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FAIR LABOR STANDARDS ACT REFORM: REVIEW OF FLEXIBLE WORKPLACE MEASURES

HEARING

OF THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

EXAMINING PROPOSALS TO REFORM THE FAIR LABOR STANDARDS ACT, FOCUSING ON RECENT CHANGES IN THE AMERICAN WORKFORCE AND THE NEED FOR FLEXIBLE WORK SCHEDULES

FEBRUARY 4, 1997

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FAIR LABOR STANDARDS ACT REFORM: REVIEW OF FLEXIBLE WORKPLACE MEASURES

TUESDAY, FEBRUARY 4, 1997

U.S. SENATE,
SUBCOMMITTEE ON EMPLOYMENT AND TRAINING,
OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room SD–430, Dirksen Senate Office Building, Senator DeWine (chairman of the subcommittee) presiding.

Present: Senators DeWine, Jeffords, Enzi, Warner, Kennedy, Dodd, and Wellstone.

OPENING STATEMENT OF SENATOR DEWINE

Senator DEWINE. Good morning. I would like to welcome everyone to this hearing of the Senate Labor and Human Resources Subcommittee on Employment and Training.

Let me begin by first welcoming to the Senate and also to this committee Senator Mike Enzi of Wyoming.

Senator, welcome.

Senator ENZI. Thank you.

Senator DEWINE. This subcommittee has jurisdiction over Federal policies affecting employment and training. In today's hearing, we will focus on some of the key changes that have taken place in American society and the American workplace in recent years. Specifically, we will discuss issues concerning a more flexible workplace.

In next week's hearing, we will address specifically the legislation that has been proposed in the U.S. Senate in this area.

It is our intention to have the legislation ready for full committee markup by the end of the month and available for the leadership to take up on the Senate floor as soon as possible after that.

Now let me turn to the subject of today's hearing. The issue today is providing flexible work options that empower employees. Let us take one example—letting workers choose between overtime pay or paid time off—and another example—letting workers make their work schedules flexible on a biweekly basis.

These are really not radical ideas. In fact, those Americans who are employed by the public sector have enjoyed these scheduling options for years.

These options have been on trial in the public sector, so I believe it is appropriate for us today to try to determine how well those policies have worked. In this regard, let me begin by citing the

view of one top executive in the public sector, and I quote: "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."

That is the view, of course, of President Clinton, expressed on July 11, 1994. The President recognized that people sometimes have to struggle pretty hard to balance the demands of work and family.

Several years after the President made that earlier statement, the President went even further, calling on all Federal agencies to develop a plan of action for better implementation of these flexible work schedules.

Again I quote: "I am directing all executive departments and agencies to review their personnel practices and develop a plan of action to utilize the flexible policies already in place—flexible hours that will enable employees to schedule their work and meet the needs of their families." End of quote. This was from a Presidential memorandum dated June 21, 1996.

It is clear that the President understands what flexibility in the workplace means to quality family life. And the American people certainly agree as well. A national poll conducted in September 1995 shows that the American work force endorses flexible work options. When asked about a proposal to allow hourly employees the choice of time and a half in wages or time off with pay, 75 percent agreed with the proposal. Sixty-five percent said they favored more flexible work schedules.

This poll was conducted on behalf of the Employment Policy Foundation, and copies of the poll results are available in the hearing room today.

I believe these poll results tally with what most of us really know intuitively. As both the economy and American family life grow more and more complex, the men and women in America's work force want greater flexibility to be able to cope with all of these changes.

There is a real need out there that these poll responses only begin to suggest. In my view, we have a very important opportunity with this legislation. If we move forward on this in a thoughtful and bipartisan way and design the best possible flextime policy, we will have gone a long way toward making America's workplace as productive and fulfilling as it can be and as it should be.

Let me turn to the ranking member of the subcommittee, Senator Wellstone.

OPENING STATEMENT OF SENATOR WELLSTONE

Senator WELLSTONE. Thank you, Mr. Chairman.

I am extremely pleased to be serving with you. I want to congratulate you on your position, and I look forward to working with you. I have a lot of respect for the work that Senator DeWine has done, especially his focus on children, and I know that you will operate this subcommittee in a respectable and productive way.

There is one housekeeping matter that I hope we can get some clarification on in the future. I note that the two panelists the

Democrats have chosen are at the end of the testimony. I hope we can do a little bit better in the future on that. I know that in the past, we have had a two-to-one ratio, and now we have a three-to-one ratio of witnesses, and I'd like to get a chance to sit down and talk with you about that as well.

I have to say how proud I am to be the ranking Democrat on this subcommittee of the U.S. Senate Labor and Human Resources Committee, especially this Subcommittee on Employment and Training, which has jurisdiction over some of the most crucial laws we have in this Nation for protecting the rights and the living standards of American working men and women.

Today we are talking about the Fair Labor Standards Act. I note that during the last Congress in 1995, at a House of Representatives hearing on the same topic we are considering today, a witness compared the Fair Labor Standards Act negatively to the Dead Sea Scrolls. The Fair Labor Standards Act was first passed in 1938, so the point was that the law is old. The remark was meant, I think, somewhat humorously, but the witness said that since jobs as we have traditionally known them are going the way of dinosaurs, the Fair Labor Standards Act had better evolve, or it will also become extinct.

The statement was made by a witness representing one of the organizations we will hear from today, although not by one of today's witnesses.

Mr. Chairman, I know that today's witnesses will have some criticisms of the Fair Labor Standards Act. That is fair. No law is so sacred that it should not be examined. I am for progress as long as we are moving forward and not turning the clock back. In fact, I am all for putting the Fair Labor Standards Act at the center of public attention. Wages and working hours are far from an archaic subject for millions of working Americans.

I do not want us to take for granted the many protections and standards that are on the books. Not all of them are fully respected and enforced, as perhaps we will hear about today, but they are on the books, and they have been achieved as an outcome of a people's history, a half-century of people's history which is still ongoing.

The magic of the market alone did not give us either the minimum wage or the 40-hour work week. Neither is the market keeping millions of working Americans out of poverty. In fact, millions of people work 52 weeks a year, 40 hours a week plus, and they are still poor; and they have families that they want to care for and spend time with.

So that for me, wages and working hours are very live issues. I am pleased to be talking about them today. I think we could have a hearing every week in this subcommittee for the rest of this Congress on the State of work in America. I appreciate today's focus on trends in work and family; that is appropriate.

Tomorrow is the anniversary of the enactment 4 years ago of the Family and Medical Leave Act, a very significant step forward for family members who work. Any conversation about how to provide employees with needed flexibility obviously should look at whether and how, based on the success of the Family and Medical Leave Act, we have done what we need to do to expand its provisions.

Some of us will be introducing a measure to expand that Act tomorrow; I would expect to hear that topic addressed today. We will also be discussing to some extent, although perhaps in more detail next week, proposals to allow employers to offer private sector employees comp time, and we will discuss a proposal, as I understand it, to get rid of the 40-hour work week—not to move forward, unfortunately, as I see it, but rather to turn back the clock.

It seems to me to be a plan that would allow employers in some cases to ask employees to work more than 40 hours in a week and pay no premium, either in hours or in pay, for those hours worked over 40. As far as I can tell, that is the aim of the proposal to move to an 80-hour biweekly work period. I have trouble seeing it as much more than an offer to cut workers' wages when compared to current law. I will be interested to hear how such an offer is seen as friendly to family, except perhaps for those families who believe they currently have too much money—and there are not too many families like that today in America.

I think there is little question that many workers would like to have more flexibility and control over their working hours. One of the main questions I hope to have answered is what really blocks employers from offering more flexibility now. Is it purely the need to pay a premium for hours worked in a week over 40? I just do not see it as unreasonable to require that premium pay, especially if the granting of time off at a later date contributes to greater employee retention and productivity. That is an option clearly available to employers now. And I hope we can learn how many make use of it, and if the number is few, then why is the number few?

I think the voluntariness of any proposal will also inevitably be an issue as we look at the particular proposals. No matter what appears to be guaranteed by what is written, we are still struggling to assure the protections of many current labor laws. Ask the farm workers, ask people in the garment industry, oftentimes with far from total success, what are the guarantees for working families.

Finally, Mr. Chairman, for those who say their aim is to provide to private sector employees what many public sector employees now enjoy—comp time or "flextime"—I remind them that there are those of us on the subcommittee who would be delighted to offer millions of American workers some other things that they do not currently have which many public sector employees have—a union, paid vacation and sick leave, a guaranteed pension, health benefits, and life insurance. Many companies do offer their wage-earner employees some of these benefits, and I applaud that, but many do not.

I think these are the relevant considerations as we talk about work and family.

Mr. Chairman, I look forward to today's testimony. We have a very important topic before us.

Senator DEWINE. Thank you.

Our first witness is Senator Kay Bailey Hutchison who, along with Senator Ashcroft, has sponsored Senate bill 4. Senator Ashcroft could not be with us this morning, but he will be testifying at our hearing next week.

Senator Hutchison, thank you very much for joining us.

STATEMENT OF HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Thank you, Mr. Chairman, and thank you, Mr. Wellstone—I see you as a potential cosponsor for our bill——

Senator DEWINE. We will work on that. [Laughter.]

Senator HUTCHISON [continuing]. Because I do believe that we will be able, and I hope we will be able, to show you that this is adding to opportunities, not taking anything away. And that is what we are trying to do here.

As you know, as all of us know, what we are trying to do is give more flexibility in the workplace to hourly employees that exempt employees now have, that Federal employees now have, that many State employees now have, and it has worked very well. It has given a kind of a release valve for the tension of not being able to take your child to the doctor or have your parent-teacher conference because there is this flexibility.

What we want to do in fact is just what you suggested, Mr. Wellstone, and that is to improve the Fair Labor Standards Act to make it more accommodating to families and their needs today, and that is the purpose of our bill.

There are 60 million hourly employees in our country who do not have the same flexibility that you and I and other exempt employees have. The reason that we want to give this flexibility is to add the ability to get time and a half in compensation, which is always there—if that is what the employee wants, it is there—but in addition to that, we would add the option of time and a half time compensation if that is what the employee chooses, and we would allow the person to be able to say: I would like to leave work early Friday in order to go to my parent-teacher conference, and I would like to make up the time on Monday.

All it does is add one more week to the flexibility. Within the 40 hours, they can now do this, but if the employee wants to get off early on Friday and carry over until Monday, that is what is restricted by the Fair Labor Standards Act.

The Fair Labor Standards Act was enacted, as you said, in 1938. At that time, 16 percent of the mothers in this country worked. Today, 75 percent of the mothers of school-age children are in the workplace. So you can see immediately that there is more stress involved in being able to meet the needs of the family and yet also be a good employee.

So we are trying to add to the existing options, add to the existing law, rather than do something that takes away from it or continues this restriction that does not allow employers and employees to sit down together and work something out if the employee is asking for it.

So the first option is that our bill would allow an employer and an employee to say, I would like to work extra hours this week, or fewer hours this week, and make up next week, and get either time and a half pay, which is the option that the employee can always ask for, or time and a half time, which also can be banked and put together up to 240 hours if the employee then would like to work something out where he or she could take off more time of an extended period and still have the basic pay scale that he or she depends on for the family income.

The second option would allow the employer and the employee just to work out customized hours such as we have in the Federal system, where you can work extra hours, 10-hour days for 4 days, and then take Friday off and have a 3-day weekend every other weekend. That is an option that many Federal employees have, and they really like that, and they like that flexibility. We would like to be able to offer that to hourly employees to be able to have as an option.

And the third option would be that nonexempt employees, hourly employees, would be able to voluntarily work overtime in order to have flextime on an hour-by-hour basis.

So that basically, we are just putting more options on the table, and we are adding one more week into the flexibility; rather than making that have to be within a one-week period, it would be within a 2-week period.

And let me mention that because of concerns that were raised in the early stages of this bill by unions that this would in some way encroach on their ability to collective bargain, that is also exempted out of this bill so that a collective bargaining agreement will not be abrogated by this law; it will prevail.

So I think we have tried to address the myriad of concerns that you have raised and others have raised in an effort to really provide options in the workplace and the needs of today that we believe will make life better for families, will take much of the stress off a family that has two working parents and also allow employers and employees, if there is not a prevailing union contract, to be able to work things out among themselves.

Mr. Chairman, I thank you for your leadership in holding these hearings and letting us look at these options, and I want to say that the person who has been the real mover in this and who deserves a lot of the credit is John Ashcroft, the Senator from Missouri, who unfortunately could not be here today, but he is going to come and testify before you at a later time. I wanted to start the ball rolling on his behalf, because he has been a Governor, and he has worked with many of the options that we are talking about in his State. I have worked with them in my State; as State treasurer, my employees were allowed to have comp time. We did not even have the time and a half requirement, which is even better for employees, but we did have hour-for-hour comp time, which a number of employees used to be able to meet their family responsibilities. It worked very well, as it has in the Federal system, and I would just like the hourly employees of our country to have the same opportunities that those who are exempt now have.

Thank you.

[The prepared statement of Senator Hutchison follows:]

PREPARED STATEMENT OF SENATOR HUTCHISON

Mr. Chairman, I want to thank you for conducting this hearing and giving me this opportunity to speak on behalf of S. 4, the Ashcroft-Hutchison Family Friendly Workplace Act. I also want to thank you for your cosponsorship of the bill, and I want to take this opportunity to thank Senator John Ashcroft for his leadership on this bill. While he is unable to testify today, I know that he looks forward to doing so during your next hearing on this issue.

Mr. Chairman, when I speak with working families throughout Texas, and I ask them how they are coping with the growing and competing demands of workplace and family, I hear a lot of different stories, as I am sure you do from your constituents in Ohio. I hear from workers who give up the security of a steady paycheck to be able to start their own small business and who need to be able to deduct the cost of their health insurance. I hear from two-income working parents trying to find and pay for quality day care for their children, and who could do so with an additional per-child income tax credit. And I hear from single-income parents struggling to make ends meet, and who asked for and starting this year will be able to take advantage of the homemaker IRA, a bill I introduced last year to allow stay-at-home spouses to save for their retirement in the same manner as their working spouses.

But most of all, Mr. Chairman; I hear from families who just can't seem to find enough hours in the day. Parents who not only work full time, but who might also be attending school to remain competitive in the workplace, or who are caring for an elderly parent, or volunteering in the community, or perhaps all of the above—all while trying to find the time to properly raise and nurture their children.

Mr. Chairman, while we in Congress can and are working to give families relief in the area of taxation and regulation, unfortunately we cannot expand the day beyond 24 hours. The Family Friendly Workplace Act, however, does the next best thing . . . it will give America's roughly sixty million hourly wage workers the flexibility to craft work schedules that will help them find the extra time they need for family, personal, and community commitments.

As you know, under the provisions of the Fair Labor Standards Act of 1938, workers paid by the hour, or so-called "non-exempt" employees, may only work 40 hours in a week at their normal rate of pay. Additional hours worked, either at the request of the employer or the employee, must be paid at the overtime rate of time-and-a-half. Because it is so expensive for their employers, less than 20 percent of non-exempt employees work overtime in an average week. Of those who do work overtime in a given week, they invariably must work at least a full 40 hours the following week in order to keep their jobs and maintain their incomes.

Mr. Chairman, this law was crafted during the height of the industrial age and in the wake of the great depression to protect workers from abusive conditions, and at a time when only 16 percent of mothers worked outside the home. That was then.

Now, employers are much more attuned to the needs and preferences of their employees. Communications technology and broad social forces are changing the way in which we define the workplace and, indeed, work itself. And, in this era of two-income families, a full 75 percent of mothers with school age children are now in the workforce. Rather than protect workers, this new deal law has increasingly become a straight-jacket for employees seeking ways to make that 24 hours go a little farther.

The time has come to give non-exempt employees the same flexibility that salaried, or "exempt" employees presently enjoy and that Federal employees have enjoyed since 1978. By untying the hands of employers and employees who may wish to agree to mutually

beneficial scheduling arrangements, but who are prohibited from doing so under existing law, the Family Friendly Workplace Act will ensure that the Federal Government will no longer stand in the way of achieving an optimal work environment for each particular workplace and each particular worker.

As an initial matter, let me make clear that the bill expands, but does not replace the existing law requiring overtime pay for overtime work. For those employees who are asked or who are required to work more than 40 hours in a single week, they will always have the option of receiving overtime pay, period. This bill simply affords the employee additional options, upon the mutual agreement of the employee and employer.

The first option the bill will offer is for the employee working overtime to receive paid time off, at a time-and-a-half rate, rather than time-and-a-half pay. Thus, an employee required to work 50 hours in a week, for example, could choose to receive a 40 hour paycheck and then bank 15 hours of paid time off.

Up to 240 hours of such "comp time" could then be banked by the employee, and could be used at any time that does not unduly disrupt the employer's business—the same standard as that found in the Family and Medical Leave Act. But unlike the FMLA and some recently-introduced bills to expand the FMLA, our legislation does not purport to dictate the reasons for which an employee could take time off. Our bill would allow an employee to take that banked time off for any reason whatsoever: to attend a PTA conference, to get the car fixed, or to just take an occasional day off. Moreover, should the employee later decide that he or she needs the money instead, the banked time may be cashed-out at the rate of pay in effect when it was accrued or the pay rate in effect when it is cashed-out, whichever is higher. Thus, the employee has absolutely nothing to lose by choosing comp time as an option to help juggle competing responsibilities.

The family friendly workplace act also addresses those 80 percent of non-exempt employees who are not normally required to work overtime. The bill will allow those employees to create a customized bi-weekly work schedule so that, for example, a worker could work 9-hour days and take every other Friday off, with pay. (This particular schedule is in fact very popular among Federal hourly workers.) Again, the worker is protected, because if the employer requires more than 80 hours of work over two weeks or additional hours not in accordance with the agreed to biweekly schedule, that additional time would be considered overtime and subject to time-and-a-half pay.

Finally, non-exempt employees would be allowed, again upon agreement with the employer, to voluntarily work overtime in order to bank so-called "flex time" on an hour-for-hour basis. Thus, an employee could choose to work overtime, bank that time, and use it at a later date for any reason so long as it does not unduly disrupt the employer's business operation.

These added scheduling options will have a host of benefits for employers and employees alike. Three fourths of Federal employees say they support comp and flex time, say they have more time to spend with their families as a result of these options, and say that flexible schedules have improved their morale and productivity. A

democratic polling firm found recently that the same proportion of Americans, 75 percent, favor expanding these options to all private sector employees.

An additional benefit of the legislation is that hourly wage workers in seasonal or cyclical industries who may not have extensive vacation or other benefits will have annual disruptions to their income reduced or eliminated. During busy periods, when overtime is required, comp time can be accumulated (at a time-and-a-half rate) and used during those slower periods when an employee might otherwise be out of a paycheck.

Mr. Chairman, a reporter recently asked me, "why would anyone be opposed to this bill?" I did not have an answer to that question. Employees like it; employers like it; and families will be strengthened by it. The only real concern I have heard voiced about the bill is that some employers who now pay overtime may somehow coerce employees into taking hour-for-hour flex time instead of receiving time-and-a-half pay.

I think anyone who has examined the bill carefully must conclude that it adequately protects employees lagainst this potential abuse. First, as I said, an employee required to work overtime will always have the option of getting paid overtime pay. No employee may be required to participate in any flexible work schedule. Should an employer attempt to convince his or her employees otherwise, using any direct or indirect form of intimidation or coercion, that employer will be subject to severe fines, back pay, and even criminal prosecution and imprisonment. In fact, Mr. Chairman, the potential penalties for employers are stricter under this bill than they are under the Fair Labor Standards Act.

If unions are concerned that this bill will infringe on their influence, they should not. The bill does not in any way supplant or replace any collective bargaining agreement to the contrary.

In short, the Family Friendly Workplace Act presents a win-win situation for both workers and their employers. Employees get time off, with pay, when they need it, and employers get a happier, more productive workforce. But most importantly, families and communities will be strengthened because parents will have the flexibility they need to spend more time with their children, to volunteer in the community, or to do whatever it is they need or desire to do to improve the quality of their lives and the lives of those around them. This is sensible legislation that the American public is requesting, and I urge your subcommittee and the full committee to give it timely, favorable consideration.

Thank you very much for giving me this time today, and I would be happy to answer any of your questions.

Senator DEWINE. Senator Hutchison, thank you very much. Your last statement anticipated my question. You and I both have had the privilege of serving our States in elected office, and I had the opportunity as lieutenant Governor in Ohio to see how this was used at the State level and to see how employees in fact used the comp time. It was something that I found was very popular among State employees. In Ohio, they could and still do take it as time and a half. You tell us that in Texas, it is one-for-one?

Senator HUTCHISON. Yes. It has been one-for-one.

Senator DEWINE. But even in that case, your experience was that it was utilized quite extensively?

Senator HUTCHISON. Absolutely. It was, and it did allow people to have that flexibility, and I think the workplace was much more smooth because you did not have that fear on the part of a parent who could not get away to attend that parent-teacher meeting or the doctor's visit.

Senator DEWINE. Thank you.

Senator Wellstone?

Senator WELLSTONE. Thank you, Mr. Chairman.

Senator Hutchison, first of all, my understanding is that your bill goes to an 80-hour, 2-week time frame, so an employer could require an employee to work 50 hours 1 week without any overtime if in fact then you moved to 30 hours the next week. Is that correct?

Senator HUTCHISON. No, Mr. Wellstone, it is not. We specifically say that an employer cannot force an employee to work more than 40 hours. That is absolutely in the law. And in fact, we have very stiff penalties if there is a violation of an employer forcing over the 40-hour work week.

Senator WELLSTONE. But if it were within an 80-hour period, if an employee were asked in one given week to work more than 40 hours, if it were the flextime, would there be an hour and a half premium paid, or not?

Senator HUTCHISON. No. Let me say that if an employer said to an employee, I would like you to work 50 hours this week and 30 hours next week, then the employee would have the absolute option to say, Fine, if you want me to work 50 hours, you will pay me time and a half overtime; or the employee could say, Fine, I will work 50 hours if you will give me time and a half time to put in the bank, or eventually to cash in.

The employee will always have the right to ask for the time and a half overtime over 40 hours.

Senator WELLSTONE. But the flextime under this piece of legislation is one-to-one; it is not one-and-a-half-to-one; is that correct?

Senator HUTCHISON. If the employee says that that is what he wants to do—if the employee comes to the employer and says, I would like to work 50 hours this week, and I would like to bank that 10 hours into a bank for the ability to work, then, 30 hours next week, or I would like to work in an 80-hour week, I would like to work 10 hours Monday, Tuesday, Wednesday and Thursday and take off all of Friday, then if the employer says okay, that can be done under this law.

Senator WELLSTONE. But the employer does not have to offer comp time under your law, right?

Senator HUTCHISON. Over 40 hours, the employer does have to—if the employee says, I want time and a half for every hour I work over, the employer has to do it. The employer cannot force this. That is what we were very careful to provide.

Senator WELLSTONE. We need some clarification as to whether the employer in fact has to offer the comp time or whether it can be flexible time, because there is a difference.

Senator HUTCHISON. It is voluntary. If the employer and the employee agree on the flextime, the hour for hour, where the employee

says, I would like to work 10 hours Monday, Tuesday, Wednesday, Thursday and then have Friday off next week, and the employer says okay, then that is an option that is here. But the employer is never able to force an employee into any of this. This is an option. It really allows the employee to ask for this from the employer and for them to voluntarily agree, and there are very stiff penalties if the employer is found to have coerced the employee.

Senator WELLSTONE. But the issue here—are we on a 5-minute limit, is that it, Mr. Chairman——

Senator DEWINE. How much do you want?

Senator WELLSTONE. No, no. There are other people. Maybe we can have another round.

Senator DEWINE. I have not turned it off yet, Paul.

Senator HUTCHISON. I am working on Mr. Wellstone to be a cosponsor of this. [Laughter.]

Senator WELLSTONE. There are two issues here. The employer has the option as to whether or not it is comp or flextime, in which case, within the 80-hour framework—given what is going on right now in this country in a lot of areas of work, the question becomes how voluntary is this, really, for employees vis-a-vis their employers, and then if the employer has the option only on the flextime and not the comp time, then what you have done is turned the whole idea of the 40-hour work week and then the notion of time and a half or overtime on its head. That is the problem.

Senator HUTCHISON. Well, Mr. Wellstone, I think that what you are saying is that employers are going to misuse their employees. If they are going to misuse their employees, they are going to do it in a 40-hour work week as well.

What we are saying is that the employee will have the option of asking for time and a half in time rather than time and a half in overtime pay, but the employee will never be forced to take the time and a half in time. The employee always has his or her right for exactly what he or she is entitled to, and if one hour over 40 hours is asked by the employer, and the employee says, I want time and a half for that hour, he gets it. And if the employer does not give it to him, there are stiff penalties.

What we are trying to do is give employers and employees more opportunities to voluntarily work for the employees' benefit and leeway and opportunity, and by stiffening the penalties for any kind of coercion—I mean, we are including jail time if an employer does coerce, to send the signal that that will not happen. But I think you have got to have some confidence that employers will want to work with employees, and if you do not have that confidence, then that same person could be just as easily abused in 40 hours as in a 2-week period.

Senator WELLSTONE. Well, Mr. Chairman, there are others here, and we may have another round of questions. I have confidence in the rationale and the history of the Fair Labor Standards Act. I have confidence in the reason why we went to a 40-hour week and why we have some protection for workers when it comes to overtime, and I do have confidence in some employers.

But I have spent entirely too much time with farm workers and entirely too much time with wage earners in this country, in a whole lot of workplaces that are not unionized, to know full well

that there is a real danger of abuse of power here. It is not exactly an equal relationship. And you had better believe that I worry about where this is going when I see one of the most important things that we have had as part of our labor law essentially being dismantled here.

Senator HUTCHISON. Well, I think that there is a different atmosphere today than there was in 1938, which is why I think that we can address some of these issues like 75 percent of mothers of school-age children working, look at their concerns and ask them directly. And I would just ask you to talk to some of the Federal employees who have been able to use this flextime, and really ask them straight out how they feel about it and try to get the input, because everything that I have seen shows that they really like it and that it is a pressure relief valve for them.

Senator WELLSTONE. I appreciate your focus on the mothers, and I think there may be some comment around here, because I think many of us are concerned about the concerns and circumstances of working women and their families, and there is much that we could do on leave policies, there is much that we could do on health care, there is much that we could do to provide protection for part-time workers and temporary workers. Maybe we can expand this, and then we will really have something that is real important to those women.

Thank you, Mr. Chairman.

Thank you, Senator Hutchison.

Senator HUTCHISON. Thank you.

Senator DEWINE. Senator Enzi?

Senator ENZI. Thank you, Mr. Chairman. It is a pleasure to be on your subcommittee.

I am a certified professional in human resources, so I have filled out the forms, I have worked with the employees. I would also mention that I am a small businessman. Now, in Washington, a small businessman has a completely different definition than what I really am. My definition of small businessman does not deal with whether it is 500 employees or 100 employees or 50 or 25 or 10. My definition of small businessman is that if you are the person who sweeps the sidewalk and cleans the toilets and waits on the customers, you are a small businessman. That is a different level of flexibility than some of the big businesses have, where they can do some of the very sophisticated kinds of job training. If everybody has to do all the work, there is less flexibility.

But one of the possibilities for flexibility that these people need is provided by the legislation that Senator Hutchison is talking about this morning, and I am pleased that that is being presented, and I am pleased to be an original cosponsor of it. I do think that it will provide an opportunity for people to have more time with their families.

There have been some drastic changes in the workplace, and I appreciate that you have brought those out—the computers, the high-speed modems, the cellular phones, the pagers, the fax machines, and telecommuting make some big differences, where there will be more in-home businesses.There are more mothers working. Some of that is by choice I know that in a lot of families, though,

one of the parents works to pay the bills, and one works to pay the taxes.

An awful lot of people are working two jobs to make ends meet, and usually, each person is often working two jobs, and the reason they are working that second job is because they cannot get extra hours at the job that they really prefer. They work for another company which also is making sure that they do not have overtime.

The downsizing problems today are leading to less flexibility as well as families making less money than if they were doing the jobs that they prefer to do. There has been a huge increase in temporary positions in this country, again, so that there is not the need to have an additional time by an individual in the company, and what that has done is take away flexibility from families.

I do think that the flextime provision of this legislation will be one of the most used provisions, one of the most requested provisions by the employees. For the employer, unless he has a situation where their workload is not a steady workload—and that is becoming more common in the workplace today, too—it will not be as often requested by the employer as it will be by the employee, but it will be accommodated by the employer.

So I appreciate your comments about how it works on an 80-hour week. I do think that it will provide the kind of flex that people need. I have never bought into the notion that Federal employees ought to have more flexibility than those in small businesses or even the medium or large businesses. I do know of some companies in Wyoming that used to be able to do that sort of thing—they used to be able to provide some flextime—and they cannot do it anymore, and it is the employees who are upset. It is the employees who want to make this change again. It is the employees who are the driving force behind making the change.

So I thank you for your comments.

[The prepared statement of Senator Enzi follows:]

PREPARED STATEMENT OF SENATOR ENZI

Thank you Mr. Chairman. I am proud to be an original cosponsor of S. 4, the Family-Friendly Workplace Act, which amends the Fair Labor Standards Act of 1938. I am a strong supporter of both employee and employer rights—always have been. Providing employees with flexible work schedules and increasing choices and options for their time at work—and quality time with their families—makes good common sense. The addition of flexibility will also help businesses with small work forces—which is also a priority of mine.

The Fair Labor Standards Act of 1938 has been beneficial. Our society, however, has braved a storm of changes since this Act was passed 59 years ago. Just look at how our nation's work environment has changed since 1938. We now have personal computers, high speed modems, cellular phones, pagers and fax machines. American suburbanization has created audio and video conferencing, satellite offices, and most importantly, "telecommuting." There has been an influx of women into our nation's workforce since 1938. According to the Bureau of Labor Statistics, 76% of mothers with school-age children now work. Moreover, 63% of mother and father households now see both parents working outside of the home—one works to pay the bills, while the other works to pay the

taxes. Despite such demographic and technological advancements, American employers and employees remain tethered to a 59-year-old Act that forbids them from crossing that "bridge to the 21St Century." This is why the Fair Labor Standards Act of 1938 yearns for a modern-day fix.

Some people are now working two jobs to make ends meet—the second at less pay than the first since labor costs are being held down by avoiding overtime. These jobs are generally inflexible and provide the employee with little or no family-time. In addition, a large portion of these jobs are "temp" positions—which, once again, drive down the cost of paying overtime wages. The Family-Friendly Workplace Act provides the time off employees desire, while keeping the option of overtime wages open. It is often the case, however, that people can bank time easier than money. Once they get the money—they spend it. The average worker never sees the money anyway. I can tell you from experience that this generation isn't interested in overtime they want the time off. The Family-Friendly Workplace Act goes the extra mile by giving them the ability to choose either one.

This important legislation simply permits voluntary agreements between labor and management to utilize a more self-serving work environment—labor gets choices and management gets higher productivity and happier workers. S. 4 amends the Fair Labor Standards Act of 1938 by providing compensatory time off that would allow employers to offer and employees to CHOOSE to use compensatory time for school and family activities and a whole range of other personal reasons. Under S. 4, employees would have the right to choose compensatory time instead of cash wages at a rate not less than one and one-half hours of each hour of overtime worked. Employees would be able to accrue up to 240 hours annually and have the opportunity to "cash-out" their accrued hours every 12 months. That's a lot of time we should be spending with our kids a true investment in our nation's future.

I am baffled at how anyone could possibly oppose the choices and options provided for under S. 4. In fact, federal employees have enjoyed flexible work schedules since 1978 19 years! I have never "bought into" the notion that federal employees should somehow be blessed with greater flexibility in the workplace than private sector employees. I am fully confident that the provisions in S. 4 will not only grant our nation's workforce with choices and options that are family-friendly, but safeguard both employers and employees from the possibility of abuse. We must take action now to help employees balance the demands of work and family lives. I believe that S. 4, the Family-Friendly Workplace Act, is an important first step in helping our nation's working parents do just that.

Senator DEWINE. Thank you, Senator Enzi.

Senator Kennedy?

Senator KENNEDY. Thank you very much.

We welcome you, Senator Hutchison, and thank you for taking the interest in this particular proposal and for making the presentation today.

I will just say at the outset that I think we have a real opportunity—I appreciate Senator Enzi's discussion about what is happening out in the work force. I do not think there is any question

that workers are being squeezed. We all read about how the roof is coming off on Wall Street, but it is not coming off on Main Street. That is why we fought for an increase in the minimum wage, even though there was a substantial group in the Senate who were opposed to it. That is why we have tried to make sure that workers, even part-time workers, will be able to participate in health care and health insurance and pensions. But that is another issue for another time.

We have a real opportunity to do something for families by extending the Family and Medical Leave Program. We will have the introduction of that program by Senator Dodd, who was the principal author of it, but we have a real opportunity to do something for families. That includes 13 million workers. It is working for companies of 50 or more employees. The commission, which is bipartisan, said that. We could pass that very, very quickly, and it would permit 13 million Americans to be able to take some time off when a child is sick or in the case of the adoption of a child or a serious illness in the family.

The President has talked about the 24-hour provision in addition, for parent-teacher meetings or for medical appointments. We could build on something that would make a major difference in terms of families. We cut that off at 50 employees—only half of the work force is affected—so we could do something there.

So I would hope that as we are looking at how to really try to help and assist family members, we will also consider those.

I must say with all respect that I draw the conclusion that this proposal provides flexibility for the employer, not for the employee. It is flexibility for the employer. Many of the things that you have identified, like being able to take an hour or two on a Friday and being able to make up the time on Monday, they can do now under the 40-hour week. They can do that now. You will hear testimony from workers at TRW where they work 10 hours, 4 days a week. You can do that now.

So there is flexibility within the system. What we basically established, and it was good 40 years ago, was that we are not going to have mothers in this case working 15 to 18 hours a day at the discretion of the employer; and we are not going to go back to the time of extraordinary exploitation of workers. Maybe that was old and bizarre at that time, but I think it is untenable even today, quite frankly. And you do not have the protections. The idea that you are saying that, well, they just want to take off on Friday and come back on Monday—they have to get a certification that it is not going to interrupt the production and so on. This is right back in the hands of the employer. They do not have that flexibility guaranteed. They do not have it guaranteed.

And when you have the Department of Labor today saying there is not adequate protection for people at the lowest level of the economic ladder, in the sweatshops, in garment factories, which has just been exposed all over this Nation, and when in at least half of those conditions, people are not even today able to get the adequate minimum wage or other protections, to just say, well, we are going to give them one more responsibility, and those nice employers who are exploiting those workers in those places, we are sure are going to do the right thing. We are not going to give you any

more inspectors to go out there—as a matter of fact, last year, when we were looking for more inspectors here in the budget resolution, we could not get any more inspectors. And there is nothing in your proposal that says you are going to request additional funding to make sure there will not be that exploitation.

So it just seems to me, Senator Hutchison, that I would like to give American workers what we have, Federal employees, on health insurance. It is so interesting when you say, well, the Federal employees have flextime, and we want to do the same for them on flextime. Well, we have Federal insurance, too, for 10 million. Tell those workers back home in this country about the kind of coverage that we have and only pay $111 a month as a premium.

The fact is that Federal employees have paid vacations and other benefits, all of which have been worked out as a result, in many instances, of unions for the Federal employees. So to suddenly say that they have flextime, and we want to do it for the neediest workers out there in these sweatshops is a big jump, I think, quite frankly, Senator Hutchison. And I just hope that as we go through this, we will be able to find out who is really getting the benefit of this, whether it is just going to be the employers, which is the way I read it—maximum flexibility for the employers so that these employees are going to do their bidding and minimum in terms of the employees.

The other point I just want to mention, because I know we have to move along, is that as I understand it, the question of exempting on collective bargaining agreements applies only to 9(a) of the National Labor Relations Act, so therefore, the railroads, airlines and construction are not covered and would be preempted under your provisions in any event. That is a particular detail, and I am not interested in trying to flyspeck today.

I might submit some other general questions so that we can begin the debate and discussion.

I want to thank you very much. I have great respect for you, and I know you have thought about this and given it a lot of attention, and I am grateful to you for taking the time and being willing to testify on this matter because it is a matter of importance. We are always grateful to hear from you and value very much your representations here.

Senator DEWINE. Senator Jeffords?

Senator HUTCHISON. If I could just respond briefly.

Senator DEWINE. Yes, of course.

The CHAIRMAN. I would be happy to let you respond on my time.

Senator HUTCHISON. Thank you. First of all, I want to correct one thing that the Senator said, and that is that under the Fair Labor Standards Act, an hourly employee cannot work 10 hours, 4 days, and then take the following Friday off of the next week—that is the problem—or 9 hours for 2 weeks and have every other Friday off as a Federal employee can. That is the flexibility that we are seeking. And if you believe that every worker should have the same rights as Federal employees, let us take the first step and give them this flextime, and let us see if it works. It does not cost anything, and it is voluntary, and we do have heavy penalties for people to be able to exercise their rights if their rights are violated.

We use the same standard in our bill as the Family and Medical Leave Act does with regard to disruption of the work, so I think we are doing everything we can to accommodate concerns. I believe that we are protecting the union interests if there is collective bargaining, but mostly we are addressing a reality, which is that 75 percent of the mothers of school-age children of this country are working. And if we can provide a little more flexibility that is totally voluntary for employers and employees, and we do everything on earth to show that it is completely voluntary, and if you believe that people are trying to do what is best in our country with employers and employees and that we have protection for those employers who would violate those parameters, then I think we need to open up and see if it works. And if there are abuses, there are remedies, and that is what we have provided for, and if the abuses abound, then let us address it again—but why not try something that would be a release valve for these pressured working parents to allow them to have the income stream that they need, but also to have the flexibility if they are able to sit down with their employers and ask for that flexibility that we give them that safety valve.

Senator DEWINE. Senator Jeffords?

The CHAIRMAN. I would like to say, Mr. Chairman, that as the chairman of the full committee, my hope this year is that when the Republicans introduce a bill, it does not automatically become a bad bill against the workers. I am a cosponsor of this legislation, and I would hope that we could work together, especially on the Medical Family Relief Act, of which I was one of the original sponsors, to see whether or not these bills can be combined, because our hope here is to get us into looking at the modern world, the modern workplace, all the problems it has, and to find ways to make it more friendly for both employers and employees. I think Senator Hutchison did a marvelous job of explaining that aspect of it.

I am going to take a kind look at the Democrat's proposal for family and medical leave and hope that we can sit down and work out a bill that will be very favorable in all respects to employers and employees.

Thank you, Mr. Chairman.

Senator DEWINE. I am going to take the remainder of my 5 minutes which I did not use to ask a couple of questions, Senator Hutchison.

Isn't it true when we are talking about the flexible work week—you were talking about the 80 hours—isn't it true that you do not even get to that unless there is an initial agreement between an employee and an employer? If the employee does not want to be involved in that, the status quo of the law today prevails; isn't that right?

Senator HUTCHISON. That is right.

Senator DEWINE. And isn't it true that all your bill does is allow the employer and employee to do something that, if they both want to do it, Federal law currently prohibits them from entering into a voluntary agreement to do?

Senator HUTCHISON. Mr. Chairman, I am glad that you emphasize that point because I think that that does put it in perspective. In most instances when I have talked about this bill, people have

said, "What? Do you mean an employer and an employee cannot do this now?" I mean, this is common sense which is out there on the other side of the beltway, but somehow is not as prevalent here inside the beltway.

So I am glad you ask that question because it is absolutely true—the law today prevails if the employee wants it to prevail.

Senator DEWINE. So in the example that has been given, if you go to a 50-hour work week, a 50 and a 30, you would only go to a 50 and a 30 if both parties prior to that had agreed that that was what was going to happen.

Senator HUTCHISON. That is right, and if both parties do not agree, then the employee has the absolute right to say: I worked 50 hours; I get time and a half overtime.

Senator DEWINE. Senator Dodd?

Senator DODD. Thank you, Mr. Chairman. I do not want to hold it up, and I gather Senator Kennedy raised the issue of the Family and Medical Leave Act.

Senator DEWINE. Very eloquently, yes.

Senator DODD. There are a couple of bills—one which I have offered which would lower that threshold from 50 to 25. We had a bipartisan commission, that spent 2 years on it—a very good commission, by the way, and people really worked very hard on it. They did surveys of employers and employees. I was quite stunned by the results because I would have assumed at the outset, given the difficulty of an employer having to accommodate a new law, that you would anticipate some problems with it.

In fact, the surveys came back—and I will put this in the record, Mr. Chairman, because I think I am right—about 96 percent of the employers indicated no difficulty whatsoever at all with the law, which surprised me, frankly. I would have expected a lower number given the fact that, as I say, it was a new law and the awkwardness of accommodating that into the workplace.

On the basis of that—just for historical purposes, we originally offered the definition of small business as 25 and then raised it to 50 as part of a compromise when the bill was passed. Frankly, we had the votes to put it at 25 when we passed the bill in 1993, but I had made a commitment to Dan Coats, Kit Bond and Arlen Specter, all of whom were tremendously helpful on this legislation, and I felt I should stick with the commitment we had made, so I left it at 50 even though we had the votes to move it to 25 in 1993. Four years ago today, in fact, that became the law of the land.

So I would like to have my colleagues consider bringing it down. It would pick up 13 million additional employees in this country who are presently not covered. I must say, Mr. Chairman, particularly in the smaller business, I have less concern, because where people know each other, they are more inclined to accommodate the needs of people than they are in larger facilities. But as we all know, there are examples where that does not happen, and the pain incurred by families when they are unable to make a choice between their family needs and the workplace.

I would point out that Senator Murray will also be proposing an idea that would not expand the time at all, but would add the academic setting. This is something that has attracted a lot of attention with PTAs, nationally, and so forth, and I presume it is a mat-

ter that we are going to want to discuss. I am sure our colleague from Texas has some sympathies with this and may even have some ideas where parents want to spend more time, and we all understand the value of parents spending some time, at a school when the need arises, 24 hours, it would be a part of that. And as I say, I am sure there will be some controversy associated with it. But I must say there is a lot of merit in the idea of providing working parents the opportunity during the academic year with full notice, a month's notice in advance to the employer, to get a 24-hour period where they would be involved as a teacher aide, for PTA meetings, or available for parent-teacher counseling and so forth with regard to their children.

I would just raise those issues for any comment you may want to make, Kay—and you may have already done so, and if so, I can read your comments later. I appreciate, Mr. Chairman, the opportunity to express those points.

Senator HUTCHISON. Well, I would just say that I think this bill is really a stand-alone from yours, and I do not think they necessarily need to be mixed, although the chairman of the committee has said they might be looked at as a package.

Nevertheless, this one has no minimum number of employees; it will affect anyone. It is just voluntary across the board, and it allows one more option for the parent who is an hourly employee to be able to ask the employer for some flexibility, either in time in lieu of overtime pay, time and a half time, time and a half pay, or in working flextime over an 80-hour, 2-week period if it is acceptable to the employer and if the employee asks for it.

I think these options can do nothing but add to the ability of families to have a relief valve from the stress of having two parents working. I certainly think that looking at your bill is something that everyone should do, but I do not think it is mutually exclusive in any way to this bill passing, and I think we can find some common ground on a bipartisan basis for allowing these kinds of options that Federal employees now have and that have worked very well, and that many State Government employees are now able to do. It has worked, and it is just time for the private sector to catch up.

Senator DODD. Thank you, Mr. Chairman.

I have been notified by staff, to protect Senator Coats and myself, that Family and Medical Leave is under the jurisdiction of family.

Senator DEWINE. That is absolutely correct.

Senator DODD. Thank you, staff.

Senator DEWINE. Senator Wellstone?

Senator WELLSTONE. Senator Hutchison, I want to let you go, but I have just two very quick final points. I really appreciate your emphasis on families and work, and I thank you for being here. I think you have done just a superb job. I should have at the very beginning said "Welcome," but after hearing you, I think you have been very impressive.

I think the concern that we have—there are a number of concerns, but just speaking for myself—is this whole question of voluntary and what it actually means in the reality of the workplace. In theory, people could voluntarily agree to $2.50 an hour for a

minimum wage, but we have minimum wage protection, and that is what this Fair Labor Standards Act is about. So I think we are going to have to really zero in on that and let us see.

Senator HUTCHISON. From the line of your questions, Mr. Wellstone, I understand exactly what you are trying to prevent, and if you will look at our bill, and if there are other things that you think we can do to make sure that it is truly voluntary for the employee, let us work together, because I think this is an added option, and it takes nothing away, and that is exactly what we intend for it to do. And if we can meet your standards, then I hope you will work with us, and I still hope you will sign on and be a cosponsor.

Senator WELLSTONE. Thank you, Senator.

Senator DEWINE. On that happy note, we will conclude.

Senator Hutchison, thank you very much.

Senator HUTCHISON. Thank you.

Senator DEWINE. I will now ask the second panel to come up, and I will introduce you as you are coming up.

The first witness on the second panel will be Sandra Boyd, who is assistant general counsel to the Labor Policy Association. She also chairs the Flexible Employment Compensation and Scheduling Coalition, lectures frequently and has authored numerous articles and books.

Our second witness is Mr. Michael Losey, who is president and CEO of the Society for Human Resource Management. Mr. Losey has over 28 years of management and executive-level experience and is a frequent speaker, author and spokesperson on human resource issues.

Our third witness is Sallie Larsen, who is vice president of human resources and communications at TRW Systems Integration Group in Fairfax, VA. She has over 20 years of management experience with TRW.

Our fourth witness on this panel is Christine Korzendorfer, who is an executive assistant for TRW Systems Integration Group's Proposal Operations. She is a working mother and has offered to share her thoughts and concerns about flexible work options.

We will start with Sandra Boyd. I will ask the panelists to try to keep your comments to 5 minutes. That will give us the opportunity to have some good questions, we hope. Thank you.

Ms. Boyd?

STATEMENTS OF SANDRA J. BOYD, ASSISTANT GENERAL COUNSEL, LABOR POLICY ASSOCIATION, AND CHAIRMAN, FLEXIBLE EMPLOYMENT COMPENSATION AND SCHEDULING COALITION, WASHINGTON, DC; MICHAEL R. LOSEY, PRESIDENT AND CHIEF EXECUTIVE OFFICER, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, ALEXANDRIA, VA; SALLIE LARSEN, VICE PRESIDENT OF HUMAN RESOURCES AND COMMUNICATIONS, TRW SYSTEMS INTEGRATION GROUP, FAIRFAX, VA; AND CHRISTINE KORZENDORFER, ADMINISTRATIVE ASSISTANT, PROPOSAL OPERATIONS, TRW SYSTEMS INTEGRATION GROUP, FAIRFAX, VA

Ms. BOYD. Thank you. First of all, let me say that my interest in workplace flexibility is not just a hypothetical; it is very personal as well. I appear before you not only as an attorney but as a wife and mother of two young children, and I can personally attest to the benefits of being able to work in an environment that permits flexibility.

My current job allows me to not only fulfill my job responsibilities but to volunteer at my son's school, go with my daughter on field trips, take care of the kids, go to the doctor and all the other responsibilities that go along with being a parent. Most days, at least, I feel like I do a fairly good job at striking that very delicate balance, but I am mindful, however, that my ability to have this kind of flexibility is in large measure because I am a professional employee, and I am exempt from the overtime provisions of the Fair Labor Standards Act.

Employers, as you will hear, have far fewer options available to their nonexempt work force because of the restrictions in the FLSA.

The FLECS Coalition, which I am also here representing, is dedicated to modernizing the Fair Labor Standards Act to provide employees greater workplace flexibility. In short, we believe employers and employees ought to be able to reach agreements on flexible schedules beyond the standard 40-hour work week and to bank compensatory time in lieu of cash overtime where such arrangements are mutually beneficial. Salary basis reform for white collar employees would also increase flexibility options.

Contrary to what you may hear, employers interested in true workplace flexibility are not trying to save money or avoid overtime pay. Real workplace flexibility works only when employers and employees can reach mutually beneficial arrangements. Choice is key.

The employers I represent know that providing flexibility in the workplace is a win-win. For employees, it means more control and an ability to strike that balance between work and personal demands. For employers, increased workplace flexibility has bottom line benefits as well, such as increased employee retention and productivity gains.

As a recent Ford Foundation study concluded: Restructuring, the way work gets done to address work-family integration and lead to positive win-win results—a more responsive work environment that takes employees' needs into account and yields significant bottom line results.

While many companies have implemented creative workplace programs, they are limited in what they can do because of the restrictions in the Fair Labor Standards Act.

The FLSA is an obstacle to workplace flexibility because while it provides some fundamentally important employee protections, with which we do not disagree, it is rigid in many respects.

The FLSA requires that all overtime-eligible employees—and that is most of the work force—be paid at least the minimum wage and receive cash overtime for hours worked in excess of 40 in a work week. This is the case even if the employee would prefer, for example, to bank that overtime in the form of comp time or flex the schedule beyond the work week.

An employee cannot waive his rights under the FLSA under any circumstances, not even through collective bargaining. An employer faced with a request by an employee to trade hours between work weeks or bank overtime is faced with this untenable choice—be in compliance with the FLSA and say "no," or say "yes," be flexible, be employee-friendly, and expose your company to liability.

The 40-hour work week and time and a half overtime penalty provisions were devised in 1938 in large measure as a penalty to encourage employers to hire more employees. Needless to say, some 60 years later, the needs of many in the work force have changed since that period of time, and it is questionable whether this rigidity without alternatives really meets all of those changing needs.

As the chairman referred to before, a recent poll done by Penn and Schoen for the Employment Policy Foundation indicated that 89 percent of all workers want more flexibility, either through flexible scheduling or through the choice of compensatory time.

The results of the Penn and Schoen poll are certainly consistent with what FLECS members are hearing from their employees. Polling data aside, even if only a small minority of employees wanted more flexible scheduling or comp time off, then through their collective bargaining representative or individually, if they are not represented, they ought to be able to make those kinds of agreements.

In conclusion, let me commend the subcommittee for addressing this subject. It is very important to many workers' lives. While finding solutions to the needs of employers and employees seeking to increase workplace flexibility will not be easy, we believe that beginning the dialogue on this issue is a necessary first step. Lifting the current roadblocks in the FLSA to provide employers and employees more options, such as flexing the work week, banking comp time and salary basis reform, is a critical first step. Ensuring that employers and employees be permitted to voluntarily choose those options is critical.

Employers know that flexibility works, but only when it is chosen freely by both parties. For those employees who receive cash overtime and want to do so within the current FLSA framework, that choice must be honored.

A cautionary note is in order, however. The solutions to workplace flexibility must not be more complicated than the problem itself. The solution is too complex, and the requirements are too burdensome; employers will not offer it, and we will not have advanced the cause of workplace flexibility. On the other hand, employee protections must be in place.

The challenge is to strike a balance and develop legislation that the average small business owner can easily implement if they choose, and employees can understand. We believe this challenge can be met, and we look forward to working with all members of the subcommittee on this very important issue.

Thank you, Mr. Chairman.

Senator DEWINE. Ms. Boyd, thank you very much.

[The prepared statement of Ms. Boyd may be found in the appendix.]

Senator DEWINE. Mr. Losey?

Mr. LOSEY. Mr. Chairman, members of the subcommittee, good morning. I am Mike Losey, president and CEO of the Society for

Human Resource Management. This is a professional society, and it is the leading voice of the human resource profession in our Nation, representing over 80,000 professional and student members in over 430 chapters in many, many communities in our Nation.

I remind the committee, however, that these are individual members. We do not permit employers to join.

Thank you for the opportunity to share my experience as well as the experience of SHRM members from companies of all sizes and all industries. These people are virtually unanimous in the opinion of expressing a strong desire to update the Fair Labor Standards Act and update it to reflect the realities of today's work force.

Enacted, of course, in 1938, it is one of the Nation's oldest labor laws and has remained essentially unchanged since it has been established. It has, however, served our Nation and our employees well. However, to ensure its continued contribution to our global effectiveness, we must recognize that FLSA is outdated and in some cases even unfriendly to our Nation's businesses and their employees.

When the Fair Labor Standards Act was passed, as has already been highlighted by my fellow panelists, it was clearly Depression recovery-directed legislation. The unemployment rate was 19 percent when your predecessors debated this law almost 60 years ago. The emphasis was on creating jobs. A 50 percent penalty was imposed on employers who worked employees beyond 40 hours.

However, I will remind everyone that in 5 years, World War II brought the unemployment rate to the lowest of this century, to 1.2 percent. Subsequently, employers began providing health insurance, pension plans, and many other employee benefits, including better practices, in an attempt to recruit and retain needed workers.

And much more has changed. In 1938, fewer than 16 percent of married women worked outside the home. Today, we all know it is over 60 percent. And according to the U.S. Department of Labor Women's Bureau, and I quote: "Women are not only more likely to work outside the home today than in the past, but they also spend more time at work than did women in earlier years."

Today, employers are faced with growing national and international competitive requirements. They have got to attract the best in employees as well as attempt to moderate and control their expenses.

Despite wide-ranging and successful efforts by employers to increase our global competitiveness, employers have been limited because of the constraints by FLSA. We need your help to remove some of these obstacles, and we believe this can be done in a manner which truly provides flexible options for employees without adversely impacting their interests.

One example that we have already talked about is the FLSA as it relates to compensatory time off for private sector employees. We are pleased that the Senate is working to address this issue through the introduction of Senate bill 4, the Family Friendly Workplace Act. While public sector employers are permitted to allow employees to bank compensatory time off in lieu of overtime pay, private sector employees do not have this option. In fact, as

has been stated this morning, it is specifically prohibited, notwithstanding the apparent satisfactory experience in the public sector.

Many employees today value and, I would argue, in some cases actually need, time off more than cash as they struggle to balance work and family demands. A 1995 U.S. Department of Labor Women's Bureau survey found that the top concern of working women is flexible scheduling in the workplace.

But of equal importance is to note that much of the U.S. economic growth is with small and medium-sized firms. These smaller firms may have cyclical or irregular workloads and customer demands. Although you can anticipate in our membership, our members come from the largest of companies, given our breadth, they also represent the smaller companies, and in fact over 56 percent of our members are from companies with less than 1,000 people and 44 percent are from companies with less than 500 people. These companies need flexibility.

If these companies had the opportunity to work with employees and offer compensatory time in lieu of cash for overtime, layoffs during slow periods could be reduced, thereby promoting improved job security and a more constant income level for the employee. Employers would have more control over their costs in this kind of situation without disadvantaging any employee. And if this happens, I predict there will be less employer reluctance to extend full-time employment opportunities, and I know that that is an objective we all seek.

I want to emphasize, however, that SHRM also strongly feels—and supports what has been said here already today—that protections must be in place to ensure that the employees are not coerced into choosing compensatory time instead of overtime when it is not their preference.

SHRM has also long supported allowing employers to adopt a pay period of greater than 1 week and only be required to provide overtime compensation for hours worked in excess of an overage of 40 hours during that period per week. Therefore, we commend Senator Ashcroft for demonstrating his commitment to providing flexibility to employees by including provisions in S. 4 which would allow employers and employees to establish work periods of 80 hours over a 2-week period.

In conclusion, SHRM applauds Senator Ashcroft and you, Mr. Chairman, the members of the committee, and the Senate leadership for embracing a commitment to update the Fair Labor Standards Act for the 21st century. Representing human resource professionals who will be implementing these employee-friendly measures and offering them to employees, we look forward to working closely with Senator Ashcroft, the members of this committee and their staff to ensure that balanced, easy-to-use and easy-to-administer legislation is achieved as it progresses through the legislative process.

Thank you very much for your time.

Senator DEWINE. Mr. Losey, thank you very much.

[The prepared statement of Mr. Losey may be found in the appendix.]

Senator DEWINE. Ms. Larsen?

Ms. LARSEN. Thank you. Good morning, Mr. Chairman and members of the subcommittee. I am Sallie Larsen, vice president of human resources for TRW Systems Integration Group.

I would like to tell you today about a young Purdue University graduate who returned to her home State of California to look for her first job. She was single and unemployed. At the time, she had three main requirements for a job: fair pay, interesting work, and of course, an office location near the beach. Her main requirements were obviously in reverse priority order.

Twenty years later, this graduate is a young woman with management experience. She has a working spouse and three children under the age of 7. Two of the children are in elementary school, and two of them play soccer. She still has three main requirements for her job: fair pay, interesting work, and of course, job flexibility. She had to give up on that office location near the beach.

This woman is just one of the many employees at TRW who now place job flexibility at the top of their priority list. I am pleased to be able to talk to the subcommittee about many of the employees at TRW where we find that we have had to implement aggressive and innovative human resources policies over the last 20 years. I would also like to share with you some of our concerns.

TRW is a global manufacturing and service company headquartered in Ohio. We have both space and defense and automotive services, and we employ 64,000 employees in 24 countries.

My group is the Systems Integration Group. We are a high-technology provider of systems and services to civil, Federal, and international customers, as well as State and local governments.

For the past 10 years, I have been part of the management team that has been charged with three main constituents that we have to serve—customers, employees and shareholders. As our chairman and CEO, Joe Gorman, has said, it is our job to "delight" these three constituents.

The objective is to use our employees, by having them be "delighted" as the way that we will then be able to delight our customers and shareholders.

We believe our partnership with our employees is very serious. This partnership is demonstrated by TRW's long history of pioneering successful human resource policies and practices. In 1980, we implemented for the first time, flextime, and we were one of the first companies to do that.

Flextime, which is different than comp time, is allowing employees to start and end around a flexible schedule around a core set of hours. This was implemented within the regulations of the Fair Labor Standards Act. At the time, the work force was delighted with this flexibility.

Over the years, however, the bar has been raised on what "delights" versus what "satisfies" our employees. They are highly educated, they now have dual-career families, they have a diverse work force, we have long commutes, we have people who want to exercise, volunteer, pursue their educational degrees. This list could go on, and it does.

What we have found is that it is critical for us to work with our employees to maintain an opportunity for them to balance their personal and professional lives.

In today's competitive market, we have found another reason to look at raising the bar on what delights our employees. To compete with hundreds of other companies in the Silicon Valley, which I am sure you have heard about, where the want ads far exceed the regular newspaper, we are competing with other companies around how to find and attract high-caliber employees.

When looking at flexible policies and programs that we could implement, we turn to our employees and management and ask them what would they want. Again, workplace flexibility was at the top of the list.

We implemented what is called a "9/80" for all employees at 14 locations in 7 States. A California employee recently shared with me how happy he was that he was able to take every other Friday off to finally be a Boy Scout leader for his son's troop. This is an hourly employee.

I am sorry that Senator Kennedy is not here, because he was wondering how we were able to achieve this without self-exempting ourselves from the Fair Labor Standards Act. We did what we call a "work around," working around the barriers of the Act yet still being in compliance. What we did was we went into our systems, and we moved our work week to end in the first week of the pay period on Friday at noon. That means that employees could work their 40 hours within the first pay period and then work the rest of their 40 hours in the second half of the work week. Employees could choose to stay on the standard 5-day, 8-hour week if they wanted to.

Where are we today? Management and employees are delighted. Since implementation of our "9/80," our attrition rate has dropped from 24 to 12 percent—over one-half. In a recent employee survey in one of our units, 93 percent of the employees said that they would prefer to stay on a "9/80" schedule, and 83 percent of the employees said this was a key factor in their decision to stay with TRW.

Imagine the benefits. On the "9/80" schedule, employees could get up to 26 3-day weekends a year.

Based on the flexibility of this and other programs, we went into our assessment mode and looked at what else we could do for our work force to again achieve employee delight. In our business unit, we have a compelling business need to better understand our employee work habits. We decided to implement the professional work schedule last year, which allows our exempt salaried employees a 2-week pay period for job flexing with their supervisors' approval.

For example, an employee in my organization could flex by taking afternoons off when she has a night class to study for her master's degree in human resources. She is able to make up those hours in the 2-week pay period.

Again, employee delight is measurable. At brown bag lunches and open forums, my boss has asked employees, How do you feel about this—have you taken advantage of the flexible work schedule—and over two-thirds of the employees raise their hands.

Unfortunately, while the professional work schedule helps our salaried employees with 2-week job flexing, partial-day time off and additional time off, we are unable to offer this benefit to our hourly employees. These employees, when I go to employee meetings and

we talk about their concerns and issues around workplace flexibility, are amazed to learn that it is a 60-year-old law that keeps them from being full members of our team. Their most common complaint to me is: Why do you treat me as a second-class citizen? I try to explain to them that it is not TRW that treats them as a second-class citizen, but that it is the law.

When I evaluate these and other workplace flexibility programs for our employees, I confess that the "me" factor does play a part. I joined the company 20 years ago, right out of college. I now have a spouse who works for the Federal Government. So I have seen first-hand that workplace flexibility and hourly leave do have a positive effect on our parenting responsibilities.

I have three children. Two are in elementary school, and two play soccer. Bill coaches the soccer teams, and I am a soccer mom. We also worry about when our 3-year-old, Jared, starts school and after-school activities, and we both have parents who are reaching their late seventies, and we worry about eldercare issues.

As you may have guessed, I am that Purdue graduate who started with TRW some 20 years ago. Do I want a company that offers fair pay, interesting work and workplace flexibility? Definitely, yes. To the limits of the current law, TRW has been able to provide all three. I would like, personally and professionally, to be able to do more.

I want to thank the committee for your efforts to look at the reform of the Fair Labor Standards Act in order to promote more workplace flexibility.

I want to thank you for giving me this opportunity to tell TRW's story as well as mine. I would also like to acknowledge that my daughter Kelsey is here today to see how Congress is working to solve our problems together for this workplace as well as the workplace of the future.

Thank you.

Senator DEWINE. Thank you, Ms. Larsen.

[The prepared statement of Ms. Larsen may be found in the appendix.]

Senator DEWINE. Ms. Korzendorfer?

Ms. KORZENDORFER. Good morning, Mr. Chairman and members of the subcommittee. My name is Christine Korzendorfer, and I am an executive assistant for TRW's Systems Integration Group's Proposal Operations. I provide administrative support to all levels of senior management, including daily interaction with division and operations-level staff. I am an hourly employee.

Thank you for inviting me here today to share my views about legislation that may permit more flexible work schedules. I support any changes in laws that will help workers better manage their personal and professional lives. However, I am particularly interested in the idea that if current law is changed, as an hourly employee, I may have a choice of taking comp time in lieu of paid overtime.

I am the mother of a 14-year-old daughter, Jennifer, who is with me today, and a 2-year-old son. My husband is self-employed, and he works 7 days a week, very long hours. Because of his schedule, I am very responsible for running the household and for the well-being of my children. I take them to the doctor, I go to their par-

ent-teacher conferences, and I am getting my daughter prepared to enter high school.

Because I work in TRW's Proposal Operations, I am on-call 24 hours a day. This means I could be working in the office up to 15 hours a day or, if I am not actually in the office, I am on-call via a beeper in case someone needs to contact me.

My days are very long and stressful, but yet very rewarding. This schedule provides me with a lot of overtime pay, and this pay is important to me—however, the time with my family is also very important. If I had a choice, there are times when I would prefer to take comp time in lieu of overtime. What makes this idea appealing is that I would be able to choose which option suits my family best.

Just recently, my son was ill, and I had to stay home with him. I took a day of vacation, which I would have preferred to use on vacation with my family. I did not want to take unpaid leave. On the day he was ill, I had already banked 22 hours of overtime. If I had had the choice, I would have used comp time in lieu of that overtime for that day off from work. Besides, I would have only had to use about 5½ hours of comp time to cover that 8-hour day.

I would like to share with you another example when compensatory time would have made a great difference in my family's life. Three years ago, I had a miscarriage, which caused me to lose 2 weeks from my job. Then, 4 months later, I became pregnant, not knowing that in my eighth month, I would be put to bed rest by my doctor. I subsequently delivered a wonderful, healthy baby boy.

To take the needed time off, I used all my vacation, my sick leave, my long-term sick and long-term disability leave. This combination of leave, however, did not cover my extended time off. From there, I went to the Family and Medical Leave Act. The net result is that I lost pay. However, if I had had a choice, I could have used banked comp time in conjunction with this time off without losing pay.

I am anticipating that when my daughter reaches high school, there will be more demands placed on me to support her activities and interests. This could include sports, other after-school activities and perhaps a job which may require my time. These demands will increase when my son reaches school age. Knowing that I could have a choice in how to use my overtime would allow me to better combine my family and work obligations—or maybe I would just want to take flextime if that were an option.

I appreciate the time you have given me to share my opinions about comp time and flextime scheduling. I think that giving employers the opportunity to offer their employees flexible work schedules to help them meet work and family commitments will increase worker satisfaction and productivity.

I would like to add something that is not written in my statement. I am happily pregnant again, due in August, and my doctor has advised me that I could be put to bed rest again. Please pass your legislation as soon as possible so that I can use my comp time to cover my leave of absence.

Thank you.

Senator DEWINE. Thank you very much.

Ms. Boyd and Mr. Losey, I wonder if either of you has looked at the use of comp time and flexibility that public employees have. We now have a few years of experience in that area. How has that worked?

Ms. BOYD. I can tell you that in State and local governments which have been able to use comp time since 1985, I think the evidence is that it works very well. People are very comfortable with it, they know how to use it, and they use it frequently.

It is interesting if you look at the number of cases that have been brought by employees or by unions regarding the use of comp time, they are very, very few and far between, which suggests to me that in fact employers and employees can work out these arrangements very well.

Mr. LOSEY. I would second that. It is somewhat surprising that we have second-guessing in regard to how this concept will work given the fact that it has existed since 1978, and also an environment where the union membership is substantially greater than it is in the private sector, around a 40 percent penetration rate. So labor is——

Senator DEWINE. Forty percent in the——

Mr. LOSEY. In the public sector versus the private sector, which is about 11 percent.

Senator DEWINE. What about the coercive factor? There has been the allegation, and additional witnesses will talk about that concern.

Mr. LOSEY. Our position as I stated is that there should be no coercion. It simply will not work.

Senator DEWINE. But what does experience tell you in the public sector, though?

Mr. LOSEY. In the public sector, I do not know of bad experience in that area, including the historical reluctance of labor for this type of issue.

Senator DEWINE. Ms. Boyd?

Ms. BOYD. There are very, very few cases regarding coercion or when people have the ability to take their comp time or flex time in the public sector, which suggests to me that it is working well.

Senator DEWINE. Ms. Larsen, you talked about the sort of double-standard or dual system between exempt and nonexempt employees. Does that create any morale problems or questions? You related some questions that you have heard that have been raised.

Ms. LARSEN. Definitely. In our workplace, we work in teams for the most part, an as Christine noted, she is part of the Proposal Operations team. So you have groups of employees going in, working long hours to win a piece of new business for the company, and a certain class of employees could use the advantages of the professional work schedule to perhaps have approved time off later with their supervisors' approval. Currently, our nonexempt hourly employees do not have that option. That is where a lot of the misunderstandings come about "Why me?" They take exception to that fact since they consider themselves professional employees at their jobs.

Senator DEWINE. These would both be members of the same "team"?

Ms. LARSEN. Right. They are putting together a proposal to win new work on a new software system. They would be working as Christine does to get the proposal written, to get it edited, to get it out the door—they are all there for all those hours, eating all that pizza.

Senator DEWINE. OK. You talked, Ms. Larsen, about what TRW has done in regard to flextime or the flexible week. I guess a question that I would have as I was listening to the testimony is, well, if it is that simple to do, what is the problem? I mean, if you can do that now, what is the problem—or is it that simple?

Ms. LARSEN. Well, that is exactly the answer. The testimony made it look like it was done with mirrors, but it really requires a lot of hard work. To implement the professional work schedule, we worked over a year. We had to put in a complete new payroll system and time-tracking system to accommodate those schedules. Similarly with our "9/80," to Senator Kennedy's question, we had to then go in and revamp what was seen as the normal work week, which ends on Friday at the end of the day, and we moved that up to Friday noon in terms of our systems capability.

So there is a lot of behind-the-scenes work, and it costly.

Senator DEWINE. You are maintaining a dual system, basically.

Ms. LARSEN. Absolutely.

Senator DEWINE. And of course, I would assume that that is a hurdle that certainly smaller companies would not be as likely to want to go over, and maybe some big companies would not want to as well. That is a hurdle.

Ms. LARSEN. Well, what we did was to look at what was the cost of implementing both in management time and in employee time in the implementation phase versus what we would get out of it by achieving our employee delight factor.

Senator DEWINE. OK. Senator Wellstone?

Senator WELLSTONE. Thank you, Mr. Chairman.

I have just a couple of questions, but first a quick response to the experience in the public sector. I think somewhere around 40 percent of the public sector work force is unionized, which gives them bargaining power, which gives them protection vis-a-vis abuses that could take place, whereas I think in the private sector, it is about 12 percent. I think that is not an unimportant statistic or an unimportant context to consider here.

Mr. Chairman, I wonder if I could just have included in the record—I have been looking at some of the coalition members of the Flexible Employment Compensation and Scheduling Coalition, and I note they include the Labor Policy Association, the National Association of Manufacturers, the National Federation of Independent Business, the National Restaurant Association. The reason I mention this is because I think all of these organizations and some others listed here were strongly on record as opposed to raising the minimum wage—as long as we are talking about what benefits workers and families. And I am going to do my own research to see where people stood on the Family and Medical Leave Act.

So if I could ask unanimous consent that this be included in the record.

Senator DEWINE. Without objection.

Senator WELLSTONE. I thank the chair.

[Information referred to was not received by press time.]

Senator WELLSTONE. Ms. Boyd——

Senator DEWINE. If I could—I cannot resist this, Paul—are we going to get into what every witness thinks about every public policy issue? I suppose we could do that.

Senator WELLSTONE. No, Mr. Chairman, but when we are talking about fair labor standards, we are talking about wages and working conditions, and we are talking about amending it——

Senator DEWINE. I understand.

Senator WELLSTONE [continuing]. So I thought this was relevant background material—not every issue, but just these issues which affect working families.

Senator DEWINE. I understand. Go ahead.

Senator WELLSTONE. I thank the chair.

Ms. BOYD. While we are clarifying things, let me be clear that the Labor Policy Association took no position on the minimum wage increase.

Senator WELLSTONE. The Labor Policy Association took no position?

Ms. BOYD. That is right.

Senator WELLSTONE. OK, fine. That is good to know; I thank you, and I stand corrected.

I think the rest of my statement was accurate on the different organizations, and it is just interesting to have it on the record to see the different frameworks from which people are operating.

Ms. Boyd, you claim in your prepared statement that "real workplace flexibility works only when employers and employees can agree on mutually beneficial arrangements such as flexible scheduling"—and I emphasize this because I think you are absolutely right about this part of it. Choice is key.

But Senator Ashcroft's bill, which is what we are discussing, does not ensure that choice for employees. Instead, the employer can deny a worker's request to use comp time, even if that request is made months in advance, if the employer decides that granting the worker's request will "unduly disrupt the employer's operation." How does this language ensure the choice that you say is so important? I think this was the point that Senator Kennedy was trying to make earlier about who has the choice.

Ms. BOYD. First let me say that that standard, being able to take compensatory time with reasonable notice and unless it is unduly disruptive, is exactly the same standard that State and local governments have used since 1985 and which I believe has been the subject of fewer than a dozen reported cases, which again suggests to me that employees and employers can work these things out.

I do believe that employee choice is preserved. I think the choice that Senator Kennedy was asking about was would people truly have the choice whether to continue to receive their overtime in cash or to bank it in comp time, and I absolutely believe that that is preserved in S. 4.

I also think with respect to when people take the time for comp time that that is something that employers and employees can work out. And if you are an accounting firm and you have a lot of nonexempt employees, you could give somebody a year's notice, and the first 2 weeks of April is probably never a good time to take off.

So it is something that employers and employees can and are able to work out together.

Senator WELLSTONE. Well—and there are so many good panelists here, and I do not want to use up all my time—but it seems to me that as a matter of fact, it is pretty clear in this bill that even if a worker makes a request, an employer can turn it down, and the experience you draw from is public sector with this operative language, and I think that that is comparing apples and oranges because in the public sector, well over 40 percent of the work force is unionized, and you have nowhere near that in the private sector, which gives those workers some power, which gives them some bargaining power, which gives them some protection, not to mention all the ways in which public sector is more public, and not to mention a whole host of other benefits that workers have which give them leverage.

So I again come back to this whole question of where are the real guarantees going to be if we are talking about doing away with the 40-hour work week.

Ms. BOYD. Well, I do not think we are talking about doing away with the 40-hour work week, just as a starting point. But second, from personal experience, I was a public sector employee—I worked for the DC. courts when I was in law school—and I was not represented by a union, and I made no money. But every time I worked overtime, I chose comp time because I knew I needed the time off during exams. That worked very well, and I believe that that will be and has been most people's experience in the public sector with comp time and that it can work equally as well in the private sector.

Senator WELLSTONE. Well, just for the record, in the Ashcroft bill—and there are different bills here—it is an 80-hour framework. And one more time—I am sorry to keep focusing on this point, and we may have to come back to this later—but your experience was that you worked in DC.—is that correct——

Ms. BOYD. Yes.

Senator WELLSTONE [continuing]. And you did not have a union representing you, but you had no problem; correct?

Ms. BOYD. Absolutely.

Senator WELLSTONE. OK. That is good. But as a matter of fact, I have had an opportunity to spend a good part of my adult life with wage-earners in many nonunion workplaces, and it is not always such a pleasant experience. And I would remind everyone here that there have been plenty of articles and plenty of exposes about plenty of the violations of some of the laws we have on the books right now guaranteeing workers a safe workplace and decent working conditions. There are whole industries where we have that problem right now. So I do not think we should be too abstract about this—quite apart from your own experience. And I understand your point, but I think——

Ms. BOYD. I am sorry—I absolutely agree that enforcement is key, that it is important and that those kinds of working conditions which you are speaking of should be treated accordingly. But I guess one question that I would have for you is whether we are going to continue to legislate to the lowest common denominator. Why not allow the TRWs of this country—which I believe are the

majority of kinds of employers that we have in small, medium, and large-sized businesses—why prevent what they are willing and able to do for their employees?

Senator WELLSTONE. I think that Ms. Larsen's testimony was fascinating, and in fact, I may want to get some written questions to you all if that is okay, because I think everybody here has had something important to say. They have been able to do that within the context of existing law.

The point that was made was yes, but we have got to go through some of these requirements and some of the paperwork. But I would like to note that you would have to make the same kinds of adjustments with this proposed change in the law. The only difference is that with the existing law, we pay people time and a half when they do overtime work. We have a 40-hour work week, we have a fair labor standard, and we live up to it.

Ms. BOYD. I believe Ms Larsen's point was also, though, that they could be doing a whole lot more; that they do what they can under the current law, but that it is difficult and that they could do a lot more.

Senator WELLSTONE. I thank the chair, and I thank the other panelists.

Senator DEWINE. Senator Enzi?

Senator ENZI. Mr. Chairman, it is a delight to have a panel with so much expertise as well as first-hand experience, actually working with the problem. I like that. And it will not be possible to cover in 5 minutes the questions that ought to be asked on this, so I will ask unanimous consent that I be able to address some questions in writing and have their responses put in the record as well.

Senator DEWINE. Without objection.

[Questions of Senator Enzi may be found in the appendix.]

Senator ENZI. Thank you.

I will change the subject slightly now. We talked a little bit about the Family and Medical Leave Act and its successes. Mr. Losey, would you say that this Act has been as successful as the administration has made it out to be? Is everything good with that Act?

Mr. LOSEY. No, Senator. I think it reflects a couple of things. One thing is the existing practices of enlightened employers. That existed prior to the passage of the Act; it has existed since then. I think another issue is a survey that was referenced by the Senator. This was conducted very, very soon after the regulations were issued. I remind the committee that this was a 13-page law that resulted in 300 pages of regulations.

Our experience and my personal experience, Senator, is that many employees still, even now, and certainly at the time of the survey did not understand their rights, and many employers did not, either.

Our feedback from our members—and we have constantly gone back and asked them to give us specific examples—two-thirds of them claim that they can point to almost daily problems with trying to administer within the law the Family and Medical Leave Act, particularly with intermittent leave. And I am not trying to be

humorous, but I think a lot of people who say it is no problem are not operating within the law.

Senator ENZI. Thank you. I am also concerned a little bit with the impression that people have that the Family and Medical Leave Act only requires unpaid leave from work. Can you give me some comments on that?

Mr. LOSEY. Well, that is really not the case because a substantial portion of the leave given in many companies' practices is paid; I think it is more than half.

Also as we know, in other cases, companies have historically provided in demanding situations—because these are employees, and employees are not the enemy—accommodations for serious illness, disability, family matters. That has been my experience. In my 35 years in this field, I have never turned down a request for extended leave because of a demanding personal situation.

Senator ENZI. It is also my understanding that if we do—and I would love to be able to pick your brain a little bit here—that if we do expand the Family and Medical Leave Act, it would perhaps raise some privacy questions, as I think it already has. Have you had any comments from your membership that have talked about private-related issues?

Mr. LOSEY. Well, in the current situation, it is limited to the urgent family matters. If we extend it to this public interest type of situation, then how does the employee notify for perhaps very personal reasons what the nature of the leave is?

And yes, to answer your question succinctly, we have had that issue come up. It is not a note from the doctor anymore. Maybe it is a note from the soccer coach or from the principal. This is the type of administration that if this Nation burdens every employer, I mean, to create a mandate at this level is not insignificant.

Senator ENZI. I know that there is concern by people talking about what has happened.

Ms. Larsen, TRW is a considerably bigger company than any of them that I deal with, and when you have done this "work around" policy, you talked about having some groups that were set up. Even setting up the groups, is there some potential legal liability that the company worries about?

Ms. LARSEN. I am not sure I understand the question, but our most common practice when we look at employee benefit programs and changes is to go to our work force through employee meetings and what we call "sensing sessions" and ask them what would they like, what would they prefer.

Are we concerned about some of the practices that we have implemented now? We have found that they are within the limits of the law and that they are making a return for us in terms of some of the statistics I quoted in terms of our retention. Also, right now we are on a very steep growth curve, so we have been able to attract some employees who clearly say in the interview that this is the key reason why they prefer to come to TRW.

Senator ENZI. I will phrase the question a little differently, then. The work group is the only mechanism that allows you to do that. If you had a smaller work force and could not have the same work group approach, would you still be able to do the "work around" situation that you are able to do now? How small a business do you

think would be able to take advantage of the same things that you are able to do, I think, because of size?

Ms. LARSEN. Well, no, I disagree to a certain extent, and maybe that is what is a little misleading. We are able to do it because of size, but actually, I believe there is more cost when you go to size because we have large HR information systems that keep track of our employees, keep track of family and medical leave. So when we do our "work arounds," we have not only got to do the communication to the employees, but then we have to go back to the system. In our smaller unit, you do not have that same issue because the computer systems are not as complex, the tracking systems are not as complex. They would still have to do something to make that happen. Sometimes size works for you, sometimes it works against you. So, not being in that small company, I could not say for sure, but for us it was a cost factor that we had to spread over our larger base. And I would guess for a smaller company, depending on the type of information systems they use, that they would have to make the same cost-benefit trade-offs.

Senator ENZI. And small business has such a problem of not wanting to hire an attorney to decide everything that they are reluctant to change any of the start-of-the-week and end-of-the-week situations that might be necessary.

Ms. LARSEN. Well, it is a complexity, and especially, depending upon what State you operate in, it can become even more complex.

Senator ENZI. Thank you. I will submit some other questions, Mr. Chairman.

Senator DEWINE. Ms. Boyd, the statement has been made several times here today that the Ashcroft bill would abolish the 40-hour work week, and you started to answer that. I wonder what your comments are about that?

Ms. BOYD. Yes. Unfortunately, Senator Wellstone is not here to hear this. I think there is a very common misconception about this. S. 4 adds additional options onto the Fair Labor Standards Act. Without written agreements, employees and employers could not flex beyond the work week or have a biweekly schedule, bank credit hours, or choose comp time. Without those agreements in place, either through collective bargaining or individually, the basic 40-hour work week, the basic FLSA provisions as we know them, continue to operate. These are just additional options that would be available.

Senator DEWINE. And again, this has to be an agreement——

Ms. BOYD. It has to be a written agreement.

Senator DEWINE [continuing]. That is entered into between the employee and the employer.

Ms. BOYD. Right. And I think very strong coercion language has also been included, which I do not believe is present in any other labor law that I am aware of.

Senator DEWINE. Well, what is the protection? I would like you to talk about that for a moment. What is the protection against the coercion or the potential of coercion? What is to stop—and I will just be real plan about it—what is to stop an employer, if this bill passes, from saying it works to his benefit to have a 50/30 work week, for example, and not pay overtime——

Ms. BOYD. And not pay overtime.

Senator DEWINE [continuing]. Or not pay it in the conventional way.

Ms. BOYD. In that circumstance just as in the current law, if you were an employer who was not paying overtime at all after the 40 hours, you would have exactly the same kind of recourse as an employee. You can call the Department of Labor—they are obligated to pursue those kinds of complaints—or you can get your own attorney, and the employer without the agreement being in place would be required to go back and pay time and a half cash overtime, the possibility of double damages, attorney's fees, costs, civil and criminal penalties, just as is the case under the current Fair Labor Standards Act.

Senator DEWINE. Mr. Losey?

Mr. LOSEY. Well, sir, on the coercion issue, under current law, we frequently have a problem with employees who volunteer for overtime. The law specifically says that you cannot require nor permit, and I think we have to prove, and we have proven with that situation, that employers can understand the law; they do not permit employees to volunteer for overtime, they pay it if it works—even if it is worked unapproved, retroactively, it is paid.

The second issue—and I do not want to speak negatively in terms of the labor input here today—but I have some concern if it is only the employer held accountable for the absence of coercion, how do they control coercion if it comes from the union? Frequently in the workplace, the union, as a free and democratic society, can exercise its own influence on workers. Would the workers be preempted from the rights under the law for which the employer has no control because of—you understand my point.

The second and most important thing, sir, is that we are not talking about coercion—we are talking about options and choices. We have an intelligent work force. They are adults. We have seen that when people have flexible benefits—how much vacation do you want, how much life insurance, what health insurance—they react very positively. When they have 401(k) plans and investment options, they react very favorably to fitting their company commitment to their welfare to their personal needs. When you retire, do you want it in cash, do you want it in a 10-year period certain—all of these options have proven there is no question no one would give it up. So when the employee is fully protected, why would we not offer this option?

Senator DEWINE. In regard to Senator Wellstone's concern that if an employer denied the drawing down of the banked comp time, the standard is what for that? Would you tell us again?

Mr. LOSEY. My understanding of the law, sir, is that when the employee accumulates and has decided he wants time off in the future at the time and a half rate, the company cannot unreasonably withhold that. There is a minor exemption where there would be a significant disadvantage. It might be limited to a situation where someone is in charge of the oven, and if they all leave, the oven goes cold, something like that.

But I do not think it would be to the employer's advantage to lose it, because they will lose the privilege. They will respond to the occasion. They are good citizens for the most part. And we will be the first ones, for any employer who abuses this and thereby jeop-

ardizes the right of right other employers and employees to bring it to anybody's attention, to get the sanctions.

Senator DEWINE. This standard, which in essence says the employer must allow the employee to use the comp time within a reasonable time if such use does not unduly disrupt the operations of the employer, is a standard which is currently in law today for public employees; is that correct?

Ms. BOYD. Yes, and in fact——

Senator DEWINE. So we have had some experience with that language.

Ms. BOYD. Absolutely, and the Department of Labor has written regulations around that after notice and comment, and there has been 10 years, now 12 years' worth of experience with that exact standard.

I would also like to point out that while I thin this law originally, or at least the comp time parts of it, were based on the State and local government experience with comp time, the comp time provisions contained in S. 4 have many more employee protections that are not available to State and local government employees. There is an annual cash-out provision; employees can ask to cash out unused comp time banks at any point.

Senator DEWINE. They can give 30 days' notice and cash it out; right.

Ms. BOYD. And employees have to do that within 30 days. Employers cannot discontinue programs without giving employees notice, and they cannot draw down banks below 80 hours. There are many, many more employee protections, I think in part to address some of the concerns of Senator Wellstone and his colleagues.

Senator DEWINE. I would like to thank the members of the panel. Ms. Korzendorfer, good luck. That is good encouragement for us, and we will certainly keep that in mind.

Let me also, Ms. Larsen, as the father of eight children, congratulate you and Kelsey. Kelsey has done very well. She has held up through some very long questions by the members of the subcommittee.

We thank all of you very much, and I will at this point invited our third panel to come forward.

Senator DEWINE. As the third panel is coming up, let me begin to introduce them. The first witness is Mark Wilson, who is the Rebecca Lukens Fellow in Labor Policy at the Heritage Foundation. Previously, he served as a senior economist in the United States Department of Labor. Mr. Wilson has numerous publications relating to labor policy issues.

Our next witness will be Mr. William Kilberg, who represents the Fair Labor Standards Act Reform Coalition. His testimony will be based on his experience as a management attorney and his former experience in forcing the Fair Labor Standards Act as Solicitor of the United States Department of Labor.

Karen Nussbaum, who will be our next witness, is director of Working Women's Department of the AFL-CIO. Previously, she served as the director of the Women's Bureau at the United States Department of Labor. She is a working mother and has been a labor advocate for 25 years.

Dr. Edith Rasell is an economist at The Economic Policy Institute, and she has offered to share her thoughts and concerns about flexible work options.

We will start with Mr. Wilson, and I would ask everyone if they could to try to keep to a 5-minute time period for your oral statements. As you all know, your written statements have already been submitted, and for all the panelists they will become part of the record.

Let me just say to our panelists that I appreciate very much as chairman of the subcommittee the fact that we did have these statements to us. We generally follow a 24-hour rule, and we were pretty close to that, so I appreciate that very much. It makes it easier for us to prepare for these hearings, and we hope that future witnesses in days ahead can comply with that rule as well as the panelists did today.

Mr. Wilson?

STATEMENTS OF MARK WILSON, REBECCA LUKENS FELLOW IN LABOR POLICY, THE HERITAGE FOUNDATION, WASHINGTON, DC; WILLIAM J. KILBERG, FAIR LABOR STANDARDS ACT REFORM COALITION, WASHINGTON, DC; KAREN NUSSBAUM, DIRECTOR, WORKING WOMEN'S DEPARTMENT, AFL-CIO, WASHINGTON, DC; AND DR. M. EDITH RASELL, ECONOMIST, THE ECONOMIC POLICY INSTITUTE, WASHINGTON, DC

Mr. WILSON. Thank you, Mr. Chairman members of the committee. Thank you for inviting me here to testify today on the need to reform the Fair Labor Standards Act to provide for flexible work schedules.

As you have noted, my testimony will be entered into the record, and I would just like to summarize it if I could.

Over the past 25 years, the United States has moved from a manufacturing economy to a global service economy, and more and more American women are working than ever before. As others have noted, we all intuitively know this. I would like to take a few moments here to provide some actual numbers behind this to give you an idea of the extent to which it has changed over the past 25 years.

Women now account for over 46 percent of the labor force, up from 29 percent in 1950. The labor force participation rate for married mothers with children under the age of 6 has increased from 11 percent in 1950 to over 47 percent today. In 1995, well over 68 percent of all mothers with children under the age of 18 were in the labor force.

In 1995, according to the Bureau of the Census, only 5.2 percent of all families mirrored the traditional "Ozzie and Harriet" style of family structure—a married couple with a wage-earning father and a stay-at-home mother with two children.

In 1995 as well, almost 75 percent, or 18.4 million married families with children had both spouses working, and in over 38 percent of these families, women were working full-time all year around.

The concerns over the well-being of families often force women, single parents, as well as husbands to choose not to work or to change jobs or to forego a job that draws on their full talents, as our previous panel identified. In many cases, this scenario could be

avoided by enabling employers to offer flexible schedules to their workers. The FLSA in some regards currently impedes an employer's ability to accommodate employee requests for greater flexibility, however.

The Department of Labor has even prosecuted employers for violating the Fair Labor Standards Act by offering their workers the same flextime options that Federal Government employees currently enjoy.

The concept of alternative work schedules, flextime, compressed weeks, flexible credit hour programs, is not new or untested. They were first introduced in Germany in 1967 as a means of relieving commuter problems. Shortly thereafter, employers in Switzerland began to offer flextime as a way to attract women with family responsibilities into the labor force.

The Hewlett-Packard Company was the first to introduce flextime in the United States in 1972, and it was mentioned in the previous panel; TRW introduced it in 1980.

Since then, however, the number of private sector workers taking advantage of flextime or some form of compressed work week schedule in the United States has grown relatively slowly. In recognition of this, in 1978, Congress passed the Federal Employees Flexible and Compressed Work Schedules Act that enabled Federal workers to arrange alternative work schedules to meet their personal needs. It was so successful that Congress extended the program in 1982 and then made it permanent in 1985, as well as extending it to all public sector workers, State and local workers, in 1985.

Organized labor has been a vocal opponent of enabling private sector employers to offer flexible schedules, particularly compressed work weeks, outside the context of collective bargaining. Federal employee unions, however, recognize the value of flextime to their members despite testimony from leaders in the AFL-CIO strongly opposing flexible schedules. In 1976 when this subject was first debated in Congress, members of the oldest and largest independent union of Government workers, the National Federation of Federal Employees, mandated their leadership to seek flextime work schedules, and the American Federation of Government employees voiced their support for the concept of flextime and proposed its broader implementation.

By 1992, 528 Federal union contracts contained provisions of alternative work schedules, and in 1996, well over 40 percent, and in some quotes, 52 percent, of Federal employees were taking advantage of various flexible scheduling arrangements.

The Fair Labor Standards Act was enacted to protect low-skill and low-paid workers, but in today's economy where both parents are likely to be working, its rigid and inflexible provisions hurt more than they help.

Given the success of the Federal program, it is disturbing that after nearly 20 years since flextime was first introduced in the United States, only 15.3 percent of all private full-time employees are working on flexible schedules.

Enforcement is important. In last year's budget, DOL's Wage and Hour Division and the Employment Standards Administration received a substantial budget increase precisely to add more inspec-

tors. It is important. It is also important to keep in mind that the complaints related to wage and overtime provisions of the Fair Labor Standards Act have been declining and as a percentage of total employment, are very, very small.

Congress should extend the same freedom to private workers that Federal employees have, flextime, and enable employers to offer flexible schedules and compensation options to their workers. As a Federal employee, I took advantage of flextime, and I was not a member of a union, and my wife significantly appreciated the fact that I could flex my schedule out to attend to the needs of our children.

Thank you very much.

Senator DEWINE. Thank you, Mr. Wilson.

[The prepared statement of Mr. Wilson may be found in the appendix.]

Senator DEWINE. Mr. Kilberg?

Mr. KILBERG. Thank you, Mr. Chairman and members of the subcommittee. My name is Bill Kilberg, and I am a partner with the law firm of Gibson, Dunn and Crutcher. I am here today representing the Fair Labor Standards Act Reform Coalition, which includes a wide range of associations and individual employers who are concerned about white collar exemption provisions of the Fair Labor Standards Act.

The FLSA too often has frustrated these employers' efforts to respond sympathetically and effectively to their employees' needs. Both as a management attorney and, in a former life, as Solicitor of the United States Department of Labor, charged with the responsibility of enforcing the Fair Labor Standards Act, I have experienced the law's inflexibility. While the underlying goal of preventing work force exploitation retains its validity, the FLSA's 60-year-old structure far too often works against the interests and desires of the employees it purports to protect.

That is why S. 4, the Family-Friendly Workplace Act, is so important. As other witnesses have noted in some detail, Senator Ashcroft's proposal offers several carefully-measured workplace scheduling options that will facilitate flexibility while preventing abuse.

Less attention has been paid, however, to another aspect of S. 4 that I believe is most critical, and that is clarification of the so-called salary basis test. This regulatory standard—and it is that, regulatory, not a statutory standard—is one of many measures used to determine whether a specific individual is an exempt "executive, administrative or professional" employee. This test provides that an employee is compensated on a salary basis only if he or she receives a predetermined weekly salary that "is not subject to reduction because of the quality or quantity of work performed." While deductions are permitted for absences of a day or more for reasons such as illness or vacation, deductions for less than a full day's absence violate the definition.

A problem has arisen because of misinterpretation of the regulation. Seizing on language in the introductory section of the regulation, stating that a salaried employee should not be subject to deduction from pay, a perception has developed that salaried status

can be lost based on the mere theoretical possibility of deductions applicable to the employee.

In recent years, starting in about 1990, most courts have applied the "subject to" principle as an ironclad rule which unequivocally mandates a loss of exemption if anyone can come up with a theoretical circumstance under which existing employer policies might allow improper deductions. Beginning with the Ninth Circuit's decision in Abshire v. County of Kern, and mushrooming in a series of subsequent cases such as Martin v. Malcolm Pirnie, Inc., courts have demonstrated a willingness to deny exemptions based on nothing more than this draconian "subject to" theory.

The consequences of this misinterpretation re enormous. In Pirnie, for example, only a very small handful of partial-day deductions had been made—about $3,000 worth over a 2-year period. The court itself labeled these as "de minimis." Many of these deductions were entirely understandable.

One employee, for example, properly concerned that any pay for time worked on her doctoral thesis would be allocated to corporate overhead and thus improperly be charged to government contracts, voluntarily directed that she did not want to be paid for the portions of workdays so spent. Under S. 4, the employer would have been free to grant such leave by agreeing to provide premiums for any overtime pay worked in that week. In Pirnie, however, the court held that the employer's "policy" of allowing such deductions caused not just this employee but an entire class of highly paid engineering professionals to lose their FLSA exemption for a 2-year period, leaving the employer with a liability approaching three-quarters of a million dollars.

In the short term, the burden of such decisions falls primarily on employers in the form of outrageous damage awards paid to employees who could not have expected overtime premiums for their highly skilled and highly paid jobs. For private sector employers alone, according to a study by the Employment Policy Foundation, potential damages are at least $20 billion a year. In the public sector, the number increases by a multiple.

In the long-term, however, employees bear the brunt of these legal anomalies. Faced with the possibility of high dollar damage awards, employers are not willing to leave their heads on the chopping block. Instead, they are changing personnel policies to make absolutely clear that no employee ever can take partial-day leave unless it falls within the statutory exemption found in the Family and Medical Leave Act. Employees who want to attend to personal matters are welcome to do so, but only at the expense of taking a full day off.

The salary basis issue has been an active concern of Congress for a number of years now. A bipartisan proposal in the House of Representatives cosponsored by Representative Rob Andrews and Thomas Petri received a hearing as early as 1993. At about the same time as Senate floor debate on the FMLA, Members of both sides of the aisle acknowledged the need for stand-alone legislation to address salary basis concerns for partial-day leave not mandated by the FMLA. Proposals from Senator Kassebaum and Senator Ashcroft followed, but neither bill received action during the 104th Congress. Separate legislation was also sponsored on the House

side by Representative Petri, addressing both the salary basis issue and other badly needed reforms.

S. 4 provides the best opportunity to date for a meaningful and effective remedy. I urge the subcommittee to act quickly on the proposal.

Thank you very much.

Senator DEWINE. Thank you, Mr. Kilberg.

[The prepared statement of Mr. Kilberg may be found in the appendix.]

Senator DEWINE. Ms. Nussbaum?

Ms. NUSSBAUM. Thank you, Mr. Chairman, for the opportunity to present the views of the AFL-CIO and of working men and women on S. 4 and the time-money stress felt by many working families.

At the AFL-CIO, I direct the new Working Women's Department, and as you mentioned, for the past 25 years, I have been an advocate for working families and particularly working women and am myself the mother of three young children.

Of the years, I have talked with thousands of working men and women in every walk of life about today's subject. And when I served as director of the Women's Bureau, I initiated "Working Women Count," a survey of more than 250,000 working women, conducted in 1994, and I have been gratified by the many references to it by Senators and other witnesses alike.

Over the last 25 years, a new picture of working families has come into focus, a picture in which family incomes are down for most families, the gap between the top fifth of families and the rest is growing, and work hours are up.

The need to make up for declining wages is creating more time pressures on families who need to spend more hours in the paid work force, and that is part of the cause for the record numbers of women who now work for pay.

As a result, many families feel they are just barely keeping it together. As a man in Birmingham told us, "I've got a middle-class job, but I cannot afford a middle-class car or a middle-class house." And a working mother spoke for many when she said, "My life feels like I am wearing shoes that are two sizes too small."

"Do not get me wrong—women like working, but they have serious concerns about the job and identify stress as their number one problem. The solutions are clear if not simple. They are time and money. Workers today feel compelled to spend more hours working, taking time away from their family and community life—but the important issue here is control over working hours."

Women around the country have explained to me that flextime that provides flexibility to the employer, but wreaks havoc on an employee's schedule, is no solution. This was voiced to me by the female bank executive who was repeatedly expected to work late with no notice; the waitress at a diner who was suddenly changed to the night shift despite the fact that she had no child care in the evenings, and the nurse, scheduled to work a second shift only an hour before her first shift ended.

When you ask these workers and many like them if changing the 40-hour work week helps them, they respond with a resounding "No." In polls done last year, majorities responded that, yes, they

want more family time, but they do not support changing laws that provide overtime pay for 40 hours.

Moreover, those people actually covered by the Fair Labor Standards Act say they are far more likely to want overtime pay than the time. When low-income workers choose to work overtime, they do it for the money, and when the right to overtime pay is challenged, these workers say they fear they will never see the money again.

With rising productivity, profits, stock market and CEO paychecks, we can do better than provide the no-win choice of time or money. We need to provide real control over work hours and make it possible for working families to afford to take time off by building on what works—for example, expand the FMLA to cover more workers and provide time off for more family needs; set higher standards for fair pay. Passing an increase in the minimum wage was an important first step. We also need to enforce and expand equal pay laws identified by working men and women as an important way to improve family incomes and having the resources to adequately enforce current minimum wage and overtime laws. And we need to provide paid leave for basic needs. You know, fewer people are covered by paid sick leave, paid vacation or paid family leave.

At the same time, the Commission on Leave report recommends that institutions develop paid leave systems.

With all this in mind, allow me to turn my attention to S. 4, the so-called Family Friendly Workplace Act. What S. 4 purports to do is to give working families what the sponsors claim to be a new option, but in fact S. 4 means more control for employers and less money for working people. Let me give you a few examples of why I believe this to be true.

First, S. 4 claims that employees will have the right to choose whether they prefer comp time or overtime pay, but in practice that choice will prove to be illusory. How many workers, especially low-wage, part-time or temporary workers, will feel free to insist on overtime pay knowing that the employer prefers comp time? And how many employers will feel constrained from coercing employees with the meager remedies in the bill?

Second, under S. 4, workers who choose comp time cannot count on using the time when the family need arises, which has been discussed earlier.

And third, under the 80-hour provision, our reading of this bill is that there is no employee option; the bill is strictly a permission for employers to establish such schedules if they so desire. And when Senator Hutchison described the bill as prohibiting employees from having to work over 40 hours when they do not want to, that sounds like a ban on mandatory overtime which, frankly, would be very appealing, but I do not think that that is what is in the bill.

There are many other examples of why S. 4 does not give more control over working lives for workers. In conclusion, I need to say that we see nothing "family-friendly" about repealing the 40-hour work week and allowing employers to require employees to work 50 or 60 hours a week in 1 week and then 20 or 30 in the next. There is nothing family-friendly in taking away from employees the right

to overtime pay, and there is nothing family-friendly about expanding the class of employees who are exempt from the FLSA and thus will have no right to either overtime pay or compensatory time off.

These proposals are a step backward, and we urge the committee to reject them.

Thank you very much.

Senator DEWINE. Thank you, Ms. Nussbaum.

[The prepared statement of Ms. Nussbaum may be found in the appendix.]

Senator DEWINE. Dr. Rasell?

Dr. RASELL. Thank you, Mr. Chairman and members of the committee. I appreciate the opportunity to testify.

I agree with many of the other panelists that families are under time constraints and need more flexibility. However, we should not and need not weaken the provisions of the Fair Labor Standards Act to achieve this flexibility.

The current provisions of the FLSA already allow employees much greater flexibility than many employers are willing to permit. Employer inflexibility, much of which may be necessary given the requirements of their workplace but which is far beyond what is required by the FLSA, is a major obstacle to employee flexibility.

For example, under current law, employers can allow employees to vary their arrival and departure times and take time off during the day while still working a 40-hour week; or, under current law, employers could offer workers a compressed work week such as 4 10-hour days per week, permitting one additional day off per week; or employers could reduce the length of the usual work week, or job-sharing could be encouraged. All of this and more is currently possible.

However, while many companies say they support such policies, they are actually used in very few firms and by very few people. A survey of 121 private companies found that just 14 percent routinely made available a flextime program. Moreover, 92 percent of those without a flextime program said it was unlikely that they would adopt such a program in the future. Only 10 percent of full-time hourly workers have flexible work schedules.

And I want to point out that Mr. Wilson's testimony emphasized this same point—that while these options are available under the law, very few workers are able to take advantage of them.

I want to comment on the testimony of the last panel and compliment Ms. Larsen and TRW for their commitment to their employees. Unfortunately, not many companies offer anything like the level of flexibility that she described, but her examples clearly illustrate the types of options available under current law.

I also want to comment on a couple of other people's testimony, Ms. Boyd and Ms. Korzendorfer, who referred to the comp time/overtime issue. I will take, for example, the issue of being able to take comp time off. Ms. Korzendorfer remarked that she is an hourly employee, does have occasional overtime work for which she receives overtime pay, but that she would prefer to get comp time. And I want to illustrate how she could achieve her goals, which she things are only achievable under the comp time option, but she could achieve those same goals under the current law.

Let us assume she usually works 40 hours a week, and in 1 week, she gets 2 hours of overtime for which she is paid the equivalent of 3 hours. In some subsequent week, she wants more time off, and under current law, what she would be able to do would be to take time off without pay. The upshot of this is that she would have worked 40 hours plus 2 hours comp time in the first week, 37 hours in the second week, and been paid for 80 hours of work. That is exactly what would have happened if she had had the comp time option. She would have worked her 40 hours the first week, her 2 hours of overtime and, in a subsequent week, would have taken her 3 hours of comp time, and she would have been paid overall for 80 hours of work.

The only difference in these two scenarios—and an important difference this is—is that by taking the overtime pay up front, she is getting compensated when she did the work. When, in the comp time option, you delay taking your compensation until some point in the future when you take your comp time, this poses a risky problem for workers in that sometimes they do not get the comp time, and companies can go out of business. So it provides more security for people to get the overtime pay at the time they do the work.

In my written testimony, I also question whether employees can actually make a free choice about taking comp time or overtime pay. This has been referred to today by other people. I also question why the biweekly work program described in S. 4 is necessary if workers were to have comp time; this provision appears especially vulnerable to abuse.

But to conclude, while no one can predict the future, the current situation can shed light on what could be expected if this bill were enacted. Clearly, current law permits much more flexibility than many employers are willing to allow. We also have the example of the public sector which has been mentioned multiple times this morning, where employees are able to bank their comp time hours—for many workers, up to 240 hours, and for some people, up to 480 hours.

However, a major problem—and I hope you will hear more about this from other witnesses—is that for many workers, the banks are full. The employees have difficulty getting permission to take their comp time.

All of this implies that many employers are not willing to allow employees more flexibility in taking time off and in arranging their schedules and suggests a pessimistic future for employees under S. 4. If employers are unwilling to grant workers flexibility now, how will workers be able to use the comp time they would earn under the provisions of S. 4?

Instead of working to pass this amendment, I think we should focus our energy on encouraging more employers to offer workers flexible schedules, making modifications to the Family and Medical Leave Act and other things that would give workers the flexibility that they want. It is not necessary to compromise the protections provided by the Fair Labor Standards Act with this amendment.

Senator DEWINE. Thank you very much, Dr. Rasell.

[The prepared statement of Dr. Rasell may be found in the appendix.]

Senator DEWINE. Ms. Nussbaum, have you had the chance to look at President Clinton's proposal in regard to comp time?

Ms. NUSSBAUM. No, not in any detail.

Senator DEWINE. Well, you are familiar or aware that he has a proposal?

Ms. NUSSBAUM. Yes.

Senator DEWINE. Do you have a position on that proposal?

Ms. NUSSBAUM. No, we do not. We feel that the bill that we are looking at today is one that is clearly unacceptable, and it is hard for us to anticipate a situation that would respond to the problem of the potential abuses. But we do not have a position on the President's bill.

Senator DEWINE. Well, I do not have all the details in front of me, and this was in The Washington Post some time ago—this is a comparison between the President's bill and this bill. Let me just read to you the key provisions of the Clinton proposal.

Workers get one and a half hours of comp time for each hour of overtime worked. Workers may accrue up to a total of 80 hours of comp time a year. Workers, with 15 days' notice, may cash out their accrued comp time. Employers may terminate or modify a comp time program with 60 days' notice. The employer must make comp time options available to all workers.

It appears relatively similar to at least the comp time section of this bill, and I wonder if, based on what I have read to you, you have an opinion about that?

Ms. NUSSBAUM. No. I am afraid I cannot comment specifically on the bill. We are very concerned about issues of a big bank that will never be recovered particularly by employees who are in marginal workplaces, and we are very concerned about issues of enforceability.

Senator DEWINE. I understand that, and the concerns that you have expressed about the Ashcroft-Hutchison bill I assume would be similar to concerns you would have about the Clinton proposal.

Ms. NUSSBAUM. And we look forward to discussing it when it comes before this committee or another committee, sir.

Senator DEWINE. We will try again another day.

Ms. NUSSBAUM. Great.

Senator DEWINE. I am intrigued by your comment that the 80-hour over a 2-week period of time provision of this bill is something that would violate the 40-hour work week and that, if I understood your testimony correctly, it is something that an employer could require the employee to participate in.

Now, I have heard the testimony of Senator Hutchison, who says that that was never her intention; I have spoken with Senator Ashcroft, who has said that that is not his intention. And then, when you look at the bill, there is a section on page 15 which reads as follows: "Except as provided in paragraph 2," which has to do with collective bargaining, "no employee may be required to participate in a program described in this section. Participation in a program described in this section may not be a condition of employment."

So I am curious—I just looked at this quickly in response to your statement—but it would appear to me that the bill as written does not back up what your testimony was, that this could not be en-

tered into unless it was a voluntary agreement between the employee and the employer, which is exactly what all the testimony has been so far.

Ms. NUSSBAUM. Senator, I do not have the bill in front of me, but I am guided by the counsel of the attorneys at the AFL-CIO, who referred to an earlier provision in the bill which appears to negate the section that you have just referred to. And we would seek to provide written testimony on this——

Senator DEWINE. Well, I would appreciate it if you could do that because it is not the intent of the authors of this bill, and I doubt that it is the intent of any of the cosponsors of the bill—it is certainly not my intent—to provide for employers to have the ability to require employees to engage in this at all. In fact, just the contrary is true.

So I would appreciate it if within a reasonable period of time, your office could submit to us your lawyers' analysis of why that is true. And in all seriousness, I would think that it would be appropriate—and we would request that you do this—if you would give us some indication as to whether or not—and the President has spoken on this several times—you have an opinion about the President's proposal. For you to be here today and say that you have no opinion about that, I find a little disturbing. So I cannot compel you to have an opinion about it, I guess, but with the concerns that you have already expressed, it would seem to me that you would have the same concerns with the President of the United States' proposal in regard to the specific area of comp time.

My time is up, but we will come back for a second round. Let me turn to my colleague.

Paul, go ahead.

Senator WELLSTONE. If the chair wants to continue with another question——

Senator DEWINE. No. Go ahead. Let us stay to 5 minutes and then we will just keep going in rounds, if we can.

Senator WELLSTONE. Well, Mr. Chairman, I think part of the reason why Ms. Nussbaum did not come here today to speak about the President's proposal is with considerable justification. She is focused on what could be, I think, a very serious negative impact on working people with this proposal.

I think all of us here are committed to what you need to do when it comes to wages and working conditions for working families. When we talk about the work force, I think we all agree it has changed dramatically, and I do not need to tell Ms. Nussbaum because this has been a good part of his life's work with 9 to 5—formed by women and mothers who work.

Here is the issue about this 40-hour week and, essentially, this 80-hour framework and basically abolishing the idea of a 40-hour week. An employer—and this is a question for either Ms. Nussbaum or Dr. Rasell—this is my layperson understanding of this, and this gets to the crux of what I think is a fundamental issue—an employer can say to an employee, Look, we want you to work 50 hours this week and 30 hours next week. That is what we need from you.

Now, in theory, an employee is free to say, I cannot do that—in theory. And we can talk about the law of the land. I mean, employ-

ers are supposed to pay minimum wage, but some do not. We can give you many examples of where they do not do that right now. So that for good reason, we are worried about if this bill were to pass what it would really mean to people.

Now, in theory, an employee could say, no, I do not want to do that. The question is where is the protection for that employee.

The second question—and all the panelists can respond to this, of course—has to do with the need for agreement. So there are two different issues here. One is, with dramatically unequal terms of power, are employees really going to be able to say no without worrying about losing their jobs? And who is going to enforce that?

The second thing is there has got to be an agreement. Well, it apparently does not have to be a written agreement. I am looking through the wording of this—and you would think from the testimony, there would have to be a written agreement between the employee and the employer—but actually, the language says on the agreement on comp-time or flextime that it must be written or "otherwise verifiable." I mean, that is a loophole that could swallow the requirement. What does "otherwise" mean? I have no idea what that means. It could be on a tape recorder, but tapes get lost. It could be in the computer, but that could get lost.

I mean, you actually do not even have a requirement in this bill for written agreement. So let me just get a response from each of you on this whole question of what this is really going to mean in terms of the 40-hour week. There are many concerns that we have about this, but that is one central concern.

If I could, because we only have two minority witnesses here today, I want to start with them, and then we will go back.

Yes, please.

Ms. NUSSBAUM. On the issue of protection for employees—and on both issues, actually—the central problem here is who has the power in the relationship. A garment worker or a poultry worker or a janitor working the night shift does not have much power when she goes to her employer and says, No, I do not want to work the extra hours this week, or, I want pay instead of time.

It is quite easy for an employer to simply not hire that person in the first place, to not assign overtime for the person who wants to get the pay instead of the time, or to find other reasons to dismiss that employee.

The employees feel very vulnerable about keeping their jobs for just about every reason, and those people who are at the low end of the scale, who make up the vast majority of workers today, do not have the power.

Senator WELLSTONE. And the vast majority of women who are workers today.

Ms. NUSSBAUM. Eighty percent of women earn less than $20,000 a year. They do not exercise much bargaining power in the workplace.

And on this issue of the public sector, which I think is interesting, not only are public sector employers more typically unionized, but they also have civil service laws that constrain their activities, and they are not subject to the same downward pressure on wages that low-wage industries are. And we see in talking with low-wage workers the tremendous pressures they are under. They will not

challenge an employer in the hopes that the 800 Wage and Hour investigators who control 6 million enterprises in this country will get around to their workplace.

Senator WELLSTONE. Dr. Rasell, I wonder if you could respond. I am thinking about this as a social scientist, and I would love to do a survey of women in the work force, many of whom are low-wage workers, and ask them in the privacy of their homes whether they think, when an employer comes to them and waives the 40-hour requirement and says, I want you to work 50 hours this week, and next week, you can work 30 hours, and this is the deal, whether they think they can really say no to that or whether they have any real bargaining power, or whether they just really think this is a huge step backward for them. I would love to get their response.

Dr. RASELL. Well, I think that that is a very good question, and I am not sure we know the answer to it. But I think we can look at the Family and Medical Leave Act, where there are protections and opportunities there for people to take time off, but we also hear that people do not take the time off when they want it because they do not want to be labeled "on the mommy track" or be stigmatized in other ways. So I think that that is just one example and a completely innocuous kind of thing where people are not even making the choices they want because of fear of repercussions, which probably have nothing to do with job loss or anything like that, which might be an issue in the situation that we are talking about today.

I think it is a very real problem.

I think your second question about being able to take the comp time and the joint agreement to make that happen—I think that that, if anything, is just as big a problem. I think that if employers were truly interested in allowing employees to have flexible work schedules, we would see a lot more today in the workplace in that regard than what we see.

We do not see it, and I think that that is because employers, for whatever reasons—and maybe many of these are legitimate—they feel that they want the employees there 40 hours a week or whatever their work week is, 9 to 5, and they do not want them gone.

Given that, I do not know how these people are going to take their comp time, and I think the history in the public sector, where these people have enormous numbers of banked hours—480 hours is 60 days; who wants that kind of—it could be cash instead—who wants that kind of stuff sitting in their bank? They cannot take it. They cannot take the time off. And I think that that is also a serious problem.

Mr. KILBERG. May I, Senator?

Senator WELLSTONE. Mr. Kilberg?

Mr. KILBERG. I would like to respond to Senator Wellstone's question. I cannot respond to it, Senator, as a social scientist, but I can, however, respond to it as a lawyer and as a former Solicitor of the Department of Labor.

The fact situation that you pose does not have anything to say about S. 4. The same outcome would be true if S. 4 passed as before S. 4. An employer today can insist that an employee work 50 hours in week one and 30 hours in week two. The employer will

have an obligation to pay 10 hours of overtime at a rate of time and a half for all hours worked over 40 in week one. That does not change under S. 4.

It is true that the employee can enter into an agreement with the employer to bank those surplus hours, but that is the only thing that changes.

Insofar as the concerns that everyone has had about voluntariness, let me point out that nothing in this bill would change the present burdens of proof that exist under the Fair Labor Standards Act. The burden of proof under the FLSA is with the employer. So if there is a written agreement, and the employee says, That is not a real agreement, I was coerced into it, the employer is going to have the burden to show that there was in fact an absence of coercion. The employer is the one who will have to keep records, just as the employer does not with regard to minimum wage and overtime.

We have heard some comments regarding the public sector and 480 hours of banked time. Of course, the provision in this bill is for 240 hours of banked time maximum. But I do not hear anyone, certainly not from the AFL-CIO, calling for repeal of such flex and comp time provisions either in the Federal Government or in State Government. Rather, it has had uniform union support.

Mr. WILSON. Mr. Chairman, if I might make a comment, regarding the banking of hours and the buildup of banked hours and the inability of employees in the private sector to not take those, an important provision in S. 4 is that on an annual basis, employers will have to cash out those banked hours, and employees can choose to cash out those banked hours at any time within a 30-day notice. That is something that perhaps should be extended to public sector works as well in their compressed hours and their ability to bank it.

Dr. Rasell gave a very good example of how an employee can, within a pay period, move hours around, but an important provision in S. 4 is that it allows and empowers employees to move credit hours and compensatory hours across pay periods and to be able to accumulate those so that if an employee wants to accumulate hours of comp time to use a month later or a month and a later to attend a field trip with his or her son or daughter, they can do that.

Regarding bargaining power, with an unemployment rate of 5.3 percent and employers both struggling to find skilled as well as unskilled workers, certainly the bargaining power for both men and women in this country has increased substantially vis-a-vis the employer, and it has very little to do with the annual wage or salary of a particular employee.

With the written agreement, the "otherwise verifiable" argument that you made, I do share that concern, Senator, on that language, although in application, employers will for legal protection obtain written approval. How else will they be able to protect themselves from an inspector from the Wage and Hour Division? That is a very easy thing to hold up. I do not believe that they will obtain a tape-recorded message or some other more ambiguous verifiable statement. Employers will in application obtain a written statement

much as they do an I-9 form and other forms of identification when an employer applies.

Senator WELLSTONE. I thank you for that clarification, and I have just a very quick response to Mr. Kilberg. In all due respect, I think my example does speak to this legislation because the difference right now—we keep focusing on the 40-hour week, do we want to basically turn the clock back on the Fair Labor Standards Act—the difference right now is that if an employer wants an employee to work more than 40 hours, that employer has got to pay time and a half; that is the law of the land. With this legislation, within this 80-week framework, an employer can say to an employee, I want you to work 45 hours, and the next week, it will be 35 hours, and you can bank it or it can be comp. The employer could say I want it to be comp, or the employer could say I want it to be flextime.

Now, you think that this empowers employees. I do not see, given the reality of what is going on around this country, that a lot of employees are going to be able to say no to that. That is the difference. Right now, the law of the land is clear. Under this, we change the law of the land, and we assume in theory, because the unemployment rate is an officially defined 5.5 percent or whatever, that in fact you have got an equal relationship, and this will empower employees, whereas I think what is going to happen is the employers are going to say, For those employees who want to do it the way we want you to do it—not all employers; a lot of people do good work now, and in fact there are all kinds of opportunities to be flexible right now, and I wish more would be so—I do not think it is going to be the equal relationship. I think you are going to have coercion here.

And there are many, many examples right now in this country in critical sectors of the economy—the lower wage the work force, the worse it gets—many of which affect women right now that show, regardless of what the theory is, that at the nitty-gritty level of where people are working, we see plenty of abuse. We see some awful working conditions. We see some awful wage conditions, in violation of existing law. And yet you assume that in theory that will not happen when you basically go against the 40-hour work week. I do not think the evidence supports you.

Mr. KILBERG. If we make the modifications to the salary basis test that are called for in S. 4, we will free up a number of investigators who are presently out, seeking large damage awards for highly compensated professional employees, who could better spend their time dealing with the problems of low-age workers.

Mr. WILSON. Let me give you an example, Senator. When I was an employee for the U.S. Department of Labor, when push came to shove and an important project needed to be completed by the end of the week, we had to put in extra hours to do that. I was empowered at that point in time to either take those hours as flextime or to be able to cash them out if I wanted to as comp time.

That is where the employer can make the request and indeed will make a request for additional work. In many instances, the workers themselves will realize that this particular project or this particular sale has got to be accomplished before the end of the day and will put in extra hours to do that for the benefit of both them-

selves as well as the business they are working for. And this bill will empower them to then choose as to whether they take their time in pay or in time at some point in time in the future.

Senator DEWINE. Senator Enzi?

Senator ENZI. Before my time starts, I did not even get the testimony of two of these witnesses until I arrived here, and I do read the testimony before the hearing so that I can reflect on it and possibly do some research. I would hope that we would be able to get testimony in a more timely fashion, Mr. Chairman.

Senator DEWINE. It will be the procedure of this committee to have a 24-hour rule and to have it enforced.

Senator ENZI. In light of not having that, some of these questions may not be as intelligent as I would like them to be, but I am going to wade into them, anyway.

Ms. Nussbaum, if a union wanted to borrow for flex or comp time, could they bargain for it and then be exempted from the Fair Labor Standards Act? Now, I know from your discussion that they would not be interested in doing that, but would they have the right to do that?

Ms. NUSSBAUM. Unions cannot bargain to exempt themselves from Federal law, but indeed they can bargain many, many forms of flexibility, as Dr. Rasell described, and in fact we do; we bargain many forms of flexibility including the ones that we discuss in the public sector. And even more important, we provide for paid leave at far higher rates than do nonunion employers.

Senator ENZI. I guess I will not get into the issue of whether union or nonunion employers pay more because most of my requests for this comp time have been from companies that pay extremely well, and it has come from the employees, not the employers.

Dr. Rasell, in your comments, you said that many employers already do not provide the sorts of things that they would be allowed to do. Are you implying that none would?

Dr. RASELL. Well, I am saying that if the concern truly is providing flexibility for employees, there is much more that could be happening right now that we do not see happening. So I am trying to think about what this means for what we are trying to put in place in S. 4, and if there are constraints now on employers and the amount of flexibility that they are going to allow workers to have—it may be that they have got to run their assembly lines certain hours or whatever; I mean, there may be completely legitimate reasons why they want people there these 8 hours every day—but if that is the case, I am not sure how people are going to take this comp time. And if that is the case, then I think they should take it in pay, and in the future, if they could work out some time off, then they have been paid already, they can take some leave without pay and be polled in that regard. They have not been disadvantaged by not having the comp time option, but they have the security of knowing they have received compensation for their overtime work.

Senator ENZI. So you think some people might want to have comp time and that some employers might want to provide that as opposed to none?

Dr. RASELL. I think this is true; I think people do want more time off, yes. I think it can happen within the current bounds of the Fair Labor Standards Act.

Senator ENZI. I am not aware of anywhere in the Fair Labor Standards Act where it allows employees to demand time off at the present time. We talked about whether the employers are willing to give all the time that everybody wants; that is not a covered issue, I do not believe.

You made a comment that the time off without pay could have been taken by the person who testified previously. My experience is that there are a lot of people out there who feel that if they take the money, they spend the money; they never wind up with the time. And I find that to be a more prevalent feeling among women in the work force. They feel that time belongs to them; money belongs to the family. They have a much stronger family belief than most of the men workers that I have been with, and so they prefer to take a flextime or a comp time situation and use the time later for their families. Should we be able to provide that for them?

Dr. RASELL. I think that we need to maintain the protections currently in the law, and I think getting the compensation up front is the way to do that.

Senator WELLSTONE. I am sorry. Could you repeat that? I did not hear your response.

Dr. RASELL. I just think that maybe if people get their paycheck, they spend it, and they do not have money sitting in the bank so they could take time without pay. This is a problem. But nonetheless their income is the same under either circumstance, and I think that maybe if people were aware of that option, if the money could be sitting in the bank and earning interest, they would under the current law receive their compensation for their overtime hours at the time it was earned and not at some point in the future when it may be in jeopardy.

Senator ENZI. In one of the businesses that I worked with when we had some extra work and wanted to know if the people wanted to do it, they said, Yes, if I can have time off next week, but if I have to take the money, I do not want to work. We explained to them that they had the capability of taking that money this week and not working next week and spending that money next week, but somehow the paychecks do not get distributed at home quite the same way as they do on paper, and it gets to be a bit of a problem for them. So I am hoping that everyone will reflect a little bit on the flexibility that we are talking about here and not the mandatory things that seem to be implied.

There were also comments that we should not touch FLSA. I am interested in whether you think we should not address these concerns at the salaries that were mentioned before, the instances where people were actually volunteering because they were concerned about the business and their role in that business, and they wanted to make the business prosper, and we do not allow it—we cannot allow it.

Should we not address those?

Dr. RASELL. This is not an area that I am deeply versed in, however, let me just say a couple of things. From what lawyers tell me, I think the law could be clearer, so that might be an area that

needs some work. But I think it is also true that part of the benefits of being an exempt employee, a salaried worker, is that you do have some flexibility in your work hours. The understanding is that sometimes you are going to work more than 8 hours a day, more than 40 hours a week; other days, you are going to work less. And these instances where people are docked pay for taking a couple of hours off, I think is the question. Why is that going on—not the issue of what happens under the Fair Labor Standards Act.

Senator ENZI. Well, I hope before people make up their minds on S. 4, they will take a little closer look at the bill and some of the provisions because we have already noted some concerns, but they actually are answered in the bill, and I do not have time to go into how they are answered in there. And I do think that this is a better solution than FLMA because this actually results in paid time rather than unpaid time, and that seems to be the preference of most of the people I have spoken with.

Ms. NUSSBAUM. Sir, if I may, it provides paid time that you have already worked for. It is not like a paid vacation time or something. You put in the hours to get that pay that you then take on the paid leave on another occasion, so it is not exactly like paid time.

Senator ENZI. It is exactly like paid time. They get paid for the time that they put in. That is also how you calculate when you are figuring vacation times, when you are doing the accounting process. So you can be paid for it.

Thank you for the time. I yield my time.

Senator DEWINE. I want to thank our panelists very much. Let me just say that Senator Warner was here, and without objection, I will enter his written statement into the record at this point.

[The prepared statement of Senator Warner follows:]

PREPARED STATEMENT OF SENATOR WARNER

Just as with the TEAM Act last year, I believe it should be a top priority of this Congress and this Committee to reform our labor laws to reflect the workplaces and lifestyles of the 1990's. The Fair Labor Standards Act has a been a bulwark against worker oppression for nearly six decades, but with its prohibitions against workplace flexibility, the FLSA has itself become incompatible in some ways with worker happiness and productivity.

S.4, the Family Friendly Workplace Act, will introduce voluntary flexibility into the a workplace. But let me be clear about some things the bill would not do. It would not end the 40-hour workweek for those who desire such a schedule. It would not end the ability of workers to receive overtime pay for extra hours worked above their normal schedule. It would not allow employers to force employees into unwanted schedules. These are all unfair charges that misunderstand the nature of this legislation.

Representing a commonwealth with an enormous number of federal employees, have seen first-hand the success of the "comptime" and "flextime" provisions which federal workplaces have utilized since the mid-1980's. It is time to extend this system to the rest of the country.

I am proud to have two representatives from TRW Systems Integration Group in Fairfax, Virginia here to share their insights about flexible work schedules with the subcommittee. You can see

from their testimony that TRW and its employees have mutually sought to introduce as much flexibility into their workplace as the FLSA will allow: TRW can attract and keep motivated employees, and their employees can juggle the demands of high-level work, family obligations, and the stress of metropolitan living.

Yet the testimony of Ms. Larsen and Ms. Korzendorfer make clear the limits of TRW's policies. Hourly employees such as Ms. Korzendorfer cannot take advantage of the professional work schedules that salaried employees enjoy. Moreover, while TRW has worked hard to implement flexible schedules within the confines of the FLSA, the flexibility is much more limited than TRW's employees might desire.

Senator DEWINE. The record will remain open for any questions from members of the subcommittee to the witnesses we have had here today.

I will also State that next week, we will have the second hearing where we will specifically focus on the bill that is in front of us, Senate bill 4.

Thank you all very much.

[The appendix follows.]

APPENDIX

PREPARED STATEMENT OF SANDY BOYD

Mr. Chairman and distinguished members of the subcommittee: My name is Sandy Boyd. I am the Assistant General Counsel to the Labor Policy Association (LPA), a public policy organization of senior human resource executives representing over 250 major corporations. LPA's purpose is to ensure that U.S employment policy supports the competitive goals of its member companies and their employees. The total number of persons employed by LPA member companies in the United States is approximately 12 percent of the private sector workforce.

I also Chair the Flexible Employment Compensation and Scheduling Coalition (FLECS), a group of over 50 companies and associations, representing both small and large businesses, not for profit and for-profit, committed to ensuring that this country's wage and hour laws meet the needs of employees and employers now and in the 21st century. A list of FLECS Coalition members and its Statement of Purpose is attached to my testimony.

On a personal note, let me say that I am pleased to appear before you today to speak about workplace flexibility. My interest in flexible workplaces is not just hypothetical, it is personal as well. I appear before you not only as an attorney but as a wife and mother of two young children. I can personally attest to the benefits of working in an environment that permits flexibility. My current position allows me to fulfill my job responsibilities while volunteering at my son's school, going with my daughter on field trips, taking the kids to the doctor and all of the other responsibilities that go along with being a parent. While it is not always easy, I believe, most days at least, that I've been able to strike a successful balance at work and at home. I am mindful, however, that my ability to have this flexibility is in large measure because I am a professional employee exempt from the overtime provisions of the FLSA. Employers have far fewer options available to their nonexempt work force because of the restrictions in the current law.

The FLECS Coalition is dedicated to modernizing the Fair Labor Standards Act (FLSA) to provide employees greater workplace flexibility. In short, we believe employers and employees ought to be able to reach agreements on flexible schedules beyond the standard 40 hour workweek and to bank compensatory time in lieu of cash overtime where such an arrangement is mutually beneficial. Salary basis reform for white collar employees would also increase flexibility options. Contrary to what you may hear, employers interested in true workplace flexibility are not trying to "save money" or "avoid overtime pay." Real workplace flexibility works only when employers and employees can agree on mutually beneficial arrangements, such as flexible scheduling. Choice is key.

The employers I represent know that providing flexibility in the workplace is a win-win. For employees, it means more control and an ability to strike a balance between work and personal demands. For employers, increased workplace flexibility has bottom line benefits as well, such as increased employee retention and productivity gains. As a recent Ford Foundation study concluded:[1]

Restructuring the way work gets done to address work-family integration can lead to positive "win-win" results-a more responsive work environment that takes employees' needs into account and yields significant bottom line results.

The FLSA Prevents True Workplace Flexibility

While many companies have implemented creative workplace programs, they are limited in what they can provide their employees because of restrictions in the Fair Labor Standards Act (FLSA).

The FLSA is an obstacle to workplace flexibility because, while it provides some fundamentally important employee protections, it is rigid and paternalistic in many respects. The FLSA requires that all overtime-eligible employees, and that is most of the workforce, be paid at least the minimum wage, and receive cash overtime for all hours worked in excess of 40 in a workweek. This is the case even if the employee would prefer to, for example, bank their overtime in the form of compensatory time or flex their schedule beyond the workweek. An employee cannot waive his or her rights under the FLSA, under any circumstances, not even through collective bargaining. An employer faced with a request by an employee to trade hours between workweeks or to bank overtime is faced with this choice: be in compliance with the FLSA and say "no" or say "yes," be flexible and expose the company to liability including back pay, double damages, attorneys' fees, court costs and possibly

[1] "Relinking Life and Work: Toward a Better Future," Ford Foundation (1996).

civil penalties. For many employers and employees this arrangement is anything but "employee friendly."

The 40 hour workweek and time and one-half overtime penalty provisions were devised in 1938 in large measure as a penalty to encourage employers to hire more employees, obviously a paramount concern during the Great Depression when unemployment rates were high. Needless to say, some 60 years later the needs of many in the workforce have changed considerably since that period of time. It is questionable whether the rigid 40 hour workweek with cash overtime, and no alternatives, really meets those changing needs. A quick look just at the changing participation of women in the workforce reveals why workplace flexibility is increasingly important to many employees:

> From between 1948 and 1995 women's labor participation rates almost doubled, from 33 percent to 59 percent, respectively. The Bureau of Labor Statistics estimates by the year 2005 the rate will increase to 63 percent.
>
> According to the Bureau of Labor Statistics, 62 percent of two parent families with children have both parents working outside the home.
>
> The Bureau of Labor Statistics also reports that about 76 percent of married women with school age children work outside the home.

Given this change alone it is no surprise that more employers are being asked for more flexible work arrangements. Even among employers who do everything they can under current law, there is more that could be done if more options were available under the FLSA.

What Employees Want: Time and Flexibility Are Paramount

For many overtime eligible employees seeking to juggle work and family responsibilities, time off and scheduling flexibility is valuable-often more valuable than additional cash overtime compensation. For those employees, being able to choose, for example, compensatory time off in lieu of cash overtime would make an important difference in their lives. This need was reflected in a poll conducted by Penn+Shoen, for the Employment Policy Foundation. A copy of the poll's results are attached to my testimony. The poll indicates that 88 percent of all workers want more flexibility, either through scheduling flexibility and/or the choice of compensatory time. The poll also indicates that 75 percent of those polled favored a change in the law that would permit hourly workers the choice of either receiving time and one half overtime in wages or in time and one half compensatory time. Significantly, of those polled who currently receive overtime wages, 57 percent responded that they would sometimes take compensatory time with 58 percent of that group indicating that they would more often choose compensatory time rather than cash overtime. Clearly, to many hourly workers more paid time off is a valuable commodity. In addition to compensatory time, the Penn+Shoen poll indicates that at least 65 percent of those polled were interested in more flexible work schedules.

The results of the Penn+Shoen poll are certainly consistent with what FLECS members are hearing from their employees. Polling data aside, even if only a small minority of employees wanted more flexible scheduling or compensatory time off, then through their collective bargaining representative, or individually if they are not represented, they ought to be able to strike mutually satisfactory arrangements with their employers.

Suggested Options to be Added to the Fair Labor Standards Act

There are three basic options that the FLECS Coalition believes ought to be included in the FLSA so that employers can offer more their employees more flexibility. These include:

Flexing the Workweek. The FLSA makes it difficult to institute flexible schedules for employees entitled to overtime. Any time an employee works over 40 hours in a workweek, the employer must pay overtime compensation. This inhibits employers from instituting flexible scheduling. For example, instead of working two 40 hour workweeks in a row (a total of 80 hours over a two week period), an employee might prefer to work a "9/80" schedule which involves 80 hours over a 9 day period, such as 45 hours the first week with 35 the next, and a scheduled day off every other week. Under current law, the employer would have to pay overtime for the additional five hours worked in the first week, even though the employee works an average of 40 hours in each workweek. As a result, many employers simply cannot afford to institute these kinds of schedules for employees entitled to overtime-even when employees request it. Many employers, therefore, only allow this type of option to exempt, salaried employees. This creates an unnecessary tension in the workplace between exempt and nonexempt employees. The advantages of being able to "flex" the workweek and have a structured day off every other week during the workweek

are numerous. Employees have pointed out the following advantages: being able to take care of personal matters that are only conducted during traditional business hours (Monday-Friday, 9-5) such as doctors appointments and service repairs; being able to volunteer at a child's school or in the community; and being able to have a structured schedule that accounts for the unique needs of child and elder care arrangements.

The FLECS Coalition believes that these types of schedules are beneficial to all concerned and that employers and employees ought to be free to "flex" the 40 hour workweek when it is advantageous to both parties.

Compensatory Time Off. Unlike their public sector counterparts who have the ability to choose whether to receive their overtime in time and one half cash or bank it for future time off, private sector employees have no such choice. Under the FLSA an employee in the private sector who is entitled to overtime must receive the overtime in cash. Many employees have obligations or needs, such as elder or child care, that make receiving compensatory time an attractive option. Other employees would like time to pursue different interests, to volunteer or advance their education. Whatever the reason, employees with their employer's agreement, ought to be able to bank their overtime in the. form of compensatory time.

President Clinton, last summer in his acceptance speech at the Democratic convention, and repeatedly thereafter, stated that he believed employees should have the option of banking compensatory time. Just prior to the end of the 104th Congress the President even transmitted a bill to Congress which would allow employees just such an option. While there are sections of the President's compensatory time proposal with which we disagree, we believe it was a step in the right direction which demonstrated that this in an issue for which a bipartisan solution is attainable.

Clarification of the Salary Basis Test. Employees exempt from the FLSA's overtime provisions must be paid their salary "on a salary basis" as that term is defined by the Department of Labor. Unfortunately, the term "payment on a salary basis" has been the subject of much court litigation over the past decade, including Auer v. Robbins, a case presently before the Supreme Court. The result of this litigation has been to create confusion and uncertainty, causing many employers to curtail some of the flexibility options previously available to exempt employees. For example, under the salary basis test exempt employees may not take partial days leaves of absence without the employer risking the loss of the employee's exemption status (and therefore being entitled to two and possibly three years of back overtime pay, double damages, attorneys fees and costs)—even when an employee

requests it. Other practices such as the payment of overtime, reducing paid leave accounts by the hour and the setting of work schedules of otherwise exempt employees have all been challenged as contrary to exemption status. This has caused cautious employers to choose unattractive options. In order to be in strict compliance with the salary basis test, they only permit employees to take paid or unpaid leave in full day increments and don't pay any additional compensation above and beyond the salary for fear that an exempt employee will be considered a nonexempt hourly worker. The FLECS Coalition believes that the salary basis test needs legislative attention to remove those obstacles which prevent exempt employees from achieving workplace flexibility.

It should be noted that the salary basis test is just one portion of DOL's antiquated white collar exemption tests, found at 29 CFR Part 541, that deserve attention. DOL's tests for determining who is exempt from the overtime provisions have not been substantively revised since the 1950's. I challenge anyone to take a hard look not only at the salary basis but duties portion of the regulations and determine with any confidence where the line between exempt and nonexempt employees falls. Instead of examining how much an employee is compensated or even the kind of work they perform, the regulations have become a hypertechnical trap for the unwary. While employers strive to keep up with the conflicting nuances of the rules, plaintiffs' attorneys have learned to "game" the system and use the ensuing confusion to their advantage. In the long run, this confusion benefits no one. Clarity and common sense need to be restored in these rules. I have also attached two articles to my testimony which further discuss these and other issues in the FLSA.

CONCLUSION

In conclusion let me first commend the Subcommittee for addressing the subject of workplace flexibility which is so important to many workers lives. While finding solutions to the needs of employers and employees seeking to increase workplace flexibility won't be easy, we believe that beginning the dialog on this issue is a necessary first step.

Lifting the current roadblocks in the FLSA to provide employers and employees more options, such as flexing the workweek, banking comp time, and salary basis reform, is a critical first step. Ensuring that employers and employees be permitted to voluntarily choose such options is also critical-employers know that flexibility works, but only when it is freely chosen by both parties. For those employees who receive cash overtime and desire to do so within the current FLSA framework, this choice must be honored. A cautionary note is in order, however. The solutions to workplace flexibility must not be more complicated than the problem itself. If the "solution" is too complex and the requirements too burdensome, employers will not offer it and we have not advanced the cause of workplace flexibility in any respect. On the other hand, employee protections must be in place. The challenge is to strike a balance and develop legislation that the average small business owner can easily implement, if they chose, and employees can understand. We believe this challenge can be met and we look forward to working with all Members of the Subcommittee on this important issue.

PREPARED STATEMENT OF MICHAEL R. LOSEY

Mr. Chairman and Members of the Subcommittee: Good morning. I am Michael R. Losey, SPHR. I am the President and CEO of the Society for Human Resource Management (SHRM). The Society is the leading voice of the human resource profession, representing the interests of 80,000 professional and student members from around the world. We do not permit employers to join. SHRM provides its membership with education and information services, conferences and seminars, government and media representation, online services and publications that equip human resource professionals for their roles as leaders and decision makers within their organizations. The Society is a founding member and I am the Secretary General of the World Federation of Personnel Management Associations (WFPMA) which links human resource associations in 55 nations.

Mr. Chairman, I appreciate the opportunity to appear before you and the members of the Subcommittee today to share my experience, as well as the experience of thousands of human resource managers who constitute the society for Human Resource Management, on the important issue of workplace flexibility.

SHRM members from companies of all sizes have expressed a strong desire to update the Fair Labor Standards Act (FLSA) to reflect the realities of today's workforce. SHRM is well suited to discuss the experience of professionals from large, medium and small companies. Over half of our members are from companies with fewer than 1,000 employees. Our membership also draws from across the spectrum of industries and employers. Despite the large variety in company sizes and industries in which SHRM members find themselves, our members are virtually unanimous in expressing frustration regarding the inflexibility and antiquity of the Fair Labor Standards Act. In fact we receive more requests from our members for clarification and information about the rights and responsibilities under the FLSA than for any other employment issue.

Today's complex workplace demands sensible laws which respect the need for flexibility, ease of use and ease of administration. These qualities all contribute to more efficient operations which translate into growth and greater employment opportunities for employees.

Enacted in 1938, the Fair Labor Standards Act is one of this nation's oldest labor laws, and one which has remained largely unchanged since it was established. It has served our nation and its employees well. However, to ensure its continued contribution to our global effectiveness, we must recognize that the FLSA is outdated and, in some cases, even unfriendly to our nation's businesses and their employees.

When the FLSA was enacted, it was clearly depression recovery-directed legislation. Interestingly, the unemployment rate on average was 19 percent when your predecessors originally passed the law. The emphasis was on creating jobs. The tactic was the creation of a penalty or those employers who worked employees beyond a 40 hour work week. The assumption was that no employer would pay a penalty of 50 percent overtime wages and would instead hire more employees.

However, in just a few short years, World War II brought the unemployment rate to the lowest of this century—only 1.2 percent. (Today, of course, it is at 5.4 percent, the lowest in six years.) Subsequently, employers began the trend of providing health insurance and pension plans in an attempt to recruit and retain needed workers.

But as you know, much has changed. For instance, in 1938, less than 16 percent of married women worked outside the home. Today, it is more than 60 percent. Three-quarters of the mothers of school-age children work outside the home. According to the U.S. Department of Labor Women's Bureau, "[women are not only more

likely to work outside the home today than in the past, but they also spend more time at work than did women in earlier years. Women have increasingly opted to work both full time and year round, partly due to economic necessity, but also due to movement into occupations that require full-time, year-round work." Human resource professionals and employers find themselves constrained by the FLSA when attempting to offer workers greater flexibility in scheduling while continuing to provide customer services and remain competitive.

Today, employers are faced with growing national and international competition to attract and retain qualified workers, as well as to reduce operating expenses. Despite wide ranging and successful efforts by employers to increase our global competitiveness, employers have been limited because of the constraints imposed by a law which has remained virtually unchanged for almost 60 years. We need your help to remove those obstacles and believe that this can be done in a manner which truly provides flexible options for employees without adversely affecting their interests.

One example of the restrictive nature of the FLSA is the issue of compensatory time off for workers in the private sector. We are pleased that the Senate is working to address this issue through the introduction of S. 4, the Family Friendly Workplace Act. While public-sector employers are permitted to allow employees to "bank" compensatory time off in lieu of paying overtime on an hour for hour basis, private-sector employers do not have such an option. In fact, offering private sector employees the choice of compensatory time or overtime payments is specifically prohibited, notwithstanding the apparent satisfactory experience of the public sector. I might also note that since the historic Congressional Accountability Act applied the FLSA to Congressional offices, this option is also specifically prohibited for Congressional employees. This bill should be expanded to provide these family-friendly workplace flexibility options for Congressional employees as well.

Many employees today value—and in some cases actually need—time off more than cash as they struggle to balance work and family demands. Thus, employers should be permitted to assist these employees by providing compensatory tune off as an option for them. U.S. Department of Labor Women's Bureau survey found that the top concern of working women is flexible scheduling in the workplace. In addition, much of the U.S. economic growth is with small and medium sized firms. As I mentioned earlier, many of our members are from small companies. Fifty-six percent of our members are from companies with less than 1000 employees and 44 percent come from firms with less than 500 people. These smaller firms may have cyclical or irregular work loads and customer demands. If companies had the ability to work with the employee and offer compensatory time in lieu of cash for overtime, lay offs during slow periods could be reduced, thereby promoting a more constant income level for the employee. Employers could then control their costs without disadvantaging any employee. If this happens, there will be less employer reluctance to extend new full-time employment opportunities.

I want to emphasize, however, that SHRM also strongly feels that protections should be in place to ensure that employers do not coerce employees to choose compensatory time off instead of overtime pay. We fully support more employee options and choices at work. Flexible options have proven to be very successful. For instance, cafeteria benefit plans and 401(k) savings plans that offer investment options have been very well received by employees.

In addition, SHRM has long supported allowing employers to adopt a pay period of up to two or four weeks and only be required to provide overtime compensation for hours worked in excess of an average of forty hours per week. Therefore we commend Senator Ashcroft for demonstrating his commitment to providing flexibility to employees by including provisions in S. 4 which would allow employers and employees to establish work periods of 80 hours over a two week period.

SHRM is not recommending that overtime payments be eliminated or reduced, only that the FLSA provide more flexibility by allowing employees the option of compensatory time off when they prefer to have it. We believe that employees should receive compensatory time off at the same rate that they would receive if they were paid for the overtime. In other words, if an employee worked 4 hours of overtime one week, the employee could choose either 6 hours of pay or 6 hours of compensatory time off.

In summary, providing compensatory time off as an option for employees would be an improvement for several reasons: It would improve employees' morale by providing them with means to juggle the demands of work and family life; It would help employers with recruitment, retention and productivity; It would ensure that private sector employees have the same rights as public sector employees; and, finally, It would allow businesses in cyclical industries to better adjust to those cycles, thereby allowing employees increased financial security during low business cycles.

The Society of Human Resource Management applauds Senator Ashcroft, the members of this Committee and the Senate leadership for embracing a commitment to update the FLSA for the 21st century. Representing the human resource professionals who will be implementing these employee friendly measures and offering them to employees, we look forward to working closely with Senator Ashcroft and the members of this Committee to ensure that balanced legislation is achieved as it progresses through the legislative process. To ensure that these options will be fully utilized by employers and employees, they must be easy to understand, use and administer. With this goal in mind, SHRM will continue to work closely with the Senate on these and other provisions within the bill designed to provide employees with flexibility.

I have included a copy of the Society's more detailed policy statement on FLSA reform with my statement. SHRM stands ready to assist the Senator Ashcroft, the members of this Committee and the Senate leadership as this important legislation progresses through the Committee process and to the Senate floor.

Thank you for your time. I would be happy to answer any questions.

PREPARED STATEMENT OF SALLIE LARSEN

Good Morning, Mr. Chairman and members of the Subcommittee. I am Sallie Larsen, Vice President for Human Resources at TRW's Systems Integration Group in Fairfax, Virginia. I would like to tell you today about a young Purdue University graduate who in 1977 returned to California to look for her first job. At the time, she was single and unemployed. Her main requirements for a job were fair pay, interesting work, and, of course, an office location near the beach. Clearly in reverse priority order.

Twenty years later, this graduate is a young woman with management experience, a working spouse, and three children under the age of seven. Two of the children are in elementary school and play on soccer teams. And yes, she still has several main requirements for her job: fair pay, interesting work, and, of course, flexibility. Again, in reverse priority order.

This woman is just one of the many employees at TRW who now places flexibility at the top of their list of job requirements. For the past twenty years TRW has moved aggressively and creatively to meet this need. I am pleased to be invited to appear before this subcommittee to talk to you about the policies we have implemented over the years that provide a wide range of flexible options to our employees to help them manage their personal and professional lives. I would also like to share some of our concerns.

TRW is a global manufacturing and service company headquartered in Cleveland, Ohio. It is strategically focused on providing products and services with a high technology or engineering content to the automotive and space and defense markets. We employ approximately 64,000 people in 24 countries.

My organization, TRW's Systems Integration Group, headquartered in Fairfax, Virginia, employees approximately nine thousand people in twenty-one states and the District of Columbia. Our job is to provide program management, systems and software engineering, and engineering and support services to defense, civil, federal, international and commercial customers, and state and local governments.

For the past ten years, I have been part of the management team serving our three constituents: customers, employees, and shareholders. Joe Gorman, TRW's Chairman and CEO, has repeatedly emphasized that our objective is to delight both customers and shareholders. Our success in achieving this goal comes in a large part from our success in delighting our employees. We take our partnership with them very seriously.

This partnership is demonstrated by TRW's long history of pioneering innovative human resource policies and practices. In 1980, in our Defense Systems Group, we implemented flexitime for over twenty-one thousand employees across the country which allowed them to modify their work schedule within the confines of an eight hour work day. This meant that all employees could flex their start and end times around standard core hours. This new schedule was implemented within the limits of what federal law would allow us to provide. At the time, the workforce was delighted with this new scheduling flexibility.

Over the years, however, the bar has been raised on what "delights" versus what "satisfies" our workforce. Our employees are highly educated. Many are in dual income families balancing multiple priorities. They have children. They have aging parents. Many of our employees have long commutes. They have outside educational pursuits, they want to volunteer in the community. The also want time to exercise at fitness centers. This list could go on and it does. In order to maintain employee

morale and increase productivity, we have had to respond to the needs of our changing work force.

In today's very competitive marketplace, the pressure to attract and retain scarce talent is another reason "delight" is becoming even more difficult to achieve. To compete with hundreds of Silicon Valley, California companies looking for the same caliber of talent we are, Sunnyvale unit, had to reexamine and create employee benefit policies that would provide a competitive edge over other companies. When assessing the options, again, flexibility was at the top of the employee list.

In 1995, with employee input and management support, TRW introduced a "9/80" work schedule for all employees at fourteen locations in seven states. A California employee recently shared a story about how happy he is at being able to participate in his son's Boy Scout activities by working eighty hours in nine days, and having every other Friday off. As an hourly employee, he does not receive over-time for those extra hours but he does receive the day off.

You may be wondering how we were able to give him and three thousand other employees this flexible work schedule without violating the regulations of the Fair Labor Standards Act (FLSA).

We had to find a "work around" that achieved our business objectives but still kept our company in compliance with the law. The work week was modified to end at Friday noon in the first week of a pay period to comply with the FLSA. Hourly employees still receive overtime for all hours worked over forty in a work week. Employees can also choose to stay on a five eight-hour day schedule and continue to receive daily overtime for hours worked lin excess of eight in a work day. Imagine the benefits! On the "9/80" schedule, employees can get up to twenty-six three day weekends a year.

Where are we today? Both management and employees are delighted. Since implementation of "9/80", our annual attrition rate in Sunnyvale has dropped from 25 percent to 12 percent--over one-half. In a recent employee survey, over 90 percent of all employees preferred and wanted to continue the "9/80" work schedule. 83 percent of these employees said it was an important factor in their decision to stay with TRW.

The problem is that "work arounds" to create and implement programs like the "9/80" are done at some cost to the company and some loss of employee productivity during implementation phase. However, given the current legal constraints, "work arounds" are the only viable option if a company really wants to implement creative work schedules.

In September 1996, we were recognized by Working Mother as one of its top one hundred companies who care about work and family issues. In addition to wages that are average or above average, opportunities for women to advance, child care support and other family-friendly benefits, the magazine recognized several of our alternative work schedules. These include flexitime, compressed workweeks, job-sharing, telecommuting, and part-time employment. I have submitted a reprint of this article with my written testimony.

Based on the successes of our previous flexible work programs, we recently implemented another "work around" called "The Professional Work Schedule".

In our business unit, we have a compelling business need to better understand our employee work patterns for bidding new work. In meeting the needs of these employees, we saw an opportunity to add even more flexibility for all of our salaried employees and managers in scheduling work across a longer period of time.

The Professional Work Schedule allows exempt, salaried employees to record all hours worked and to flex these hours over a two week pay period with their supervisor's approval.

For example, an employee in my organization has set up a regular schedule of one afternoon off every week to spend time studying before a weekly night class. She adds the hours to other days in the two week pay period. In addition, her supervisor has the ability, based on hours worked and business needs, to grant approved time off at a later date.

Again, employee delight about the Professional Work Schedule has been favorable and measurable. At open forums and brown bag lunches, over two-thirds of the employees raised their hands when asked if they had taken advantage of the flexibility of the Professional Work Schedule.

One employee who works in our proposal operations where hours are long as employees work to win new business for the company, recently told me that with the Professional Work Schedule, he now can take some time off and not worry about using vacation. By separating our billing and pay systems, employees can be recognized for working long hours today by taking approved time off later in the year.

The Professional Work Schedule helps our salaried employees with two week flexing, partial day time off, and additional time off. However, we are unable to ex-

tend this schedule to our hourly employees because of the restrictions of the Fair Labor Standards Act. These employees are amazed to learn that it is a sixty-year old law that is substantially unchanged since it was passed that stands in their way of becoming a full member of the team. Their most common complaint: "Why am I treated as a second class citizen?" Our answer: it is the law, not the company's unwillingness to offer the Professional Work Schedule to them.

When I evaluate these and other employee benefit programs and policies at TRW, the. "me factor" does play a part. I joined the company twenty years ago right out of college. I now have a spouse who works for the federal government and three children. I have seen first hand that the flexibility government employees have with work schedules and hourly leave—that the private sector doesn't have today—can make a positive difference in sharing our parenting responsibilities.

We both volunteer in Kelsey's and Kendall's elementary school classes, and Bill coaches on the girl's soccer teams. We wonder how much more challenging life will be when Jared, our three year old, starts school. We also worry about elder care issues as our parents reach their late seventies.

As you may have guessed, I am that Purdue graduate that joined TRW in 1977. I am that executive who works at TRW today. Do I want a company that offers fair pay, interesting work, and flexibility? Definitely, yes. In fact, I am delighted that TRW, within the limits of the current law, has delivered all three. I would like, both personally and professionally, to be able to do more.

I want to thank the committee for their efforts to look at reform of the Fair Labor Standards Act in order to promote more work place scheduling flexibility. I also want to thank you for giving me this opportunity to tell TRW's story, as well as mine.

PREPARED STATEMENT OF MARK WILSON

Mr. Chairman, Members of the Committee, thank you for inviting me to testify on the need to reform the Fair Labor Standards Act (FLSA) to provide for flexible work schedules. Please accept my written testimony and enter it into the record. It should also be noted that the following testimony is my own view and does not necessarily reflect that of The Heritage Foundation.

Over the past 25 years, the United States has moved from a manufacturing to a global service economy, and more American women are working than ever before. Workers are demanding more flexible hours, working conditions, and compensation packages, than current laws and regulations allow. America's economy, labor market conditions, and labor-management relations have changed dramatically since the Fair Labor Standards Act (FLSA) was passed in 1938, yet few provisions of the Act have been updated to reflect those changes. For example:

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

Concerns over the well-being of their families often force women, single parents, and husbands to choose not to work, to change jobs, or to forego a job that draws on their full talents. In many cases, this scenario could be avoided by enabling em-

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[1] This data is from various press releases of the Bureau of Labor Statistics.
[2] "Bureau of the Census, 'Money Income in the United States: 1995," September 1996.
[3] Bureau of the Census, "Money Income in the United States: 1995," September 1996.
[4] Ibid.
[5] Princeton Survey Research Associates, "Worker Representation and Participation Survey, Top-Line Results," October 1994; Penn+Schoen Associates, Inc., "Flexible Scheduling and Compensatory Time Poll," conducted for the Employment Policy Foundation, October 27, 1995.

ployers to offer flexible work schedules. The FLSA, however, currently impedes an employer's ability to accommodate employee requests for greater flexibility in scheduling. For example, a worker may want to work 44 hours one week in order to take a half-day off the following week to attend a parent/teacher conference without using any leave or losing any pay. The FLSA, however, requires that employee receive money instead and is therefore forced to use other leave (usually vacation leave) to care for the schooling of their children. The Department of Labor has even prosecuted employers for violating the FLSA by offering their workers the same flex-time options federal government employees currently enjoy.[6]

THE HISTORY OF FLEXIBLE WORK SCHEDULES

The concept of alternative work schedules is not new nor untested.[7] They were first introduced in Germany 1967 as a means of relieving commuting problems. Shortly thereafter, employers in Switzerland began to offer flex-time as a way to attract women with family responsibilities into the labor force. The Hewlett-Packard Company was the first to introduce flex-time in the United States in 1972.[8] Since then, the number of private sector workers taking advantage of flex-time or some from of compressed workweek in the United States has grown relatively slowly.[9]

In 1978, Congress passed the Federal Employees Flexible and Compressed Work Schedules Act, that enabled Federal workers to arrange alternative work schedules to meet their personal needs. It was so successful that Congress reauthorized the program in 1982 and made it permanent in 1985. In 1985, Congress also extended to all public sector workers the flexibility to use compensatory time in lieu of overtime pay.

Organized labor has been a vocal opponent of enabling private sector employers to offer flexible schedules, particularly compressed workweeks, outside the context of collective bargaining. Federal employee unions; however, recognize the value of flex-time to their members despite testimony from leaders in the AFL-CIO "strongly" opposing flexible schedules.[10] In 1976, members of the oldest and largest independent union of government workers, the National Federation of Federal Employees, mandated their leadership to "seek flexitime work schedules." and the American Federation of Government Employees voiced their support for the concept of flexitime and proposed] its broader implementation."[11] By 1992, 528 federal union contracts contained provisions on alternative work schedules,[12] and in 1996, more than 52 percent of federal employees were taking advantage of flexible scheduling arrangements.[13]

President Clinton acknowledged the benefit of flexible scheduling when he directed all executive departments and agencies to expand their use of flexible family friendly work arrangements in a memorandum on July 11, 1994.[14] In issuing the memorandum, Mr. Clinton stated, "broad use of flexible work arrangements to enable Federal employees to better balance their work and family responsibilities can increase employee effectiveness and job satisfaction, while decreasing turnover rates and absenteeism."

The Fair Labor Standards Act (FLSA) was enacted to protect unskilled, low-pay workers. But in today's economy, where both parents are likely to be working, its rigid and inflexible provisions hurt more than they help. The FLSA deprives workers of the right to order their daily lives, both on and off the job, to meet the respon-

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[6] Craig E. Richardson and Geoff C. Ziebart, 'Red Tape in America: Stories from the Front Line," The Heritage Foundation, 1995, p 109.

[7] Alternative work schedules includes flex-time, flexible credit hour programs, compensatory time, and compressed workweeks.

[8] Barney Olmsted and Suzanne Smith, "Creating a Flexible Workplace," American Management Association, 1989.

[9] By 1991, nearly 20 years after flex-time was first introduced in the U.S., only 15.3 percent of all private full-time employees were working on flexible schedules compared to 27.0 percent of federal government employees. See: Bureau of Labor Statistics, "Workers on Flexible and Shift Schedules," August 14, 1992.

[10] In testimony before Congress in 1977 and 1978, the AFL-CIO "strongly" urged the rejection of the Federal Employees Flexible and Compressed Work Schedules Act. See: Part-time Employment And Flexible Work Hours, Committee on Post Office and Civil Service, U.S. House of Representatives, 95th Cong., 1st Sess., May 24, 1977, pp. 167. Flexitime and Part-time Legislation, Committee on Governmental Affairs, U.S. Senate, 95th Cong., 2nd Sess., June 29, 1978, pp. 217.

[11] Ibid.

[12] Office of Personnel Management, "Labor-Management Relations Guidance Bulletin," July 1995.

[13] Office of the Press Secretary, "Conference on Corporate Citizenship Panel I," The White House, May 16, 1996.

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

sibilities of work and home. Given the success of the federal flex-time program, it is disturbing that after nearly 20 years since flex-time was first introduced in the U.S., only 15.3 percent of all private full-time employees were working on flexible schedules.[15] Congress should extend the same freedom to private workers that federal employees have—flextime—and enable employers to offer flexible schedule and compensation options to their workers.[16]

PREPARED STATEMENT OF WILLIAM J. KILBERG

Mr. Chairman and Members of the Subcommittee: The Fair Labor Standards Act Reform Coalition, which I represent, includes a wide range of associations and individual employers who are concerned about white collar exemption provisions of the Fair Labor Standards Act ("FLSA").[1] The FLSA too often has frustrated these employers' efforts to respond sympathetically and effectively to their employees' needs. Both as a management attorney, and in my very different former role of enforcing the FLSA as Solicitor of the United States Department of Labor, I have experienced the law's inflexibility firsthand. While the underlying goal of preventing workforce exploitation retains its validity, the FLSA's 60-year-old structure far too often works against the interests and desires of the employees it purports to protect.

That is why S. 4, the Family Friendly Workplace Act, is so important. As other witnesses have noted in some detail, Senator Ashcroft's proposal offers several carefully measured workplace scheduling options that will facilitate flexibility while preventing abuse. Compensatory time, for example, would allow employees to elect leave in lieu of cash overtime premiums, enabling them to build up a bank of paid leave that can be used for family and personal emergencies. Flexible scheduling, which is also included in the bill, would authorize adjustment schedules over two-week periods, providing greater flexibility to deal with ongoing family or personal demands.

Less attention has been paid, however, to another aspect of S. 4 that I believe is most critical: clarification of the so-called "salary basis" test. This regulatory standard, which is one of many measures used to determine whether a specific individual is an exempt "executive, administrative, or professional" employee, provides that an employee is compensated on a salary basis only if he receives a predetermined weekly salary that "is not subject to reduction because of the quality or quantity of work performed."[2] While deductions are permitted for absences of a day or more for reasons such as illness or vacation,[3] deductions for less than a full day's absence violate the definition.

A problem has arisen because of misinterpretations of the regulation's concluding section, which states:

> The effect of making a deduction which is not permitted under these interpretations [i.e., a deduction for less than a full day's absence] will depend upon the facts in the particular case. Where deductions are generally made when there is no work available . . . the exemption would not be applicable to [the employee] during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered lost if the employer reimburses the employee for such deductions and promises to comply in the future.[4]

Although consequences for exempt status under this regulation clearly flow from "making a deduction"—and apply only "to [the employee] during the entire period when such deductions were being made"—the Department of Labor and most courts have reached a different conclusion. Seizing on language in the introductory portion of the regulation stating that salaried employees should not be "subject to" deduction from pay, a perception has developed that salaried status can be lost based on the mere theoretical possibility of deductions applicable to the employee.

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[15] Statistical Abstract of the United States 1994, "Workers on Flexible and Shift Schedules: 1985 and 1991," p 410.

[16] In 1978, Congress recognized the benefit of these work-arrangements and passed the Federal Employees Flexible and Compressed Work Schedules Act.

[1] In addition to the legislation currently before the Subcommittee, the Coalition advocates other white collar exemption reforms pertaining to the duties standards and treatment of highly compensated employees. The Coalition looks forward to future hearings by this Subcommittee at which these further FLSA issues will be addressed.

[2] 29 C.F.R. §541.118(a).

[3] 29 C.F.R. §541.118(a)(2)-(3).

[4] 29 C.F.R. §541.118(a)(6).

Most courts, in fact, have applied the "subject to" principle as an ironclad rule, which unequivocally mandates a loss of exemption if anyone can concoct a theoretical circumstance under which existing employer policies could allow improper deductions. Beginning with the Ninth Circuit's 1990 decision in Abshire v. County of Kern,[5] and mushrooming in a series of subsequent cases such as Martin v. Malcolm Pirnie, Inc.,[6] courts have demonstrated a willingness to ignore all the other facts in the case to deny exemptions based on nothing more than this draconian "subject to" theory.

The consequences of this misinterpretation are enormous. In Pirnie, for example, only a very small handful of partial day deductions had occurred, which the court itself labeled "de minimis." Many of these deductions were entirely understandable; one employee, for example, had voluntarily directed that she did not want to be paid for the portions of workdays she spent working on her doctoral thesis. Under S. 4, the employer would have been free to grant such leave by agreeing only to provide premiums for any overtime worked in that week notwithstanding time spent working on the thesis. In Pirnie, however, the court held that the employer's "policy" of allowing such deductions caused an entire class of highly paid engineering professionals to lose their FLSA exemption.

In the short term, the burden of such decisions falls primarily on employers, in the form of outrageous damage awards for employees who could not have expected overtime premiums for their highly skilled and highly paid jobs. For private sector employers alone, according to a study by the Employment Policy Foundation, potential damages approach $20 billion per year. The actual figure may be much higher, since the study was based on a two-year statute of limitations rather than the three-year statute accompanied by doubling for "liquidated damages" that is available if a violation is deemed "willful," and a damage calculation method resulting in less than one-third of the damages yielded by more aggressive methodologies that have been advocated by plaintiffs in some recent cases.

In the long term, however, employees bear the brunt of these legal anomalies. Faced with the possibility of high-dollar damage awards, employers will not willingly leave their heads on the chopping block. Instead, they inevitably will change personnel policies to make absolutely clear that no employee ever can take partial day leave unless it falls within the statutory exception for leave mandated by the Family and Medical Leave Act ("FMLA"). The doctoral candidate who wants to work on her thesis will be told the next time that she has to do it on her own time. Employees who want to attend to personal matters will be welcome to do so—but only at the expense of taking a full day off.

In fact, when the Abshire and Pirnie decisions first came out a few years ago, one of my clients related to me the story of a longtime employee who had fallen off the roof of his home and had become paralyzed from the neck down. After a while, this employee returned to part-time duty, but he was never physically able to resume full-time status. If the client had reclassified this employee as hourly, he would have suffered reductions in his pension, vacation, stock savings investments, and—most importantly—his medical benefits. Instead, the client retained the employee as salaried, but reduced his salary in accordance with the hours the employee was unable to work in any particular week. Unfortunately, the result of this generosity, under Abshire and Pirnie, was to put the client at risk of overtime liability to every one of its salaried employees. Given these consequences, this client has expressed serious reservations about its freedom to act in such a compassionate manner the next time a similar situation arises.

Expansion of the FMLA could never resolve such problems. No matter how many specific categories of leave that Congress might mandate, it could never anticipate and catalog every circumstances under which an employee might legitimately wish to take unpaid leave. Nor should it want to. If flexibility is good for employees—justifying the current statutory exception from the salary basis requirement for leave mandated by the FMLA—then policies contemplating non-mandated leave should not create a loss of FLSA exemption. An employer should be free to tell the employee that leave can be taken, with the only cost being overtime liability to that employee in the week in which the leave is allowed.

Unfortunately, this problem is showing no signs of imminent self-correction. Sensing the problems that the current inflexible rule has created, the Department of Labor recently reversed earlier guidance by articulating a rule denying exempt status on a class-wide basis only if the "facts in the particular case" indicate that em-

[5] 908 F.2d 483 (9th Cir. 1990), cert. denied, 111 S. Ct. 785 (1991).
[6] 949 F.2d 611 (2d Cir. 1991), cert. denied, 113 S. Ct. 298 (1992).

ployees are "subject to" deductions "as a practical matter."[7] However, such a rule—at least according to the Department—would still lead to a loss of exemption in cases such as Malcolm Pirnie. Moreover, this wholly discretionary standard invites employers to play a high stakes game of chance, hoping that policies authorizing leave will not be frowned upon under the unintelligible "practical matter" test. No prudent employer would be willing to take such a gamble.

Recent judicial decisions likewise offer no comfort. While a few courts have expressed reservations about the broad "subject to" standard,[8] other recent decisions seem to reflect a judicial game of "Can you top this?" Several courts have held, for example, that the mere act of accounting for absences through paid accrued leave triggers a loss of exemption, notwithstanding the lack of any reduction in predetermined salary.[9] Even the payment of hourly overtime bonuses to certain employees, in addition to their predetermined weekly salaries, has been enough for some courts to find a loss of exemption.[10]

On some of these issues, such as the effect of additional overtime premiums, the Department of Labor has promulgated regulatory guidance and opinion letters that should be helpful.[11] Many courts, however, have ignored these pronouncements in a misguided attempt to construct a philosophically pure "subject to" requirement. Moreover, even if the Department were inclined to issue guidance resolving the entire "subject to" problem, that regulatory change would operate only prospectively.[12] Irrational salary basis claims already pending, but not yet decided, are just as dangerous to the purposes of S. 4 as claims yet to be filed. Since S. 4 is merely intended to restore the common-sense view that prevailed before cases such as Abshire, the salary basis portion of the bill should be amended to make clear its retroactive application to cases pending but not yet decided. Such a retroactivity provision has appeared in each of the many significant salary basis bills introduced in the past six years.

Mr. Chairman, the salary basis issue has been an active concern of Congress for many years. A bi-partisan proposal in the House of Representatives, cosponsored by Rep. Rob Andrews (D-NJ) and Thomas Petri (R-WI), received a hearing as early as 1993. At about the same time, during Senate floor debate on the FMLA, members on both sides of the aisle acknowledged the need for a standalone legislation to address salary basis concerns for partial-day leave that is not mandated by the FMLA. Proposals from Senator Kassebaum and Senator Ashcroft followed, but neither bill received action during the 104th Congress. Separate legislation was also sponsored on the House side by Rep. Petri, addressing both the salary basis issue and other badly needed reforms to the FLSA's duties standards.

S. 4, however, provides the best opportunity to date for a meaningful and effective remedy. Coupled with other measures in the bill, the salary basis provisions of this legislation—modeled after Rep. Petri's bill—offer an important mechanism that employers can use to help their employees cope with the demands of modern family life. I urge this Subcommittee, therefore, to act quickly on this proposal.

PREPARED STATEMENT OF KAREN NUSSBAUM

Mr. Chairman, thank you for the opportunity to present to this Committee the views of the AFL-CIO and of working men and women on S. 4, the Family Friendly Workplace Act, and on the time-money stress felt by many working families.

At the AFL-CIO, I direct the new Working Women's Department. For the past 25 years, I have been an advocate for working families and particularly working women. I've done research, worked on legislative solutions, been a public servant in the federal government, built organizations to shape the transformation of work, and am, myself, a working mother of three children. Over the years, I've talked with thousands of working women and men in every walk of life about the very subject

[7] Brief for the United States as Amicus Curiae at 10, Auer v. Robbins, No. 95-897 (U.S. argued Dec. 10, 1996).

[8] See Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995), cert. granted, 116 S. Ct. 2545 (1996).

[9] Klein v. Rush-Presbyterian-St. Luke's Medical Center, 990 F.2d 279 (7th Cir. 1993); Benzler v. State of Nevada, 804 F. Supp. 1303 (D. Nev. 1992).

[10] See, e.g., Hilbert v. District of Columbia, 784 F. Supp. 922 (D.D.C. 1992), aff'd in part and rev'd in part on other grounds, 23 F.3d 429 (D.C. Cir. 1994).

[11] See, e.g., Wage and Hour Division Letter Ruling (July 17, 1987) (stating that docking of accrued leave does not affect an employee's salaried status since it results in no actual loss of pay); 57 Fed. Reg. 37,666, 37,676 (Aug. 19, 1992) (reaffirming position); see also 29 C.F.R. §541.118(a) (stating that the "salary basis" definition is met if an employee receives a predetermined amount constituting all or part of his compensation," contrary to court rulings stating that overtime bonuses in addition to an employee's predetermined salary trigger loss of exemption).

[12] 57 Fed. Reg. 27,678 (Aug. 19, 1992).

of today's hearing. Additionally, when I served as the director of the Women's Bureau at the U.S. Department of Labor, I initiated Working Women Count!—a survey of more than 250,000 working women, conducted in 1994?

PICTURE OF AMERICAN FAMILIES

Over the last 25 years, a new picture of American families has come into focus—a picture in which incomes are down the gap between the top fifth of families and the rest is growing ever wider and work hours are up.

In an abrupt turnaround, the vast majority of working families—the bottom 80%—are seeing their incomes stagnate or fall behind. Average pay for production workers alone has fallen 12% since 1979, in dollars adjusted for inflation.

While income for most American families is going down, the top fifth of families has seen their incomes grow by nearly 20% since 1979. We see the gap between those at the top and the rest of society widening. In 1980, top CEOs were paid 41 times what the average worker earned. Today, top CEOs earn 145 times what the average worker earns. This gap is also replicated in benefits. High-income earners are three times more likely to have health insurance and five times more likely to have pensions.

And there's a gap in work and family policies, as well. Despite the fact that low-income families need family-friendly workplaces even more than do high-income earners—because their lower pay limits their ability to purchase flexible dependent care and take unpaid leave—it is higher-income employees who are more likely to have company-supported child care, job sharing, and paid leave.

The financial pressures on working families have driven record numbers of women into the paid workforce. Nearly half of the workforce is women—doubled since the time of their grandmothers—and even a majority of mothers with infants now work for pay. The number of women working multiple jobs has increased more than four fold in the last 20 years. Women now account for almost half of all moonlighters. At the same time, hours for men are going up too. One-fourth of all full-time workers spent 49 or more hours a week on the job in 1990. Of these, almost half were working 60 hours or more.

How does it add up? The need to make up for declining wages is creating more and more time pressure for families who need to spend more and more hours in the paid workforce. As a result, many families feel they are just barely keeping it together. As a man in Birmingham told us: "I've got a middle-class job but I can't afford a middle-class house." A working mother spoke for many when she said, "My life feels like I'm wearing shoes that are two sizes too small."

Don't get me wrong. Women like working—79% of respondents to the Working Women Count! survey said they liked or loved their jobs. But they reported serious concerns on the job and identified stress as their number one problem. The solutions are clear, if not simple—time and money.

CONTROL OVER HOURS

Workers today feel compelled to spend more hours in the paid workforce, taking time away from family and community life. But the more important issue here is control over working hours. Women around the country have explained to me that "flextime" that provides flexibility to the employer—but wreaks havoc on a employee's schedule—is no solution. This was echoed by the bank executive who was expected to work late with no notice; the waitress at a diner, who was changed to the night shift, despite the fact that she had no child care for evening hours; and the nurse, scheduled to work a second shift shortly before her first shift ended. When you ask these workers, and many like them, if changing the 40-hour work week helps them, they respond with a resounding "no." In polls done by the AFL-CIO and the Economic Policy Institute, last year, majorities responded that they want more family time, but they do not support changing the laws that provide overtime pay after 40 hours; and they were skeptical that changes in the law could be enforced to protect workers.

TIME IS MONEY

Moreover, those people actually covered by the Fair Labor Standards Act are far more likely to say they want overtime pay, as opposed to time. When low-income workers choose to work overtime, they do it for the money. And when the right to overtime pay is challenged, these workers worry they'll never see the money, again.

REAL SOLUTIONS

With rising productivity, profits and CEO paychecks, we can do better than provide the no-win choice of time or money. We need to provide real control over work hours, and make it possible for working families to afford to take time off, by building on what works:

Expand the Family and Medical Leave Act to cover more workers and provide time off for more family needs. The report of the bi-partisan Commission on Leave finds that the FMLA has virtually no negative effects on employers, while it has clear benefits for workers and their families.

Set higher standards for fair pay. Passing an increase in the minimum wage was a great first step. We also need to take steps to enforce and expand the equal-pay laws, identified in many polls by working people—both men and women—as an important way to improve family incomes.

Provide paid leave for basic needs. At the times when families are under the greatest stress, working families are less likely to receive paid sick leave, paid vacation, and paid family leave. The Commission on Leave report identified the lack of paid leave as the biggest reason why employees in family-and-medical-leave-covered institutions do not take family and medical leave. The Commission recommended that employers, employee reps and others give serious consideration to the development of a uniform system of wage replacement for periods of family and medical leave.

With all this in mind, Mr. Chairman, allow me to turn my attention to S. 4, the so-called "Family Friendly Workplace Act."

What S. 4 purports to do, to respond to the needs of our hard-pressed working families, is to give them what the sponsors of this legislation claim to be a new option. Workers can have more time to devote to their families' responsibilities, the sponsors say, but only if the workers are prepared to surrender the overtime earnings on which they depend to make ends meet. For too many working families, that is a Hobson's choice.

FALSE ANSWERS

Although the Committee has deferred until next week its examination of the legislation that is pending before it, my testimony would not be complete if I did not at least briefly state the AFL-CIO's adamant opposition to S. 4, the so-called Family Friendly Workplace Act.

We see nothing family-friendly about repealing the 40-hour workweek and allowing employers to require their employees to work 50 or even 60 hours in one week, and 20 or 30 hours the next.

We see nothing family-friendly in taking away from employees the right to overtime pay and substituting a system of compensatory time off that is riddled with loopholes and limitations.

And we certainly see nothing family-friendly about expanding the class of employees who are exempt from the Fair Labor Standards Act and who thus will have no right to either overtime pay or compensatory time off.

These proposals are, in our view, large steps backwards. Their enactment would mean more control to employers—and less money for workers. We, therefore, would Urge this Committee to set these proposals aside and begin work on measures that will meet the real needs of our hard-pressed working families—like an expansion of Family and Medical Leave and stronger equal pay laws.

STATEMENT OF THE AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES

The American Network of Community Options and Resources (ANCOR) currently represents over 650 agencies across the United States that together support more than 50,000 people with disabilities. ANCOR promotes and assists private providers by serving as an accurate and timely source of information at the national level. The association communicates with and assists members through formal outreach, training and other special services regarding trends and innovations in the disability field. About 85 percent of the members of ANCOR are nonprofit agencies, the rest are proprietary and family-care providers.

Most of the funding for community services for people with disabilities comes from federal, state and local sources. The federal/state Medicaid program is a major resource, as are other Social Security programs, including Supplemental Security Income, Disability Insurance, Medicare and Title XX Social Services. As federal and state budgets tighten, there are increasingly fewer dollars to go around. All levels

of government are now looking for ways to make additional cuts, and pay raises and benefits are kept to a minimum to protect programs.

Direct support workers are the most important resources our members have, but there is little money available for expansive employee benefits. One of the most valued things our members can offer to their employees is flexibility in the workplace. Unfortunately, currently law prohibits the private sector from offering the range of flexible opportunities currently available to federal, state and local government employees. It is time this discrimination against private-sector workers stopped.

The Family Friendly Workplace Act (S 4) introduced by Senator John Ashcroft would give our members an opportunity to provide their employees with greater flexibility and more work options.

Many workers have expressed interest in compensatory time and flex time. They would like to have the opportunity to forgo receiving overtime pay and instead accumulate hours to take off at a later date for personal use. Time is more valuable than money to many people, particularly when working just an hour or two more in one workweek would result in so little extra take-home pay, but when the hours are banked together for use at a later date, they add up and can be used to take together a day—or perhaps more—at a time.

In the human service field, hours worked might involve the following:

> A direct-support worker might stay on the job for a couple of extra hours one evening to read to a sick child because the worker who comes on duty for the next shift will be tied up with the demands of the other children who live in a group home, and the child will otherwise not get the one-on-one attention he can benefit from at this time. The employee who stays over can then take a couple of hours off one afternoon to go to his or her own child's school to attend a school play.
>
> A maintenance worker can bank overtime hours plowing driveways and shoveling snow in the winter to take off and go fishing with his children in the summer.
>
> A direct-support worker who works overnight might stay a couple of hours from time-to-time in the morning waiting for the employee who works the next shift to arrive, or to stay with someone who is sick and cannot go to school or training. She could use this time to go to the theater with her husband once a month.
>
> An office secretary could bank hours worked one week to type a special report for a board meeting to take off at a later date to join a group of friends driving to a discount shopping mall in another town.

These are but a few examples of the ways that a compensatory time or flexible credit hour program could work. Many, many workers would use these options in lieu of taking overtime pay.

Biweekly work programs would also be welcome in the human service field. There are many people who would like to be able to work nine nine-hour days to take a regularly-scheduled day off every two weeks, permitting the employee to catch up with personal chores while children are in school, or just to enjoy having three days off in a row to rest and unwind after the responsibility of supporting a challenging group of people with disabilities.

These are truly family-friendly programs that benefit employees. Private sector employees should have the same flexibility that is offered to public-sector workers. These programs are options. Workers want choices. They want to have a greater opportunity to control their own lives without being required to conform to rigid schedules that were common almost 60 years ago when the Fair Labor Standards Act was passed, particularly in these days when both husbands and wives have to work, and there are so many single-parent families where there is no opportunity to share responsibility for children's school events, or to attend to sick children or older family members who also live in the family home.

People shouldn't have to lie about being sick or take time off without pay. They should be able to accumulate hours and take time off as paid personal comp-time leave instead. Not all ANCOR members will want to use these programs if they do become law. In some cases the extra bookkeeping will be prohibitively complicated and costly, and some may find that it is difficult to find other employees to cover an extra shift of duty. However, those who do understand the value of these kinds of benefits will find that employees will be more willing to work for each other if they can later take advantage of this flexibility to do something they wish to do at a later date.

Employees who are provided with more flexibility tend to be happier on the job. They have better attendance records when they do not have to take sick leave or time off without pay in order to attend to personal business, and both they and their

employers can plan in advance for personal leave time. They do not experience burnout as quickly and staff turnover is reduced.

The employee protections which prohibit coercion or the use of compensatory time as a condition of employment should be adequate to protect people who would rather receive overtime pay than accumulate compensatory or flexible credit hours. Unfortunately, those few employers who exploit their workers are likely to do so anyway. They will ignore these prohibitions just as they now ignore the minimum wage and overtime requirements. The provisions of the Family-Friendly Workplace Act will not increase exploitation.

Federal employees have enjoyed programs like these since 1978, and state and local employees have the comp time option as well. Employees in the private sector should no longer be discriminated against. Please resist further efforts to complicate the bill and pass the Family Friendly Workplace Act.

RESPONSE TO QUESTIONS OF SENATOR ENZI FROM MICHAEL R. LOSEY

Question 1. Are employers experiencing difficulties when complying with the Family and Medical Leave Act? Is the number of employers experiencing such difficulties increasing?

Answer 2. Surveys indicate that employers are in fact experiencing difficulties when complying with the Family Medical Leave Act. The results of several surveys of the SHRM membership are enclosed for the hearing record:

> We sent the Commission on Leave's Westat Survey to SHRM members attending our March 1996 legal and legislative conference and 71 percent of the respondents indicated that their organization has found compliance with the FMLA "somewhat" or "very difficult".
>
> This finding was consistent with the results of our June 1994 survey which found that three fourths of the members were experiencing daily administrative problems in attempting to comply with the FMLA.
>
> A separate survey on The Top 10 Human Resources and Health Care Issues conducted by the Indiana Chamber of Commerce indicated that Indiana employers identified compliance with the Family and Medical Leave Act as their "biggest human resources related legislative or regulatory concern[.]"
>
> The most recent survey of our members showed that after three years of enactment, nearly 6 out of 10 human resource professionals say their organizations spend additional dollars implementing the FMLA. About half (51 percent) said that their organizations had not benefited from the FMLA. The most significant FMLA costs, according to 36 percent of the respondents, is the expense incurred for replacement workers.

Other FMLA costs include: Continuation of health insurance—33 percent; Loss of productivity—33 percent; Time spent to explain the FMLA—25 percent; Administrative costs to track leave—24 percent; Overtime for workers not on leave—20 percent; Decreased morale due to increased work loads—10 percent; and Attorney fees—8 percent.

The U.S. Department of Labor has recently begun to receive an increasing number of complaints regarding the FMLA, with most of the complaints being resolved without going to court. This surge of complaints filed suggests that both employers and employees are just coming to an understanding of the Act, its obligations and its administrative requirements. It also suggests that employers are generally trying in good faith to comply with the statute, but are typically either unaware of tracking and administrative requirements or are confused by the complexity of the statute and its burdensome implementing regulations.

While it is difficult to know whether administrative problems are increasing or decreasing, it is our professional judgement that the Act is still not yet fully understood by employers or utilized by employees. It has also been our experience that many employers are unaware of the level of detail of compliance necessary to comply with the Act. This finding is consistent with the U.S. Commission on Leave's finding that employers and employees were unfamiliar with the law. In fact the U.S. Commission on Leave Westat researcher stressed that the Commission's report is "only the first look at what the survey can provide on the dynamics associated with the law" and noted that "additional research would be needed to provide a more global examination of the impact of this legislation."

I am also enclosing for inclusion in the record a May 6, 1996 Lawyers Weekly USA article which discusses the widespread nature of FMLA implementation problems and the October 2, 1996 Investor's Business Daily article.

We strongly believe that technical corrections to the Act would greatly ease the administrative problems for employers.

Question 2. How much paperwork is an employer required to "fill-out" when complying with the Family Medical Leave Act? Would such requirements also be required by an employer when complying with the Family-Friendly Workplace Act?

Answer 2. The paperwork requirements under Family Medical Leave Act include a physician certification form, the employer's written response to an employee's request for leave upon receipt of the certification form and the employer's notice to the employee regarding whether the leave will be taken pursuant to the FMLA. The difficulties experienced by employers with this process are illustrated by the following statement by Hallmark Cards to the Senate Subcommittee on Children and Families for the May 1996 hearing on FMLA implementation problems:

> The Medical certification Process is Cumbersome for Both Employers id Doctors. The medical certification process as defined by the DOL is cumbersome. Employers have little means of questioning what the employee's doctor says, other than for the employer to send the employee for second and third opinions at the employer's expense. It is likely to take at least two weeks for the employer to obtain the employee's initial medical certification. As indicated above, Hallmark's experience has been that most FMLA absences are not pre-scheduled. Thus, the employee is usually already absent when the employer learns of the need for a medical certification. The employer has two calendar days to send the FMLA notification and medical certification forms to the employee under Section 825.301. Since the employee is gone, these forms are often mailed. The employer cannot require that the employee have the FMLA medical certification back for 15 days after the employee receives it. The entire process from the time Hallmark learns of the absence until Hallmark receives back the completed form can often take close to three weeks. (This assumes that the employee submits the certification in a timely fashion. Frequently, there are additional delays caused either by the employee's or the doctor's delay.) Only then can the employer determine whether in fact the absence is covered by the FMLA.
>
> Not only is the initial medical certification process cumbersome, but the employer's only option under the DOL regulations in the event that the employer disagrees with the initial certification is to obtain second—and third—opinion. See Section 825.307. Each of these steps is likely to take at least an additional 15 days, and, by the time that doctors are found, appointments are scheduled, and results are obtained, could easily take longer than 15 days. Thus, in cases where the initial medical certification is disputed, it could easily be two months or more before the employer has sufficient information to determine whether an absence should be covered by the FMLA.
>
> Doctors Are Unfamiliar with FMLA Medical Certification Requirements. Further compounding the problems caused by the DOL regulations is the fact that many doctors are unfamiliar with the FMLA and the requirements that employees submit medical certification forms. Hallmark has had several doctors in the Kansas City metropolitan area complain that Hallmark has imposed the lengthy medical certification form on the medical community; they simply do not recognize that this is a federal regulatory requirement.

As indicated in the enclosed testimony by SHRM's witness, Libby Sartain, SPHR, CCP, Vice President of People with Southwest Airlines, who testified last year before the Senate Children and Families Subcommittee, stated that:

> The Department of Labor determined that employees can take FMLA leave in as little as eight minute increments. The tracking of this leave is very difficult to say the least. This difficulty has been exacerbated by the FMLA's vague definition of serious health condition.

Kathleen Fairall, who testified on SHRM's behalf at the S. 4 Senate hearing on February 13, recounted her recent frustration at repeated but unsuccessful efforts to try to obtain an FMLA physician certification for an employee. After negotiating past the receptionist and others in her final effort to obtain the certification form, she asked the physician to take ten minutes to fill out the form, to which he responded, "Where do I find the ten minutes?" Other physicians, however, simply refuse to fill out the paperwork, try to charge the employers or employees for filling out the paperwork or complain about the excessive administrative requirement. Without the cooperation of certifying physicians, employers cannot comply with the two-day requirement.

While the legislative language of the Family-Friendly Workplace Act does not impose administrative burdens comparable with the FMLA, and while nothing in S. 4 requires employers to change current practices or to agree to certain options, SHRM continues to work closely with Senator Ashcroft and members of the Labor

and Human Resource Committee to ensure that the options provided under the Family-Friendly Workplace Act will user friendly for both employers and employees. The easier that the flexible options are for employers and employees to understand, use and administer, the more likely that employers will make the options available to their employees on a widespread basis.

Question 3. Large businesses often have the ability to implement "work around" policies that allow flexible work schedules without violating the Fair Labor Standards Act of 1938. My concern is that small business owners tend to shy away from such "risky" policies due to the legal liability of possibly violating the 1938 Act. Many small business owners lack the financial means of hiring legal counsel needed for constructing such policies. Without legal counsel, are "work around" policies a legal liability for small employers? If so, would the passage of the Family-Friendly Workplace Act (S. 4) relieve small businesses from such liability?

Answer 3. Employers of all sizes, large and small, risk legal liabilities whenever they attempt to work around the archaic strictures of the Fair Labor Standards Act. This is especially true for smaller businesses which do not have the financial resources to retain legal counsel. Without such counsel, they would be ill-advised to attempt to find creative work schedules which would satisfy the needs of employees and yet remain within the strict requirements of the FLSA's 40 hour, seven day work period. The Family-Friendly Workplace Act would give employers of all sizes, but particularly to small ones, great comfort in knowing that they can accommodate their employees' needs without exposing themselves to legal liabilities. Employers today face growing national and international competition to attract and retain qualified workers, and need Congressional support to enhance both employees' job satisfaction and businesses' competitive standing.

Again, Senator Enzi, thank you for the opportunity to testify on important workplace flexibility legislation. We look forward to continuing to work closely with you and your staff as the Senate amends S. 4 and moves the measure to the Senate floor.

[Additional material may be found in committee files

PREPARED STATEMENT OF EDITH RASELL, M.D.

Mr. Chairman and members of the Subcommittee on Employment and Training. I am Edith Rasell, an economist at the Economic Policy Institute. Thank you for inviting me to testify on Senate Bill 4, the Family Friendly Workplace Act.

The purpose of the hours provision in the Fair Labor Standards Act (FLSA) was and is to restrict the length of the work week. Requiring employers to pay an overtime pay premium provided an economic disincentive to work weeks longer than 40 hours. In short, the FLSA established the 40-hour week standard. Currently, however,

- average hours worked per week are rising, despite a growing share of the labor force being employed part time;
- people are working more overtime hours, despite the pay premium disincentive; and
- work hours are rising in the US, while hours per week are falling among all our major industrialized trading partners with the exception of Canada where the rise has been lower then in the US.

This is not a time to weaken the hours provision of the FLSA.

Nonetheless, given the growing numbers of two-earner families and single-parent families in which the parent works, employees have a need for more flexibility in their work schedules. However, the current provisions of the FLSA already allow employees much greater flexibility than many employers are willing to permit. Employer inflexibility, much of which may be necessary given the requirements of their workplace but which is far beyond what is required by the FLSA, is a major obstacle to employee flexibility.

For example, under current law employers can allow employees to vary their arrival and departure times and take time off during the day, even while requiring a specified number of hours to be worked each week. Under current law, employers can offer workers a compressed work week such as four ten-hour days per week, permitting one additional day off per week. Employers can reduce the length of the usual work week. Job sharing can be encouraged. All this and more is currently possible. However, while many companies say they support such policies, they are actually used in very few firms and by very few people. A survey of 121 private

companies found that just 14% routinely made available a flextime program. Moreover, 92% of those without a flextime program said it was unlikely they would adopt such a program in the future (Stroh and Kush 1994). Only 10% of full-time hourly workers have flexible work schedules (BLS News, August 14, 1992).

Proponents of S. 4 argue that this amendment would give to private employees the same flexibility currently enjoyed by federal and other public sector employees. However, the situations of private and public sector employees are very different. In the public sector, 43% of workers are covered by collective bargaining agreements which afford them additional protections. In the private sector, just 11% of workers are covered.

Currently, state and local employees may accumulate comp time in place of overtime pay. But many employees have reach their maximum number of bankable hours: 240 hours (30 days) for most workers and 480 hours (60 days) for police and firefighters. A major problem is that employees have difficulty obtaining their employer's permission to use their comp time hours.

This proposed amendment to the FLSA stipulates that employees will make the choice of receiving compensatory time off or overtime pay, and the decision about participating in the flexible credit hour or biweekly work program. The bill prohibits any coercion by employers in these decisions and prohibits making participation in these programs a condition of employment. However, because the bargaining power of employers and employees is so unequal, ensuring such a free choice for all workers is not possible. The pressures can be very mild but also very effective. We know that some people do not exercise their options under the Family Medical Leave Act because they do not want to be stigmatized (e.g., being on the mommy track) by taking the time off that they desire and to which they are legally entitled. Through such subtle influences or more overt ones, workers choices can be compromised.

If workers cannot exercise a free choice, then this bill would put overtime pay at risk. In any given week, some 13% of hourly workers receive overtime pay. Approximately 60% of overtime pay recipients earn less than $10 per hour, or about $20,000 per year if they work full time, year round. About 62% live in families with incomes below $40,000. In a period of stagnant wages, many of these workers rely on their overtime pay. They cannot afford a flexible schedule if it means less take home pay.

If there were no overtime pay premium to discourage work weeks of greater than 40 hours, then the length of the average workweek would rise and fewer people would be hired. An estimated 1.4 million jobs would be lost (Golden 1997).

While no one can predict the future, the current situation can shed light on what could be expected if S. 4 were enacted. Current law allows much more flexibility than employers are willing to permit. In the public sector where employees are able to bank their comp time hours, the banks are frequently full. All this implies that many employers are not willing to allow employees more flexibility in taking time off and suggests a pessimistic future for employees under S. 4. If employers are unwilling to grant workers flexibility now, how will workers be able to use the comp time they would earn under the provisions of S. 4?

Instead of working to pass S. 4, we should focus our energy on encouraging more employers to offer workers the flexible schedules that are currently allowed. Employers could also offer paid personal leave days for workers to use at their discretion. Moreover, employers could shorten the average work week. This would not only give workers more time off, but evidence suggests it would also boost productivity and raise employment. It is not necessary to compromise the protections provided by the FLSA with this amendment.

Tuesday, February 11, 1997

The Honorable Mike Enzi
United States Senator
United States Senate
SH-116 Hart Senate Office Building
Second Street and Constitution Ave., N.E.
Washington, D.C. 20510-5003

Dear Senator Enzi:

We at Unicover Corporation are very pleased to have been asked to testify regarding S.4 before the Senate Employment and Training Subcommittee.

While our formal testimony before the Committee offers enthusiastic support in general for the bill to allow for compensatory time off, biweekly work program, credit hours, and salaried exemption provisions, there are two provisions of this bill which we believe should be amended.

1. We believe that the requirement that accumulated compensatory time and flexible credit hours remaining unused be paid out once a year diminishes the benefit of this program to employees significantly. Based upon our brief experiment with compensatory time in the early 1980's, we know that people set about to accumulate significant amounts of time in order to have an extended vacation sometimes more than a year into the future. We also saw that people who had used most of their available vacation before an unexpected event arose (such as a wedding) were able to bank additional time to permit them to attend such an event where their only alternative would have been to take unpaid leave.

   Currently our employees accrue vacation at a rate of 2, 3, or 4 weeks per year depending on their length of service. Even today it is not at all unusual to find that employees cannot do the things that they want to do because they do not have enough vacation time accrued, sometimes even because illness or other emergencies resulted in exhausting available leave. The every 12-month payout requirement can mean an employee who has something special planned, beyond the mandatory payout date, for which they want to accumulate additional time may be forced to take cash instead. We therefore recommend that the 12 month payout requirement be eliminated, be expanded to at least 24 months or made negotiable between employer and employee (at the employee's option) in order to be more of a benefit to the employee.

2. The provision under flexible credit hours that employees may bank up to 50 hours in a 12 month period seems illogical. Employees will be most likely to use their time off in full day increments so that 6 days and 2 hours does not make much sense on the face of it. Since this is a voluntary program "initiated and requested" by the employee, each request for which presumably must be approved by the employer, it is not clear to us why a maximum amount of time which can be earned in a 12 month period needs to be stated in this legislation. If a maximum amount does need to be included for some reason, we recommend that it be an intuitively logical number of hours such as 40 or 80.

Finally, we do confess some discomfort with the language "An employer . . . shall not directly or indirectly intimidate, threaten, or coerce any employee . . ." Unicover Corporation's interest in compensatory time is in providing a benefit to employees that will keep them happy and working for Unicover Corporation. Intimidating or coercing them certainly would not achieve our objective. On the other hand, the breadth of this language would create the opportunity for the occasional disgruntled employee to "stick it to" the company. We understand that some protection against abuse may be in order, but hope it can be narrowed somewhat.

Thank you for considering our views.

Sincerely,

UNICOVER CORPORATION

James A. Willms

James A. Willms
Executive Vice President

[Whereupon, at 12:25 p.m., the subcommittee was adjourned.]

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