

Economic Policy Institute

April 25, 2017

Representative Virginia Foxx
Chairperson
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC

Representative Robert C. Scott
Ranking Member
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC

Dear Chairwoman Foxx and Ranking Member Scott:

On behalf of the Economic Policy Institute Policy Center (EPI-PC), we write to the Committee to express our strong opposition to The Working Families Flexibility Act (H.R. 1180), introduced February 16, 2017, by Rep. Martha Roby (R-Ala.). The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI-PC urges Members of the Committee to oppose this bill, which would further erode overtime protections for American workers.

Millions of workers are working overtime but are not getting paid for it. This is, in part, the result of outdated overtime rules governing workers' eligibility for overtime pay. The erosion of overtime protections has led to workers earning less money while working longer hours, and has created a generally overworked middle class. The way to address this issue is to strengthen overtime protections—not, as H.R. 1180 does, create a new *employer* right to avoid paying workers overtime.

The Working Families Flexibility Act would amend the Fair Labor Standards Act (FLSA) to allow private-sector employers to “compensate” hourly workers with compensatory time off in lieu of overtime pay. Contrary to proponents' claims, the bill does not create employee rights, it takes them away. It does create a new *employer* right—the right to delay paying any wages for overtime work for as long as 13 months. The legislation forces workers to compromise their paychecks for the

possibility—but not the guarantee—that they will get time off from work when they need it.

In early April, a witness for the U.S. Chamber of Commerce, Leonard Court, testified before this committee in support of H.R. 1180. As a witness, he tried and failed to explain why every significant labor or women’s rights advocacy group opposes H.R. 1180, despite the supposed advantages its advocates tout. The fundamental reason for this is that H.R. 1180, and its companion bill in the Senate (S. 801), does nothing to improve family flexibility, paid family leave, or fair scheduling practices, and simply gives employers the right not to pay overtime at the time when overtime is worked.

The FLSA is the original family-friendly law. It permits a wide range of flexible work schedules. For example, under current law, public and private employers may choose to allow their workers to vary the start or end of their workday, including on an ad-hoc basis. Employers may also choose to permit employees to schedule four 10-hour days with one workday off, or arrange nine-hour workdays with a day off every other week. All of these arrangements are permissible under the FLSA. Employers can and should take advantage of the flexibility the current law already provides. Perhaps most revealing, under the FLSA, an employer may pay an employee for overtime worked in a given week and then, to reward the employee for putting in extra time, may schedule future unpaid time off. The result would be that the total annual hours worked and income received would be the same as under Rep. Roby’s comp time in lieu of overtime proposal, but workers would not have to wait for up to 13 months to be paid for the overtime hours. In other words, *everything the comp time bill purports to provide for workers is actually available under the FLSA.*

H.R. 1180 will reduce worker income. The Working Families Flexibility Act would result in less money in employees’ paychecks, even when they do work overtime. Many employees rely on overtime pay to earn enough money to make ends meet every month—but this bill would allow employers to avoid paying overtime premiums when employees work extra hours, by giving them “comp time” to bank for future use instead. This means employees will still be working longer hours, but they will be receiving less in their paychecks at the time they work the longer hours. They will essentially be loaning their employer their overtime pay (at no interest) for as long as 13 months.

Under the legislation, an employee may decline to accept comp time in lieu of overtime. It follows that employers will assign overtime preferentially to those who accept comp time, thereby depriving the workers who need the extra cash of opportunities for overtime work. So, not only will the employees who receive comp time instead of overtime pay

earn less, so will the employees who refuse comp time and insist on being paid overtime pay.

H.R. 1180 undermines the fundamental goal of overtime protections, which is to discourage employers from overworking employees without additional pay.

Allowing employers to give “comp time” cheapens the use of overtime since employers don’t have to pay out overtime premiums when the work is actually done. The employer, not the employee, has the final say over when comp time can be used.

Employers can deny an employee’s request to use comp time hours if they feel it would “unduly disrupt” the employer’s business. And employees are required to make a request in advance without any leeway in emergency situations. Accordingly, many employees will work a lot of overtime and find their leave banks full at the end of the year. If workers don’t manage to use at least two-thirds of their banked comp time, they will actually have worked more hours during the year, not less.

It is especially distressing that under H.R. 1180, for the first time, employees would essentially have to negotiate with their employer to receive overtime pay that they have always had as a right until now.

“Comp time” in lieu of overtime pay is wrong for the private sector. Proponents of comp time in lieu of overtime pay argue that public-sector employees receive this benefit and it should be extended to private-sector workers. However, there are significant differences between public- and private-sector workers that make this a much riskier proposition:

- There is little information available on the use of and experience with comp time in state and local governments, making it impossible to determine whether workers are able to meaningfully access comp time under the system.
- Public-sector workers can’t be fired except for good cause, they have administrative appeal rights, and they have significantly higher rates of union representation. These considerations make them more likely to challenge an employer’s decision denying them the use of comp time and less likely to be coerced into agreeing to comp time in lieu of overtime pay.
- Private-sector workers also face a real danger of losing comp time accrued in the event of a business failure. [According to the Small Business Administration, in 2013, over 400,000 small businesses closed.](#) Nothing in the legislation provides workers whose employer goes out of business with a guarantee to receive payment for accrued comp time. The employer is not required to put sufficient money in escrow or to buy a bond to guarantee payment in case of closure or bankruptcy.

- Wage theft, the practice of employers failing to pay workers the full wages to which they are legally entitled (including their overtime premiums), is already a widespread and deep-rooted problem that directly harms millions of U.S. workers each year, depriving them of billions of dollars annually. H.R. 1180 could add another complicated layer to this mix, without providing any additional enforcement authority or funding to the U.S. Department of Labor.

At no risk to the employee, the FLSA already allows an employer to grant time off to employees who work overtime. H.R. 1180 adds nothing but delay and risk to the employees' right to receive extra compensation when they work more than 40 hours in a week. We strongly urge Members of the Committee to oppose this bill.

Sincerely,

Ross Eisenbrey
Vice President, Economic Policy Institute Policy Center

Celine McNicholas
Labor Counsel, Economic Policy Institute Policy Center