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THE NAKED TRUTH ABOUT COMP TIME

Current proposal is like emperor's new clothes:
there's nothing there for workers

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Of all the worker protections enacted over the years, the Fair Labor Standards Act (FLSA), which established the 40-hour workweek in 1938, remains the bedrock of family-friendly statutes. This is the law that brought Americans the weekend (before the FLSA, six- and seven-day workweeks were not uncommon). The only enforcement mechanism for the 40-hour workweek is the requirement that employers pay time-and-a-half for all hours over 40 in a week. In other words, the FLSA establishes a monetary disincentive for employers to work their employees more than 40 hours a week. For two-thirds of a century, this system has struck a successful balance by giving employers a way to get work done at a fair price in times of overload while at the same protecting employees' time with their families.

The compensatory, or "comp," time bill (H.R. 1119) proposed by Rep. Judy Biggert (R-Ill.) would upset that balance by eroding protections for workers' rights and creating a strong financial incentive for employers to lengthen the workweek. A clear-headed look reveals that there is nothing in the proposed bill for workers but rhetoric and slick marketing. Contrary to what the bill's proponents say, H.R.1119 doesn't create employee rights, it takes them away. It does, however, create a dangerous new *employer* right—the right to delay paying any wages for overtime work for as long as 13 months.

Under the FLSA, employees who work overtime must be paid time-and-a-half for those hours at the time they are worked, but they can arrange with the employer to take unpaid time off at a later date.

Under H.R. 1119, however, an employee who works overtime hours in a given week might not receive any pay or time off for that work until more than a year later, at the employer's discretion. Without receiving any interest or security, the employees, in essence, lend their overtime pay to the employer in the hopes of getting it back some time later as paid time off. Employees' overtime compensation is put at risk of loss in the event of business failure and closure, bankruptcy, or fraud. Furthermore, employees get no guarantee of time off when they want or need it.

It seems strange that some employers are now asking for more flexibility in scheduling workers when most employers don't take advantage of the flexibility the law already provides. The great majority of employers do

not allow their workers to vary the time they start or end the workday. Even fewer allow workers to schedule four 10-hour days with Friday off, or to arrange a nine-day schedule with every other Friday off, arrangements that are permissible under the FLSA.

And almost no employers let employees have time off in exchange for overtime hours, even though the law permits it.

So, why are employers interested in H.R. 1119? Here's one good reason: a company with 200,000 FLSA-covered employees, for instance, might get 160 free hours at \$7.00 an hour from each of them (160 hours is the maximum allowed under H.R. 1119). That's the equivalent of \$224 million that the company wouldn't have to pay to its workers for up to a year after the worker has earned it. Considering that, under normal circumstances, the employer might have to pay 6% interest for a commercial loan of this magnitude, it could save \$13 million by relying on comp time to "borrow" from its employees instead.

What do employees with families really need?

To improve living standards, working families really need three things: more income, fewer work hours, and more regular schedules. Comp time legislation, as presented in H.R. 1119, fails on all three counts.

Comp time will reduce worker income.

- By design, comp time is *intended* to reduce employee pay as a trade-off for shorter hours.
- Not only will the employees who substitute comp time earn less, so will the employees who refuse comp time and insist on being paid for their overtime at the time they work it. Employers will assign overtime preferentially to those who accept comp time, thereby depriving the workers who need the extra cash of overtime work.
- Workers will risk the loss of up to 160 hours of wages because their overtime pay is not put into escrow or a trust fund and could be lost if the employer goes out of business or declares bankruptcy. Each year, hundreds of thousands of employers go out of business.
- Workers with comp time credits will not earn interest of any sort, as they would if they put their overtime pay in the bank.

Comp time will actually lead to longer work hours for many employees.

- First, because it makes overtime work cheaper for the employer, they will be more likely to schedule it. This is fundamental economics. As overtime labor hours becomes less expensive, employers will purchase more of them. Comp time undermines the fundamental goal of the FLSA's overtime rules: to discourage overtime work by making it more expensive.
- Second, *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.* Employees are not guaranteed that they can ever use their banked comp time in H.R. 1119. The employer can veto the employee's requests to use banked comp time, so many employees will find their leave banks full at the end of the year. In an effort to work enough overtime in order to

have more time off with their families, workers will end up worsening their time pressures.

Comp time means unpredictable schedules.

- Regular schedules are the key to employees being able to balance work and life demands. The last thing a mother with kids to pick up from child care at 5:00 needs is to be told that she has to work two hours of overtime. Getting three hours off at some time in the future is of little benefit, particularly when it's the employer—not the employee—who decides when that time off can be scheduled.
- On its face, the notion that workers have to first work stressful, schedule-wrecking overtime in order to get time off is contradictory and counterproductive.
- Child care is hard to find and hard to arrange. Parents cannot afford to risk losing child care when they are compelled to work overtime and fail to pick up their children at the appointed time. Good child care is also costly, so trading comp time for cash overtime premium pay is an especially bad deal for the low-income parents who are most likely to be covered by the FLSA.

Comp time is mistargeted

It is important to remember who, in fact, is covered by the FLSA's overtime provisions. By and large, better-paid employees are not covered. Doctors, lawyers, architects, and other professionals are exempt; outside sales staff on commission are exempt, as are other "executives," a category defined to include workers such as assistant managers at fast food restaurants and many administrative employees. The people most able to afford to trade part of their pay for shorter hours are those who are already exempt from the FLSA.

We should be skeptical of polls that purport to show that employees want to trade their overtime pay for comp time. Such polls never ask, "Would you trade your overtime pay for comp time if you couldn't be sure that you would ever get to take time off when you wanted to?" Most polls don't even make sure that the employees they survey are covered by the FLSA. The 10% of workers who might be willing to accept less pay for shorter hours are more likely those who are exempt and who earn enough to contemplate doing with less.

Public sector vs. private sector

Some have suggested that, if public employees have the "benefit" of comp time, then private sector employees should, too. But the situations for public and private sector workers are vastly different.

The risks for public sector workers are much less. They can't be fired except for good cause, and they have administrative appeal rights. Thus, these public sector workers can more safely challenge an employer's decision to deny the use of comp time off because of "undue disruption" to the employer's operation. Unlike private sector workers, they aren't at risk of the employer's bankruptcy or business failure. The risks in the private sector are simply much higher: Even in the boom year of 2000, the SBA says 550,000 businesses folded, and more than 200,000 of them were business failures.

In the public sector, there's no profit motive for pushing comp time instead of overtime pay: public sector managers won't get richer by coercing their employees. Recordkeeping is better and more open to public scru-

tiny, so it is easier for public employees to establish the amount of time in their leave bank. Turnover is also lower in the public sector, so employees are less likely to leave unused credits with a former employer. And unions are far more prevalent in the public sector, leaving employees less likely to rely on the overworked, understaffed Department of Labor Wage and Hour Division to protect their rights. The Wage and Hour Division has fewer than 1,000 inspectors for a U.S. labor force of 150 million workers and 7 million workplaces.

Comp time will leave workers more vulnerable

Nothing in H.R. 1119 would prohibit an employer from assigning overtime work exclusively to employees who choose the comp time option. Workers who depend on cash overtime to provide for their families would be hurt, with no remedy.

H.R. 1119 provides no remedy for the employee who plans to use two weeks of accrued comp time for a vacation, only to have the employer deny the leave, telling him it is “unduly disruptive” to take it when the employee has planned.

There is no remedy for the employee who wants to use comp time on a Friday, only to be told, “OK, but you’ll have to work on Saturday.” It will also be perfectly legal for employers to cut workers' paid vacation leave and force them to substitute comp time, which they cannot accrue without first having to work overtime hours.

Needless to say, the average worker will not be able to afford an attorney to sue a bankrupt or liquidated employer for lost comp time credits. H.R. 1119 does not even provide a priority in bankruptcy for employee claims.

Conclusion

Once one looks past the false marketing, the naked truth about H.R. 1119 is revealed. It is nothing more than a scheme to allow employers to avoid paying for overtime, a scheme that will result in longer hours, lower incomes, and less predictable workweeks for American workers.

If Congress wants to shorten work hours and assure family-friendly schedules for America’s workers, then it has many options that would be better than H.R. 1119, including: prohibiting mandatory overtime (especially when scheduled on short notice); raising the overtime premium from time-and-a-half to double time; or increasing FLSA overtime coverage by limiting exemptions.