THE AUTOCRATICALLY FLEXIBLE WORKPLACE

A HISTORY OF OVERTIME REGULATION IN THE UNITED STATES

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Employers’ Struggle Against Statutorily Imposed Premium Overtime Wages for Non-Minimum Wage Workers: 1938-1942

Another difference of opinion which might be clarified by court action hinges on the question of hours. This controversy, if it is a controversy, seems rather strange in view of the statute’s moderate hour provision. The Act does not even satisfy the perennial demand of labor—the 8-hour day. The Act does not tell the employer what hours in any day he may work his men. It simply says he shall not work his employees more than 44 hours without paying them time and a half for overtime. In fact, the overtime provision is where the rub comes in. There has been much talk about ways and means of an employer working his men more than 44 hours without paying them any more than they were paid prior to the effective date of the Act.1

The Wage and Hour Division (WHD) engaged in extensive public education during the run-up to the act’s date of effectiveness. Two national radio networks gave the Wage and Hour Administrator, Elmer Andrews,2 fifteen minutes the night before and a third broadcast a program the next day.3 Yet even before the FLSA went into effect at 12:01 a.m., Monday, October 24, 1938, the WHD had received “[e]vidence of employer resistance” from several states.4 Already a week earlier an employer had telegraphed the WHD seeking the general counsel’s blessing for his “painless compliance” scheme to lower “the hourly wage of every worker in his place, from president to office boy, to 25 cents an hour for the first 44 hours and 37½ cents overtime” and to guarantee the difference between that amount and the weekly compensation prior to October 24.5

Such reports prompted Andrews to declare preemptively: “‘Millions of Americans look forward to Monday...as the beginning of a new advance in the

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2Elmer Andrews (1890-1964), had, before Roosevelt appointed him the first Wage and Hour Administrator, been the New York State industrial commissioner. Who Was Who in America (1961-1968) at 4:31 (1968).
5“FLSA and ‘Painless’ Compliance,” Wage and Hour Reporter 1:375 (Nov. 21, 1938).
nation's offensive against exploitation and hardship. These millions welcome the opportunity to help inoculate our economic system against the virus of sweatshops. Unfortunately, however, there is a small and scattered minority who apparently are unwilling or incapable of contributing to the common good. These delinquents, whose number and importance are magnified by their isolation, resort to subterfuge in an effort to camouflage their selfishness and blame the Fair Labor Standards Act for their own anti-social conduct."6 The intensity and longevity of this important conflict contradicts the later scholarly claim that "[f]or several months, Andrews enjoyed his honeymoon."7

Roosevelt himself may have been disappointed that the bill "had been so watered down in its long journey through Congress that it could have little impact on the national economy,"8 but employers, who had failed to voice such apprehensions at the hearings in 1937, feared a "very violent" "shock." For example, Benjamin Anderson, Jr., the economist of the Chase National Bank, conceded in an address to the Chamber of Commerce of Kansas City, on December 14, 1938, that at 48 or 50 hours, overtime was a "serious burden" warranting labor unions' "good rule" of time and a half to protect workers' health. But a mandatory 50 percent premium for hours above 40 "create[ed] an inelasticity" which could plunge the next business upturn into a "needlessly violent and premature crisis." Anderson found the FLSA altogether "unfortunate," but especially could not "contemplate with equanimity" a 50-percent overtime penalty after a mere 40 hours for all industry within two years.9

The chief dispute on the eve of October 24 was the payment of overtime to salaried employees.10 The Bureau of National Affairs' (BNA) authoritative Wage and Hour Reporter argued that "[t]he root of the controversy" stemmed from a statement that Administrator Andrews had made before the Southern States Industrial Council in Birmingham on September 29. It is implausible that Andrews' statement provided anything but a pretext for employers' resistance that would have emerged anyway, especially since the WHD's official Interpretative Bulletin No. 4 ("Maximum Hours and Overtime Compensation"), published on

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8 James MacGregor Burns, Roosevelt: The Lion and the Fox 343-44 (1956).
10 On employers' coordinated efforts from 1938 to 1940 to amend the FLSA to broaden the exclusion of white-collar workers, see Marc Linder, "Moments Are the Elements of Profit": Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act ch. 2 (2000).
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October 21, contradicted Andrews' statement,\(^1\) which he himself later disowned ("certain impromptu remarks I made...in reply to random questions asked me at the end of the speech").\(^2\) Indisputably, however, Andrews had put his foot in his mouth in the following colloquy:

Q.—Many clerical and non-supervisory employees are on a monthly or weekly wage basis. Is it necessary for such wages to be recalculated to an hourly basis and time and one-half paid for hours over forty-four?

MR. ANDREWS—... Clerical forces, we all feel, are included in the Act. But I cannot see where there is going to be any practical difficulty there because your clerical force in any plant of any consequence certainly is earning on a basis of more than 25 cents an hour, weekly wages divided by the hours they work. If they are well above 25 cents an hour, it seems to me that there would not be much question about time and a half for overtime, because you could figure in that weekly wage that time and a half over the 44 hours had been given consideration as remuneration for their full week's work."\(^3\)

That Andrews's slip was not inadvertent was clear from his answer to a similar question in Birmingham that was not trotted out in the later debate. In response to a question concerning overtime liability for office employees of steamship companies who were paid more than the statutory minimum wage, Andrews replied: "They still get enough wages, I am sure, that if you want to break it up into so much per hour, so much for time and a half, it would still work out."\(^4\) Nevertheless, those who wanted to make much ado of these ignorant off-the-cuff remarks ignored the disclaimer that the BNA had appended to their publication already three weeks after the Birmingham meeting: "it should be kept in mind that the Administrator's answers are not final on any point and that he reserves the right to 'change his mind'...." They also conveniently overlooked Andrews's own self-deprecating admission at Birmingham about a similar gaffe he had committed soon after his appointment as deputy labor commissioner in New York State.\(^5\)

Employers' focus on the FLSA's overtime premium in the period immediately after enactment was driven by the fact that more than four times as many workers were affected by it than by the minimum wage provision. In 1938, an estimated 1,384,000 workers were covered and working more than 44 hours; by

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\(^4\)"Some Employers' Questions Answered" at 196.
\(^5\)"Some Employers' Questions Answered" at 194.
1939, 1,751,000 workers were predicted to be covered and working more than 42 hours, and by 1940, 2,184,000 workers. In contrast, in 1938 only 300,000 workers were earning less than the minimum wage of 25 cents, while the Wage and Hour Administrator predicted that by 1939 550,000 would be earning less than the minimum wage of 30 cents. The manufacturing industries with the greatest overtime liability were food, lumber, and textiles.\(^6\)

During the congressional hearings on the FLSA, it had been the very rare employer who, when asked by Senator Hugo Black whether “there should be any permission to work longer than 40 [hours] on payment of overtime,” replied, as did Donald Comer, president of Avondale Mills and former president of the American Cotton Manufacturers Association: “No. Get another man.”\(^7\) Employers launched a many-sided campaign against the overtime provision of the FLSA as soon as the law went into effect.\(^8\) During its very first week, enforcement officials were occupied with employers’ efforts to achieve costless compliance with the overtime rule. An Ohio steel foundry, for example, planned to cut the hourly wage from 70 to 40 cents, on which time and a half would be paid, and then add back a 30-cent an hour bonus.\(^9\) A trade association suggested to its members that they could achieve costless compliance by reducing the hourly wage of an employee who worked 48 hours from 50 cents to 46 cents. However, if the worker insisted on his old 50-cent wage, employers should offer him only 40 hours, leaving him with a total weekly wage of $20: “‘Naturally employees are going to be quite willing to take the slight hourly rate cut and a full weekly pay envelope rather than contribute $4 for the privilege of having an extra day off with nothing to do but spend his money.’”\(^10\)

Remarkably, unions had long been aware that such evasions were predictable. As far back as 1912, when Congress was in the final throes of a two-decade debate on an eight-hour law for federal government contractors’ employees that did not provide for overtime work, N. P. Alifas, the president of a government


\(^{18}\) Carroll Daughterty, who had been the chief economist of the BLS and WHD, incorrectly stated in his labor economics textbook: “Under the business conditions of 1938 and 1939 most employers seemed to have no great difficulty in adjusting their operations to the Act’s requirements. But the rise in business activity caused by the government’s expenditures for national defense in 1940 led some employers to begin agitating for modification of the Act’s hours provisions.” Carroll Daughterty, *Labor Problems in American Industry* 1:191 (1944 [1941]).


\(^{20}\)“Complaint Form; First Violations Reported,” *Wage and Hour Reporter* 1:291, 292 (Nov. 7, 1938).
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machinists union local, testified against employers' request for overtime on the grounds that it would be misused:

[I]f a manufacturer secured a contract...he could very easily evade the law like this: For instance, here is John Smith who gets $3.60 for a nine-hour day. That is 40 cents an hour. The employer might say: "Mr. Smith, we have secured this contract from the Government on condition that we work the men an eight-hour day, and with the provision that the men are to be allowed to work overtime." He may also say: "I secured this contract on a very low bid. You know there is a great deal of competition among employers, and, Mr. Smith, you have been in the habit of working nine hours for me for $3.60; surely you will be willing to help me overcome the technicality of this law, and instead of 40 cents an hour accept 38 cents an hour for the eight hours, and accept time and a half for the extra hour, or 57 cents, which will make just $3.61 instead of $3.60 as heretofore.\(^{21}\)

Significantly, Alifas then added what no one criticized about the FLSA a quarter-century later: the existence of such a permissive overtime provision "would be dangerous, as it would utterly nullify the real intention of the law. It is just such contractors as the one cited here that make a rigid law necessary...."\(^{22}\)

One of the more primitive evasions was reported on the front page of The New York Times just a few weeks after the FLSA went into effect: some employers stamped or printed a waiver of overtime payments on pay checks on the assumption that workers' acceptance of the check would act as a waiver of their FLSA rights.\(^{23}\) The two chief thrusts to employers' resistance, however, were economic and legal. The former focused on readjusting wages and hours to avoid the bite of the overtime premium. The object of litigation was to secure rulings that the overtime premium was applicable only to the minimum wage in opposition to the WHD's interpretation that section 7 of the FLSA clearly makes the employee's "regular rate" and not the minimum wage the base for the overtime premium.\(^{24}\)

The WHD's first line of defense against this attack was reliance on section 18 of the FLSA: "No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under

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\(^{22}\)Eight-Hour Law: Hearings Before the Senate Committee on Education and Labor, 62d Cong. at 372 (1912).

\(^{23}\)"Workers Cannot Waive Wages Act Hours; Andrews Warns Employers Not to Try Idea," N.Y. Times, Nov. 21, 1938, at 1:2.

this Act, or justify any employer in increasing hours of employment maintained
by him which are shorter than the maximum hours applicable under this Act.”

At his Birmingham question and answer session on September 29, Andrews had
also put his foot in his mouth on this issue. When asked whether an employer
paying higher wages than his competitor could reduce wages “to meet the com­
petitive situation where he observes the minimum,” the Wage and Hour Ad­
ministrator replied:

I have heard of that in some of the communications industries, that that is being con­
templated. Of course, the Act contains a pious wish that that should not be done. I think
it is not going to make for any happier industrial relationship...between employer and em­
ployee. I think it is economically unsound and pretty generally unfair, but that is all I can
say about it.

Andrews’s infamous “pious wish” may have been as accurate a label as could
be placed on section 18, which clearly differed, for example, from a 1970 Ontario
hours law that explicitly prohibited employers from reducing a worker’s regular
rate to comply with the premium overtime wage provision. But the WHD was
not deterred from dressing up the wish in the agency’s initial (and ambiguous)
interpretation. In Interpretative Bulletin No. 4 of October 21, the WHD asked
and answered hypothetical questions about the regular rate against the back­
ground of section 18. If an employer, who before the FLSA went into effect had
employed his workers for 48 hours at a flat hourly rate well in excess of the 25­
cent minimum wage, reduced its employees’ wage rate to an amount still above
the minimum wage so that their total weekly wages including time and a half for
overtime remained the same, the WHD was not yet prepared to “give any definite
interpretation” of the applicability of section 18. It merely pointed out that “it is
not safe to assume that a section of an Act of Congress is meaningless,” and
speculated that if the same employer tried to use the section to “justify” the wage
reduction in negotiations with its employees, a court “might” be warranted in
holding that the reduction “is not really a reduction in legal contemplation,” and
that therefore the regular rate remained the pre-FLSA higher rate.

In mid-November 1938, the WHD’s assistant general counsel informed the
Fifth National Conference on Labor Legislation that “if the effect of what the em­
ployer does is to reduce the hourly wage being received at the time the act went


1938).

See below ch. 17.

Wage and Hour Div., Interpretative Bull. No. 4, in BNA, Wage and Hour Reference
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into effect, he is violating the spirit of the act. We cannot assume that Congress put that in there for nothing, and I think that the employer who engages in such a practice is running a big risk of having to pay twice the amount which he was paying at the time to his employees..."\(^29\)

Nevertheless, not wanting to take any chances, the Conference incorporated into the model state wage and hour bill that it adopted a provision "[w]ith the hope of effecting a more certain limitation of hours and of preventing evasion of overtime compensation through such devices as reduction of basic wage rates...."\(^30\) The provision required the state labor commissioner to issue regulations including "such partial or total restrictions or prohibitions on the employment (notwithstanding the payment of time and one-half the regular rate of pay) of employees in excess of the hours specified in section 4 (a) as he finds necessary to prevent the circumvention of the intent of section 4 (a) to reduce hours of labor by the reduction in wage rates to avoid the penalizing effect of the overtime compensation provisions, or by other devices."\(^31\)

The possible interpretations of section 18 had not passed unnoticed in the press when it suddenly appeared in the bill as it emerged from the House-Senate conference committee. The *Times* was immediately, and remained for years, exercised over this "potential joker." It conceded in June 1938 that it had probably been inserted "with the best of intentions"—namely, to assuage fears that the statutory minimum wage would tend to become the maximum and maximum hours the minimum. However, the editors speculated that the "ambiguous sentence...may prove to be a very mischievous joker. There will be those who will try to interpret it to mean that all existing wages above the minimums now fixed and all existing hours below the maximums now existing must be frozen at their present levels—or that all existing wages can only move in one direction—upward. Such an interpretation...would paralyze the American economy."\(^32\)

Two months later, repeating much of its earlier editorial verbatim, the *Times* saw its premonitions coming true as the national director of the Congress of Industrial Organizations (CIO) asserted that two large employers intended to use the FLSA as a cover for reducing wages in tandem with reducing weekly hours from 48 to 40. To be sure, the paper found a silver lining in the CIO's lament that the lack of an enforcement provision in section 18 gave employers a ""technical loop-


\(^30\) *Proceedings of the Fifth National Conference on Labor Legislation* at 28.


The National Association of Manufacturers (NAM) immediately launched an aggressive campaign to undermine the effectiveness of the overtime provision with respect to employees whose hourly wage exceeded the new statutory minimum. It also contended that there was “a serious legal question” as to whether salaried employees were covered by the overtime provision at all. Through its general counsel, John Gall, the NAM called attention to Andrews’ admission that section 18 “was nothing more than a ‘pious hope’ on the part of Congress.” Gall also pointed out that even if an employer wished to respect the spirit of a provision that lacked any sanction, section 18 did not refer to wage rates, but merely “a wage”; consequently, so long as the total weekly pay was not reduced, employers could comply with the alleged spirit of the law despite reducing wage rates. Moreover, Gall argued that the FLSA permitted employers to pay salaried employees for more than 44 hours weekly at their existing weekly compensation provided that the base hourly rate did not fall below 25 cents and the overtime rate was at least 37.5 cents. The NAM argued that “if the employer could not modify the basic rate so as to work salaried employees for the same weekly hours as before, at the same total compensation, the employer was ‘forever prevented from lowering a present wage rate even if it resulted in no lowering of total compensation.’” Gall asserted that if the NAM’s view did not prevail, “unscrupulous” employers would have an incentive to fire their existing employees and hire new ones at the lower, minimum rates of 25 and 37.5 cents.

The Wage and Hour Administrator, perceiving this interpretation as a direct threat to the new law’s effectiveness, struggled to draw out Congress’s intent from the overtime provision:

“Congress refrained from taking the more drastic step of prescribing an absolute maximum work week, but made it unlawful for an employer to work an employe for longer than forty-four hours a week unless such employe receives compensation...in excess of the hours above specified at a rate not less than one and a half times the regular rate at which he is employed....

“Congress thus made it economically disadvantageous to an employer to maintain a work week in excess of forty-four hours. The expectation evidently was that this provision would tend to bring down the customary work week to forty-four hours. The question now is whether this expectation can be defeated by various devices, with the probable result the coming Congress will renew consideration of more far-reaching proposals.”

35“Disputes Hirers on Overtime Law,” *N.Y. Times*, Nov. 6, 1938, at 2:1. Even the liberal economist and later Senator Paul Douglas agreed with the NAM that it would be
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In the weeks following the FLSA's effective date (Oct. 24, 1938), high-ranking WHD officials attended numerous employers' meetings to discourage them from running afoul of section 18. Calvert Magruder, the agency's general counsel, warned the annual meeting of the Manufacturers' Association of Connecticut against "the effort to make a huge joke of the overtime provisions...."36 Speaking to the Executives Association of Greater New York on November 16, Paul Sifton, the deputy Wage and Hour administrator (and former leftist playwright), also advised against reducing the hourly base rates of employees working more than 44 hours: "The work week is not merely to be shortened for the lowest-paid workers, but for all industry, and if devices for circumventing the overtime provisions are permitted, then the act's intent falls down."37

In an appearance at the same time before the Structural Clay Products Industry, George McNulty, the WHD's associate general counsel, included among the "obvious subterfuges" reducing employees' hourly rate to 25 cents, but guaranteeing them their old total pay, reducing base wages only during peak periods so that employees would receive the same total wages as during normal weeks, and declaring that henceforth workweeks would be 56 hours in order to calculate a lower hourly rate. McNulty also categorized as a subterfuge the then proliferating ruse of lowering the hourly rate from well above 25 cents to an amount still above 25 cents, but calibrated exactly so that, despite complying with the new time and a half rule, employers could continue to employ workers for 48 hours weekly without having to pay any more than before the act went into effect. He warned employers that even in the unlikely case that the bookkeeping schemes they were devising for "juggling purported regular hourly rates" were later found to be legal, "is it wise to assume that Congress will sit supinely by?"

If a huge joke is made of Section 7 (which sets the maximum hours), Mr. McNulty said he doubted that "Congress will join in the laughter. Passage of the Black-Connery Thirty-Hour Bill was once seriously considered and may be again.... If flexibility is incompatible with enforcement, then Congress may well vote for enforcement without flexibility."38

"very dubious public policy" to enforce section 18 because its effect would be to "freeze existing wage scales at their present levels and prevent any future reductions, whether caused by a depression, a fall in prices...." Paul Douglas and Joseph Hackman, "The Fair Labor Standards Act of 1938: II," Pol. Sci. Q. 54:29-55 at 35 (1939).

36Calvert Magruder, "What Did Congress Intend? Mr. Magruder's View," Wage and Hour Reporter 1:357, 358 (Nov. 14, 1938) (address delivered Nov. 10).


38"Industry Warned on Wage 'Juggling,'" N.Y. Times, Nov. 18, 1938, at 40:1. The WHD's assistant general counsel Rufus Poole stated that employers asked the division for
A few days later, the *Times* reported on its front page, the Wage and Hour Administrator said flatly that any employers reducing wages to 25 cents an hour "as a result of the act were acting in a 'most illegal manner.'" However, despite his assurance that the intent of the act was to prevent wages from being reduced to the minimum wage, Andrews revealed some legal uncertainty when he added that he was considering suggesting a clarifying amendment to Congress "to be sure that the penalty applies to all sections where penalties should apply...." Yet even in the absence of such congressional action, Andrews was eager to litigate such reductions: "In our opinion it is illegal.... You can say it just as often as you want to. It would tickle me to death. So many people say it can be done."39

Contrary to a popular misconception, employer resistance was not confined to the South. In 1940, for example, a large employer association in New York was indicted for having conspired to effect an industry-wide violation of the FLSA.40 The stratagems used by employers, large and small, to avoid the financial bite of the overtime law is nicely captured by some of the high-profile litigation. One such case arose two days before the FLSA went into effect when a superintendent of the General Mills plant at Larrowe, Ohio, near Toledo, met, on instructions from the company main office, with the watchmen, who had been working 56 hours weekly at 60 cents per hour for total weekly wages of $33.60, and advised them that "under the statute the company could put on other men to do the work as watchmen for 60 cents an hour instead of paying overtime of 90 cents to the present employees for a large part of the work."41 He explained that they could either work 40 hours at the same hourly wage or, if they wished to continue working a 56-hour week, at a reduced hourly wage of 52.5 cents for the first 40 hours and time and a half for the remaining 16 hours, leaving their total wages unchanged. Since the 40-hour option would have left them with only 71 percent of their then weekly wage—but would have required the employment of at least two other watchmen—the workers "were willing to work 56 hours 'if it was legal' for the company to make such an arrangement." In their FLSA suit against General Mills, Samuel Williams and his coworkers demanded the statutory time and a half overtime based on their real regular rate, which had been 60 cents an hour, during more than two years. In mid-1941 Judge Frank Picard (who would shortly achieve national fame as the trial judge in the Mt. Clemens Pottery


40Richter, "Four Years of the Fair Labor Standards Act" at 99.

41General Mills v. Williams, 132 F.2d 367, 368 (6th Cir. 1942).
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portal-to-portal case) formulated the point of the litigation this way: "There is no denying that this was an attempt, by contract, to circumvent the purpose of the Fair Labor Standards Act by reducing wages, maintaining the same number of hours and giving the workman the same pay he was receiving before the act went into effect. No one disputes this, and the question simply is: Did the defendant company have the right to enter into a contract with its men previous to the effective date of the Fair Labor Standards Act as long as the minimum rate paid was not below the rate set by the act?"

From the FLSA's finding of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," and its declared policy of eliminating those conditions "without substantially curtailing employment or earning power," Picard concluded that Congress condemned long hours not so much as being unhealthful but as generating unemployment: "Congress...anticipated that many industrial leaders would not be adverse to giving more employment as long as it didn't cost anything and to meet any possible circumvention the policy of the Act itself enunciated the doctrine that the eventual change to a 40-hour week should be made generally without affecting the 'earning power' of the workers of the United States." Picard saw this congressional intent buttressed by section 18, which "notifies the employer that nothing in the act 'justifies' him in reducing a wage paid by him which is in excess of the applicable minimum wage...."

Focusing on what he regarded as the economic realities, Picard found nothing ambiguous in section 18:

It clearly shows that Congress, composed of men the majority of whom had reason to believe from past experience that there would always be a few employers who would not enter into the spirit of the intention of such legislation, had in mind that minority and desired to place a barrier against the very thing that happened here. If all industrial leaders had reduced the wage rate in anticipation of this act, they would probably have found

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42See Linder, "Moments Are the Elements of Profit" ch. 3.
43Williams v. General Mills, Inc., 39 F. Supp. 849, 850 (N.D. Ohio, 1941). The plaintiffs were members of an AFL union, but the union, preoccupied with the plant's larger departments, apparently did not intervene. Id. Judge Picard was a federal district judge in Michigan, but heard this case in the Western Division of the Northern District of Ohio. The following year, citing his decision in this case, he handed down a similar ruling in Anuchick v. Transamerican Freight Lines, Inc., 46 F. Supp. 861, 866 (E.D. Mich. 1942). Plaintiffs' lawyer, Edward Lamb, was also a high-profile portal-pay litigator, whom the chairman of the House Un-American Activities Committee accused of being a communist. See Linder, "Moments Are the Elements of Profit" ch. 3.
44FLSA, § 2, 52 Stat. at 1060.
45Williams v. General Mills, 39 F. Supp. at 851. Picard offered no evidence for his claim that: "Except in certain fields of industrial endeavor, very few who have studied the problem contend that 48 hours or more of labor per week are detrimental to health." Id.
their men willing to work overtime to get the same wages. Congress knew that. They sought to prevent the act's frustration because the evil was not so much in the length of time men worked but, with nine, ten or twelve million unemployed..., the problem was to cut into that unemployment without financially hurting industry or its employees. It was hoped to cut at least four or five millions from the unemployment ranks. This it appears was the big objective of the...Fair Labor Standards Act.46

In response to General Mills's defense that Congress attached no remedy to violations of section 18, Judge Picard stated merely that congressional intent had to be derived from the act as a whole; in that sense he concluded that employers and employees were not privileged to contract for a nominal regular rate regardless of the real rate in order to nullify the overtime provision. Finally, Picard, reaching far beyond the statute, refused to enforce a contract that was against public policy because it was based on coercion of the employees by the employer and simultaneously "almost amounted to a conspiracy between the men and the company against an act of Congress—the men conspired to keep others out of work and the company to refrain from paying higher wages." Despite the workers' quasi-conspiracy to hog rather than share work, Picard awarded them their overtime pay and damages.47

Picard's vindication of section 18 in General Mills v. Williams was, however, short-lived: in December 1942 the Sixth Circuit Court of Appeals reversed the lower court decision on the basis of the Supreme Court's June 1942 decision in Walling v. A. H. Belo, which had ruled that the FLSA in general and section 18 in particular does not prevent employers from contracting to employ their employees at the same wage so long as the new rate exceeds the statutory minimum.48

A number of similar complaints reached the courts in the early 1940s, producing divergent outcomes. In one of the earliest, Gurtov v. Volk, decided less than four months after the FLSA went into effect by the Small Claims Part of the Municipal Court of New York City in Brooklyn, plaintiff-shipping clerk had been earning $12 for 50 hours of work or 24 cents an hour. In contemplation of the FLSA, the employer raised his wages on July 15, 1938 to $15 weekly, which remained his wage until he left defendant's employ in December. The court ruled

48General Mills, Inc. v. Williams, 132 F.2d at 369-70; Walling v. A.H. Belo Corp., 316 U.S. 624, 630 n.6 (1942); see also below ch. 10. Almost half a century after this battle was lost, John Owen, Reduced Working Hours: Cure for Unemployment or Economic Burden? 47 (1989), still mistakenly believed that "the FLSA specifically prohibits reducing hourly wages below the rate paid before the law went into effect. It is likely that a new reduction in the standard work-week would be accompanied by a similar prohibition."
against the worker's claim for time and one-half on the grounds that it was un­reasonable to regard the overtime provision as a "penalty against employers who, in apparent good faith, have paid wages in excess of the amount prescribed by the act. Such employers appear to be exempt from the operation of the statute."49 This decision was flawed by the incorrect assumption that overtime is due only on the minimum wage and the failure to compute the regular rate on which overtime was due, which here at the very least would have been 30 cents ($15/50 hours), thus producing overtime wages of 90 cents per week (15 cents x 6 hours). As a federal judge observed two years later, the employers "insist if, what defen­dants were paid can be so allocated as to cover the statutory minimum for the statutory maximum hours and, in addition, one and one half for all overtime, that such a salary meets the requirements of the law. ... The proposition seems very plausible, but, unless such was an arrangement agreed to by the parties...it is not compliance, because perchance it might figure out that way. ... It is not enough that the salaries...may be allocated or spread so as to cover the minimum and one and a half for overtime. It may even exceed the 30¢ minimum and the 45¢ for overtime and yet be a violation of the law."50

In another early federal court case, from May 1940, an oil refinery worker who had been receiving a fixed monthly salary of $150 told his employers a week after the FLSA went into effect that he wanted the benefit of shorter hours conferred by the new law; his foreman informed him that shorter hours would bring lower pay in their wake, but no changes ever took place. The federal court in Abilene, Texas, found for the defendant-employer on the grounds that the pay exceeded the minimum wage and overtime (on the minimum wage) for the number of hours worked.51

A complaint based directly on section 18 was filed in Maryland federal court by a hosiery knitter whose piece rate had amounted to the comparatively high weekly wage of $40 before the FLSA went into effect. At that time the Easton Hosiery Mills lowered his piece rate by five cents in order to finance the wage increase that the employer had to implement to comply with the FLSA vis-à-vis the low-wage helpers. The court dismissed the complaint because section 18 provided no relief, Congress did not intend to freeze wages above the minimum, and, even if it did so intend, it lacked the power to do so. The court noted that the original FLSA bill had authorized administrative action to prevent precisely what Easton Hosiery Mills had done, but the House had deleted the provision, and a proposed amendment to achieve the same end was not adopted. The court con­ceded that the legislative proponents intended section 18 to serve as a mandate

and not a mere policy statement, but they had failed to embody that intent in any statutory language.52

Another high-profile judicial decision arose out of a complaint filed by the WHD against a Minnesota manufacturing firm that on the eve of the FLSA had employed 18 workers working 50 to 56 hours a week at hourly rates varying between 45 and 80 cents. In the interim between enactment of the FLSA and October 25, 1938, the employer told the employees that with low profits it would have to adjust wages to comply with the new law. To avoid premium overtime rates, it would have to reduce hours to 44, but since it wished to maintain the workers’ weekly wages, it planned to lower hourly wages by 10 cents; it would pay time and a half on the lower rate, and if the total still failed to reach their present wages, it would make up the difference with a weekly bonus or gratuity. In response to the workers’ hostile reaction, the employer stated that it would drop the plan and reduce their hours to 44. Because the workers objected to a loss of wages and were willing to continue the long work weeks, they were unwilling to agree to the alternative proposal; although they feared that the bonus scheme was illegal, they ultimately accepted it. The court in Fleming v. Carleton Screw Products Company agreed with the WHD’s argument that the new wage rates were fictitious, the pre-FLSA rates being the real regular rates; to accept the employer’s defense that it was free to agree with its employees to hold them harmless while protecting itself against higher overtime costs would have nullified the FLSA’s purpose of making long hours more expensive and thus creating more employment by cutting those hours.53 On appeal, the Eighth Circuit expressly rejected the employer’s claim that the FLSA does not apply to employers paying in excess of the minimum wages and one and one-half times that minimum for overtime hours.54 The Sixth Circuit came to a similar conclusion in a suit against the Continental Baking Company.55

Despite employers’ campaign of civil disobedience, Major A. L. Fletcher, the Assistant Administrator in Charge of Cooperation and Enforcement, expressed the belief in early December 1938 that the FLSA might yet be “properly administered by capital, labor” and the WHD.56 And in spite of this organized resistance to the overtime law, the Wage and Hour Administrator assured the

52Remer v. Czaja, 36 F. Supp. 629 (D. Md. 1941). The court’s reasoning compelled it to reject the WHD’s interpretation of the regular rate as meaning the wage in effect when the Act went into effect and requiring ignoring reductions in violation of section 18 in computing overtime wages. Interpretative Bull. No. 4.
54Carleton Screw Products Co. v. Fleming, 126 F.2d 537 (8th Cir. 1942).
55Bumpus v. Continental Baking Co., 124 F.2d 549 (6th Cir. 1941).
NAM that only a "delinquent minority" who "contaminated the whole business community" had prevented businessmen from eliminating the "evils of sweatshops, of unfair competition and of low purchasing power" and had made necessary "some sort of compulsion,...the power of organized society applied through legislation...." Yet Andrews himself found the controversy that the NAM and employers had provoked odd since the FLSA's hour provision is permissive and does not even prescribe the eight-hour day. (In fact, the president of the AFL had alluded to the need for overtime pay after eight hours as an aside at the 1937 FLSA hearings, and at the end of 1938 the Textile Workers Organizing Committee proposed amending the FLSA to provide penalty overtime pay after eight hours daily and four hours on Saturdays, but it was not enacted then or since.)

By mid-1939, when deputy administrator Sifton addressed the Iowa Bankers Association, the WHD, while still insisting that lowering the wage rate to cancel the effect of the overtime premium ran contrary to congressional expectations of employment spreading and increased purchasing power, seemed almost to be reduced to pleading with employers, on moral rather than legal or economic grounds, not to litigate the force of section 18. In a puzzling non sequitur, Sifton asked employers, in view of the uncertainty of predicting judicial outcomes: "If you win, will it be worth it?"

Other employers organizations were not content with legislating or litigating the details of federal wage-hour regulation. At the end of April 1939 the Chamber of Commerce of the United States demanded congressional repeal of "curbs on business" including the FLSA. By early 1940, claiming that "[f]ew legislative enactments have produced greater confusion or have been more bitterly criticized," the Committee on Manufacture of the Chamber of Commerce also called for outright repeal. Dissatisfied with the mere "palliatives" that the scores of proposed amendments might have constituted, the committee recommended relegating to the states all regulation of wages, hours, and working conditions to prevent the "oppression" of "special classes of workers...." Significantly, the

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57 "Mr. Andrews' Address to N.A.M.,” *Wage and Hour Reporter* 1:413 (Dec. 19, 1938) (address of Dec. 9, 1938).
58 Andrews, “FLSA Problems for Congress or the Courts” at 419.
62 "Chamber Demands Congress Repeal Curbs on Business,” *N.Y. Times*, May 1, 1939, at 1:5.
overtime provisions, especially their application to office and salaried workers, were at "the heart of the Committee’s objections" to the FLSA. With respect to employees who were accorded "privileges" such as paid vacations and sick leave, the Chamber asserted a generally held view that mandatory overtime pay was "inequitable to the employer and...tend[ed] to restrict the opportunities of the worker to improve his status."63

In light of employers' single-minded attack on the scope of the overtime provision, it seems odd that the Wage and Hour Administrator reassured the NAM in late 1940 that protest about the 40-hour week stemmed from journalists and academics, "not from manufacturers. Perhaps this is the reason: In 1909 average weekly hours worked in factories were 53; in 1929, 46 hours; in 1939, 38 hours. The 40-hour week had arrived in manufacturing industries long before the law made it mandatory."64 Yet despite the fact that in 1939 fewer than one-eighth of covered workers were working more than 44 hours and thus benefiting from the overtime provision—in contrast to only 3 percent of covered workers whose wages were lifted by the 25-cent minimum wage65—a wide cross-section of employers had resolved to undo the new law.

Although the WHD had insisted that reducing wage rates in order to offset the overtime penalty was "contrary to the purpose of the Act," by the time of World War II it was constrained to concede that because "no penalty is provided in the Act for action contrary to its purpose in this respect," the division "does not...proceed against an employer who reduces a rate of pay to avoid the effect of the overtime penalty."66

64 Philip Fleming, Address before the NAM, New York City, Dec. 12, 1940, in 86 Cong. Rec. 6963 (1940).
66 BNA, Wage and Hour Manual 233 (1944-1945 ed.).