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Committee on Education & Workforce
Subcommittee on Workforce Protections

Hearing on "The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities."

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Chairman Mackenzie, Ranking Member Omar, Members of the Subcommittee:

Thank you for the opportunity to speak with you today about the reform of the Fair Labor Standards Act, a topic I have thought about, for decades, as I assisted employers to comply with wage-hour laws and helped workers receive the wages they are entitled to under those laws.

Let me begin with a brief overview of my background of and commitment to increasing compliance with the Fair Labor Standards Act and state wage and hour laws. First, I grew up in a working-class family in a farming community in Cambridge, Illinois, population 2,200. My mother was a grill cook. My father was a butcher, until he became too ill to do that work and started running a cash register. My sister is a secretary. My brother was a correctional officer and then drove DoorDash, until he survived an aortic aneurism and could no longer work. Of almost 50 aunts, uncles and cousins, only 5 attended a four-year college. In short, most in my family are wage earners, living paycheck to paycheck. I love them and want them all to be paid correctly. It's personal.

Thus, when I served as Administrator of the Department of Labor's Wage and Hour Division, responsible for enforcement of the FLSA, my focus was protecting vulnerable, low-wage workers. That focus included expanding low-wage industry initiatives – targeted investigations in industries employing workers below, at, or just above the minimum wage. When I arrived at WHD, the agency had targeted initiatives in only three low-wage industries: garment, agriculture and health care. We expanded these initiatives to include retail, restaurant, hospitality, janitorial, security and others. We collected record amounts of back wages for low-wage workers.

Compliance with the FLSA continued to be my focus when I returned to private practice, although now by working with employers to identify and correct violations. In my practice, I conducted internal audits of employers' compliance in the areas of minimum wage,

overtime, independent contracting and other pay practices. When I found violations, I worked with my clients to correct their practices, including paying back wages. I also was a founding executive of ComplianceHR where I developed applications to assess FLSA and other employment law compliance using expert systems technology. I developed, for example, the Navigator OT and Navigator IC apps which assess overtime and independent contractor compliance. These applications apply a series of tests (based on federal and state statutes, regulations, case law and agency rulings) to user responses in an on-line questionnaire. With these apps, an employer or an employee advocate can quickly determine the likelihood of a violation at a much lower cost than engaging an attorney.

Yes, as an attorney, I took some of the first steps using AI to make attorneys obsolete or at least less necessary for workers and small businesses – because I have one central, driving focus: No worker, no small business, no one, should need a lawyer to figure out how a worker needs to be paid under our laws. And I can tell you that my clients wanted the same thing. Universally, they came to me wanting to know how to follow the law. They just needed guidance on how to do it. They'd usually tried to figure it out for themselves; but almost always, they'd thrown up their hands. The law was too unclear, too opaque. They needed the help of a professional. And that brought home for me one basic lesson:

We need clear and simple rules.

The FLSA: A Short History

The Fair Labor Standards Act is neither clear nor simple; and it has become grossly outdated in the 87 years since it was signed into law by President Roosevelt. Since that time, our economy has transitioned from agriculture to manufacturing, then to service, and now to technology – with workers moving from fields to factories, to offices, and now back to their homes. We have moved from rural to urban environments. The participation of women in the workforce has nearly doubled, according to BLS data. The number of workers choosing independent work over employment continues is growing exponentially: now 72.7 million people, 27.7 million full time, according to MBO Partners' 2024 State of Independence report. The FLSA is not keeping up.

In the last 87 years, Congress has amended sections of the FLSA less than 20 times, but most amendments have been in coverage (9 times), exemptions (9 times), and the minimum wage (9 times). Exemptions have been repealed more often than created. For example, amendments in 1961 and 1966 eliminated exemptions for most retail and service employees; in 1974 and 1977, overtime exemptions were repealed for over a dozen industries (including hotels, restaurants, public transit, seafood canning, and sugar processing); state and local government employees gained FLSA protections in 1985. The

only major new overtime exemptions came in 1961 with the addition of commissioned employees of retail and service establishments (as all other retail exemptions were phased out); academic administrative personnel and teachers in 1966; and in an effort led by Senator Edward M. Kennedy (R-MA) in 1996, an exemption for computer employees.

Key issues have gotten scant attention: Congress last legislated on the definition of work in 1949. That same year, the FLSA amendments included for the first time a definition of the "regular rate" in Section 7(e), 29 U.S.C. § 207(e). That section determines the types of compensation that must be included in the overtime calculation. Congress has not revisited remedies and defenses since 1989.

By my math, that's 76 years since any changes to the definitions of work or the regular rate (except the exclusion of stock options in the year 2000). Remedies and defenses were last revised 36 years ago. And Congress last considered updates to exemptions 29 years ago. I think we can all agree that much has changed since then in the type of work we preform, how we perform work, and how we are compensated for our work. It's time and past time for change, even though change will be difficult and there will be disagreements over what change is needed or advisable.

I hope we can all agree, however, that we need clear and simple rules that small businesses and workers can understand without an attorney or HR professionals. Clear and simple rules would ensure workers are paid correctly in the first instance – without having to wait months or years for a DOL investigation or private litigation. For low-wage workers, living paycheck to paycheck, justice delayed is justice denied.

<u>The Need for Clear and Simple Rules</u>

You may be skeptical of my claim that the FLSA is not a clear and simple law. Minimum wage for all hours worked and overtime pay for hours over 40. What's so hard about that?

Definition of Employee and Employer

Let's start here: the FLSA applies to employers and employees. Who is an employer? Who is an employee? The definitions in the FLSA, unchanged since 1938, are no help to figure this out. The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." Okay, it seems a bit circular. But maybe the definition of "employee" will clear it all up. "Employee" means "any individual employed by an employer." That's crystal clear – not! Is it any wonder that we have been debating joint employment and independent contracting now for almost a decade? Millions spent on litigation; hundreds of court cases; dueling regulations, from one Administration to the next. Only Congress can stop the madness.

We need clear and simple definitions of "employee" and "employer" in the FLSA.

My recommendations:

- Amend the definition of "employer" in 29 U.S. Code § 203(d) to mean "a person who pays an employee for services but does not include a person who contracts with an independent contractor."
- Amend the definition of "employee" in 29 U.S. Code § 203(e) to mean "a person who provides services to an employer for compensation but does not include an independent contractor."
- Reintroduce and enact the Save Local Business Act, H.R. 2826 (118th Congress), which would have amended 29 U.S.C. § 203(d) to provide that an employer may be considered a joint employer only by directly and immediately exercising significant control over the essential terms and conditions of employment.
- Reintroduce and enact the Modern Worker Empowerment Act, H.R.5513 (118th Congress), which would have amended 29 U.S. Code § 203(e) by adding a new definition of independent contractor.
- Preempt state independent contractor laws to simplify worker-classification law by ensuring one, national standard, avoiding the common situation today where a worker can be an employee in one state but an independent contractor in another state or under federal law (or an employee under one state statute but an independent contractor under a different statute in the same state.
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What is Work?

Next: Workers must be paid for work. But what is work? That's easy, work is … well, its work. Work is central to the FLSA, but the statute does not define it. The FLSA does have a definition of the word "employ": To employ is "to suffer or permit to work." Again, circular and unhelpful. DOL has issued an entire chapter of regulations to define "work" at 29 CFR Part 785: 13 pages in the code of federal regulations, 8,500 words. Originally issued in 1961, and only 9 of its 50 sections have been updated since. The regulations are often confusing. For example, travel time: normal commute, not work, although it can become work if you are required to transport a lot of tools and equipment; travel from one job site to another, work, but travel from the last job site to home, not work; travel that requires an overnight stay is work if it occurs during your regular work hours, but it is not work if it occurs before or after those hours. An employee who works 9 to 5, then, and takes a plane to travel to a required training that leaves at 7 and arrives at 11 must be paid for 2 hours of

work (9 to 11, but not 7 to 9). Oh, and that is true whether the travel occurs on a workday or a day the employee normally doesn't work. Let's talk training time: Work or not work? Voluntary training outside normal working hours. It depends. Is the training related to your job? Work. If not, not. A supervisor says to dock worker: "The truck is late, so I don't have any work for you right now; go wait in the breakroom and I'll let you know when the truck comes in." Work or not work? Probably work, even if the worker took a nap in the breakroom. Waiting to be engaged, not work; engaged to be waiting, work.

Seriously, how is a small business owner or a worker supposed to know this stuff? Are you surprised that a supervisor or small business owner might not know that sending a worker an email telling him not to come to work may cause work to occur (reading the email)? Or what about a text message? Or a Facebook message? Or a tweet? We don't know because the FLSA wasn't designed with any of these technologies in mind. It was written in 1938, before most people had cars, much less smartphones.

We need a clear and simple definition of the term "work" in the FLSA.

My recommendations:

- Add the following definition of "work" 29 U.S. Code § 203: "All activities that an employer instructs, directs, requests or requires an employee to perform."
- Further amend 29 U.S. Code § 203 to exclude off-the-clock time of less than five minutes per shift as *de minimis* time.
- Enact H.R. 1084 introduced by Representative Hinson in the 118th Congress which would have amended 29 U.S. Code § 203(o) to exclude from hours worked time spent attending or participating in training programs is voluntary and outside an employee's regular working hours.

Calculating Overtime

Calculating overtime pay. Easy, right? Time and a half. But 1.5 multiplied by … what? Your hourly rate, most people think, but that is wrong. It's 1.5 times a workers "regular rate" of pay, not his hourly rate. "Regular rate" is defined at Section 7(e) of the FLSA, 29 U.S.C § 207(e), as "all remuneration for employment," *except*:

1. sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

2. payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by

an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

3. Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;
4. contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;
5. extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;
6. extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;
7. extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a), where such premium rate is not less than one and one-half times the rate

established in good faith by the contract or agreement for like work performed during such workday or workweek; or

8. any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

   (A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

   (B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

   (C) exercise of any grant or right is voluntary; and

   (D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

      (i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

      (ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

That long and complicated list raises as many questions as it answers. The phrase "and other similar payments to an employee which are not made as compensation for his hours of employment" in clause 2: does "other similar payments" restrict this to payments when no work is performed and travel expenses? Or does it mean any payments which are not made in compensation for work? Bonuses in subsection 3: an employer does not need to pay overtime on discretionary bonuses, but discretionary does not mean what most folks would think. The bonus must be discretionary both as to the fact of payment and the amount of payment, without any prior contract, agreement or promise. The construction

supervisor says at 1 o'clock, "Hey team, if you can get this wall finished by 5 o'clock, I'll give everyone an extra $100. A bonus announced in advance! Overtime is due.

My training for HR professionals on how to calculate overtime runs a solid two hours. I receive dozens of questions on what types of compensation needs to be included in the regular rate, and my answers often amaze (or, should I say, astonish) my audience, even at the annual meeting of SHRM. If HR professionals don't know the rules, how can we expect small business owners and workers to get the right answers.

DOL has regulations that attempt to instruct us on how to calculate overtime pay at 29 C.F.R. Part 778: 56 pages in the code of federal regulations, about 43,000 words, in 121 sections. The first Trump Administration made some improvements to these regulations in 2019, the first update to some of the sections since 1968 or 1971. But too many questions remain unanswered, and the Trump Administration was constrained by outdated statutory language. Except for the addition of the stock option language in 2000, the definition of regular rate was enacted in 1949 and never revisited.

Benefits, provided by employers and valued by employees, have changed much since then. Today, employers want to cover the costs of childcare and elder care, help employees pay off student loans, encourage employees to use public transportation by providing subsidies (a benefit federal employees have had for years), for example. But employers who provide such benefits risk a large, unexpected overtime bill.

We need to modernize and clarify the exclusions from the "regular rate" in Section 7(e) of the FLSA.

My recommendations:

- My primary recommendation is to amend Section 7(e) to state, simply and clearly, that all non-monetary benefits provided to all employees regardless of hours worked are excluded from the regular rate. With this amendment, an employer could provide its workers with free lunches, free public transportation, free child and elder care, free gym memberships or personal trainers – or anything that we can't necessarily think of today, but workers may value in the future.
- In the alternative:
    - Reintroduce and enact the Empowering Employer Child and Elder Care Solutions Act, H.R. 3271 (118th Congress), which would have amended 29 U.S. Code § 207(e) to exclude "the value of any child or dependent care services provided by an employer."

    - Add new subsections to 29 U.S. Code § 207(e) to exclude student loan repayments, employer-provided meals, public transportation subsidies and other valued benefits that employees received regardless of hours worked.
    - Amend 29 U.S. Code § 207(e)(4) to allow exclusion of the cost of self-funded and administered retirement, life, accident, health insurance and other benefits (rather than excluding only contributions made by an employer to a trustee or third person).
- Amend 29 U.S. Code § 207(e)(3) to exclude from regular rate bonuses of up to 10 percent of annual wages.

Overtime Exemptions

The last new exemption passed by Congress was the computer professional exemption in 1990, but even that is terribly out of date as millions of employees work in new tech jobs that were not even though of in 1990. We also need some clear and simple exemptions that small business owners and workers can easily understand.

My Recommendations

- Adopt a new exemption based on income alone for highly compensated employees. A simple rule for employees who earn mid six figures, for example, without regard to job duties performed.
- Amend the exemption in Section 7(i) so that all employees paid primarily on commission and therefore rewarded for extra work by extra commissions, are exempt. All commissions sales employees should be exempt regardless of industry.
- Update the computer professional exemption in Section 213(a)(17).
- Restore the companionship exemption to its original scope by reintroducing and enacting H.R. 7099 from the 118th Congress. This bill would ensure home care workers are overtime exempt regardless of their employers. Employers performing the same work should not be treated differently under the FLSA. More importantly, restoring the companionship exemption would prevent home care workers from going into the underground economy to provide care for families that cannot afford to hire caretakers through regulated and safer agency oversight.

Add Tools to Return Wages to Workers, FAST

The FLSA is so complicated that good faith employers make mistakes. Give me a day with the time and payroll records of any employer in America, and I can find a violation. But

unlike every other federal employment law, the FLSA discourages employers from correcting those mistakes. There are no affirmative defenses for employers as under employment discrimination laws. There is no private settlement of FLSA claims. There are no waivers of FLSA claims. Employers who pay back wages risk being sued for more, much more. In short, employers have no incentive to audit compliance and correct mistakes.

Such incentives would benefit workers. You cannot fund enough wage and hour investigators to visit the more than 11 million workplaces covered by the FLSA (according to the Labor Department's FY2025 budget documents). In FY2024, the Division concluded 17,300 compliance actions. At that rate, WHD could visit every workplace in 635 years. Reality check: Even if you quadrupled the agency's budget, most employers would never be investigated. And don't look to private litigation to make up the gap. In 2024, only 5,515 FLSA cases were filed in federal courts. And, both DOL investigations and federal litigation take time, a lot of time. Low wage workers, living paycheck to paycheck, cannot afford to wait, assuming a violation is ever discovered. If employers do not self-audit and self-correct, most workers will never even know they were not paid correctly.

Congress could ensure that workers get back wages fast by providing employers some incentive to comply and pay back wages, voluntarily.

My recommendations:

- Create an affirmative defense to liquidated damages, civil penalties, and criminal penalties for employers who adopt and communicate complaint procedures to address employee wage claims, investigate such claims, and take appropriate action.
- Create a new program, such as the former PAID program, allowing employers to ask the Labor Department to supervise the payment of back wages, as proposed by Rep. Stefanik in H.R. 5743 (118th Congress)
- Allow employees and their representatives to enter private settlements of FLSA claims, including waivers, with protections similar to the Older Workers Benefits Protection Act.

Other Recommended Reforms

A few other reforms for your consideration:

- Adopted in the 1989 amendments to the FLSA, a business is a covered enterprise with $500,000 in annual gross volume. The U.S. Small Business Associations size standards defining a small business, by industry, are all well above $500,000 – the

lowest at $8,500.000 for carpet cleaners. Congress should exclude more small businesses from enterprise coverage my increased in AGV in section 3(s).

- Amend section 3 to include definitions of “willful” and “repeat” violations.
- Reintroduce and enact the Working Families Flexibility Act, H.R. 1980 (117th Congress) to authorize employers in the private sector to offer compensatory time to their employees in lieu of cash overtime, as had been available to federal employees since 1985. The requirements and process for federal employee comp time should be updated and simplified, to reflect the almost 40 years of experience and difficulties with Section 7(o), 29 U.S.C. § 207(o), and its implementing regulations.
- Another option to increase workplace flexibility that so many workers seek, is to amend 7, 29 U.S.C. § 207, to allow an employer and employee to agree to pay overtime after 80 hours in a 14-day work period.