The Autocratically Flexible Workplace

A History of Overtime Regulation in the United States

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Taking Care of Business: 
Congress Cuts Overtime Coverage in 1949

Henry Ford announced yesterday that his contribution to the Wilson campaign would be a country-wide eight-hour day propaganda. This will be spread from every point where there is a Ford agency.... “I am in favor of the passage of a Federal law that will make eight hours the national working day. ... There is no business where the employees cannot be worked eight hours a day and no more,” he said. “If they can’t do it, then the business is not properly managed.”

World War II and Democratic control of Congress frustrated employers’ initial efforts to revise the FLSA overtime provision. When Republicans gained control of the Eightieth Congress in 1947, big business’s priorities were legislative intervention to put a stop to the thousands of portal-pay suits that had been filed for travel and wash-up time under the FLSA, and enacting the Taft-Hartley amendments to undermine union power under the National Labor Relations Act. Once those missions had been accomplished, employers turned their attention to other restrictions on their ability to deploy labor as they saw fit. Thus despite widespread wartime coverage in the business press of findings that longer work-weeks led to less than proportional increases in output, demonization of the 40-hour week became a propagandistic priority among large employers in 1947.

Hearings on FLSA revision held by the House Labor Committee late that year gave a good sense of what firms found restrictive about the law and how far they intended to roll back labor standards legislation. Representative Owens (R. Ill.), taking up the cause that employers had lost in 1942, suggested that premium overtime payments be calculated only on the basis of the minimum wage, leaving organized workers to bargain for any additional overtime. The Wage and Hour Administrator devoted 10 small-print pages to criticizing various proposals by employers ranging from outright repeal of the overtime provision, reducing the regular rate to the statutory minimum wage, and extending the non-overtime

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2See Marc Linder, “Moments Are the Elements of Profit”: Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act ch. 3.
workweek to 48 hours, to excluding piece-rate workers from overtime coverage.\(^5\)
A submission by a group of nineteen manufacturing companies in Cleveland employing more than 50,000 workers reveals the depth of the resentment harbored by unreconstructed northern industrial employers:

Unfortunately, many people have forgotten, and a large majority of people have never known, that the effect of the overtime-pay provisions of the Federal Fair Labor Standards Act was to place a limit on the number of hours that the productive facilities of this Nation might be worked. ...

Whatever arguments might have existed in 1938 for sharing the work no longer exist now. With prices...already too high because of shortages of goods, and with many nations...in desperate circumstances and crying out for the goods we might produce, it outrages every economic law to continue with a Government-imposed penalty to prevent the operation of this Nation’s productive facilities more than 40 hours a week.\(^6\)

To underscore just how superfluous the FLSA’s regulation of overtime had become, the Cleveland manufacturers told a tale of a golden age of bilateral negotiational harmony long before the FLSA had been enacted and “unions had attained their present great bargaining power.” Even back then it was employers’ practice to pay premium rates when they wanted work done after regular working hours.

The custom began years ago when working hours were 10 or more a day. A rush order or an emergency situation would arise requiring work past the customary hours. The employer would ask an individual employee, or a group of employees, to work overtime to meet the situation. Frequently the men would say they wanted to go home. Then an informal bargaining process would begin, in which the employer attempted to induce the men to stay by offering a premium of time and one-tenth, or time and one-fourth. The point was thus voluntarily determined at which the disinclination of men to work was overcome by their desire for additional money.\(^7\)

Since such voluntary premium rates had been “part of the fabric of custom throughout American industry,” even in nonunion plants, before the FLSA’s enactment in 1938, the custom, in the Cleveland employers’ view, would have spread by 1947, “with unions having grown to be the power they are....” But these manufacturers preferred bargaining to congressional imposition of premium


\(^7\)Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938 at 4:2846.
rates because it was less arbitrary and more flexible. More importantly, they charged, the function of premium rates—"induc[ing] men to do that which they ordinarily would not want to do, namely work overtime"—had been turned on its head: building trades unions in Cleveland, using "duress and threat of strike," had negotiated double-time rates for Saturday work and "then turned around and informed the contractor that unless he scheduled the tradesmen to work Saturdays on a regular basis, the men would not work the other days of the week." The next step in this union plot was "obvious": "Assured of Saturday work at double time, some men then take a day off in the middle of the week, but still draw 6 days’ pay for working only 5."8

But the Cleveland manufacturers did see a ray of hope in the silent compulsions of the labor market: "With today’s high living costs, there are many workmen who would be glad to gain extra money by working five and a half or six-hour days at straight time. It is their right to so elect. This would give them extra money with which to pay bills...." Unfortunately, the FLSA stood in the way of such a consensual extension of the normal workweek to 48 hours. Why that ancient custom of paying more to induce men to work more than they cared to was suddenly no longer in play, the manufacturers did not reveal. All they knew was that the mandatory FLSA overtime premium "in...most cases...absolutely bars employers from scheduling their operations more than the statutory maximum without penalty. Thus, men lose wages, and the Nation loses goods."9

How, when all U.S. manufacturers faced exactly the same overtime cost structure and—with much of rest of the industrial world lying in ruins—produced half of world manufacturing output,10 a slightly higher wage bill could possibly generate such disastrous consequences, the Cleveland employers did not bother to explain.

Dubious, apparently, of the likelihood of direct repeal of the overtime provision, the Cleveland group sought a legislative second-best: it urged Congress to enact a special provision permitting 48-hour workweeks at straight-time rates in any establishment in which a majority of employees authorized such an extension. The manufacturers sought to ward off any claims that they were merely demanding longer hours at lower pay by observing that "large number of workmen already accept work outside of their employment after working hours and on Saturdays to augment their regular incomes." Since they were willing to work for a second employer at straight-time wages (which were probably lower than those of their primary job), why should they be deprived of this same opportunity

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10W. S. Woytinsky and E. S. Woytinsky, World Population and Production: Trends and Outlook 1004-1005 (1953).
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for an additional eight hours with their primary employer? After all: "Large numbers of American workmen are thrifty and industrious. Why deny them the right to utilize fully their time in the establishment where unquestionably they are paid the most, and deny their regular employer the use of his best trained and most competent help?"11

Without realizing it, the Cleveland employers had called attention to an inconsistency in overtime regulation that the 1937 Pennsylvania 44-hour-week, following the model of some women's and child labor laws, had avoided.12 By failing to conceptualize the 40-hour week as applying to all work performed by an employee for all of his or her employers, and by permitting individual workers to work 40 hours for one employer and additional hours for one or more other employers without triggering any overtime penalty for any employer, Congress undermined the penalty's macroeconomic work-spreading impact, while depriving workers of protection against the health and safety consequences of overwork as well as of the premium wages that allegedly compensate them for subjection to this burden.

Other employer groups were not so timid as the Clevelanders. An umbrella organization of 46 industrial associations, including numerous state, local, and manufacturing associations spread all over the United States, urged outright repeal of the statutory overtime premium. Denying any desire to "'chisel,'" the group asserted that the FLSA simply "does invade the right of employer and employee to arrive at a more satisfactory arrangement than the law requires...." And in the wake of the launching of the Marshall Program and "[o]ur crying need today...for production, more production, more production," it concluded that "the whole problem of overtime can be approached more intelligently through employment contracts than by statute."13

During the second session of the Eightieth Congress in 1948, employers shifted their focus toward raising the threshold triggering overtime or eliminating the premium altogether.14 The NAM urged the "very drastic change" that anything above the minimum wage exceeded "the field which...the statute should have anything to do with." It clearly voiced employers' increasing irritation that "[m]ost of the problems in the last 6 years have been concerned with employees who receive double, or three or four times" the minimum wage and "this hair-

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12See above ch. 7.


splitting” over whether overtime had to be paid on bonuses and other fringes. Before those plans could succeed, however, President Truman’s surprise victory over Dewey and the Democrats’ majority in the Eighty-First Congress emboldened labor and its legislative supporters to push for higher FLSA standards and broader coverage. But labor unions overestimated their congressional strength and in the end their drive to “modernize” the FLSA in the wake of the transition of the U.S. economy from depression to international domination was thwarted by a pro-employer Republican-Southern Democrat coalition, which blocked efforts not only to expand FLSA coverage, but also to undo Taft-Hartley.

In March 1948, the management magazine Modern Industry published a debate between Secretary of Labor Lewis Schwellenbach and a right-wing economist, Lewis Haney, over suspension of the statutory overtime premium. Noting that “[m]any employers are emphatically in favor of tossing it into the ashcan,” the magazine asked whether Joe Worker and management would benefit from a reduction in overtime pay. Conjuring up an “inflation emergency,” Haney’s diatribe culminated in the assertion that a 40-hour week with time and a half thereafter was “the essence of inflation.” Reluctant to advocate a “disastrous deflation in dollar wages,” he viewed increased output without a wage increase as the only solution: “all laborers who can do so” had to be “allow[ed] and encour-ag[ed]...to work longer hours at their regular rate of pay. ... It took over 45 hours a week to win the war.... It will take much more than 40 hours to win the peace.”

The seriousness with which capital was pursuing a rollback of the FLSA was signaled by the forceful advocacy of the 45-hour week by the president of General Motors, Charles E. Wilson. Delivering a talk entitled, “Can We Win the Peace with the Forty-Hour Week?” to the Cleveland Chamber of Commerce in April 1948, he reproached labor for having “made a ‘sacred cow’ of the forty-hour week when it was meaningless, when the welfare of the country was at stake.” Wilson insisted that he was not “advocating a plan that would reduce the compensation workmen are now receiving for forty-five hours. ... I am not advo-
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While capital was demanding more work, the AFL returned to its Depression-era theme of work-spreading. In January 1949, its Shorter Work-day Committee warned that when the Marshall Plan and rearmament no longer sufficed to “‘carry us along,’” it would press for the thirty-hour week.22 By September, the AFL Executive Council reported to the organization’s annual convention that a shorter standard work day and week were needed. Viewing the long-term and postwar sweep of U.S. economic development as shaped by a persistent gap between strong productivity increases and lagging (working-class) income resulting in debilitating periodic unemployment, the AFL argued: “‘While shorter hours alone cannot perform the full task of the expansion of job opportunities that will be needed in an ever-growing degree, it can make a very important contribution to the achievement of that aim. It is furthermore an entirely worthwhile end in itself, and a historic one for labor.’”23

The pro-labor Democrats expeditiously held hearings at the end of January and beginning of February 1949 on the administration’s bill, H.R. 2033,24 and reported out a revised bill, H.R. 3190 (introduced by the chairman of the House Labor Committee, Representative Lesinski) in March. The bill, which was never enacted and failed even to reach the House floor, revealed unions’ overoptimism. The committee’s point of departure was the conviction that employers had succeeded in frustrating the attainment of the overtime provision’s three objectives—shortening the workweek for workers’ health, efficiency, and well-being, spreading work, and compensating workers for the burdens of long weeks—“by the use of two devices which have been held by the courts not to violate the present act, although their effect is to deny to an employee the full 50 percent premium for overtime work.... This bill would outlaw these devices.” The Belo plan was defective in the committee’s view because the “fact that the employee is paid time and one-half this [contractually assigned] rate...when he works in excess of the number of hours covered by the guaranty does not...justify failure

to pay full time and one-half for each hour after 40, based on the pay to which the employee is entitled when he works only 40 hours.\textsuperscript{25}

The other device, which the Supreme Court had upheld in \textit{Overnight Motor Transportation Co. v. Missel}, had, according to the House Labor Committee report, "been variously described as 'Chinese overtime,' the galloping rate,' or the 'fluctuating workweek.'\textsuperscript{26} The name "coolie or Chinese overtime," the president of the Office Employees International Union (AFL) explained to Congress, derived from the fact that the more hours an employee worked during a week, the lower his hourly pay.\textsuperscript{27} Under this arrangement, workers were paid a fixed straight-time weekly salary regardless of how many hours they worked so that their regular rate, on which the overtime rate was based, decreased as the workweek increased. As the Committee noted: "The curious result of this method of calculation is that this employee, who would earn $1.25 an hour at straight time if he worked only 40 hours, can average only 78 cents an hour for the entire workweek, including overtime pay, if he works twice as long. It is apparent that the objectives of the act's overtime provisions are defeated by such a scheme."\textsuperscript{28}

The Wage and Hour Administrator, William McComb, attacked such wage payment practices. He testified before the committee that "under such agreements, an employee may be worked for 50, 60, 70, or more hours a week without any premium pay being paid for the excess hours." He urged Congress to correct the situation because the Supreme Court had upheld these plans on the grounds that the legislature had failed to prohibit them.\textsuperscript{29} The AFL joined the attack on "Chinese overtime, under which salaried employees are systematically deprived of their rightful overtime compensation." To "correct this injustice," the AFL proposed that salaried workers' regular basis be calculated by dividing their weekly salary by no more than 40 hours and their monthly salary by no more than 173 hours.\textsuperscript{30} The CIO also supported an amendment to remove the "injustice" caused by \textit{Belo}, which had opened the way to "tricky evasion of the overtime provisions."\textsuperscript{31}


\textsuperscript{26}H. Rep. No. 267 at 19.


\textsuperscript{28}H. Rep. No. 267 at 19.


\textsuperscript{31}Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House
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The committee bill would have adopted the AFL's proposal by providing that "any salaried employee...employed in excess of forty hours in any workweek shall be paid for each such hour in excess of forty, in addition to his salary for forty hours of work, at a rate not less than one and one-half times the hourly rate obtained by dividing his weekly salary by not more than forty...." The proposal, however, was not enacted, and the WHD promulgated an interpretative regulation, sustained by the courts, approving this practice, which three business school professors later characterized as "for all purposes, negating the intent of the FLSA." The original House and Senate administration omnibus FLSA revision bills contained no amendment dealing with Belo plans. But the next version of the Democratic House bill would have authorized Belo plans if they paid a regular rate of $1.50 an hour—that is, twice the proposed minimum wage of 75 cents. The committee would have permitted the Labor Secretary to authorize "bona fide agreements for a guaranteed weekly wage in limited circumstances where the committee believes that collective bargaining and the payment of a genuine and sufficiently high rate of pay (at least $1.50 an hour) will obviate evasion and circumvention of the overtime provisions." Consequently, the bill approved by the House Labor Committee was intended to prevent the use of these devices, which the Office Employees International Union—"part of the free enterprise team"—testified that Bank of America, the country's largest, still used. Pro-business legislators derided this move as designed to make Belo-type wage plans "virtually unusable.

As a result of complicated parliamentary procedures, a bill sponsored by a


32§ 7(c), in H. Rep. No. 267 at 5. The provision would not have applied to workers paid at least $1.50 per hour pursuant to a collective bargaining agreement.


3995 Cong. Rec. 11892, A5233 (2949).
coalition of Republicans and Southern Democrats prevailed. As enacted, the 1949 FLSA amendments wrote the Belo plan directly into the FLSA as an approved form of overtime payment. Under the new section it became and remains lawful for an employer to employ an employee more than 40 hours a week pursuant to a "bona fide individual contract" or collective bargaining agreement, if the employee's duties necessitate irregular hours, and the contract specifies a regular rate not less than the statutory minimum wage and compensation of not less than time and a half that rate for all hours beyond 40 and "provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified." As the U.S. Department of Labor notes in its regulations, such an approved guaranteed wage plan entitles an employer to work employees overtime "without increasing the cost to the employer, which he would otherwise incur under the Act." At least one state took notice: the Alaska Department of Labor issued a regulation that expressly makes the Belo plan's guaranteed weekly pay for variable hours, as approved by the FLSA, one of the "not acceptable methods of complying" with that state's overtime law. In upholding the validity of the regulation, the Alaska Supreme Court agreed with the state's argument that the result of the Belo plan—that a worker's average hourly wage decreases as his overtime hours rise—"contravenes the policies of requiring increased compensation and promoting the spreading of employment."

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40BNA, The New Wage and Hour Law 5-10 (1949).