to participate in children's school activities or literacy training under a family literacy program, would give employees the time they need to spend with their children, regardless of hours

worked overtime or agreements between employers and employees. Attending to children's education is critical to their development. Studies show that attending parent-teacher conferences may significantly influence children's academic performance. Parental involvement is more important than family education level or income in determining student success. Under current law, however, working parents have to risk losing their jobs if they take time off to do the right thing. 28% of employed parents report that they have problems getting time off to attend school activities; 23% of employed parents report problems getting time off to meet with their children's teachers. Not surprisingly, in light of those statistics, 40% of employed parents believe they aren't devoting enough time to their children's education. Further, 89% of company executives—the very groups now supporting S. 4—identified the biggest obstacle to school reform as the lack of parental involvement. Senator Murray's amendment would give parents the flexibility they need to change those sobering statistics.

A large majority—86%—of American voters support expansion of the FMLA. Yet this Committee rejected Senators Dodd's and Murray's amendments to do just that by party-line votes of 8 to 10.

Guaranteeing real employee choice—Senator Wellstone's amendment

S. 4 contains sections that are totally unacceptable in concept, such as those creating an 80-hour, biweekly work period and so-called "flexible credit hours". Those changes would cut workers' pay and undercut the basic principle of a regular 40-hour work-week, turning back the clock on essential labor protections. But the compensatory time provisions of the bill are also fundamentally flawed. Minority members of the Committee offered a number of amendments aimed at improving S. 4 in an effort to highlight these critical deficiencies, taking majority members at their word that flexibility and increased control over work schedule for employees is a desirable goal. Unfortunately, each amendment was defeated on a party-line vote, despite acknowledgement by majority members of legitimate concerns raised during debate of the amendments.

Senator Wellstone offered the first such amendment, a provision to ensure that an employee could actually use earned comp time when he or she really wants or needs to use it. With reasonable exceptions, employees should be able to use comp time at their discretion. After all, comp time is earned compensation, not vacation time or a gift from the employer. First, the amendment would have given an employee the right to use accumulated comp time for any of the reasons enumerated in the Family and Medical Leave Act, such as a serious family illness or a new child in the family. Second, the amendment would have required employers to meet a much higher standard in order to deny an employee's request to use earned comp time when the employee gives at least two weeks' notice. If the employee gave two weeks' notice, an employer could only deny the request if the employer could show that the requested time off would cause "substantial and grievous" injury to the business. Finally, if an employee gave less than two weeks' notice of an intent to use comp time, the amendment permitted an employer to deny that request if granting it would "unduly disrupt" the employer's operation.

The majority rejected this amendment, which goes to the heart of whether comp time is actually intended to provide flexibility to employees, on a party-line vote. The majority thereby demonstrated that S. 4 apparently is not intended to allow employees real flexibility. If an employee cannot take earned time off on short notice in case of a family illness, and cannot plan in advance to use earned comp time, then where is the choice and flexibility for employees and their families which the bill purports to offer? If an employer can decide when the employee can use earned comp time, the bill not only reserves flexibility exclusively for employers, it creates a new ability for employers actually to delay providing earned compensation for hours previously worked by denying use of earned comp time for non-substantial reasons.

Ensuring nondiscrimination—Senator Kennedy's amendment

Senator Ashcroft, the principal sponsor of S. 4, testified before the Subcommittee on Employment and Job Training on February 13, 1997 that "to safeguard against abuse, this bill would prohibit an employer from forcing employees to accept compensatory time off in lieu of financial compensation. * * * This bill in no way alters the 40 hour work week [because] no employee can be forced to work such a [flexible] schedule nor could working flexible schedules be made a condition of employment."

Senator Ashcroft also conceded that abuses of flexible schedules can only be deterred by strong enforcement provisions in the bill itself. Accordingly, in the same hearing, he called for quadruple damages for employers who violate the provisions of S. 4: "If the employee says, No thanks; I like 40 hours a week, and if you intimidate me into doing this, there are quadruple penalties for you * * *"

But the actual text of S. 4 provides no quadruple damages for violators, despite Senator Ashcroft's stated preference for them. Worst of all, the bill fails to prohibit employers from discriminating against workers for their choice of overtime pay instead of comp time. As drafted, the bill gives an employer the option to assign overtime hours only to workers who express a preference for comp time, and cut off all overtime hours for workers who would prefer to earn overtime pay. Since it is predominantly low-wage workers who rely on overtime to make ends meet, this bill is, in effect, a pay cut for low-wage workers. Employers can tell their workers, "from now on, all the overtime hours will go to people who choose comp time. Overtime pay no longer exists." Unfortunately, under S. 4, such conduct would not be illegal.

Senator Kennedy's amendment would have accomplished what the Republican leadership said they wanted their bill to do—prevent discrimination and deter violations of the labor law. The amendment would have prohibited employers from distributing overtime hours solely to employees who express a preference for comp time. Further, the amendment actually provided for quadruple damages for violations. Despite Senator Ashcroft's representations, his bill in fact did not. Notwithstanding their self-righteous rhetoric, the members of the Committee majority refused in a party-line vote to provide either genuine protection against discrimination or true quadruple damages.

Comp time hours constitute hours worked—Senator Wellstone's amendment

Senator Wellstone offered a second amendment, intended like his first one to make the bill's comp time provisions operate in a way that would be beneficial to employees—not just to employers. The amendment sought to ensure that comp time would be treated as "hours worked" for the purpose of calculating an employee's entitlement both to overtime and to certain employee benefits that are tied to the number of hours worked. The need for such an amendment is obvious, if the intent of comp time is not to cut workers' pay or reduce their benefits. Take the example of a worker who decides to use eight accumulated hours of comp time in order to enjoy a 3-day weekend by taking a Monday off. Without the amendment, no provision in the bill or in law would prevent an employer from requiring that employee to work 10-hour days Tuesday through Friday without paying overtime because only 40 hours would have been counted as worked. The employee would have been denied what should be considered earned overtime, as well as the "flexibility" promised by supporters of the bill. The supposedly previously-earned comp day off would have served only to increase the employee's hours worked on other days in the same week.

The need to count comp time when used as hours worked for the purpose of calculating employee benefits is equally clear. In many industries, employers and employees make contributions to an employee's pension plan for each hour that the employee works. Such arrangements are particularly common in industries characterized by multi-employer pension plans, such as the construction industry. Overtime hours are considered hours worked for purposes of making contributions under such plans. If S. 4 becomes law, however, comp time hours when used will not be counted toward such employees' pension benefit. In short, workers taking comp time not only will lose overtime pay, but they will suffer a reduction in pension benefits as well.

The majority argues weakly that, under current law, vacation time is not counted as hours worked when calculating overtime and other employee benefits. This is both irrelevant and insulting. Comp time off is not vacation time. It is earned compensation. The majority's equation of the two reflects either a fundamental misunderstanding of their own bill, or yet another disingenuous attempt to reduce employees' compensation. Regardless of the motive, the outcome was the same: another partyline vote against the amendment.

Excluding vulnerable employees—Senator Wellstone's amendment

The third Wellstone amendment was yet another effort to improve the employee protections in the bill. It would have excluded from coverage under S. 4 workers who would be particularly vulnerable to exploitation should comp time be offered as a tool to their employers. It would have excluded part-time, seasonal and temporary employees, as well as employees in the garment industry. Workers in these sectors generally do not enjoy a relationship of equal power with their employers. The voluntariness of the comp time "option" would be extremely questionable. Unscrupulous em-

ployers would gain too many new opportunities to exploit or deny earned pay and benefits to workers in these sectors.

The garment industry is particularly illustrative. In 1996, the Department of Labor's Wage and Hour Division undertook a compliance survey among garment contractor shops in the Los Angeles area. The survey found that 55 percent of the shops were failing to honor current overtime requirements. The Department of Labor reports that overtime violations in the garment industry have totalled nearly $12 million since 1992, affecting over 32,000 garment workers and averaging roughly $375 in lost wages per worker. These are cases that have been identified and remedied. The Department of Labor estimates that minimum wage and overtime violations prevail in more than 50 percent of the 22,000 American apparel industries. It would be unconscionable to give employers in this industry another opportunity to deny hard-earned pay to their employees—yet that is precisely what the majority did, in still another party-line vote.

Delay implementation until enforcement resources available—Senator Wellstone's amendment

Senator Ashcroft admitted to the Employment and Training Subcommittee that adequate enforcement resources were essential in order to implement his bill properly. The fourth Wellstone amendment, also defeated, took this representation seriously. Noting that the current backlog of complaints in the Department of Labor's Wage and Hour Division is approximately 40 percent of the annual number of complaints, Senator Wellstone proposed delaying implementation of the bill until the backlog could be reduced to 10 percent. The Wage and Hour Division is responsible for investigating and remedying most reported violations of the FLSA. It receives approximately 40,000 complaints annually, and managed in 1996 to reduce its backlog to approximately 16,000. Assuming that complaints would likely increase with new opportunities for disputes regarding earned comp time, and noting that justice delayed can often be justice denied for employees in such cases, minority members found it reasonable to require that adequate enforcement resources be in place before the bill could be implemented. Once again, however, the majority failed to conform its actions to its words. The amendment was defeated along straight party lines.

CONCLUSION

This bill is totally unacceptable, for all the reasons described above. Even those who believe that a genuine comp time bill is an appropriate legislative goal must stand in opposition to this bill. President Clinton, for one, has endorsed the concept of comp time. However, he has stated that he would be forced to veto S. 4. The Department of Labor effectively conveyed the President's views on the failings of this legislation in a letter sent to the Committee Chairman before the markup of S. 4. While its full text is appended to this report, the following excerpt succinctly identifies the bill's deficiencies:

> Any comp time legislation must effectively and satisfactorily address three fundamental principles: real choice for

> employees; real protection against employer abuse; and preservation of basic worker rights, including the 40-hour work week. President Clinton will veto any bill that does not meet these fundamental principles. . . . While the President has called for and strongly supports enactment of responsible comp time legislation, he will not sign *any* bill—including S. 4—that obliterates the principle of time-and-a-half for overtime or that destroys the 40-hour work-week. Workers—not employers—must be able to decide how best to meet the current needs of their family.

For these and all the foregoing reasons, we urge our colleagues to oppose this legislation.

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