The public debate regarding the venerable Fair Labor Standards Act (FLSA) overtime rules makes it clear the time is ripe to re-examine the FLSA in toto. To what extent is “fair” and meaningful labor-standards reform embodied in the Department of Labor’s (DOL) recently revised white-collar exemption and the perennial Congressional proposals to allow compensatory (comp) time to be substituted for premium cash payment? With so much attention paid to which and how many job classifications are (or are not) becoming exempt, all sight of the forest has been lost in the trees. The standard to apply to any proposal is the extent to which it remains true to the original intent of the FLSA. That is, does it sufficiently: (1) deter employer demand for excessive work hours that may lead to overwork, (2) reward extended work effort, and (3) encourage the spreading of job opportunities?

Context
Any reform should take into account the current economic context: rising labor productivity without commensurate increases in real earnings, the predominance of dual-income households who daily face competing demands on their time, and employers’ focus on labor-cost restraint in a race-to-the-bottom world of intensifying market competition.

Regulation of hours in the modern era should aim to keep overtime work safe, legal, and rare:
- **Safe** by curbing hazards to worker and public health or safety;
- **Legal** by prohibiting practices such as misclassification of employees as exempt, withholding of owed overtime pay, underestimation of a worker’s base pay rate when computing pay, off-the-clock work, and manipulation of employees’ time cards (altering clock-out times, shaving time or fabricating break time);
- **Rare** by inclusively covering more workers and/or discouraging habitual scheduling of overtime work beyond what employees prefer.

“Overtime” work simply means working beyond the standard workweek (of 40 hours), which is not necessarily harmful. Indeed, with real wages stagnant it represents one of the few ways that workers can prop up earnings or avoid personal bankruptcy without shouldering multiple jobs. However, when hours are involuntarily long, beyond a worker’s preferred workweek (“overemployment”), and/or lead to symptoms of “overwork,” such as stress and fatigue that might heighten the risk of accidents, injuries, illnesses, and other health problems, there is a case for stricter, not looser, regulation. Surveys show that almost 3 in 10 work-
ers feel overworked and anywhere from 7 to over 30 percent (depending on the question wording and sample) are overemployed, willing but unable to reduce their hours even for a proportional reduction in earnings. Among both hourly and salaried workers, one in every four to five employees faces mandatory overtime work. Many more workers technically work overtime “voluntarily,” but do so out of fear of job loss, to prove commitment, or to show they are worthy of promotion.

Is Comp Time the Solution?

Congressional bills H.R.1119 and S.317 would permit private-sector employers, with a worker’s written permission, to replace pay with future comp time for non-exempt employees. Despite a recent round of Congressional efforts to protect employees against coercion, the comp-time arrangement still falls well short of being helpful.

First, comp time in lieu of pay would not deliver a reduction in overemployment or even total annual hours of work unless it were to: (1) foster true worker choice over refusal of scheduled overtime hours; (2) preclude employer denial of use of comp-time credits when the worker prefers (use “within a reasonable period” after the request is insufficient; and denial must meet a higher standard than avoidance of “undue disruption” of business or operations—such as denial in cases that would “cause substantial and grievous injury to the employer’s operations”); and (3) prevent forced use of comp time credits by employers. Under a comp-time system, if employees put in 2 hours of overtime work each week, then they will have worked about an extra 100 hours and accumulated 150 hours of comp-time credits each year. Unless such employees are able to use 67 or more of those credits by year’s end, they will have worked more hours than had they not put in the overtime.

Second, since the over-employed consist largely of exempt workers, comp-time proposals are mis-targeted, omitting those employees most likely to benefit from compensatory time. Ironically, comp-time bills would not cover the quasi-professional/managerial jobs that the DOL has recently exempted from premium pay.

Fresh and Broader Ideas

Comp time could conceivably be incorporated into the FLSA, provided:

• non-exempt employees earn straight-time pay for overtime and bank the compensatory time, qualify for a shorter (e.g., 35 hour) standard workweek, and retain full benefit eligibility.

• Certain exempt employees (including “knowledge workers”) were to qualify for it, being informed of their expected “standard” workweek upon hiring (e.g., 45 hours), with hours worked above that tracked and compensated with comp time.

Alternatively, a broader amending of the FLSA could include:

• The legally protected right to refuse assignment of overtime, and a super-premium (e.g., double-time) for overtime scheduled with less than some minimum notice (perhaps 24 or 48 hours) and/or beyond some maximum amount per day or per week (such as 12 and 60, respectively);

• Extension of the pay premium regulation to workday length and to the more hazardous work on the evening/night shift;

• Greater subsidies for creative work-sharing practices and for adopting reduced-hours options for employees who wish them temporarily;

• Minimum paid leave—pooled vacation, sickness, and/or personal time off, prorated by hours worked;

• Coverage of currently exempted vehicle drivers, covered currently only by Department of Transportation regulations that set a maximum of 60 hours per week and 11 hours per day (rules that are commonly disregarded); and
• Pro-rating of employee benefits by hours worked, reducing the inherent economic bias toward scheduling longer hours per employee.

**Targeted Reform**

Short of establishing uniform workweek standards across all employees, the FLSA could be amended to introduce relatively stricter hours limits in sectors and occupations where employees are more likely to be over-employed, overworked, or a (science-based) public-health or safety risk. At the top of this list would be select ed low-wage, high-risk-of-non-compliance industries in which the DOL has successfully monitored enforcement, such as garment manufacturing, agriculture, nursing homes, day care, restaurants, janitorial services, and temporary help. Also included would be occupations receiving the most public support via licensing and occupational regulation, such as pilots, truckers, police officers, nurses, and medical interns. Another useful change would be a shorter standard workweek for working parents who claim pre-school dependents, with a daily overtime premium (e.g., after 7 hours) and flextime schedule backed by anti-discrimination employment law (modeled on the recent “flexible employment” law in the United Kingdom).

Truly modernized, American-flavored labor standards will promote mass customization of work schedules and a wider array of workweek and work year choices. This will facilitate the pursuit of greater productivity per hour of work, rather than the current, counterproductive average productivity per hour of work via lengthening hours—with its heightened risk of fatigue, stress, burnout, and work-family imbalance. The first step is to reconsider Senator Arlen Specter’s bill (S.1611) to establish a commission to study DOL overtime regulations. In the meantime, let us follow the oath of “at least to do no harm.”

**References**


Lonnie Golden

Lonnie Golden is associate professor of economics and labor studies/industrial relations at Pennsylvania State University, Abington College. His research focuses on working hours, labor-market flexibility, and the non-standard work force.