The FLSA Comp Time Controversy: 
Fostering Flexibility or
Diminishing Worker Rights?

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This article examines the case for permitting private sector employers
to provide compensatory time off ("comp time") in lieu of overtime pay
under the Fair Labor Standards Act. The article begins by outlining ex-
isting law allowing the use of comp time in the public sector and comparing
it with the proposed private sector comp time legislation. The case for pri-
vate sector comp time is then questioned by examining the degree to which
scheduling flexibility is constrained by current law; employer interests
served by comp time; evidence on compliance with the overtime provisions
of the FLSA; case law involving disputes over comp time in the public sec-
tor; and distinctive features of the public sector that limit its usefulness as a
model for private sector comp time. Concerns that comp time might be
used to diminish worker rights appear justified. If comp time legislation is
enacted nonetheless, it is critical that the legislation incorporate an entitle-
ment to the use of accrued comp time, patterned on the provisions of the
Family and Medical Leave Act.

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In the archives of federal labor laws, the FLSA holds a position nearly comparable to that of the Dead Sea Scrolls - there are other items that are more ancient, but not many.¹

While the FLSA's goals remain laudable, its effectiveness has been undermined by radical changes in the workforce it regulates. . . . [T]he FLSA now more often serves not as an [sic] protector of the oppressed, but rather as a straightjacket forbidding employers from giving modern workers what they want.²

I.
INTRODUCTION

As the basic federal wage and hour law, the Fair Labor Standards Act of 1938 (FLSA)³ provides for payment at an hourly rate at least equal to the minimum wage, payment of overtime (at one and one-half times the regular rate of pay) for hours worked in excess of forty during a work week, and prohibition of "oppressive child labor."⁴ Criticisms of the FLSA have abounded in recent years, as have proposals to amend the statute. The overtime provisions of the Act have drawn the sharpest attention from reformers. A central issue in the debate over the FLSA is whether private sector employers should be allowed to offer compensatory time off ("comp time") in lieu of monetary payment for overtime worked.⁵ Currently, this practice is legal for governmental, but not private sector, employers.⁶

To be sure, applying the FLSA is a complex undertaking and the Act stands as an object lesson on the hazards of devising "one-size-fits-all" rules for the workplace. Yet, claims that the statute is antiquated and that


⁴. Over the years, other statutes have been passed as amendments to the FLSA, including the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1997).

⁵. While the extension of "comp time" to the private sector is a key issue, it is by no means the only proposal currently being advanced to amend the FLSA. Employers are pressing vigorously for changes in the "salary basis test" used to determine exempt status, alterations to the "duties test" (particularly for administrative employees), lengthening the span of time over which overtime eligibility is calculated, allowing "volunteer" work to be performed for private employers, removing the Act's distinction between "inside" and "outside" sales persons, and a host of other measures. See, e.g., Senate hearing 1996, supra note 2, at 51-9 (statement of the Flexible Employment Compensation and Scheduling Coalition). Somewhat less arcane and technical than these other issues and more attractive to politicians, comp time has been the focus of FLSA reform in political circles and other changes have tended to be packaged with it. While this article limits itself to the single issue of comp time, it is important to be aware of the broader ferment surrounding the FLSA, if for no other reason than that many of the proposed changes would lessen eligibility for overtime, and hence, comp time as well.

significant changes are needed deserve close scrutiny, as do the particular "reforms" advocated. Beyond the contention that the law is out of step with the times, criticisms of the prohibition against private sector comp time center on the themes that the FLSA hinders the "flexibility" and "choice" of both employers and employees, and that it disadvantages the private sector without good reason. However, increased "flexibility" may be tantamount to a lack of enforceable standards, and the call for "parity" with public employers, who enjoy exceptions to the law's general provisions, may ignore questions about the wisdom of the exceptions themselves and whether these exceptions would be equally appropriate in a different context. The relatively lengthy history of the FLSA may well demonstrate that it is not obsolete but in fact continues to express basic principles of fair treatment in the workplace.

This article examines the case for permitting private sector employers to pay for FLSA overtime work with comp time. Employer complaints that the FLSA constrains them from meeting employee needs with innovative scheduling and compensation arrangements are vastly overstated. While they claim comp time would merely respond to worker needs and "modernize" the FLSA for its own sake, private sector employers stand to gain a great deal from being allowed to offer comp time in lieu of overtime pay. The available evidence on compliance with the overtime provisions of the FLSA and the effectiveness of Department of Labor (DOL) enforcement efforts strongly suggests that the increased employer discretion and greater enforcement difficulties associated with comp time will result in more employees being denied their right to compensation for overtime work.7 While drawing inferences from the public sector experience with comp time is risky due to the substantial differences between the two sectors, public sector comp time litigation points to a number of problems (particularly limitations on employee choice and control over the use of comp time) that will likely arise in the private sector as well.

Despite these problems and the fact that comp time appears to offer minimal benefit to employees and considerable opportunity for abuse by employers, political forces are such that Congress will probably pass some form of private sector comp time legislation. Both proponents and opponents of comp time appear to agree that any comp time legislation should, at a minimum, ensure genuine employee "choice" and leave intact the basic right of workers to overtime compensation, whether as cash or as time off. To be faithful to these principles, comp time legislation should provide for an enforceable entitlement to use earned comp time, modeled after the Family and Medical Leave Act's8 provisions regarding entitlement to leave and reinstatement rights.

7. See discussion infra Part IV.C.1.
This article describes existing law allowing for comp time in the public sector (Part I), outlines the most recent House and Senate comp time bills, and draws comparisons between the two bills and with current law (Part II). The main arguments of comp time proponents are summarized (Part III). The case for comp time is questioned by examining the degree of flexibility already available within the Act, employer interests served by comp time, evidence on compliance with the overtime provisions of the law (Part IV), litigation against public employers over comp time (Part V), and relevant differences between the public and private sectors (Part VI). Key elements necessary to protect worker interests and achieve the goals of enhanced flexibility and choice are outlined in Part VII.

II. CURRENT LAW

The Fair Labor Standards Act (FLSA) currently requires private sector employers to compensate FLSA overtime monetarily and prohibits them from using comp time in lieu of cash payments. However, public sector employers can use comp time provided that certain conditions are met. Any use of comp time to meet FLSA overtime obligations must be pursuant to an agreement to that effect. When employees are represented by a union, the agreement must be made with the employees’ representative and incorporated into a collective bargaining agreement or other document. In the absence of representation by a union capable of entering into an agreement, the FLSA requires individual “agreements or understandings” between employees and their public employers. Department of Labor (DOL) regulations allow an employer to expressly condition employment on acceptance of such an individual agreement or understanding regarding comp time, as long as the employee “knowingly and voluntarily” agrees to it and has been informed of her right to preserve, use, or cash out accrued comp time. The regulations add further that an employer can establish an “agreement or understanding” if she notifies an employee that comp time will be used in lieu of overtime pay, the employee does not refuse the arrangement, and the employee decides to accept comp time “freely and without coercion or pressure.”

Employers must provide comp time at the rate of one and one-half hours of paid time off for each overtime hour worked. Employees must be allowed to use their accrued comp time “within a reasonable period after

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12. Id.
making the request" but only "if the use of the compensatory time does not unduly disrupt the operations of the public agency."\textsuperscript{14} When an employee accrues 240 hours of comp time (480 hours for public safety, emergency response, and seasonal employees), her employer must pay for any additional overtime in cash.\textsuperscript{15} Public employers also have the option to, at any time, pay employees for comp time earned at the regular rate of pay.\textsuperscript{16} Upon termination of employment, an employer must cash out unused comp time at the final regular rate of pay or the average regular rate of pay over the last three years of employment, whichever is greater.\textsuperscript{17}

III.

PROPOSED CHANGES IN THE LAW

Various proposals to amend the FLSA have been put forth in recent years.\textsuperscript{18} In the House, comp time legislation dubbed the Working Families Flexibility Act of 1997\textsuperscript{19} was the first bill introduced in the first session of the 105th Congress. The full House passed it on March 19, 1997. A Senate comp time bill has encountered difficulty. The Family Friendly Workplace Act\textsuperscript{2} was approved by the Senate Committee on Labor and Human Resources on March 18, 1997, but a vote by the full Senate has thus far been averted by filibuster.\textsuperscript{22}

Whatever the fate of the current bills, it is likely that similar legislation will continue to be proposed and debated, and may well be enacted.\textsuperscript{23}

\begin{itemize}
  \item \textsuperscript{14} 29 U.S.C. § 207(o)(5) (1997).
  \item \textsuperscript{16} See 29 C.F.R. § 553.27(a) (1997).
  \item \textsuperscript{17} See 29 U.S.C. § 207(o)(4) (1997).
  \item \textsuperscript{18} Prior to the current Senate Bill 4, Sen. Ashcroft (R-Mo) sponsored Senate Bill 1129, the Work and Family Integration Act. See \textit{FLSA: Senator Ashcroft Seeks to Reform Federal Law Governing Overtime Pay}, 155 Daily Lab. Rep. (BNA), Aug. 11, 1995, at D-5. This 1995 bill would have extended comp time to the private sector and allowed for compressed work schedules in which FLSA overtime would not be required until more than 160 hours were worked over four weeks. H.R. 2391, the 1996 precursor to H.R. 1, was also named the Working Families Flexibility Act. H.R. 2391, 104th Cong. (1995). Private sector comp time bills in the Senate go back to at least 1988, when S. 2196 was introduced by Sen. Wallop (R-Wy), but not acted on. Also introduced but not acted on in 1988 was H.R. 3920, a bill that would have completely eliminated the minimum wage and overtime provisions of the FLSA. The bill's sponsor was Rep. Richard Armitage (R-Tex), now the House Majority Leader. See \textit{U.S. DEP'T OF LABOR, MINIMUM WAGE AND MAXIMUM HOURS UNDER THE FAIR LABOR STANDARDS ACT} 2-3 (1989).
  \item \textsuperscript{19} H.R. 1, 105th Cong. (1997). The bill's chief sponsor was Cass Ballenger (R-NC).
  \item \textsuperscript{20} See 143 CONG. REC. H1155-56 (daily ed. March 19, 1997). The bill passed the House by the narrow margin of 222-210.
  \item \textsuperscript{21} S. 4, 105th Cong. (1997). The bill's chief sponsor is John Ashcroft (R-Mo).
  \item \textsuperscript{23} Republican leaders continue to identify comp time as a legislative priority and to search for ways to break the Senate log-jam. For example, they recently offered Senate Bill 4 as an amendment to minimum wage legislation sought by Democrats. See \textit{GOP Expected to Revive Comp-Time Bill This Session, But Outlook Uncertain}, 75 Daily Lab. Rep. (BNA), April 20, 1998, at D-19.
Comp time has proven to be an attractive issue for politicians concerned with their appeal to women and workers. Because it portends significant changes in the law, the pending legislation deserves careful examination.

A. Comparison of House and Senate Comp Time Bills

The House and Senate comp time bills are quite similar, save that the Senate bill includes "bi-weekly work" and "flexible credit hour" programs, two proposals that would mark a fundamental departure from the current FLSA overtime scheme. Insofar as the House bill passed by only a slim margin, despite the absence of these more controversial measures, it is doubtful whether any comp time legislation going to the President would include such provisions. That leaves as the primary difference between the two bills varying figures for maximum accrual of overtime, a matter that appears readily amenable to compromise and resolution.

Federal legislation is not the only game in town. Michigan recently amended its minimum wage law to permit more employers to provide compensatory time in lieu of overtime pay. See MICH. COMP. LAWS § 408.384a (1997). The statute applies to small (gross sales less than $500,000) private employers not subject to the FLSA, but not to larger private employers, for whom the stricter federal standards would presumably continue to govern. See Michigan Minimum Wage Law Allows for Comp Time in Lieu of Overtime Pay, Mich. Employment L. Letter (Feb. 1998).

24. The 1996 presidential election indicated a significant widening of the "gender gap" in American politics, in which women are more likely to vote for Democratic candidates than are men. In the 1996 election, 54% of women voters opted for Clinton, while only 43% of male voters did. See Marjorie Connelly, Portrait of the Electorate, N.Y. TIMES, Nov. 10, 1996, at 28. This phenomenon is certainly not lost on Republican leaders and it is reasonable to surmise that the gender gap was one of the things that they had in mind when a comp time bill was the first piece of legislation introduced in the House following the 1996 election. Comp time is not an exclusively female concern, of course, but insofar as women still bear a disproportionate share of child-rearing responsibilities, it can be presented as a measure that is particularly responsive to women.

25. Both of these bills have evolved considerably since being introduced. The version of H.R. 1 referenced is that passed and amended by the House on March 19, 1997. 143 CONG. REC. H1137-40 (daily ed. March 19, 1997). The version of S. 4 referenced is that reported by the Senate Labor and Human Resources Committee, with modified committee amendment, on May 13, 1997. 143 CONG. REC. S4332-34 (daily ed. May 13, 1997). No doubt, comp time legislation will undergo further change before it is enacted, if ever. The value of setting out the concrete details of the existing bills is that this permits comparison with alternatives and avoids treating comp time as an abstraction or a caricature.

26. S. 4, 105th Cong. § 3(b),(c) (1997); see also infra notes 39-40 and accompanying text.

27. For this reason, this article does not deal at length with these two aspects of the Senate comp time bill. They are not essential to, and in fact go well beyond, the notion of comp time. Nevertheless, concerns that comp time is being used to undermine entitlement to overtime are heightened enormously by inclusion of these other provisions.
1. Similar or Identical Provisions

a) Private sector employers would be allowed to provide comp time at a rate of not less than one and one-half hours for each hour of employment for which overtime is required under the FLSA.28

b) Comp time would be allowed only if it were agreed to in a collective bargaining agreement. For employees not represented by a labor organization, an agreement between the employer and employee, prior to performance of the work and affirmed by a verifiable record, would be required. The employee would have to consent to the agreement knowingly and voluntarily and the employer could not require consent as a condition of employment.29

c) The employer would have to provide monetary compensation within thirty-one days of the end of a work year (which may or may not be the calendar year) for any comp time that had not been used during that year.30

d) With thirty days’ notice, the employer could provide monetary compensation for unused comp time in excess of eighty hours. An employer could also discontinue the policy of offering comp time with thirty days’ notice, unless a collective bargaining agreement provided otherwise.31

e) An employee could withdraw an individual agreement to accept comp time at any time. An employee could also request at any time (in writing) that her employer cash out her unused comp time. The employer would have to do so within thirty days of receiving the written request.32

f) The employer could not "directly or indirectly" intimidate, threaten, coerce, or attempt to coerce an employee for the purpose of interfering with the employee’s right to request or not request comp time and could not require that an employee use accrued comp time.33

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31. See H.R. 1, 105th Cong. § 2(r)(3)(C),(D) (1997); S. 4, 105th Cong. § 3(a)(1)(r)(4)(C),(5)(A) (1997). Under the Senate bill, the existence of a collective bargaining agreement is not mentioned as a restriction on discontinuation of a comp time policy, but written notice by the employer to employee is required.


33. See H.R. 1, 105th Cong. § 2(r)(4) (1997); S. 4, 105th Cong. § 3(a)(1)(r)(6)(A) (1997). While the Senate bill refers to "interfering with the rights of the employee to use accrued compensatory time off," the House bill does not specifically address this issue.
g) Comp time cashed out following a voluntary or involuntary termination of employment would be paid for at the higher of two rates: the regular rate when the comp time was earned or the final regular rate.\textsuperscript{34}

h) An employer would have to allow an employee to use accrued comp upon the employee’s request, provided the employee gave notice within a "reasonable time" and the employee’s absence would not "unduly disrupt" the operations of the employer.\textsuperscript{35}

i) Comp time would be available only when an employee had worked at least 1000 hours for the same employer in a period of continuous service during the twelve months prior to the date of agreement.\textsuperscript{36}

j) Remedies for coercion of employees would include payment for the comp time accrued by the employee and an additional equal amount as liquidated damages, reduced by the amount of comp time that had been used.\textsuperscript{37}

\section*{2. Substantial Differences between the Bills}

\begin{itemize}
  \item[a)] Under the House bill, an employee could not accrue more than 160 hours of comp time. The Senate bill would set the maximum at 240 hours.\textsuperscript{38}
  \item[b)] The Senate bill provides for a “Bi-weekly Work Program” under which an employer could establish a basic work requirement of up to eighty hours over a two-week period. The program would be subject to the same conditions as comp time with regards to agreement, withdrawal, and absence of coercion. Under such a program, overtime obligations would be incurred only after the employee had worked in excess of 80 hours over two work weeks, regardless of how many hours were worked in one week.\textsuperscript{39} The House bill does not provide for this type of program.
  \item[c)] The Senate bill provides for a “Flexible Credit Hour Program” under which, subject to the same conditions as comp time, an employee could work hours in excess of her basic work requirement in order to reduce the required number of hours at a later time. Hours in excess of forty that were designated as flexible credit hours would not be considered when computing overtime.\textsuperscript{40} The House bill does not include this provision.\textsuperscript{41}
\end{itemize}

\textsuperscript{36} See H.R. 1, 105th Cong. § 2(r)(2) (1997); S. 4, 105th Cong. § 3(a)(1)(r)(3)(C) (1997). The Senate bill sets the minimum at 1250 hours. The House bill specifies that the 12 months of service be continuous, while the Senate bill simply refers to 12 months.
\textsuperscript{37} See H.R. 1, 105th Cong. § 3(2) (1997); S. 4, 105th Cong. § 3(a)(2)(B) (1997). The House bill refers to liability “for each hour of compensatory time accrued by the employee,” while the Senate bill refers to “the number of hours of compensatory time off involved in the violation that was initially accrued by the employee.”
\textsuperscript{39} See S. 4, 105th Cong. § 3(b) (1997).
\textsuperscript{40} See S. 4, 105th Cong. § 3(c)(2) (1997).
B. Comparison with Existing Public Sector Law

To be sure, the bills draw their essence from the existing public sector comp time provisions of the FLSA. The bills have requirements similar to those in the public sector comp time provisions of the FLSA: any comp time must be at the rate of time and one-half, procedures must exist whereby employees indicate their choice of receiving comp time, accrued comp time is subject to maximum limits, and employees must be able to use their comp time within a reasonable period provided that doing so is not unduly disruptive to the employer.\textsuperscript{42}

However, it is noteworthy that while the proposed legislation would extend comp time to the private sector, neither bill attempts to make parallel changes to existing public sector comp time provisions. Instead, the bills would create a separate set of rules for private sector comp time and leave the public sector rules unchanged.

The proposed legislation would depart from the public sector comp time scheme in several, significant respects. Under the proposed legislation, it would be illegal for private sector employers to make willingness to accept comp time agreements a “condition of employment.”\textsuperscript{43} There would be a minimum number of hours that an employee must have worked for an employer prior to becoming eligible for comp time.\textsuperscript{44} There would be a lower limit (under the House bill) on the maximum number of comp time hours that could be accrued and comp time remaining at the end of a designated 12-month period would have to be cashed out.\textsuperscript{45} There would be explicit provision for discontinuation of the comp time policy by the employer and an option for the employer to pay for any unused comp time in excess of 80 hours, both with 30 days’ notice.\textsuperscript{46} There would also be explicit provision for an employee to, at any time, withdraw an individual agreement to receive comp time and receive the balance of any accrued comp time in cash within 30 days.\textsuperscript{47} And finally, the bills contain more extensive language prohibiting coercion in the choice or use of comp time.\textsuperscript{48} Thus, the pending comp time bills have more in common with each other than they do with existing law.

\textsuperscript{41} The Senate bill also contains salary basis test provisions, while the House has dealt with this issue in separate legislation. See White Collar Reform Act, H.R. 647, 105th Cong. (1997).
\textsuperscript{43} See supra note 29 and accompanying text. Compare supra note 11 and accompanying text.
\textsuperscript{44} See supra note 36 and accompanying text. The current law contains no such limit.
\textsuperscript{45} See supra note 30 and accompanying text. Compare supra notes 15-16 and accompanying text.
\textsuperscript{46} See supra note 31 and accompanying text. The current law has no parallel provision.
\textsuperscript{47} See supra note 32 and accompanying text. The current law has no parallel provision.
\textsuperscript{48} See supra note 33 and accompanying text. Compare supra note 12 and accompanying text.
The FLSA does not generally provide for bi-weekly work schedules or flexible credit hours, and it prohibits these arrangements to the extent they result in non-payment of overtime for weekly hours worked in excess of forty. However, the Federal Employees Flexible and Compressed Work Schedules Act permits these types of arrangements. The Senate bill is closely patterned after this federal legislation, although there are a few differences worth noting. Under the federal employee statute, the “bi-weekly work program” is a “compressed schedule,” defined as an eighty-hour, bi-weekly basic work requirement scheduled for less than ten days. The Senate bill would not limit bi-weekly work programs to those that result in a reduction in work days. Another key difference is that under the existing federal legislation, employees with compressed schedules earn overtime for “any hours in excess of those specified hours which constitute the compressed schedule,” while the Senate bill would restrict overtime to hours in excess of eighty over a two-week period. Lastly, the Flexible and Compressed Work Schedules Act limits accrual of flexible credit hours to a maximum of twenty-four hours, while the Senate bill would allow accumulation of up to fifty hours.

On balance, the pending bills are more detailed than the current comp time provisions of the FLSA and (excepting the provisions unique to the Senate bill) hold out the promise of greater protection for employees. The proposed legislation clearly embodies an attempt to counter the objections of comp time critics. However, judgment of the merits of the proposed legislation should await further investigation of the potential pitfalls of private sector comp time. More extensive protective language may fail to achieve greater protection when compliance and enforcement are problematic.

IV. THE CASE FOR PRIVATE SECTOR COMP TIME

The principal argument advanced by comp time proponents is that changing the law to allow private sector comp time would instill much-
needed flexibility into the FLSA. Comp time proponents further argue that changes in the workforce and the economy since enactment of the FLSA in 1938, in particular the increased number of women in the labor force and the rise in dual-wage-earner and single-head-of-household families, have heightened time pressures on workers. Altered circumstances have thus created a need for the option of receiving time off rather than overtime pay and any number of surveys purport to show that employees feel that need. Employers are portrayed as merely desiring to give employees the time off that they want and need. Proponents of comp time legislation take great pains to point out that employees would simply have a second and equivalent option available to them; they would not be required to forego overtime pay unless they freely chose to do so. Private sector employees are simply being given a choice that public sector workers have had for some time, an arrangement that has worked just fine in the public sector.

There have indeed been significant changes in the composition of the workforce and the structure of families that one could reasonably expect to create or intensify conflicts between work demands and responsibilities in other spheres of life. It is indisputable that the labor force participation rate for women has increased substantially since passage of the FLSA, from slightly less than 33% in 1948 (earlier figures are not available) to approximately 59% in 1995. Among women who are 35 to 44 years of age, the labor force participation rate in 1995 was 77%. For married couples, dual wage earning has become commonplace. Dual-wage-earner families made up only 19.8% of all families (including single-head-of-household families) in 1951, but by 1995 this figure had swelled to 47%. Households headed by a single person increased from about 13% of all households in 1951 to 23% of all households in 1995, with the vast majority of them headed by women. The effects of broader labor force participation and diminished social support are exacerbated by lengthened hours of employment. Stud-

56. References to increased flexibility find their way into virtually every discussion of comp time, including the names of employer groups backing comp time proposals as well as the names of the proposals themselves. See, e.g., Senate hearing 1996, supra note 2, at 51-9 (statement of the Flexible Employment Compensation and Scheduling Coalition); The Working Families Flexibility Act, H.R. 1, 105th Cong. (1997).


58. See infra notes 78-79 and accompanying text.


61. See Juliet B. Schor, Worktime in Contemporary Context: Amending the Fair Labor Standards Act, 70 Chi.-Kent L. Rev. 157, 158-60 (1994) (excluding the unemployed and underemployed, average annual hours of work increased by 138 between 1969 and 1987). The trend of increased annual hours of work has continued, with 26 more hours being worked per year in 1994 than in 1989. See MISHEL, ET AL., supra note 60, at 134. Some of the increase in work time is, in fact, the result of more overtime. It has been estimated that about 20% of hourly workers worked over 40 hours in a typical week in 1996,
ies document that workers do, in fact, experience the stresses that these objective indicators of work/family conflict imply.62

Altered employment patterns and family structures have molded a workforce with different needs than those of previous generations. As William J. Kilberg has put it, "[t]oday’s single parents and dual wage earners lack spouses at home who can run personal errands and respond to emergencies. They need flexibility in work schedules and leave which the FLSA’s hourly pay strictures are not designed to accommodate."63 To buttress this argument, comp time proponents regularly cite a variety of surveys showing employee support for the notion of trading pay for more time off. One of the more frequently mentioned studies is a survey by Penn and Schoen Associates, commissioned by the Employment Policy Foundation.64 This 1995 poll reportedly found that 75% of the 800 individuals surveyed supported the idea of allowing employees to trade overtime pay for comp time.65 Penn and Schoen also reportedly found that 57% of individuals who currently work overtime would “sometimes” take comp time instead if given the choice.66 A 1996 post-election survey commissioned by the “Independent Women’s Forum” produced similar findings, with more than half (55%) of the 1200 respondents indicating that they were very or somewhat willing (the reported results collapsed the two categories) to “give up some seniority/pay at work in exchange for more personal time.”67


63. Senate hearing 1996, supra note 2, at 47.

64. To my knowledge, the widely cited Penn and Schoen Associates survey is not available in published form. The Employment Policy Foundation that commissioned the survey is an educational foundation funded largely by employers. The foundation has issued a series of reports advocating reform of the FLSA. See, e.g., KENNETH L. DEAVERS, POTENTIAL PRIVATE SECTOR OVERTIME LIABILITY FOR MISCLASSIFICATION OF EXEMPT STATUS UNDER THE FAIR LABOR STANDARDS ACT (1995); HATTIANGADI, supra note 61; JAMES S. HOLT & ALAN E. SIMON, THE PRIVATE SECTOR COSTS OF THE DEPARTMENT OF LABOR’S PAY DOCKING POLICY (1992) (estimating maximum liability from partial-day exempt leaves). Other organizations active in the debate over the FLSA and comp time, including the Economic Policy Institute, see, e.g., LONNIE GOLDEN, FAMILY FRIEND OR FOE? WORKING TIME, FLEXIBILITY, AND THE FAIR LABOR STANDARDS ACT (1997), and the AFL-CIO’s Working Women’s Department, see, e.g., WORKING WOMEN’S DEPARTMENT OF THE AFL-CIO, ASK A WORKING WOMAN SURVEY (1997) (surveying women on job and benefit issues), are closely tied to the labor movement.

65. See HATTIANGADI, supra note 61, at 5.


Why would employers expend political capital to advocate for comp time? Proponents suggest that employers support comp time because employees are all but clamoring for it and employers desire to be responsive to the needs of their employees. Roosevelt Thomas, a Vice President for Human Resources at the University of Miami and spokesperson for the College and University Personnel Association (CUPA), offered the following argument on behalf of comp time:

[E]ven with all of the variety of work-life policies we provide, there have been several situations on our campus in which the employee would have benefited if the institution had the ability to offer comp time off instead of overtime. . . . I am not saying comp time will be the answer for everyone. But, our employees have requested greater flexibility in work arrangements in order to better cope with pressing family, personal, and professional development needs.68

Similarly, J. Drew Hiatt, Director of Government Affairs for the National Business Owners Association, an organization of small business owners, has argued that:

current law stymies employers who want to create family-friendly work environments that respond to their employees’ needs and priorities concerning flexible scheduling. The Ballenger legislation addresses employers’ desire to accommodate employees’ requests for greater flexibility in the scheduling of personal time.69

Only occasionally and indirectly is a financial motive suggested. For example, the Labor Policy Association has asserted that “[t]he lack of flexibility imposed by the FLSA when compensating employees for overtime work adds to the employer’s burden by making it difficult to keep costs down.”70

The chance that an employer would take advantage of greater flexibility to cheat her workers is dismissed as small, the sort of thing that a few rogue employers might do, but something that the vast majority of companies would find unappealing. A statement from the “Flexible Employment Compensation and Scheduling Coalition” acknowledges the 1995 raid of a sweatshop in El Monte, California, but minimizes its significance:

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68. Id. at 28-9.
69. Id. at 228.
70. House hearing 1995, supra note 1, at 34. The potentially beneficial effect of comp time on employers’ bottom lines has been described more artfully by another Labor Policy Association spokesperson.

Contrary to what you may hear, employers interested in true workplace flexibility are not trying to "save money" or "avoid overtime pay." . . . 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.

At the same time, we must recognize that the El Monte situation is a deviation. The overwhelming majority of American employers view their employees as a valuable asset to be treated with the respect, dignity, and rewards that are appropriate to attract, retain, and motivate them.\textsuperscript{71}

Irritated by the testimony of comp time opponents, Congressman Harris Fawell (R-II) complained:

\[\text{It seems to me that your whole presentation is based on the assumption that there is no true choice because you really can't trust employers, and they have the last word, so we should forget about everything we are trying to do here with this legislation . . . . I mean, there is not even an opportunity to find out if the employer will be a bad guy.}\textsuperscript{72}

Likewise, John Shamley, deputy director of personnel for the District of Columbia, has suggested that the concerns of comp time opponents reflect a by-gone era:

\text{The difference between what happened when the laws were passed in the late 1930's and the issues that we have now is that the law was specifically passed to prevent and forbid a lot of employer abuses. The issues that we are dealing with today are not really the issues of employer abuses, but it is the way that work has changed and it is how individuals view their work as changed . . . .}\textsuperscript{73}

\text{The case for comp time trades heavily on the value of “choice”.}\textsuperscript{74}

\text{There is a fundamental law in economics and a corollary in American history proved over and over again by our politics: giving individuals a greater number of attractive choices makes them better off . . . . The advantage of the Working Families Flexibility Act is that it gives employees, not employers, the power to choose what is in their best interests, either more time or more money.}\textsuperscript{75}

The moving force behind the Senate comp time proposal, Sen. John Ashcroft (R-Mo), has repeatedly insisted that the aim of his legislation is merely to provide employees with more choices, and not to take anything away from them:

\text{So what we are talking about is expanding options for employees. We are not talking about lessening the enforcement, we are not talking about removing a single protection for employees, unless we are so devoid of re-}

\textsuperscript{71}. Senate hearing 1996, supra note 2, at 52.
\textsuperscript{72}. House hearing 1997, supra note 67, at 203-04.
\textsuperscript{73}. Senate hearing 1996, supra note 2, at 34.
\textsuperscript{74}. In a few countries, workers need not choose between overtime pay and time off because, by law, they receive both. In France, compensatory time is provided in addition to overtime pay after 42 hours of work in a week. South Africa and the United Arab Emirates also provide for both types of overtime compensation under specified circumstances. See Working Time Around the World, in 14 CONDITIONS OF WORK DIGEST, at 294 (1995).
\textsuperscript{75}. House hearing 1997, supra note 67, at 47 (statement of Diana Furchtgott-Roth, Resident Fellow, American Enterprise Institute).
spect for employees that we feel that they have to be protected from
themselves, from making choices . . . .76

A Labor Policy Association position paper is similarly contemptuous
of those who would "protect" workers from the right to choose:
The patronizing approach of the FLSA is ultimately reflected in its denial of
choice to those employees who are covered by it. As we have seen, the
wishes of volunteers and those who wish to be paid with time off are sub-
sumed to a judgment already made by Congress as to their best interests.77

Lastly, proponents seize upon the existing use of comp time in the
public sector to argue both that private sector employers deserve parity
under the law and that comp time "works." Russell Gunter of the Society
for Human Resource Management contends that, "[i]n the public sector,
comp time is considered a major benefit. Indeed, if you look through the
litigation under the Fair Labor Standards Act since 1985 when the Fair La-
bor Standards Act covered State and local governments, comp time litiga-
tion is all but non-existent."78

Sen. Ashcroft also considers comp time to be a proven winner:
We have what is clearly defined as a win-win situation. It has been a con-
fessed and acknowledged win-win in Government since 1978 [since pas-
sage of the Federal Employees Flexible and Compressed Work Schedules
Act]. . . . We have no better case for its extension to the workers generally
than the fact that the record is clear.79

The Labor Policy Association has stressed the need for public and pri-
vate sector parity under the law:
The public sector already is enjoying the advantages of choosing between
overtime pay or compensatory time off. . . . The rationale for allowing this
flexibility to public sector employers was that the FLSA would require the
public sector to "assume additional financial responsibilities which in at
least some instances could be substantial." [citation omitted] To assume
that businesses struggling to compete in today's global marketplace do not
also bear "substantial financial responsibilities" makes no sense.80

Thus, an array of employer organizations, politicians, and policy ana-
lysts have enthusiastically backed comp time as a means of injecting flexi-
bility and choice into a rigid statute and thereby meeting a pressing need of
workers for more paid time off. Not everyone agrees.

76. Senate hearing 1996, supra note 2, at 34-5.
77. House hearing 1995, supra note 1, at 40.
80. House hearing 1995, supra note 1, at 34-5.
V. QUESTIONING THE CASE FOR COMP TIME

Comp time has been criticized as a distraction from more fundamental problems facing American workers, including stagnant real wages, excessive debt, increased hours of work, irregular hours, entrapment in contingent employment, and pay inequity. This argument has considerable merit, but it does not dispose of the issue of whether comp time, on its own limited terms, is worthwhile.

Similarly, conflicting poll results and claims about what workers want have been bandied about without generating much meaningful discussion.


82. The time squeeze employees experience has been exacerbated by employer demands for increased work hours. Overtime hours have increased substantially, especially in manufacturing. See Schor, supra note 61, at 158-60; Smith, supra note 81, at 599-603; Hattiangadi, supra note 61, at 7. Noteworthy absent from arguments advocating comp time is any discussion of stagnant or falling real wages and family incomes. The decision to trade time off for overtime pay is presumably influenced by the need for income. For the vast majority of employees, especially the non-exempt employees who are candidates for FLSA overtime, real wages (particularly on an hourly basis) have slid or remained stagnant since the mid 1970’s. See Mishel et al., supra note 60, at 134. Family income has also suffered, with median family income falling 5% in the period from 1989-1995. See id. at 45. To maintain their standard of living, American families have taken on a massive amount of consumer debt. Installment credit, much of it in form of high interest credit card debt, reached $1.2 trillion in 1997, up 50% from 1993. See Timothy L. O’Brien, Giving Credit Where Debt is Due, N.Y. TIMES, Dec. 14, 1997, at WK14. While comp time is often portrayed as particularly beneficial to working women, the AFL-CIO’s survey of 725 working women found them to be especially concerned about the likes of pay equity, safety on the job, and health benefits. Working women also expressed the desire for more paid time off, provided by the employer in the form of sick days and vacation time. See Working Women’s Department of the AFL-CIO, supra note 64. The point here is not to document in any comprehensive way the economic circumstances of American workers, but simply to underscore that those who seek to champion the interests of working families can choose from an array of issues other than comp time.

83. While the surveys cited above, supra notes 64-67 and accompanying text, bespoke enthusiasm among workers for comp time, other studies indicate very limited support. For example, a 1995 survey conducted by Lake Research for the Economic Policy Institute found that only 18% of all respondents (and 15% of hourly workers) supported a comp time bill like S.4 that also included a bi-weekly work program, while 64% of respondents were opposed. See House hearing 1995, supra note 1, at 207. A 1985 BLS study of worker schedule preferences, based on the Current Population Survey, found that 65% of respondents desired to work the same amount of hours for the same pay, 28% wanted to work more hours at the same pay rate, and only 8% wanted to work fewer hours for less money. See Susan E. Shank, Preferred Hours of Work and Corresponding Earnings, 109 MONTHLY LAB. REV., Nov. 1986, at 40-41. Men, who are the primary recipients of overtime work, were even more likely to prefer the same or more hours. See id. While these findings are from the mid-1980’s and the BLS did not inquire about comp time directly, it is noteworthy that they were produced by a methodologically sophisticated, non-partisan organization and showed minimal support for the idea of trading money for time. Anita Hattiangadi claims that the approximately 76% of female respondents aged 35-44 who indicated that they would prefer to either maintain the same number of hours or reduce them indicates support for comp time. See Hattiangadi, supra note 61, at 19. This seems to be a strained interpretation of these data. This was the sex and age group that expressed the greatest desire to accept less pay in exchange for more time off, but even among this group, only 10.7% chose this response. See id. There are simply no grounds for lumping this group together with the much larger segment of female respondents who wanted no change in their hours or pay.
There is reason to doubt the evidence presented by comp time proponents and to question the image of employees clamoring for comp time. At the same time, there are most likely some workers who would prefer comp time instead of pay for overtime. Regardless of what the exact number of supporters is, however, the soundness of a decision to import comp time to the private sector does not hinge on the precise size of the group.

The arguments put forth by comp time proponents must be analyzed with questions that cut far deeper than an opinion poll. If a key aim of allowing comp time is to provide greater flexibility, to what extent does the FLSA actually inhibit flexibility? Why is it that employers favor this more administratively complex arrangement? Are any gains to employers likely to be achieved at the expense of workers? Insofar as comp time advocates exalt increased employee choice, how freely could employees exercise that choice? Since comp time is currently in practice in the public sector, does the experience of government employees support the judgment that comp time “works?” Lastly, are private and public employment sufficiently similar to justify the argument that there should be parity between private and public employers with respect to provision of comp time? In this Part and those that follow, I attempt to answer these questions.

A. How Much Flexibility is There Under Existing Law?

Almost lost in the din of the flexibility mantra is the fact that the FLSA already affords private sector employers and employees considerable latitude in scheduling and providing time off. There are numerous ways in which work schedules can be arranged to allow employees more time off, or grant them more convenient schedules, without employers incurring overtime pay obligations. For example, “flextime,” in which employees arrange their schedules by coming in earlier or later around designated “core hours,” is compatible with the FLSA. Since overtime accrues on the basis of total

84. Methodological details of these studies are typically in short supply. Besides the varying results, other causes for concern are the use of different questions across studies, respondents who are not always persons eligible for or actually receiving FLSA overtime pay, and response categories that are collapsed into nebulous dichotomies. Further, to my knowledge, no study directly compares the desirability of comp time to more employer provided paid time off (e.g., more personal days, vacation, etc.).

85. Even if only a small percentage (say, twenty percent) of workers desire comp time, an argument can still be made that comp time would respond to the needs of those workers without disadvantaging other employees. Also, the desire for comp time pay may very well change over time and circumstances. Workers may become more comfortable with comp time (or less so) or reach points in their careers where their desire for comp time or overtime will reverse.

86. See, e.g., Golden, supra note 64, at 16-18 (discussing changes employers could make in their own policies to increase efficiency); FLSA: Close Look at Law Reveals Variety of Ways to Give Workers More Time Off, 114 Daily Lab. Rep.(BNA), June 13, 1997, at D-19 (FLSA already provides a half-dozen rarely utilized options for more flexible scheduling).
hours in a work week, the number of hours in a particular day or the choice of those hours is immaterial to the determination of overtime pay. 87

"Compressed" work weeks, such as four ten-hour days, are also entirely legal. Employers could also implement a more elaborate form of compressed work week, the "9/80" schedule. 88 By beginning the work week at noon on Friday, an employee can work eight nine-hour days and one eight-hour day, in order to receive a three-day weekend every other week. Under this arrangement, the employee is still working a forty-hour week (i.e., four nine-hour days plus four hours either on the Friday afternoon at the beginning of the work week or on Friday morning at the end of the work week) and no FLSA overtime is required. More generally, work weeks need not be the same for every employee, provided that they are consistently applied. 89

Another basic source of flexibility comes from rearranging hours within the work week. If an employee works ten hours in one day, overtime can be avoided if those extra hours are taken off later within the same work week. Hours can be freely adjusted within a work week and this form of "comp time" may be especially advantageous. Time off that comes shortly after working an extra long day may be of particular value in allowing an employee to catch up on sleep or get neglected affairs in order. There is, of course, no limitation under the FLSA on the provision of paid time off to workers, nor for that matter, unpaid leave. The flexibility of paid time off provided by employers could be enhanced by establishing a "paid time off banking program," providing undifferentiated time off that can be used for any purpose. 90

Certainly, the FLSA imposes scheduling restrictions beyond which overtime liability is incurred. The primary constraint is that any trading of extra work hours for time off must occur within the same work week and result in no more than forty hours of work for the week. The feasibility of adjusting hours within a work week depends upon how late in the work week extra hours are put in and whether the work demands that occasioned the longer hours extend beyond the work week. If longer than usual hours are worked late in the work week, or the volume of work that needs to be done remains unabated, scheduling time off within the same work week may be difficult or impossible. And, of course, once overtime liability is incurred, it cannot be satisfied by providing time off rather than monetary compensation.

Despite the professed desire for greater flexibility, relatively few private sector employees (particularly among the non-exempt) enjoy the flexi-

90. See Golden, supra note 64, at 17.
bility in scheduling currently allowed under the law. For example, Bureau of Labor Statistics (BLS) data from the May 1997 Current Population Survey show that only a little more than a quarter (27.6%) of workers have flexible schedules which allow them to vary the time that they begin or end their work days. While that figure may not seem especially impressive, it marks a substantial increase from prior years (12.4% in 1985, 15.1% in 1991). But these numbers conceal considerable inter-occupational stratification. On closer inspection, managers and professionals (i.e., exempt employees) are far and away the most likely to have flexible schedules, while blue-collar workers are much less likely to have such schedules; 42.4% of “executive, administrative, and managerial” employees have flexible schedules, compared to only 14.6% of “operators, fabricators, and laborers.” Hence, while the FLSA permits flexible schedules, this form of flexibility is not currently extended to or utilized by the vast majority of non-exempt employees.

Employers concerned about their employees’ ability to meet the demands of their family and personal lives might also provide more paid time off. The available data suggest that the solicitude of employers for their employees has generally not taken this direction. Table 1 presents data from the BLS Employee Benefits Survey on the entitlement of blue-collar workers to various forms of paid time off. Among full-time employees of medium or large private establishments, the vast majority enjoy some paid vacation and holidays. In 1995, an estimated 88% of blue-collar workers employed at these establishments enjoyed paid holidays and 94% had paid vacations. Paid sick leave and personal days are much less common, with 39% of blue-collar workers getting sick days and only 15% having personal

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91. See U.S. BUREAU OF LABOR STATISTICS, WORKERS ON FLEXIBLE AND SHIFT SCHEDULES IN 1997: SUMMARY, Table A (1998). The BLS cautions that technical changes made to the CPS in 1994 may limit comparability across years.

92. See id. at Table 2. Some, presumably non-exempt, service workers had higher levels of schedule flexibility (22.7% in the case of food service workers).

93. Unless otherwise stated, the figures cited in this section pertain to medium and large private establishments. Under the BLS definition, medium and large establishments are those that employ 100 or more employees. Establishments of this size are a distinct minority (a little over 2% of private U.S. establishments), although they employ a disproportionately large segment of the workforce (roughly 45%) (U.S. DEP’T OF LABOR, FACT FINDING REPORT OF THE COMM’N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 8 (1994). These larger establishments have traditionally been more generous in the provision of benefits to their employees than smaller firms, so if there is any trend toward an expansion of paid time off, it should be most evident among this group of employers. Also, in light of considerable inter-occupational variation in the provision of paid leave, the focus is on the BLS category that most closely matches the non-exempt employees whose flexibility comp time advocates seek to advance: “blue-collar production and service employees.” Lastly, it is important to note that the figures cited pertain only to full-time, and not to part-time, employees. Benefits available to the latter group are typically far more limited.

94. The 1995 data on employee benefits are the most recent available. The 1995 report is not in print, as of this writing, but the tables that comprise the report are available on-line through the BLS home page (http://stats.bls.gov/blshome.htm).
<table>
<thead>
<tr>
<th></th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1988</td>
</tr>
<tr>
<td><strong>HOLIDAYS</strong></td>
<td></td>
</tr>
<tr>
<td>(%) Entitled</td>
<td>94</td>
</tr>
<tr>
<td>Mean Number of Days:</td>
<td>9.2</td>
</tr>
<tr>
<td><strong>PERSONAL DAYS</strong></td>
<td></td>
</tr>
<tr>
<td>(%) Entitled</td>
<td>15</td>
</tr>
<tr>
<td>Modal Number of Days:</td>
<td>2.5</td>
</tr>
<tr>
<td><strong>VACATION</strong></td>
<td></td>
</tr>
<tr>
<td>(%) Entitled</td>
<td>97</td>
</tr>
<tr>
<td>Mean Number of Days:</td>
<td>n.a.</td>
</tr>
<tr>
<td>At 1 Year</td>
<td></td>
</tr>
<tr>
<td>10 Years</td>
<td>n.a.</td>
</tr>
<tr>
<td>20 Years</td>
<td>n.a.</td>
</tr>
<tr>
<td><strong>SICK DAYS</strong></td>
<td></td>
</tr>
<tr>
<td>(%) Entitled</td>
<td>47</td>
</tr>
<tr>
<td>Mean Number of Days:</td>
<td>9.4</td>
</tr>
<tr>
<td>After 1 Year</td>
<td></td>
</tr>
<tr>
<td>10 Years</td>
<td>14.5</td>
</tr>
<tr>
<td>20 Years</td>
<td>17.4</td>
</tr>
</tbody>
</table>

Rather than reflecting an expansion of paid leave, the 1995 figures are for the most part slightly lower than those from previous years. The apparent drop-off in sick leave over this short period of time is striking, but it reflects, in part, a change in BLS methodology. Personal days are particularly valuable due to their versatility, but only a small and relatively constant percentage of blue-collar workers are allocated personal days. Overall, the best and most recent data on employer leave policies provide scant evidence of a recent expansion in paid time off for the group of workers who stand to be affected by comp time legislation, either in terms of the percentage of employees entitled to leave or in the number of days of leave provided. If anything, the data point to a mild trend in the opposite direction.

Certainly, it is expensive for employers to provide employees with more paid leave. However, given a specified allocation of paid leave, that time can be rendered more flexible and useful to employees by a policy of allowing the time off to be carried over between benefit years, or at least cashed out, rather than forfeited. Flexibility is also enhanced by permitting leave to be used for a wider variety of purposes.

Table 2 presents BLS data on the characteristics of vacation and sick leave policies. Overall, it does not appear that the leave policies of employers are designed to maximize flexibility. For example, Table 2 illustrates that 57% of blue-collar workers in the surveyed establishments who receive paid vacation lose any days that are not used during the year. Only 13% can carry over unused vacation time to the following year, while 18% have the opportunity to receive cash for the time. Eight percent enjoy the greatest flexibility, being able to choose between the two. Unused sick leave is less likely to be lost, although over a third of blue-collar employees (37%) face that prospect. In contrast to vacation days, employers appear much more willing to carry over unused sick days into the following year (37% had this option in 1995). In terms of allowing alternative uses for sick leave, the closely allied situation of needing time for a doctor’s appointment was the most likely to be permitted. A little over a third of employees (36%) were able to use sick days to take care of sick children. Use of sick

95. See id.
96. Specifically, the BLS no longer counts “per disability sick leave plans” as paid sick days, but instead, treats them as “short-term disability” coverage. See id. Thus, workers who receive paid sick days only upon incurring a disabling condition, are no longer counted as having paid sick time, whereas previously they were. It is unclear how much of the apparent decline in sick time results from this recoding. One relevant clue is that the 1993 survey, which preceded the change in coding methods, showed that 45% of blue-collar workers had sick days, down from 48% in 1991. Consequently, not all of the decline can be attributed to the new methodology.
97. The availability of personal days to blue-collar employees in private sector establishments also pales in comparison to the 31% of state and local government blue-collar employees with personal leave. See Bureau of Labor Statistics, U.S. Dep’t of Labor, BLS Report on Employer Benefits in State and Local Governments 8, Table 1 (1994).
### Table 2. Percentage of Employees Entitled to Vacation and Sick Leave Policies of Varying Flexibility (among full-time, blue-collar production and service employees of medium and large sized private establishments)*

<table>
<thead>
<tr>
<th></th>
<th>Year</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1991</td>
<td>1993</td>
<td>1995</td>
<td></td>
</tr>
<tr>
<td><strong>VACATION</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carry-over only</td>
<td>21</td>
<td>19</td>
<td>13</td>
<td></td>
</tr>
<tr>
<td>Cash-out only</td>
<td>17</td>
<td>15</td>
<td>18</td>
<td></td>
</tr>
<tr>
<td>Both options</td>
<td>5</td>
<td>6</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>Unused days are lost</td>
<td>52</td>
<td>57</td>
<td>57</td>
<td></td>
</tr>
<tr>
<td><strong>SICK DAYS</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carry-over only</td>
<td>35</td>
<td>42</td>
<td>37</td>
<td></td>
</tr>
<tr>
<td>Cash-out only</td>
<td>17</td>
<td>17</td>
<td>13</td>
<td></td>
</tr>
<tr>
<td>Both options</td>
<td>13</td>
<td>12</td>
<td>11</td>
<td></td>
</tr>
<tr>
<td>Unused days are lost</td>
<td>35</td>
<td>28</td>
<td>37</td>
<td></td>
</tr>
<tr>
<td><strong>Alternative Uses Allowed</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>For Sick Days:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Funeral</td>
<td>13</td>
<td>14</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>Sick child</td>
<td>33</td>
<td>37</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>Personal reason</td>
<td>18</td>
<td>16</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>Doctor's appointment</td>
<td>57</td>
<td>59</td>
<td>48</td>
<td></td>
</tr>
<tr>
<td>None allowed</td>
<td>30</td>
<td>28</td>
<td>36</td>
<td></td>
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</tbody>
</table>


* Percentages do not equal 100 due to rounding and data unavailability for some cases.
days for funeral attendance or simply as another type of personal day was generally not available to blue-collar employees. When looked at over the short span of time for which adequate data are available, there is again little indication that leave policies are being liberalized to make them more responsive to the needs of individual employees.

Systematic data are more difficult to come by concerning other forms of flexibility available to employers within the existing FLSA framework. Various estimates have been offered as to the incidences of compressed work schedules, ranging between 15 and 36% of firms. Since not every employee (and indeed, most likely not the majority of employees in firms that use compressed work weeks) actually have compressed work weeks, the percentage of employees with compressed work schedules is probably still quite modest. The shifting of hours within work weeks is not tracked by an official statistic and the extent of the practice is anyone's guess.

There is little evidence, then, that employers are using the flexibility available to them under existing law in scheduling work without incurring overtime liability. Scheduling inflexibility is thus not simply the result of antiquated law constraining employers. One could argue that comp time is needed all the more due to the limited availability of other means of providing workers with time off, but it is clear that employers are not equally interested in all forms of flexibility that would help workers deal with conflicting pressures in their lives. This calls into question the "flexibility" arguments of comp-time proponents and suggests the need for a searching look at why employers and their Congressional allies advance comp time as the preferred option.

B. What's "In It" for Employers?

Quite apart from satisfying the desire to be responsive to the needs of workers, there are numerous ways in which the extension of comp time to the private sector might redound to the benefit of employers. Potential benefits to employers include the following:

- For weeks in which a worker used comp time, her employer would have to pay only her normal wages instead of her normal wages plus an overtime premium. This would clearly result in lower pay for individuals who work overtime. Whether this would also result in overall savings to the employer would depend on whether the employer would have to

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98. See Barney Olmsted & Suzanne Smith, Creating a Flexible Workplace 45-46 (2d ed. 1994).
99. To illustrate, consider a worker who is paid bi-weekly and who earns $10/hr. She works 50 hours in the first week of the pay period and then her normal 40 hours in the second week. Under existing law, she must be paid a total of $950 for the two weeks ($550+$400). If she receives comp time instead and uses the 15 hours earned during the second week, she earns $400 in both weeks, for a total outlay by the employer of $800.
schedule a replacement, how much the replacement would be paid, and the fixed costs of employing the comp time user.

- When wage payments are lessened, other payments that are tied to payroll costs (e.g., the employer's share of social security, unemployment insurance, pensions) are also reduced. The savings would again be affected by the scheduling of replacements.

- The "banking" of overtime earnings in the form of comp time hours would constitute an interest-free loan to employers. Payment for overtime work would be deferred to some unspecified future date that would usually be later than when cash overtime would have been due. The pending bills would limit the "term" of this "loan" to thirty-one days after the end of the year in which the overtime was worked, by which time employers would have to cash out any remaining comp time.

- Absenteeism, turnover, diminished productivity, and other undesirable manifestations of workfamily conflict might be lessened. It should surprise no one that workers with pressing family and personal problems are more likely to be absent, suffer from distractions while at work, spend inordinate amounts of time on the telephone, and, ultimately, leave employment. More time off might ameliorate these undesirable, productivity-lessening effects.

- Employee use of paid sick leave might be reduced. As a corollary to the above, if comp time is available, employees might be less inclined to use sick time for non-medical situations.

These potential benefits to employers, though downplayed by comp-time proponents, may be unobjectionable. After all, if workers would be getting something they want, then it is only fair that the arrangement would also benefit employers. This is the essence of a "win-win" situation. However, there are other potential benefits to employers that would more clearly come at the expense of workers.

- Employers might use the availability of comp time as an reason to roll back other types of paid leave. Anticipating that comp time will lessen usage of sick days is quite different from treating comp time as though it were an equivalent "benefit" and reducing other forms of paid time off. It is critical to realize that while comp time comes as paid time, it is not paid time off in the same sense as vacation or personal days since comp time is payment for work already performed rather than an employer-
provided benefit. There is also a legitimate concern that an employer might require employees to exhaust comp time prior to using employer-provided leave. This requirement might result in a forfeiture of employer-provided leave.

- **Comp time hours might not be counted the same way as overtime hours in determining eligibility for pensions or other benefits related to length of service.**

- **Accrued comp time might be used to reduce or defer an employee’s entitlement to unemployment compensation.** Laid-off workers, rather than their employers, would be funding their own unemployment insurance.

- **During weeks that workers use comp time, their employers might require that they work more hours than normally scheduled, without providing overtime pay or additional compensatory time.** In general, absences due to the likes of illnesses, holidays, or vacations can be ignored in computing both hours worked and the “regular rate” of pay under the FLSA, even if the employee is paid for those absences. Lacking contractual protection, employees might have to “make up” the comp time that they use and employers would not be obligated to provide additional comp time unless weekly hours exceed forty.

- **Employers would likely increase their reliance on overtime.** To the extent that comp time would be less expensive than overtime pay, and in light of the strong incentives employers already have to prefer overtime to the hiring of additional workers (e.g., fixed costs such as benefits), it is reasonable to expect that employers would demand longer hours from their employees. Thanks to a program designed to accommodate family

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103. Concerns of this sort may underlie the provision in Michigan’s comp time statute that only employers who allow employees at least ten days of leave per year without loss of pay are eligible to offer comp time. See Mich. Comp. Laws § 408.384(a)(8) (1998).

104. This might happen if, for example, the employer did not allow employees to “carry over” vacation and sick leave from one year to the next.

105. See House hearing 1997, supra note 67, at 188 (testimony of Karen Nussbaum). An amendment proposed by Sen. Paul Wellstone (D-Minn) stipulating that comp time be treated the same as paid time for pension purposes was rejected by the Senate Labor and Human Resources Committee. See FLSA: Senate Panel Splits Along Party Lines on Comp-Time Legislation, 53 Daily Lab. Rep. (BNA), March 19, 1997, at D-8. Presumably, it was the view of the Committee that the proposed legislation does not, in fact, require comp time hours to be counted for this purpose. In the House, Congressman Ballenger (R-NC) has offered the contrary view. See House hearing 1997, supra note 67, at 200.

106. A more benign interpretation is that having comp time available would allow workers, especially those employed by small companies and in industries subject to frequent fluctuations in demand, to support themselves prior to unemployment insurance becoming effective, where they would not be eligible for payments due to irregular employment, or to supplement reduced hours. See House hearing 1997, supra note 67, at 160 (testimony of Russell Gunter, SHRM). Of course, workers who received cash overtime and then saved or invested it would be even better off under these circumstances.


and personal needs, workers might find themselves working longer and perhaps less predictable hours.\textsuperscript{109}

- **The pace of work would intensify if co-workers or work team members were required to take up the slack when other employees take comp time.**
  
  There is no certainty that employers would deploy substitute workers to cover for employees using comp time. Thus, at a time when the pace and volume of work is being increased for most workers, comp time usage might exacerbate problems and pit workers against one another. Employees who work more independently might find that output expectations are not reduced simply because they have opted to take their comp time. Instead, work might “pile up” in their absence and they would have to work that much harder upon returning.

- **Through subtle or overt pressures (from co-workers as well as managers), workers might not take all of the comp time to which they were entitled or insist on their right to overtime pay.**
  
  Unlike the overtime pay system, under which an employer must pay overtime within a specified period of time after the work is done, only an employee request could trigger the use of comp time. For a variety of reasons, ranging from the expectations of over-extended co-workers, to the desire to appear fully “committed” to their jobs, to the sheer volume of work for which employees are held responsible, employees might not request all of the comp time available to them.\textsuperscript{110} Comp-time opponents fear that pressure on employees would start with the very decision about whether to accept comp time in the first place.\textsuperscript{111} Many employees who could use the extra money from overtime pay might “get the message” that their employer expects them to accept comp time and therefore decide not to risk retaliation by insisting on overtime pay.

- **Overall, allowing comp time would make it easier for employers to evade the overtime requirements of the FLSA if they were inclined to do so.\textsuperscript{112}**
  
  Currently, employers are legally obligated to pay for overtime in cash and

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\textsuperscript{109} From an employee’s perspective, the issue is the disruption created by unpredictable and more frequent overtime demands. For the workforce as a whole, greater reliance on overtime spells fewer available jobs. See Golden, supra note 64, at 12 (calculating that the end of required overtime pay and a concomitant increase in overtime work would result in a reduction in employment levels of 0.5 to 2.3%).

\textsuperscript{110} The proposed legislation specifies that any comp time hours remaining at the end of the work year would have to be paid for in cash within 31 days. See H.R. 1, 105th Cong. § 2(r)(3)(B) (1997); S. 4, 105th Cong. § 3(a)(1)(r)(4)(B) (1997). It also contains extensive language that would prohibit interference with an employee’s right to request compensatory time. See H.R. 1, 105th Cong. § 2(r)(4) (1997); S. 4, 105th Cong. § 3(a)(1)(r)(6)(A) (1997). However, these provisions rely on employees for their enforcement.

\textsuperscript{111} See House hearing 1997, supra note 67, at 187 (testimony of Karen Nussbaum); id. at 191 (testimony of Helen L. Norton, Women’s Legal Defense Fund); Golden, supra note 64, at 14.

\textsuperscript{112} “H.R. 1 changes fundamentally the 60-year-old Fair Labor Standards Act and creates new opportunities for employer abuses. However, the bill contains no money for the increased education or enforcement efforts that its changes will require.” House hearing 1997, supra note 67, at 197 (testimony of Helen L. Norton).
compliance is relatively verifiable. That would not be the case with comp time. For example, a comp time scheme would present difficult questions about what type of employer behavior constitutes "coercion." The accuracy of employer records would also become a major issue because comp time would most often be used or paid for well after the date it was earned. Even when employees genuinely desired comp time, their right to use such time at all, much less when they wanted to, would be difficult to enforce. It would be more difficult to verify that an employer was stalling in allowing the use of comp time and penalize that employers than it is to track and sanction employers who fail to pay overtime within the required pay period. Ultimately, if an employer refused to let an employee use her comp time because it would be "unduly disruptive," because the employee did not request it in a reasonably timely manner, or simply because the employer does not wish to provide it, the employer would win the battle. Even if an employee chose to sue, it would be unlikely in the extreme that the DOL or any court would act quickly enough to grant the employee the time off when needed. In addition, the creation of comp time banks at private sector companies, many of which are likely to go out of business or file for bankruptcy, would raise the specter of employees forfeiting their stored earnings.

Comp time might serve as a wedge for further, even more fundamental, changes in the FLSA, such as basing overtime on periods longer than the work week or altering the salary and duties tests used in determining exempt status. While there is no necessary link between comp time and these other changes, comp time is being debated within the framework of broad FLSA reform and existing comp time bills often incorporate these other provisions. These measures, when combined with comp time, would diminish the amount of overtime earned and lessen the number of persons eligible to receive overtime pay under the FLSA. By itself, comp time would subtly attenuate the connection between overtime work and compensation by further separating them in time and permitting non-cash remuneration. It would promote an individualistic, market-like arrangement in place of a uniform, socially agreed upon standard.

113. This is not to say, however, that there is assiduous compliance with and enforcement of the FLSA's overtime provisions. See discussion infra Part IV.C.


115. But see Schor, supra note 61, at 166-70. Schor stands out among comp time advocates in simultaneously favoring adoption of comp time (and indeed, elimination of overtime premium pay) and expanding FLSA coverage by eliminating exemptions for certain salaried employees.

116. The breadth of change envisioned by comp time advocates is suggested in the following: There are several changes that could bring the FLSA back in line with its original purpose of protecting those with inadequate bargaining power. First, employees above a certain income level should automatically be excluded from the FLSA's hourly wage and overtime mandates. Second, the law should be changed to presume that employees are free to negotiate the pay
comp time, by itself and especially in concert with other proposed changes to the FLSA, might be a first step toward de facto elimination of the entitlement to overtime compensation.\textsuperscript{117}

Comp time promises numerous advantages to employers, some of which are virtually certain to be realized. There is little question that the cost of overtime work to employers would be reduced and that this would promote more extensive use of overtime. Other benefits to employers are entirely plausible, but less certain. Comp time has the potential to raise productivity and lessen use of sick time, but there are many variables that could negate these effects. Depending on the language of any comp time legislation, the availability of comp time would very likely affect unemployment insurance claims and comp time hours might not be counted in computing weekly compensable hours. Other gains are less certain and would depend on the willingness of employers to use comp time as a vehicle to evade, or at least postpone, their overtime pay obligations. But would significant numbers of employers actually do that? Are employees likely to be pressured to accept comp time rather than overtime pay, coerced into using comp time at particular times, denied access to their comp time, and retaliated against for seeking to cash out accumulated comp time? Or would such actions be the rare exceptions that prove the rule of fair treatment and respect for workers’ rights?

\textsuperscript{117} Arrangement they desire, rather than presuming that the government will intervene in all cases as under current law.


S\en. Ashcroft has evinced similar faith in the efficacy of the labor market and individual negotiations to protect employee interests, in answering concerns that enforcement of the FLSA will be further compromised by a move to comp time:

\textquoteleft Let us not fall into the trap of thinking that there is just one option for workers. There are lots of places where they work and lots of things they do, and if an employer gets very onerous in the way it deals with workers, word will get out. Boeing is not going to attract the right kind of engineers if they are abusive.\textquoteright

\textit{Id.} at 35.

117. Labor attorney Michael T. Leibig has argued that the cumulative effect of comp time and other FLSA reforms must be considered:

The forty-hour work week standard of the Fair Labor Standards Act is under attack in the courts, administratively, in the professional press, and in Congress. The attack on fundamental provisions of the Act is being mounted under the veneer of a series of provision reforms allegedly designed to modernize the Act and make it more flexible. In fact, the "reforms" would seriously jeopardize any possibility of realistically enforcing the basic forty hour work week.

\ldots [lists proposed changes including comp time]

The strategy is one which has selected key provisions of the FLSA, without which general enforcement would be difficult, attacked each of those provisions in isolation, attempted to establish the irrationality of the provision taken in isolation, and, thereby, gain a series of amendments to the Act which taken together would gut enforcement and effectively undermine the forty hour work week.

C. Will Compliance with FLSA Overtime Provisions Suffer if Comp Time is Allowed?

Assessments of comp time and the adequacy of comp time bills seem to turn heavily upon the potential for employer abuses. A position on this issue need not rest solely on supposition or ideological leanings. There are data from several valuable studies of employer compliance with the current overtime provisions of the FLSA.\(^{118}\) There is also the on-going experience of the public sector with comp time.\(^{119}\) This evidence does not inspire great confidence in private sector comp time. Instead, it suggests a genuine risk that many employers would use the increased flexibility afforded them to diminish workers rights.

1. Research on Compliance with and Enforcement of the FLSA

Mandated by Congress in 1977, the Minimum Wage Study Commission’s charge included inquiry into the “overall level of non-compliance with the Act.”\(^{120}\) Its efforts produced the most comprehensive study of this subject to date. Data were obtained in 1979 through a survey of 15,000 randomly selected business establishments. For the most part, DOL field inspectors followed their normal enforcement procedures, but rather than wait for employee complaints, companies were randomly selected for compliance audits. Data were gathered on non-compliance in the current work week and over the preceding two years.\(^ {121}\)

During the work weeks in which the audits occurred, 21% of the establishments where overtime work had been performed violated the overtime provisions of the FLSA.\(^ {122}\) Over the two year period, 43% of establishments committed at least one overtime violation.\(^ {123}\) Establishments in the wholesale and retail trade, services, and agriculture industries exhibited the highest rates of non-compliance with the overtime provisions of the FLSA.\(^ {124}\) Expressed in terms of employees rather than establishments, 4.2% of employees that had worked overtime in the study week did not receive full overtime pay.\(^ {125}\) Employers owed $11,243,000 in back wages

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118. See discussion infra Part IV.C.1.
119. See discussion infra Part V.
122. See id. at 80.
123. See id. at 82.
124. See id. at 80-81.
125. See id. at 84-85. The authors were unable to calculate an employee violation rate over the entire two year period. However, they state that “[f]or both the minimum wage and overtime violations, about four times as many individuals were found paid in violation during the two-year period as were underpaid in the current workweek.” Id. at 86.
for overtime violations during the current work week and $811 million over the two-year study period. Perhaps most disturbing, the DOL had detected through its normal enforcement process only one-fifth of the back wages owed due to FLSA violations (both minimum wage and overtime) that it uncovered through the survey audits.\footnote{126}

Evidence from the Minimum Wage Study Commission documents, at least for the late 1970s, that violations of the FLSA have been wide-spread and that normal enforcement efforts detect only a small proportion of violations (at least in terms of dollars unpaid). Sellekaerts and Welch go further in arguing that "the evidence strongly indicates that many FLSA violators are recidivists."\footnote{127} In support of this assertion, they note that 28.1% of the firms found to be in violation of the overtime provisions of FLSA during the current work week had been investigated within the previous year and only 21.5% had never been investigated.\footnote{128} Recidivism is consistent with purposeful non-compliance, coupled with weak enforcement of the FLSA; non-compliance, according to Sellekaerts and Welch, "is an economic phenomenon, a behavior motivated by business incentive to minimize employment costs."\footnote{129}

Another late 1970s study of FLSA compliance that used different data sources found a somewhat higher rate of non-compliance.\footnote{130} Ehrenberg and Schumann estimated that 9.6% of employees who worked over forty hours failed to receive any premium pay for the survey week.\footnote{131} The results from a regression analysis of the determinants of non-compliance with the overtime provisions of the FLSA\footnote{132} led Ehrenberg and Schumann to conclude that "[i]taken together, these results provide strong support for the view that at least some employers do make conscious decisions about whether to comply with the overtime provisions of the FLSA; decisions that involve a weighting of the benefits and costs of such an action."\footnote{133} The ability of a model premised on intentional, calculating behavior to statistically account for non-compliance casts doubt on the notion that the vast

\footnotesize{\begin{itemize}
  \item \footnote{126}{See id. at 89.}
  \item \footnote{127}{Id. at 82.}
  \item \footnote{128}{See id. at 83.}
  \item \footnote{129}{Id. at 88.}
  \item \footnote{131}{See id. at 183.}
  \item \footnote{132}{See id. at 191-93. In the regression analysis, several variables were found to be significant predictors of non-compliance with the overtime provisions of the FLSA. Non-compliance was significantly lower in unionized firms and in heavily concentrated industries such as manufacturing and public utilities. Workers with lower wage levels (interpreted as a proxy for low skill) were more likely to be illegally denied overtime. Effects for demographic characteristics were less consistent, but generally showed minorities and older workers to be more likely not to receive the overtime pay due them.}
  \item \footnote{133}{Id. at 193.}
\end{itemize}}
majority of violations are inadvertent, products of complicated and arcane rules that result in misclassification of non-exempt employees, or innocent mistakes in computing compensable hours.

The General Accounting Office (GAO) likewise entered the fray in the late 1970s and evaluated the DOL’s efforts in enforcing the FLSA. The GAO’s study focused on 1978-1979 and involved review of over 4000 cases where a monetary finding was made, as well as review of hundreds of cases closed without a monetary finding. The GAO report characterized employer non-compliance with the record keeping, minimum wage, and overtime provisions of the FLSA as “a serious and continuing problem.” The GAO “found that many employers willfully violated the act and that current enforcement actions have not resulted in penalties that would deter these violations.”

The GAO based this conclusion on a number of factors. First, there was substantial agreement among the compliance officers and regional solicitor officials surveyed that willful violations were extensive. Second, while acknowledging that the precise extent of willful violations (or violations of any kind, for that matter) was unknown, repeat violations of the same section of the FLSA were relatively common. The GAO viewed repeat violations as signaling intent because an initial DOL investigation should have been sufficient to clear up misunderstandings about the law. In samples of local and regional office cases, between 21 and 37% of offending employers had at least one prior violation. Furthermore, high percentages (ranging from 80 to 98% in the two samples) of the repeat violations involved the same provisions of the act. As another indicator, albeit more indirect, of intent to violate the FLSA, the GAO found that “[r]ecord keeping violations are extensive.” Compliance officers reported that 49% of cases closed in June 1979 that had monetary findings contained record-keeping violations. The officers found evidence that the employer had falsified or concealed records in 6% of all cases.

The GAO’s critical gaze did not spare DOL enforcement efforts. The GAO noted that the DOL investigates only a small percentage of all establishments covered by the FLSA (primarily in response to employee com-

135. See id. at 6-7.
136. Id. at 4.
137. Id. at 23.
138. See id. at iii.
139. See id. at 23-24.
140. See id.
141. See id.
142. Id. at 8.
143. See id. at 8-9.
144. See id. at 9.
plaints), obtains only partial re-payment of wages owed employees, conducts few follow-up investigations to monitor recidivist employers or ensure that wages owed are actually repaid, and is less than zealous in using the powers it does possess (e.g., rarely seeking a third year of back pay despite willful violations, not requiring the payment of interest on back pay due).\textsuperscript{145}

Taken together, the best available research on employer non-compliance with the FLSA converges in the assessment that the incidence of non-compliance is substantial, that non-compliance cannot be attributed solely to innocent misunderstandings, and that DOL enforcement efforts are inadequate.

2. More Recent Evidence

In several follow-up studies,\textsuperscript{146} the GAO found that most of the problems identified in its earlier report persisted, but that the DOL was attempting to enforce the law with even fewer staff. The number of Wage and Hour Division field investigators dropped from over 1000 in 1980 to 798 in fiscal year 1995, despite a substantial increase during that same period in the number of employees and establishments covered by the FLSA.\textsuperscript{147}

To make the most of its limited resources, the DOL has shifted to a “targeted” approach and has placed a greater emphasis on education and outreach to employers.\textsuperscript{148} One of the targets, the garment industry, has proven to be recalcitrant. A 1998 DOL survey of Los Angeles-area garment industry firms found the level of compliance with the FLSA (both

\textsuperscript{145} See id. at 50-59. The GAO also found the enforcement powers of the DOL inadequate and suggested that the DOL be given the power to assess civil money penalties upon violators (in lieu of liquidated damages that can only come after successful litigation). See id. at 18, 42. Congress amended the FLSA in 1989 to provide for civil money penalties of up to $1000 per violation in cases where there are repeat or willful violations. See 29 U.S.C. § 216(e) (1997).


\textsuperscript{147} See Sellekaerts & Welch, supra note 121, at 96 (citing a figure of 1046 field compliance officers in 1980); Fay Hansen, FLSA Compliance and Enforcement, 28 Compensation & Benefits Rev. 8, 10 (July/Aug.1996). However, some 200 inspectors have been hired since 1996, bringing the total number of field inspectors closer to the 1980 level. Telephone Interview with Michael Ginley, Deputy for Enforcement Policy, U.S. Dep't of Labor, Wage and Hour Division (Sept. 16, 1998).

minimum wage and overtime requirements) unchanged from 1996; the overall compliance level remained 39%.\textsuperscript{149}

The DOL has also turned its attention to nursing homes and personal care facilities. A survey of 288 randomly selected facilities in the spring of 1997 found that 30% were not in compliance with the FLSA.\textsuperscript{150} This rate of non-compliance, while substantial, was less than the DOL had feared based on its prior complaint-based enforcement efforts. Of the facilities with violations, 83% committed overtime pay infractions. The meatpacking industry has also become a DOL target and the DOL has recently sued a number of firms for failing to pay millions of dollars in overtime.\textsuperscript{151}

Whether or not overtime violations have "become the workplace conflict of the 1990s," as an article discussing a class action lawsuit against Albertson's supermarket chain suggests,\textsuperscript{152} it is clear that compliance with, and enforcement of, the FLSA's overtime requirements remain highly problematic. More systematic data on enforcement of the overtime provisions of the FLSA reinforce this conclusion and raise questions about the DOL's new enforcement strategy.

Table 3 presents enforcement data for fiscal years 1990 through 1996.\textsuperscript{153} Even though enforcement data necessarily reveal only the tip of the iceberg in terms of underlying compliance, the pervasiveness of overtime pay violations is clearly shown by the many thousands of employees each year found to be denied overtime compensation and the more than $100 million wrongfully withheld from employees each year.\textsuperscript{154} If the 1990s reflect the relationship that the Minimum Wage Study Commission found in the late 1970s between back pay owed, as determined by normal enforcement efforts, and the amount actually owed employees (i.e., the lat-

\textsuperscript{149} See U.S. Dep't of Labor, Office of Public Affairs, OPA Press Release: U.S. Department of Labor Announces Latest Los Angeles Garment Survey Results (May 27, 1998). However, the DOL has cited its garment industry initiative, dubbed "Eradicating Sweatshops," as an example of the success of its new approach to achieving compliance. See U.S. Dep't of Labor, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act 34 (1998). Compliance in the garment industry varies considerably depending on the degree of monitoring to which firms are subject, both by the government and contracting firms.


\textsuperscript{153} Thanks to Alan L. Moss, Chief Economist of the Dep't of Labor, Wage and Hour Division, for making the availability of these data known to me and sharing his insights. The conclusions drawn from the data are, of course, my own.

\textsuperscript{154} To facilitate comparisons between sectors and across years, the figures for the number of employees found to be improperly compensated for overtime work are normed (in the third column of Table 3) by relating them to the number of non-exempt employees for each year. These should not be viewed as "violation rates" because they are based solely on enforcement data and, more importantly, the denominator is the total number of non-exempt employees, rather than the considerably smaller group that actually worked overtime during the year.

<table>
<thead>
<tr>
<th>Year/Sector</th>
<th>Number of Non-Exempt Employees (in thousands)</th>
<th>Number of Employees Owed O/T Pay (in thousands)</th>
<th>Percent of Non-Exempt Owed O/T Pay</th>
<th>Amount of O/T Pay Owed ($ millions)</th>
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<tr>
<td>1990 (74,128 compliance actions)</td>
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<td>1991 (60,686 compliance actions)</td>
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<td>166.6</td>
<td>0.22</td>
<td>93.9</td>
</tr>
</tbody>
</table>


* Public and private figures may not equal total due to rounding and to the existence of a number of “nonclassified establishments.”
ter is five times the former),\textsuperscript{155} then employees may be losing out to the
tune of half a billion dollars each year due to overtime violations.\textsuperscript{156} The
data in Table 3 also suggest that non-exempt employees are more likely to
be improperly paid for overtime work in the private sector than in the public
sector, although extreme caution should be taken before drawing such a
comparison.\textsuperscript{157}

By far, however, the most striking feature of the data in Table 3 is the
precipitous decline over time in the number of DOL compliance actions and
the concomitant drop in the number of violations found and the monetary
value of those violations. While the DOL undertook over 74,000 com-
pliance actions (i.e., on-site investigations and resolution of complaints over
the phone) in 1990, the number dropped to a little over 41,000 in fiscal year
1996. The possibility that violations by employers have diminished cannot
be dismissed based on these data, but there is no readily apparent explana-

\begin{flushright}
\textsuperscript{155} See Sellekaerts & Welch, supra note 121, at 89.
\textsuperscript{156} The figures for overtime pay owed do not include payments that individual employees may be
awarded by going to court on their own behalf. Also, it is important to realize that the back pay deter-
mained by the DOL to be owed employees is by no means the same thing as the amount which employers
agree to pay or which employees ultimately receive. Some sources suggest that the amount recovered
by employees may be as small as 50\% or 60\% of the back pay owed. See, U.S. Dep't of Labor,
Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act 20
\textsuperscript{157} One complicating factor is that public sector employees may be less likely to work overtime
hours. One study of overtime workers found the percentage of private sector workers receiving over-
time pay to be about twice that of public sector workers. See Darrell E. Carr, Overtime Work: An
Expanded View, 109 Monthly Lab. Rev., Nov. 1986, at 36, 38, Table 2. If private sector employers
make more overtime pay decisions, then a larger number of violations would be expected, even if the
rate of violations is the same. On the other hand, there is reason to believe that the relative job security
of public sector employees may result in a greater propensity to challenge employer violations.
\textsuperscript{158} Michael Ginley, Director of Enforcement Policy for the Wage and Hour Division of the DOL,
offered several explanations for the lower frequency of enforcement actions. Within the past two years
the DOL has hired a significant number of field investigators (about 200) and it takes time to properly
train new personnel. Additionally, the Wage and Hour Division has taken on the major new responsibil-
ity of enforcing the Family and Medical Leave Act, without being given additional resources and staff.
This has had the inevitable effect of lessening enforcement efforts elsewhere, including for the FLSA.
The DOL's targeting and education strategy is also reflected in the enforcement numbers. If a call
results simply in the provision of information and that is sufficient to resolve a potential dispute, then the
call is not counted among compliance actions. Additionally, it takes longer to investigate cases where
violations have occurred. A targeting strategy means that the probability of finding a violation in a
given investigation is greater, resulting in more time being spent on each case. Telephone Interview
with Michael Ginley, Deputy for Enforcement Policy, U.S. Dep't of Labor, Wage and Hour Division
(September 16, 1998).
\end{flushright}
These apparent shortcomings in the enforcement of the FLSA should give policymakers pause. Employers stand to benefit considerably from comp time because it would transform the overtime system from one of mandatory payment to one where employees must enforce their own rights and employers possess certain veto powers over those rights. Such a shift in the balance of power could undermine the entire system if the enforcement mechanism lacks the resources to monitor employers effectively. That danger, coupled with the fact that the comp-time proponents’ desire for “flexibility” could be met by existing but underutilized options, should be enough to stall comp time legislation in its tracks. However, because that appears unlikely and because the proponents also point favorably to the public sector experience with comp time, I proceed to consider that experience and whether we should expect a similar experience in the private sector.

VI.

How Well Has Comp Time Worked in the Public Sector?

Proponents of comp time legislation regularly assert that its usage in the public sector has gone swimmingly and that this constitutes grounds for extending it to the private sector. And while the proposed private sector legislation is not identical to the existing FLSA public sector language, the drafters have drawn heavily upon the public sector provisions. But just how well has comp time worked in the public sector?

The history of public sector coverage under the FLSA has been recounted extensively elsewhere and only brief recapitulation is necessary here. For nearly the first thirty years of its existence, the FLSA was applied only to the private sector. Coverage of selected public sector employees (i.e., school, hospital, nursing home, and transit workers) began in 1966 and was extended by Congress to virtually the entire public sector in 1974. A constitutional challenge by a number of states and cities to the extension of the FLSA to the public sector proved successful in *National League of Cities v. Usery.* Following the Supreme Court’s decision in *National League of Cities,* there was a hiatus of almost ten years in which the FLSA was not applied to the public sector (except in “non-traditional” functions). Then, in 1985, the Supreme Court, in *Garcia v. San Antonio Metropolitan Transportation Authority,* reversed *National League of Cities* and found application of the FLSA to the public sector proved successful in *National League of Cities.*
Congress responded by amending the FLSA\textsuperscript{162} to allow public employers to provide comp time. It is undisputed that the decision to allow comp time in the public sector was predicated on a desire to ameliorate projected labor cost increases for cities and states because of compliance with the FLSA, particularly its overtime provisions.\textsuperscript{163} The public sector comp time provisions of the FLSA are thus the product of a political deal struck when there were substantial and possibly destructive fiscal pressures on states and municipalities. Beyond acknowledging that comp time was already common practice for many public employers and often incorporated into collective bargaining agreements, the legislative history makes no mention of a desire to be "family friendly" or to promote "flexibility."\textsuperscript{164}

Anecdotal reports suggest that public employees are denied comp time when they request it, forced to use comp time when they do not want to use it, and quickly accumulate the maximum allowable number of comp time hours,\textsuperscript{165} but there is a dearth of systematic data on the public sector comp time experience. However, there is a body of public sector comp time litigation that, while not voluminous, points to serious problems with comp time and its precarious balance of employee and employer rights. One could expect that if comp time is extended to the private sector, these problems will arise with much greater frequency.\textsuperscript{166}

A. "Choice" and the Use of Comp Time

1. Comp Time Use Required Upon Reaching a Specified Level of Accumulation

Public employers and their employees have disputed whether employers can legally require employees to use their accrued comp time upon accumulating a specified amount. Employers impose such requirements in order to keep employees from reaching maximum accrual levels, at which point any further overtime would have to be paid for in cash. In \textit{Heaton v.}\textsuperscript{166}
Moore, the Missouri Department of Corrections circulated a memo which stated that after an employee had accrued 180 of comp time, she and her supervisor were to devise a plan to reduce her comp time balance. Failure to submit such a request would result in the department unilaterally scheduling the employee for comp time use. The department adhered to this policy and there were, in fact, instances where comp time was scheduled over the objections of the affected employees.

The Court of Appeals for the Eighth Circuit held that the policy violated the FLSA. The court rejected the state’s argument that the statute’s silence on this matter left the public agency free to require and schedule comp time use. Instead, the court interpreted the FLSA’s limitation of a public employer’s discretion to reject comp time requests to those situations where granting the time off would be “unduly disruptive” as meaning that other forms of unilateral employer control over comp time decisions are inconsistent with the Act.

Significantly, the Eighth Circuit endorsed the view that “banked compensatory time essentially is the property of the employee.” It suggested that comp time should be treated in fundamentally the same manner as the overtime pay for which it is a substitute:

As the employee would have the right to spend the employee’s cash overtime pay when and as the employee chose, the employee should be allowed to spend the banked compensatory time as the employee chooses, subject only that the employee not “unduly disrupt” the public employer’s operations in doing so.

Whether receipt of earned comp time is a right equivalent to receipt of overtime pay is a key issue under any comp time scheme. The Supreme Court had the opportunity to reject the Eighth Circuit’s holding but chose to deny certiorari.

Several district courts have cited Heaton as persuasive and reached the same conclusion about forced comp time use. In Hellmers v. Town of Vestal, N.Y., the defendant required the plaintiff to use his comp time upon accumulating more than twenty four hours and prohibited him from using more than eight hours of comp time in any single week. In ruling on a summary judgment motion, the district court held that:

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168. See id. at 1179.
169. See id. at 1180.
170. See id. However, the court explicitly left open the question of whether public employers and employees could enter into agreements that place further limitations on comp time use. See id. at 180 n.4.
171. Id.
172. Id.
[i]n light of the clear wording of section 207(o)(5), which specifically gives the employee the right of access to and control of the use of that banked time subject only to the employer’s right to deny requested uses by the employee that would unduly disrupt the employer’s operation, the Court will not expand an employer’s power to condition use of compensatory time beyond that which Congress has provided.\textsuperscript{175}

Another district court held in \textit{Moreau v. Harris County} that a county sheriff’s department’s policy of requesting that accrued comp time be used when it reached a certain level (determined by each bureau based on its personnel requirements) and then ordering usage in the absence of prompt compliance\textsuperscript{176} violated the FLSA. The court held, “Governments are allowed to substitute time off for cash as compensation, but the time credits need to be as nearly equivalent to cash as possible; the time off must be consumable by the worker on the worker’s own terms.”\textsuperscript{177} The court also dismissed as improbable the prospect that employees would attempt to extort benefits from employers by requesting leave when they were especially needed.\textsuperscript{178}

However, because \textit{Heaton} stands as the only appellate level decision on this matter and because other courts appear to be of a different mind,\textsuperscript{179} it is not clear to what extent public employees presently have (or whether private sector employees who would be covered under prospective comp time legislation would have) the right to control use of their comp time. Certainly, the proposed legislation goes well beyond the current statutory language by prohibiting an employer from directly or indirectly intimidating, threatening, or coercing an employee by requiring her to use comp time.\textsuperscript{180}

\begin{enumerate}
\item \textit{Comp Time Use Required Prior to Taking other Forms of Paid Leave}

Somewhat similar to the foregoing, but distinguishable, is the situation in which a public employer requires that accumulated comp time be expended prior to use of other forms of annual leave provided by the employer (e.g., personal days, vacation). In \textit{AFSCME v. Louisiana Department of Health and Hospitals},\textsuperscript{181} the U.S. District Court for the Eastern District of Louisiana considered a challenge under the FLSA to a policy of “automatically and mandatorily” deducting any requested leave from em-

\begin{footnotes}
\item \textsuperscript{175} \textit{Id.} at 847.
\item \textsuperscript{176} 945 F.Supp. 1067, 1068 (S.D. Tex. 1996).
\item \textsuperscript{177} \textit{Id.} at 1068.
\item \textsuperscript{178} \textit{See id.}
\item \textsuperscript{179} \textit{See, e.g., infra} notes 181-85 \textit{and accompanying text.}
\item \textsuperscript{180} \textit{See H. R. 1, 105th Cong. § 2(r)(4) (1997); S. 4, 105th Cong. § 3(a)(1)(r)(4)(A) (1997).}
\item \textsuperscript{181} 1996 U.S. Dist. LEXIS 472 (E.D. La. Jan. 12, 1996); 1996 U.S. Dist. LEXIS 11080 (E.D. La. July 26, 1996) (motion for re-consideration), \textit{rev’d in part} 145 F.3d 280 (5th Cir. 1998) (affirmed part of decision allowing leave to be deducted from comp time before it was deducted from other sources).
\end{footnotes}
employees' accrued compensatory time, regardless of which form of leave the employees wished to expend. In finding for the employer, the District Court distinguished this case from *Heaton*, since the AFSCME plaintiffs requested time off and were not compelled to use comp time upon accumulating a certain number of hours.\(^{182}\)

Yet, the court went further and suggested that it would not have followed *Heaton* even if the facts had been the same. The court maintained that the comp time provisions of the FLSA were "intended to alleviate the burden of paying cash overtime, not to create any new property rights in employees."\(^{183}\) The court chided the Eighth Circuit for failing to take into account the "voluntary" nature of comp time arrangements:

The voluntary agreement, governed in the absence of clear statutory language by the intent of the parties, includes the provisions of the Civil Service Rules which expressly allow the State to force an employee to use either k-time [comp time] or a-leave [other paid time off] without any reason, and to force such use even in the absence of the employee's request to use such time.\(^{184}\)

Under this expansive view, comp time "agreements" incorporate state civil service laws. In direct contrast to *Heaton*, a public employer, at least one with Civil Service rules on its side, could legally require that comp time be used.\(^{185}\)

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182. See 1996 U.S. Dist. LEXIS 472, at *23-*24. In reaching this conclusion, the court proceeded from a dubious premise:

Given that there is no fundamental difference between earned k-time [comp time] and earned a-leave [other paid time off], and taking into account an employee's motivation in requesting either form of compensation (that is, the employee would like to have a day off with pay), the employee has no legitimate interest in requesting one type of leave over the other . . . . The only stake an employee may have is in using a specific type of leave in order to maximize his short term monetary gain . . . .

*Id.* at *23-24.*

Thus, in the court's view, the only reason an employee would desire the use of paid leave other than comp time would be to allow the comp time to accrue to the statutory maximum, thereby creating eligibility for overtime payments. In fact, there are a number of important distinctions between the two types of leave. Other forms of leave may be lost to the employee if not used by a certain date (e.g., vacation days), whereas employees cannot forfeit comp time. The use of some other forms of leave (e.g., sick days) can be and often is more circumscribed, making it reasonable for an employer to retain comp time for unforeseen contingencies. Lastly, the employee's comp time is not a "benefit" provided by the employer, but stored payment for work already performed.

183. *See id.*

184. *Id.* at *28.*

185. In denying a joint motion for reconsideration, the court was even more sweeping in its view of what constitutes an acceptable comp time agreement under the FLSA:

Plaintiffs are concerned that the Court may have assumed that they conceded that the compensatory time arrangement is one that they consented to with AFSCME, who is the compensatory time representative for the employees of the State. The Court does not assume the same and does not find that either AFSCME or the aggrieved plaintiffs agreed to the compensatory time policy of the State. The finding is that, notwithstanding the decision in *Heaton v. Moore* [citation omitted], for the reasons previously entered, the State has not violated any federal statutes or regulations by requiring employees to use their accrued k-time or compensatory time when they submit a request for annual leave.
3. "Reasonable Period" and "Undue Disruption" as Limitations on Comp Time Use

The FLSA requires that employees be permitted to use their accrued comp time off, subject to the limitations that there be a "reasonable period" between the request and the use and that such use "not unduly disrupt the operations of the public agency." Use of accrued comp time is qualified in the same manner under the pending legislation. Determining what constitutes a "reasonable period" or an "undue disruption" is thus pivotal to giving employees actual "choice."

Unfortunately, the legislative history of the 1985 amendments to the FLSA provides scant guidance to the meaning of these key terms. The Senate report explains that the term "reasonable period" is used rather than a specified period of time in order "to accommodate varying work practices based on the facts and circumstances of each case." The discussion of "unduly disruptive" requests is only slightly more illuminating. The report indicates that this means "something more than mere inconvenience" and provides a single example: "a request by a snow plow operator in Maine, to use 40 hours of comp time in February probably would be unduly disruptive."

DOL regulations elaborate on the factors affecting a "reasonable period," including "(a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements . . ., and (d) the availability of qualified substitute staff." Significantly, the regulations state that if the terms of a comp time agreement specify the meaning of "reasonable period," then the agreement will control. Regarding "undue disruption," the regulations echo the conference committee’s sentiment that this entails more than "mere inconvenience," and state that a denial of comp time should be predicated upon the employer’s reasonable and good faith belief that the requested time off would "impose an unreasonable bur-

AFSCME v. Louisiana Dep’t of Health and Hospitals, 1996 U.S. Dist. LEXIS 11080, at *13. The court appears to have found it immaterial whether the employee representative actually agreed to the policy in question.

188. Id.
189. Id. Even the Maine snow plow operator example is ambiguous. Would any comp time at all taken by a snow plow operator in February be unduly disruptive, or only a large block of time like the forty hours mentioned? What if it were April instead? Ohio rather than Maine? The Arkansas Supreme Court recently considered the application of FLSA comp time provisions to its court reporters. In its administrative order, the court interpreted undue disruption to mean that court reporters will not be allowed to use any comp time while the court is in session. See In re: Compensatory Overtime for Official Court Reporters and Promulgation of Administrative Order, 3WH Cases 2d (BNA) 1502 (1996). In prohibiting all comp time use during the presumably six months or more that the court is in session, this policy seems to go well beyond the example of the hypothetical snow plow operator.
190. 29 C.F.R. § 553.25(c)(1) (1997).
den on the agency's ability to provide services of acceptable quality and quantity."

In *Banks v. City of Springfield*, newly hired police officers required to attend a residential basic law enforcement course argued that the city impermissibly withheld use of their earned comp time for nearly five months. In rejecting the claim, the district court judge observed that none of the plaintiffs had actually made a request to use the time. But even if they had, the court would have upheld the city on the grounds of undue disruptiveness.

In the instant case, it would be unduly disruptive of the training course to allow Plaintiffs to use their comp time before the ten week training programs were completed. If a cadet were allowed to use his comp time while at the academy, not only might he miss information relevant to his job, but he may also fall short of the 400 minimum training hours required to be certified.

*Heaton* also dealt with the meaning of "unduly disrupt." The Missouri Department of Corrections maintained that its policy of mandatory comp time use was intended to avert undue disruption stemming from the financial burden of paying overtime to employees accruing more than the statutory maximum number of comp time hours, as well as the scheduling problems that would result from trying to ensure that employees do not exceed that maximum. The Eighth Circuit dispensed with this argument by pointing out that the undue disruption referenced in the statute must arise from an employee's request to use comp time and not from the anticipation of potential problems in the future if comp time levels continue to grow. The court reasoned that Congress anticipated comp time use would be at least somewhat disruptive (hence use of the term "unduly") and that in any event the prospect of having to pay cash overtime would not constitute undue disruption.

More worrisome for employees is the district court decision in *Aiken v. City of Memphis, Tennessee*. In *Aiken*, the city adopted a means of scheduling comp time whereby a police officer desiring to take comp time on a given day would sign up in a logbook under the entry for that day. An officer was allowed to enter a request for a particular comp time day beginning thirty days prior to the desired day off. If a supervisor determined that enough officers had requested a particular day such that the department

192. 29 C.F.R. § 553.25(d) (1997).
194. *See id.* at 973, 979.
195. *Id.* at 979.
197. *See Heaton*, 43 F.3d at 1181.
198. *See id.*
could not effectively function with any more employees gone, then the supervisor would indicate in the logbook that no one else could sign up for that day. The plaintiff officers contended that the city could avoid having to deny anyone the use of comp time by paying overtime to other officers to cover for those using comp time. The general policy of the city was, in fact, not to use overtime to make up for the absence of officers on comp time. As the plaintiffs framed the case, then, the possibility that overtime (in the form of comp time) would have to be paid to other officers did not constitute an "undue disruption" sufficient to justify failing to provide the requested comp time.

Following Heaton, the district court agreed with the proposition that "the necessity of paying overtime compensation does not constitute an undue disruption within the meaning of the FLSA." The city, however, claimed that its comp time scheduling policy merely implemented the FLSA requirement that comp time requests be granted within a "reasonable period." Requests received prior to a given day "filling up" were within a reasonable period and were granted; requests made after a day had been closed out were not within a reasonable period and were denied (unless a genuine emergency existed or a substitute was found). Insofar as the scheduling policy had been incorporated into the Memorandum of Understanding between the city and officers regarding comp time, and the DOL regulations allow such agreements to govern the meaning of "reasonable period," the court ruled in favor of the city.

Despite their central place in the comp time scheme, the precise meaning of "reasonable period" and "unduly disrupt" have not been fleshed out by either legislators or the courts. Nor should we expect this to occur since, by their nature, these terms are ambiguous and perhaps not even clearly separable. What can be expected is that employers will construe these limitations on comp time use more broadly than employees will and that numerous disputes will ensue. The discretion given employers in deciding whether a request for comp time is sufficiently timely or not unduly disruptive is substantial and provides a ready means by which employee choice can be frustrated. Devising narrower grounds for denial of comp time re-

200. See id. at 745.
201. See id. at 745-46.
202. Id. at 746.
203. See id. A troubling aspect of this decision is the manner in which it blurs the separate criteria of "reasonable period" and "undue disruption." Arguably, the Memphis policy failed to define any specific reasonable period within which the employer would be required to grant overtime and focused entirely on avoiding what the employer regarded as undue disruption: not having enough officers to schedule without paying someone overtime. The policy arbitrarily required that comp time requests could be made no more than 30 days in advance. Further, a request made 29 days in advance might be rejected if other officers had already signed up, while a request made one day in advance would presumably be granted if no one had signed up.
quests, as some have done, would shrink the area left to employer discretion but would not fundamentally change the situation.

4. Acceptance of Comp Time as a Condition of Employment

If comp time is about affording greater "choice" to employees, then it is critical that the decision to accept comp time rather than overtime pay not be made a condition of employment. The FLSA itself does not address this basic issue. However, DOL regulations, while requiring that the individual employee's "decision to accept compensatory time off in lieu of cash overtime payments be made freely and without coercion or pressure," also explicitly allow an agreement to accept comp time to be made "an express condition of employment." This is allowed provided that the employee "knowingly and voluntarily agrees to it as a condition of employment" and is informed that compensatory time may be used, preserved, or cashed out as per the provisions of the FLSA.

The DOL's position on this matter is contradictory; there is supposedly freedom from coercion and yet the only real alternative is that of not taking the job. Furthermore, existing regulations allow public employers to simply notify their unrepresented employees that comp time will be provided in lieu of overtime pay. If these individual employees fail to communicate to their employer that they do not accept this arrangement, then individual "agreements" are deemed to exist.

In Sarmiento v. City and County of Denver, the Tenth Circuit Court of Appeals reversed a lower court ruling and allowed the plaintiff to go to trial on the claim that he had not voluntarily agreed to be paid for overtime work with comp time. Specifically, the plaintiff alleged that his supervisor had been told that if employees wanted to receive payment for overtime, they "could find another job." The supervisor testified that he did not negotiate this issue with employees because he knew that only comp time was available due to financial constraints. The potential for this form of coercion to occur if comp time is extended to the heavily non-union private sector, where most comp time agreements will be individual, seems very real.

Both the Senate and House comp time bills require that any individual agreements be "entered into knowingly and voluntarily by such employees

204. See the discussion of Democratic alternative comp time bills, infra note 256.
205. 29 C.F.R. § 553.23(c)(1) (1997).
206. Id.
207. Id.
208. See id.
210. Id. at *10.
211. See id.
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and not as a condition of employment."\textsuperscript{212} Thus, the proposed legislation appears to squarely address this basic limitation on employee choice. However, it is difficult to know how this would be enforced, unless employers would be prohibited from raising the issue prior to hiring. Further, the DOL’s willingness to allow comp time to be made a condition of employment while at the very same time maintaining that the decision to accept comp time be uncoerced, coupled with the evident tendency of the DOL and some courts to construe “agreement” very loosely,\textsuperscript{213} suggest the potential for problems despite seemingly unequivocal statutory language.

5. Acceptance of Comp Time as a Condition for Receiving Overtime Work

Employers who do not make willingness to accept comp time a condition of employment can achieve the same end by allocating overtime opportunities to only those employees who have agreed to accept comp time. The practice of allocating overtime opportunities in this manner appears to be legal under the current language of the FLSA. After all, if acceptance of comp time can legally be made a condition of employment, then it follows that the DOL and courts would countenance linking overtime work to acceptance of comp time. However, to date, there are no court decisions directly addressing this issue.

Insofar as the proposed legislation prohibits making willingness to receive comp time a condition of employment, the question of whether this alternative avenue would be open to employers is all the more important. Rep. Cass Ballenger (R-NC), Chair of the House Subcommittee on Workforce Protections and sponsor of House Bill 1, has stated, in response to concerns about coercion, “[I]f the employer only gives overtime to employees who choose comp time, the employer is pretty clearly coercing employees into taking comp time, which is directly against the law.”\textsuperscript{214} It is not obvious that the DOL or courts would adopt Ballenger’s stated, but perhaps too briefly considered, interpretation. Nor, for that matter, does this appear to be the understanding in the Senate.\textsuperscript{215}


\textsuperscript{214} House hearing 1997, supra note 67, at 200.

\textsuperscript{215} For example, in debate over S. 4 on the Senate floor, Sen. Kennedy’s (D-Mass.) assertion that “Under the Ashcroft bill, discrimination in awarding overtime will be perfectly legal” went unchallenged by comp time proponents. 143 CONG. REc. S4336 (daily ed. May 13, 1997).
B. Statute of Limitations and Remedies for Failure to Provide Comp Time

The general statute of limitations for filing FLSA claims is two years, extended to three years in cases of willful violations. But when does the clock start ticking in cases where comp time is not provided? The issue was addressed in Archer v. Sullivan County, Tennessee, in which a county Sheriff's Department, belatedly adjusting to the 1985 FLSA amendments, informed employees that they should report uncompensated overtime hours previously worked. The county subsequently informed employees that comp time claims based on these previously worked overtime hours would not be honored after all, because they could not be verified. Not surprisingly, the employees brought suit. The county argued that the statute of limitations had expired, since the disputed overtime hours dated back to the mid-1980s, while the suit was brought in 1991. The court rejected the argument, holding that employees were not made aware that their comp time was being withheld until they were so notified in 1991.

Similarly, an employee whose comp time was not paid out upon his termination was able to sue for non-payment of the comp time, with the cause of action accruing at the point of termination, not when the overtime work was performed as the employer maintained. Greater difficulty may arise in pinning down the date that a claim for non-payment of comp time accrues under other circumstances, such as identifying the point at which a foot-dragging employer has actually refused to honor comp time commitments.

The customary remedies for non-payment of overtime are disbursement of the illegally withheld sum, liquidated damages for up to the same amount, and attorney's fees and costs. Is this also true for comp time? In Oliver v. Layrisson, the plaintiff who was terminated without payment for his accrued comp time was awarded money damages for the comp time (at his final hourly rate), an equal sum in liquidated damages, and attorney's fees. In contrast, the Archer court ruled that the plaintiffs, who had remained county employees, were entitled to an injunction restraining the employer from failing to provide comp time, but that monetary damages (both payment for the withheld comp time hours and liquidated damages) were

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218. See id. at *4.
219. See id.
220. See id. at *5.
221. See id. at *7-8.
225. See id. at *13.
not appropriate. Since compelling provision of comp time was not an option in Oliver, where the plaintiff had already been terminated, the two decisions may be compatible. However, the Archer court’s message to plaintiffs is that suing for refusal to provide earned comp time, never mind mere postponement, will net only a court order to provide the illegally denied comp time. Nothing equivalent to liquidated damages is awarded and the employer’s liability for non-payment of overtime is thus significantly diminished under a comp time arrangement.

The pending comp time bills both address the issue of remedies, but only in the context of violations of the prohibition against intimidating, threatening, or coercing employees for the purpose of interfering with their right to request or not request comp time or to force employees to use their comp time. In such cases, both bills provide for monetary and liquidated damages. Where, as in Oliver and Archer, the issue is a refusal to provide earned comp time or payment for that time, courts would be left to fashion awards out of the general FLSA remedies and differing results can be expected.

C. Representation and the Negotiation of Collective Comp Time Agreements

The public sector has also seen litigation over whether a particular group of employees has representation such that the public employer is obligated to enter into any comp time agreement with the representative rather than with individual employees. The FLSA provides that a public employer may use comp time only pursuant to:

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . . .

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227. See supra note 37 and accompanying text.
228. However, there are differences in wording in the two bills that might be substantive. House Bill 1 bases damages on “each hour of compensatory time accrued by the employee . . . .” while Senate Bill 4 refers to “the number of hours of compensatory time off involved in the violation that was initially accrued by the employee; minus (II) the number of such hours used by the employee.” H.R. 1, 105th Cong. §3(2)(f) (1997) (emphasis added); S. 4, 105th Cong. §(3)(a)(2)(f)(1)(A) (1997) (emphasis added).
229. See, Steenson, supra note 159, at 1821. In Steenson’s cogent analysis, the question of representation for comp time purposes is broken down into three sub-issues: whether it is the existence of an actual agreement or simply the presence of a representative that prohibits the employer from entering into individual comp time agreements; whether the representative can be anyone designated by employees or only an entity recognized under state law; and whether the agreement entered into must be a collective bargaining agreement authorized under state law.
But what happens when state law prohibits (or does not authorize) collective bargaining with some or all government employees? The Supreme Court addressed the issue in *Moreau v. Klevenhagen.* In *Moreau,* a group of deputy sheriffs in a Texas county sought to have their designated union representative negotiate a collective FLSA comp time agreement on their behalf. They objected to the county’s practice of providing comp time pursuant to individual agreements with employees. In Texas, public employers are prohibited from entering into collective bargaining agreements with public employees. The Court concluded that while the absence of an agreement with a collective bargaining representative is not sufficient to allow the public employer to enter into individual comp time agreements, the presence of a representative legally unable to negotiate a collective comp time agreement does free the public employer from the obligation to offer comp time only pursuant to a collective agreement. Thus, because the deputies’ representative could not legally enter into a collective comp time agreement, the county did not violate the FLSA by maintaining individual comp time agreements with the deputies.

Insofar as the issue of representation is rooted in legal constraints peculiar to some public employers, its relevance to the private sector is limited. However, there is still ambiguity in the proposed language, which refers to a “labor organization that has been certified or recognized as the representative of the employees of the employer under applicable law.” This phrase appears to be more limiting than the reference to “representatives of such employees” in the current law. Questions might conceivably arise as to whether an employer would be permitted to press for individual agreements despite representation if a union was recognized voluntarily rather than through the NLRB’s representation election process or if the employer is one that, through its jurisdictional standards, the NLRB chooses not to cover.

From the foregoing, it is apparent that the experience of comp time in the public sector, while not highly contentious in comparison to other aspects of administering the FLSA (e.g., compensable hours, “regular” rate of pay, salary basis test), has nonetheless generated some illuminating litigation. Given that comp time is meant to increase employee “choice,” it is

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232. See id. at 29-30.
233. See id. at 30.
234. See id. at 33.
235. See id. at 34-35.
238. “Card check” recognition, in which the employer voluntarily recognizes the union based on authorization cards in lieu of certification through the often contentious representation election process, has become a goal for some unions. See Steven Greenhouse, *Unions, Bruised in Direct Battles with Companies, Try a Roundabout Tactic,* N.Y. TIMES, March 10, 1997, at B7.
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particularly significant that litigation has occurred over the limitation of employee choice by employers requiring that comp time be used at particular times, upon specified levels of accumulation, or prior to usage of other forms of leave; over whether an agreement to accept comp time existed; and over denial of comp time based on employer judgments about lack of reasonable notice or undue disruption. If it could reasonably be assumed that instituting comp time in the private sector would present no additional problems, then the public sector record, while pointing to difficulties, might not suffice as a basis for rejecting private sector comp time. However, that assumption is untenable. In light of both the private sector’s record of considerable non-compliance with the overtime provisions of the FLSA, and important differences between the two sectors noted below, more serious difficulties can be expected with private sector comp time.

VII.
ARE THE PRIVATE AND PUBLIC SECTORS SUFFICIENTLY ALIKE TO WARRANT PARITY IN STATUTORY TREATMENT?

An interesting feature of the comp time debate is that proponents argue that an existing public sector practice should be extended to the private sector. This argument inverts the more familiar rhetoric that the public sector should be either privatized or “managed like a business.” However, both of these lines of reasoning tend to overlook key differences between the two sectors.

To begin with, the rationales for adopting public sector comp time were completely different than the rationales offered for public sector comp time. To be sure, the decision to allow comp time in the public sector did not rest on an analysis of differences between the private and public sectors, but in the wake of Garcia,239 Congress needed to stem the potentially large costs created by governmental compliance with the FLSA. However, while private employers would also enjoy substantial savings from comp time, comp-time proponents promote the change as a response to the needs of workers. Comp time was also already widely used by public agencies and incorporated into labor agreements when Congress authorized public sector comp time in 1985,240 while it has never been an established practice in the private sector. The circumstances and the stated rationale for adopting

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239. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); see also supra notes 159-64 and accompanying text.

240. This is because comp time agreements were negotiated when public employers became covered by the FLSA in 1974 and tended to remain in place, notwithstanding the Supreme Court’s shifting views on the constitutionality of applying the FLSA to state and local employees. Thus, when the public sector became covered under the FLSA again in 1986, Congress essentially ratified existing practice by permitting public sector comp time. See Reliable Cost Estimates is Major Issue in FLSA Application to Public Employees, 190 Daily Lab. Rep. (BNA), Oct. 1, 1985, at C-1; House hearing 1995, supra note 1, at 209 (testimony of Michael T. Leibig).
comp time in the private sector are thus quite different than those of the public sector, where comp time was hastily adopted as a financial expedient.

In addition, the public and private sectors simply have different characteristics. For the purposes of considering comp time, the gap between public sector collective bargaining and that in the private sector is particularly illuminating. Comp time legislation confers rights that are not readily enforceable. In the absence of a union to negotiate a protective collective comp time agreement, monitor the allocation of comp time, and pursue grievances for violations of agreed-upon comp time procedures, employees may lack the leverage to enforce their statutory rights. Denial or postponement of comp time use, limitation of overtime to employees willing to accept comp time, and required use of comp time prior to other forms of leave are more likely to occur when employees lack the protection of a union. Private sector employees will be far less likely than public employers to enjoy that protection, due to the now minimal private sector presence of unions (approximately 11% of private sector employees were covered under collective bargaining agreements in 1996; by contrast, approximately 43% of public employees were covered by collective bargaining agreements in 1996).242

Another key difference is the propensity of private sector companies to go out of business. When private sector companies cease operation or file for bankruptcy, as they do in large numbers, the stored wages of workers in the form of comp time might be lost. In contrast, governmental units, fiscal pressures notwithstanding, offer a degree of stability that assures workers they will reap the benefits of their accumulated comp time. In addition, greater competitive pressures in the private sector, the personal stake of owners and managers in the financial success of companies, whole industries with egregious records of FLSA non-compliance, and less comprehensive regulation of the employment relationship (including the lower unionization rates noted above, but also an absence of civil service and constitutional protections) all portend more employer abuse in the private sector.

While private sector comp time advocates desire parity with the public sector, it is clear that public administrators see the public sector as unique


242. See Directory of U.S. Labor Organizations 91 (C.D. Gifford ed., 1997). Figures for coverage under a collective bargaining agreement are slightly higher than for union membership. The former are cited here because it is representation rather than membership that is most directly relevant to the comp time issue.

243. See Economic Report of the President 391 (transmitted to the Congress Feb. 1998) (showing a business failure rate of 80.0 per 10,000 establishments in 1996, compared to 27.8 in 1979).
and therefore seek exclusion from the FLSA entirely. A coalition of major public employer associations\textsuperscript{244} offered its own proposals for FLSA reform, but concluded with the following:

As the Committee begins its review of the FLSA, we would recommend that it recognize that the Constitution limits the power of congress to legislate in areas of traditional government functions. We believe the Committee should consider over-turning the decision of the United States Supreme Court in \textit{Garcia v. San Antonio Metropolitan Transit Authority} \cite{citation omitted}, in which it was held that it did not violate the Tenth Amendment to apply the FLSA to traditional functions of state and local governments. The committee also should be cognizant that the FLSA constitutes an unfunded mandate on state and local governments.\textsuperscript{245}

Other government officials have been less restrained in calling for a complete public sector exemption. California Governor Pete Wilson, in a letter submitted to the Senate Labor and Human Resources Committee, argued that:

the FLSA has proven unable to account for the unique nature and functions of state and local government . . . . [R]ather than “protecting” employees who cannot protect themselves, application of the FLSA has provided a means for well-protected and well compensated employees, as well as other unintended beneficiaries, to seek and reap windfalls from already depleted government coffers. Complete exemption is, therefore, the only practical alternative.\textsuperscript{246}

New York City Mayor Rudolph Giuliani earlier sounded the same cry for liberation from the FLSA, in testimony before the House Subcommittee on Workforce Protections:

The Fair Labor Standards Act is an enormously costly unfunded mandate . . . . [I]mposition of the FLSA on the public sector is absolutely contrary to the message that I came to Washington to deliver: States — and particularly cities — need the freedom to solve their own problems. . . . Lifting FLSA’s application to State and city employees will go a long way to liberating States and cities from Federal intervention and the ongoing burdens of litigation.\textsuperscript{247}

While public officials’ pleas for reversal of \textit{Garcia} have thus far been unavailing, the unique constitutional status of state government employers has nonetheless affected FLSA cases. Since the Supreme Court’s 1996


\textsuperscript{245} \textit{Id.}

\textsuperscript{246} \textit{Id.} at 6-7.

\textsuperscript{247} \textit{House hearing 1995, supra} note 1, at 8-10.
Seminole Tribe decision, courts have routinely held that while the FLSA applies to state government employers, enforcement of the law by federal courts is barred by the Eleventh Amendment. Despite Congressional intent to legislate this area, the FLSA’s basis in the Commerce Clause, as opposed to the more fundamental equal protection provisions of the Fourteenth Amendment, does not justify abrogation of states’ sovereignty and immunity. Thus, at least in FLSA minimum wage and overtime claims against state government agencies, plaintiffs must sue in state court or have the Department of Labor sue on their behalf. The view that federal courts lack subject matter jurisdiction in FLSA suits against state agencies underscores the legal distinctiveness of the public sector and portends greater variability in, if not weaker, judicial enforcement of the law in the future.

It does not follow, then, that even if comp time can be said to “work” in the public sector, that this is a reason to extend it to the private sector. Public sector comp time arose for different reasons than those now advanced by comp time proponents and because Congress had to respond to the existing practices of government employers. Greater abuse of comp time can be expected in the private sector due to the lesser availability of union representation and other legal protections, the greater immediacy of competitive pressures, the relatively high rate of business failures, and the history of poor compliance with the overtime provisions of the FLSA. Arguments for parity in treatment of the private sector also ignore the aim of public sector employers to exempt themselves from the FLSA entirely.

VIII. WHAT SHOULD BE DONE?

Comp time should not be adopted for the private sector. Comp time would be, at best, a distraction from the more fundamental concerns of
workers. It would likely result in lower earnings for workers and heavier use of overtime by employers. In turn, it would lead to fewer workers being hired and longer, less predictable work hours for those with jobs. By facilitating evasion of the overtime requirements of the FLSA, comp time legislation will exacerbate already serious problems of non-compliance and weak DOL enforcement. In the long run, through the increased discretion given employers, higher levels of non-compliance, and an emphasis on individual agreements, the principle of overtime pay as an entitlement for workers will likely be eroded.

However, given political realities, it is likely that some form of comp time legislation will be enacted in the foreseeable future. If so, what type of legislation would stand the best chance of actually helping workers, the putative beneficiaries of comp time? While there are clearly a variety of motives for supporting or opposing comp time, both sides in the comp time debate have endorsed “choice” as a key element of any comp time scheme. Choice is compromised where employees are presented with comp time as a condition of employment, told when to use and when not to use their comp time, denied overtime work if they do not accept comp time, and are retaliated against for decisions about accepting comp time or using their time. Comp time legislation that seeks to enhance choice must explicitly deal with these and other limitations on employee choice that are manifested in the public sector experience.

Opposing sides in the comp time debate have also agreed that the availability of comp time should not undermine the basic right to receive compensation for overtime work, although they have disputed whether proposed legislation would do so. To the extent proposed comp time legis-

252. The tendency of comp-time proponents to invoke “choice” as a value has already been noted and illustrated. See supra notes 68-80 and accompanying text. Opponents frequently cite denial of real choice for employees as the basis for their opposition:

That is why the real issue regarding comp time [sic] is who is going to make the decision. If it is going to be the employee, put my name on it. Put my name on it. And I bet you would get the overwhelming majority of the Members on this side. If the employers are the ones who are going to make the decision - certainly you are not going to have my support, and you are going to be hard pressed to get the support of those who have been championing workers’ rights.


253. Comp-time proponents regularly assert that they are proposing only a minor reform of the FLSA that will not compromise worker rights:

The legislation does not, and I repeat, does not change or eliminate the traditional 40-hour work week. No one can honestly claim that it does. The bill simply provides employees with another option with regard to overtime compensation. For America’s workers who are increasingly frustrated about coping with the demands of work and family responsibilities, it is a long overdue change. That is the simple common sense change that H.R. 1 makes.


Opponents are even more apt to raise the issue of diminished rights, and of course, reach a different verdict:

We must not lose sight of what lies at the core of the Fair Labor Standards Act and at the core of this debate, and that is, paying hardworking, honest Americans for the work they do. An
lation contains provisions which lengthen the time period over which overtime work is measured or significantly broaden the range of employees deemed "exempt," such legislation would clearly undermine existing legal protections. Comp time legislation free of these provisions might still compromise basic FLSA rights if, for example, workers were regularly denied use of comp time or pressured into "forgetting about it." To help ensure that FLSA rights are not diminished by any comp time arrangement, it is critical that legislation treat comp time as much like overtime pay as possible. Ultimately, this means that the use of accrued comp time upon reasonable notice should be an employee "right" rather than a privilege subject to employer judgment.

In devising comp time arrangements that operate in the interest of workers, it might be helpful to keep in mind Weiler's "governing the workplace" framework. That is, the primary options for making decisions about the workplace, and about how workers' interests will be represented and protected, are the government (through legislative, judicial, and regulatory action), unions (through collective bargaining), the cumulative actions of individual employees (via the labor market), and employers (in its more benign form, "progressive" human resource management). Rather than think only in terms of crafting fool-proof legislation and ensuring governmental enforcement of worker rights — unlikely events under the best of circumstances — it is necessary to consider how legislation and these other mechanisms might interact to affect the workings of a comp time system.

A. Key Elements of Comp Time Legislation

What would legislation look like if it treated comp time as an entitlement equal to cash overtime and maximized employee "choice"? The intent of the following discussion is not to be comprehensive, much less to draft comp time legislation, but rather to identify key elements that should be incorporated in such legislation. Some of these key elements are already included as provisions in one or both of the pending comp time bills, in which case the concern is that they be retained in the final version of any legislation and that congressional intent be made clear to the courts. Other key elements, many of which can be found in Democratic "alternative"
comp time bills,\textsuperscript{256} would have to be added. Ultimately, however, it is critical that the legislation go beyond existing proposals and incorporate the Family and Medical Leave Act's principle of an entitlement to leave and restoration following that leave.

1. \textit{A Broad Prohibition of Employer Coercion and Discrimination}

Since employers stand to gain if employees accept comp time in lieu of overtime pay, and even more so if comp time is either not used or used only when convenient for the employer, credible protection against coer-

\textsuperscript{256} Any number of amendments to the pending comp time bills have been put forth in both houses of Congress. Two of the most comprehensive Democratic proposals, intended as substitute bills, are Amendment No. 266 in the Senate, sponsored by Senators Baucus (D-Mt.), Kerrey (D-Neb.), and Landrieu (D-La.), and Amendment No. 5 in the House of Representatives, sponsored by Rep. Miller (D-Cal). The Senate Democratic alternative comp time bill, 143 \textsc{Cong. Rec.} S4493 (daily ed. May 14, 1997), differs from the Republican comp time bills in that it would:

1) Not extend comp time to part-time, temporary, or seasonal employees, nor to employees in the garment industry;
2) Define "representative" broadly to include more than just collective bargaining representatives;
3) Set a maximum of 80 hours of comp time that could be earned in a year;
4) Require regular reports to employees on comp time hours used and remaining;
5) Require employers to cash out unused comp time within 15 days of an employee request to do so;
6) Expressly authorize the DOL Secretary to further limit or eliminate comp time as necessary to protect vulnerable employees;
7) Prohibit the use of a terminated employee's comp time as a basis for limiting entitlement to unemployment insurance;
8) Provide that an employee experiencing a qualifying event under the FMLA could use comp time at any time, even where the employee was not covered by the FMLA;
9) Provide that compensatory time requested for any other purpose, and with at least two weeks' prior notice to the employer, would have to be granted unless doing so would "cause substantial and grievous injury to the operations of the employer;"
10) Provide that a request for comp time with less than two weeks notice would have to be granted unless doing so would be unduly disruptive;
11) Prohibit substitution of comp time for any other paid or unpaid leave or time off to which an employee would otherwise be entitled;
12) Specify that payments for comp time hours used would be treated as payment for hours worked in the calculation of entitlement to employee benefits;
13) Specify that comp time hours used would be counted as hours worked for purposes of overtime eligibility and other benefits;
14) Prohibit discrimination broadly and explicitly prohibit discrimination in the allocation of overtime work;
15) Specify that penalties for violations include payment for the overtime hours in question, an equal amount in liquidated damages, other equitable relief, and, in certain situations, civil penalties of up to $1000 per violation;
16) Provide that accumulated comp time would be treated as unpaid wages in Chapter 11 proceedings;
17) Establish a Commission on Workplace Flexibility, which would be responsible for evaluating the impact of comp time provisions on both public and private sector employees.

Amendment No. 5 in the House, 143 \textsc{Cong. Rec.} H1144 (daily ed. March 19, 1997), voted upon and rejected by a margin of 193 to 237, was very similar to the Senate alternative bill. It further narrowed the definition of employees eligible to receive comp time by specifying that employees not entitled to take at least 24 hours of leave during a year for school-related activities, to accompany a medical or dental appointment, etc., would not be considered employees for the purpose of eligibility to receive comp time. It did not address the issue of counting comp time hours the same as overtime hours for the purpose of unemployment insurance eligibility.
cion, discrimination, and retaliation is a prerequisite to genuine choice. To start, comp time legislation should prohibit making acceptance of comp time a condition of employment, a feature present in both pending comp time bills. The public sector experience points to other forms of coercion that should be expressly prohibited, as well, including required use of comp time upon a specified level of accumulation and mandatory exhaustion of comp time before use of other forms of paid time off. Non-discrimination provisions should also apply explicitly to decisions about allocating overtime work. Further, the legislation should prohibit discrimination or retaliation because of a decision to accept or reject comp time, the use of or refusal to use available comp time, the “cashing out” of comp time, or the reversal of an earlier decision to accept or reject comp time. The protection of these latter two actions is vital to the protection of employees from exploitation, but the proposed language on coercion and discrimination has neglected to address these specific situations. Merely prohibiting these abuses will not obviate problems of discrimination and retaliation, but the presence of strong statutory language, backed by meaningful sanctions, is an essential resource for employees, some of whom will have to turn to litigation to uphold their rights.

2. Meaningful Sanctions

It is far easier to write protective-sounding language than it is to enforce that language. If the law is to have any real teeth, it must have appropriate penalties. For this purpose, a useful distinction can be drawn between systematic violations (i.e., employer policies that deny choice, such as conditioning employment on acceptance of comp time or requiring employees to use comp time upon accruing a specified amount), retaliation against individuals for using or not using their comp time or cashing out remaining comp time, etc., and denial or postponement of the legitimate comp time requests of individuals. For systematic offenses, the DOL and the courts should be able to revoke the employer’s right to offer comp time (for at least some meaningful period of time) and compel payment of all accumulated comp time to all employees. Instances of discrimination and retaliation can be dealt with like other cases of employees who are punished for asserting their FLSA rights, with remedies including re-instatement, back-pay, possible liquidated damages, and attorney’s fees. Repeated cases of discrimination or retaliation by the same employer should also result in revocation of the right to offer comp time and mandatory payment of all accumulated comp time in cash.

The most difficult problem in the enforcement arena, however, is how to handle a denial of an individual’s comp time request because her employer found the request not sufficiently timely, unduly disruptive, or just inconvenient. It is unlikely that a meaningful remedy could be fashioned
that is commensurate with the damage done by the offense, yet sufficient to justify the trouble and expense of filing a charge with the DOL, much less going to court. Basically, legal sanctions are of no avail in this situation. I suggest an alternative approach below in section VII.A.5.

3. **Recognition of the Role of Unions and Other Representatives**

The strongest opposition to comp time legislation has come from the labor movement. Yet, comp time actually presents opportunities for unions. The pending bills, and the extant provisions of the FLSA for public employees, all require that an employer reach an agreement with the employee representative over comp time before the employer institutes any comp time. This gives represented employees real leverage, both in deciding whether they want comp time at all and in pushing for a favorable comp time plan. If Congress enacts inadequate statutory language, unions could bargain for more beneficial terms. Unions could monitor violations of comp time agreements and challenge them with grievances, rendering workers’ rights to comp time far more enforceable. Unions could use the attention brought to work-family conflicts as the springboard for advancing a broader agenda focusing on attaining greater control over work hours (such as by limiting mandatory overtime), higher pay (thereby making choices between work and time off meaningful), and adequate child care. Comp time might even open up new pressure tactics, such as concerted “cash-out” or comp-time-use campaigns.

The public sector experience and the differing definitions of “representative” in the pending bills both suggest the need for care in defining the term. A comp time statute’s definition of “representative” should be broad enough to include unions not certified through the traditional NLRB election process. At a minimum, it should encompass unions recognized through card checks and unions outside of the NLRB’s chosen jurisdictional bounds. Since private sector employers are not prohibited from engaging in collective bargaining like some public employers, the definition of “representative” should also include any individual or organization, in-

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258. The “consensus” view among courts is that it is the presence of a representative with the ability to negotiate a valid collective agreement, rather than the existence of a collective agreement, that effectively bars an employer from entering into individual comp time agreements. See Steenson, *supra* note 159, at 1821-23. Presumably, an employer could unilaterally impose its own terms for a collective comp time agreement if an impasse occurs in negotiations but could not enter into individual agreements with employees under any circumstances.
dependent of the employer, that can credibly claim to speak for the majority of the workforce in question.²⁵⁹

4. Procedural Protections for Unrepresented Employees

While collective bargaining and statutory rights enhance protection of workers' interests, most private sector employees do not have union representation and would be left to "negotiate" individual comp time agreements and enforce their own rights. Negotiations between individual employees and their employers are generally suspect due to the power imbalance involved, but comp time legislation can provide for several protections for unrepresented employees.

First, the law should require an actual, written agreement between an employer and employee that could be rescinded by either party upon notice.²⁶⁰ It should be made clear that an agreement would not exist where an employer merely announced the policy to an employee and he or she commenced or continued to work. Public sector cases point to the further importance of specifying that agreements would be limited to their own express terms and could not incorporate other policies of the employer that might limit access to comp time.

Second, the law should require employers to provide with each payroll stub an accounting of any comp time used during the payroll period and the balance of comp time that remains. Receipt of this information on a regular basis should make it clear to employees that their comp time is in fact available and lessen disputes over the amount of comp time being banked.

Third, employees should have an unequivocal right to "cash out" their comp time.²⁶¹ This would allow employees to receive their comp time as

²⁵⁹. The latter could be determined simply by a petition, in which employees confer the right to negotiate a comp time agreement on their behalf to some individual, committee of co-workers, union, etc.

²⁶⁰. The pending bills both allow for the individual agreement to be a "written or otherwise verifiable statement ...." H.R. 1, 105th Cong. § 2(r)(2)(B) (1997); see also S. 4, 105th Cong. § 3(a)(1)(r)(2)(B) (1997). In Senate debate, Sen. Kennedy has pointed to the casual notion of an agreement that the bills seem to incorporate and has contrasted it to the more rigorous procedure for opting out of comp time (the request is required to be in writing). See 143 CONG. REc. S4337 (daily ed. May 13, 1997).

²⁶¹. The pending comp time bills both include cash-out provisions, specifying that payment be made within 30 days. See supra note 31 and accompanying text. The Senate alternative bill provides for payment in 15 days, while the Miller amendment called for unused compensatory time to be paid for in cash on the payday of the pay period during which the request is made. See supra note 256 and accompanying text. All of the proposed bills also specify maximum accumulation levels, although these differ in terms of the number of hours allowed and, more importantly, in whether the maximum applies to accrual (the balance in the comp time bank at any point in time) or to the number of comp time hours earned during the year. See supra notes 38, 256 and accompanying text. Additionally, the Republican and Democratic bills are in agreement that remaining comp time is to be cashed out at the end of the year. See supra notes 30, 256 and accompanying text. In my view, an unequivocal cash-out provision and the ability to immediately rescind comp time agreements render less important maximum annual comp time accumulation or earning levels and the requirement that all unused comp time be cashed out
pay within a relatively short period of time. If employees encounter difficulties with the comp time plan or are denied access to their accumulated comp time, cashing out or threatening to cash out comp time — and possibly rescinding the comp time agreement — should provide important options and leverage.

5. An Entitlement to the Use of Comp Time

The problem remains that when employees attempt to use their comp time, their employers may refuse to allow them time off. If comp time truly provides employees with an equivalent option and does not diminish their rights under the law, then employees should be entitled to their time off. After all, overtime pay is not provided merely when the employer finds payment convenient and denied when funds are tight. Yet when an employee has to request to use comp time and the employer can deny the request, the employee does not enjoy a corresponding right. Even if the employer is manifestly wrong in her denial, the employer’s view will likely prevail. An employee will be unlikely to take legal action to compel the employer to make the comp time available, and even if such action were taken, it would be resolved hopelessly after the fact.

There is a straightforward answer to this problem. Given that sufficient notice (to be spelled out in the statute) has been provided, employees should have unconditional access to at least part of their comp time. This approach is not without precedent. Under the Family and Medical Leave Act ("FMLA"), the occurrence of a qualifying event triggers a requirement that an employer provide leave and restore the employee to the same or an equivalent position following the taking of leave. FMLA leave is an entitlement and not something doled out at the employer’s discretion.

at the end of the year. Indeed, the latter is likely to precipitate employer attempts to force comp time usage, such as closing down for the last few weeks of the designated 12 month period.


263. FMLA leave is, of course, not entirely unconditional. The statute requires that, where the need for leave is “foreseeable,” an employee is expected to provide 30 days notice to the employer. In addition to this notice requirement, foreseeable leave taken for a planned medical treatment should entail a reasonable effort on the employee’s part “to schedule the treatment so as not to disrupt unduly the operations of the employer . . .” 29 U.S.C. § 2612(e)(2)(A) (1997). The suggested comp time statute would also incorporate a notice period, albeit a shorter one, in recognition of the fact that relatively brief periods of absence would be involved. Employees would have incentives to not “unduly disrupt” the employers operations, but the decision on using comp time would be theirs. See supra note 35 and accompanying text.

264. The significance of this distinction is not lost on employers. Libby Sartain, Vice President, People, for Southwest Airlines lamented at a Senate hearing on the FMLA:

[a]nd sadly, the part that I dislike the most is that we used to negotiate with our employees and work with them in a partnership to get time off, and now there is an entitlement and almost an adversarial relationship when employees request leave because they are requesting a right under the law rather than a benefit that our company offers.

Oversight of the Family and Medical Leave Act: Hearing before the Subcomm. on Children and Families of the Senate Committee on Labor and Human Resources, 104th Cong. 18 (1996) [hereinafter Senate FMLA hearing 1996].
The Democratic alternative comp time bills go further than the pending bills toward treating comp time as an entitlement. Under the Democratic alternatives, comp time requests submitted at least two weeks in advance would have to be granted by the employer unless doing so would "cause substantial and grievous injury to the operations of the employer." Requests submitted less than two weeks in advance would have to be granted unless doing so would unduly disrupt the employer's operations (the public sector standard under current law).

However, even under the Democratic bills, employers would remain in the position of making these judgments when considering whether to grant comp time requests, employees would be left to challenge the decisions after the fact, and the courts would be left to interpret what the standards actually mean. A preferable approach would be to completely remove the employer veto but limit the impact of absences by capping the amount of comp time that employees could use at any one time. Legal disputes would still occur, but they would center on whether requested comp time was denied, whether sufficient notice was provided, and, if the employee took the comp time despite the employer's denial, whether the employee suffered retaliation. These issues are likely to prove more tractable for the courts than attempts to second-guess employers' reasons for denying comp time.

How might an entitlement to comp time work in practice? If an employee with comp time desired to use comp time, he or she would inform the employer. Because it might become necessary to document the date of the notice, employers should create a simple written form which would specify the date of the request and the day(s) requested (an exchange of e-mails would also work). If the employer agreed, he or she would sign the form indicating concurrence. The employee would then take the comp time. If the employer disagreed, he or she would indicate that on the form. The employer could then require the employee to wait fourteen days from the date of the request (not the response), but then the employee would have a right to take the comp time. Employees who were on the other end of those "negotiations" may very well have held a different view. Moreover, conferring an entitlement to comp time use may actually spur negotiation and mutual accommodation between employers and employees. The point is that employers will have to deal with employees about their need for time off and not simply make unilateral determinations about when and if that is convenient.

265. S. 266, 105th Cong. §2(r)(5)(B)(i),(ii); see also supra note 256. The "substantial and grievous injury" language appears to be patterned after the "key employee" provisions of the FMLA. See 29 C.F.R. § 825.218 (1997). These define the circumstances under which certain highly compensated employees can be denied restoration following FMLA leave. Applied to comp time, this standard would presumably be more stringent than the "unduly disrupt" standard.

266. There is nothing magical about 14 days. However, it is a period of time that should be sufficient to allow for scheduling adjustments to be made. It also reinforces the desired equivalence with overtime pay by making comp time available roughly within a pay period, just as would overtime pay.
While the employer would have to grant the comp time following the required notice period, it is reasonable to put a limitation, such as five days (a work week), on the amount of comp time that the employer would be required to provide at any one time. As with the FMLA, there would also need to be a “restoration” requirement under which employers would be required to restore employees returning from comp time use to their same position.²⁶⁷

Is the FMLA entitlement approach appropriate for comp time? Would such an arrangement inevitably result in chaos for employers? On the one hand, comp time should pose fewer scheduling problems because periods off the job would be relatively brief. On the other hand, comp time would be used far more often than leave taken under the FMLA and the FLSA applies to a far greater number of employees and companies than the FMLA does.²⁶⁸ Given that both employers and employees would have leverage under the proposed scheme, the best outcomes would be where both parties recognize that fact and attempt to accommodate one another. Most employees know that it does not pay to go out of their way to irk the boss, but some might nonetheless be tempted to assert the right to use comp time without heed to employers’ concerns. If they did so, they could reasonably expect that the employer would stringently hold them to the fourteen-day notice requirement or limit them to the maximum number of consecutive days off. There would be nothing to stop an employer from explaining why a particular day off would create problems and suggesting an alternative time that would be preferable. The employer might even offer an incentive to the employee to re-schedule the requested comp time.²⁶⁹ In the end, though, the use of earned comp time would be up to employees.

Employers who respect their employees should not be unduly fearful that their employees would exercise their “choice” in problematic ways. Employers who do not have that kind of relationship with their workforce would have more reason for concern and might conclude that they do not want to offer comp time, which would be their prerogative. Or, if employers are so thinly staffed that demands to use comp time would invariably create serious scheduling conflicts, this again suggests that such employers

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²⁶⁷ When comp time is treated as an entitlement, a restoration requirement paralleling that of the FMLA becomes particularly important. Given the short periods of time for which employees using comp time would be gone, the restoration should be to the same position, and not merely to an “equivalent” position. The importance of a restoration provision is that it treats a demotion or other employment detriment suffered while someone is using comp time as presumptively retaliatory.

²⁶⁸ Use of FMLA leave is limited by the fact that an employee must experience a qualifying event and that the leave might be unpaid. It has been estimated that only about 3% of covered employees have actually taken FMLA leave. See Senate FMLA hearing 1996, supra note 264 at 10 (statement of Geri D. Palast, Asst. Secretary, DOL Office of Congressional and Intergovernmental Affairs).

²⁶⁹ Unlike the pending bills, I would not make provision of benefits part of the definition of “coercion.” See supra note 33 and accompanying text.
are not suitable candidates for comp time and should not be offering it. The proposed changes would simply help balance employer and employee interests, rather than confer a decisive advantage to one or the other, and allow for the genuine exercise of choice.

IX.
CONCLUSION

Workers are saddled with longer work hours and greater difficulty in reconciling the conflicting demands of their jobs and personal lives. Polls suggest that at least some private sector workers would like the opportunity to trade overtime pay for more time off. Legislators have drafted bills that, although based on the FLSA's public sector comp time provisions, would go beyond those provisions to incorporate language ostensibly more protective of workers' rights. So what is the problem?

Premium pay for hours worked in excess of a societally determined weekly maximum, as codified in the FLSA, is a basic right of workers and one that is generally recognized (with differing details) throughout the world. Arguments for change and modernization of the FLSA deserve close scrutiny when these "reforms" have the potential to undermine the fundamental and long-established right of workers to overtime pay. Subjected to such an examination, private sector comp time reveals itself to be a change that is far more in the interests of employers (and politicians anxious to improve their standing with women voters) than those of workers. It represents a retreat from an entitlement to overtime pay and a step backward toward more individualized dealings between workers and their far more powerful employers.

Comp time needlessly threatens to diminish the rights of workers. By and large, employers, while complaining that their flexibility in scheduling is constrained by the FLSA, fail to use the considerable leeway already permitted by the law. Their preference for comp time is not surprising, as employers stand to lower their costs in a number of ways by promoting the use of comp time. Comp time legislation opens up new areas of discretion for employers and makes it likely that an already poor record of compliance with the overtime provisions of the FLSA will further deteriorate.

The available evidence strongly suggests that any increased discretion and insulation from enforcement will, in fact, result in greater non-compliance. A variety of studies show non-compliance with overtime pay requirements to be a serious problem, one not limited to a few "rogue" employers. The public sector comp time experience to date, while not highly contentious, has generated litigation that points to the types of problems, particularly constraints placed on employee "choice," that are likely to be seen in far greater numbers if comp time is applied to the private sector. Furthermore, even if the public sector comp time experience was without blemish, differences between the public and private sectors caution against assuming
the same outcomes for the more competitively driven, less regulated, and far less unionized private sector.

In the likely event that legislators persist in pursuing comp time, any such legislation should be designed to maximize employee choice and to ensure that workers are gaining an equivalent option rather than losing rights. Further, legislators need to be cognizant of the limitations of statutory language in protecting employee choice and discouraging employer coercion. The legislation, while it should make the most of the role of union representation where it exists, will generally be applied in non-union settings characterized by vastly imbalanced power. To promote at least a modicum of choice under these circumstances, and to ensure that comp time is treated as the equivalent of overtime pay (the availability of which is not conditioned upon employer judgments), private sector comp time legislation should incorporate the FMLA’s central provisions of entitlement to leave and restoration upon returning from leave. Upon providing her employer with sufficient notice, an employee should be unconditionally entitled to use at least a portion of her available comp time.