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[Minimum Wage] [1]

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MINIMUM WAGE

Proposals • Talking Pts
Side-By-Side

Proposals • Side-By-Sides
Talking Pts • Fact sheets

U.S. Department of Labor

Office of the Assistant Secretary for
Congressional and Intergovernmental Affairs
Washington, D.C. 20210

To: Andy (456-2604)

(1) The Talking points are from the NEC

(2) Then, find a commercial summary of the pension highlights, as well as an internal D.L document. I hope these help!

Kevin (219-6141)

PENSION PROVISIONS IN THE MINIMUM WAGE BILL TO EXPAND COVERAGE, INCREASE PORTABILITY, AND ENHANCE SECURITY

The minimum wage bill includes many of the President's pension proposals, contained in his Retirement Savings and Security Act, which will empower more Americans to save for their retirement by expanding pension coverage, portability, and protections and significantly simplifying pension rules.

- **Expands Pensions** to help millions of working Americans not currently covered by an employer-provided plan save for their retirement.
- **Increases Portability** by reducing the obstacles facing many workers when they change or lose their job and want to keep their retirement savings and continue saving.
- **Enhances Protections** so hard-working Americans do not have to worry whether their retirement savings will be there when they need them.
- **Simplifies Pensions** to encourage and make it easier for employers to offer pensions.

THE MINIMUM WAGE BILL'S PENSION PROVISIONS MEET THESE CHALLENGES:

1. <u>NEW SMALL BUSINESS 401(k) PLAN -- To Expand Pension Coverage</u>: While 76% of workers in large businesses have employer-provided pensions, only 24% of workers in small businesses do. In June 1995, the President first proposed a simple small business "401(k) plan" to expand pension coverage to up to *10 million workers* in small businesses not currently covered by a plan. Republicans followed with their own proposal. The minimum wage bill's small business plan, while providing a smaller share of benefits to lower and middle wage workers, includes many elements of the President's plan and provides for:

   - **$6,000 Tax-Free Contributions.** Workers could save up to $6,000 a year tax-free through automatic payroll deductions.

   - **Employers Contribute 2% of Salary or Match Contributions Up To 3% of Salary.**

   - **One-Page Form.** Cuts through the red tape with a simple, one-page form without complicated employer filing, calculations, or testing.

   - **100% Portable.** All contributions would be immediately vested and fully portable.

   The bill also expands coverage by:

   - Simplifying 401(k) plans for *all* businesses;
   - Making the 9 million employees of non-profit organizations, as well as employees of Indian tribes, eligible for 401(k) plans;
   - Enabling relatives who work in a family business to earn their own retirement benefits;
   - Repealing unreasonable limits on benefits for certain disabled and low- and middle-income state and local government employees; and
   - Enabling millions of spouses who do not work outside the home to contribute up to $2,000 to an individual retirement account.

2. <u>INCREASES PENSION PORTABILITY</u>: Workers who change jobs and want to take their retirement savings with them and keep saving currently face a multi-faceted obstacle course. The President's portability proposals in the minimum wage bill could help *over 5 million workers each year* who have an employer-sponsored pension plan and who change jobs:

- **Takes Away 1-Year Wait To Save At a New Job:** Millions of workers are forced to wait 1 year before they can enter their new employer's pension plan. The minimum wage bill changes a law to encourage private employers to stop imposing this 1-year wait.

- **Guarantees Benefits for Workers on the Move:** Reduces the vesting period from 10 to 5 years for multiemployer plans -- which cover union workers such as construction workers who frequently change jobs -- to ensure they don't lose their benefits if they've worked for 5 years.

- **Secures Portability for Veterans:** Changes tax rules to ensure that veterans who serve their nation are not penalized and can continue their pension coverage when they return from service.

3. <u>ENHANCES PENSION PROTECTION AND SECURITY</u>: The Retirement Protection Act, enacted in 1994 at the President's request, has reduced pension underfunding for the first time in a decade, protecting the benefits of 40 million workers and retirees in traditional pension plans. In 1995, the Labor Department launched an initiative to protect savings in 401(k) plans from misuse, recovering to date nearly $10 million for thousands of workers. Recently the Labor Department issued new rules to ensure that worker contributions to 401(k) plans start earning money for workers sooner. Now the minimum wage bill:

- **Protects Government Employees' Savings from Orange County-Style Fiascos:** Requires state and local government retirement savings plans to be held in trust so that employees do not lose their savings if the government declares bankruptcy, as Orange County recently did.

- **Increases Penalties for Self-Dealing:** Penalties for self-dealing pension funds (such as loans to the company owner) are generally doubled, from 5 percent to 10 percent.

- **Improves Spousal Protections:** Helps protect spousal benefits in the choice of an annuity and during divorce proceedings.

4. <u>EASES PENSION ADMINISTRATION</u>: Many employers are discouraged from establishing or maintaining plans because rules governing their administration are complicated and expensive. The minimum wage bill:

- **Eliminates Complex Limitations:** As proposed by President Clinton, the bill eliminates the complex limitations on contributions and benefits for workers in a defined benefit and defined contribution plan with the same employer.

- **Simplifies Corrective Action Rules:** The bill makes it easier for employers to take corrective action if they make excess tax-free contributions, and makes the corrective action rules fairer.

- **Simplifies Computations:** The bill simplifies rules for computing pay for pension purposes, allowing lower-paid workers to receive more benefits.

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Date: August 1996

LEGAL ALERT

The United States Senate and the United States House of Representatives passed the Small Business Job Protection Act of 1996 ("Act"). The President is expected to sign the Act. The Act contains provisions which impact "tax-qualified" retirement plans and require amendment of such plans to maintain their "tax-qualified" status.

Definition of Highly Compensated Employee. For years beginning after December 31, 1996, the term "highly compensated employee" is defined as (i) a 5% owner of the employer at any time during the current or preceding year or (ii) an employee who had compensation in excess of $80,000 (indexed for inflation) for the preceding year and who was in the top 20% of employees by compensation for such preceding year. The Act provides that the employer can elect to apply the "$80,000" limit to all employees instead of only to employees in the top 20% by compensation. In addition, the Act repeals the provision that required an employer which had no officers who met the "highly compensated employee" definition to consider the highest-paid officer to be a highly compensated employee.

Definition of Compensation. The Act amends the definition of compensation for purposes of the maximum limit on contributions under section 415 of the Internal Revenue Code of 1986, as amended ("Code"), to include salary reduction contributions to 401(k) and cafeteria plans. This provision is effective for years beginning after December 31, 1997.

Family Aggregation. The Act repeals the provision that required that 5% owners and the top ten employees by compensation be aggregated with certain family members and treated as a single highly compensated employee. The repeal of this provision applies for plan years beginning after December 31, 1996.

Distribution of Excess Elective Contributions. For years beginning after December 31, 1996, distributions of excess elective deferral contributions will be made first to highly compensated employees with the greatest dollar amount of elective deferrals (as opposed to the greatest percentage).

Minimum Participation Requirement. The Act provides that the minimum participation requirement (which requires a plan to benefit at least the lesser of 50 employees or 40% of the employees) will only apply to defined benefit plans. This provision is effective for plan years beginning after December 31, 1996.

Excludable Employees for "ADP/ACP Test" Purposes. The Act alters the operation of the Actual Deferral Percentage ("ADP") and Actual Contribution Percentage ("ACP") tests. In this regard, the Act sets forth that employees not completing the maximum minimum age (age 21) or service (one year of service) requirements can be ignored for purposes of the tests even though they are able to participate in the plan. This provision is effective for plan years beginning after December 31, 1998.

Simplified ADP/ACP Calculations. For years beginning after December 31, 1996, the Act provides that the maximum ADP and ACP for highly compensated employees is determined by reference to the ADP and ACP for nonhighly compensated employees for the preceding, rather than the current, plan year. However, employers may elect to utilize current year data.

Alternative Nondiscrimination Safe-harbors. For years beginning after December 31, 1998, the Act provides that a plan satisfies the ADP test and the ACP test if the employer provides proper notice to participants and either (i) matches dollar per dollar employee elective contributions up to 3% of compensation, matches 50 cents per dollar for contributions between 3% and 5% of compensation, and does not match contributions of highly compensated employees at a rate greater than the match rate for nonhighly compensated employees; or (ii) makes a nonelective contribution of at least 3% of compensation on behalf of each nonhighly compensated participant without regard to whether the participant made elective deferral contributions.

Distribution Rules. The Act (i) eliminates 5-year averaging for lump-sum distributions from tax-qualified plans for tax years beginning after December 31, 1999; (ii) provides that the 15% excise tax on excess distributions does not apply to excess distributions received in 1997, 1998 or 1999; and (iii) modifies the required distribution rules to provide that, for years beginning after December 31, 1996, participants who work beyond age 70-1/2 will be able to defer the commencement of distributions until April 1 of the year following retirement.

Combined Limit of Section 415(e). The Act repeals the combined limit for participants in both a defined contribution and a defined benefit plan maintained by the same employer for years beginning after December 31, 1999.

USERRA Technical Amendments. The Act provides several provisions to permit plan sponsors to comply with the requirements of USERRA without violating the Code's tax-qualification requirements. The effective date of these provisions is December 13, 1994.

Tax-exempt Employer 401(k) Plans. For years beginning after December 31, 1996, the Act allows tax-exempt organizations to maintain 401(k) plans. However, state and local governments continue to be unable to maintain 401(k) plans.

"Simple" Plans. The Act establishes a "Simple" retirement plan which is a salary deferral plan available to employers who do not have another qualified plan and who have no more than 100 employees earning at least $5,000 per year. All employees who earned at least $5,000 in two previous years and who are expected to earn at least $5,000 in the current year are eligible to make salary deferral contributions to the plan of up to $6,000 (adjusted for inflation). Employers must generally provide a dollar for dollar matching contribution for salary deferral contributions up to 3% of compensation.

Amendment Adoption Deadlines. The Act provides that amendments to plans to comply with changes made by the Act do not have to be made before the start of the first plan year beginning on or after January 1, 1998 or January 1, 2000 for government plans.

We hope you find this Legal Alert helpful and informative. This alert is only a summary of the authorities cited. We strongly recommend that you obtain and read a full copy of the legislation before you take any action. We will be happy to provide you with a copy of all authorities upon request. In the event you need a copy or have any questions concerning this Alert, please feel free to contact us at (609) 234-6800.

SECTION-BY-SECTION ANALYSIS OF DEPARTMENT OF LABOR RELATED AMENDMENTS IN THE SMALL BUSINESS JOB PROTECTION ACT OF 1996

Section 1116. Clarification of Employment Tax Status of Certain Fishermen. This section amends section 3121(b)(20) of FICA and, by reference, FUTA, to clarify the employment tax status of certain fishermen. Current law permits exclusion from coverage of services performed by these individuals when a list of criteria is met, among them that the size of the crew is normally fewer than 10 individuals. The change would specify that the exclusion would apply if the average size of the crew on trips made during the preceding 4 calendar quarters was fewer than 10 individuals. This amendment is retroactive to January 1, 1995.

Section 1118. Newspapers Distributors Treated as Direct Sellers. This section amends Chapter 25 of the Internal Revenue Code of 1986, general provisions relating to employment taxes, to expand the definition of "direct seller" to include newspaper carriers and distributors, effectively making these individuals independent contractors and thus ineligible for any benefits arising out of status as an employee. Current provisions in the FUTA exclude such services from coverage but only if the individual performing the services is under the age of 18. This provision is effective January 1, 1996.

Section 1201. Work Opportunity Tax Credit. The enactment would replace the expired Targeted Jobs Tax Credit with a new Work Opportunity Tax Credit. Employers would be eligible to claim a 35 percent credit on the first $6,000 of first-year wages paid to a qualifying individual ($3,000 of first-year wages paid for summer youth employees).

Employers would be required to prescreen an individual on or before the day the individual is offered employment.

A credit would not be allowed unless the employee had worked at least 180 days (400 hours) or in the case of qualified summer youth employees, 20 days (120 hours).

Targeted groups for purposes of the tax credit are: qualified IV-A recipients, qualified veterans, qualified ex-felons, high-risk youth, vocational rehabilitation referrals, qualified summer youth employees, or qualified food stamp recipients.

The WOTC program would begin October 1, 1996 and terminate on September 30, 1997.

Section 1202. Employer-Provided Educational Assistance Programs. This section amends section 127 (d) of the Internal Revenue Code of 1986 to temporarily extend (retroactively from January 1, 1995 through May 31, 1997) the exclusion from taxable income for employer-provided educational assistance. The exclusion for post-graduate level education will be disallowed for courses beginning after June 30, 1996. It should also be noted that this exclusion is included by reference in FUTA and will therefore be applicable in determining the base on which the employer computes the Federal UI tax owed.

Section 1203. FUTA Exemption for Alien Agricultural Workers. This section amends section 3306(c)(1)(B) of FUTA to permanently extend the exemption of wages paid to H2A aliens who are admitted to the U.S. to perform agricultural labor. This provision would be retroactive to January 1, 1995 when the most recent temporary exemption expired. This exemption has been temporarily extended many times since coverage was first extended to services performed in agricultural labor in 1976.

Section 1421. Reporting and Fiduciary Requirements Relating to Savings Incentives Match Plans for Employees (SIMPLE). The provision amends the Internal Revenue Code to provide that an employer is permitted to designate a SIMPLE account trustee to which contributions on behalf of eligible employees are made. The provision also amends parts 1 and 4, Subtitle B, Title I of ERISA so that only simplified reporting requirements apply to SIMPLE plans and so that the employer (and any other plan fiduciary) will not be subject to fiduciary liability resulting form the employee (or beneficiary) exercising control over the assets in the SIMPLE account. For this purpose, an employee (or beneficiary) will be treated as exercising control over the assets in his or her account upon the earlier of (1) a affirmative election with respect to the initial investment of any contributions, (2) a rollover contribution (including a trustee-to-trustee transfer) to another SIMPLE account or IRA, or (3) one year after the SIMPLE account is established.

The trustee of a SIMPLE account would be required each year to prepare, and provide to the employer maintaining the SIMPLE plan, a summary description containing the following basic information about the plan: the name and address of the employer and the trustee; the requirements for eligibility; the benefits provided under the plan; the time and method of making salary reduction elections; and the procedures for and effects of, withdrawals (including rollovers) from the SIMPLE account. At least once a year, the trustee would also be required to furnish an account statement to each individual maintaining a SIMPLE account. In addition, the trustee would be required to file an annual report with the Secretary. A trustee who fails to provide any of such reports or descriptions would be subject to a penalty of $50 per day until such failure is corrected, unless the failure is due to reasonable cause.

The employer maintaining a SIMPLE plan would be required to notify each employee of the employee's opportunity to make salary reduction contributions under the plan as well as the contribution alternative chosen by the employer immediately before the employee becomes eligible to make such election. This notice must include a copy of the summary description prepared by the trustee. An employer who fails to provide such notice would be subject to a penalty of $50 per day on which such failure continues, unless the failure is due to reasonable cause.

Section 1442. Elimination of Special Vesting Rule for Multiemployer Plans. The special 10-year vesting rule applicable to multiemployer plans contained in the Internal Revenue Code and in ERISA is repealed. This provision is effective for plan years beginning on or after the earlier of (1) the later of January 1, 1997, or the date on which the last of the collective bargaining agreements pursuant to which the plan is maintained terminates, or (2) January 1, 1999, with respect to participants who have at least one hour of service after the effective date.

Section 1451. Waiver of Minimum Waiting Period for Qualified Plan Distributions. This provision, amending both the Internal Revenue Code and ERISA, provides that a plan may permit a participant to elect (with any applicable spousal consent) a distribution with an annuity starting date before 30 days have elapsed since the explanation was provided, as long as the distribution commences more than seven days after the explanation was provided. The conference agreement also provides that a plan is permitted to provide the explanation after the annuity starting date if the distribution commences at least 30 days after such explanation was provided, subject to the same waiver of the 30-day minimum waiting period as described above. This is intended to allow retroactive payments of benefits which are attributable to the period before the explanation was provided.

Section 1460. Clarification of Application of ERISA to Insurance Company General Accounts. This provision amends ERISA to require the Secretary of Labor to issue proposed regulations providing guidance for the purpose of determining, in cases where an insurer issues 1 or more policies (supported by the assets of the insurer's general account) to or for the benefit of an employee benefit plan, which assets of the insurer (other than plan assets held in a separate account) constitute plan assets for purposes of ERISA and the Code. Final regulations must be issued by December 31, 1997. These regulations will only apply with respect to a policy issued by an insurer on or before December 31, 1998. New polices issued after December 31, 1998, will be subject to the fiduciary obligations under ERISA.

Section 1704(g). Clarification of Treatment of Medicare Entitlement Under COBRA Provisions. The provision amends section 602(2)(A)(v) of Title I of ERISA to limit the continuation coverage, where a covered employee is entitled to Medicare and within 18 months of such entitlement separates from service or has a reduction in hours, to no more than 36 months. This change would prevent one possible interpretation of the current statutory language that would permit continuation coverage for up to 54 months.

Section 1704(n). Veterans' Reemployment. The provision amends ERISA to provide that certain rules that apply to plan loans in ERISA will not be violated merely because a plan suspends the repayment of a loan during a period of uniformed service. This is a conforming change to Internal Revenue Code changes. This proposal would be effective as of December 12, 1994, the effective date of the relevant USERRA provisions.

Sections 1951-54. Generalized System of Preferences. Renews the authority of the President to provide duty-free treatment to imports of eligible articles from designated Beneficiary Developing Countries, subject to certain conditions and limitations. The legislation would maintain (without any changes) requirements that beneficiary developing countries must be taking steps to afford internationally-recognized worker rights to workers. several technical changes would lead to reduced GSP imports from the most competitive beneficiary countries: the per-capita income threshold for GSP graduation would be reduced, and more imports would be considered "competitive" and therefore not eligible for GSP.

Section 2102. Portal-to-Portal Act (Travel Time) Amendment. Eliminates any requirement for employers to pay for home-to-work travel by employees in an employer-provided vehicle, and for any activities performed by an employee which are "incidental to the use of such vehicle for commuting," if the travel is within the "normal commuting area of the employer's business" and use of the vehicle is "subject to an agreement" between the employer and employee or employee's representative. The changes will apply retroactively to actions pending on the date of enactment.

Section 2104. Minimum Wage Increase. Raises the Federal minimum wage under the Fair Labor Standards Act (FLSA) by $.90 an hour in two steps -- a $.50 increase from $4.25 to $4.75 effective October 1, 1996, and a $.40 increase to $5.15 effective September 1, 1997.

Section 2105(a). Computer Exemption. Modifies the existing minimum wage and overtime exemption for certain "computer professionals" who earn more than 6½ times the minimum wage by superseding it with a provision exempting these workers if they earn at least $27.63 per hour. This replaces an index formula (6½ times the applicable minimum wage) with a fixed rate (flat $27.63/hour) based on the current -- not the increased -- minimum wage level.

Section 2105(b). Tip Credit. Eliminates the existing provision which requires employers of tipped employees (e.g., waiters and waitresses) to pay at least 50 percent of the statutory minimum wage in cash, and replaces it with a provision which locks the minimum cash wage at the current hourly standard -- $2.13 per hour -- even after the statutory minimum wage goes up. Tipped employees must receive the balance of the hourly minimum wage in tips or the employer must pay the difference.

Section 2105(c). Youth "Opportunity" Wage. Establishes a permanent, fixed subminimum wage -- at $4.25 per hour -- for youth under 20 years of age in their first 90 consecutive calendar days of employment with any employer. A provision prohibits employers from using the subminimum wage to displace older workers.

Talking Points - Houseparents

As reported by Committee, H.R. 2531 amends the Fair Labor Standards Act (FLSA) to exempt a class of employees, houseparents, from both the minimum wage and the maximum hours requirements of that Act.

As reported by Committee, the bill was opposed by every Democrat except one.

The bill does not consist a minor correction of Department of Labor regulations, it is a substantive change in law.

The bill is not non-controversial. The legislation, particularly those provisions exempting houseparents from the minimum wage, are highly controversial.

Bringing this bill to the floor under the Corrections Day calendar, in a manner that does permit the minority to offer germane amendments, perverts both the purposes for which the Corrections Day calendar was created and the procedures of the House.

In 1974, the Fair Labor Standards Act was amended to provide that non-profit child care institution do not have to pay overtime to married couples who "reside in a family-like setting" to care for children with at least one deceased parent, provided that such couples are paid not less than $10,000 per year and receive free room and board. That is, such couples do not have to be paid time and half for work in excess of 40 hours a week.

H.R. 2531 provides that single individuals who reside for 72 hours with children who have been institutionalized in non-profit child care facilities do not have to be paid either minimum wages or overtime provided that they are paid $8,000 a year and receive free room and board.

H.R. 2531 is a poorly crafted bill that promotes the exploitation of houseparents.

By exempting houseparents from the minimum wage, H.R. 2531 permits those individuals to be employed as many hours in a day, as many days in a week, and as many weeks in a year as it is humanely possible to work for no more than $8000 a year and room and board.

Permitting the exploitation of care providers jeopardizes the welfare of the children for whom they care.

$8,000 a year is almost a $1,000 less than a full time minimum wage worker receives. The effect of H.R. 2531 is to require employers to pay higher wages to all other employees, including groundskeepers, custodial staff, and housekeepers, than they pay to those individuals who are principally responsible for caring for the children.

In 1974, the Congress required married couples to receive $10,000 a year, the equivalent of $31,400 today. H.R. 2531 requires only that an individual receive $8,000 a year, a

50% reduction below what the Congress considered a minimal, appropriate salary in 1974.

H.R. 2531, does not index the minimum wage that houseparents must be paid, thereby guaranteeing further erosion in the living standards of these workers.

The intent of the 1974 amendment was to promote a family-like atmosphere for children who are residents in non-profit child care centers. The amendment achieved that purpose in part by requiring that the houseparents reside with the children. H.R. 2531, by contrast, requires only that the employee be on the same grounds as the children for 3 days a week. What kind of family atmosphere is promoted by encouraging an employee who is allegedly to serve as a surrogate parent to spend more away from the children in his or her charge than with those children?

The 1974 amendment was limited to those who cared for children who were orphaned. H.R. 2531 applies to those who care for any "abused, neglected, delinquent, orphaned, homeless, or emotionally impaired child," regardless of how impaired that child may be. By eliminating both the minimum wage and the overtime requirements, H.R. 2531 encourages employers to work fewer employees longer hours even where the burdens for caring for a child may be extensive. Even if one is wholly indifferent to the rights of workers, eliminating the overtime and minimum wage requirements for those who care for severely impaired children is horrible policy.

Many opponents of H.R. 2531 could otherwise support a reasoned bill that expands the current overtime exemption to include individuals who truly serve as surrogate parents for institutionalized children. The House should have the opportunity to consider such amendments.

In Opposition to H.R. 1227

Mr. Chairman, I strongly oppose H.R. 1227.

We are now about to consider legislation that allows employers to require workers to perform work without being paid for it. The Republican majority will not raise the minimum wage in order to make work pay, but you are perfectly willing to take the time and effort to make sure that work doesn't pay.

H.R. 1227 was originally described as seeking to do no more than codify the Department of Labor's April, 1995 opinion letter which specified when an employee must be compensated for commuting in an employer owned vehicle.

That letter provided four conditions must be met:

- First, the employee must voluntarily chose to use the employer's vehicle.
- The employee cannot incur costs as a result of using the employer's vehicle.
- The vehicle must be of a type that is normally used for commuting.
- The commute must be within normal commuting distance.

Now let us look at what the majority is proposing we report. First, an employee may be required to perform any duties incidental to the use of the vehicle without being paid for that time.

Second, regardless of the benefits derived by the employer or the burdens placed on the employee, commuting time is deemed automatically to be unrelated to the employee's principle activities and the employee is therefore not entitled to compensation.

Third, the bill appears to be specifically designed to allow an employer to require an employee to agree to use the employer's vehicle as a condition of employment. This completely ignores the requirement that the employee voluntarily agree.

Fourth, this legislation effectively permits an employer to require the employee to use any vehicle, from a tractor to 16 wheel semi, to commute.

Finally, this bill applies retroactively to pending litigation notwithstanding the fact that the bill bares no relationship to the April, 1995 Department of Labor opinion letter and substantially changes current law. Apparently, the bill intentionally seeks to immunize employers who have violated the law.

The original theory behind the exemption for commuting time was that an employee who is commuting to and from work is on his or her own time. The employee may choose the means by which he or she commutes. The employee may chose the route by which to go. The employee may perform any errand of his or her choice on the way to or from work. The employee may pick up and drop off passengers as they desire. In short, other than being required to be at a certain place by a certain time, the employee's commuting time has nothing to do with the employer. It is the employee's own time to do with as he or she sees fit. In such circumstances, regardless of whether the employee is using their own vehicle or the employer's, I fully agree that the employer should not be required to compensate the employee.

Under this legislation, however, it is the employer and not the employee who controls the commuting time. To give only the most obvious example of how an employee's discretion is compromised, it is extremely common in this country for parents to drop off their children at school on the way to work. However, an employee who can be required to use an employer's vehicle to commute to work is also effectively prohibited from engaging in this very common and often necessary family task.

Further, this bill enables employers to require employees to perform services for free that employers are otherwise required to pay for under current law. The employer can require the employee to load the vehicle, to fuel the vehicle, to maintain the vehicle, to take job assignments, or to perform any other duty incidental to the commute without paying the employee for those services. In any other circumstance, an employer is unquestionably required to pay the employee for each and all of those services.

This legislation effectively eliminates the right of workers to choose how they will commute to work; it eliminates the ability of workers to exercise discretion over what they do while they are commuting; and it allows employers to require employees to work off the clock. At a time when corporations are making historic profits, while working families are seeing their wages decline, the Republicans not only refuse to even consider legislation increasing the minimum wage, but are seeking to enact legislation that literally steals both time and money from workers. So much for the Republicans' concern for the welfare of ordinary Americans and their families. I urge that this legislation be defeated.

Issues

Issues

"Small Business Exemption" Under the Fair Labor Standards Act

Some proponents of a new small business exemption under the Fair Labor Standards Act (FLSA) -- which would remove minimum wage and overtime protection for all employees of businesses which do an annual dollar volume of business of less than $500,000 -- argue that this change is needed to restore an exemption that was eliminated as a result of an error in the 1989 Amendments to the FLSA. They point to efforts in both the House (sponsored by then-Congressman Espy) and the Senate (sponsored by Senator Bumpers) in the early 1990s to change the coverage provisions of the FLSA.

But the truth is that the Fair Labor Standards Act -- since its original enactment in 1938 -- has never contained an across-the-board small business exemption.

The 1989 Amendments eliminated a narrowly targeted exemption for only **small retail and service** firms. Employees of <u>all other</u> small businesses -- such as garment manufacturing firms, small mines, small guard service and janitorial companies -- have <u>always</u> been subject to minimum wage and overtime protection under the FLSA based on "individual coverage." That is, since 1938, employees who work in small <u>non-retail/service</u> firms have been covered by the FLSA's minimum wage and overtime protections if they engage in work activities related to interstate commerce. In fact, "individual coverage" based on activities relating to interstate commerce was originally the <u>only</u> basis for coverage under the FLSA.

Notwithstanding any confusion or disagreement about whether earlier legislation was intended to restore the pre-1989 small retail and service business exemption from individual coverage -- or substantially broaden this exemption to include all small businesses -- the effect of a small business exemption like that recently considered, and rejected, in the House is clear.

Such a small business exemption would have the effect of denying any minimum wage increase to possibly millions of <u>current</u> workers now covered by the FLSA in the kinds of jobs in the kinds of industries that have always been afforded this essential workplace protection.

Even worse, such an exemption would have the effect of denying any Federal minimum wage and overtime protection to as many as 10 million workers <u>starting</u> work for nearly two-thirds of U.S. businesses <u>in the future</u>. Enforcement experience in the garment and janitorial service industries, for example, clearly indicates the grave danger of exempting all small employers from minimum wage and overtime protection; in many cases these are the businesses where the most vulnerable workers find employment.

Such a small business exemption would deprive virtually every new employee -- regardless of their wage level -- of Federal overtime protection if they go to work for a firm with annual gross revenues of $500,000 or less. It would take away "America's time-and-a-half" for these workers.

Such an exemption could create an incentive for larger firms to spin-off work to small low-wage contractors and subcontractors to reduce or hold down labor costs.

Such an exemption would also adversely affect the ability to effectively enforce minimum wage and overtime in larger companies where the annual gross revenue is difficult to establish or prove in order to assert "enterprise" coverage under the FLSA.

The Goodling Amendment in the House -- which the President threatened to veto -- was based on the Espy/Bumpers bill, but modified the approach by grandfathering in current covered employees at the current minimum wage rate. Senator Bond and others appear to be considering similar small business exemption amendments -- such as locking in the current minimum wage for small businesses without affecting coverage or current employees' entitlement to the (lower) minimum wage and overtime -- which are characterized as improvements over Espy/Bumpers. But in opposing the Goodling amendment, the President has already indicated his intent to veto a minimum wage increase for some if it comes with the price tag of excluding other workers who have always been covered. This approach too deprives certain workers of the treatment they have always been afforded under the FLSA, and would create a two-tier minimum wage for adult workers with those locked in at a wage level that reflects a 40 year low in value.

As the President said on May 22 in reference to the small business exemption then being considered and ultimately defeated in the House:

> "... the House leadership is today proposing a giant fraud on the American people. Their legislation will eliminate the minimum wage for all workers hired by fully two-thirds of American businesses. I hope Senator Dole will join me in opposing this extreme measure. We must not tolerate sweatshops and a repeal of wage protections for millions of Americans, as a condition of assuring a living wage for some workers."
>
> "Let me be clear: Eliminating the minimum wage is no way to raise it. If Congress sends me a bill to eliminate the minimum wage and wage protection for millions of workers, I will veto it."

"Small Business Exemption" Under the Fair Labor Standards Act

Background

When the Fair Labor Standards Act (FLSA) was originally enacted in 1938, the only basis for coverage of the minimum wage and overtime (and child labor) provisions was "individual coverage" of only those workers whose work activities related to interstate commerce. At the time, there was an exemption from the minimum wage and overtime provisions for all employees of local retail/service establishments. The FLSA -- since its original enactment -- has never contained an across-the-board small business exemption.

Over the years, the FLSA has frequently been amended -- typically to expand coverage to more businesses and more employees.

In 1961, the FLSA was amended to add a new basis for minimum wage and overtime coverage of "enterprises" so that all employees of firms -- with some employees engaged in interstate commerce -- that did more than $1 million in annual dollar volume were covered, irrespective of whether the employee was individually covered based on interstate commerce. This significantly increased the number of employees covered by minimum wage and overtime protection. As a result, workers would be covered either if they work for a covered enterprise or (individually) if they work in activities related to interstate commerce in a firm that doesn't meet the enterprise test.

At the same time (1961), the retail/ service establishment exemption was narrowed to encompass only small retail/service firms with specified annual dollar volumes -- which changed up and down through subsequent amendments over the years. The effect was that all employees of such small retail/service firms were exempt irrespective of whether individually engaged in interstate commerce activities.[1] Employees of all other small businesses -- such as garment manufacturing firms, small mines, small guard service and janitorial companies -- had always been subject to minimum wage and overtime protection under the FLSA based on "individual coverage." That is, employees who work in small non-retail/service firms have always been covered by the FLSA's minimum wage and overtime protections if they engage in work activities related to interstate commerce.

In 1989, in conjunction with the two-stage minimum wage increase (the first since

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[1] In 1966, the enterprise coverage threshold was reduced to $500,000 for most enterprises; in 1974 it was further reduced to $250,000. Exempt small retail/service firms became defined as those with annual dollar volumes which conformed with the enterprise coverage threshold, also as a result of the 1974 Amendments.

1981), the enterprise coverage threshold was increased back to $500,000. At the same time, the small retail/service exemption from individual coverage was repealed. Some believe that this was an inadvertent drafting error in the legislation. Others believe that the intent was to establish an across-the board small business exemption though this was not the effect of the law enacted. Others believe this repeal was an intentional change as a trade-off for the increased enterprise coverage threshold.

In any case, the repeal had the effect of extending minimum wage and overtime protection to individually-covered employees of small retail/service establishments that had previously been exempt. This effect gave rise to introduction of remedial legislation (Bumpers/Espy), never enacted, that some characterized as intended to restore the *status quo ante* the 1989 amendments. In fact, the legislative proposals actually introduced would not have merely restored the pre-1989 situation; rather, these bills would have established an across-the-board minimum wage and overtime exemption for all small businesses (under $500,000 in annual dollar volume) and, thus, would have removed minimum wage and overtime protection from classes of workers that had always been covered since 1938.

Q: Why has the Congress not extended the Fair Labor Standards Act (FLSA) to all businesses in the United States?

A: Federal authority to regulate employee wage payments under the FLSA derives from the Commerce Clause of the U.S. Constitution. Congress found that without FLSA's protections, substandard labor conditions were detrimental to the health, efficiency, and general well-being of workers in industries ***engaged in commerce***. Such conditions would: (1) burden the channels and instrumentalities of commerce and cause them to be used to spread substandard labor conditions among workers throughout the States; (2) burden the free flow of goods in commerce; (3) create an unfair method of competition in commerce; (4) cause labor disputes that obstructed commerce; and (5) interfere with the orderly and fair marketing of goods in commerce. Starting in 1938, the FLSA only covered individual employees who were engaged in commerce or in the production of goods for commerce, or in any activity closely related and directly essential to producing goods for commerce -- *i.e.*, workers were "individually" covered (based on their direct connection to interstate commerce).

FLSA's coverage provisions are construed broadly to give effect to its remedial purposes, while exceptions to coverage are construed narrowly. With few exceptions (the 1989 FLSA Amendments being the most notable), the Congress has enacted successive amendments continually expanding the Act's coverage. Beginning in 1961, FLSA was amended to add a second way that workers would be covered -- "enterprise coverage" -- which extended the Act's protections to ***all*** employees in an enterprise engaged in commerce meeting a specified annual dollar volume test, ***even if every employee was not individually engaged in commerce***, as long as at least ***some*** employees were engaged in commerce or in the production of goods for commerce, or were handling, selling or otherwise working on goods or materials that had been moved in or produced for commerce. This "enterprise coverage" threshold was changed over the years by later amendments, and is currently $500,000 based on the 1989 FLSA Amendments.[1] Congress has never assumed that every employee in every business would always be covered, but has required that there be the requisite connection to commerce, either through "individual" or "enterprise" coverage.

FLSA also contains numerous exemptions from minimum wage or overtime (or both), which exempt certain otherwise covered employees from FLSA's monetary requirements -- *e.g.*, "executive, administrative and professional" employees who meet certain criteria; outside sales persons; employees of certain seasonal amusement or recreational establishments, small newspapers, and small telephone companies; workers on small farms (under 500 "man-days" of labor per quarter); casual babysitters and persons employed as companions to the elderly or infirm. Under current law, any employee of a business that does less than $500,000 in annual business who does <u>not</u> engage in commerce or produce goods for commerce is not required to be paid the minimum wage or overtime.

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[1] Also, under current law, all employees of hospitals, schools and institutions of higher education, and Federal, State and local governments are covered irrespective of the annual dollar volume of business done.

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FAIR LABOR STANDARDS ACT OVERVIEW

The Fair Labor Standards Act (FLSA) sets **minimum wage, overtime pay, child labor standards, and recordkeeping requirements.** It requires payment of the Federal **minimum wage** ($4.25 per hour), and time-and-one-half **overtime** premium pay, based on the **regular rate of pay**, for hours worked over 40 per week, to all **covered employees**, unless a particular **exemption** applies.

COVERAGE

Not every business or employee is covered; those not covered do not have to meet FLSA's terms. Coverage is based on the nature of the business and the employee's duties. **Employees engaged in interstate commerce** or in producing goods for interstate commerce, and all employees in certain **enterprises** so engaged, including **public agencies** (Federal, State and local governments), are covered. **Interstate commerce** is broadly defined to include working in communications or transportation; regular use of the mails, telephones and other interstate communications; documenting records of interstate transactions (including interstate credit card transactions); handling, shipping or receiving goods that are moving in interstate commerce; crossing State lines during the normal course of employment; and working for independent contractors that do clerical, custodial or maintenance, or other work for businesses engaged in interstate commerce or in producing goods for interstate commerce. Many enterprises with annual gross sales or business less than $500,000 do not meet FLSA's "enterprise coverage" test.

EXEMPTIONS

FLSA's exemptions mean some covered employers do not have to pay minimum wage or overtime to certain employees. Some exemptions are based on the type of business while others depend on the work of individual employees. An employee may be exempt from FLSA's minimum wage or overtime standards, or could be exempt from both. FLSA also has partial exemptions from overtime (e.g., firefighters receive overtime after 53 hours per week under §7(k) of FLSA). FLSA currently provides nine complete exemptions from both minimum wage and overtime in §13(a), and 22 full or partial exemptions from overtime in §13(b).

MAXIMUM HOURS

There is no limit on the maximum number of hours in a day or days in a week that an employee may be required to work if the employee is at least 16 years old and if the employer pays proper overtime to covered, nonexempt employees who work over 40 hours per week. Compliance with FLSA does not excuse an employer from obligations to meet any higher standards required by State or local laws or collective bargaining agreements.

OVERTIME PAY REQUIREMENTS

All covered, nonexempt employees must be paid overtime pay, based on time-and-one-half their "regular rate of pay," for all hours worked over 40 per week. FLSA's overtime rules were intended to discourage employees working excessively long hours by increasing the cost through time-and-one-half premium pay on the hours worked over 40 per week, and to encourage employers to spread available work to more employees. To make it effective, Congress required that all remuneration paid to, or on behalf of, an employee (except for a few specific exclusions) be included in the "regular rate" for computing the time-and-one-half overtime premium rate.

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COMPTIME

PRIVATE SECTOR

The Fair Labor Standards Act (FLSA) does not allow employers in the private sector to grant compensatory time off ("comp time") in lieu of monetary payment for overtime hours worked. FLSA requires that all covered, nonexempt employees in the private sector receive time-and-one-half overtime premium pay on the next regular payday after the work is performed for all hours worked beyond 40 per week.

PUBLIC SECTOR

State and local governments are allowed, under the 1985 FLSA Amendments, to substitute paid time off as "comp time" in lieu of overtime pay under certain conditions. The comp time must accrue at 1½ hours for each hour of overtime worked. The law limits how many comp time hours may be accumulated (480 hours in fire protection or law enforcement; 240 hours elsewhere). Use of comp time is only allowed pursuant to an agreement or understanding between the employer and the employee (or representative) reached before the work is performed. A public employee must be allowed to use accumulated comp time within a reasonable period after requesting it if taking it would not unduly disrupt the employer's operations. When an employee is terminated, any unused comp time must be paid at the average regular rate over the last three years or the final regular rate, whichever is higher.

The legislative history to the 1985 FLSA Amendments reflects that Congress wanted to respond to concerns of State and local governments over the financial impact of FLSA's overtime provisions by accommodating existing pay practices that had been worked out voluntarily between many State and local governments and their employees. Such arrangements included providing comp time off instead of premium pay for overtime hours, which "... reflect[ed] mutually satisfactory solutions that [were] both fiscally and socially responsible. To the extent practicable, [Congress sought] to accommodate such arrangements". S. Rep. No. 159, 99th Cong., 1st Sess. 8 (1985).

FEDERAL GOVERNMENT SECTOR

Title 5 of the U.S. Code governs Federal employees' pay entitlements, ***in addition to*** FLSA's provisions. Title 5 allows Federal employees to be granted comp time off, hour-for-hour, for irregular or occasional overtime hours worked under conventional or fixed schedules or for any overtime worked under an "alternative" work schedule. Employees not exempt under FLSA may ***elect***, but may not be ***required*** to accept, comp time instead of overtime pay. Accumulated comp time is limited to 64 hours carryover from one year to the next. A separating employee is paid for unused comp time at the rate in effect when the comp time was earned.

"Alternative" work schedules began as a three-year experiment in the Federal government in 1978, were extended in 1982, and made permanent in 1985. Federal employees on alternative, compressed, or flexible schedules may accumulate up to 24 "credit hours" without payment of overtime. "Credit hours" are voluntarily worked by an employee beyond the basic 40-hour per week work schedule requirement which may later be used as paid time off.

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Ballenger Comp Time Bill

Cons (against comp time)

- FLSA's overtime provisions were intended to discourage long work hours and spread available employment opportunities to more workers. Easing the overtime penalties for employers by making comp time an available option for delaying over-time payments is inconsistent with one of FLSA's fundamental purposes.
- Low-wage workers and those that have little leverage in the workplace can never really be assured of a "free choice" if they wish to receive cash for overtime premium pay.
- For unscrupulous employers, this will provide one more opportunity to exploit workers -- and it will be difficult to prove they have done so.
- Enforcement of FLSA's overtime provisions will be even more difficult.

Cons (against Ballenger bill)

- There is no way to guarantee that a private sector employee would eventually receive payment for accrued overtime obligations in the comp time bank if a company folds or declares bankruptcy.
- There can be up to a 30 day delay after an employee requests a payout of accrued comp time.
- Employees' exercise of free choice should not place their jobs in jeopardy or disadvantage their ability to advance, or otherwise result in discrimination (e.g., slower promotions; less favorable work assignments; whether overtime hours would be made available by the employer if the employee chooses cash instead of comp time, etc.)
- The provisions that are intended to ensure choice are insufficient or are easily circumvented by the unscrupulous employers:
  - only willful violations of the coercion provision are penalized;
  - there is no requirement that the employer/employee agreement be in writing;
  - there is no provision for how to handle a change in the employer/employee agreement;
  - no notice of employee rights is required;

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- an employer could offer the option of comp time to only selected employees.

- Employers will actually increase their control over employees' worklife:

  - an employer could deny the use of banked comp merely by stating that the employee's absence would "unduly disrupt the operations of the employer;"

  - an employer could decide <u>at any time</u> to pay an employee for banked comp time – even if the employee has plans for using the comp time (vacation, family and medical leave, etc).

- There is no recordkeeping requirement, so employees would have to keep track of their own accrued hours.

- Employees should be able to choose whether to even work the overtime in the first place.

- Penalties for willful violations of the anti-coercion provision are only available to those who sue privately.

- There will be a competitive advantage for those firms that can avoid the overtime premium pay penalty by paying comp time.

<u>Pros (for comp time)</u>

- According to some polls, a majority of employees would like the option of receiving comp time (in lieu of overtime pay) so that they have more time off to spend with their family, pursue other interests, go to school, etc.

- State, local and federal employees already have this option and it seems to work well for them.

<u>Pros (for Ballenger bill)</u>

- Some of the provisions actually provide greater benefits or protections for private employees than is currently provided for state and local government employees (e.g., coercion clause and penalty for a willful violation of that clause).

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May 10, 1996 Ballenger Comp Time Bill (H.R. 2391)

Differences -- Comp Time for State and Local Governments Vs. Private Sector

The bill proposes comp time provisions for the private sector that differ from those for State and local governments in the following respects:

- For employees in the private sector, the agreement or understanding for comp time may not be a "condition of employment."
- Private sector employers may not intimidate, threaten or coerce (or attempt to, directly or indirectly) employees into requesting or not requesting comp time in lieu of overtime pay, or require any employee to use comp time. The public sector has no comparable provisions.
- Private sector employees may accrue no more than 240 hours of comp time in a bank without cash payment. Public sector employees in public safety, emergency response, or seasonal activities may accrue up to 480 hours of comp time; all others, 240.
- For private sector employers, at the end of every year, any unused comp time (in the "bank") must be cashed out at the employee's regular rate at time of payment. No comparable provisions apply to the public sector.
- Private sector employers must cash out accrued comp time within 30 days of employees' written requests. No comparable provisions apply to the public sector.
- Upon termination of employment, private sector employees are paid for unused comp time at the average rate during the period it accrued (for public sector, over the last three years of employment) or the final rate, whichever is higher.
- Private sector employers that willfully violate the anti-intimidation/anti-coercion provisions would be liable in private litigation to affected employees for the amount of each hour of comp time accrued, plus an equal amount in liquidated damages (less each hour of comp time that was used). No comparable provisions apply to the public sector.

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Ballenger Comp Time Bill, The "Working Families Flexibility Act" (H.R. 2391)

H.R. 2391 would extend current FLSA comp time provisions now available only for State and local governments to the private sector, with certain changes. Supporters of the bill promote it as a "flexibility" and "family-friendly" issue for employees.

Basic Provisions:

- Comp time hours accrue at 1½ times the number of overtime hours worked.
- Comp time is available only if there is a collective bargaining or other agreement or understanding "knowingly and voluntarily" agreed to by employees before the overtime work is performed.
- The agreement or understanding may not be a "condition of employment."
- Employers may not intimidate, threaten or coerce (or attempt to, directly or indirectly) employees into requesting or not requesting comp time in lieu of overtime pay, or require any employee to use comp time.
- Private sector employees may accrue no more than 240 hours of comp time in a bank without cash payment.
- At the end of every year, any unused comp time (in the "bank") must be cashed out at the employee's regular rate at time of payment.
- Employees may also, at any time, request in writing that they be paid in cash for accrued comp time; employer has 30 days to comply. Such payments are at the higher of their average pay rate in effect during the period it accrued or the final rate.
- Employer retains the right to cash out any unused comp time at any time.
- Terminated employees are paid for unused comp time at the higher of their average pay rate in effect during the period it accrued or the final rate, which can be collected through private lawsuits as unpaid overtime compensation if necessary.
- Employees would be allowed to schedule and use their comp time as paid time off within a reasonable time after requesting it, if the time away from work does not unduly disrupt the employer's operations.
- Private sector employers that willfully violate the anti-intimidation/anti-coercion provisions would be liable in private litigation to affected employees for damages, computed as the amount of each hour of comp time accrued in violation, plus an equal amount in liquidated damages, less each hour of comp time that the employee used during the period.

UNITED STATES DEPARTMENT OF LABOR

FACSIMILE TRANSMISSION

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MESSAGE:

Andy Blocker —
Per our discussion
Ann Walker
X67845

PRESIDENT CLINTON HAS ALWAYS SUPPORTED A MINIMUM WAGE INCREASE AS A WAY TO MAKE WORK PAY

SUPPORTED MINIMUM WAGE HIKES AS GOVERNOR. As Governor of Arkansas, Bill Clinton supported two increases in the state minimum wage. And he changed state minimum wage law to cover more workers.

1992: CANDIDATE CLINTON CALLS FOR EXPANDING EITC AND RAISE MINIMUM WAGE TO MAKE WORK PAY. In 1992, President Clinton proposed expanding the Earned Income Tax Credit and raising the minimum wage to keep pace with inflation in order to ensure that no parent who was willing to work full-time would have to raise their children in poverty.

- **In *Putting People First,*** Presidential Candidate Clinton and Vice-President Candidate Gore proposed to "increase the minimum wage to keep pace with inflation." (p. 127)

- **In the Clinton/Gore Welfare Information packet,** Candidate Clinton and Vice-President Candidate Gore proposed to make the minimum wage a fair wage, and index it to inflation because "working people shouldn't have to lose purchasing power just because of inflation." [Clinton/Gore Welfare Information Packet, September 9, 1992]

- **On October 30, 1992,** the *Star Tribune* wrote that Candidate Clinton wants to "increase the minimum wage to keep pace with inflation and expand the earned income tax credit to guarantee no full-time workers lives in poverty." [Star Tribune, October 30, 1992]

AUGUST 1993: PRESIDENT CLINTON EXPANDS EITC AS FIRST STEP TO MAKE WORK PAY. In 1993, President Clinton took the first necessary step to achieving the goal of ensuring that anyone who worked full-time didn't have to bring up their children in poverty: he expanded the Earned Income Tax Credit to provide a tax break for 15 million of our most hard-pressed households.

- **In April of 1993, *The Washington Post* wrote that:** "Mr. Clinton's goal is ambitious: to make sure that in households with children where at least one person works full-time, the family won't fall below the poverty line. Under current law, the maximum EITC benefit for a family with two or more children was scheduled to rise to $ 2,000 next year; Mr. Clinton would boost the maximum to $3,370 by 1995. He would also raise the benefits for families with one child and establish a small new credit for workers without children....***On top of this, Mr. Clinton would try to boost the earnings of the working poor by hiking the minimum wage.***" [The Washington Post, April 20, 1993 -- emphasis added]

IN 1994 PRESIDENT CLINTON FOUGHT FOR UNIVERSAL HEALTH CARE -- WHICH WOULD HAVE BEEN THE EQUIVALENT OF A MINIMUM WAGE INCREASE FOR MILLIONS OF LOW-WAGE WORKERS. NONETHELESS, HE STILL MAINTAINED HIS SUPPORT FOR A MINIMUM WAGE INCREASE.

- **JUNE OF 1994, *THE WASHINGTON POST* WROTE THAT:** "From health-care reform to ***a higher minimum wage*** to more training opportunities to increased earned-income tax credits to mandatory fringe benefits, the Clinton administration wants to increase dramatically the income security of the more than 6 million American adults whom it classifies as the 'working poor.'" [The Washington Post, June 26, 1994 -- emphasis added]

1995: PRESIDENT CLINTON PROPOSES MINIMUM WAGE INCREASE TO FULFILL COMMITMENT TO MAKE WORK PAY. On February 3, 1995, President Clinton put forward his proposal to increase the minimum wage from $4.25 to $5.15 over two years in two equal steps. This proposal would directly benefit 10 million American workers.

- **In his 1995 State of the Union, President Clinton called for Congress to raise the minimum wage:** "The goal of building the middle class and shrinking the underclass is also why I believe that you should raise the minimum wage. It rewards work. Two and a half million Americans -- 2.5 million Americans, often women with children, are working out there today for $4.25 an hour. In terms of real buying power, by next year that minimum wage will be at a 40-year low. That's not my idea of how the new economy ought to work.

  Now, I've studied the arguments and the evidence for and against a minimum wage increase. I believe the weight of the evidence is that a modest increase does not cost jobs, and may even lure people back into the job market. But the most important thing is, you can't make a living on $4.25 an hour. Especially if you have children, even with the working families tax cut we passed last year. In the past, the minimum wage has been a bipartisan issue, and I think it should be again. So I want to challenge you to have honest hearings on this; to get together; to find a way to make the minimum wage a living wage.

  Members of Congress have been here less than a month, but by the end of the week, 28 days into the new year, every member of Congress will have earned as much in congressional salary as a minimum wage worker makes all year long." [State of the Union Address to the Nation, January 25, 1995]

- **On February 3, 1995, President Clinton proposed raising the minimum wage**

from $4.25 to $5.15: "Our job is to create enough opportunity for people to earn a living if they'll exercise the responsibility to work. That's why we fought so hard to expand the earned income tax credit - a working family tax cut for 15 million families - in 1993; precisely why we're calling on Congress today to raise the minimum wage 90 cents to $5.15 per hour.

The only way to grow the middle class and shrink the underclass is to make work pay. And in terms of real buying power, the minimum wage will be at a 40-year low next year if we do not raise it above $4.25 an hour. If we're serious- let me say this, too, emphatically- if we are serious about welfare reform, then we have a clear obligation to make work attractive and to reward people who are willing to work hard...

If in 1990, because the minimum wage had not been raised in such a long time, a Republican president and a Democratic Congress could raise the minimum wage, surely in 1995 - facing the prospect that work, full-time work, could be at a 40-year low in buying power unless we act - a Congress with a Republican majority and a Democratic president can do the same for the American people." [Announcement by President Bill Clinton of Minimum Wage Increase, February 3, 1995]

- **JUNE, 1995. At town hall meeting with Speaker Gingrich, the President reiterated his support for a minimum wage increase:** "The reason that I am for it is that I believe that -- first of all, I know that a significant percentage of people on the minimum wage are women workers raising their kids on their own. And I just believe that we shouldn't allow -- if we don't raise the minimum wage this year, then next year, after you adjust for inflation, it will be at a 40-year low...

  And I believe, if you go back to when they did it when -- the last time it was done was, when, '89 or something, I think, on balance, we did fine as a result of doing it. And I think we should do it again. [Remarks by President Clinton, Speaker Gingrich at Senior Center in Claremont, N.H., June 11, 1995]

- **In May 1995, President Clinton calls for minimum wage increase:** "I believe it is especially important to women that we raise the minimum wage this year. Women represent three out of five minimum wage workers, but only half the work force. I have done everything I could to create a climate in which people are encouraged to be successful parents and successful workers. I believe that. That's what the Earned Income Tax Credit was all about in 1993... But it isn't enough. If we do not raise the minimum wage this year, next year it will be in real dollar terms, the lowest it has been in 40 years. Now that is not my idea of what the 21st century American economy is all about. [Remarks at Women's Bureau Reception, May 19, 1995]

- **On Labor Day 1995, President Clinton tells California that the minimum wage should be raised:**"I also think we ought to raise the minimum wage. Let me tell you, if we don't raise the minimum wage this year, on January the 1st of next year, our minimum wage in terms of what the money will buy will be at a 40-year low. I want a high-wage, high-growth, high-opportunity, not a hard-work, low-wage 21st century. And I think you do, too. And that's what we ought to do." [Remarks at the Dedication of California State University at Monterey Bay in Monterey, California, September 4, 1995]

1996 PRESIDENT REITERATES HIS CALL FOR AN INCREASE IN THE MINIMUM WAGE

- **Speech to Keene State College, New Hampshire.** "[A]mong the greatest heroes in this country are the people who work 40 hours a week and do their best to raise their kids and only make the minimum wage. If we do not raise the minimum wage, this year it will drop to a 40-year low in terms of what it will buy. There is always a lot talk in Washington about family values. It's hard to raise a family on $4.25 an hour. Let's raise the minimum wage." [President Clinton, Keene, New Hampshire, February 17, 1996]

- **1996 State of the Union Address.** "More and more Americans are working hard without a raise. Congress sets the minimum wage. Within a year, the minimum wage will fall to a 40-year low in purchasing power. Four dollars and 25 cents an hour is no longer a minimum wage, but millions of Americans and their children are trying to live on it. I challenge you to raise their minimum wage." [President Clinton, State of the Union Address to Congress, January 23, 1996]

PRESIDENT CLINTON HAS ALWAYS SUPPORTED THE MINIMUM WAGE AS A WAY TO MAKE WORK PAY

April 2, 1996

CLAIMS THAT PRESIDENT CLINTON OPPOSED A MINIMUM WAGE INCREASE ARE JUST NOT TRUE.

- President Clinton has always supported the Minimum Wage -- and he has NEVER opposed a minimum wage increase. President Clinton has always supported increasing the minimum wage -- from the campaign in 1992 to the present. He specifically proposed a 90-cent increase 14 months ago.

- Republican Members point to a 10-word *Time* magazine quote from 1995 that alludes to President Clinton's opposition to the minimum wage in 1993. But, President Clinton didn't say any such thing. The statement *Time* refers to does not appear in any transcript, tape, or speech text.

- For four years now President Bill Clinton has fought for several provisions that would raise the standard of living of hard-working families, including: increasing the minimum wage, expanding the Earned Income Tax Credit, and providing health care coverage for working families.

- President Clinton initially focused his legislative agenda on raising workers' raises and increasing economic security through expansion of the Earned Income Tax Credit and health care reform, but he has always supported a Minimum Wage increase. Together with his EITC expansion, the President's minimum wage increase would ensure that no parents would have to raise their children in poverty.

The "Minimum Wage for Families Act" is a Sham

- The Congressional majority just can't seem to vote to increase the minimum wage, and they just can't seem to stop raising income taxes on working Americans.

- Their new proposal is nothing but a shell game.

- Last year, the Senate Finance Committee voted to raise taxes on working families by $44 billion over seven years by cutting the Earned Income Tax Credit (EITC). About 17 million families would have seen an immediate income tax increase averaging $302, rising to $471 by 2005.

- Then in the budget bill that the President vetoed, the Congressional majority voted to raise income taxes on nearly 13 million working families by $31 billion, a per-family income tax hike averaging $332 in 1996 alone.

- Even accounting for the $500 child credit and the increase in the standard deduction, about 7.7 million families would pay an average of $318 in higher taxes under their plan.

- In their last seven year budget offer this spring, the Congressional majority offered to raise income taxes on working families by "only" $15 billion, but the President said NO to raising income taxes on working families.

- Now the Congressional majority says it is wants to take the money it tried to take out of the pockets of working Americans, give some of it back to minimum wage workers, and spend the rest on other tax provisions.

- Congress shouldn't raise income taxes on working families at all. Their proposal would push employers lower wages, instead of raising them. And their program would create a whole new program just to avoid doing every American knows is the right thing to do: raise the minimum wage.

- THIS IS A SHELL GAME. CONGRESS SHOULD STOP DELAYING AND VOTE YES OR NO ON A CLEAN, STRAIGHTFORWARD INCREASE IN THE MINIMUM WAGE. AMERICAN WORKERS DESERVE A RAISE.

Hutchinson-Ballenger Proposal to Modify EITC in Lieu of Minimum Wage Increase

- Representatives Hutchinson (R-Ark.) and Ballenger (R.-N.C.) have proposed that the EITC be adjusted in lieu of increasing the minimum wage.

- Details of their plan have not been released yet. However, it is very unlikely that they will be able to achieve all of their stated goals.

- Representatives Hutchinson and Ballenger claim that they would increase the EITC to make up the gap between a $4.25 minimum wage and a targeted hourly wage of $7 for workers with one child and $8 for workers with two or more children.

  -- Under current law, the EITC increases the hourly wage by $1.03 (to $5.28 an hour) for a worker with one child and by $1.70 (to $5.95 an hour) for a worker with two or more children.

  -- To reach the Hutchinson-Ballenger targets, the EITC rate would have to be increased from 34 percent to 90 percent for a worker with one child and from 40 percent to 88 percent for a worker with two or more children.

  -- With no further modifications to the EITC, its annual costs (of between $25 billion and $40 billion a year) would have to more than double to reach this goal.

- Yet, Representatives Hutchinson and Ballenger claim that they can expand the EITC to reach this goal while reducing the costs of the tax credit by $15 billion over the next six years.

  -- Press accounts suggest that they would use about half of the roughly $30 billion savings contained in the budget reconciliation bill to finance the expansion of the EITC. But for a few billion dollars a year, Representatives Hutchinson and Ballenger will not be able to increase the EITC rate for minimum wage workers by more than 3 to 4 percentage points.

- Even this small increase in the EITC for minimum wage workers with children would have to be financed by reductions in the EITC for other workers.

  -- Under the budget reconciliation bill, taxes would have increased, on average, by $318 for nearly 8 million EITC recipients, even accounting for the proposed $500 child tax credit.

  -- Taxes would have increased, on average, by $508 for over 3 million workers with children.

  -- Over 4.3 million very low-wage workers who do not reside with qualifying children would become ineligible for the EITC. These workers would incur an average tax increase of $174.

Office of Tax Analysis
April 25, 1996

"THE MINIMUM WAGE FOR FAMILIES ACT"

LEGISLATIVE DESCRIPTION AND SUMMARY

This proposal will fundamentally redesign the EITC, and rename it the "Working Families Support Credit".

RATIONALE

It has become difficult in recent years to support a family on a minimum-wage salary. There is agreement among both Republicans and Democrats that we need to provide assistance to the "working poor", but there is significant disagreement on the best way to accomplish this goal.

The administration has proposed an increase in the minimum wage as the solution to this problem. While such an increase would provide some relief to the working poor, it would also have much more far reaching effects, including placing large economic constraints on the private sector, a loss of entry-level positions, and an inflationary ripple effect on wages. A minimum wage increase would also affect those persons who arguably are not in need of this assistance, such as teenagers working during their summer vacation.

Our proposal would accomplish the goal of providing assistance to those who are truly in need -- working families -- while at the same time avoiding the additional problems associated with a minimum wage increase.

BACKGROUND

The Earned Income Tax Credit (EITC), which was created in 1974, provides a refundable tax credit to lower-income working families with children and currently to some adult childless workers. The EITC has expanded greatly since its creation as a result of both Congressional and Presidential initiatives, including efforts by the Reagan, Bush and Clinton administrations.

RECIPIENTS

Under current law, there are an estimated 18.2 million tax units eligible for EITC. 12.7 million of these tax units are families with children, of whom roughly 5.3 million have one child and 7.4 million have two or more children. The remaining 5.5 million eligible tax units are childless workers ages 25 through 64.

PROPOSAL

This EITC reform proposal, which builds upon the reforms in the Republican Balanced Budget Act of 1995, will redesign and reform the current EITC program in an effort to return the program to its original purpose of serving low-income working families. The proposal will address the following:

* Convert large annual "lump sum" EITC payments into equal monthly payments so as to more practically supplement family income

* Deny credit to undocumented workers

* Eliminate credit for childless adults

* Increase the support credit for parents

* Rename Earned Income Tax Credit the "Working Families Support Credit"

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If you would like to cosponsor this legislation or if you have additional questions, please contact Chuck Seyfarth with Representative Hutchinson at 5-4301.

The Minimum Wage for Families Act

A proposal to create a three tiered minimum wage to lift incomes of poor families with children. The three wage rates are :

Individuals	**$4.25 an hour**
Families with 1 child	**$7.00 an hour**
Families with 2 or more children	**$8.00 an hour**

How does it work ?

Employers would be able to hire as many job applicants as possible at the current starting wage of $4.25. The Federal government would provide families with children a monthly cash payment to bring these families up to the $7 or $8 level as outlined above. The payments would be administered through the Internal Revenue Service.

How much would it cost ?

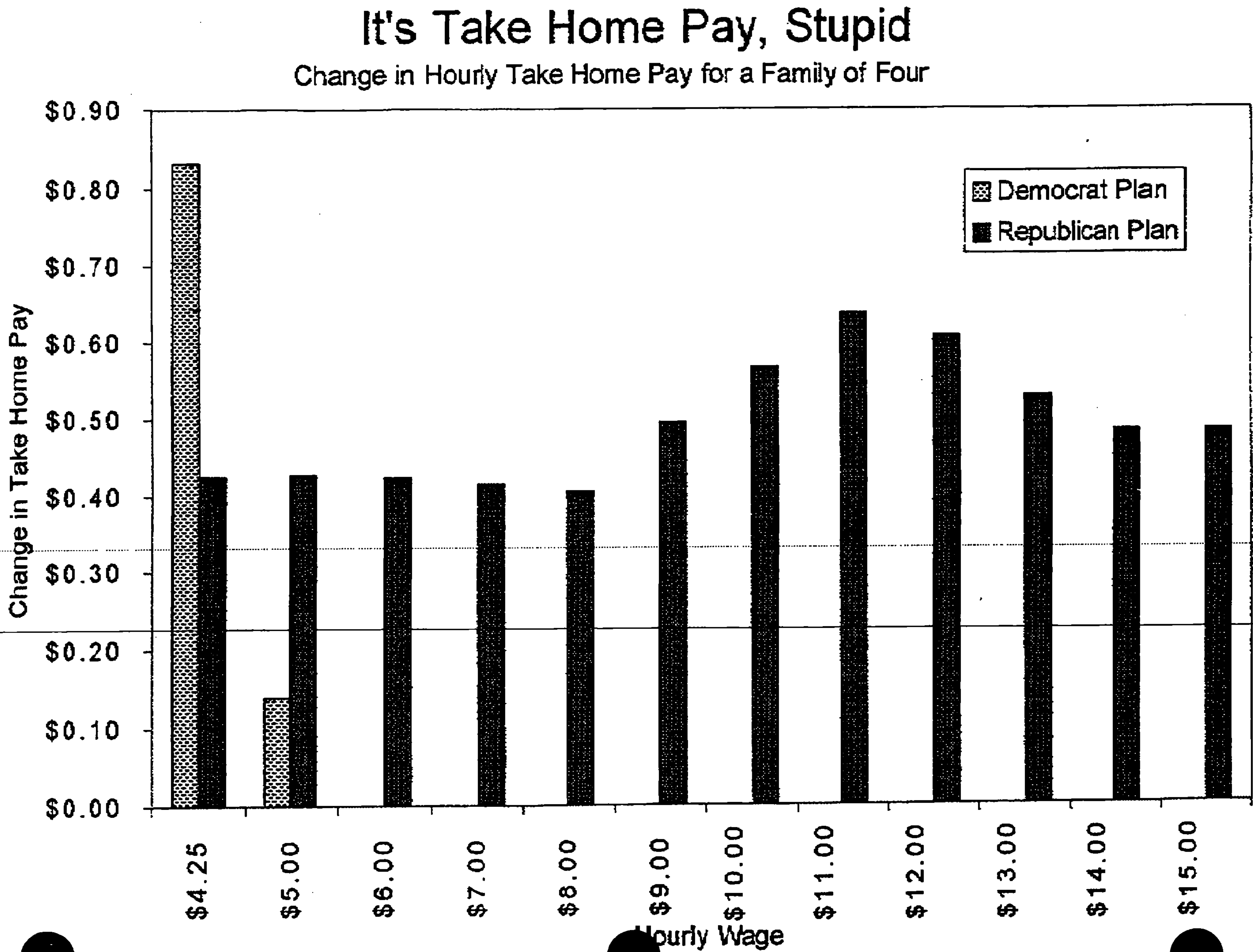
This proposal is expected to be scored by the Joint Tax Committee to save at least $15 billion over 6 years. Much needed reforms of the poorly designed Earned Income Tax Credit will provide significant savings that will be used to increase assistance to those families that actually have to raise children. Any additional savings generated from reforms of the EITC program will be used to finance the $500 per child tax credit available to all low-income and middle class families.

How does it fit with the Republican Tax Cut proposal ?

The Minimum Wage for Families Act can be easily integrated into the $500 per child tax credit proposal. When combined, **all** families, whether they earn $4.25 or more an hour, will see their take home pay increase because of this proposal.

How does it complement the Republican Welfare Reform proposal ?

Under the Republican welfare reform proposal, as many as 7 million able-bodied adults on public assistance will be asked to work. Small business can not create 7 million jobs for these often poorly educated individuals at the same time that Democrats want to increase the cost for hiring these workers.


It's Take Home Pay, Stupid
Change in Hourly Take Home Pay for a Family of Four
Democrat Plan
Republican Plan
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Hourly Wage

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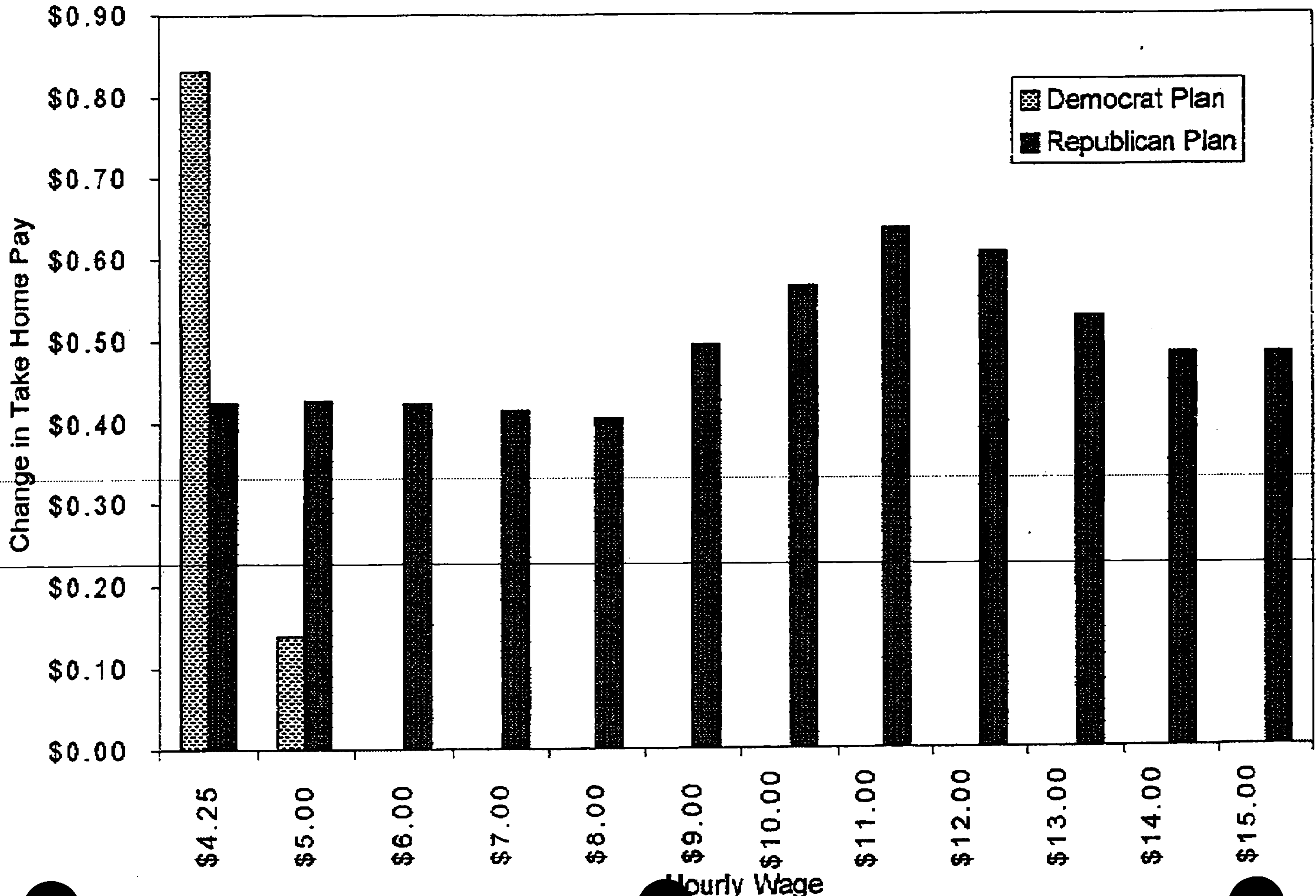

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DRAFT

DRAFT REVISED 3/10/97

Fair Labor Standards Act (FLSA) Enforcement Data

Complaints under the FLSA may involve alleged violations of minimum wage, overtime, recordkeeping, and/or child labor requirements. The Wage and Hour Division received nearly 35,000 complaints in fiscal year (FY) 1996. Available data do not separately record complaints by type of violation alleged.

In FY 1996, 13,687 compliance actions (out of 42,392 completed, or **32%**) disclosed **overtime violations**. These represent **nearly 50%** of those in which FLSA monetary (minimum wage or overtime) violations were found.

In FY 1996, the Wage and Hour Division found just over **$100 million in backwages due to overtime** violations owing to nearly 170,000 workers.

In FY 1996, Wage and Hour's compliance actions involved a little more than **one-half of one percent of all (6.5 million) employers in the U.S.** FLSA monetary violations of some kind are found in **82%** of all compliance actions initiated because of complaints, and in **29%** of all directed (*i.e.*, non-complaint) compliance actions.

In an investigation-based compliance survey of the garment industry in the Los Angeles area in the spring of 1996, Wage and Hour found **55%** of the contractor shops in violation of overtime requirements. A similar survey in 1994 found **78%** in violation.

DRAFT

FAIR LABOR STANDARDS ACT OVERVIEW

The Fair Labor Standards Act (FLSA) sets minimum wage, overtime pay, child labor standards, and recordkeeping requirements. It requires payment of the Federal minimum wage ($4.25 per hour), and time-and-one-half overtime premium pay, based on the regular rate of pay, for hours worked over 40 per week, to all covered employees, unless a particular exemption applies.

COVERAGE

Not every business or employee is covered; those not covered do not have to meet FLSA's terms. Coverage is based on the nature of the business and the employee's duties. Employees engaged in interstate commerce or in producing goods for interstate commerce, and all employees in certain enterprises so engaged, including public agencies (Federal, State and local governments), are covered. Interstate commerce is broadly defined to include working in communications or transportation; regular use of the mails, telephones and other interstate communications; documenting records of interstate transactions (including interstate credit card transactions); handling, shipping or receiving goods that are moving in interstate commerce; crossing State lines during the normal course of employment; and working for independent contractors that do clerical, custodial or maintenance, or other work for businesses engaged in interstate commerce or in producing goods for interstate commerce. Many enterprises with annual gross sales or business less than $500,000 do not meet FLSA's "enterprise coverage" test.

EXEMPTIONS

FLSA's exemptions mean some covered employers do not have to pay minimum wage or overtime to certain employees. Some exemptions are based on the type of business while others depend on the work of individual employees. An employee may be exempt from FLSA's minimum wage or overtime standards, or could be exempt from both. FLSA also has partial exemptions from overtime (e.g., firefighters receive overtime after 53 hours per week under §7(k) of FLSA). FLSA currently provides nine complete exemptions from both minimum wage and overtime in §13(a), and 22 full or partial exemptions from overtime in §13(b).

MAXIMUM HOURS

There is no limit on the maximum number of hours in a day or days in a week that an employee may be required to work if the employee is at least 16 years old and if the employer pays proper overtime to covered, nonexempt employees who work over 40 hours per week. Compliance with FLSA does not excuse an employer from obligations to meet any higher standards required by State or local laws or collective bargaining agreements.

OVERTIME PAY REQUIREMENTS

All covered, nonexempt employees must be paid overtime pay, based on time-and-one-half their "regular rate of pay," for all hours worked over 40 per week. FLSA's overtime rules were intended to discourage employees working excessively long hours by increasing the cost through time-and-one-half premium pay on the hours worked over 40 per week, and to encourage employers to spread available work to more employees. To make it effective, Congress required that all remuneration paid to, or on behalf of, an employee (except for a few specific exclusions) be included in the "regular rate" for computing the time-and-one-half overtime premium rate.

DRAFT

COMPTIME

PRIVATE SECTOR

The Fair Labor Standards Act (FLSA) does not allow employers in the private sector to grant compensatory time off ("comp time") in lieu of monetary payment for overtime hours worked. FLSA requires that all covered, nonexempt employees in the private sector receive time-and-one-half overtime premium pay on the next regular payday after the work is performed for all hours worked beyond 40 per week.

PUBLIC SECTOR

State and local governments are allowed, under the 1985 FLSA Amendments, to substitute paid time off as "comp time" in lieu of overtime pay under certain conditions. The comp time must accrue at 1½ hours for each hour of overtime worked. The law limits how many comp time hours may be accumulated (480 hours in fire protection or law enforcement; 240 hours elsewhere). Use of comp time is only allowed pursuant to an agreement or understanding between the employer and the employee (or representative) reached before the work is performed. A public employee must be allowed to use accumulated comp time within a reasonable period after requesting it if taking it would not unduly disrupt the employer's operations. When an employee is terminated, any unused comp time must be paid at the average regular rate over the last three years or the final regular rate, whichever is higher.

The legislative history to the 1985 FLSA Amendments reflects that Congress wanted to respond to concerns of State and local governments over the financial impact of FLSA's overtime provisions by accommodating existing pay practices that had been worked out voluntarily between many State and local governments and their employees. Such arrangements included providing comp time off instead of premium pay for overtime hours, which "... reflect[ed] mutually satisfactory solutions that [were] both fiscally and socially responsible. To the extent practicable, [Congress sought] to accommodate such arrangements". S. Rep. No. 159, 99th Cong., 1st Sess. 8 (1985).

FEDERAL GOVERNMENT SECTOR

Title 5 of the U.S. Code governs Federal employees' pay entitlements, ***in addition to*** FLSA's provisions. Title 5 allows Federal employees to be granted comp time off, hour-for-hour, for irregular or occasional overtime hours worked under conventional or fixed schedules or for any overtime worked under an "alternative" work schedule. Employees not exempt under FLSA may ***elect***, but may not be ***required*** to accept, comp time instead of overtime pay. Accumulated comp time is limited to 64 hours carryover from one year to the next. A separating employee is paid for unused comp time at the rate in effect when the comp time was earned.

"Alternative" work schedules began as a three-year experiment in the Federal government in 1978, were extended in 1982, and made permanent in 1985. Federal employees on alternative, compressed, or flexible schedules may accumulate up to 24 "credit hours" without payment of overtime. "Credit hours" are voluntarily worked by an employee beyond the basic 40-hour per week work schedule requirement which may later be used as paid time off.

DRAFT

Ballenger Comp Time Bill

Cons (against comp time)

- FLSA's overtime provisions were intended to discourage long work hours and spread available employment opportunities to more workers. Easing the overtime penalties for employers by making comp time an available option for delaying over-time payments is inconsistent with one of FLSA's fundamental purposes.

- Low-wage workers and those that have little leverage in the workplace can never really be assured of a "free choice" if they wish to receive cash for overtime premium pay.

- For unscrupulous employers, this will provide one more opportunity to exploit workers -- and it will be difficult to prove they have done so.

- Enforcement of FLSA's overtime provisions will be even more difficult.

Cons (against Ballenger bill)

- There is no way to guarantee that a private sector employee would eventually receive payment for accrued overtime obligations in the comp time bank if a company folds or declares bankruptcy.

- There can be up to a 30 day delay after an employee requests a payout of accrued comp time.

- Employees' exercise of free choice should not place their jobs in jeopardy or disadvantage their ability to advance, or otherwise result in discrimination (e.g., slower promotions; less favorable work assignments; whether overtime hours would be made available by the employer if the employee chooses cash instead of comp time, etc.)

- The provisions that are intended to ensure choice are insufficient or are easily circumvented by the unscrupulous employers:

  - only willful violations of the coercion provision are penalized;

  - there is no requirement that the employer/employee agreement be in writing;

  - there is no provision for how to handle a change in the employer/ employee agreement;

  - no notice of employee rights is required;

- an employer could offer the option of comp time to only selected employees.

- Employers will actually increase their control over employees' worklife:

    - an employer could deny the use of banked comp merely by stating that the employee's absence would "unduly disrupt the operations of the employer;"

    - an employer could decide <u>at any time</u> to pay an employee for banked comp time – even if the employee has plans for using the comp time (vacation, family and medical leave, etc).

- There is no recordkeeping requirement, so employees would have to keep track of their own accrued hours.

- Employees should be able to choose whether to even work the overtime in the first place.

- Penalties for willful violations of the anti-coercion provision are only available to those who sue privately.

- There will be a competitive advantage for those firms that can avoid the overtime premium pay penalty by paying comp time.

<u>Pros (for comp time)</u>

- According to some polls, a majority of employees would like the option of receiving comp time (in lieu of overtime pay) so that they have more time off to spend with their family, pursue other interests, go to school, etc.

- State, local and federal employees already have this option and it seems to work well for them.

<u>Pros (for Ballenger bill)</u>

- Some of the provisions actually provide greater benefits or protections for private employees than is currently provided for state and local government employees (e.g., coercion clause and penalty for a willful violation of that clause).

DRAFT

May 10, 1996 Ballenger Comp Time Bill (H.R. 2391)

Differences -- Comp Time for State and Local Governments Vs. Private Sector

The bill proposes comp time provisions for the private sector that differ from those for State and local governments in the following respects:

- For employees in the private sector, the agreement or understanding for comp time may not be a "condition of employment."

- Private sector employers may not intimidate, threaten or coerce (or attempt to, directly or indirectly) employees into requesting or not requesting comp time in lieu of overtime pay, or require any employee to use comp time. The public sector has no comparable provisions.

- Private sector employees may accrue no more than 240 hours of comp time in a bank without cash payment. Public sector employees in public safety, emergency response, or seasonal activities may accrue up to 480 hours of comp time; all others, 240.

- For private sector employers, at the end of every year, any unused comp time (in the "bank") must be cashed out at the employee's regular rate at time of payment. No comparable provisions apply to the public sector.

- Private sector employers must cash out accrued comp time within 30 days of employees' written requests. No comparable provisions apply to the public sector.

- Upon termination of employment, private sector employees are paid for unused comp time at the average rate during the period it accrued (for public sector, over the last three years of employment) or the final rate, whichever is higher.

- Private sector employers that willfully violate the anti-intimidation/anti-coercion provisions would be liable in private litigation to affected employees for the amount of each hour of comp time accrued, plus an equal amount in liquidated damages (less each hour of comp time that was used). No comparable provisions apply to the public sector.

DRAFT

Ballenger Comp Time Bill, The "Working Families Flexibility Act" (H.R. 2391)

H.R. 2391 would extend current FLSA comp time provisions now available only for State and local governments to the private sector, with certain changes. Supporters of the bill promote it as a "flexibility" and "family-friendly" issue for employees.

Basic Provisions:

- Comp time hours accrue at 1½ times the number of overtime hours worked.
- Comp time is available only if there is a collective bargaining or other agreement or understanding "knowingly and voluntarily" agreed to by employees before the overtime work is performed.
- The agreement or understanding may not be a "condition of employment."
- Employers may not intimidate, threaten or coerce (or attempt to, directly.or indirectly) employees into requesting or not requesting comp time in lieu of overtime pay, or require any employee to use comp time.
- Private sector employees may accrue no more than 240 hours of comp time in a bank without cash payment.
- At the end of every year, any unused comp time (in the "bank") must be cashed out at the employee's regular rate at time of payment.
- Employees may also, at any time, request in writing that they be paid in cash for accrued comp time; employer has 30 days to comply. Such payments are at the higher of their average pay rate in effect during the period it accrued or the final rate.
- Employer retains the right to cash out any unused comp time at any time.
- Terminated employees are paid for unused comp time at the higher of their average pay rate in effect during the period it accrued or the final rate, which can be collected through private lawsuits as unpaid overtime compensation if necessary.
- Employees would be allowed to schedule and use their comp time as paid time off within a reasonable time after requesting it, if the time away from work does not unduly disrupt the employer's operations.
- Private sector employers that willfully violate the anti-intimidation/anti-coercion provisions would be liable in private litigation to affected employees for damages, computed as the amount of each hour of comp time accrued in violation, plus an equal amount in liquidated damages, less each hour of comp time that the employee used during the period.

DRAFT -- NOT FOR RELEASE

June 24, 1996
(House)

H.R. 2531 - Houseparent Exemption Act
(Hutchinson (R) AR and 67 cosponsors)

The Administration strongly opposes H.R. 2531 which would amend the Fair Labor Standards Act (FLSA) by providing a broad exemption for "houseparents" from the minimum wage and overtime protections of the Act. Under H.R. 2531, child care employees who work and reside in family-like settings at private non-profit institutions would no longer be afforded these essential workplace protections. Furthermore, the President challenged Congress to raise the minimum wage, and H.R. 2531 is inconsistent with that goal.

* * * * * * *

(Do not Distribute Outside the Executive Office of the President)

This Statement of Administration Policy (SAP) was developed by the Legislative Reference Division (Briatico), in consultation with the Department of Labor (Taylor), HRD (Himler), OIRA (Fitzpatrick/Bond), and the WH Office of Deputy Chief of Staff (O'Connor).

The House Committee on Economic and Educational Opportunities reported H.R. 2531, as amended, on May 21, 1996.

Administration Position to Date

On March 21, 1996, Secretary Reich sent a letter on H.R. 2531 to the House Committee on Economic and Educational Opportunities that stated "the Department cannot support broadening a very narrow, targeted overtime exemption to the extent that it would exempt a vast number of 'houseparents' from both FLSA minimum wage and overtime protections."

Background

Currently, the FLSA provides an exemption from overtime protections for certain individuals who are employed by nonprofit educational institutions. Specifically, the exemption applies to individuals and their spouses employed by these institutions: (1) who serve as the parents of children who are orphans or have lost one natural parent or are enrolled in and reside at the institution; (2) if the individual and spouse reside at the institution and receive free room and board; and (3) the individual and spouse receive not less than $10,000 a year combined.

Major Provision of H.R. 2531

H.R 2531 would amend the FLSA to:

- Define "houseparent" to include any person (married or single) employed by a private non-profit institution as a child-care worker who: (1) serves as a substitute parent for children who do not live with their own families and (2) resides in a family-like setting with such children.

- Provide a broader exemption from minimum wage and overtime protections for employees who serve as "houseparents" for abused, neglected, delinquent, orphaned, homeless, or emotionally impaired children if: (1) the children's primary residence is the institution; (2) the employee resides at the institution with the children for at least 72 hours a week; and (3) the employee receives free room and board and earns not less than $8,000 a year.

Pay-As-You Go

HRD (Himler) advises that H.R. 2531 would not affect receipts or outlays; therefore it would not be subject to the pay-as-you-go requirements of the Omnibus Budget Reconciliation Act of 1990. CBO agrees (final).

LEGISLATIVE REFERENCE DIVISION DRAFT
June 24, 1996 - 12:15 p.m.

H.R. 1227, Fawell Bill to Amend the Portal-to-Portal Act

The Portal-to-Portal Act of 1947 (Portal Act) (29 U.S.C. 251 et seq.) relieves employers from having to pay minimum wages and overtime compensation under the Fair Labor Standards Act (FLSA), the Davis-Bacon Act, and the Walsh-Healey Public Contracts Act for certain specified activities. The effect is to limit compensation for time spent in specified activities performed by employees which are "preliminary" or "postliminary" to an employee's "principal" activity or activities. As a consequence, these activities are not compensable work hours for purposes of minimum wage and overtime.

According to its sponsor, H.R. 1227 is intended to ensure that use of a company-owned vehicle by an employee for commuting from home to the first job site, and from the last job site to home, would not be considered compensable work time. This would recognize longstanding industry practices that the sponsor characterizes as mutually beneficial to both employees and employers.

Basic Provisions:

- The bill amends section 4(a) of the Portal Act to declare that an employee's use of an employer's vehicle for travel and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities and, therefore, not compensable hours of work.
- This provision would apply if the travel is within the "normal commuting area of the employer's business" and use of the vehicle is "subject to an agreement" between the employer and employee or employee's representative.

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Differences with Current Law

Under existing law, travel from home before the regular work day begins, and return travel to home after the work day ends, is ordinary "home-to-work" travel, which is not compensable. But all time spent in travel as part of an employee's principal activity, such as travel from job site to job site during the work day, is compensable work time. Where an employee is required to report at a meeting place to receive instructions, to pick up tools, or to perform other work, the travel time from the meeting place to the work place is also compensable work time.

Until August 1994, DOL held that if an employee received instructions or work assignments at home and then drove the employer's vehicle from home to the first job site, the travel time was compensable hours of work. Investigations of employers in the home heating oil industry in the New York metropolitan area revealed that certain employer practices had evolved contrary to FLSA's requirements, and the industry had overlooked long-settled interpretations of compensable travel time. Enforcement actions generated a groundswell of resistance from various firms and intense Congressional interest and pressure, prompting DOL to issue a letter ruling in April 1995 holding that violations would no longer be asserted for travel between home and the worksite ("home-to-work" travel) in an employer-provided vehicle if: (1) the driving is strictly voluntary and not a condition of employment; (2) the vehicle is a type that would normally be used for commuting; (3) the employee incurs no cost for driving or parking the vehicle at home or elsewhere; and (4) the worksites are within the normal commuting area of the employer's establishment.

H.R. 1227 was introduced three weeks before DOL issued its April 3, 1995, interpretative statement of policy.

- There are situations where employees perform work while traveling by conducting business for the employer or the employer's customers -- for example, making telephone contacts to clients. This would be a compensable activity under current law but would be excluded under the bill.

- The bill would exclude travel time from home to work, as well as "activities performed by an employee which are incidental to the use of such vehicle for commuting." It is not entirely clear what is intended to be excluded from compensable work time, so there is potential that litigation could construe the exception quite broadly.

- The exception would apply under this bill if the travel is within the "normal commuting area of the employer's business" and use of the vehicle is "subject to an agreement" between the employer and employee or employee's representative. Under DOL's April 1995 ruling, additional limitations apply:

(1) while the bill provides that use of the vehicle "is subject to an agreement," that language may not preclude terms and conditions of employment that are not fully voluntary but are unilaterally imposed by the employer;

(2) there is no limitation on the type or size of vehicle, so that an employee might not be compensated for driving a heavy truck or cherry picker, for example (some heavy trucks may be restricted to certain routes, which could lengthen employees' "commuting" time without any offsetting compensation under the bill);

(3) there is no provision to ensure that employees incur no costs for driving or parking the employer's vehicle at home or elsewhere.

Fawell Travel Time Bill (Portal Act Amendment)

Cons (against Fawell bill)

- The Department of Labor has already taken action through its April 3, 1995, published interpretation to clarify "home-to-work" travel in company vehicles, so this legislation is unnecessary.

- The bill introduces ambiguous language into the Portal Act, creating uncertain concepts and litigation outcomes in applying that Act, raising uncertainty and needless litigation, and creating serious concerns that the exception may encroach into circumstances that should remain compensable.

- There are insufficient safeguards to ensure that use of the employer's vehicle is strictly voluntary on the part of employees.

- The proposed change in law chips away at existing wage protections, and opens the door to potential worker abuse by unscrupulous employers.

- There is a perception that the bill may allow employers to transfer some of the costs of their operations (storage of company vehicles) onto employees without just compensation.

- The bill has the potential to disrupt some ongoing industry practices where the travel to and from home and the first and last worksites are paid for as compensable work time, which would lower compensation for some workers.

Pros (for Fawell bill)

- With added clarification that incorporates further protections as in the DOL interpretative ruling, there is some mutual benefit for both employees and employers -- employees avoid the costs of providing their own means of transportation (vehicle plus gasoline) for commuting.

- Use of company vehicles by employees for commuting is a pervasive practice in certain industries, and the bill would enable these practices to continue without disruption.

- Employees avoid having to physically check in at the company office before going to their first worksite and from the last worksite each day (higher productivity for employers).

- Employers avoid having to incur the costs of centrally storing the vehicle.

AMENDMENT TO H.R. 1227

OFFERED BY MR. FAWELL

Strike all after the enacting clause and insert the following:

SECTION 1. PROPER COMPENSATION FOR USE OF EMPLOYER VEHICLES.

Section 4(a) of the Portal-to-Portal Act of 1947 (29 U.S.C. 254(a)) is amended by adding at the end the following: "For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.".

SEC. 2. EFFECTIVE DATE.

The amendment made by section 1 shall take effect on the date of the enactment of this Act and shall apply in determining the application of section 4 of the Portal-to-Portal Act of 1947 to an employee in any civil action brought before such date of enactment but pending on such date.

UNITED STATES DEPARTMENT OF LABOR

FACSIMILE TRANSMISSION

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MESSAGE: This is a background piece on H.R. 1227, Rep. Fawell's Portal to Portal bill. It is scheduled to go to the Rules Committee on Tuesday and the Floor on Wednesday in the House. As you know, the plan in the House at this point is to link this bill with the minimum wage.

104th Congress
2d Session

H. RES. ______

H.R. 3448 -- The Small Business Job Protection Act of 1996, and H.R. 1227 -- The Employee Commuting Flexibility Act of 1996

1. Modified closed rule.

2. Provides for the consideration in the House of H.R. 3448, the Small Business Job Protection Act, without the intervention of a point of order except those arising under sec. 425(a) of the Congressional Budget Act (prohibiting unfunded mandates).

3. Provides that the amendment in the nature of a substitute recommended by the Ways and Means Committee shall be considered as read.

4. Waives all points of order against the committee amendment in the nature of a substitute except those arising under sec. 425(a) of the Budget Act.

5 Provides that the bill and committee amendment shall be debatable for one hour, divided between the chairman and ranking minority member of the Ways and Means Committee.

6. Orders the previous question on the bill and committee amendment to final passage without intervening motion except one motion to recommit, with or without instructions.

7. Provides that the provisions of clause 5© of rule XXI (requiring a three-fifths vote on bills, amendments, and conference reports containing income tax rate increases) shall not apply to the bill, amendments thereto, or conference reports thereon.

8. Provides after the disposition of H.R. 3448 for consideration in the House of H.R. 1227, the Employee Commuting Flexibility Act without intervening point of order except those arising under sec. 425(a) of the Budget Act (prohibiting unfunded mandates).

9. Provides that the amendment in the nature of a substitute recommended by the Economic and Educational Opportunities Committee, as modified by the amendment printed in section 3 of the rule (adding a short title), is considered as adopted.

10. Orders the previous question to final passage without intervening motion except: (1) 90 minutes of debate divided between the chairman and ranking minority member of the Economic and Educational Opportunities Committee; (2) an amendment printed in part 1 of the report on the rule if offered by Rep. Riggs of California or his designee, debatable for 90 minutes; (3) an amendment printed in part 2 of the report on the rule if offered by Rep. Goodling of Pennsylvania or his designee, debatable for one hour and subject to a division of the question between subsection 3(b) (small business exemption) and the remainder of the amendment; and (4) one motion to recommit, with or without instructions.

11. Provides that each amendment made in order is considered as read, is not subject to amendment or point of order, except those arising under sec. 425(a) of the Budget Act.

12. Provides that in the engrossment of H.R. 3448, the Clerk shall await the disposition of H.R. 1227 and shall add the text of H.R. 1227 as passed by the House.

13. Provides that upon the addition of the text of H.R. 1227 to the engrossment of H.R. 3448, H.R. 1227 shall be laid on the table.

RESOLUTION

Resolved, That upon the adoption of this resolution it shall be in order without intervention of any point of order (except those arising under section 425(a) of the Congressional Budget Act of 1974) to consider in the House the bill (H.R. 3448) to provide tax relief for small businesses, to protect jobs, to create opportunities, to increase the take home pay of workers, and for other purposes. The amendment in the nature of a substitute recommended by the Committee on Ways and Means now printed in the bill shall be considered as read. All points of order against the committee amendment (except those arising under section 425(a) of the Congressional Budget Act of 1974) are waived. The bill and the amendment shall be debatable for one hour equally divided and controlled by the chairman and ranking minority member of the Committee on Ways and Means. The previous question shall be considered as ordered on the bill and the amendment to final passage without intervening motion except one motion to recommit with or without instructions. The yeas and nays shall be considered as ordered on the question of passage of the bill and on any conference report thereon. Clause 5(c) of rule XXI shall not apply to the bill, amendments thereto, or conference reports thereon.

Sec. 2. After disposition of H.R. 3448 it shall be in order without intervention of any point of order (except those arising under section 425(a) of the Congressional Budget Act of 1974) to consider in the House the bill (H.R. 1227) to amend the Portal-to-Portal Act of 1947 relating to the payment of wages to employees who use employer owned vehicles. The amendment in the nature of a substitute recommended by the Committee on Economic and Educational Opportunities now printed in the bill, modified by the amendment printed in section 3 of this resolution, shall be considered as adopted. The previous question shall be considered as ordered on the bill, as amended, and any further amendment thereto to final passage without intervening motion except: (1) 90 minutes of debate on the bill, which shall be equally divided and controlled by the chairman and ranking minority member of the Committee on Economic and Educational Opportunities; (2) the further amendment printed in part 1 of the report of the Committee on Rules accompanying this resolution, which may be offered only by Representative Riggs of California or his designee, shall be in order without intervention of any point of order (except those arising under section 425(a) of the Congressional Budget Act of 1974), shall be considered as read, shall be separately debatable for 90 minutes equally divided and controlled by the proponent and an opponent, and shall not be subject to a demand for division of the question; (3) the further amendment printed in part 2 of the report of the Committee on Rules accompanying this resolution, which may be offered only by Representative Goodling of Pennsylvania or his designee, shall be in order without intervention of any point of order (except those arising under section 425(a) of the Congressional Budget Act of 1974), shall be considered as read, shall be separately debatable for one hour equally divided and controlled by the proponent and an opponent, and on which the question shall be divided between the proposed subsection 3(b) and the remainder of the proposed section 3 (and shall not otherwise be subject to a demand for division of the question); and (4) one motion to recommit with or without instructions.

Sec. 3. The amendment in the nature of a substitute recommended by the Committee on Economic and Educational Opportunities now printed in H.R. 1227 is modified by the following amendment:

Immediately after the enacting clause insert the following new section (and redesignate succeeding sections accordingly):

"Section 1. This Act may be cited as the 'Employee Commuting Flexibility Act of 1996'.".

Sec. 4. (a) In the engrossment of H.R. 3448, the Clerk shall --

(1) await the disposition of H.R. 1227 pursuant to section 2 of this resolution;

(2) add the text of H.R. 1227, as passed by the House, as new matter at the end of H.R. 3448;

(3) conform the title of H.R. 3448 to reflect the addition of the text of H.R. 1227 to the engrossment;

(4) assign appropriate designations to titles within the engrossment; and

(5) conform provisions for short titles within the engrossment.

(b) Upon the addition of the text of H.R. 1227 to the engrossment of H.R. 3448, H.R. 1227 shall be laid on the table.