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"REVIEWING THE RULES AND REGULATIONS IMPLEMENTING
FEDERAL WAGE AND HOUR STANDARDS"

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Mr. Chairman, Ranking Member Wilson, and distinguished members of the subcommittee. Thank you for the opportunity to testify on this important topic. I am speaking today in my individual capacity and as a Distinguished Scholar at Cornell University's School of Industrial & Labor Relations, and not on behalf of any of the other organizations with which I am or have been affiliated.

Mr. Chairman, America's working families are suffering through a decades-long wages crisis. While government did not cause this crisis, neither stagnant wages nor growing income inequality is a foregone conclusion. Public policy matters immensely. The United States government, particularly the U.S. Congress and the U.S. Department of Labor, must do more to establish a firm and fair floor for wages, ensure workers receive appropriate compensation when they work overtime, and provide for fair competition among employers by effectively, consistently, and vigorously enforcing wage and hour laws.

America's Wages and Inequality Crisis

Most American workers have struggled with stagnant real (i.e., inflation-adjusted) wages for decades. Many labor economists peg the beginning of the wages crisis to the end of the 1970s. The real average hourly wage for the large majority of workers, although it has moved slightly higher and lower at times over the decades, has been essentially flat since 1979. While there are several alternative measures of wages and earnings, they all tell essentially the same story: the average American worker has not received a meaningful raise since before Ronald Reagan was elected president.

The story becomes more stark and troubling when we assess the effects of this wages crisis on workers by wage level. Men earning wages below the median wage --- that is, the lowest 50% of wages --- have seen their real wages decline since 1979. Men earning the lowest 20% of wages have seen the largest decline in real wages. Meanwhile, men earning the top 10% of wages have seen meaningful real wage gains, and those earning the top 1% of wages have received the largest real wage increases. As a group, women have done somewhat better than men, but women earning in the bottom 20% of wages have received almost no real wages increase since 1979. Only women earning the top 20% of wages have received sizable wage increases during that time.

The one period that offered a respite from this four-decades-long wages crisis was President Bill Clinton's second term. From 1996 to 2001, real average hourly earnings of private production and nonsupervisory employees (another reasonable measure of wages) increased about 7.5%. Equally important, real wage gains were spread across the wages spectrum --- that is, low-wage as well as high-wage workers received real increases. Because it is an oasis in a wages desert, this period is instructive for policy makers.

One very important reason real wages rose during President Clinton's second term is that labor markets were extremely tight. The unemployment rate during this period fell below and stayed below 5% for several years, and even dipped below 4% during several months. Part-time employees who would rather work full-time were far less prevalent in the late 1990s than they are today: 4.2 million in January 1996 and 3.3 million in January 2001 compared with 6.7 million in May 2015. Labor force participation, which measures the percentage of working-age people who have jobs or are actively looking for jobs, hovered around 67% from 1996 through 2001, actually increasing slightly during this time. In May 2015, the labor force participation rate was 62.9% meaning there are many more workers who have stopped looking for work. In sum, President Clinton's second term was characterized by a large number of employers bidding up wages in order to compete for a small pool of available workers.

But a second reason that wages rose during the second Clinton term was that the U.S. government raised the wages floor. In 1996, Congress raised the federal minimum wage from $4.25 to $5.15 --- a 21% increase in two annual increments. Almost ten million workers benefitted: 71% adults and 58% women. Households in the bottom 20% of the income distribution typical receive only 5% of total family income, but they received 35% of the benefits from the 1996-97 minimum wage increase. Numerous empirical studies failed to find any significant job loss associated with the 1996-97 increases. In fact, working families' increased incomes may have allowed them to spend more in their communities and, in the process, create jobs. During the same period, some workers benefitted from the availability of unpaid leave under the federal Family and Medical Leave Act which, after President Clinton signed it in 1993, protected some employees from losing their jobs because they took time off from work to care for themselves or a family member after a serious illness struck or to care for a newly born or adopted child. In sum, a higher wage floor and new labor standards protections for workers were important contributors to the one period of across-the-board wages growth during America's four-decades-long wages crisis. It is also worth noting that President Clinton's second term was a period of rapid economic and jobs growth unmatched until President Obama's second term.

By contrast, the waning months of President Bush's administration brought devastating job losses, including 700,000 jobs lost during the month of President Obama's first inauguration. Supported by aggressive monetary policy from the Federal Reserve, President Obama led a successful effort to help the American economy recover from the Great Recession. The American Recovery and Reinvestment Act and other Obama Administration policies facilitated turning catastrophic job losses into a record-setting 63 consecutive months of private-sector jobs growth that produced 12.6 million jobs for American workers. Our economy has added 3.1

million jobs over the past 12 months and an average of 217,000 jobs per month in 2015. The unemployment rate has fallen from its peak of 10% to 5.5% in May 2015, according to the Bureau of Labor Statistics. As a result of this job creation, American labor markets have begun to tighten and real wages are rising again. Average hourly earnings for all workers increased by 2.3% over the last year while average hourly earnings of production and nonsupervisory employees increased by around 2.0%. Although these are small increases, America's very low inflation rate --- at or near 0% in the most recent Bureau of Labor Statistics report --- ensures that workers will receive some real wage increase this year, as they did last year. Yet, the pace of wage growth is slow and the amount is too small to help American families recover from the devastating decline in household incomes caused by the Great Recession. Real median household incomes in the United States remain well below their pre-recession levels.

The story is quite different for the wealthiest Americans. Their incomes and wages have continued to grow dramatically --- substantially faster and more than those of the average family. While it is fair to say that they have reaped the largest share of our nation's recent economic recovery, the outsized share of national income flowing to the wealthiest Americans since the Great Recession is merely the continuation of a long-lasting trend that has made the rich richer. Since 1979, productivity in the United States has almost doubled, and our economy has more than doubled in size, but working families are not receiving their fair share of this growth. Since the late 1970s, the 60% of households with the lowest incomes have seen no real increase in their household incomes while the top 5% have increased their household incomes by several multiples. The households in the top 10% of incomes, which used to take in one-third of our national income, now take half. As noted above, the same story can be told about wages. When it comes to wealth, the ratio of the average top 1% household's wealth to the median American family's wealth in 2015 is more than twice the ratio in 1983. The rich are getting richer in absolute terms and in comparative terms, and the richest of the rich are doing best of all.

The wages crisis has been devastating for America's families as they have struggled to maintain their standard of living and middle-class status. Yet, the wages crisis has also hurt our economy. Seventy percent of the U.S. economy is consumption --- that is, working class and middle class families, among others, buying goods and services. These families spend a much higher percentage of their incomes on consumer goods and services than higher income families spend. In other words, if a minimum wage worker earns an additional dollar, she will spend that entire dollar to buy groceries or pay rent to support her family. That dollar goes directly back into the economy. If a millionaire or billionaire earns an additional dollar, he is much more likely to save that dollar than spend or invest it. Thus, our economy grows more when working class and middle class families increase their incomes than when wealthy people increase their incomes. The shift in wealth, incomes, and wages away from the working class and the middle class to the wealthiest Americans over the past four decades has reduced overall consumption from the level it might have achieved if wealth, incomes, and wages had been more fairly distributed. This "reverse Robin Hood" economic shift has contributed to what former Treasury Secretary Lawrence Summers called "secular stagnation" --- that is, slow growth in the American economy caused by inadequate demand. Simply, the U.S. economy is growing more slowly because of the wages crisis. While we are pressing the accelerator, we also have our foot on the brake.

The Wages Crisis' Causes

Once again, although government has made it worse rather than better, government did not directly cause this wages and inequality crisis. The principal culprits are technology and globalization. Over the course of the last four decades, uncounted technological innovations have resulted in middle-wage, middle-skill workers being replaced with machines: for example, ATMs in place of bank tellers, robots in place of manufacturing workers, digital technologies in place of telephone operators, and EZ passes in place of toll collectors. When I was the Acting Secretary of Labor, I had the privilege of visiting the ArcellorMittal steel plant in Cleveland, Ohio, one of the largest and most productive integrated steel manufacturing facilities in our country. The plant had been through bankruptcies and other challenges arising out of global competition in the dozen years before I visited. I was shocked when I walked onto the plant floor and did not see any workers. The plant was entirely mechanized. A small number of employees could be found in a series of pods that housed sophisticated computers and television screens that these modern-day steelworkers used to monitor production, quality, and other issues and run the robots and other machines that made the steel 24 hours each day, 365 days each year. A steel plant that once employed more than 8,000 workers currently employs only 1,800. This is the effect of technology on middle-skill jobs in workplaces across our country.

Where technology did not replace workers, it facilitated offshoring middle-skill jobs to other countries. A visit to the maquiladoras in Mexico, garment factories in Vietnam or Bangladesh, iPhone manufacturing sites in China, electronics fabrication plants in Malaysia, or a call center in India would confirm this widely acknowledged fact. In some cases, technology has created jobs in the United States. The Internet-based industries and occupations that call Silicon Valley home are all examples. However, job creation in these industries has not kept pace with job destruction in other industries where displacement or offshoring has occurred. As a result, the United States has suffered a measurable loss of middle-wage job opportunities, particularly those affecting those jobs traditionally filled by workers who did not attend college and earn a bachelor's degree.

Without these opportunities, middle-skill workers must scramble to secure more education and training to qualify for high-skill jobs, or slip into the lower wage, low-skill labor market where competition is intense. Adding millions more workers --- both U.S. workers and foreign workers who can compete from overseas using technology --- to low-wage labor markets has put a powerful downward pressure on already low wages in those markets. Similarly, increased competition from displaced middle-skill workers for the smaller number of middle-wage jobs that remain in the U.S. also puts significant downward pressure on wages in those labor markets. Some higher skilled workers, who have benefitted from an increase in the return to their education, skills, and knowledge, have seen their wages rise and the unemployment levels remain very low, but they have been the exception during the wages crisis.

Intensified, often global, competition among businesses has also put meaningful downward pressure on wages. Companies locked in competition for market share or capital sometimes seek to reduce costs and squeeze out profits wherever and however possible. These competitive strategies can have negative consequences for workers as their wages are cut, employment relationships fissure, and benefits and protections evaporate. In the absence of very tight labor markets that give workers individual bargaining power in their dealings with employers, or powerful and effective labor unions that give workers collective bargaining power, employers' ability to choose competitive strategies regardless of their effects on workers' wages and well-being can go unchecked. Slack in labor markets, and the longlasting decline in union density to 6.6% of America's private-sector workforce, have made choosing these strategies far easier. For these reasons, government must step in.

Public Policy Can Ameliorate the Wages Crisis

The list of prescriptions for ending the wages crisis and narrowing income inequality is long. Some of it extends beyond this committee's jurisdiction. For example, Congress could further tighten labor markets by creating millions of jobs --- particularly middle-wage, middle-skill jobs --- with smart investments in transportation and communications infrastructure, alternative energy development, and advanced manufacturing, along with other sectors. Assisting states and local governments with returning their workforces to the levels reached during President George W. Bush's administration would create jobs and tighten labor markets while improving public education, strengthening public safety, and helping local transportation systems, and also restoring a traditional pathway into the middle class for millions of Americans.

Beyond sound fiscal policy, tax policy, job training, and labor policy matter a great deal to wages and the breadth of the income inequality gap. Germany and some other European countries suffer from a lesser degree of income inequality and a lesser challenge with respect to stagnant wages because their tax policies are more progressive, they have extensive government-provided social insurance, and they offer workers multi-channeled job training and education systems, among other reasons. Especially important, our European trading partners also make it far easier for workers to join unions. Their systems also permit collective bargaining agreements that cover millions of workers who are not union members. In some cases, including in Germany, they have statutorily mandated "works councils" that involve workers' representatives in "co-determination" of virtually all workplace policies.

While America's workers may not expect to live in a country that mimics European public policies, they expect that their government will protect them from bearing the full burden of the consequences of increasingly intense competition in capital markets, local and national product and labor markets, and the global economy's product and labor markets. Americans expect that labor markets and workplace practices will be governed by fair "rules of the road." These rules must predictably lead to fair competition among employers and fair treatment of workers, especially workers who do not have sufficient individual bargaining power to protect themselves. Workers' must never be exploited or their wages stolen to feed employers' profits.

Strategies for Congress and the Labor Department to Ameliorate the Wage Crisis

The United States has adopted a set of policies that relate to the wages crisis, like a national minimum wage and overtime protections, protections against exploitative child labor, and family and medical leave, among others. Too many of those policies have fallen into disrepair or have been rendered ineffective because they have not kept up with changing times. This section addresses some of those policies that are within the scope of this hearing. Each of the following policy proposals would help ameliorate the wages crisis, contribute to narrowing income inequality, help America's working families, and strengthen the U.S. economy:

Raise the minimum wage, including for tipped employees.

When I was the Acting Secretary, I traveled the country meeting with small groups of minimum-wage and low-wage workers to learn about their lives and how an increase in the federal minimum wage would help them. I heard powerful and poignant stories of people scraping to get by, or not getting by, on a minimum wage of $7.25 per hour. One mother in Florida told me of her painful choice to sacrifice work hours and wages in order to attend a meeting with school administrators to discuss her daughter's disability and education plan. As she and her daughter drove home from the meeting, her daughter was hungry, so they stopped for dinner. Short of money, the mother could only buy one hamburger and one order of french fries and ask for two cups of water. The daughter ate the meat and the fries. The mother ate the bun.

This kind of excruciating choice is common among minimum wage and low-wage workers: pay for groceries or pay the rent; fix the car or fix the heater in your home; buy prescription medications or buy clothes for your children to wear to school. During my travels, I heard story after story of people who fell behind and could never get ahead --- living with family, sleeping on a friend's couch, walking miles because of a lack of bus fare, cutting pills in half to save money on refills.

Congress should follow the example set by 17 states and the District of Columbia over the last two years and raise the minimum wage. The proposal pending before Congress is the Raise the Wage Act, which would increase the federal minimum wage to $12 per hour by 2020. This committee should consider and approve this bill immediately. Some estimates suggest that as many as 38 million workers would benefit from this minimum wage increase. The value of the current federal minimum wage --- totaling only $15,080 for a full-time worker over a full year --- has eroded to a historically low level. The value of today's minimum wage, adjusted for inflation, is well below the minimum wage in 1968, for example. Congress should also index the minimum wage to median wages as a means of preventing further erosion in its value, as the Raise the Wage Act proposes.

An increase in the minimum wage also must be extended to so-called "tipped employees" whose federal minimum wage rate has been stuck at $2.13 per hour for 20 years. The difference between this paltry wage and the usual minimum wage of $7.25 is paid by restaurant-goers who leave tips for these hard-working men and women. I suspect that patrons leaving tips intend this money to go to their servers, not the restaurants. The Raise the Wage Act proposes to phase out this practice and ensure that tipped employees get the same cash wage from their employers as other employees.

Expand minimum wage and overtime coverage to low-wage workers, like home health aides, who have been excluded by an outdated and obsolete exemption.

In 1974, Congress expanded the Fair Labor Standards Act to cover "domestic service" workers so that employees performing household services in a private home would be paid at least the minimum wage and overtime. These amendments exempted from minimum wage and overtime protection casual babysitters and other workers employed to provide "companionship services" to elderly persons or persons with illnesses, injuries, or disabilities. In 1975, the Labor Department's Wage & Hour Division promulgated regulations that had the effect of categorizing home health aides and other similar workers as fitting within this "companionship exemption" and, therefore, excluding them from minimum wage and overtime legal protections.

The home health care industry has changed dramatically since 1975. The number of home health aides had grown markedly over the past decade and faster growth is expected in the coming years. This growth is, in part, a product of accelerating changes to health care delivery designed to reduce costs. Simply, more Americans will be discharged from, or never admitted to, hospitals and institutions so that they may live and receive care at home and remain a part of their communities. For rapid jobs growth to occur without sacrificing the quality of care, we must induce a rising number of workers to become home health aides. Higher wages and overtime pay are a necessary part of that process.

Perhaps more fundamentally, our society must recognize these workers' critical importance. They care for our parents, children, grandparents, siblings, and us when we need them most. They make it possible for people with disabilities to live in the community rather being warehoused in an institution. They are not babysitters. They are professional caregivers --- one of our society's most noble professions. They deserve our respect and thanks, and nothing less than the federal minimum wage and overtime pay when they work more than 40 hours in a week.

Reflecting changes in the industry and the importance of these workers, the Labor Department proposed new regulations that should have taken effect on January 1, 2015 to narrow the companionship exemption and provided minimum wage and overtime protections to home health aides and similar workers. Unfortunately, in a poorly reasoned decision, U.S. District Court Judge Richard Leon blocked the regulations. His decision is currently on appeal to the U.S. Court of Appeals for the District of Columbia. The court heard oral argument on May 7, 2015. I expect that the Court of Appeals will reverse Judge Leon's decision and allow the updated regulations to take effect. This will be the right decision. When the Court of Appeals frees it to act, the Labor Department should immediately implement the new regulations working closely with state Medicaid directors, the Centers for Medicare and Medicaid Services, unions representing home health aides, and advocates for people with disabilities and senior citizens to ensure that higher wages for home health aides do not result in reduced assistance to those they serve.

<u>Expand eligibility for overtime pay.</u>

When Congress exempted executive, administrative, and professional employees from the FLSA's minimum wage and overtime protections, it implicitly concluded that these workers ordinarily would have sufficient power in the labor market to bargain with their employers for fair salaries and reasonable work hours. Highly paid workers who lead organizations or their constituent units, or who work closely with those leaders, or who are uniquely talented and credentialed professionals should be able to negotiate with sufficient strength to protect themselves. However, when Congress delegated the task of defining "executive," "administrative," and "professional" to the Labor Department's Wage & Hour Division, some of this central purpose of the exemptions was lost over the years. As a result, workers who should be protected by the FLSA are treated as exempt. For example, no ordinary citizen would think that a fast-food restaurant's assistant manager earning $27,000 per year who supervises a couple of co-workers and makes recommendations about hiring, but spends a large portion of her time salting fries, flipping burgers, and serving customers, is an "executive." Yet, these low-wage workers and others legally can be required to work 50, 60, or even 70 hours per week without receiving overtime pay.

Right now, the Office of Management & Budget is reviewing draft proposed Wage & Hour Division regulations that would update the overtime rules. I expect these regulations will be published for public comment in the coming weeks. While I do not know the content of these regulations, I hope the Labor Department will update the "salary threshold" which must be reached before a worker is an exempt executive, administrative, or professional employee. The current threshold is $455 per week, or less than $11.50 per hour for 40 hours of work in a week. According to the Bureau of Labor Statistics, the average hourly wage in 2014 was almost twice that amount. Wages are one reasonable proxy for individual bargaining power --- that is, powerful workers can bargain for higher wages or salaries. A low wage, by contrast, suggests little bargaining power and a real need for the FLSA's protection. The existing outdated threshold suggests that large numbers of workers who do not have much bargaining power have been unfairly and inappropriately, but legally, exempted from the FLSA's protections.

Some employers are justifiably frustrated by the uncertainty that comes with trying to apply the existing overtime regulations. The existing rules are too complex. Where possible, regulations should be written to make absolutely clear to the regulated community how it should comply. Unnecessary ambiguity and uncertainty should be eliminated in favor of transparent standards to which employers can conform their conduct prior to any intervention by government. For this reason, the Wage & Hour Division should clarify the meaning of the "primary duty" test for these exemptions. Under existing rules, executive, administrative, or professional duties must be the employee's primary duties before that employee can be exempted from FLSA coverage. But there is no clear standard in the existing regulations for "primary." One court, after reviewing the facts of a particular case, held that exempt duties requiring as little as 1% of an employee's time were nevertheless "primary." The Wage & Hour Division should propose a bright line test that resolves this ambiguity, perhaps by employing a preponderance standard (i.e., more than 50%).

<u>Congress should not narrow eligibility for overtime.</u>

While the Labor Department seeks to expand overtime protections to better reflect congressional intent, Congress must not permit workers to be deprived of overtime pay that they badly need to make ends meet and save for their children and their future. For example, various legislative proposals would allow employers to substitute cash overtime pay for "comp time" --- time off from work. While superficially appealing, these proposals are deeply flawed for several reasons. I will focus my testimony on only three of these reasons.

First, the proposals seem to be premised on the myth that the FLSA inflexibly prohibits compensatory time off as a reward for hard-working employees. The FLSA permits employers to grant paid time off awards to employees who work more than 40 hours in one week, or 30 hours, or 50 hours, or to employees who perform exceedingly well at work regardless of their work hours. The only difference between the system authorized by the comp time proposals and existing law is that employees would receive lower pay under the comp time bills. They would be required to sacrifice their overtime pay in return for time off. More generally, the FLSA permits flexible scheduling of employees' work hours within the broad confines of a 40-hour work week. For example, an employee can work twelve hours one day and six hours the next day without running afoul of the FLSA or triggering overtime liability. As long as the employee receives overtime compensation for hours worked in excess of 40 hours, the employer can set a work schedule that best fits its needs. Congress should not legislate based on a perception of inflexibility that does not exist.

Second, workers need time *and* money, not time *or* money. The essence of the wages crisis is that workers' real wages have been stagnant for decades. The idea that workers should have to buy time off from work from their employers by sacrificing overtime pay, in addition to being morally dubious, will not solve the signal economic challenge of our time. It certainly will not help hard-pressed working class and middle class families to pay their bills. At the same time, according to the Organization for Economic Cooperation and Development, U.S. employees already work more hours than workers in most other developed countries. Simply, U.S. workers' wages are too low *and* they are working very hard. Employers should be encouraged to find an economically efficient way to give their employees greater flexibility to care for themselves and their families without being permitted to ask workers to reduce their pay in return.

Third, based on the comp time proposals I have reviewed, the deal that they seem to offer to workers ---trade overtime pay for time off --- is not the real deal. Simply, the pending comp time proposals do not guarantee that employees control the time they have earned like they would cash overtime wages. Of course, when an employee receives premium pay for working overtime, she can spend those extra wages on anything she would like. Under the law, the employer has no say in the employees' spending. Comp time is very different. The employer keeps control over the comp time in two ways: (a) the employer can unilaterally "cash out" an employee's comp time with 30 days' notice (in the House's version of the bill, the employer may cash out only comp time in excess of 80 hours); and (b) an employee can be prohibited from using her comp time if the employer concludes that the employee's absence would "unduly disrupt" the employer's business operations.

Imagine an employee who has worked overtime during January, February, and March in order to accumulate comp time that she intends to use to take four weeks off from work (with pay, because of the comp time) to care for her 80-year-old grandmother who will undergo a serious medical procedure in August. In mid-June, the employee gives her supervisor advance notice of the dates she intends to use her comp time. Before the end of June, the supervisor notifies the employee of either of two things: (1) the employer has decided to buy back the employee's comp time by paying her the overtime wages the employee would have been paid in January, February, and March; or (2) the employee cannot use her comp time in August because it would unduly disrupt operations in August given that so many other employees will be taking vacation at the same time. What is the result under the comp time proposals? The employee does not get to use her comp time (or, under the House's version, all of her comp time), despite her careful planning and long hours of work. She will not be available to care for her grandmother through her procedure and four weeks of convalescence. Because grandmothers are not covered family members under the federal Family and Medical Leave Act, the employee cannot take job-protected time off and use her overtime pay to cover her lost wages. The employer, on the other hand, gets an interest free loan from the employee of the total value of the employee's overtime pay from January, February, and March through the end of June and perhaps longer. This is just one of many scenarios in which the promised tradeoff --- overtime pay for time off --- will not be realized by workers because employers retain control over the use of comp time.

The true purpose of comp time legislation was revealed by Justice Clarence Thomas in a Supreme Court decision entitled *Christensen v. Harris County*. *Christensen* involved a challenge to the provisions of the FLSA that allow public-sector employers to provide comp time in lieu of premium pay to their employees who work overtime. Employees of the Harris County sheriff's office sued their employer because it had established a comp time system that looked very much like the kinds of systems authorized by the private-sector comp time proposals currently pending in Congress. Justice Thomas reviewed the history of the FLSA's coverage of public employers and public employees, in particular Congress' amendments to the FLSA extending coverage to the public sector in 1966 and 1974. After Congress expanded coverage to state and local governments, the Supreme Court initially held in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the FLSA could not be constitutionally extended to cover state and local government employees. The Court overruled that decision in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985). Thus, after 1985, the FLSA applied to public-sector employers and employees. Enter comp time. As Justice Thomas recounted, "[i]n the months following *Garcia*, Congress acted to mitigate the effects of applying the FLSA to States and their political subdivisions, passing the Fair Labor Standards Amendments of 1985, Pub. L. 99—150, 99 Stat. 787." In other words, the 1985 amendments added comp time to the law *in order to save public-sector employers money* because the FLSA had just been applied to them for the first time. The goal was not added flexibility for employees; rather, comp time allowed public-sector employers to avoid the added costs of paying overtime to their employees. The private-sector comp time proposals now under consideration seem to be directed toward the very same purpose.

<u>Ensure all workers have access to paid leave for family and medical purposes.</u>

As noted earlier, the federal Family and Medical Leave Act provides some U.S. workers of some U.S. employers with 12 weeks of job-protected leave if they must take time off from work to care for themselves or a family member after a serious health condition strikes or to care for newly born or adopted child. The FMLA was an important achievement. Millions of employees have taken needed leave over the past 20 years. Employers found it easy to comply. But the FMLA is limited. Employees of small businesses are not covered, many part-time workers are not covered, and many family members (like grandmothers) are not covered. A U.S. Department of Labor survey issued in 2013 for the FMLA's 20th anniversary found that only one in six work sites reported being covered by the FMLA (another 30% were unsure) and only 59% of employees reported being covered. Equally important, under the FMLA, family and medical leave is only available to those employees who can afford to take *unpaid leave*. In the Labor Department's survey, low-wage workers were more than twice as likely as higher wage workers to report that they had an unmet need for leave. Forty percent of workers reported cutting short their FMLA leave because of financial concerns.

The discussion of paid leave is a necessary part of the wages crisis. Workers are forced to cut their own pay when they must take time off from work without compensation. In the worst circumstances, workers may lose their jobs because they must care for a sick child or attend to their own illness or disability. Workers do not merely work --- they have families and other responsibilities that are both entirely predictable and a fundamental part of the human condition. Yet, the United States lags far behind the rest of the developed world in policies that respect these facts of life. According to the International Labor Organization, the United States and Papua New Guinea are the only two out of 185 countries that do not provide paid maternity leave. Of course, the United States does not have a federal law that guarantees paid paternity leave, family leave, or sick leave.

Congress should provide funding to support states that are experimenting with paid leave systems. Paid leave makes it possible for all workers to take paid time off to care for themselves and their families or the arrival or a newborn or newly adopted child. Several states have already enacted laws that provide paid leave and they work successfully. Congress can help others to do the same. Further, forty-three million American workers do not have access to any paid sick leave. This is a disturbing statistic, not merely for people who care about working families, but also for those who are concerned about public health. We do not want families' inability to absorb a loss of a day's or week's pay to force sick waiters, waitresses, health care workers, retail workers, or others who have extensive contact with the public to go to work. "Presenteeism" --- that is, people going to work while sick --- is a threat to all of us. Congress should enact the Healthy Families Act to ensure that workers are entitled to at least seven days of paid sick leave.

<u>Provide the Labor Department's Wage & Hour Division with the enforcement resources it needs to ensure fair competition among employers and protect workers from wage theft.</u>

The U.S. Department of Labor's Wage & Hour Division has been charged by Congress with enforcing the minimum wage, overtime, and child labor provisions of the Fair Labor Standards Act; prevailing wage requirements and wage determination provisions of the Davis-Bacon and Related Acts and the McNamara-O'Hara Service Contract Act (SCA); wages and working conditions under the Migrant and Seasonal Agricultural Worker Protection Act; the job protections of the Family and Medical Leave Act; and the Employee Polygraph Protection Act. The Wage & Hour Division's compliance responsibilities extend to 135 million workers in more than 7.3 million workplaces throughout the United States and its territories. What is the total number of staff funded by Congress to accomplish these monumental tasks? In FY 2014, total Wage & Hour Division FTE was 1,803. Yet, many of these employees are not investigators in the field. Some help employers by providing compliance assistance through direct consultations or online and printed materials. Others engage in worker education efforts.

In early 2009, the Government Accountability Office issued a scathing report essentially finding that the Wage & Hour Division was performing poorly in responding to workers' complaints of FLSA violations. Operating undercover, GAO filed ten typical worker complaints with Wage & Hour's local offices across the country. Wage & Hour staff deterred these "workers" from filing complaints by encouraging them to resolve the issue themselves, directing most calls to voice mail, not returning phone calls to both employees and employers, and providing conflicting or misleading information about how to file a complaint. Wage & Hour policies required investigators to enter all reasonable complaints into Wage & Hour's database. Half of GAO's fictitious complaints were not so recorded. Looking beyond its undercover cases, GAO identified real-life cases affecting at least 1,160 employees whose complaints were inadequately investigated by Wage & Hour. Five of the cases were closed based on false information provided by the employer that could have been verified by a search of public records to which Wage & Hour staff did not have access. GAO also found that Wage & Hour's investigations were often delayed by months or years, partly because backlogs in some offices prevented investigators from initiating cases within six months. In sum, whether due to a lack of resources, poor management, inappropriate performance measures, ineffective systems, or underqualified or uninterested employees, Wage & Hour had failed to collect and act upon information and complaints from vulnerable workers who believed their rights had been violated.

With new leadership in the department and the Wage & Hour Division beginning in 2009, the organization dramatically turned around its performance. Among other accomplishments, the Wage & Hour Division responded more quickly and effectively to complaints, in part because of a new prioritization policy. Over the first five years of the Obama Administration, the Labor Department returned more than $1.1 billion dollars in wages lost through wage theft to the workers who earned them. The department also did the best job, ever, of targeting Wage & Hour investigations to the workplaces that had violations whether the Wage & Hour Division initiated the investigation on its own (a "directed investigation") or responded to a complaint (a "complaint investigation"). The Wage & Hour Division's strategic enforcement efforts have been more tightly focused on low-wage industries where fissured employment relationships can lead to exploitation and wage theft. The addition of 300 investigators in the FY 2010 appropriations bill contributed to this performance improvement, but the improvement can also be credited to an aggressive, evidence-based, data-driven performance measurement and management system implemented across the Labor Department beginning in 2010. The Wage & Hour Division staff work very hard, target their efforts using thoughtful and data-driven strategies, and dramatically improved their performance and efficiency from 2009 through 2015. They are doing everything they can with the resources Congress has provided. More resources would allow them to produce even better results.

Congress can help to ensure that wage and hour laws are fairly and effectively enforced in at least two ways. First, Congress should increase the resources provided to the Wage & Hour Division. President Obama's FY 2016 budget proposed an increase of 317 FTE for the Wage & Hour Division. This is a small down payment on the increases the Wage & Hour Division actually needs, and the minimum commitment that Congress should make to America's working families. Second, Congress can enact legislation that helps employers to come into compliance with the laws enforced by the Wage & Hour Division without any intervention by the Wage &

Hour Division. I believe firmly that the overwhelming majority of U.S. employers want to comply with the law, and actually comply with the law. But responsible employers can be significantly disadvantaged when forced to compete with law-breaking employers that are never held to account or face penalties that do not punish or have deterrent effects.

President Obama's Fair Pay and Safe Workplaces executive order offers two illustrations of the kind of preventive compliance legislation Congress might consider. The executive order requires federal contractors and their subcontractors to provide every employee with a pay stub that discloses the employee's regular rate of pay, number of hours worked, gross pay, and any deductions from gross pay for taxes, benefits, or other payments. This transparency will help employees to check, on their own and without any government involvement, whether they are receiving the pay to which they are entitled. Employers will be better able to check their own compliance with the FLSA and state and local wage laws. Further, this requirement would help employers by bringing them into compliance with the FLSA's recordkeeping requirements.

The executive order also requires federal contractors and their subcontractors to provide every worker classified as an "independent contractor" with written notice to that effect. This notice will eliminate any surprises between workers and employers, and reduce the amount of misclassification that occurs in the economy. As the members of this sub-committee know, millions of workers are improperly misclassified as "independent contractors," rather than "employees." Only employees are covered by most employment laws. So, misclassification deprives these workers of minimum wage and overtime protections, but also workers compensation, unemployment insurance, and the protection of other employment laws. To the tune of several billion dollars, misclassification also cheats state and federal governments out of payroll taxes for Social Security, Medicare, and unemployment insurance, as well as income taxes. Requiring employers to disclose a worker's status as an "employee" or an "independent contractor" will nudge them to avoid misclassifications. Among other reasons, these written statements to their employees could become evidence against employers in any investigation by the Wage & Hour Division or a private action brought by employees.

Beginning during my time at the Labor Department, the Wage & Hour Division entered into 21 memorandums of understanding with state governments to cooperate with respect to misclassification. Every level of government has an interest in addressing misclassification of employees. Congress can also help to reduce the incidence of misclassification by including it as a substantive violation of the FLSA. In addition, Congress could adopt the proposal included in President Obama's FY 2016 budget to increase civil money penalties so that irresponsible employers will be deterred from seeking to gain a competitive advantage over responsible, law-abiding employers by misclassifying employees or otherwise violating the FLSA. If they are not deterred, employers must pay a meaningful price when they do not play by the rules. Congress can and should enact legislation that make these changes to the Fair Labor Standards Act.

Conclusion

Thank you again for the invitation to testify before the subcommittee. I believe firmly that it is time for Congress and the Obama Administration to use every reasonable tool at their disposal to end the wages crisis and narrow income inequality. Some of those tools are within the jurisdiction of this subcommittee. I urge the subcommittee and committee to act immediately.

I appreciate the opportunity to share my views on how you might deploy those tools to benefit working families and our economy.