The Autocratically Flexible Workplace

A History of Overtime Regulation in the United States

Marc Linder

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The Right to Refuse

Remember, the long struggle for the 8-hour day was not a struggle for 8 hours of work. It was a struggle for 16 hours away from work.¹

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State Laws Prohibiting Mandatory Overtime Work

The states have tried not to differentiate their hours of work and overtime laws from the FLSA and those of other nearby states. With the possible exception of California, no state has wanted to be an innovator in this area, preferring instead to let the federal government or the market take the lead.¹

Frankly, we would prefer that all overtime be voluntary, however, we don’t believe that we can survive with that. That’s basically what it boils down to....²

I

If, as Justice Louis Brandeis argued during the Great Depression, “it is one of the happy incidents of the federal system that a single courageous State may...serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country,”³ state efforts to win the race to the top of labor standards (without risking interstate capital flight) by limiting overtime work have—all too predictably in a federal system—been rare and their fruits meager. Indeed, in 2002 eighteen states still lack a run-of-the-mill overtime pay law.⁴

Apart from Oregon’s 1913 statute covering factory workers,⁵ the best-known ungendered, quasi-maximum hours law from the pre-FLSA period, which remains, with several crucial amendments, on the books, and the three failed or feckless pieces of legislation in Alaska, Montana, and Pennsylvania,⁶ states, to the extent that they have addressed the question at all, have favored the libertarian approach of conferring on individual workers the right to refuse employers’ demands to work overtime without exposing themselves to any discipline or detri-

⁵See above ch. 8.
⁶See above chs. 5-7.
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ment. With the sole exception of a bill enacted in Maine in 2000, which is so narrow and timid as to be virtually meaningless in the real world beyond setting a precedent, none of these initiatives has been enacted. Employers' successful resistance to and arguments pressed against them merit chronicling and analysis. Finally, although these right-to-refuse bills of general applicability have failed, at the turn of the millennium one occupational group especially oppressed by mandatory overtime work, nurses, has succeeded in securing passage of hybrid legislation in a growing number of states; to justify a laissez-faire regime permitting nurses to decide for themselves whether they are too tired to work safely at premium overtime rates, these laws self-contradictorily use the nineteenth-century principle of prohibiting certain occupational groups whose fatigue could injure the public from working more than a set number of hours.

The Oregon law limits the working day of workers (but not of managers, supervisors, or foremen) in mills, factories, and manufacturing establishments to ten hours plus three hours of overtime compensated at time and a half. In 1923 the legislature limited working hours in sawmills and logging camps to eight hours daily and 48 hours weekly (with numerous occupational exceptions), but also suspended enforcement until California, Washington, and Idaho enacted similar laws (which they never have). In 1989, the law was amended so as not to apply to unionized employees whose collective bargaining agreement limits the required hours of work and provides for overtime payments. The minimum civil penalty for employing a worker more than 13 hours in a day is $500 per day for the first offense and $1,000 for additional offenses. Although manufacturing competitors in no other states are statutorily limited to 13-hour days, Oregon factory owners have manifestly learned to live with the restriction. The current Oregon Wage and Hour Administrator reports that in her quarter-century with the Bureau of Labor and Industries she has never heard of employer efforts to induce the legislature to repeal the provision or to suspend it until neighboring states enact similar laws. Neither she nor a Wage and Hour claims examiner could recall any complaints against employers for requiring workers to work more than 13 hours, though some are filed against employers that unlawfully fail to pay time and a half for hours 11 to 13.

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Or. Rev. Stat. §§ 652.010(2), 652.020(1), (3) and (4), 652.030 (1999); Or. Admin. R. § 839-001-0125(1)(j) (2001). A similarly structured California statute that granted unionized mines a 12-hour variance from an eight-hour law (which was later amended to permit nonunion mines to operate longer hours where a two-thirds majority of the workers votes to do so) was upheld in Viceroy Gold Corp. v. Aubry, 75 F.3d 482 (9th Cir. 1996).


Telephone interview with Christine Hammond, Portland, OR and Jo Ann DuVall, Eugene, OR (Dec. 17, 2001). Such nonpayment of overtime premiums occurs despite the fact that the Bureau is empowered to waive and has waived the employer's obligation to pay time and a half if it will not prejudicially affect the interests of the public or the af-
Despite the long-running success of Oregon's modest maximum-hours law, states have instead focused on libertarian right-to-say-no initiatives. The highest-profile political struggle erupted in 1977 over a bill filed in the California Assembly that simply provided: "No employee shall be terminated from his or her employment for refusal to work overtime."\(^10\) The bill was amended repeatedly over the following several months. First, workers were protected from any kind of adverse disciplinary actions, while businesses with five or fewer employees, much of agriculture, railways, and work performed in emergencies endangering public health and safety were exempted; overtime was defined as work performed "over and above...the normal hours in a working week."\(^11\) Then the agricultural and small-business exemptions were deleted, but a broad and amorphous exemption was added for "emergencies due to unavoidable and unforeseeable circumstances which cause significant disruption of usual operations."\(^12\) This new exemption was then tightened somewhat by substituting "extreme" for "significant."\(^13\) Finally, on June 23, the small-business exemption was written back into the bill, this time, however, raised 10-fold to exempt employers employing 50 or fewer employees, leaving only 5 percent of private employers and 65 percent of the employees covered.\(^14\)

The following day the California Assembly passed this amended bill by a margin of 43 to 29, but employers and their representatives were outraged. As one Assemblyman, who regarded it as "'the most antibusiness bill that has been considered by this Legislature,'" put it: "'We might as well put up a sign that says, 'Business not welcome. The Legislature of the State of California will run your business.'"\(^15\)

At the Senate Industrial Relations Committee hearing in November 1977, the bill's author summed up the fundamental issue: "Simply, do people have the right

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\(^{13}\)Cal. Leg. A.B. No. 1295 (amended in Assembly June 6, 1977).


\(^{15}\)"Bill Banning Forced Overtime for Workers Okd by Assembly" (quoting Daniel Boatwright); California Legislature, *Assembly Final History 1977-78 Regular Session* 825 (A.B. 1295).
to say no to an order that they have to work beyond the normal work day. Does an employee have the right to say, 'I'm exhausted.' or 'It's my son's birthday.' or 'I have to pick my kids up.'...without the fear of being fired? Should people be allowed to control their own time? [T]his legislation protects that basic right."16

One of the most telling objections that employers raised to the bill was its capacity to undermine their coercive authority. As the California Laundry and Linen Supply Association complained: "All employees who work five and one-half or six days, could literally 'go on strike' any time they had a real or imagined 'grievance.' They simply refuse to work on Saturday, and management could not, under AB 1295, discipline them! [T]hey can all refuse overtime work and literally 'shut down' our plants. This would not be a 'strike,' but our entire plant of employees exercising their 'right' not to work overtime, granted them by AB 1295."17

The industrial relations director of another large firm inadvertently specified workers' real grievance—namely, that the employer had violated the central norm establishing that the clock objectively determines when enough is enough: "It would be very difficult to operate the business if the threat existed that all employees could walk off the job at the end of a work day regardless of the amount of work which remains to be done." Where that work is shipping "toys and sundries to drug and discount stores in 13...states" from a distribution center, it is clear both that no emergency warranted compelling employees to work against their will and that entrusting to management the decision as to how much of an in principle endless "amount of work remains to be done" underwrites workplace autocracy.18 A vice president of Hunt-Wesson Foods painted an even more disturbing scenario for management, which at the same time gave substance to workers' seemingly rhetorical lamentations about involuntary servitude: "For the most part, there are no replacements available for skilled employees. If overtime were not required, key skilled employees could easily shut down any one or more of our operating plants by refusing overtime work."19 Viewed in this way, employers' intense opposition to the bill was self-explanatory: the proposed law


18Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 1:258 (testimony of James Watson).
would have overridden employers' economically coercive counterpower to nullify workers' superior labor market position.

Unionized employers also resented the fact that a mandatory overtime law, by creating a background institutional entitlement that unions would otherwise have to make collective bargaining concessions to secure, would enable unions to have their cake and eat it too.20 (By this logic, the notion that "[i]f the Legislature begins removing items from the collective bargaining arena, the process itself is threatened,"21 should have precluded Congress from enacting the FLSA three years after the NLRA.)22 Indeed, employers were especially indignant that the proposed law went far beyond what unions demanded during collective bargaining. The manager of the Crown Zellerbach paper mill in Los Angeles praised the "responsible recognition" that the workers' union had displayed in the most recent bargaining by requesting merely that: "‘No employee shall be required to work more than 11 consecutive days without a day off. No employee shall be required to work more than one double shift per week, 16 hours, nor more than three 12 hour shifts, or no more than a combined total of three overtime days in any one week.’" To be sure, the manager's characterization of what could be regarded more as a plea for mercy than a demand as "a far cry from the proposed legislation" elicited this barbed rejoinder from the committee chairman: "On that point, sir, that's also a far cry from what exists in that agreement which you currently have."23

Unions, in contrast, complained that employers sometimes used mandatory overtime to stockpile output before the expiration of collective bargaining agreements to undermine strikes.24 However, unions also made themselves vulnerable to a serious objection from legislators by conceding that many workers relied on overtime pay. Thus after a Communications Workers of America (CWA) official representing telephone company workers observed that "[m]ost of our members...want the overtime because they've got themselves in that economic situa-

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20 Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime: Appendices at 220 (Zechar).

21 Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 1:281 (statement of Thomas Colbert, ind. rels. Dir., Foremost-McKesson).

22 Indeed, the U.S. Supreme Court has ruled that even with respect to federal preemption and the NLRA, states are free to regulate employment conditions even though such a statute "gives employees something for which they otherwise might have to bargain. ... Both employers and employees come to the bargaining table with rights under state law that form a "‘backdrop’" for their negotiations...." Fort Halifax Packing Co. v. Coyne, 482 U.S. 1,21 (1987).

23 Senate Committee on Industrial Relations, Interim Hearings on AB 1295—Mandatory Overtime at 1:225 (testimony of Doug Bockstanz and Sen. Bill Greene).

tion where it's now a necessity. It's their overtime, so they get it," the chairman of the Senate Industrial Relations Committee asked him why the legislature should impose a solution on employers "if the workers themselves cannot come to an acceptable agreement to the point of being able to have a united position in dealing with management...." The CWA's unresponsive answer urged the legislature to act on the grounds that the unionized business sector was reluctant to negotiate on this matter because it did not want to have to face competition from nonunion firms that operated with a free hand regarding overtime.25

Employers, too, were guilty of self-contradictory logic when they warned legislators that the proposed law, by making "overtime labor less reliable than it is right now," would cause "prudent businessmen to reduce their dependence on overtime labor. This means there would be less overtime available for workers who depend on it to meet their obligations." When this veiled threat to eliminate voluntary along with mandatory overtime made no impression on the committee, the Crown Zellerbach paper mill manager virtually accused workers of forcing him to require overtime, lamenting: "This is not my policy to work overtime. As a matter of fact, my policy is to work less and less overtime. However, there are a large number of people who depend on overtime wages because of the financial situations they've gotten themselves into."26

After 30 hours of hearings, the bill's author was compelled to dilute the bill to keep it alive in the senate committee, thus turning what had originally been a 15-word bill into six pages of largely procedural safeguards for employers. In addition to limiting coverage to firms with more than 100 employees and sun-setting the provision after three years, Assemblyman Tom Bates reduced workers' self-empowerment to the right to file a complaint with the state labor commissioner if the workers had previously filed a grievance or complaint with the employer and the parties had made a serious effort to resolve it. The commissioner was required to investigate complaints that workers had been "forced to work overtime by their employer on regular, recurring, and frequent bases as a term or condition of employment." At hearings that the commissioner was authorized to hold he was required to take testimony and make findings on whether the employer had: made a serious attempt to create a voluntary overtime system and to find additional workers for overtime not coverable on a voluntary basis; used forced overtime in an arbitrary and capricious way; and taken his employees' personal concerns into account. After completing a lengthy administrative procedure saturated with due process for employers, the commissioner was autho-

25Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 1:127-28 (Ken Major, Cal. area dir., CWA, and chairman Senator Bill Greene).

26Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 1:227, 230 (testimony of Doug Bockstanz).
rized to grant an exemption from working overtime—and even this exemption might "permit the employer to work employees forced overtime under emergency conditions"—or issue a cease and desist order requiring the employer to give employees at least 48 hours' advance notice of the requirement to work overtime, to create a voluntary overtime system, or to try to hire additional workers. A lengthy appeal process then became available to employers. But after business lobbyists argued that even this diluted provision would "interfere with management's right to require employees [sic] to work overtime when necessary," the senate committee rejected the bill four to two.27 Thus collapsed the major laboratory experiment in the country's most populous state to confer a modicum of protection on workers against mandatory overtime.

In spite of the defeat of the California initiative, legislators in several other states sought to enact related legislation. On March 21, 1979, a bill, sponsored by 12 representatives, was introduced in the Wisconsin Assembly that would have prohibited employers from disciplining or terminating any employee for refusing to work more than eight hours of overtime in any week or more than 100 hours in a calendar year. Employers of fewer than 20 employees would have been exempt; the ban would also not have applied to emergencies endangering public health or safety or to those "due to unavoidable and unforeseeable circumstances causing a severe disruption of usual operations." The state Department of Industry, Labor and Human Relations was authorized to investigate complaints and issue enforcement orders.28 In connection with a mandatory fiscal estimate submitted three weeks later, the department estimated that it was currently receiving 170 calls per month on this issue.29 After a public hearing was held on the bill on April 24, 1979, the chief sponsor offered a substitute amendment that eliminated the weekly overtime standard and the small-employer exemption, authorized the department to award reinstatement with back pay and to assess forfeitures against offending employers of not more than $100 (per day of continuing violations), but the bill nevertheless died in the Assembly on April 3, 1980.30


28 State of Wisconsin, 1979 Assembly Bill 328.


A related effort at the same time in neighboring Illinois received even shorter shrift: introduced on April 4, 1979, House Bill 1519 would have amended the state minimum wage and premium overtime law to prohibit employers from suspending, discharging, or otherwise disciplining any employee for refusing to work overtime hours (generally more than 40 per week). Though radical within the scope of its coverage, the bill would not have protected any of the large number of workers (including farm laborers, government employees, and executive, administrative, and professional employees) who were also excluded from the overtime premium provision. However, the bill was tabled by a 15-0 vote of the Labor and Commerce Committee three weeks later.

An in some respects radical bill, very similar to the Wisconsin proposal, was introduced in the New Jersey Senate on January 24, 1980. Eugene Bedell’s proposed law would have made it illegal for employers to terminate or discipline in any other manner any employee for refusing to work overtime. Senate Bill No. 887 broadly defined “overtime” as work over and above the employee’s “normal daily hours of work...which in no event shall exceed eight hours per day, unless otherwise specified by a valid collective bargaining agreement.” This expansive protection for nonunion workers was limited by several exceptions, the most important of which exempted all employers of 50 or fewer employees and excluded all executive, administrative, and professional employees. In addition, the law would not have applied to overtime work performed during emergencies in which public health or safety was endangered or those resulting from “unavoidable and unforeseeable circumstances which cause extreme disruption of usual operations.” Finally, the bill would have provided for enforcement by conferring a private right of action on employees to sue employers for damages resulting from unlawful termination or disciplinary action; in addition to the greater of actual damages or $1,000 in statutory damages, Senate Bill No. 887 would have awarded costs and reasonable attorneys’ fees to employees who prevailed.

Thus, significantly, the bill did not directly enjoin employers from firing employees for refusing to work overtime, but merely sought to impose financial disincentives on firms.

The Senate, Labor, Industry and Professions Committee held a hearing on the bill in the industrial city of Linden in May 1980. Despite the deference paid by

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32Illinois Legislative Reference Bureau, Legislative Synopsis and Digest: Final Volume 2: 1979, at 2028.
33New Jersey Senate Bill No. 887 (Jan. 24, 1980).
34Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 (An Act to prohibit employers from terminating or otherwise disciplining employees for refusal to work overtime and providing penalties therefor, and supplementing Title 34 of the Revised Statutes): held May 8, 1980, City Hall, Linden, New Jersey ([1980]); Robert
the bill to collective bargaining agreements, many large unionized employers vigorously testified against state intervention, adamantly insisting “that it is absolutely necessary that management retain the right to take action for refusal to work overtime whenever it is necessary.” General Motors, which operated a plant in Linden, took an especially hard-line position, asserting at every turn the quasi-natural inevitability of its overtime regime: “by the very nature of the entire process of building automobiles, overtime is inherent, it is unavoidable.” Consequently, state intervention to make overtime voluntary with each individual employee was “unrealistic. It must be done, it cannot be optional. ... Half an assembly line cannot elect to work and the other half elect not to work, and both have their way.” Moreover, General Motors alleged that such a law “would place the power in the hands of very few individuals to thwart the will and desire of the vast majority of their fellow employes [sic] who do want to work the premium hours, and in many instances to work even full straight time.” Perversely, General Motors sought to support its implausible claim that there was “no evidence showing that overtime has been a hardship on employees any more than has the requirement to report during regular working hours” with the argument that overtime enabled the many workers whom GM put on short-time and lay-off to work a 2000-hour year; in this way, the corporation sought to turn compulsory overtime work against its opponents by arguing that overtime served “the important function [of] accomplish[ing] precisely what has been frequently urged..., that is to stabilize employment.”

In contrast, the New Jersey Business and Industry Association complained that the bill was “extremely discriminatory” because it left management in unionized firms “free to make such [overtime] assignments,” whereas similar arrangements between nonunion employers and their individual employees would be “null and void,” thus placing “the employer and the operation of his business at the discretion of the employee.” The largely nonunion hotel and restaurant industries sought to justify legislative inaction by suggesting parity between overtime rules laid down by management and individual workers. Just as any agree-


35Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 63 (William Sailer, general manager, governmental affairs, Public Service Electric & Gas Co.).

36Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 28x (statement of General Motors Corp.).

37Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 26x-27x (statement of General Motors Corp.).

38Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 49x (written statement).
ment by an employee at the time of hire to work the overtime that employer may
"from time to time" call on him to perform should be honored, so, too: "If the
prospective employee tells the employer that under no circumstances will he ever
work more than eight hours a day, or more than 40 hours a week...and if the
employer agrees to that, then that understanding should prevail. We don't think
that New Jersey needs a state law to interfere with...such agreements...."39 Con­
juring up the best of all possible worlds, the New Jersey State Chamber of Com­
merce deployed an assertion that by logical extension would eliminate the need
for any labor standards legislation: "Poor [employer overtime] practices are self-
correcting."40

In the midst of this barrage of employers' solid opposition, even the bill's
chief sponsor got cold feet. Despite his conviction that something was "wrong"
"if we have to force people to work overtime when they don't want to in order to
stay competitive," Senator Bedell admitted: "I still don't know; I have not made
up my mind yet whether this legislation is the way or not."41 Apparently neither
he nor his colleagues were persuaded by the refutation of the necessity of over­
time work offered by one telephone company worker who explained that her
employer mandated two-day service for customers who merely wanted a phone
of a different color:

But is it really important to force people to work overtime so that you can have an outside
jack by your pool? Is it critical that you have one at your cabana at the beach club? These
are the kinds of things that we are forced to work overtime for....42

Unsurprisingly, the bill died in committee without any further legislative action.

Public recognition of workers' persistent resentment of mandatory overtime
re-emerged at the turn of the millennium as several states took tentative and
largely unsuccessful steps toward restraining employers from imposing super­
normal workweeks on unwilling workers. In January 1999 a bill was introduced
in the West Virginia legislature amending the time and a half for overtime
provision in the state minimum wage and maximum hours law to provide "that
an employee has the right to decline to work longer than the forty hours in any

39Public Hearing Before Senate Labor, Industry and Professions Committee on S-887
at 72-73 (testimony of Clark Martin, representing New Jersey Restaurant Association,
Hotel/Motel Association, and Milk Industry Association).

40Public Hearing Before Senate Labor, Industry and Professions Committee on S-887
at 34 (testimony of James Morford, director, governmental relations, N.J. State Chamber
of Commerce).

41Public Hearing Before Senate Labor, Industry and Professions Committee on S-887
at 36.

42Public Hearing Before Senate Labor, Industry and Professions Committee on S-887
at 47 (testimony of Barbara Brenner).
workweek.” A management-side law firm warned employers that the bill “takes away your right to require an employee to work overtime even when the request is crucial to productivity and overall business success.” In the event, the legislature adjourned in June without having taken any action on the bill; the bill was reintroduced in 2000 and 2001, but no action was taken.

However, a more timorous bill introduced a week later in January in Maine ultimately made history. The concrete occasion for the legislative initiative was the exasperation of workers at the Poland Springs bottling plant in Poland, Maine, who for four months or more in 1997 had been required to work 12- and 16-hour shifts seven days a week without any days off. The plant was organized by the United Food and Commercial Workers, but the collective bargaining agreement “allows workers to log more than 100 hours in a week....”

The bill that was promptly introduced in the Maine Senate—by the senator representing the county in which the Poland Springs plant was located—amended the state maximum hour and overtime law so that an “employer may not require an employee to work overtime in violation of the following limitations: A. An employer may not require an employee to work more than 32 overtime hours in any one calendar week; and B. An employer may not require an employee to work overtime on more than 6 days in a calendar week.” The bill excluded seasonal workers, but defined “overtime” to include more than eight hours in a day as well as more than 40 in a week. This extraordinarily generous treatment of employers may be contrasted with similar regimes in Western Europe, where employers are permitted to employ workers during limited overtime hours over a week, month, or year.

Three weeks later, the Joint Standing Committee on Labor held a hearing on the bill. The director of the state Bureau of Labor Standards testified that his agency “often receive calls...from workers who want to know if their employer can fire them if they refuse to work mandatory overtime, even mandatory overtime that to most people would seem extreme. The answer at present is YES....” The director reported that while the workers might consider their situation “unfair,” the agency was also concerned “from a workplace safety perspective” be-

43West Virginia House Bill 2018, 74th Legislature, 1999 (Lexis).
45West Virginia House Bill 2018, 75th Legislature, 2000 (Lexis); West Virginia House Bill 2344, 76th Legislature, 2001 (Lexis).
48See below ch. 16.
cause workplace injuries increase as the result of fatigue caused by "excessive hours on the job." The agency supported the bill, but suggested an "exemption for essential workers in public emergency situations." Much of the testimony furnished by employers focused on the need for exemptions for emergency state work such as snowplowing. Surprisingly, even the submission of the National Federation of Independent Business, while not supportive, did not denounce the bill as the end of the world for free enterprise.

In committee, the amendatory process quickly watered down an already exceedingly deferential bill and accommodated many of the aforementioned concerns. The limit on overtime was stretched to 96 hours over three weeks, and that on daily overtime was deleted. Exemptions were added for public emergencies, essential services, and health and safety considerations. It is unclear whether a newspaper was speaking tongue in cheek when it reported that under the bill "Maine workers will be limited to 96 hours of mandatory overtime within any three-week period..." Another amendment enabled employers to request emergency waivers for up to three weeks for unforeseen or uncontrollable circumstances that would otherwise harm their firms.

Basic criticisms of the bill made during the Senate floor debates were directed at the effort to "micromanage business" and "dictate" to manufacturers and labor: "The employees' overtime provides them an opportunity of an income that is not part of an annual salary and that they can purchase the extras in life [with] that they couldn't have. ... Why don't we let them [manufacturers] run their business the way they feel is most efficient and is in the best interests of both their employees and their financial standings." Another senator, after confessing that "[i]t sort of boggled the imagination as to why any sane, rational, economically motivated employer would continue that practice [of paying time and a half for long hours instead of hiring additional workers] for any great length of time particularly against the will of those who were employed," answered his own question by noting that benefit packages made it cheaper or at least competitive vis-à-vis hiring additional workers. But the senator's opposition to the bill rested on the calculation that "we are not yet at the point where the fringe benefit packages...customarily made available to employees will induce employ-

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49Testimony of Alan Hinsey (Feb. 12, 1998) (furnished by Maine Law and Legislative Reference Library from the Labor Committee files).
54Legislative Record, S-2177 (Sen. Mitchell, Mar. 27, 1998).
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ers to exploit this situation to a degree that it requires us to take legislative action to correct the vice.” Moreover, even where such expensive benefits are available, intervention would probably not be called for since those firms are likely to be unionized.55

The bill’s sponsor, John Cleveland, made a crucial point that he apparently did not need to draw out for the members: “it puts no limitation whatsoever on voluntary overtime. An individual may work as many hours as they choose in a voluntary situation and many individuals choose to do that for a number of reasons.”56 Such a take-it-or-leave-it norm is both in its own right inconsistent with, and so open to employer abuse as to be unimaginable in, any modern labor-protective statute. Such libertarianism would make it possible for employers, for example, to pressure workers into waiving their rights under minimum wage, overtime, safety and health, and social insurance laws. It was precisely the kind of provision that doomed nineteenth-century protective laws to meaninglessness. In this so-called pre-enforcement stage, maximum hours statutes were “unenforceable because they set standards which were to prevail only in the absence of an agreement to the contrary between the employer and the employee.” Such laws might forbid employers to “compel” women to work beyond a certain number of hours, but the ‘woman who wished to hold her job must perforce express willingness to work longer hours. But in the eyes of the law she was under no compulsion.”57

After having made such concessions, Cleveland finally responded to the aforementioned call for a continuation of the at-will regime: “I think we have to recognize that these employees are human beings. They have families. They have children. They have community responsibilities. ... Is that the kind of society, at the end of the 20th century that we really want from people who work for a wage. That employers ought to be able to demand from them anything that they want? That they ought not to be able to live a life to help raise their children, to participate in their community but rather to be used more as slaves to meet the production schedule...?”58 The Senate then passed the bill 22 to 13.59 A smaller majority, 76-68, prevailed three days later in the House,60 where the debate was more attentive to employers’ complaints that the bill “would put such a string around them that there are occasions when they wouldn’t be able to get

56Legislative Record, S-2176 (Sen. Cleveland, Mar. 27, 1998).
58Legislative Record, S-2178-79 (Sen. Cleveland, Mar. 27, 1998).
59Legislative Record, S-2180 (Mar. 27, 1998).
60Legislative Record, H-2024 (Mar. 30, 1998).
essential work completed...."°

The governor’s veto was curious in that he criticized the bill both for denying employers flexibility and making Maine less attractive to high-wage employers—an argument he perversely used the same day in vetoing an increase in the state minimum wage to $5.40 an hour—and for still permitting employers to require employees to work as many as 96 overtime hours every three weeks. When the Senate fell one vote short of the two-thirds majority needed to override the veto, employers survived their closest brush ever with even the feeblest of interferences with their unfettered control over the length of the working day.°

But two years later, on May 5, 2000, the more than century-long struggle for a general limit on overtime work finally took “a very small step” when the governor signed an even weaker bill prohibiting employers from requiring employees to work more than 80 overtime hours every two weeks—a burden described by Senator Neria Douglass as the limit beyond which workers are “probably dead on their feet.”°° In addition to excluding farm and seasonal workers and even low-paid executive employees (whose annualized salary was 3000 times the state minimum hourly wage), and excepting work performed in response to an emergency declared by the governor, essential services for the public such as utility and telecommunication service, snowplowing, and road maintenance, and work necessary to protect the public health or safety when the excess overtime is required outside the normal course of business,°° the law also exempted annual maintenance work (for up to four consecutive weeks) to propitiate the paper industry.°° As a Republican senator (and former trucking employer) at the next (120th) legislative session summarized the progress that the law had achieved: previously there had been “limitless mandatory overtime. A hospital, a dairy farmer, a trucking operation could say 'you've to work forever.' The 119th said 'no, that's not fair to the workers. We're going to say 80 hours in two weeks is enough.'°°


°°An Act to Limit Mandatory Overtime, 1999-2000 Me. Legis. Serv. ch. 750 (codified at 26 Me. Rev. Stat. Ann. § 603). The paper industry provision excepted “[a]n employee who works for an employer who shuts down an operation for annual maintenance or work performed in the construction, rebuilding or repair of production machinery and equipment, including machine start-ups and shutdowns related to such activity. This exception applies to contractors of the employer that are providing services related to the activities in this paragraph.” 26 Me. Rev. Stat. Ann. § 603(3)(H).

°°Legislative Record S-762 (May 15, 2001). Since farmworkers were excluded from coverage, dairy farmers could continue to require their employees to work “forever.” Sen. W. Tom Sawyer, Jr., revealed that a nurse had once told him that she had made her hus-
Not satisfied with this extraordinarily meager beginning, nine months later Senator Douglass introduced An Act to Improve Limits on Mandatory Overtime, which would have reduced the amount of mandatory overtime from 80 to 60 hours every two weeks. Unlike his predecessor three years earlier, at the public hearing before the Joint Standing Committee on Labor on March 27, 2001, even the director of the Maine Bureau of Labor Standards had nothing good to say about the proposed reduction: "Maine is the only state that has a statutory limit on overtime. The federal Fair Labor Standards Act likewise contains no limit on overtime hours. This bill then seeks to add to what is already a unique restriction that employers in other states don't have to contend with." Since the law had been in effect for only eight months, its impact had not yet been assessed. Director Michael Freitt and his agency did not "yet know whether the law restricts employers in any significant way or whether it provides any real benefit to employees." In opposing the amendment, the Maine State Chamber of Commerce not only saw no need to reduce the mandatory overtime ceiling, but asserted that the original law had been a reaction to allegations concerning "a single employer site" and to its knowledge "there are no other outstanding single sites with concerns with regard to excessive mandatory overtime." The Chamber's representative then went on, self-contradictorily, to insist that employers had to retain the power to compel overtime:

Let me make it clear that the Maine Chamber of Commerce is not in any way advocating that employers force their employees to work long periods of excessive overtime. If employers do so, they face increased risk of workplace accidents due to fatigue, declining employee moral and even a loss of production capabilities. However, having said that, there will be times when some employers may require their employees to work some mandatory overtime.

An association of construction firms was much more precise about its objections to the lower ceiling on mandatory overtime, revealing that some employers are acutely aware of how crucially reliant the implementation of their extraordinary overtime demands is on a labor market unencumbered by state-enforced labor norms. Associated Contractors of Maine testified that when firms faced
completion deadlines on road paving projects:

it is completely normal for paving crews to work 13 to 14 hours, 6 days a week. In one week, that’s 84 hours, 44 of which is overtime. Double that, and you’ve got 88 hours of overtime.

Obviously, in the previous scenario, the current limit of 80 hours for mandatory overtime is exceeded. But workers are paid time and a half and most are more than happy to earn all that overtime pay in a concentrated period of time because their work is primarily seasonal. But what if one or a group of the workers in the paving crew decided they did not want to work on Saturday? The law says they can’t be forced to, but where does that leave the contractor? That could seriously affect the ability of the contractors to meet the completion deadlines. Under the current limit of 80 hours, there is less chance of that happening than if the limit was reduced to 60 hours.69

After the joint committee by a 7-6 straight party-line vote recommended passage on May 1, 2001,70 Republicans generally rehearsed employers’ arguments during the brief Senate debate on May 8, 2001, but Senator Peter Mills added two points. First, he argued that neither the law nor the proposed amendment targeted the real “abuse,” which was not 60 or 80 hours of overtime bi-weekly, but “the working of a double shift at a time when someone may not be up to doing it. If you have somebody working a 12 hour shift, and the replacement doesn’t come in, it’s not uncommon in the paper industry, for someone to work the next 12 hours as well; so they are working 24 hours in 24 hours time.” Having “personally handled cases” as an attorney involving workers working 24 or 36 hours straight, “maybe under conditions of no sleep and duress,” he had never understood how the bill “would actually work in practice.” Despite his “real concern,” however, he did not offer an amendment to “address the real problem.” Second, Mills’s antipathy to the law was exacerbated by the fact that “the problem was presented to us by people who were in organized bargaining units.” As legislators had been saying for decades, he did not believe that it was the legislature’s role to “rewrite an employment contract that the bargaining parties for some reason haven’t been able to write for themselves.”71

The bill’s sponsor, Senator Douglass, presumably trying to make a virtue out of a necessity in justifying a potentially radical intervention that in its initial stages was riddled with inconsistencies, especially a libertarianism directly at odds with the principle of compulsory labor norms, conceded: “Quite frankly, the

69Testimony of Associated Constructors of Maine, Inc. (Mar. 27, 2001) (furnished by Maine Law and Legislative Reference Library from the Labor Committee files).
70http://janus.state.me.us/legis/bills/DividedReport.asp?id=1086&SESSION=FIRST+REGULAR.
71Legislative Record S-645-646 (May 8, 2001).
amount of time that was designated as being over the limit, 80 hours in a 2 week consecutive period, was grabbed out of the air. It had no basis in studies, it had no real discussion in so far as negotiations go because, in general, there were folks who were simply opposed to the concept and those who were in favor of it.” Without pointing to any studies that supported the choice of 60 hours, Douglass merely called it a “public policy statement” that it was “important for us to protect our citizens and the citizens who might be hurt by that employee who is working tired.”

Senator Douglass’s reasoning failed to convert any Republicans, and with three Democrats voting No, the bill was defeated 20-15. The following day the House engaged in an even briefer debate, the chief contribution to which was made by Democratic Representative George Bunker, Jr., a self-employed owner of an investigation agency, who defended the proposal as the “decent, right thing to do”—enabling workers who can be fired for refusing to work 60 or 80 hours of overtime every two weeks to say: “I am just too tired. I just wouldn’t do well at my job. Please let me go home. This is permissive folks. It allows a competent decision to be made by that employee and he or she cannot be disciplined for getting tired and have to go home or having to take care of the children, daycare or running to the doctor’s office.” The bill then passed the House 89-53, but the sub-veto-level vote did not persuade the Senate to adopt a motion to recede, which failed 14-21, and the effort died, leaving in place the only generally applicable law in the history of the United States empowering workers to veto employers’ demands to work overtime, but only under such extreme circumstances that very few, if any, workers will ever be able to take advantage of it.

Perhaps in response to growing worker and union complaints about the large increase in overtime work during the 1990s, by the end of the decade several states had begun considering anti-overtime legislation. Pennsylvania joined their ranks in October 1999, when 28 legislators introduced the Restricted Overtime Act in the House. This short and modest bill would have afforded employees not subject to a collective bargaining agreement the right to refuse to work more than 16 hours of overtime (beyond 40 hours) per week. Employers declined to testify at the hearings in January 2000, but the Pennsylvania Chamber of Business and Industry submitted a letter that rejected such “unwarranted intrusions into

72 Legislative Record at S-646.
73 Legislative Record at S-647.
74 http://janus.state.me.us/house/hsebios/bunkgh.htm
75 Legislative Record at H-696-697.
76 Legislative Record at H-697.
77 http://janus.state.me.us/legis/status/sen-detail.asp
78 House Bill 1941 (Oct. 6, 1999).
employee/employer relationships," and disingenuously suggested that the issue be addressed at the federal level to avoid causing Pennsylvania firms a competitive disadvantage.\footnote{Letter from Fred Sembach, vice president, government affairs, Pennsylvania Chamber of Business and Industry, to Joseph Gladeck, Jr., chairman, House Labor Relations Committee, Jan. 18, 1999 [sic; should be 2000]. See also "Bills Would Limit Overtime and Require Breaks," Pittsburgh Post-Gazette, Jan. 23, 2000, at B3 (Westlaw).} Without identifying or justifying the philosophy, the antiunion Associated Builders & Contractors insisted: "As a philosophical matter, employees who want to work overtime should be encouraged to do so."\footnote{Letter from Duane Feagley, executive director, Assoc. Builders & Contractors, Inc., Keystone Chapter, to Joseph Gladeck, Jan. 18, 2000.}

Several union officials and members did testify. Like their counterparts elsewhere, workers focused on family values, expressing resentment at not being able to attend children's skating parties or to tuck their children in bed.\footnote{House of Representatives, Commonwealth of Pennsylvania, [Hearing on] House Bills 1940 and 1941, House Labor Relations Committee 37-39 (statement of Homer Beard, GTE employee and IBEW member).} AFL-CIO officials and rank-and-file members stressed that they did not wish to restrict voluntary overtime.\footnote{House of Representatives, Commonwealth of Pennsylvania, [Hearing on] House Bills 1940 and 1941, at 8, 52 (testimony of Teresa Ruhl, regional COPE director, Penn. AFL-CIO, and Linda Sanders, UNITE member).} Indeed, one long-year GTE telephone installer and repairman, who in the previous eight months had worked the maximum number of overtime hours (12) permitted by the union contract every week and during seven weeks had been "forced" to work beyond the cap, testified that he and his coworkers would change their plans if the company just asked them as they formerly had done. "But when you're told as a slave that you will do it...it's a click in the switch."\footnote{House of Representatives, Commonwealth of Pennsylvania, [Hearing on] House Bills 1940 and 1941, at 38, 58 (quote) (testimony of Homer Beard).} Although no hostile legislator asked whether unions would support a bill that merely required employers to ask employees politely to work overtime, the Republican chair of the House Labor Relations Committee raised the same question that had arisen at the hearings in California in the 1970s: if overtime "is that big of a problem, then perhaps maybe this issue should take precedence over some of the other issues that are negotiated on behalf of the workers."\footnote{House of Representatives, Commonwealth of Pennsylvania, [Hearing on] House Bills 1940 and 1941, at 47 (Rep. Joseph Gladeck).}

Since the bill excluded places of employment under union contract, union witnesses raised the issue on their own, one rightly pointing out that even where unions do bargain over the issue, unionized employers still had to compete against nonunion firms that can work their employees "excessively...." Thus what both union workers and employers needed was "a fair and even field" where
"across the state everybody could only work 16 hours overtime...."85 The other explanation offered by unions as to why legislation was necessary, even in the unionized sector, to eliminate compulsory overtime was the failure of collective bargaining to resolve the matter to workers’ liking. The president of a United Steelworkers (USW) local at a Bethlehem Steel plant explained that “[e]ven in a long and historic contractual relationship between the steel industry and my union,” in the course of which the USW had negotiated overtime penalties, voluntary overtime preferences, overtime rotations, and temporary transfer programs,86 no matter what level of relief or flexibility we have provided the steel industry, the demand for complete and total authority to be able to require unlimited overtime as the boss desires never recedes and is insatiable. ...

If the management[s]'...quest for unfettered overtime assignment rights exists in this kind of industry with a powerful and well-established union, what do you imagine is the situation for people in nonunion, management-dominated work places?

I can tell you that my direct experience in working with people trying to organize a union is the situation has become a form of wage slavery.87

Perhaps prompted by this confessed impotence, the Pennsylvania legislature, while not taking any other action toward enactment that session, was presented with a bill in 2001 that simply entitled employees (regardless of whether they worked under collective bargaining agreements) to refuse to work more than eight hours of overtime beyond the 40-hour week without being subject to termination or discrimination based on that refusal. Again, however, the legislature took no action on the bill.88 Nor was any action taken on a bill introduced the same day that would have increased the overtime premium to 100 percent for all weekly hours beyond 48.89

A much more ambitious initiative to curtail overtime began occupying the Washington State legislature in the year 2000. Senator Darlene Fairley, the Democratic chair of the Labor Committee, introduced a bill whose underlying legislative intent found that employers’ practices of requiring workers to work long days and even longer weeks:

hurt working families, make affordable child care difficult to find, and lead to higher
stress levels and industrial injury and occupational disease rates. These practices limit
employment opportunities to a smaller number of workers rather than extend employment
opportunities to a larger number of workers. Thus, it is the intent of the legislature that
workers not be required to work overtime.90

As recommended by the Labor Committee, the bill would have prohibited
employers from requiring employees to work more than eight hours a day or 40
hours per week unless they worked on a four-day, 10-hour schedule. Among the
bill’s numerous excluded workers were those performing emergency work (such
as utility, fire, police, and medical personnel) and those packing or processing
perishable agricultural products. The bill would also have permitted employers
to petition for a variance if more than 80 percent of their affected employees
voted in a secret ballot to approve a written proposal to work longer hours, but
in no event more than 12 hours per day or 42 hours per week for four consecutive
weeks. The bill would also have excluded the many workers already excluded
from the state’s overtime law, including farm workers, executive, administrative,
and professional employees, news carriers, seamen, and workers on state-oper­
ated ferries. Finally, the bill would also have offered a closely hedged-in ex­
emption for continuous production operations in two important industries in
Washington—primary metal processing and paper products. Firms would have
been permitted to require employees to work part of the next shift if: the need
arose as a result of an unanticipated event such as employee sickness or emer­
gency repair of machinery (but not because of a need to increase production to
meet increased market demand), and the unanticipated event halted or might halt
the continuous production operation; the employer in good faith exhausted rea­
sonable attempts to find volunteers from the next shift; the employees in question
had critical skills and expertise required for the work; and the employer, pursuant
to the employees’ request, helped them get safe transportation home after the
shift and to address child care or other family obligations successfully. A final
limitation on the continuous operation exemption would have prohibited employ­
ers from requiring employees to work more than 12 consecutive hours or two
straight shifts, or from requiring more than 16 overtime hours in any calendar
month.91 Again, workers at the legislative hearings focused on overtime work’s
interference with their families, while employers bemoaned that the bill would

same time to provide overtime pay for software developers and engineers and related
workers self-contradictorily uses the same language in its preamble to justify imposition

91 Washington, Sen. Bill 6120 (introduced Jan. 10, 2000, and recommended by
committee Jan. 28, 2000). The bill was pre-filed on Dec. 8, 1999.
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deprieve them of taking advantage of the “edge” they had in access to the world’s best workforce.\(^2\) The bill died in the Rules Committee in February 2000.

The movement re-emerged in the Illinois legislature in 2001 when a Mandatory Overtime Limitation Act bill was filed. Its express purpose was to “reduce excessive amounts of mandatory overtime which increase stresses on family life, jeopardize the health and safety of employees, and undermine the effectiveness of workplace operations.” It would have prohibited employers from requiring employees to work more than 48 hours per week (or 12 hours per day). It would have created exceptions for work performed pursuant to officially declared emergencies as well as for the performance of essential services such as snow-plowing, road maintenance, and utility and telecommunication service. But even in these exceptional cases employers would have been required to pay double-time wages. No action, however, was taken on the bill after it was referred to committee.\(^3\)

II

One group of workers that has begun to achieve some successes in combating mandatory overtime is nurses, who in 2001-2002 induced the legislatures in Maine, Oregon, New Jersey, Washington, and Minnesota to enact laws conferring various levels of protection against the imposition of unwanted overtime. Superficially, this campaign resembles successful instrumental efforts in the late nineteenth and early twentieth century to cap the hours of (de facto adult male) workers in occupational groups (such as railway employees, and street railway and bus drivers) in which fatigue could cause injuries to the public and not merely the workers themselves.\(^4\) Most pertinent in this context were turn-of-the-century laws limiting the workdays and workweeks of pharmacists and drug clerks. For example, the California legislature characterized a 1905 statute that limited the hours (to 10 per day and 60 per week) of those selling drugs or “compounding physicians’ prescriptions” as “a measure for the protection of public health....”\(^5\)

A nurse testifying in 2002 in favor of a bill banning mandatory overtime for nurses before the Senate Labor and Commerce Committee of the Washington State legislature sought to link the struggles: “Is it legal for truck drivers to keep driving when they are too tired? We need laws to protect the public from the

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\(^3\)Illinois, House Bill 3176 (introduced Mar. 1, 2001).


\(^5\)1905 Cal. Stat. ch. 34, § 1, at 28.
danger of nurses falling asleep at the wheel."96 Her point was well taken, but the bill, unlike those older laws, in no way prohibited fatigued nurses from voluntarily working overtime.97 Similarly, a bill introduced in Congress, the Safe Nursing and Patient Care Act of 2001, which would prohibit requiring a nurse to work beyond his or her shift, 12 hours per day, or 80 hours every two weeks (except during declared states of emergency)98 in institutions receiving payments under the Medicare program, includes the finding: "The widespread practice of requiring nurses to work extended shifts and forego days off causes nurses to frequently provide care in a state of fatigue, contributing to medical errors and other consequences that compromise patient safety."99 Likewise, in introducing the bill, its chief sponsor, Representative Fortney Pete Stark stressed: "Mandatory overtime is dangerous for patients plain and simple."100 Equally characteristically, these most recent initiatives are permissive and libertarian rather than mandatory and coercive: whereas the earlier laws prohibited employers from requiring or permitting workers to work beyond the hours threshold and thus withdrew from needy workers the right to undermine societally established norms,101 "nurses would be allowed to continue to volunteer for overtime if and when they

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97 To be sure, the rigor of the federal law limiting train engineers' working hours leaves much to be desired. Pat Gilbert, "Train Engineers Overworked? Heavy Overtime Raises Safety Issue," Bergen County Record, Aug. 11, 1996 (Electric Library).

98 H.R. 3238, § 3 (107th Cong., 1st Sess., Nov. 6, 2001). The companion Senate bill is S. 1686. Two other bills that would amend the FLSA to prohibit employers from requiring registered nurses (and other health care employees except physicians) to work more than eight hours a day or 80 hours every two weeks (absent a natural disaster or a governmentally declared state of emergency) are the Registered Nurses and Patients Protection Act, H.R. 1289, and Patient Care Employees Protection Act, H.R. 1902, 107th Cong., 1st Sess., Mar. 29 and May 17, 2001. The original version of the bill is H.R. 5179, 106th Cong., 2d Sess (2000). Nurses and other hospital employees are already treated differently under the FLSA § 7(j): by agreement, two-week pay periods are permissible, provided that employees are paid overtime for any hours beyond eight per day or 80 per two weeks.

99 H.R. 3238, § 2(4).


101 E.g., 1905 Cal. Stat. ch. 34, § 2, at 28-29; 1900 N.Y. Laws ch. 453, at 1126 (regulating hours of pharmacists in New York City).
feel they can continue to provide safe, quality care...."\textsuperscript{102}

Against the background of several high-profile strikes and under nationwide pressure from the American Nurses Association,\textsuperscript{103} state nurses associations, and nurses unions to prevent hospitals from imposing huge amounts of overtime on nurses "to cover routine personnel shortages" and "threaten[ing] nurses who question this practice with the possibility of losing their jobs or their license under the pretext of patient abandonment,"\textsuperscript{104} legislators in a large number of state legislatures in 2001-2002 introduced bills—many of them with identical language—prohibiting mandatory overtime. Bills in the states (California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Kentucky, Maryland, Missouri, New York, Ohio, Pennsylvania, Rhode Island, West Virginia, and Wisconsin) that have not yet enacted them were generally similar to the pattern of the congressional bill in advancing protection of the public as the objective, but at the same time privileging nurses to work voluntarily as many hours as they wished.\textsuperscript{105}

In the words of a proposed amendment of Pennsylvania's Professional Nursing Law: "Only individuals are capable of determining their capacity to work beyond their predetermined, regular work schedule."\textsuperscript{106} Although workers may be in a much superior position to judge their own work capacity than their employers, it is unclear why society is not in a better position to override the decisions of employers and workers that may be tainted by short-term monetary considerations

\textsuperscript{102}147 Cong. Rec. at E 2007 (Stark).


\textsuperscript{104}Hawaii H.B. No. 842, § 1 (2001).

\textsuperscript{105}Cal. S.B. 1027 (2001) (40 hours); Colo. S.B. 134 (2002) (scheduled daily shift, or 12 hours during 24-hour period, or 80 hours in 2 weeks); Conn. H.B. 5698 (2001) (40 hours); Fla. H.B. 1799 and S.B. 2326 (2002) (scheduled daily shift, or 12 hours during 24-hour period, or 80 hours in 2 weeks); Hawaii H.B. 842 (2001) (40 hours); Ill. H.B. 859 and 1955 and S.B. 555 (2001) (40 hours); Iowa H.B. 2237, H.B. 2324, and S.B. 2126 (2002) (scheduled daily shift, or 12 hours during 24-hour period, or 80 hours in 2 weeks); S.B. 2127 (2002) ("agreed upon assignments"); Ky. H.B. 732 (2002) (regularly scheduled daily work shift or 40 hours in one week); Md. H.B. 42 (2001) (40 hours); Mo. H.B. 1923 (2002) (scheduled daily shift, or 12 hours during 24-hour period, or 80 hours in 2 weeks); N.Y. A.B. 7127 and S.B. 3515 (2001) and N.Y. A.B. 9731 (2002) (40 hours); Ohio H.B. 78 (2001) (agreed upon, predetermined regularly scheduled full-time work week or 18 consecutive hours); Pa. S.B. 1102 (2001) (regular shift, 12 hours in 24-hour period, or 80 hours in 14 days); R.I. H.B. 5394 (June 20, 2001) (60 hours, but requiring more than 60 hours is not a violation provided that the work is "required and directly related to the direct care of a particular patient" and is not required on a regular basis); R.I. S.B. 209 (June 27, 2001) (predetermined scheduled work shift of 8, 10, or 12 hours or eight hours of overtime in a 30-day period); W.Va. H.B. 2829 and S.B. 265 (2002) (agreed to, predetermined scheduled work shift of 8, 10, or 12 hours not to exceed 40 hours per week); Wisc. A.B. 457 and S.B. 211 (2001) (40 hours).

not germane to the question of the best possible patient care. To be sure, a few (as yet unenacted) bills did set a very generous limit on nurses’ voluntary overtime, prohibiting them from working more than 16 hours in a 24-hour period.107

The first two states that enacted such laws had to set generous limits for employers. Once again, Maine was the first state to legislate. Under the original bill, whose chief sponsor was herself a nurse education consultant, a licensed nurse “or a person employed by a licensed, certified or registered provider of mental or physical health care in the public or private sector or any business establishment providing health care services, who provides direct care to patients, in the exercise of professional judgment regarding the performance of giving quality care to patients, may not be disciplined if that person refuses to work overtime.”108 The bill was revised in committee to require that such care-giver “has determined, in the exercise of professional judgment, that that person, due to fatigue or other factors, may not be able to provide quality care to that person’s patients during those overtime hours.”109 Immediately after the legislature passed that version by three votes short of a veto-proof majority in the Senate (21-14) and a veto-proof majority in the House (99-43) on May 8-9, 2001,110 the governor was noncommittal on whether he would sign it.111

However, on May 15 the Senate reconsidered the bill and considered an amendment offered by Senator W. Tom Sawyer, Jr. (a retired businessman)112 that “critics maintained would have essentially gutted the bill’s original intent.”113 It would have required that, in addition to the objecting nurse, his or her supervisor also “determined, in the exercise of professional judgment, that that person, due to fatigue or other factors, may not be able to provide quality care to that person’s patients during those overtime hours.” In addition, it would have required that “[o]ther staff of equivalent qualifications is available to ensure adequate patient staffing and quality care.”114 Senator Sawyer described his motivation for submitting the amendment in terms reminiscent of the aforementioned complaints lodged by California employers about a state law that would have given workers

109Committee Amendment A (S-114).
112http://www.state.me.us/legis/senate.
114Amendment S-186.
generally the right to refuse overtime work.\textsuperscript{115} "I am truly worried that in no instance do we allow a single individual the opportunity or the option of closing down a floor, closing down an emergency room."\textsuperscript{116} The bill's sponsor, Senator Pendleton, noted that the amendment did "exactly opposite of what we were hoping to do and puts everything back the way it was. It requires that a supervisor be involved in the decision of whether you're too tired to do extra hours after you've done your full shift. That's how things are done now."\textsuperscript{117} And Senator Jill Goldthwait, herself a registered nurse, observed that the amendment "ask[s] another person to make a judgment about how tired someone is. I can't imagine how that judgment can be made accurately when you're a separate person."\textsuperscript{118} The Senate then defeated the amendment by the narrowest possible vote (17-17).\textsuperscript{119}

The following day Governor Angus King announced that he had ""some problems with the bill."" First, he was not sure that a nurse's right to refuse overtime in the first hours after eight ""comports with what the bill purports to say which is that tiredness is the issue."" Perhaps even more important to the governor was the need not to encourage the others: ""It's also been my experience that once you take a step like this, I can guarantee that in the next Legislature there will be three more bills for mandatory overtime limitations for some profession. I'm just not sure the state needs to step in and make the rules."\textsuperscript{120} With the Maine State Nurses Association declining comment on whether it could mobilize a two-thirds majority to override a potential veto,\textsuperscript{121} the Legislature decided to recall the bill from the governor's desk to thwart that veto. Specifically, Governor King's objection was that the bill ""didn't focus on fatigue. I don't know exactly what the number [of hours is], but I would like to see them work on a proposal that reflects the reality of fatigue and some objective standard.""\textsuperscript{122} The compromise ""brokered"" by the governor and worked out between nurses' and hospitals' representatives\textsuperscript{123} eviscerated nurses' entitlements sufficiently that Senator Sawyer could truthfully boast that it ""does a nice job of

\textsuperscript{115}See above ch. 15.
\textsuperscript{116}\textit{Legislative Record} at S-760 (May 15, 2001).
\textsuperscript{117}\textit{Legislative Record} at S-760 (May 15, 2001).
\textsuperscript{118}\textit{Legislative Record} at S-761 (May 15, 2001).
\textsuperscript{119}\textit{Legislative Record} at S-763 (May 15, 2001).
\textsuperscript{120}Higgins, "King Handed Bill Barring Forced OT."
\textsuperscript{121}Higgins, "King Handed Bill Barring Forced OT."
attending to the concerns of employers that regularly schedule overtime as a matter of course.”\(^{(124)}\) Thus as enacted by the governor on June 13, 2001: “A nurse may not be disciplined for refusing to work more than 12 consecutive hours. A nurse may be disciplined for refusing mandatory overtime in the case of an unforeseen emergent circumstance when overtime is required as a last resort to ensure patient safety. Any nurse who is mandated to work more than 12 consecutive hours...must be allowed at least 10 consecutive hours of off-duty time immediately following the worked overtime.”\(^{(125)}\)

Two weeks later the governor of Oregon signed a modest bill that will go into effect on October 1, 2002. Oregon hospitals will be barred from requiring nurses to work more than two hours beyond a regularly scheduled shift or more than 16 hours in a 24-hour period.\(^{(126)}\)

In contrast, the third state to act, New Jersey, although it took more than three years, enacted a more radical anti-mandatory overtime statute. The inception of legislative struggle in New Jersey can be dated to October 1, 1998, when Patients First, a coalition of several unions and other organizations, held a rally at the statehouse in Trenton to push for stricter patient care standards at hospitals and nursing homes. Among the demands was one for a ban on mandatory overtime, which “makes health care workers prone to mistakes.” State Senator Joseph Vitale told those present that he planned to introduce a bill dealing with their demands.\(^{(127)}\) On March 15, 1999, he introduced two related bills, one of which would have required the Commissioner of Health and Senior Services to adopt regulations providing for a series of minimum staffing ratios at hospitals.\(^{(128)}\) The other bill—which was co-sponsored by the Republican Senate Majority Leader, John Bennett, who continued his co-sponsorship until the bill became law almost three years later—would have amended the state Wage and Hour Law to prohibit health care facilities from requiring hourly employees to accept work in excess of eight hours daily or 40 hours weekly, “except in the case of an unforeseen emergent circumstance when the overtime is required only as a last resort....” The prohibition of mandatory overtime—voluntary overtime work was expressly permitted—was designed “to safeguard their [the workers’] health, efficiency, and general well-being as well as the health and general well-being of the persons to whom these workers provide services.”\(^{(129)}\) An identical bill was introduced in

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\(^{124}\) *Legislative Record* at S-1106 (June 6, 2001).


\(^{128}\) S.B. 1755 (1999).

the Assembly in May,\textsuperscript{130} but the legislature adjourned before further action could be taken. New bills were then introduced in both Houses on January 11, 2000.\textsuperscript{131} On June 29 a slightly different Assembly substitute bill—which was sponsored by the Republican Speaker of the Assembly, Jack Collins, who would also sponsor the bill the next year—passed both Houses virtually unanimously, thus becoming the first such bill to be passed in the United States. Only two significant changes were made: instead of a maximum eight-hour day, a mutually agreed-upon predetermined scheduled work shift of 8, 10, or 12 hours was permissible within the framework of a 40-hour week; and the effective date was postponed until one year after enactment.\textsuperscript{132}

This relatively smooth legislative course was in part a function of the fact that, when the New Jersey Hospital Association (NJHA) realized that, with even the non-labor oriented Republican leadership of the Senate and the Assembly supporting the bill, it was "not stoppable," the organization decided not to oppose the bill in order not to antagonize the sponsors and undermine its own efforts to lobby for more favorable provisions. In the event, however, after discovering that many of its members opposed the bill, the NJHA eventually changed its position.\textsuperscript{133} According to Senator Vitale, the NJHA, after promising neutrality in exchange for his promise to hold off on proposed legislation prescribing staffing levels, which the hospitals opposed even more adamantly, "in secret" began intensively lobbying the governor, which resulted in her vetoing the bill.\textsuperscript{134}

Despite the overwhelming legislative majority, on September 21, 2000, Republican Governor Christine Whitman conditionally vetoed the bill, recommending several crucial changes (which the legislature could have adopted before returning the amended bill). Although she shared nurses' concerns that excessive overtime may result in an unsafe work environment for employees, and place in jeopardy the patients whom they serve, I am troubled...that this bill limits its focus to banning mandatory overtime, and is silent concerning the issue of excessive voluntary overtime. For example, the bill would prohibit a hospital from requiring a nurse from working one additional hour of mandatory overtime to avoid temporary short staffing, but it would not prohibit the same nurse from working an unlimited number of voluntary overtime hours. The potential threat to patient and employee safety due to overtired employees occurs regardless of whether excessive hours are considered mandatory or

\textsuperscript{130} A.B. 3101 (1999).
\textsuperscript{131} S.B. 122 and A.B. 367 (2000).
\textsuperscript{133} Telephone interview with Betsy Ryan, general counsel, New Jersey Hospital Association, Princeton, NJ (Feb. 4, 2002).
\textsuperscript{134} Telephone interview with Sen. Vitale.
Whitman therefore recommended deleting the prohibition of mandatory overtime and substituting instead a provision authorizing the Commissioner of Health and Senior Services, in consultation with the Commissioner of Labor, to "adopt, following a public hearing, regulations establishing the maximum hours for a work day or work week," and to empower the commissioner to permit work in excess of the maximum hours in case of unforeseen emergencies.\textsuperscript{136}

Regardless of whatever plausibility may have inhered in the substance of the governor's recommendation, Senator Vitale, the bill's chief sponsor, believes that the concern she expressed about voluntary overtime was disingenuous and functioned as a smokescreen to soften her real intention, which was to prevent enactment of any regulation of overtime.\textsuperscript{137}

Nurses' reaction was immediate and entirely negative.\textsuperscript{138} The "outraged" president of one local hospital workers union argued: "Although the governor's veto may protect the pockets of hospitals and nursing homes, it will only exacerbate the current staffing crisis and further drive down the level of patient care."\textsuperscript{139} The nurses' animus toward Whitman's recommendation was summed up by Jeanne Otersen, the policy director of the Health Professionals and Allied Employees (HPAE), New Jersey's largest nurses' union: Whitman "has said to the (health care) industry the practice of forcing people to stay 16 hours a day is okay."\textsuperscript{140} The basis for this criticism apparently rested on the belief, as the Bergen County Record editorialized, that the governor's proposal would be acceptable only if all overtime were "voluntary. Otherwise, a nursing home or hospital could avoid hiring more workers by insisting that everyone else work the longer hours on a regular basis or risk losing their jobs. The 40-hour work week could be left in the dust."\textsuperscript{141} The New York Times agreed that under Whitman's regime nurses "would be required to continue to work overtime when ordered to by their

\begin{itemize}
\item Telephone interview with Senator Joseph Vitale, Trenton, NJ (Feb. 4, 2002).
\item Colleen Diskin, "Veto Keeps Forced OT in Health Care: Whitman Irks Unions, Nursing Home Activists," (Bergen County) Record, Sept. 22, 2000, at A1 (Lexis).
\item Barbara Rosen, letter to editor, (Bergen County) Record, Oct. 5, 2000, at L10 (Lexis) (pres., Health Professionals and Allied Employees Local 5091).
\item Donna Leusner, "Whitman Vetoes Ban on Nurses' Forced OT: Governor Wants Voluntary Shifts Limited Too as Health Unions Cite Tired Employees," (Newark) Star-Ledger, Sept. 22, 2000 (Westlaw).
\item "Nurses and Overtime: They Are Often Forced to Work Long Hours," (Bergen County) Record, Sept. 25, 2000, at L2 (Lexis).
\end{itemize}
bosses...."\textsuperscript{142}

While the governor's spokeswoman was characterizing her approach as "broader...in applying the bill to voluntary overtime as well as mandatory overtime," another nurse was able to identify a gap in the otherwise impeccable logic of Whitman's ostensible attack on the libertarian approach to overtime: "‘When you plan on overtime, you plan to be rested and have your children or elderly parent cared for.... When the supervisor comes to a nurse after a 12-hour shift and states: ‘Your relief is not coming, you have to stay another four or more hours,’ a cascade of events, not to mention exhaustion, can (affect) your ability to perform your duties.’"\textsuperscript{143}

Although this objection is not without force—and was in part accommodated by the ultimate enactment, which requires employers, in case of lawful emergency overtime, to give employees time to arrange for care of family members\textsuperscript{144}—it remains unclear how nurses, any more than automobile assembly line workers, could pre-store enough rest to work through 16-hour days at peak performance except on a very occasional basis. The arduous burden associated with extraordinarily long workdays also raises the presumption that the decision nevertheless to undergo such ordeals is driven by financial considerations, which are precisely the forces that compulsory labor standards are designed to prevent from triggering a race to the bottom. Indeed, Otersen of the HPAE, the chief union lobbyist for the bill, concedes that she intentionally avoided confronting that aspect of the governor's recommendation because a significant proportion of the union's membership working voluntary overtime does so to make ends meet and would have objected to any bill that prohibited the practice. When, Otersen reports, Governor Whitman's conditional veto, so to speak, "called the union's bluff," the HPAE, in turn, sought to call her bluff by broaching the subject of a bifurcated overtime limit, under which voluntary overtime would have been capped separately, but, since the administration's real agenda was killing any overtime bill rather than reaching a compromise, the initiative was never taken up.\textsuperscript{145}

This interlude underscores that, in spite of the real and important differences between voluntary and involuntary overwork in terms of co-determination at the workplace and workers' ability to plan their lives outside the workplace, all overtime work tends to degrade labor standards and working conditions. If nurses take seriously their lobbying claim that their hours must be capped for the same reason that maximum hours are legally imposed on air traffic controllers,\textsuperscript{146} air-

\textsuperscript{143}Leusner, "Whitman Vetoes Ban on Nurses' Forced OT" (quoting Susan Weiss).
\textsuperscript{144}2001 N.J. Sess. Law Serv. ch. 300, S. 2093, § 4.c (Westlaw).
\textsuperscript{145}Telephone interview with Jeanne Otersen, Emerson, NJ (Feb. 5, 2002).
\textsuperscript{146}14 C.F.R. § 65.47 (2001).
plane pilots,\textsuperscript{147} flight attendants,\textsuperscript{148} train employees,\textsuperscript{149} and truck drivers\textsuperscript{150}—namely, that because fatigue can cause injury and death to others, "abusive use of overtime...is a matter of public health safety"	extsuperscript{151}—it is unclear on what principled basis nurses believe that, unlike transportation workers, they should remain entitled to decide for themselves whether they would like to violate those societally created norms in order to "make extra money"\textsuperscript{152} by means of overtime premiums—a point of view with which even Otersen and Senator Vitale were unable to disagree.\textsuperscript{153}

The decision not to seek to override the governor's conditional veto, despite virtually unanimous passage of the bill, was dictated by party politics: the leadership of the Republican-controlled legislature, according to Senator Vitale and lobbyist Otersen, signaled that it would not permit the process to go forward because the politically acceptable quota of overrides of the Republican governor had already been filled.\textsuperscript{154}

Early in 2001, as supporters were introducing their bills again in the wake of Governor Whitman's departure to head the federal Environmental Protection Agency, the NJHA, together with nursing homes and assisted living facilities, began registering their objections publicly.\textsuperscript{155} The NJHA's general counsel did not blink at reducing the entire dispute to its core of naked power: "We are concerned if we remove mandatory overtime from our arsenal, we may have no nurses on some floors."\textsuperscript{156}

The bill as introduced once again by Senator Vitale differed somewhat from the bill that Whitman had conditionally vetoed. Forgoing regulation of the length

\begin{footnotes}
\item[147] Commercial airline pilots are prohibited from flying more than a fixed number of hours per day, week, month, and year. 14 C.F.R. § 121.471 (2001).
\item[148] 14 C.F.R. § 121.467 (2001).
\item[150] Truck drivers are prohibited from driving more than fixed number of hours per day and week. 49 C.F.R. §§ 395.1 and 395.3 (2001).
\item[153] Telephone interviews with Otersen and Sen. Vitale.
\item[154] Telephone interview with Sen. Vitale.
\end{footnotes}
of the workday, it narrowed the focus to the 40-hour week, this time, however, expanding the scope of the “unforeseeable emergent circumstance” to include “an unpredictable or unavoidable occurrence at unscheduled intervals relating to health care delivery that requires immediate action.” At the same time, it narrowed the scope of the exceptional use of mandatory overtime by stipulating that it not be “used to fill vacancies resulting from chronic short staffing.”

Despite the legislature’s inability to determine the total number of overtime hours—voluntary, mandatory, or pursuant to a collective bargaining agreement—worked at affected health care units, the number of additional workers who would have to be hired to compensate for the ban on mandatory overtime, or whether employers would be able to hire a sufficient number to compensate, the Senate passed the bill 37-0 on June 28 and the Assembly by a vote of 72-4 on December 10, 2001. As enacted, the law contained a number of important revisions made by the Senate Health Committee and Budget and Appropriations Committee in March and June, respectively, that induced employers to adopt a position of neutrality on passage.

First, the law does not apply to on-call time—employers’ appropriation of which is a proliferating method of forging the 24-hour workday—defined as “time spent by an employee who is not currently working on the premises of the place of employment, but who is compensated for availability, or as a condition of employment has agreed to be available, to return to the place of employment on short notice if the need arises.” To be sure, the law does not “permit an employer to use on-call time as a substitute for mandatory overtime.” Second, employers’ right to avail themselves of the emergency escape clause is conditioned on their first having “exhausted reasonable efforts to obtain staffing.”

The underlying reasonableness standard is conceived quite broadly, requiring that an employer “shall: a. seek persons who volunteer to work extra time from all available qualified staff who are working at the time of the unforeseeable emergent circumstance; b. contact all qualified employees who have made themselves available to work extra time; c. seek the use of per diem staff; and d. seek personnel from a contracted temporary agency when such staff is permitted by law.

157S.B. 2093, §§ 2-3 (Feb. 8, 2001). The companion A.B. 3303 was identical and on Dec. 10, 2001, S.B. 2093 was substituted for it in the Assembly.


159See, e.g., Bright v. Houston Northwest Medical Center Survivor, Inc. 934 F.2d 671 (5th Cir. 1991); Owens v. ITT Rayonier, Inc., 971 F.2d 347 (9th Cir. 1992).


1622001 N.J. Sess. Law Serv. ch. 300, S. 2093, § 3 (Westlaw).
In order to discourage employers from abusing the emergency clause, they are required to document in writing, for review by the Labor and Health Departments, their exhaustive reasonable efforts. In addition, to deal with one of nurses’ (and other workers’) most frequently voiced complaints, even under the emergency provision the law requires employers to give an employee the “necessary time, up to a maximum of one hour, to arrange for the care of the employee’s minor children or elderly or disabled family members.” The “reasonable efforts” clause, however, does not apply in the event of an officially declared emergency, disaster, or catastrophic event that “substantially affects or increases the need for health care services.” This definition was acceptable to union leaders, “who had feared that hospitals would invoke the emergency clause whenever workers called out sick.”

The reason, according to Senator Vitale, that the NJHA ultimately became reconciled to the partial abolition of mandatory overtime was his credible threat to pass even less acceptable legislation. Nevertheless, the NJHA’s general counsel observed that many hospitals remain opposed to the legislation because they believe that it will deprive them of an important managerial tool.

When the acting governor finally signed the bill into law on January 2, 2002, it was only one year until the country’s most rigorous ban on forced overtime for nurses would go into effect.

Finally, in March 2002 Washington and Minnesota became the fourth and fifth states to enact a law shielding nurses from unwanted overtime. In Washington, too, the legislative process exacted a toll in the form of diluting the protection initially offered by the first bill. In this case, the House bill introduced in January 2001 provided for only one exception to the prohibition on forcing employees to work overtime or discriminating against them for refusing to work overtime (defined as hours worked beyond an agreed-on, regularly scheduled shift or workweek)—an unforeseen emergency. The enforcement procedure empowered investigators to suspend or revoke the license of any health care facility that committed seven or more violations if investigators found “an ongoing

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168 Telephone interview with Sen. Vitale.
169 Telephone interview with Betsy Ryan.
pattern of deliberate violations....” In any lawsuit brought for violating the prohibition, the mere fact that any employee had worked in excess of forty hours per week constituted a prima facie violation. In order to rebut this presumption, the employer would have had to prove both that an emergency had occurred and that overtime had been “required only as a last resort at the time the employee was forced or compelled to work.” The bill encouraged workers to be vigilant by entitling the employee who made the initial report of a violation leading to sanctions against the employer to receive 20 percent of the fine.171

After this bill made no progress, a bill was introduced in the Senate in January 2002 that within six weeks passed both chambers by large majorities once amendments had been added that made the limits on overtime more palatable to employers. While not “actively” opposing the bill, the Washington State Hospital Association sought to persuade the legislature that its members should not be treated as rapacious profit-making employers: “‘Hospitals are not factories pushing their workers to increase their output of widgets to increase the bottom line.’”172

As enacted, the law sets out in the preamble that, against the background of a critical shortage of health care workers and the need to safeguard the workers’ health and efficiency and patients’ safety, required overtime should be limited as a matter of public policy.173 Affording employers some flexibility, the legislature defined overtime as hours beyond 12 in a 24-hour period or 80 hours within two weeks.174 The statute also expanded the class of exempt emergencies by including “any unforeseen disaster or other catastrophic event which substantially affects or increases the need for health care services.”175 Excluded from overtime were both any work caused by pre-scheduled on-call time and any situation in which an employee is required to complete a patient care procedure already in progress “where the absence of the employee could have an adverse effect on the patient.”176 Most importantly, the ban on overtime also does not apply where the employer documents that it has used “reasonable efforts to obtain staffing.”177 The employer can satisfy this requirement by: seeking workers to volunteer to work extra hours from among all available qualified employees who are working; contacting “qualified employees who have made themselves available to work

172Queary, “Nurses Seek Right to Refuse Overtime” (quoting testimony of Lisa Thatcher before the Senate Committee on Labor and Commerce on Jan. 28, 2002).
174Wash. S.B. 6675, § 2(4).
175Wash. S.B. 6675, § 2(7).
176Wash. S.B. 6675, § 3(3)(d).
177Wash. S.B. 6675, § 3(3)(c).
extra time”; seeking per diem staff; and seeking employees from a temporary agency if such a procedure is permitted by law or any applicable collective bargaining agreement, and if the employer “regularly uses a contracted temporary agency.” In addition to these striking accommodations, the law also made the prohibition on overtime more acceptable to employers by jettisoning all of the aforementioned innovative and strict enforcement provisions of the House bill, although it does impose a fine for violations rising from $1,000 to $5,000 for repeat violators.

The Minnesota statute, against which only one legislator voted, is of the decidedly weak and narrow variety. It prohibits employers from taking action against a nurse for failing to “accept an assignment of additional consecutive hours...in excess of a normal work period,” which is defined as up to 12 hours consecutive hours “consistent with a predetermined work shift.” In addition, the protection is conditioned on the nurse’s declining to work “because doing so may, in the nurse’s judgment, jeopardize patient safety.” Moreover, the emergency exemption is broadly phrased to include a period when replacement staff cannot report for the next shift and increased patient need resulting from unusual, unpredictable, or unforeseen circumstances including adverse weather.

Thus with varying degrees of success and rigor organized nurses have initiated a movement to confer on one occupational group a statutory right to refuse to work overtime, while reserving to themselves the prerogative to work overtime at premium rates if they so choose regardless of whether they are fatigued. Because the campaign and the legislation are explicitly founded on the health and safety consequences for non-workers of nurses’ overtime-induced fatigue, rather than setting a precedent for others, they hearken back to a confining nineteenth-century tradition lacking the kind of broad principle needed to apply the right to refuse to the vast majority of workers whose long overtime hours ruin only their own physical and mental health (or, in the worst case, the safety of their co-workers).

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178 Wash. S.B. 6675, § 2(6).
180 "Governor Ventura Signs Ban on Mandatory Overtime," PR Newswire, Mar. 25, 2002 (Lexis).
181 Minn. S.B. 2463, § 3 (2002).