REWARDING PERFORMANCE IN COMPENSATION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

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REWARDING PERFORMANCE IN COMPENSATION ACT

Tuesday, July 31, 2001

Subcommittee on Workforce Protections

Committee on Education and the Workforce

U.S. House of Representatives

Washington, D.C.

The Subcommittee met, pursuant to call, at 1:32 p.m., in Room 2175, Rayburn House Office Building, Vice Chair Judy Biggert presiding.

Present: Representatives Biggert, Ballenger, Isakson, Goodlatte, Keller, Culberson, Owens, Kucinich and Woolsey.

Staff Present: Molly McLaughlin Salmi, Professional Staff Member; Kent Talbert, Professional Staff Member; Victoria Lipnic, Professional Staff Member; Dave Thomas, Legislative Assistant; Peter Gunas, Director of Workforce Policy; Jo-Marie St. Martin, General Counsel; Heather Valentine, Press Secretary; Patrick Lyden, Professional Staff Member; Deborah L. Samantar, Committee Clerk/Intern Coordinator; Peter Rutledge, Minority Senior Legislative Associate/Labor. Maria Cuprill, Minority Legislative Associate/Labor; Brian Compagnone, Minority Staff Assistant/Labor.

Vice Chair Biggert. A quorum being present, the Subcommittee on Workforce Protections will come to order.

Obviously, I am not Chairman Norwood. He sends his regrets that he couldn't be here today. We are meeting to hear testimony on H.R. 1602, the Rewarding Performance in Compensation Act.

I am going to limit the opening statements to the Chairman and the Ranking Minority Member. Therefore, if other Members have statements, they may be included in the record. With that, I ask unanimous consent for the hearing record to remain open 14 days to allow Members' statements and other extraneous material referenced during the hearing to be submitted in the official hearing record.

Without objection, so ordered.

OPENING STATEMENT OF VICE CHAIR JUDY BIGGERT, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Ladies and gentlemen, good afternoon, and on behalf of Chairman Norwood, I would like to take this opportunity to welcome each of you to our hearing on H.R. 1602, the Rewarding Performance in Compensation Act. H.R. 1602 will help workers share in financial gains when their extra efforts produce increases in productivity.

This legislation was introduced by Representative Cass Ballenger from North Carolina, a Member of this Subcommittee who has worked for several years to address the special problems that employers face when providing bonus or gainsharing programs to their employees.

In October 1999, similar legislation was reported from the Committee on Education and the Workforce; and in February 2000, the Senate passed a bankruptcy bill that included bonus gainsharing. However, no changes made it into law.

Employers have found that rewarding workers who do high-quality work improves performance and the ability of the company to compete. Bonus or gainsharing plans can encourage employee creativity and innovation, improve customer satisfaction and promote safety and efficiency.

While the Fair Labor Standards Act does not prohibit employers from providing these types of rewards, it does make it difficult and confusing for those who wish to do so. With gainsharing, employees are assigned individual or group productivity goals, and the savings achieved from improved productivity or the gains are then shared between the company and the employees. The payouts are based directly on factors under an employee's control, such as productivity or cost, rather than on the company's profits. Thus, employees directly benefit from improvements that they help to produce by increasing their overall compensation.

Unfortunately, many employers who choose to operate such pay plans can be burdened with unpredictable and complex administrative costs. For example, if a bonus is based on production, performance or other factors, the payment must then be divided by the number of hours worked by the employee during the time period that the bonus is meant to cover and added to the employee's regular hourly pay rate. This adjusted hourly rate is used to calculate the employees' overtime rate of pay for other types of employees, such as executive, administrative or professional employees who are exempt from minimum wage and overtime. An employer can easily give financial rewards without having to recalculate rates of pay.

The Rewarding Performance in Compensation Act would amend the FLSA to specify that an employee's regular rate of pay for the purposes of calculating overtime would not be affected by additional payments that reward or provide incentives for

employees who meet certain goals. By eliminating disincentives in current law, this legislation will encourage employers to reward their employees and make it easier for employers to share the wealth with their employees.

I would like to thank all of our witnesses for taking time to be with us today. We look forward to hearing your views on the legislation that we are considering here today.

WRITTEN STATEMENT OF VICE CHAIR JUDY BIGGERT, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE – SEE APPENDIX A

Vice Chair Biggert. I now yield to the distinguished Ranking Minority Member of the Subcommittee, Mr. Owens, for whatever opening statement he wishes to make.

STATEMENT OF RANKING MEMBER MAJOR R. OWENS, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Thank you very much, Acting Chairwoman Biggert. We regret that Chairman Norwood could not be here with us, but we welcome your special wisdom and compassion to be applied to this subject.

I want to welcome today's witnesses and thank them for their willingness to be here this afternoon, but I must note, however, that this is not a new issue and I suppose you all know this. Legislation substantially similar to H.R. 1602 has been pending before the Committee in the previous two Congresses.

I have opposed this legislation in previous Congresses, and I continue to oppose it. I have never been persuaded that there is a need for H.R. 1602. Employers were paid bonuses before the Fair Labor Standards were enacted, and they continue to now. To contend that the use of bonuses is some kind of new development is simply not true.

Further, for more than 60 years, employers have been able to recalculate hourly wages and overtime liability to account for bonuses. To contend that such a recalculation is an insurmountable obstacle to using bonuses, especially now with the widespread use of payroll service companies and the universal use of computers, simply is not credible.

More importantly than my doubts regarding the need for the legislation are my concerns about the dangers that this legislation poses. The Fair Labor Standards Act generally requires employers to pay overtime on all performance-related compensation paid to workers. H.R. 1602 would effectively gut this requirement by permitting employers to exempt from overtime compensation that is paid to a worker as a bonus.

Under H.R. 1602, while employers would generally still have to pay the minimum wage, employers are encouraged to convert all additional compensation into bonuses. For example, where an employee is making $20 an hour today, regardless of whether that $20 is in the form of wages or performance bonuses, an employer is generally required to pay $30 an hour for hours worked by that employee in excess of 40 hours a week. Under H.R. 1602, an employer could pay an employee $5.15 an hour in wages and could pay an additional bonus of $14.85 an hour for the first 40 hours worked.

On the surface, it appears that the employee is still making $20 an hour. However, when an employee works overtime, the employee is only entitled to $7.73 an hour instead of the $30 an hour the employee is entitled to under current law.

Even if the employer voluntarily agrees to pay the performance bonus for overtime hours as well as regular hours of work, the employee's overtime pay is still reduced by $30 an hour to $22.58 an hour.

H.R. 1602 reduces overtime pay for workers. While I can understand why some employers or managers may think this is a good idea, in my view, undermining overtime pay has disastrous consequences for both workers and society. The requirement to pay overtime is the only legal limitation placed on the number of hours an employee may be required to work by ensuring that it costs more to work an employee in excess of 40 hours a week. The overtime law not only ensures that employers have sufficient time off to meet personal and family needs, but it promotes regular scheduling. If an employer can require an employee to work overtime at no additional cost to the employer, then there is little incentive for an employer to avoid scheduling overtime work, and workers will have less time to meet family responsibilities, and they will have greater uncertainty as to their schedule.

Finally, if there is no additional cost for overtime work, then it becomes cheaper for an employer to work one worker many hours rather than hiring and training another worker. Undermining overtime would make it significantly harder for those with jobs to meet family responsibilities and would increase unemployment by encouraging employers to work fewer workers for longer hours. Both consequences would harm rather than enhance the quality of life for most Americans.

I yield back the balance of my time.

Vice Chair Biggert. Thank you, Mr. Owens for your opening statement. It is now my pleasure to introduce our panel of witnesses. Our first witness on the panel will be Dr. Charles Fay. He is a Professor and Director of Human Resources Management Graduate Programs at Rutgers University.

I will now yield to Mr. Culberson. He will be introducing our second witness, Ms. Lori Thomas.

Mr. Culberson. Thank you, Madam Chairwoman.

It is my privilege to introduce Ms. Lori Thomas, who is the Vice President of the Management Compensation Group/Dulworth, Inc. in Houston, testifying on behalf of The Society for Human Resource Management. She is a constituent and runs the Compensation and Benefits Consulting Unit, which assists clients in compensation planning and executive benefit plan design, installation, financing and administration. She has been with the company since 1984 and serves on its Board of Directors.

She is also a magna cum laude graduate of the University of Houston with a degree in computer science and is currently pursuing postgraduate work in accounting and finance. She is active in the community, Madam Chairman, and serves as a member of the Society for Human Resource Management and Treasurer-elect and Legislative Action Committee member for the Houston Human Resource Management Association, as well as the American Management Association and the National Association of Stock Plan Professionals.

She is here today to provide us with some real-life, technicolor, vivid illustrations of the impact of current law on small businesses and their ability to manage themselves and to reward good employees for their good performance.

I welcome you here today, Ms. Thomas, on behalf of the Subcommittee on Workforce Protections and look forward to your testimony on this important issue. And may I also say I am in the final stages of drafting on a key amendment to the Patients' Bill of Rights, which has to be in the Rules Committee by 5:00, so I may have to slip out a little bit earlier.

With that, we are very pleased you are here. Thank you.

Vice Chair Biggert. Thank you, Mr. Culberson. If you know someone here, you get the long bio. If you don't, then it is the short bio.

Following Ms. Thomas will be Mr. Michael Leibig. Mr. Leibig is a partner at the law firm of Zwerdling, Paul, Leibig, Kahn and Wolly. He is testifying on behalf of the AFL-CIO.

And our final witness for today is Mr. Leonard Court from the law firm of Crowe and Dunlevy. Mr. Court is here on behalf of the U.S. Chamber of Commerce.

So, first of all, let me remind the witnesses that under our Committee rules, you must limit your oral statements to 5 minutes, but your entire written statements will appear in the record. You also see that we have little timers there. When you begin speaking the light will be green and after 5 minutes it will turn to yellow, at which point you should begin to wrap up so we can keep to our schedule.

Dr. Fay, you may begin your testimony.

STATEMENT OF CHARLES FAY, PROFESSOR OF HUMAN RESOURCES MANAGEMENT, DIRECTOR, GRADUATE PROGRAMS IN HUMAN RESOURCES MANAGEMENT, SCHOOL OF MANAGEMENT AND LABOR RELATIONS, RUTGERS: The STATE UNIVERSITY OF NEW JERSEY, HIGHLAND PARK, NJ

Thank you for the opportunity to testify concerning H.R. 1602. I am Charles Fay, a Professor of Human Resources Management at Rutgers University. My research and teaching focus on reward systems, performance management; and I also have some interest in new work systems.

Today I would like to talk to you in the short time I have about how work and rewards have changed and how the FLSA has not changed. I will start with the old work. If you look at Attachment A in the written material I have submitted, page 8, you will see a diagram of an industrial engineering model to work. If it looks like an assembly line, it is because it is exactly like an assembly line.

Work done under this model has several important characteristics. Work is defined in terms of tasks done, and a job is a small set of tasks done by one employee. Jobs are stable. Because you have coordination difficulties, you need a bureaucratic hierarchy, and the only way you can perform under this industrial engineering model is either to work to the pace of the line or to produce more pieces.

A typical nonexempt job that is characteristic of this old work is an autoworker putting a left rear hubcap on each car that passes by. You could also think of a clerical worker, and there are many in government who look at the same form over and over again filled in by different people and make sure that a particular field has been filled out correctly. By the way, this is why we talk about a paper factory, because it is an application of an industrial engineering technique to a clerical task.

In this kind of work, employees are expected to check their brains at the door when they clock-in in the morning. Workers have very little discretion, particularly on assembly lines. They operate at the speed of the line. And the only way you can increase performance under this form of work is to either work harder or to work longer hours. As a result, the reward system for this old kind of work is almost always base pay or piece rates or some small bonuses. Historically, there have been very few bonuses for nonexempt workers. There have been many, many bonuses for exempt employees.

Job value under this old work system focuses on internal comparisons, economic models, job evaluation systems such as the Hay system, or a classification system that is used in the government for general schedule workers. In this work model, I would argue the regular rate requirement does in fact make sense, but this isn't what work looks like any longer. And let me just give you an example.

In the late 1980s, I visited a semiconductor fabrication unit and, as usual in these kinds of situations, I walked around looking at the work done and talked to some employees about what they did before starting on the assignment. Now, usually when I

do that and I do that any time I go to a factory, I get the following kinds of answers: "I am a…." followed by a job title, and then a listing of tasks; "I do A, I do B, I do C."

In this case, I got very different answers at the semiconductor fabrication unit. The first thing that I got was an aside from some people: "Do you mean last week, this week or next week?" The other answer that was fairly standard was, "I do whatever it takes." Occasionally, people would say, "I produce X," or "I provide a (certain) kind of service." The work model that goes with these answers is also in your materials. It is Attachment B, page 9. If you take a look at that attachment, you see that it looks very, very different from the industrial assembly line model.

First of all, jobs are built around people in the new work model rather than around tasks. People focus on outcomes. The only constant is change. Employees and teams have a lot of discretion, and the bureaucratic hierarchy has all but disappeared in these organizations. Employees interact with many different people, both inside and outside of the organization, and that is noted here in terms of relationships with key customers. If you have a financial services provider that does one-stop shopping, you have interacted with this new work.

The reward systems for the new work model are very different. Job value is market-based. Incentives are going to focus on groups working smarter. The effort required may actually be reduced. Incentive programs aimed at getting groups to work smarter are equivalent to many profit-sharing plans where the organization seeks to share the contribution to profits with the group responsible. As a result, they should really be treated like other profit-sharing plans.

Thank you. That concludes my oral testimony, Mrs. Chairwoman. I will be happy to answer any question you or the other Committee Members may have.

WRITTEN STATEMENT OF CHARLES FAY, PROFESSOR OF HUMAN RESOURCES MANAGEMENT, DIRECTOR, GRADUATE PROGRAMS IN HUMAN RESOURCES MANAGEMENT, SCHOOL OF MANAGEMENT AND LABOR RELATIONS, RUTGERS: THE STATE UNIVERSITY OF NEW JERSEY, HIGHLAND PARK, NJ - SEE APPENDIX B

Vice Chair Biggert. Thank you, Dr. Fay.

Ms. Thomas, you may begin your testimony.

STATEMENT OF LORI A. THOMAS, CCP, VICE PRESIDENT, MANAGEMENT COMPENSATION GROUP/DULWORTH, INC., HOUSTON, TX, ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, WASHINGTON, D.C.

Good afternoon, Chairwoman Biggert and Members of the Subcommittee. As Congressman Culberson said, may name is Lori Thomas. I am a Vice President with Management Compensation Group in Houston, and I am here today on behalf of the Society for Human Resource Management to urge Congress to pass H.R. 1602.

This important piece of legislation would allow employers to provide incentive bonus plans and gainsharing arrangements without impacting the regular rate for purposes of calculating overtime.

The majority of my clients are small to mid-sized businesses, and many of them are unaware when they first come to us about the requirement that performance bonuses be included in overtime pay. Most of them, because they are small companies, lack the resources to make a recalculation of overtime. Therefore, they are unable in many situations to install the type of bonus arrangements they and their employees really desire.

During the last year, I worked with a particular client to install a broad-based performance bonus plan. The type of arrangement the company wanted was a formula-based plan where each employee starts with a target bonus and is assigned certain company-wide, divisional and personal performance goals. The ultimate bonus is then calculated based on the attainment of these goals.

I informed the client they would need to include overtime in the formula, and we passed the final plan design past a labor attorney, who suggested that we keep the target bonuses for all the nonexempt employees at the same level and base their bonuses only on the company profit goal. The resulting plan actually has provided a much more objective way to determine bonuses than their old discretionary plan did, but there are some areas where the plan falls short.

First, because overtime had to be included in the formula, the company had to reduce target bonus amounts for all employees in order to stay within budget on the plan. Many of the nonexempt employees at this particular company have little or no opportunity for overtime because of the type of work they do, and those who do have the ability to work overtime are likely to get bonuses that will be larger than their supervisors.

The plan is difficult to communicate, because while the performance goals of the exempt employees have been tailored to each individual situation, the performance measures for the nonexempts are based strictly on company performance, and that does little to motivate the nonexempt employees to achieve personal or divisional goals.

A company has four basic options when it comes to bonus arrangements:

They can choose not to offer a plan at all, which places them at a competitive disadvantage, and it does nothing to motivate or reward their employees.

They can choose to install a purely discretionary arrangement, which again does very little to motivate employees to achieve desired results.

They can install a performance-based plan and deal with overtime recalculation, which, by the way, is primarily a manual process. It is very costly and time consuming. But one of the downsides of this type of arrangement is that people who work more overtime are going to get the largest bonuses, and time worked is not always an indicator of top performance.

The final arrangement is you can install a performance-based plan and avoid the overtime issue by excluding your nonexempt employees. Sadly, this is something we are seeing happen fairly often.

Last year, I worked with SHRM, the Texas State Council and Houston chapter, to conduct a survey of Texas employers to see how they are reacting to the Fair Labor Standards Act and what choices they are making with respect to performance bonuses. What we found is that 60 percent of the companies who responded to the survey do provide some sort of performance bonus plan. Forty-two percent of those exclude their nonexempt employees, and more than 50 percent of those said that the decision to do so was based on the Fair Labor Standards Act.

Last year, the Congress took a very important step when it passed legislation exempting stock option gains from the overtime calculation. And while I applaud you for this very important piece of legislation, I ask you to consider that performance bonuses are another way to ensure employer success with all employees. For employees of privately held companies they are the only way, because stock is not available as a compensation device.

The Fair Labor Standards Act is an outdated law that in this day and age can serve as an impediment to the very employees it was designed to protect. I urge you to pass H.R. 1602 to encourage employers to provide performance and gainsharing bonuses to all employees.

Thank you very much for the opportunity to be here. I would be happy to answer any questions that you may have.

WRITTEN STATEMENT OF LORI A. THOMAS, CCP, VICE PRESIDENT, MANAGEMENT COMPENSATION GROUP/DULWORTH, INC., HOUSTON, TX, ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, WASHINGTON, D.C. - SEE APPENDIX C

Voice Chair Biggert. Thank you, Ms. Thomas.

Mr. Leibig, you may begin your testimony.

STATEMENT OF MICHAEL T. LEIBIG, PARTNER, ZWERDLING, PAUL, LEIBIG, KAHN AND WOLLY, ALEXANDRIA, VA, ON BEHALF OF THE AFL-CIO, WASHINGTON, D.C.

My name is Michael Leibig. In addition to representing the AFL-CIO, the International Union of Police and a number of other unions here today, I also am a professor of law at Georgetown University, where I have taught for 26 years and for many of the years concentrated on the Fair Labor Standards Act. Since I have submitted written testimony, I just want to concentrate on two points in the time I have now.

The first is the negative impact of this legislation, if it passes, on people who already receive bonuses. In my testimony I give a number of statistics collected by the American Management Association; the Economic Policy Institute; Unite, which is a labor union in the needle trades, in the old-fashioned way of speaking; the International Union of Police and the United States Steelworkers.

All of those cases show that a great percentage of the American workforce already receives bonuses in gainsharing, and we certainly support that. If this legislation were passed, an employer who was just operating under what the law allows would reduce the pay of those people because now they pay overtime to the nonexempt people on the rates. And so one of the impacts would be a number of workers whose pay would go down because the amount of the reduction in overtime, as I have pointed out in my testimony, is greater than the bonuses that they receive. So that is one problem.

Another problem is that it would legally authorize employers to designate in the future what portion of pay is the bonus and what portion of pay is the base pay. There would be nothing illegal about donating everything except the minimum wage as the base pay and everything else as a various form of bonuses.

Now, the witnesses in favor of the legislation say that is unlikely to happen, because only unscrupulous employers would do that. That is not true at all. We should assume under the Fair Labor Standards Act, as the Act always has, that all employers who are scrupulous would in the interest of their stockholders take advantage of whatever economic savings they can. That is a perfectly appropriate thing for them to do. But you can't say that this legislation is only going to apply to those people who don't want to take advantage of the very benefit it gives. You have got to assume that any employer would take advantage of it. And once they do, it undermines the whole theory of the regular rate, which you explained.

What I would really like to explain is that he difficulty of including bonuses now and establishing bonuses now is greatly exaggerated by some of the sponsors of the bill, especially compared with the actual wording of the bill. If you look at the regulations on how you calculate to include bonuses in the regular rate, which I have attached to my

testimony, in CFR 778.209 and 210, there is a great deal of flexibility. You don't have to calculate each time the person is paid overtime. You can wait till the period on the bonuses is paid. You can do the bonus as a percentage. It outlines a whole lot of ways that this can be simply done.

One example given of companies who seek advice is that the ways they are told do it by lawyers are very complicated. Well, that is fine if they want to do it that way, but they don't have to do it that way. The regulations make it clear; there are ways to include the bonuses that are not complicated. And in this age when people already have to calculate tax withholding and other things that they have to do in the pay system under Federal law they have all of the records that are necessary to include the bonus. They already have to have a payroll system, and it is not a complicated system to include it.

But let us pretend that it is. If you read the regulation in 210, which says if you pay a bonus and you figure out what percentage the bonus was of the overall salary the person made that year and just add to the overtime the person made that year that same percentage, that complies with the law.

If you read that and then read this legislation, which says that an employer, before he can do this, has to be able to show that he is in good faith for the purpose of distributing to employees additional remuneration over and above the wages and salaries that are not dependent on such a plan. It is not clear what that means, but it is much more difficult for an employer to figure out what that means than it is to read the regulations. The regulations are simpler than this objective standard included in this bill. And based on Congressman Ballenger's report a couple of years ago, I know some of this language was put in the bill to avoid the unscrupulous lawyer problem, in other words, the employer that would take advantage.

But if you read that language, it either does nothing or it is more complicated for an employer, because it is trying to say, if you are a scrupulous employer, you can include the bonus, but if you are an unscrupulous employer, you can't, and here's how you determine by that language what it is. If you read that language and then read the simplest way of including bonuses, it is already in the law in the regulations. The regulations are clearly simpler than the new regulations are.

My time is up, but I would just like to say that the number of institutions that have instituted bonuses already demonstrate the capability of having bonus and gainsharing without this legislation. If there are companies that think this is that complicated, and I said this 3 years ago and I still do, we would be glad to look at their systems for free, and show them how they can do it, as would the Department of Labor.

WRITTEN STATEMENT OF MICHAEL T. LEIBIG, PARTNER, ZWERDLING, PAUL, LEIBIG, KAHN AND WOLLY, ALEXANDRIA, VA, ON BEHALF OF THE AFL-CIO, WASHINGTON, D.C. – SEE APPENDIX D

Vice Chair Biggert. Thank you, Mr. Leibig.

Our final witness is Mr. Court. You may begin your testimony.

STATEMENT OF LEONARD COURT, SENIOR PARTNER AND CHAIRMAN OF THE LABOR AND EMPLOYMENT LAW SECTION, CROWE AND DUNLEVY, OKLAHOMA CITY, OK, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE, WASHINGTON, D.C.

Thank you, Madam Chairwoman and Members of the Subcommittee. By way of introduction, I am a member of the Labor Relations Committee of the U.S. Chamber of Commerce and Chair of that Committee's Fair Labor Standards Act Subcommittee. I am also a Senior Partner of Crowe and Dunlevy, Oklahoma's largest law firm; and I am proud to say that the most recent addition to this body's Oklahoma delegation, Brad Carson, comes from our law firm. Additionally, I am an adjunct professor of law at both the University of Oklahoma Law School and Oklahoma City University Law School.

Our firm represents all sizes of employers in Oklahoma, from large multinational corporations such as Goodyear and Avis to small companies having 25 employees or less. Giving advice to all of these clients gives me a perspective on how a variety of companies in different industries react to the legislation that is currently before this Committee.

My observations are based upon three assumptions:

First, in the current atmosphere of global competition, rewarding employees for improvements is desirable in areas of productivity, efficiency and incentive.

Second, predictability of compensation is important to employees. They want to know how much money they can make.

Third, bonuses are an effective and desirable method of compensation, and it seems to me that virtually every witness here agrees with that proposition.

The issue is how those bonuses are given. The Fair Labor Standards Act allows and recognizes the principles of bonuses by allowing the giving of discretionary bonuses without the inclusion of that sum into the hourly rate calculation. Unfortunately, however, the FLSA passed over 60 years ago impedes these principles in the treatment of nondiscretionary bonuses and requiring their inclusion in the regular rate of pay.

Unquestionably, the nature of business and competition today is very different from that which occurred when the FLSA was originally passed. Today even small Oklahoma companies have to compete on an international basis. To do so effectively, these companies must become more productive and more efficient. That requires that they find ways to reward their employees and recruit better employees and retain them. Many employers believe the performance-based bonuses are the way to accomplish those goals. This Committee has already heard a lot of testimony about that, and I don't plan to

duplicate that effort.

Employers tend to reject performance-based bonuses because of the costs associated with the required recalculation under the FLSA and because of the other disincentives that are nationally involved. While admittedly the advent of computerized payroll systems has lessened the burden somewhat, they certainly have not eliminated the need for developing individualized programs, rechecking the calculations that have been done. This is time and money that could be better spent with additional bonus compensation. Recent client discussions illustrated this problem to me.

In preparing for this hearing, I have tried to talk to a cross section of my clients concerning nondiscretionary bonuses in the FLSA requirements. The almost unanimous reaction has been a disinclination to engage in these kinds of performance-based bonuses because of the problems associated with them. Now, I acknowledge that quantifying the number of companies who would adopt gainsharing or bonus programs if H.R. 1602 became law is virtually impossible to determine. However, my personal experience with over 25 years in this field tells me that the percentage would be significant.

I would note here within the last month that I have worked with a client, much like Ms. Thomas, who looked at performance-based bonus systems but ultimately, being a small client and not wanting to have to deal with the recalculation problems, rejected that issue. Furthermore, in my role as Chairman of the FLSA Subcommittee for the U.S. Chamber, I repeatedly hear from other employment attorneys and business representatives who share in these same problems and experiences. Our Subcommittee has identified passage of this legislation as one of the most important modifications that can be made for the benefit of both management and their employees.

The net result of the current FLSA approach to these kinds of nondiscretionary bonuses simply widens the gap between exempt and nonexempt employees. Exempt workers are receiving the gainsharing and bonus programs that are not being offered to many of the nonexempt workers. All members of the team want to feel part of that team, and all members of that team want to share in the rewards that are given for its success. The current FLSA does not allow that.

Additionally, my experience tells me that predictability is important in compensation. The FLSA interferes with that by not emphasizing and allowing the use of nondiscretionary bonuses. Quite the contrary, most companies select the discretionary bonus, which doesn't tell the employee what they have to do or what they will receive.

This Congress has made modifications to the Fair Labor Standards Act over time to change the incentive approach, the most recent being with the stock options. It is now time for this Congress to take that next step to recognize the need for nondiscretionary bonuses that are not included in the overtime rate and pass H.R. 1602.

Thank you, and I am open for my questions that the Committee might have.

WRITTEN STATEMENT OF LEONARD COURT, SENIOR PARTNER AND CHAIRMAN OF THE LABOR AND EMPLOYMENT LAW SECTION, CROWE AND DUNLEVY, OKLAHOMA CITY, OK, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE, WASHINGTON, D.C. – SEE APPENDIX E

Vice Chair. Thank you, Mr. Court.

Now we will turn to questions by the Committee members; and, in fairness, we will also watch the clock. So each of us will limit our questions to 5 minutes. And I think since we have the sponsor of H.R. 1602 here with us that I will yield to Mr. Ballenger of North Carolina to open the questioning.

Mr. Ballenger. I have a question for Dr. Fay, because every year we run into the same thing. This is the third time I have run this bill, and it is obvious from your testimony, that you have studied and developed several pay plans that are in use in companies. Is that correct?

Dr. Fay. Yes.

Mr. Ballenger. We heard Mr. Leibig say that H.R. 1602 would not prevent an employer from reducing an employee's wage down to the minimum wage and designating the rest of the employee's earnings as gainsharing. Do you agree with this position?

Dr. Fay. No, I do not. In fact, given the language of the bill, it would be impossible to do. The bill states that the plan has to be in writing, made available to employees, and provide that the amount of payments to be made under the plan to be based on a formula.

All gainsharing plans operate from formulas. They are fairly complex formulas, and they require having a gain so that a share is paid out. They require that there be a reduction in the ratio of labor costs to total costs or labor hours to total costs of production. And to rig that in such a fashion that you come out anywhere close to a market rate using the formula, would be pure luck. The amount of gainsharing payout is going to be determined by the gains that are made; and, again, I would like to stress these gains are a function of working smarter, not harder. It is just impossible to be able to rig it in that way.

I might also note that, in connection with this, while there are an awful lot of plans that are cited as being gainsharing or performance-based systems of one kind or another, there is no evidence in these, and I am familiar with the Hewitt Associates study. I might have a performance-based pay system bonus for mid-level managers, and I would end up with 47 percent of people, so that many of the bonus plans that are cited here do not really apply to nonexempts.

The one exemption is in the steel industry, by the way, because a union rep in the steel industry invented gainsharing. The first gainsharing plan was developed by Joe Scanlon, who was a union rep for a steel mill that was about to go belly up; and he argued successfully that it was necessary for both management and employees to figure out how to work smarter so they could stay in business. He and his union force would be willing

to do that, provided that the gains that they created would be shared. That spirit is still the spirit in every one of these incentive programs.

Mr. Ballenger. I would like to ask Mr. Leibig a question. Let me give you an example of a case that I know actually existed.

A company was trying to figure out a way to make better profits and decided that they would offer bonuses to the employees based how much they reduced their waste factor at the end of the year. Now, according to you, you are going to be able to figure out how far down to reduce your pay so that you can get this thing to come out where they are just working for the minimum wage.

But in this particular case, you get to the end of the year and have two different plans. One of them didn't get below. They picked a figure, 10 percent. Ten percent is what our waste is running this year. You have got to beat that next year. If you do, we will base the bonus amount of money, say, for each quarter of a cent below, you give them $5,000 to divide up. So the other branch of the company actually cut their waste down to 9 percent. So there are 4 quarters. That is $20,000. And you divide it back to them on the basis of their time.

In the plant I am using this as an example you have 10 workers. Two of them work for $10 an hour. Two of them work for $11 an hour. Two of them work for $12 an hour. Two of them work for $13 an hour. Two of them work for $14 an hour. The first one works 2,200 hours in the year. The second one works 2,100 hours a year. The third one works 2,000 hours a year. The fourth one works 2,050 hours a year. The fifth works 2,075 hours a year. Now, how are you going to get the minimum down so you can cheat the kid out of anything he has earned; how are you going to figure that? Even with a computer, I would dare you to do it.

Mr. Leibig. Well, first of all, under one of the options where you can take how many hours they worked overtime over the year, none of those people worked over 2080 hours a year.

Mr. Ballenger. No, no, no. You are wrong; 2,200 hours, 2,100 hours, and 2,075 hours.

Mr. Leibig. Some of them did and some of them didn't?

Mr. Ballenger. Some of them didn't, yes. So how are you going to divide it up?

Mr. Leibig. First, you just calculate the bonus you want to pay. And I assume from your example that it comes out to be a percentage of their overall pay.

Mr. Ballenger. No, sir.

Mr. Leibig. It is a percentage of how much they get paid?

Mr. Ballenger. It would based on what they get paid, yes.

Mr. Leibig. Right. So if the person made $20,000 and they did enough savings, they might get a 5 percent bonus or 10 percent bonus.

Mr. Ballenger. How am I going to get him down to the minimum wage, then?

Mr. Leibig. Well, first let me say how you would calculate it without a lot of complications.

Mr. Ballenger. No. The basic point is you are getting the wages down to the minimum, but you are figuring this at the end of the year. The bonus comes out after they have finished the year.

Mr. Leibig. No, no. That's two different questions. Right now, if that company had to pay the bonuses under the Fair Labor Standards Act that was a percentage of the people's salary, all they would have to do is take the number of hours they worked overtime, the amount it was, and take that same percentage and pay that. So, first of all, they could calculate it.

However, that company that you just described could, if they wanted to, just develop a written pay plan that says our employees' base salary is now whatever the minimum wage is. That would be legal.

Mr. Ballenger. Have you ever tried to hire anybody now at minimum wage?

Mr. Leibig. Well, wait let me finish. But you wouldn't pay them at minimum wage, because you would say, we are also going to pay you so much more and we are going to designate that as a bonus and that could be $50,000.

Mr. Ballenger. What you have done then is tell this employee that you are going to pay him $5.75 an hour.

Mr. Leibig. No, no.

Mr. Ballenger. You just said it, minimum wage.

Mr. Leibig. No, I didn't say that.

Mr. Ballenger. So you will agree that you are going to pay $5.75 an hour. Of course, you are not going to have any employees.

Mr. Leibig. No that is not what you are going to tell him. You are going to tell him your base is only $5.75 an hour, but really you are going to be paid whatever you are going to be paid under the bonus.

Mr. Ballenger. Of course, you are saying I am a crook to start with, so how in the world are you going to get anybody to work for you?

Mr. Leibig. No, you are not a crook, because this bill specifically allows that.

Mr. Ballenger. It doesn't make any difference whether they allow it. You know a crook and I know a crook when we see one.

Mr. Leibig. Well, it would be legal.

Vice Chair Biggert. The gentlemen's time has expired.

Mr. Leibig. It would be illegal to do that, though.

Vice Chair Biggert. Does the distinguished gentleman, the Ranking Minority Member, Mr. Owens, have questions?

Mr. Owens. I have some friends from Israel who say that some of the mathematicians that have come to Israel from Russia are capable of solving any problem with what they call arrogant logarithms. It sounds like we need an arrogant logarithm here to deal with this.

Mr. Leibig, would H.R. 1602 prevent an employer from paying an attendance bonus?

Mr. Leibig. Prevent an employer from paying attendance bonus? It wouldn't prevent it if the employer wanted to pay it.

Mr. Owens. So it would be both lawful and easy for an employer to convert a $20-an-hour wage to, say, a $6-an-hour wage and pay a $14-per-hour bonus, correct?

Mr. Leibig. Right. Right. And then they would only have to pay overtime on the figure that wasn't the bonus. That is correct.

Mr. Owens. Now, Dr. Fay said that you and I are both mistaken when we say that H.R. 1602 permits employers to convert wages into bonuses. Would you care to respond?

Mr. Leibig. Well, all I would say is that I do think that the Committee staff did work on some language that I understand was an effort to do that, and if you look at what the language actually says, it says that the plan has to be in writing. Fine, you could write up what you said. It has to be communicated to the employees. That is fine. You could communicate to the employees. And then it says it has to be established and maintained in good faith. An employer could put the plan in your favor of good faith.

For the purpose of distributing an employee's additional remuneration, that would be the attendance bonus additional remuneration, and it has to be above the wages that are not dependent on the plan, which the part of the wages that they would designate are not dependent on the plan.

This bill authorizes exactly what you just described as a way of reducing the overall overtime costs which have all the attendant consequences, both you and your statement and that I mentioned before. So clearly there is nothing in the bill that would prevent that. In fact, it seems to say it is okay, as long as it is in writing, communicated and meets the standard of being accomplished in good faith. And I am assuming it is

good faith for an employer to say I am good in faith because I want to make my company be more efficient and have gainsharing for all the good reasons that I have gainsharing. The bill assumes that.

Mr. Owens. You cited some authorizations that support your position. Could you read those again?

Mr. Leibig. Sure. First, the AFL-CIO and a number of unions that I mentioned, the steel for instance. One of the main unions that I am the general counsel of is the Police Union. We did a survey and over half of the police officers in the United States already get bonuses that meet the definition that are included in their overtime rate now.

After this bill passes, most employers that I am aware of will take them out of the overtime rate. So police officers will get 50 percent reduction in pay as a result of this, because they usually do work overtime and they would get a reduction, and the AFL-CIO affiliated unions.

Also, I teach at Georgetown Law School, and, as I said, I myself have been involved in a number of FLSA enforcement cases in all the courts. In three cases in the Supreme Court and Courts of Appeal in all situations the employees favored including the bonuses in the regular rate. And I would note there are no employees here that support the bill or that testified in favor of the bill. They are all employer representatives.

Mr. Owens. Ms. Thomas, you said people who work overtime would get the largest bonuses. Can you explain what point you were making there?

Ms. Thomas. When you add overtime into your bonus formula or you base your formula on a percentage of wages, you count base salary for those who are exempt and you count base salary plus overtime for those who are not exempt. Then the bonuses, as a result of the overtime being factored in, can be larger for those who do have a significant amount of overtime.

Mr. Owens. Under this bill they would get larger bonuses than they would under the existing law?

Ms. Thomas. As the law exists today, that is an issue.

Mr. Owens. And do you contend that computing all this is very difficult?

Ms. Thomas. I don't contend that computing a bonus where you merely multiply a percentage by salary or salary plus overtime is difficult.

A plan that is based on performance that may extend over a quarter or a calendar year before the bonus is determined and then you have to go back during the period of time for which the bonus covered performance and recalculate overtime, I believe that is very difficult, yes. It is a manual calculation. If you talk to human resource professionals who are in charge of payroll, and the two major payroll companies that handle payroll for a lot of companies in the United States they will tell you that this is not a simple process.

It is not an automated process. There is a great deal of time involved.

Mr. Owens. Well, you can refer them to Mr. Leibig, who said he would do it for free. Thank you.

Vice Chair Biggert. Thank you, Mr. Owens, and I think I will take my turn right now and ask a question of Mr. Court. We are about to have a vote, but we will continue for as long as we can and then go vote.

Mr. Court, would you explain the differences in treatment of discretionary bonuses under current law from bonuses based on productivity gains, and do you think we should continue this distinction?

Mr. Court. No, Madam Chairwoman, I don't. Discretionary bonuses are not included in the overtime calculation.

I would suggest, for instance, consistent with Representative Owens' statement that we have been paying bonuses for over 40 years and most of those have been discretionary bonuses. The problems with them are that they give no predictability and no guarantee to the employees. You don't know what you have to do to get them. You don't know how much you are going to get. They are left to the employers' discretion at the end of the year.

The nondiscretionary bonus, as this Committee knows, is figured very differently under the current law. And because of that treatment, as the other witnesses have indicated, I suggest there is a disincentive to give that kind of bonus.

The other aspect, if I can digress just a second, is the enforcement issue and this claim for change. Let me point out that certainly, at least in the unionized sector of our economy, if I as an employer were to try to make the kind of change that is being claimed here unilaterally, I have no doubt Mr. Leibig would have an (8)(a)(5) unfair labor practice charge in the National Labor Relations Board's hand immediately. I can't make that unilateral change in wages, hours and working conditions under an existing collective bargaining agreement.

Vice Chair Biggert. Based on your experience and those of your clients, how important are productivity incentive programs in motivating and retaining employees?

Mr. Court. I think my clients certainly believe that productivity-based bonuses are very important. They want to have more latitude to use them. They are, however, reluctant to enact them because of the problems we have talked about, not only in retaining employees but also in getting better employees.

Vice Chair Biggert. Ms. Thomas, with your testimony, you attached a survey of employers in Texas on performance-based gainsharing. Can you tell the one or two really important findings from that survey? What do you really look at when you see the survey?

Ms. Thomas. Yes, ma'am. We surveyed members of SHRM chapters in Texas and also members of the Texas Chamber of Commerce to find out what they were doing with respect to bonuses. We had 321 respondents to the survey. Sixty percent of those companies do provide performance bonuses for their employees in one form or another. Forty-two percent of the companies that do provide that type of arrangement exempt or exclude their nonexempt employees.

We asked if the distribution was based on the Fair Labor Standards Act requirement that overtime be included in those bonuses, and 52 percent of the companies that exclude their nonexempt employees said that it was the factor. There were a few companies where the response was they were unaware of what the basis for the decision was, but a significant number do exclude the nonexempt employees because of the issue of overtime recalculation.

We also asked those who do include their nonexempt employees about plan administration and their experience with that. Only 13 percent said that the plan was either simple or very simple to administer. Most of them said it was very difficult, and they cited the recalculation as the issue.

Vice Chair Biggert. Then based on your work with various employers, what level of cash bonuses do employees typically receive in gainsharing plans?

Ms. Thomas. What we are seeing is that employers are trying to increase the amount of bonuses that they are paying, because it makes more sense to pay a larger performance bonus if you are going to motivate someone to increase productivity rather than to pay a discretionary bonus. So we are starting to see bonuses become a more meaningful component.

For someone who is not at a management level, we have seen target bonus amounts ranging from 5 percent, 10 percent, 15 percent, depending on the philosophy of the company. But we are seeing those percentages increase for companies that want to put in bonus plans.

Vice Chair Biggert. My time is about to expire, so I think I will turn to Ms. Woolsey.

Ms. Woolsey. Thank you. Thank you, Madam Chairman. Thank you, panel.

My background before Congress was in human resources management for 10 years with a high-tech electronics company of over 800 that started with 13 people when I joined them, and then 10 years as human resources consultant. So I come from a different perspective than most of the panel.

It was our philosophy at the company that I worked for that the employees who contribute the most generally earn the most and generally receive the largest bonuses. Hence, it wasn't in our best interest to be picky about how much they got over how much they didn't get when what we were trying to tell them was job well done.

I don't see how what we are talking about ever works for the employee. What do we care about? I know, tax-and-spend Democrat you are probably thinking, the Chamber of Commerce and things like that. It doesn't matter. You have to think about the employee. What if they sat here and listened to you talking about how they weren't worth setting up a computer program that might be a little difficult? So what if it is not simple? Do it. Make it work for the people that work for you, and let them gain by their contribution to your organization.

There. That is my lecture. You have all heard it before. But I just for the life of me cannot believe why business or we must think they are going to benefit so greatly by doing in that employee, and that somehow the employees aren't going to get it. I can't see how it could possibly be.

I would like to ask Mr. Leibig the same question that was asked earlier. Under H.R. 1602, from your perspective, could an employer pay employees a bonus instead of wages?

Mr. Leibig. Well, they would have to pay the minimum wage, but, above the minimum wage, the employer can designate under the bill, as long as he has a written plan the employers know about and it is in good faith whatever part of wages they want as a bonus and whatever wages they want as the base. The base would have to be the minimum wage, of course. But, beyond that they could do whatever they wanted to.

Ms. Woolsey. But which is more secure, the wage your job and your talents equal or minimum wage, and maybe a bonus, maybe not, depending on your contribution?

Mr. Leibig. To be perfectly honest with you, most of my experience in this recently has been with police officers. And I have got to tell you, police officers want the guarantee, but they also favor bonuses. They already get bonuses that are included in the overtime rate. If this bill passed, they would then get bonuses that aren't included in the overtime rate, and that would reduce their overall pay. So, obviously, they want more pay.

I would like to say that employees would like to have all their pay in the base and none in bonuses, but my actual experience is that we have nothing against bonuses when they are calculated as nondiscretionary bonuses. And I do agree, discretionary bonuses are often given, but the problems pointed out logically make sense.

If it is a discretionary bonus, you don't know what it is. If it is a nondiscretionary bonus, you do know what it is. You can rely on it, and you actually can easily calculate how much it is going to be and how much it is going to increase your overtime. So I think both motivate them.

But the biggest danger of the bill I think is that, immediately upon passage, any employer who is trying to minimize their cost under the Fair Labor Standards Act would be motivated, especially in policing where a lot of them aren't covered by collective bargaining, to reissue a plan that designates a portion of the employee's bonuses that used to be in the base rate. Why wouldn't they do it? The bill says they can do it if they are in good faith, and so I think they can do it when you get a reduction in pay.

Ms. Woolsey. Does H.R. 1602 make the workplace more or less family friendly?

Mr. Leibig. Well, obviously, you can debate about that, but I think it makes it less family friendly for a couple of reasons. The base pay could go down. The pay that the management controls goes up.

For instance, there is some talk about how do you make the workplace more flexible. If you have a workplace that is more flexible, where people have more say over working different hours and stuff, it is obviously to their advantage as they flex their hours if they work more time and get more; and if they work less time they sacrifice it. So I think it is family friendly.

The bill does damage to family, but in the current system it is family friendly because it would reduce take-home pay. It would also be a motivation to increase hours because it would cost less for each overtime hour so there would be pressure to increase the length of the work week, have employees work longer hours rather than to hire a new employee, because each hour of overtime would be cheaper.

Vice Chair Biggert. The gentlewoman's time has expired, and we have to vote. So I would like to thank the witnesses, and if there is no further business, the Subcommittee stands adjourned.

Whereupon, at 2:34 p.m., the Subcommittee was adjourned.

APPENDIX A - WRITTEN STATEMENT OF VICE CHAIR JUDY BIGGERT, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Opening Statement of Representative Judy Biggert, Vice-Chair

Subcommittee on Workforce Protections
Committee on Education and the Workforce

Tuesday, July 31, 2001

Good afternoon. I'd like to take this opportunity to welcome each of you to our hearing on H.R. 1602, the "Rewarding Performance in Compensation Act." H.R. 1602 will help workers share in financial gains when their extra efforts produce increases in productivity.

This legislation was introduced by Rep. Cass Ballenger (R-NC), a member of this subcommittee, who has worked for several years to address the special problems that employers face when providing bonus or gainsharing programs to their employees.

In October 1999, similar legislation was reported from the Committee on Education and the Workforce and in February 2000, the Senate passed a bankruptcy bill that included bonus gainsharing. However, no changes made it into law.

Employers have found that rewarding workers for high quality work improves performance and the ability of the company to compete. Bonus or gainsharing plans can encourage employee creativity and innovation, improve customer satisfaction, and promote safety and efficiency.

While the Fair Labor Standards Act does not prohibit employers from providing these types of rewards, it does make it difficult and confusing for those who wish to do so.

With gainsharing, employees are assigned individual or group productivity goals and the savings achieved from improved productivity, or the gains, are then shared between the company and the employees. The payouts are based directly on factors under an employee's control, such as productivity or costs, rather than on the company's profits. Thus, employees directly benefit from improvements that they help to produce by increasing their overall compensation.

Unfortunately, many employers who choose to operate such pay plans can be burdened with unpredictable and complex administrative costs. For example, if a bonus is based on production, performance or other factors, the payment must then be divided by the number of hours worked by the employee during the time period that the bonus is meant to cover, and added to the employee's regular hourly pay rate. This adjusted hourly rate is used to calculate the employee's overtime rate of

pay.

For other types of employees, such as executive, administrative, or professional employees who are exempt from minimum wage and overtime, an employer can easily give financial rewards without having to recalculate rates of pay.

The Rewarding Performance in Compensation Act would amend the FLSA to specify that an employee's regular rate of pay for the purposes of calculating overtime would not be affected by additional payments that reward or provide incentives for employees who meet certain goals. By eliminating disincentives in current law, this legislation will encourage employers to reward their employees and make it easier for employers to "share the wealth" with their employees.

I would like to thank all of our witnesses for taking time to be with us today. We look forward to hearing your views on the legislation that we are considering here today.

APPENDIX B – WRITTEN STATEMENT OF CHARLES FAY, PROFESSOR OF HUMAN RESOURCES MANAGEMENT, DIRECTOR, GRADUATE PROGRAMS IN HUMAN RESOURCES MANAGEMENT, SCHOOL OF MANAGEMENT AND LABOR RELATIONS, RUTGERS: The STATE UNIVERSITY OF NEW JERSEY, HIGHLAND PARK, NJ

STATEMENT OF CHARLES FAY
PROFESSOR OF HUMAN RESOURCES MANAGEMENT
DIRECTOR, GRADUATE PROGRAMS IN HUMAN RESOURCES MANAGEMENT
SCHOOL OF MANAGEMENT AND LABOR RELATIONS
RUTGERS: THE STATE UNIVERSITY OF NEW JERSEY

ON

THE REWARDING PERFORMANCE IN COMPENSATION ACT (HR 1602)

BEFORE THE

HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
JULY 31, 2001

Good afternoon, Mr. Chairman and Members of the Subcommittee. Thank you for inviting me to testify today about the reasons the Fair Labor Standards Act should be amended to recognize changed circumstances in the workplace and to facilitate corresponding changes in reward systems.

I am Charles Fay, Professor of Human Resources Management and Director of Graduate Programs in Human Resources Management at Rutgers, the State University of New Jersey. My research, teaching and consulting all focus on reward systems, and particularly on performance-related rewards. In the last several years I have become interested in the changing nature of work, and the implications of that change for the management of human capital.

I have authored or edited a number of books on reward systems, and published numerous articles in professional and scholarly journals. I served as the Chair of the Research Committee of the American Compensation Association (now WorldatWork) and have been a faculty member for several of the courses in their certification program. I was a member of the Federal Salary Council, and served as Chair of that body's Working Group.

This committee has heard testimony in previous years from such experts as Margaret Coil and Pam Farr regarding the impact of the current FLSA regular rate requirement. This requirement provides that payments received by non-exempt workers that result from individual or group incentive programs rewarding improvement in productivity, quality, efficiency or sales goals be included in base pay for the purposes of calculating overtime pay.

I think most HR and rewards professionals could provide similarly convincing testimony about the negative impact of current law on organizations that attempt to remain competitive in an increasingly competitive global economy while

sharing the rewards of success with the employees who are responsible for that success. These negative impacts include undermining the shared culture of excellence that organizations are trying to achieve by reinforcing artificial distinctions between exempt and non-exempt employees, reinforcing an entitlement mentality among all workers, and adding significant payroll transaction costs.

I will not focus on these arguments, although they are as valid today as they were when they were first made. Instead, I would like to focus on changes that have occurred in work in the last decade or two, and how those changes make inclusion of incentive bonuses in base pay for overtime calculation purposes as inappropriate as Congress has found the inclusion of profit sharing payouts or stock option profits to be.

The Traditional Job Model

When the Fair Labor Standards Act was initially passed, the dominant economic sector was manufacturing and the dominant work model was derived from industrial engineering. A diagram illustrating that model is appended as Attachment A. In this model, work is broken down into discrete tasks and the smallest set of tasks consonant with the workload of a single employee is grouped together to form a position. The industrial engineering model optimizes the work process and the goal of human resources is to find employees of the lowest set of knowledge, skills and abilities to perform each limited task set well. Work design leaves little discretion to the employee; the only way to be more productive is to work at the speed of the production line. These are the kinds of jobs where employees are expected to check their mind at the door when they clock in.

Most traditional human resource management practices are based on the industrial engineering model. Jobs are defined in terms of stable task sets, and job specifications are derived from the task set. Employee selection is based on job specifications; training, performance management and job value are based both on task sets and job specifications. If you ask an employee in this kind of job what they do, you are likely to get a job title and task set.

In one plant, I spoke with an operator about his job. He related that he was an automated lathe operator, and described his job as putting a piece of stock in the lathe, checking that it was secured, checking that the cutting blade was in place, pressing the "on" button, and when the piece was finished, removing it and placing it in the finished pieces bin for pickup. If anything went wrong with the operation he called his supervisor or maintenance.

Employees with these jobs are likely to turn down special assignments, noting, "That's not in my job description." While not all non-exempt jobs followed the industrial engineering model precisely, human resource management processes

treated them as if they did. That's one reason we refer to some service organizations (including more traditional government offices) as paper factories.

Reward systems in organizations adhering to the industrial engineering model are likely to be most influenced by internal equity models. There are two approaches to determining job value. The first set of models would include company-specific economic and budgeting models to estimate the value added by specific jobs. The second approach consists of job evaluation systems such as the Hay system in the private sector and the classification system used by the federal government for General Schedule jobs. The outcomes of the evaluations based on these models determine job value, or, in unionized establishments, serve as the basis for wage bargaining.

When organizations adhere to industrial engineering approaches to job design, making all pay base pay makes some sense, because workers have little discretion in how their job is done, and performance consists of completing the physical tasks assigned. In those jobs where performance differentials are possible, pay is usually based on a piece rate, and calculating overtime based on performance-related pay not only makes sense, but is necessary for any realistic view of base pay level.

The New Work Model

About ten years ago I visited a semiconductor fabrication plant as part of a rewards research/consulting project. I asked for a plant tour and a chance to talk with some of the operators, as I usually do. When I asked people what they did, I got one of three answers:

1. I provide customer service (or some other product or service).
2. Whatever it takes.
3. Do you mean last week, this week, or next week?

A theme that ran throughout all the answers was that these employees acted as members of one or more teams. These teams are increasingly autonomous, or self-managed, and in such workplaces the old bureaucratic hierarchy characteristic of the industrial engineering work model has largely disappeared.

The answers I received, and the jobs these answers describe, reflect a massive shift in the way work is organized today. This is true not only in high technology plants such as semiconductor fabrication, but also in the assembly of consumer products from personal computers to appliances, in the back office operations of financial services companies, and in customer service units of all industries. Much of the "reinventing government" initiative involves this redesign of work processes to provide better service to the public.

This model focuses on outcomes, not tasks. Employees at all job levels are expected to fully engage their brains as well as their backs. Change is an

inherent part of work, and employees today expect significant change in goals, work settings, and other aspects of work. Finally, work is increasingly done by employees as part of one or more work groups. This new work model is appended as Attachment B. Note in the diagram that the focus is on relationships and outcomes rather than tasks. The work team encompasses the same positions but how work is distributed across those positions is not prescribed by the organization. Unlike the organization in attachment A, where the only formal relationships specified are hierarchical (manager to supervisor to worker), in the new work model employees are expected to interact with many different groups to accomplish their work.

Human resource management under the new work model is still emerging. However, without stable task-based jobs on which to base human resource management processes, it is clear that traditional processes are no longer as useful as they once were. The new focus on competencies, for example, reflects that goal-focused jobs require "whatever it takes" rather than a prescribed set of work tasks, and employers can no longer rely on a set of task-derived specifications for selection criteria, performance standards, or training needs analysis. These jobs may even require a restructuring of goals to reflect new conditions. When the targets, and indeed even the playing field are constantly changing, organizations become more interested in individual and group capabilities and potentials.

The new work is also impacting rewards practices. Under the old work model, compensation for non-exempt employees (or those to whom overtime is owed under the FLSA) consisted almost entirely of base pay. That pay was generally based on hours worked, or, in some cases, the number of pieces produced. Performance consisted either of working to line speed, or producing more product. Generically, what was being rewarded was physical effort and endurance. Pay was almost entirely individual-based rather than group-based.

Under the new work model, this approach to pay is no longer appropriate. Job value is now determined primarily through external equity, or market pricing models. While base pay still accounts for most of the compensation received by non-exempt employees, incentives are becoming a larger percentage of earnings. Incentives have changed as well – they are provided to work smarter, not harder. These incentives tend to be based on group rather than individual performance.

As an aside, gainsharing plans have always had these characteristics. However, gainsharing plans were in place in relatively few organizations, typically where perceptive management and labor unions recognized the potential contributions to be made by non-exempt employees to improve work processes.

Incentive plan designs today have multiple goals, all aimed at sharing the results of increased economic viability in an increasingly competitive global market.

Program specifics vary according to the strategy of the organization. Pam Farr noted that at Marriott's Courtyard and Residence Inn sites, the incentive program made quarterly payouts based on guest satisfaction, revenue per occupied room, and targeted team and hotel goals. Other organizations have incentives focusing on safety, market share, productivity, teamwork, and many other goals that require working smarter and more cooperatively towards a business objective rather than harder.

These incentives generally apply to groups consisting of exempt and non-exempt employees. They have much more in common with profit-sharing plans and stock option plans than with piece rate or "work harder" plans. In a sense, the organization is looking at these incentives as profit sharing plans focused on the small groups that are responsible for the increased contribution to profit by thinking about how to work smarter and a willingness to work cooperatively with other employees to create greater value.

FLSA's Base Pay Procedures Impact

The requirement under the FLSA that employers include incentive payouts to recalculate base pay for overtime purposes is not attuned to changing models of work or the compensation systems that are rising in response to the new work. The problems these rules impose can be summarized as follows:

1. Most incentive programs today are designed for both exempt and non-exempt workers. Requiring incentive pay be rolled into base pay for purposes of computing overtime rates means inequitable treatment of exempt and non-exempt workers. The target payout of any incentive is based on expected economic value to the organization. If part of the expected value must be partially allocated to excess overtime payments, the total bonus pool must be reduced by approximately the same amount. Non-exempt workers get more than their share of the "profit" of the group effort. This reduces the effectiveness of the incentive for all employees, and introduces an issue that makes successful teaming all that much harder.

2. The outcomes that these incentive plans reward are not extra job effort that occurs both in regular work hours and in overtime. No extra effort may be required by any employee once the work is made "smarter," and, in fact, effort may be reduced under the "smarter" work. These incentive systems are not piece rate systems and should not be treated as such under the law.

3. Extra administrative costs for recalculating base pay for overtime purposes should not be ignored. Most incentive plans have quarterly payouts and many have monthly payouts. Many

organizations have several different incentive plans and an individual employee may be eligible to participate in multiple plans. These organizations would like to be able to have the flexibility to offer different incentive plans on a short-term basis as circumstances and strategies change. Even electronic transactions have costs, and the more complex the transaction (and the less uniform the application across employees) the more costly that transaction is.

Before closing, I would like to comment on one argument that has been raised in testimony in previous years: that employers will take advantage of any change in FLSA requirements to shift compensation programs for non-exempt employees so that incentive pay is a substantial proportion of total pay, in order to reduce overtime costs. This assertion rests on a complete misunderstanding of the purpose of incentive pay. The goal of all these incentive schemes is to get people more involved with the work setting and to use their intellect rather than their back to make the organization more productive. Organizations can't have it both ways, even with the worst of intentions. Employees who could be fooled by such an approach are unlikely to have the intellect to contribute to increased productivity in the first place. In addition, because most organizations use market pricing, they are unlikely to move very far away from the benchmarks set by their labor market competitors.

Conclusion

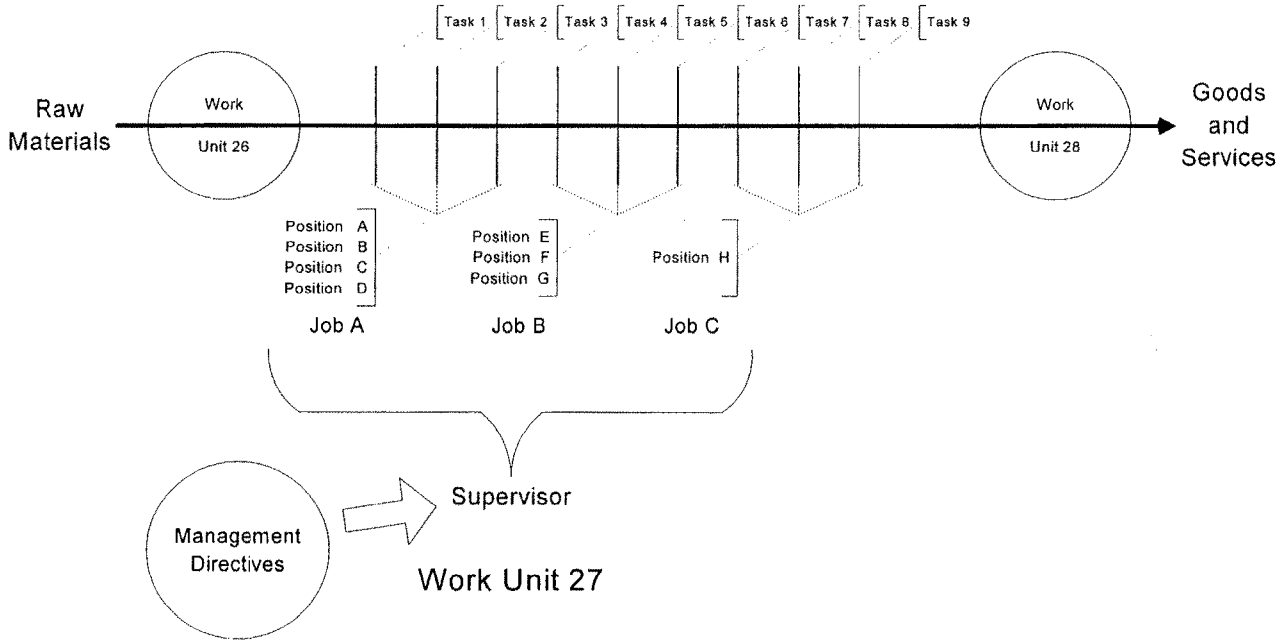
Mr. Chairman, the nature of work has changed dramatically in the last fifteen years. Human resource practices, and particularly rewards practices, are struggling to keep up. This is occurring at a time when global economic competition has never been more intense. American organizations are relying increasingly on having all their employees work smarter. In spite of our high labor costs the United States is a formidable world competitor precisely because employees continue to work smarter.

The current FLSA rules governing treatment of incentive pay for the purposes of computing overtime rates were designed for a different time, when work and wages were very different than they are today, and when few organizations had to worry about competition from overseas producers of goods and services. Applying these rules to the new work and new reward systems inhibits the use of these systems to incent employees to work even smarter than they do today. The rules inhibit employers from sharing the contributions to the organization that come from this smarter work on an equitable basis with the employees who are responsible for those contributions. Profit sharing has been recognized as a form of incentive that should not be included in the calculation of overtime rates; it is time that Congress recognize other, similar incentives as well. In my opinion,

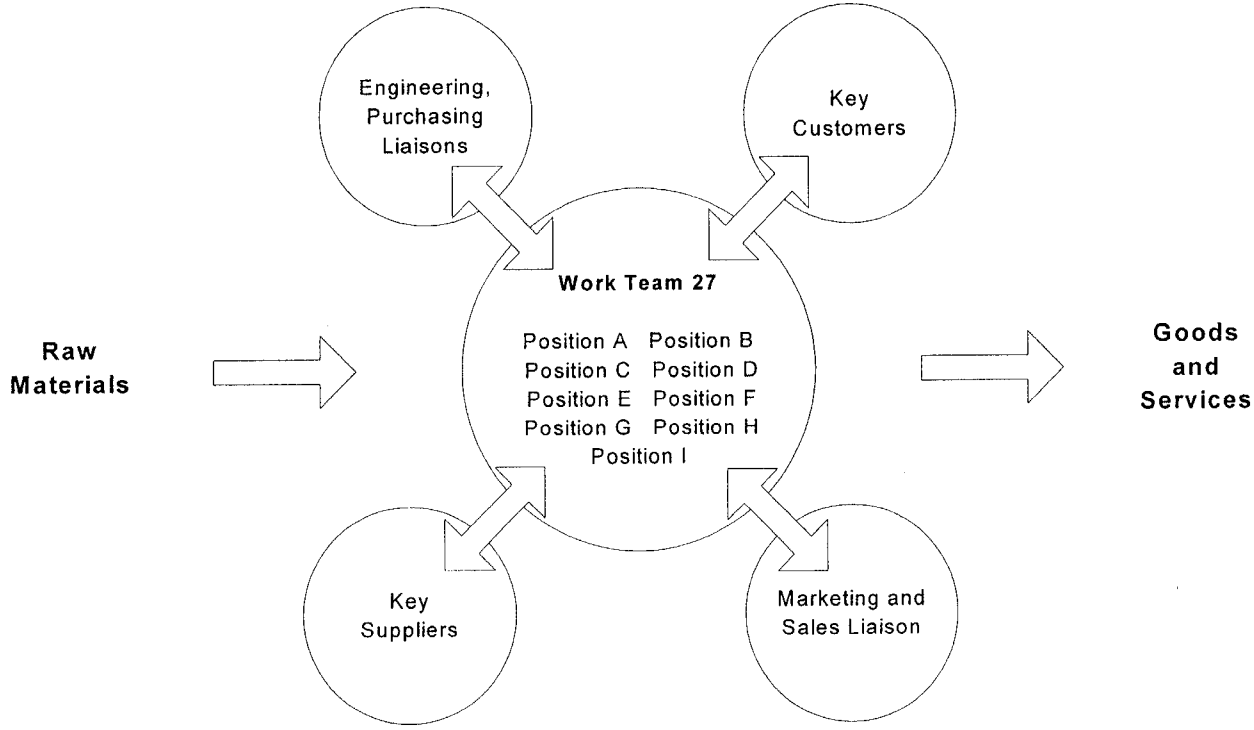
H.R. 1602, the Rewarding Performance in Compensation Act, would accomplish this objective.

Thank you for allowing me to testify today, Mr. Chairman. I will be happy to answer any questions you, or the other members of the Subcommittee may have.

Attachment A: Industrial Engineering Work Model



Attachment B: New Work Model



Committee on Education and the Workforce

Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)

Your Name: Dr. Charles Fay		
1. Will you be representing a federal, State, or local government entity? (If the answer is yes please contact the Committee).	Yes	No X
2. Please list any federal grants or contracts (including subgrants or subcontracts) which you have received since October 1, 1998: Analysis of National Compensation Survey Program, Bureau of Labor Statistics, J330W3DC-98-P313X-000-00- Blue Collar Job Evaluation Systems as They Relate to the Design of the National Compensation Survey, Bureau of Labor Statistics, 1000006013 Application of Private Sector Compensation Policy into BLS Compensation Survey for Public Dissemination, Bureau of Labor Statistics, 1000005918		
3. Will you be representing an entity other than a government entity?	Yes	No X
4. Other than yourself, please list what entity or entities you will be representing: N/A		
5. Please list any offices or elected positions held and/or briefly describe your representational capacity with each of the entities you listed in response to question 4: N/A		
6. Please list any federal grants or contracts (including subgrants or subcontracts) received by the entities you listed in response to question 4 since October 1, 1998, including the source and amount of each grant or contract:		
7. Are there parent organizations, subsidiaries, or partnerships to the entities you disclosed in response to question number 4 that you will not be representing? If so, please list:	Yes	No X

Signature: _____ Date: 31 July 2001

Please attach this sheet to your written testimony.

PERSONAL INFORMATION: Please provide the committee with a copy of your resume (or a curriculum vitae). If none is available, please answer the following questions:

a. Please list any employment, occupation, or work related experiences, and education or training which relate to your qualifications to testify on or knowledge of the subject matter of the hearing:

See Attachment – Vita

b. Please provide any other information you wish to convey to the Committee which might aid the members of the Committee to understand better the context of your testimony:

Please attach to your written testimony.

APPENDIX C – WRITTEN STATEMENT OF LORI A. THOMAS, CCP, VICE PRESIDENT, MANAGEMENT COMPENSATION GROUP/DULWORTH, INC., HOUSTON, TX, ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, WASHINGTON, D.C.

TESTIMONY OF LORI A. THOMAS

VICE PRESIDENT, MANAGEMENT COMPENSATION GROUP/DULWORTH, INC.

ON BEHALF OF

THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

BEFORE

THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF

THE COMMITTEE ON EDUCATION AND THE WORKFORCE

UNITED STATES HOUSE OF REPRESENTATIVES

JULY 31, 2001

Good afternoon, Mr. Chairman and Members of the Subcommittee. My name is Lori Thomas, and I am a vice president of Management Compensation Group/Dulworth, Inc. in Houston, Texas. I am here today on behalf of the Society for Human Resource Management (SHRM). I have been an active member of SHRM since 1998, and currently serve as treasurer-elect of the Houston chapter, the Houston Human Resource Management Association.

The Society for Human Resource Management is the leading voice of the human resource profession, representing over 165,000 professional and student members globally. The Society is the largest human resource management association in the world.

On behalf of SHRM, I am here to discuss H.R. 1602, the Rewarding Performance in Compensation Act, introduced by Representative Cass Ballenger (R-NC), and to urge enactment of this important piece of legislation. H.R. 1602 would amend the Fair Labor Standards Act (FLSA) to allow employers to implement performance and gainsharing bonus programs without impacting the 'regular rate' of non-exempt bonus recipients for purposes of calculating overtime compensation.

The FLSA was passed in 1938, during the industrial age. At that time, many employees were subjected to poor working conditions and required to work long hours without overtime pay. Employers were unlikely to be concerned about attracting and retaining employees because most jobs called for unskilled, manual workers and the labor supply was plentiful.

Much of today's workforce is knowledge-based, and employers realize that their employees are their most valuable asset. They must provide competitive pay and a good working environment or they will lose talented workers. Furthermore, with the high costs of recruiting and training and the scarce supply of qualified job candidates, retaining employees has become a high priority. In order to retain workers, employers are seeking creative compensation solutions that engage and motivate employees and allow them to share in the company's success. These solutions are often collectively referred to as "pay for performance" plans.

While the economy and the workplace have undergone significant changes in the last 63 years, the FLSA has remained relatively unchanged. Ironically, in today's economy, this outdated law now serves in some situations as an impediment to the very employees it was designed to protect.

I have been with Management Compensation Group/Dulworth for over 17 years, and I've headed our compensation consulting practice since 1990. The majority of our clients are small to mid-sized companies with little or no human resources staff, so they need assistance implementing effective compensation strategies, including performance bonus arrangements. Because many of our clients have limited human resource training, they are often unaware of the FLSA requirement that performance bonuses be counted in the overtime calculation until we tell them. Also, they typically lack the resources to recalculate overtime to include performance bonus payments. As a result, some clients are unable to implement the type of bonus arrangement they, and their employees, desire.

During the last year, I have worked closely with a particular client to implement a performance bonus plan. They knew when we started the project that they wanted to offer the plan to everyone. They also wanted a formula-driven plan where every employee starts with a target bonus (expressed as a percentage of salary) and is assigned certain company-wide, divisional and personal performance goals. The resulting bonus would be determined by adjusting the target bonus amount by the level of attainment of the various goals. The idea behind assigning different performance goals to different employees is that the goals can be designed to measure performance in areas where the employees have the most immediate and direct impact, while providing some overall company focus to foster teamwork.

After discussing the FLSA requirements on performance bonuses with the client, I informed them that they would need to include overtime pay in the formula for the non-exempt employees. I also consulted a labor attorney to determine how much flexibility we had with respect to the other aspects of the plan. The attorney suggested that we provide the same target bonus for all non-exempt employees (expressed as a percentage of salary plus overtime), and that we determine their ultimate bonus based only on attainment of the company net profit goal. Her rationale was that if we used various target bonus amounts and different performance measures, the resulting bonuses would vary significantly when expressed as a percentage of salary plus overtime. She wanted to avoid any possible argument that the company had determined the bonuses based solely on base salary and then backed into the resulting percentages simply to express the results in terms of salary plus overtime. (While her opinion was probably on the

conservative side, we would prefer to err on the conservative side rather than put our clients at risk.)

The resulting plan does provide a more objective approach to bonus determination than did the prior discretionary arrangement, but there are some areas where the plan falls short. First, because the company had to include overtime in the calculation, they had to reduce the target bonuses for all employees (exempt and non-exempt) in order to remain within their projected budget. Because of the variability of overtime, this has also introduced a greater amount of uncertainty in the ongoing budgeting process for the plan. Second, many of the non-exempt employees are in positions that provide little or no opportunity for overtime work, so they are at a disadvantage. Because overtime is included in the formula, the bonuses of the non-exempt participants who do work overtime will likely exceed the bonuses of their exempt managers. Third, communication of the plan is difficult because the non-exempt employees' bonuses are based only on company performance while exempt employees have performance goals that have been tailored to their individual situations. Finally, because non-exempt employees' bonuses are based only on company performance, the plan is far less likely to motivate the non-exempt workers to achieve personal performance goals.

Another client I worked with recently was interested in installing a performance bonus plan because the company wanted to motivate their employees to increase profits. They have a significant number of non-exempt employees who work overtime. While the client was leaning toward introducing the plan only for management, I believe they were open to considering a broad-based plan until they

discovered that overtime needed to be factored into the plan. This discovery convinced them to stay with a managers-only bonus arrangement.

A company has four basic choices when it comes to bonus plans. First, they can choose not to offer a plan at all. This avoids the overtime recalculation problem, but it places the company at a competitive disadvantage and does nothing to motivate and reward employees. The second choice is to offer a purely discretionary bonus, which is not included in the regular rate for purposes of overtime calculation. Discretionary plans provide little motivation, and they can result in morale problems because employees don't understand how the bonuses are determined and sometimes perceive the process as unfair.

The third option is to offer a performance bonus arrangement and include the bonus in the regular rate for purposes of calculating overtime. A significant drawback with this option is that, in spite of today's sophisticated computer systems, much of the overtime recalculation is manual and it is a time-consuming and costly process. A more serious consequence of this arrangement is that employees who have worked more overtime will receive the largest bonuses, and number of hours worked is not necessarily an indicator of good performance. Consider the stellar performer who is attending night school to develop new skills or who has family responsibilities at home that prevent him/her from working a significant amount of overtime. Should this employee earn a smaller bonus than an average performer who is free to work additional hours? When bonus amounts are driven by hours worked rather than achievement of defined goals, pay for performance becomes "pay for attendance," which is not desirable.

The fourth option is to offer a performance bonus arrangement and avoid the burden of overtime recalculation by excluding the non-exempt employees from participation. The obvious drawback with this approach is that non-exempt employees are every bit as critical to the success of the company as are the exempt workers, and they should be allowed to share in the company's success. Excluding the non-exempts from the performance bonus plan – even if they are provided a discretionary bonus plan instead - prevents the company from building a true sense of teamwork, creates a harmful "class" system, and sends a message to non-exempt workers that their contribution is less important.

Because of my experience in working with clients on performance bonus arrangements, I was interested in learning more about the choices other companies are making in this area. I worked with the Houston Human Resource Management Association and the SHRM Texas State Council last year to conduct a survey that provides some insight into the choices companies are making with respect to performance bonus plans and how the FLSA influences those choices. (A copy of the statistical results is included in the Appendix.) The 321 survey respondents were members of one of the Texas SHRM chapters or members of the Texas Association of Business and Chambers of Commerce. Many of the respondents were human resource professionals who had at least some knowledge of the FLSA performance bonus requirements.

The survey results showed that approximately 60% of companies provide a performance bonus plan. Just over 42% of these companies exclude non-exempt employees from participation. Of the companies that exclude non-exempts, just

over 52% indicated that the decision to exclude non-exempt employees was due to the FLSA requirement that the performance bonus be included in the overtime calculation. Of the companies that do include non-exempt employees, only 13% indicated that plan administration, which includes the regular rate recalculation, was simple to very simple. Most respondents rated plan administration as very difficult.

Performance-based pay is a valuable tool in attracting, retaining and rewarding employees at all levels. Although many performance bonus arrangements are relatively new, studies are showing that performance pay plans boost overall company performance. In *The Hay Report, Compensation and Benefit Strategies for 1999 and Beyond*, a study of incentive payments broken down by employee group and salary level shows that higher-performing companies (in terms of profits and return on equity growth) are the ones that pay higher performance bonuses. More recently, in their article titled "Reward Practices and Organizational Performance" (*Compensation and Benefits Review, July/August 2001*), Richard S. Allen, Ph.D. and Marilyn M. Helms, D.B.A. found in a study they conducted on a wide variety of reward practices, that four particular reward arrangements were "statistically significant predictors of organizational performance." Of these four types of rewards, individual-based performance systems were rated number two, just behind employee stock option plans (ESOPs). Performance bonuses can boost corporate performance while sharing success with employees, and employers should be encouraged to provide such programs to *all* employees.

Congress made an important first step last year when it passed the Worker Economic Opportunity Act, allowing stock option gains to be excluded from the regular rate for purposes of overtime calculation. At that time, many Members expressed their concern that unless the law was changed, non-exempt workers would be excluded from stock option plans. They indicated that stock options are an important way for all employees to share in the success of their companies. While this is very true, and I applaud Congress for quickly passing this important law, I urge you to consider that performance bonus plans are also an important - and in many cases, more appropriate - means of sharing company success with all employees. In fact, for employees of privately held companies, performance bonuses may be the *only* mechanism for sharing company success because stock is not available as a compensation tool.

Until the FLSA is amended to exclude performance bonuses from the regular rate calculation, many companies will be forced to forego such plans entirely, or they will continue to exclude non-exempt employees from participation because overtime recalculation is cost-prohibitive. Encouraging companies to provide the same compensation plans at all levels is a necessary first step in addressing the ever-widening pay gap that exists between the most highly-compensated and the least highly-compensated. Moreover, studies have shown that companies with performance bonus plans are more profitable than other companies, and increased corporate profits are good for the company, the employees and the overall economy.

Mr. Chairman, the Fair Labor Standards Act now serves as an impediment rather than an instrument for employee protection with respect to bonus compensation. Therefore, on behalf of SHRM, I strongly urge bipartisan support and prompt Congressional passage of legislation amending the Fair Labor Standards Act Section 7(e)(3) and related sections to encourage broad-based performance and gainsharing bonus programs.

Thank you for the opportunity to appear here before you today. It has been my pleasure to address the Subcommittee and I hope you will continue to call upon SHRM for human resource expertise on critical issues concerning the FLSA. I will be happy to answer any questions you may have on this issue. Thank you.

APPENDIX

Fair Labor Standards Act

Performance-Based/Gainsharing Bonus Plan Survey

Summer, 2000

Introduction

Houston Human Resource Management Association (HHRMA) and the Society for Human Resource Management (SHRM) Texas State Council conducted a survey of human resource professionals in Texas. Those surveyed are members of HHRMA or one of the other SHRM chapters in the state. In addition, the survey was sent to members of the Texas Association of Business & Chambers of Commerce (TABCC). The TABCC respondents are typically business owners or executives, and are not necessarily in the human resources field.

The purpose of the survey was to gather information regarding the impact of the Fair Labor Standards Act (FLSA) on performance-based/gainsharing bonus practices at the participants' companies. A copy of the survey questionnaire is attached to this report.

The survey was conducted via electronic mail, so the survey population was limited to members for whom a current e-mail address is available. Because some of the chapters forwarded the survey to their local chamber of commerce or other interested parties, it is not possible to produce an accurate count of the number of people who actually received the survey.

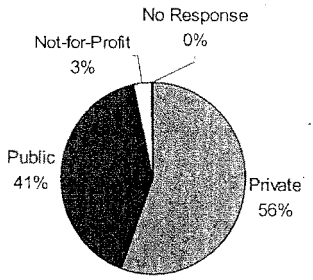
Participants were not asked to provide their names or the names of their companies. This report presents the compiled survey results.

Participant Profile

Responses from 321 individuals have been compiled in this report. These individuals represent companies in the following industries:

Industry	Participants	Percent
Manufacturing	51	15.89%
Energy	41	12.77%
Other Service	31	9.66%
Financial	25	7.79%
Technology	21	6.54%
Education	14	4.36%
Other Industrial	14	4.36%
Health Care	13	4.05%
Consulting	11	3.43%
Insurance	11	3.43%
Chemicals & Pharmaceuticals	10	3.12%
Telecommunications	10	3.12%
Engineering & Construction	9	2.80%
Government	9	2.80%
Real Estate	7	2.18%
Retail	5	1.56%
Utilities	5	1.56%
Accounting & Law	4	1.25%
Aviation & Aerospace	4	1.25%
Hotels & Restaurants	4	1.25%
Marine	3	0.93%
Marketing & Advertising	3	0.93%
Architecture	2	0.63%
Environmental	2	0.63%
Printing & Publishing	2	0.63%
No Response	10	3.12%
Total	321	100.00%

The mix between publicly-traded and privately-held companies is fairly even. Fifty-six percent of the companies (177) are privately-held and 41% (133) are publicly-traded. Three percent (10) are not-for-profit organizations. One participant did not provide this information. The number of full-time employees is shown below. Not surprisingly, the private companies tend to have fewer full-time employees than the public companies, and the not-for-profit organizations have the smallest workforces.



Private Companies

Participants in Category	Number of Full-Time Employees
21 (11.86%)	5,000 +
28 (15.82%)	1,000 – 4,999
25 (14.12%)	500 – 999
53 (29.94%)	100 – 499
50 (28.25%)	< 100
177 (100.00%)	

Public Companies

Participants in Category	Number of Full-Time Employees
43 (32.33%)	5,000 +
39 (29.32%)	1,000 – 4,999
10 (7.52%)	500 – 999
34 (25.56%)	100 – 499
7 (5.26%)	< 100
133 (100.00%)	

Not-for-Profit Organizations

Participants in Category	Number of Full-Time Employees
0 (0.00%)	5,000 +
0 (0.00%)	1,000 – 4,999
0 (0.00%)	500 – 999
1 (10.00%)	100 – 499
9 (90.00%)	< 100
10 (100.00%)	

The majority of the responses (73.21%) came from someone at or above the manager level. A breakdown of participant titles follows:

Title	Participants	Percent
Owner, President, CEO, Principal	21	6.54%

Officer	10	3.12%
CFO/Controller	7	2.18%
HR or Other Vice President	22	6.85%
HR or Other Director	57	17.76%
HR or Other Manager	118	36.76%
HR or Other Administrator	2	0.62%
HR Supervisor	5	1.56%
HR or Other Analyst	9	2.80%
HR Coordinator	9	2.80%
HR Generalist	17	5.30%
HR Specialist or Representative	13	4.05%
Consultant	7	2.18%
Other Support	3	0.93%
No Response	21	6.54%
Total	321	100.00%

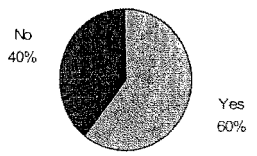
Survey Findings

Over 60% of respondents indicated that their company provides a performance-based/gainsharing bonus plan. Approximately 40% do not have a bonus plan that is based on performance.

193	(60.12%)	Provide a performance-based bonus plan
128	(39.88%)	Do not provide such a plan
321	(100.00%)	Total participants

Of the 128 companies that do not provide a performance-based bonus plan, only 24 answered the question regarding whether their decision not to provide such a plan was influenced by the current treatment under the FLSA. (Unfortunately, this question was worded in such a way that it was not clear that it applied to those who do not offer any performance-based plan.) Of those who did respond to this question, 11 said their decision not to offer a performance-based plan was due to the FLSA requirement that such bonuses be included in overtime pay. Thirteen said their decision not to provide a plan was not influenced by the FLSA requirement.

Does Your Company Provide a Performance-Based Bonus Plan?



If you provide a performance-based plan, who is eligible to participate?

Of the 193 companies that do provide a performance-based bonus plan, **111 (57.51%) include non-exempt employees. (Eighty-two companies, or 42.49%, exclude non-exempt employees from their plan.)** Nineteen companies include members of an organized labor group in their plans. Note that the responses in the category do no total 193 because the groups of eligible employees are not mutually exclusive.

Eligible to Participate	Participants	Percent
Exempt Employees	193	100.00%
Non-Exempt Employees	111	57.51%
Organized Labor	19	9.84%

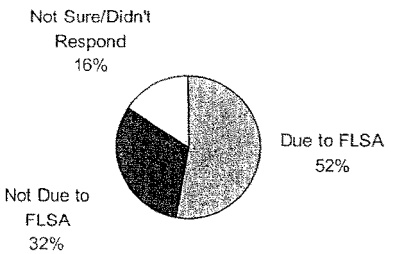
If you include non-exempt employees, what has been your experience with plan administration?

The majority of the 111 companies that do include non-exempt employees in their plan rated the administration of the plan somewhat difficult to very difficult. **Only 13 of the companies rated their plan administration simple to very simple.**

Administrative Experience	Participants	Percent
Very Simple	4	3.60%
Simple	9	8.11%
Somewhat Difficult	24	21.62%
Difficult	19	17.12%
Very Difficult	28	25.23%
Our Non-Exempts Typically Do Not Work Overtime	17	15.32%
Don't Know or Did Not Respond	10	9.01%
Total	111	100.00%

If you exclude non-exempt employees, was your decision due to FLSA treatment?

Just over half of the 82 companies that exclude non-exempts from their performance-based bonus plan do so because of the FLSA requirement that such bonuses be included in overtime pay. Eight participants were not sure if the FLSA treatment played a part in their company's decision to exclude non-exempts from their plan. Five participants did not respond to the question.



Reason for Excluding Non-Exempt Employees	Participants	Percent
Due to FLSA	43	52.44%
Not Due to FLSA	26	31.71%
Not Sure or Did Not Respond	13	15.85%
Total	82	100.00%

Committee on Education and the Workforce

Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)

Your Name: Lori A. Thomas		
1. Will you be representing a federal, State, or local government entity? (If the answer is yes please contact the Committee).	Yes	No X
2. Please list any federal grants or contracts (including subgrants or subcontracts) which you have received since October 1, 1998: None		
3. Will you be representing an entity other than a government entity?	Yes X	No
4. Other than yourself, please list what entity or entities you will be representing: Society for Human Resource Management (SHRM) Houston Human Resource Management Association (Houston SHRM chapter)		
5. Please list any offices or elected positions held and/or briefly describe your representational capacity with each of the entities you listed in response to question 4: SHRM member, Houston Human Resource Management Association member and treasurer-elect for 2001-2002		
6. Please list any federal grants or contracts (including subgrants or subcontracts) received by the entities you listed in response to question 4 since October 1, 1998, including the source and amount of each grant or contract: None		
7. Are there parent organizations, subsidiaries, or partnerships to the entities you disclosed in response to question number 4 that you will not be representing? If so, please list:	Yes	No X

Signature: Lori A. Thomas Date: July 24, 2001

Please attach this sheet to your written testimony.

APPENDIX D – WRITTEN STATEMENT OF MICHAEL T. LEIBIG, PARTNER, ZWERDLING, PAUL, LEIBIG, KAHN AND WOLLY, ALEXANDRIA, VA, ON BEHALF OF THE AFL-CIO, WASHINGTON, D.C.

BEFORE THE COMMITTEE ON EDUCATION AND THE WORKFORCE -- UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING H.R. 1602, THE "Rewarding Performance in Compensation Act"

TESTIMONY OF MICHAEL T. LEIBIG

"The Fair Labor Standards Act, The Forty Hour Work Week, Overtime Pay & Inclusion of Bonuses In The Regular Rate.

Room 2175, Rayburn House Office Building
Washington, D.C. 20515

Tuesday, July 31, 2001 1:30 p.m.

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MICHAEL T. LEIBIG

Michael T. Leibig is a partner in the Washington, D.C. law firm of Zwerdling, Paul, Leibig, Kahn and Wolly where he has specialized in labor and employment law since 1975. He is General Counsel to the International Union of Police Associations, AFL-CIO; and counsel to over 25 local police unions. He has represented the UAW, CWA, SEIU, AFSCME and numerous other unions. He represented the U.S. Secret Service Officers in the Monica Lewinsky grand jury proceeding and Starr investigation. He has represented non-union managerial employees of Time-Life, Mobil Oil, Airbus,. Xerox and other large and small enterprises. He has been an Adjunct Professor of Law at the Georgetown University Law Center since 1975 and received the Charles Fahy Distinguished Professor Award in 1999.

Leibig was born in Corning, New York and brought up in Louisville, Kentucky; received a BA degree in history and philosophy from Georgetown University in 1968; attended Ohio University graduate school in history and economics; and received a Juris Doctor Degree from the University of Virginia in 1971. He served as an officer in the United States Coast Guard from 1971 through 1975 and received the Coast Guard Achievement Award. He has taught at the American University and George Washington University.

Leibig is a member of the Bars of the District of Columbia and Virginia. He has litigated employment, discrimination and Fair Labor Standards Act cases in the federal district courts in sixteen states, argued before seven of the eleven United States Courts of Appeal, and has argued three cases before the United States Supreme Court, *Moreau v. Klevenhagen* (the need for an FLSA comp time agreement in the public sector), *Auer v. Robbins* (FLSA exemptions and deferral to regulations); and *Christensen v. Harris County* (the forced use of public sector comp time under the FLSA). He has participated in over fifty FLSA enforcement actions.

Leibig is author of *Policing Your Paycheck: A Guide to FLSA Enforcement*; *Organizing and the Law in the Public Sector*; *Police Unions and the Law;* and numerous other publications. He has appeared before various Congressional Committees as an expert witness on the FLSA and given seminars concerning FLSA enforcement throughout the United States.

"The Fair Labor Standards Act, The Forty Hour Work Week, Overtime Pay & The Danger of Enclosing Bonus From The Regular Rate"

INTRODUCTION
(July 31, 2001)

I am Mike Leibig. I am an employment attorney with Zwerdling, Paul, Leibig, Kahn and Wooly here in the District of Columbia. I have been an Adjunct Professor of Law at the Georgetown University Law for twenty-six years and have taught a number of employment and employment related courses which cover the Fair Labor Standards Act. I am involved in FLSA enforcement litigation throughout the country having appeared as lead counsel in FLSA litigation in federal district courts in sixteen states, the District of Columbia and Puerto Rico, and argued FLSA cases in seven of the eleven United States Courts of Appeal and three FLSA cases before the United States District Court. Since 1985 I have appeared numerous times before various Committees of the Congress as a witness in FLSA matters.

I appear today on behalf of myself, the AFL-CIO, and the International Union of Police Associations, AFL-CIO, for whom I serve as General Counsel. I appear in opposition to the enactment of H. R. 1602. While no one could sensibly oppose the increasing movement to the already widespread practices of rewarding employees with gainsharing and productivity bonuses, these beneficial forms of compensation are widespread and can be implemented and administered simply under current law.

More importantly, however, the provisions of H.R. 1602 excluding such gainsharing and productivity bonuses from the regular rate upon which the Fair Labor Standards Act's premium time and one half pay provision is calculated would --

(1) fundamentally undermine the FLSA and its encouragement of the 40 hour work week;

(2) reduce the take home pay of hundreds of thousands of American workers;

(3) reduce the compensation of all Americans who work overtime hours;

(4) encourage the present lengthening of the American work weekand lead to additional forced overtime;

(5) increase bonuses but reduce earnings.

I'd like to offer some support for these points, followed by a few more technical comments which establish that bonus systems may be encouraged and expanded under the current FLSA without these negative consequences.

WHAT HARM COULD THE EXCLUSION ON BONUSES FROM OVERTIME RATES DO?

***First*, the exclusion of bonus payments from the regular rate provides a method of evasion of the FLSA time and one half overtime requirement.**

Since the original enactment of the FLSA 50 years ago, a number of efforts have been made periodically to exclude elements of compensation from the regular rate of pay upon which overtime is calculated. Each of these efforts were resisted by Congress, the Department of Labor, the Wage and Hour Administrator, and the Courts because they undermine FLSA overtime requirements. The FLSA time and one-half overtime requirement is the engine which drives the American work place toward the Act's goal of a 40 hour work week. Under H.R. 1602 an employer may develop a "written bonus plan with a specific formula" under which a portion of an employees remuneration would be excluded from the FLSA

overtime requirement. There is no provision in the bill which prevents an employer from operating properly and legally in the employer's own economic interest to include all remuneration above the minimum wage in such a plan and thus significantly avoid the overtime requirements of the Act. The FLSA and its regulations have always been drafted in a context in which it is assumed that employers, even honest well meaning employers, act in the economic self interest of their enterprise. A pay plan which leaves only the minimum wage covered by the FLSA overtime requirements certainly could be put in place even under H.R. 1602's wording that such a system be "in good faith and for the purpose of distributing to employees additional remuneration over and above the wages and salaries that are not dependent on such a plan." That language would not prevent an employer from establishing a pay plan under which all compensation above the minimum wage is designated as gain sharing. This would mean that the overtime rules of the FLSA would apply only to the minimum wage position of an employee's remuneration.

***Second*, H.R. 1602 Encourages Employers to Cut the Costs of Overtime.** Excluding bonuses from overtime pay would significantly reduce employees' overtime pay. For example, a worker paid $12.00 per hour as a regular rate of pay would, under current law, earn $18.00 per hour in overtime pay, without regard to how an employer structured the employee's compensation. However, if the employer were allowed to take advantage of H.R. 1602 and designate through a set formula in a written plan that half the employee's compensation was an

incentive bonus (that is, $6.00 as the base rate and $6.00 as a performance linked bonus), hourly overtime compensation would fall by 16.7% to $15.00. Such a reduction would be within the law and any employer acting in his own economic interest would be encouraged to take advantage of it.

***Third*, H.R. 1602 Would Reduce the Current Take Home Overtime Pay of Hundreds of Thousands of Workers.**

Performance-based pay is widespread, in particular in the manufacturing sector. A 1997 American Management Association (AMA) survey of manufacturing companies found that "almost every company was using some kind of positive-incentive bonus plan to motivate employees to raise output to meet customers orders."[1] Among others, gainsharing plans were quite common, while reliance on piece work pay was declining. A survey by Hewitt Associates confirms and increased incidence of performance-based pay systems: Four of five (78 percent) surveyed organizations currently have at least one type of variable pay plan in place, up from fewer than half (47 percent) in 1990.[2]

The American Management Association estimates that 2,500 companies were using gainsharing in the mid-nineties[3] – and the numbers are growing. Among machine-tool companies, for example, 22% used gainsharing in 1997 compared to only 8 percent twenty years earlier.[4]

In the textile industry, employers are replacing piece rates with gainsharing. A study by the Economic Policy Institute found that "in the plants that [they] studied, managers have introduced group piece-rate systems with special group

bonuses for achieving targeted levels of quality or production."[5] UNITE! estimates that 168,000 of the workers it represents, or more than half of its 250,000 members, would lose out if the production incentives were exempted from regular rate determination for overtime pay computation. This includes 90,000 garment workers, 36,000 workers in distribution, 18,000 in auto supply, and 24,000 in industrial laundries.

Within law enforcement, the I.U.P.A. represents officers in just under 500 law enforcement agencies. In well over 50%, bonus plans exist.

Gainsharing is also quite common in the steel industry. The United Steelworkers of America estimates that 100,000 of its members participate in gainsharing plans and another 100,000 in basic steel alone participate in incentive plans. Overall, the majority of the union's membership (60-70%) is likely to be affected by the proposed change in the bonus rules.[6]

In short, many workers already participate in performance-based pay plans, and excluding non-discretionary bonuses from the regular rate for computing overtime could have a significant negative effect on all of them. Moreover, passage of the proposed exclusion would encourage employers in every industry to shift away from straight pay toward performance-based systems, in order to reduce their overtime pay. *As a result, all 74 million American workers currently entitled to overtime pay could be negatively affected by the proposed bonus amendment.*[7]

***Fourth*, H.R. 1602 Would Encourage the Trend Toward a Longer Work Week and Additional Forced Overtime.**

Excluding non-discretionary bonuses from overtime pay computation would also likely increase work hours overall. The number of overtime hours has risen in recent years. In the manufacturing sector, for example, overtime has increased by 40%, from 3.3 hours per week in 1979 to 4.6 hours per week in 2000.[8] A reduction in overtime pay resulting from changed bonus rules would create a strong incentive for employers to increase mandatory overtime hours even more. Many workers already work excessively long hours and find it extremely difficult to balance family and work. Reducing overtime pay by excluding bonuses would likely increase such forced overtime and long hours, exacerbating the time squeeze working families face.

***Fifth*, H.R. 1602 Would Lead to Increased Use of Bonuses but Reduce Employees Earnings.**

Performance and incentive bonuses already often make up a significant share of total earnings. For example: A survey conducted by MIT economics professor Paul Osterman found that 31 percent of production workers were paid bonuses based on group or firm performance in 1997. These performance bonuses made up 23 percent of annual pay increases for workers receiving bonuses, and therefore are a significant part of compensation for many workers.

In the steel industry, a survey of mini mills found that production and productivity performance bonuses make up between 45% and 60% of total compensation.[9] If performance bonuses did not count in determining the regular rate for overtime

pay purposes, many steel workers would face large cuts in overtime pay. Excluding non-discretionary bonuses from overtime pay computation would encourage all employers to shift even more of workers' pay to bonuses. Such manipulation of compensation would result in lower overtime earnings per hour and could result in lower actual earnings for affected workers.

H.R. 1602 DOES NOT PREVENT THESE PROBLEMS

Supporters of H.R. 1602 appear to have tried but have failed to draft provisions which would prevent these problems. Current DOL regulations which would remain in place after enactment provide no protection. H.R. 1602 provides that a bonus plan must be written and that the bonus must be in accordance with a specific formula. Additionally, the amendment provides that the bonus plan must be "established and maintained in good faith for the purpose of distributing to employees additional remuneration over and above the wages and salaries that are not dependent upon the existence of such plan." This does nothing to solve the Bill's problems. By definition, every bonus is in addition to an employee's regular wage. Nothing in this amendment says that an employer may not reconfigure the pay or lower the wages of current employees. However, even if the amendment prevents employers from reconfiguring the pay of current employees, this bill remains fatally flawed. Such a provision would simply have the effect of providing financial incentive for employers to displace current workers with new workers. There is nothing in this legislation that prevents an employer from restructuring the compensation package of a new worker or a worker who is moved into a new job. The ultimate consequence of the legislation remains the same.

Existing Department of Labor regulations also fail to ensure that the provisions of the legislation will not result in the restructuring of workers' pay. Those regulations provide:

> (a) The term "bonus" is properly applied to a sum which is paid as an addition to total wages usually because of extra effort of one kind or another, or as a reward for loyal service, or as a gift. The term is improperly applied if it is used to designate a portion of regular wages which the employee is entitled to receive under his regular wage contract
> ***
> (e) The general rule may be stated that wherever the employee is guaranteed a fixed or determinable sum as his wages each week, no part of this sum is a true bonus and rules of determining overtime due on bonuses do not apply.

The intent of these provisions is to prevent an employer from claiming ad hoc that a part of an employee's regular wage is a bonus that would otherwise be exempt from the overtime calculation. However, H.R. 1602 does not restrict an employer from establishing the employee's wage at any level the employer desires and the provision do not restrict an employer from providing additional compensation in the form of bonuses. Nothing in existing regulations prevents an employer from establishing an employee's "wage" at the minimum wage rate and providing additional compensation in the form of performance bonuses. Far from prohibiting this, H.R. 1602 encourages it by ensuring that no part of the bonus will be used in calculating the employee's overtime pay.

Bonus Systems Including Productivity & Gainsharing Flourish:
Under Current Law The Necessary Calculation Is Easy

Productivity bonus and gainsharing flourish under the current provisions of the FLSA. As is documented above over a third of non-exempt American workers already benefit from gainsharing and production bonus systems. Those systems exists and are

spreading under the current requirements of the Fair Labor Standards Act. There is nothing in the Act which impedes or prevents this.

Employers have been paying bonuses to covered workers without problem for more than fifty years. In this era of widespread use of payroll services, complicated payroll tax rules, and virtually universal computer access the administration of bonus systems under the current FLSA rules presents no real inhibition to their current and expanded use. Calculating overtime in a gainsharing work place requires an employer to generate no new information. Employers already must keep track of how many hours the employee works, how many of those hours are FLSA overtime, what remuneration has been paid for those hours, and a record of any productivity or gainsharing payments. Calculating a bonus for employees that includes the proper overtime payment is not complicated. The DOL regulations in 29 C.F.R. § 778.209 and 210 make it easy. See DOL's Bonus regulations 29 C.F.R. § 778.208-215(A) (Attached).

1. Woodruff Imberman, "Using Incentive Plans to Boost Productivity in Manufacturing," *JOM*, vol. 50, no. 11 (1998).

2. Hewitt Associates. "Salary Increases to Remain Stable in 2001 as More Companies Rely on Variable Compensation, Hewitt Study Shows." Press Release, August 28, 2000.

3. Woodruff Imberman, "Improving Plant Performance Through Gainsharing," *JOM*, vol. 47, no. 7 (1995). The AMA study defines gainsharing as a group incentive, pay-for-performance wage system shared with the employer as a result of improving productivity above a certain level.

4. Woodruff Imberman, "Using Incentive Plans to Boost Productivity in Manufacturing," *JOM*, vol. 50, no. 11 (1998).

5. Eileen Appelbaum, Thomas Bailey, Peter Berg, and Arne L. Kalleberg, *Manufacturing Advantage: Why High-Performance Work Systems Pay Off.* Ithaca, N.Y.: Cornell University Press, 2000, p. 76.

6. Roy Murray, Director of Collective Bargaining Services, United Steelworkers of America, September 2000.

7. U.S. Department of Labor estimate, September 2000.

8. Bureau of Labor Statistics, "The Employment Situation: [Various Months 2000]." *News Release*, various months of 2000; and Eva E. Jacobs, *Handbook of U.S. Labor Statistics: Employment, Earnings, Prices, Productivity, and Other Labor Data*, Third Edition, 1999.

9. Craig Woker, "Tying Pay to Success at Minimills." *New Steel*, December 1998.

rate or an addition of so many cents per hour) and premiums paid for hazardous, arduous or dirty work. It also requires inclusion of any extra compensation which is paid as an incentive for the rapid performance of work and since any extra compensation in order to qualify as an overtime premium must be provided by a premium rate per hour, except in the special case of pieceworkers as discussed in §778.418, lump sum premiums which are paid without regard to the number of hours worked are not overtime premiums and must be included in the regular rate. For example, where an employer pays 8 hours' pay for a particular job whether it is performed in 8 hours or in less time, the extra premium of 2 hours' pay received by an employee who completes the job in 6 hours must be included in his regular rate. Similarly, where an employer pays for 8 hours at premium rates for a job performed during the overtime hours whether it is completed in 8 hours or less, no part of the premium paid qualifies as overtime premium under sections 7(e) (5), (6), or (7). (For a further discussion of this and related problems, see §§778.308 to 778.314.)

Bonuses

§778.208 Inclusion and exclusion of bonuses in computing the "regular rate."

Section 7(e) of the Act requires the inclusion in the regular rate of all remuneration for employment except seven specified types of payments. Among these excludable payments are discretionary bonuses, gifts and payments in the nature of gifts on special occasions, contributions by the employer to certain welfare plans and payments made by the employer pursuant to certain profit-sharing, thrift and savings plans. These are discussed in §§778.211 through 778.214. Bonuses which do not qualify for exclusion from the regular rate as one of these types must be totaled in with other earnings to determine the regular rate on which overtime pay must be based. Bonus payments are payments made in addition to the regular earnings of an employee. For a discussion on the bonus form as an evasive bookkeeping device, see §§778.502 and 778.503.

§778.209 Method of inclusion of bonus in regular rate.

(a) *General rules.* Where a bonus payment is considered a part of the regular rate at which an employee is employed, it must be included in computing his regular hourly rate of pay and overtime compensation. No difficulty arises in computing overtime compensation if the bonus covers only one weekly pay period. The amount of the bonus is merely added to the other earnings of the employee (except statutory exclusions) and the total divided by total hours worked. Under many bonus plans, however, calculations of the bonus may necessarily be deferred over a period of time longer than a workweek. In such a case the employer may disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained. Until that is done he may pay compensation for overtime at one and one-half times the hourly rate paid by the employee, exclusive of the bonus. When the amount of the bonus can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned. The employee must then receive an additional amount of compensation for each workweek that he worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of statutory overtime hours worked during the week.

(b) *Allocation of bonus where bonus earnings cannot be identified with particular workweeks.* If it is impossible to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted. For example, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each week of the period to which the bonus relates, and if the facts support this assumption additional compensation for each overtime week of the period may be computed and paid in an amount equal to one-half of the average hourly increase in pay resulting from bonus allocated to the week, multiplied by the number of statutory overtime hours worked in that week. Or, if there are facts which make it inappropriate to assume equal bonus earnings for each workweek, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each hour of the pay period and the resultant hourly increase may be determined by dividing the total bonus by the number of hours worked by the employee during the period for which it is paid. The additional compensation due for the overtime workweeks in the period may then be computed by multiplying the total number of statutory overtime hours worked in each such workweek during the period by one-half this hourly increase.

§778.210 Percentage of total earnings as bonus.

In some instances the contract or plan for the payment of a bonus may also provide for the simultaneous payment of overtime compensation due on the bonus. For example, a contract made prior to the performance of services may provide for the payment of additional compensation in the way of a bonus at the rate of 10 percent of the employee's straight-time earnings, and 10 percent of his overtime earnings. In such instances, of course, payments according to the contract will satisfy in full the overtime provisions of the Act and no recomputation will be required. This is not true, however, where this form of payment is used as a device to evade the overtime requirements of the Act rather than to provide actual overtime compensation, as described in §§778.502 and 778.503.

§778.211 Discretionary bonuses.

(a) *Statutory provision.* Section 7(e) (3)(a) of the Act provides that the regular rate shall not be deemed to include "sums paid in recognition of services performed during a given period if *** (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly ***". Such sums may not, however, be credited toward overtime compensation due under the Act.

(b) *Discretionary character of excluded bonus.* In order for a bonus to qualify for exclusion as a discretionary bonus under section 7(e)(3)(a) the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum, if any, to be paid as a bonus is determined by the employer without prior promise or agreement. The employee

has no contract right, express or implied, to any amount. If the employer promises in advance to pay a bonus, he has abandoned his discretion with regard to it. Thus, if an employer announces to his employees in January that he intends to pay them a bonus in June, he has thereby abandoned his discretion regarding the fact of payment by promising a bonus to his employees. Such a bonus would not be excluded from the regular rate under section 7(e)(3)(a). Similarly, an employer who promises to sales employees that they will receive a monthly bonus computed on the basis of allocating 1 cent for each item sold whenever, in his discretion, the financial condition of the firm warrants such payments, has abandoned discretion with regard to the amount of the bonus though not with regard to the fact of payment. Such a bonus would not be excluded from the regular rate. On the other hand, if a bonus such as the one just described were paid without prior contract, promise or announcement and the decision as to the fact and amount of payment lay in the employer's sole discretion, the bonus would be properly excluded from the regular rate.

(c) *Promised bonuses not excluded.* The bonus, to be excluded under section 7(e)(3)(a), must not be paid "pursuant to any prior contract, agreement, or promise." For example, any bonus which is promised to employees upon hiring or which is the result of collective bargaining would not be excluded from the regular rate under this provision of the Act. Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is to be made and the like are in this category. They must be included in the regular rate of pay.

§778.212 Gifts, Christmas and special occasion bonuses.

(a) *Statutory provision.* Section 7(e)(1) of the Act provides that the term "regular rate" shall not be deemed to include "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency ***" Such sums may not, however, be credited toward overtime compensation due under the Act.

(b) *Gift or similar payment.* To qualify for exclusion under section 7(e)(1) the bonus must be actually a gift or in the nature of a gift. If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift. If the payment is so substantial that it can be assumed that employees consider it a part of the wages for which they work, the bonus cannot be considered to be in the nature of a gift. Obviously, if the bonus is paid pursuant to contract (so that the employee has a legal right to the payment and could bring suit to enforce it), it is not in the nature of a gift.

(c) *Application of exclusion.* If the bonus paid at Christmas or on other special occasion is a gift or in the nature of a gift, it may be excluded from the regular rate under section 7(e)(1) even though it is paid with regularity so that the employees are led to expect it and even though the amounts paid to different employees or groups of employees vary with the amount of the salary or regular hourly rate of such employees or according to their length of service with the firm so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency. A Christmas bonus paid (not pursuant to contract) in the amount of two weeks' salary to all employees and an equal additional amount for each 5 years of service with the firm, for example, would be excludable from the regular rate under this category.

§778.213 Profit-sharing, thrift, and savings plans.

Section 7(e)(3)(b) of the Act provides that the term "regular rate" shall not be deemed to include "sums paid in recognition of services performed during a given period if *** the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulations ***". Such sums may not, however, be credited toward overtime compensation due under the Act. The regulations issued under this section are Parts 547 and 549 of this chapter. Payments in addition to the regular wages of the employee, made by the employer pursuant to a plan which meets the requirements of the regulations in Part 547 or 549 of this chapter, will be properly excluded from the regular rate.

§778.214 Benefit plans; including profit-sharing plans or trusts providing similar benefits.

(a) *Statutory provision.* Section 7(e)(4) of the Act provides that the term "regular rate" shall not be deemed to include: "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for employees ***." Such sums may not, however, be credited toward overtime compensation due under the Act.

(b) *Scope and application of exclusion generally.* Plans for providing benefits of the kinds described in section 7(e)(4) are referred to herein as "benefit plans". It is section 7(e)(4) which governs the status for regular rate purposes of any contributions made by an employer pursuant to a plan for providing the described benefits. This is true irrespective of any other features the plan may have. Thus, it makes no difference whether or not the benefit plan is one financed out of profits or one which by matching employee contributions or otherwise encourages thrift or savings. Where such a plan or trust is combined in a single program (whether in one or more documents) with a plan or trust for providing profit-sharing payments to employees, the profit-sharing payments may be excluded from the regular rate if they meet the requirements of the Profit-Sharing Regulations, Part 549 of this chapter, and the contributions made by the employer for providing the benefits described in section 7(e)(4) of the Act may be excluded from the regular rate if they meet the tests set forth in §778.215. Advance approval by the Department of Labor is not required.

(c) *Tests must be applied to employer contributions.* It should be emphasized that it is the employer's contribution made pursuant to the benefit plan that is excluded from or included in the regular rate according to whether or not the requirements set forth in §778.215 are met. If the contribution is not made as provided in section 7(e)(4) or if the plan does not

qualify as a bona fide benefit plan under that section, the contribution is treated the same as any bonus payment which is part of the regular rate of pay, and at the time the contribution is made the amount thereof must be apportioned back over the workweeks of the period during which it may be said to have accrued. Overtime compensation based upon the resultant increases in the regular hourly rate is due for each overtime hour worked during any workweek of the period. The subsequent distribution of accrued funds to an employee on account of severance of employment (or for any other reason) would not result in any increase in his regular rate in the week in which the distribution is made.

(d) *Employer contributions when included in fringe benefit wage determinations under Davis-Bacon Act.* As noted in §778.6 where certain fringe benefits are included in the wage predeterminations of the Secretary of Labor for laborers and mechanics performing contract work subject to the Davis-Bacon Act and related statutes, the provisions of Pub. L. 88-349 discussed in §5.32 of this title should be considered together with the interpretations in this Part 778 in determining the excludability of such fringe benefits from the regular rate of such employees. Accordingly, reference should be made to §5.32 of this title as well as to §778.215 for guidance with respect to exclusion from the employee's regular rate of contributions made by the employer to any benefit plan if, in the workweek or workweeks involved, the employee performed work as a laborer or mechanic subject to a wage determination made by the Secretary pursuant to Part 1 of this title, and if fringe benefits of the kind represented by such contributions constitute a part of the prevailing wages required to be paid such employee in accordance with such wage determination.

(e) *Employer contributions or equivalents pursuant to fringe benefit determinations under Service Contract Act of 1965.* Contributions by contractors and subcontractors to provide fringe benefits specified under the McNamara-O'Hara Service Contract Act of 1965, which are of the kind referred to in section 7(e)(4), are excludable from the regular rate under the conditions set forth in §778.215. Where the fringe benefit contributions specified under such Act are so excludable, equivalent benefits or payments provided by the employer in satisfaction of his obligation to provide the specified benefits are also excludable from the regular rate if authorized under Part 4 of this title, Subpart B, pursuant to the McNamara-O'Hara Act, and their exclusion therefrom is not dependent on whether such equivalents, if separately considered, would meet the requirements of §778.215. See §778.7.

[33 FR 986, Jan. 26, 1968, as amended at 36 FR 4699, Mar. 11, 1971]

§778.215 Conditions for exclusion of benefit-plan contributions under section 7(e)(4).

(a) *General rules.* In order for an employer's contribution to qualify for exclusion from the regular rate under section 7(e)(4) of the Act the following conditions must be met:

(1) The contributions must be made pursuant to a specific plan or program adopted by the employer, or by contract as a result of collective bargaining, and communicated to the employees. This may be either a company-financed plan or an employer-employee contributory plan.

(2) The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, and the like.

(3) In a plan or trust, either:

(i) The benefits must be specified or definitely determinable on an actuarial basis; or

(ii) There must be both a definite formula for determining the amount to be contributed by the employer and a definite formula for determining the benefits for each of the employees participating in the plan; or

(iii) There must be both a formula for determining the amount to be contributed by the employer and a provision for determining the individual benefits by a method which is consistent with the purposes of the plan or trust under section 7(e)(4) of the Act.

(iv) **Note**: The requirements in paragraphs (a)(3) (ii) and (iii) of this section for a formula for determining the amount to be contributed by the employer may be met by a formula which requires a specific and substantial minimum contribution and which provides that the employer may add somewhat to that amount within specified limits; provided, however, that there is a reasonable relationship between the specified minimum and maximum contributions. Thus, formulas providing for a minimum contribution of 10 percent of profits and giving the employer discretion to add to that amount up to 20 percent of profits, or for a minimum contribution of 5 percent of compensation and discretion to increase up to a maximum of 15 percent of compensation, would meet the requirement. However, a plan which provides for insignificant minimum contributions and permits a variation so great that, for all practical purposes, the formula becomes meaningless as a measure of contributions, would not meet the requirements.

(4) The employer's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund must be set up in such a way that in no event will the employer be able to recapture any of the contributions paid in nor in any way divert the funds to his own use or benefit. (It should also be noted that in the case of joint employer-employee contributory plans, where the employee contributions are not paid over to a third person or to a trustee unaffiliated with the employer, violations of the Act may result if the employee contributions cut into the required minimum or overtime rates. See Part 531 of this chapter.) Although an employer's contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the employer of sums which he had paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of marking payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained. For example, a benefit plan may provide for definite insurance benefits for employees in the event of the happening of a specified contingency such as death, sickness, accident, etc., and may provide that the cost of such definite benefits, either in full or any balance in excess of specified employee contributions, will be borne by the employer. In such a case the return by the insurance company to the employer of sums paid by him in excess of the amount required to provide the benefits which, under the plan, are to be provided through contributions by the employer, will not be

deemed a recapture or diversion by the employer of contributions made pursuant to the plan.

(5) The plan must not give an employee the right to assign his benefits under the plan nor the option to receive any part of the employer's contributions in cash instead of the benefits under the plan: *Provided, however,* That if a plan otherwise qualified as a bona fide benefit plan under section 7(e)(4) of the Act, it will still be regarded as a bona fide plan even though it provides, as an incidental part thereof, for the payment to an employee in cash of all or a part of the amount standing to his credit (i) at the time of the severance of the employment relation due to causes other than retirement, disability, or death, or (ii) upon proper termination of the plan, or (iii) during the course of his employment under circumstances specified in the plan and not inconsistent with the general purposes of the plan to provide the benefits described in section 7(e)(4) of the Act.

(b) *Plans under section 401(a) of the Internal Revenue Code.* Where the benfit plan or trust has been approved by the Bureau of Internal Revenue as satisfying the requirements of section 401(a) of the Internal Revenue Code in the absence of evidence to the contrary, the plan or trust will be considered to meet the conditions specified in paragraphs (a) (1), (4), and (5) of this section.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7312, Jan. 23, 1981]

Payments not for Hours Worked

§778.216 The provisions of section 7(e)(2) of the Act.

Section 7(e)(2) of the Act provides that the term "regular rate" shall not be deemed to include "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment ***." However, since such payments are not made as compensation for the employee's hours worked in any workweek, no part of such payments can be credited toward overtime compensation due under the Act.

§778.217 Reimbursement for expenses.

(a) *General rule.* Where an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer, section 7(e)(2) is applicable to reimbursement for such expenses. Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount of the reimbursement reasonably approximates the expenses incurred). Such payment is not compensation for services rendered by the employees during any hours worked in the workweek.

(b) *Illustrations.* Payment by way of reimbursement for the following types of expenses will not be regarded as part of the employee's regular rate:

(1) The actual amount expended by an employee in purchasing supplies, tools, materials, or equipment on behalf of his employer.

(2) The actual or reasonably approximate amount expended by an employee in purchasing, laundering or repairing uniforms or special clothing which his employer requires him to wear.

(3) The actual or reasonably approximate amount expended by an employee, who is traveling "over the road" on his employer's business, for transportation (whether by private car or common carrier) and living expenses away from home, other travel expenses, such as taxicab fares, incurred while traveling on the employer's business.

(4) "Supper money", a reasonable amount given to an employee, who ordinarily works the day shift and can ordinarily return home for supper, to cover the cost of supper when he is requested by his employer to continue work during the evening hours.

(5) The actual or reasonably approximate amount expended by an employee as temporary excess home-to-work travel expenses incurred (i) because the employer has moved the plant to another town before the employee has had an opportunity to find living quarters at the new location or (ii) because the employee, on a particular occasion, is required to report for work at a place other than his regular workplace.

The foregoing list is intended to be illustrative rather than exhaustive.

(c) *Payments excluding expenses.* It should be noted that only the actual or reasonably approximate amount of the expense is excludable from the regular rate. If the amount paid as "reimbursement" is disproportionately large, the excess amount will be included in the regular rate.

(d) *Payments for expenses personal to the employee.* The expenses for which reimbursement is made must in order to merit exclusion from the regular rate under this section, be expenses incurred by the employee on the employer's behalf or for his benefit or convenience. If the employer reimburses the employee for expenses normally incurred by the employee for his own benefit, he is, of course, increasing the employee's regular rate thereby. An employee normally incurs expenses in traveling to and from work, buying lunch, paying rent, and the like. If the employer reimburses him for these normal everyday expenses, the payment is not excluded from the regular rate as "reimbursement for expenses." Whether the employer "reimburses" the employee for such expenses or furnishes the facilities (such as free lunches or free housing), the amount paid to the employee (or the reasonable cost to the employer or fair value where facilities are furnished) enters into the regular rate of pay as discussed in §778.116. See also §531.37(b) of this chapter.

§778.218 Pay for certain idle hours.

(a) *General rules.* Payments which are made for occasional periods when the employee is not at work due to vacation, holiday, illness, failure of the employer to provide sufficient

Committee on Education and the Workforce

Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)

Your Name:		
1. Will you be representing a federal, State, or local government entity? (If the answer is yes please contact the Committee).	Yes	No ✓
2. Please list any federal grants or contracts (including subgrants or subcontracts) which you have received since October 1, 1998: None		
3. Will you be representing an entity other than a government entity?	Yes X	No
4. Other than yourself, please list what entity or entities you will be representing: AFL-CIO IUPA, AFL-CIO		
5. Please list any offices or elected positions held and/or briefly describe your representational capacity with each of the entities you listed in response to question 4: General Counsel, IUPA, AFL-CIO		
6. Please list any federal grants or contracts (including subgrants or subcontracts) received by the entities you listed in response to question 4 since October 1, 1998, including the source and amount of each grant or contract: None		
7. Are there parent organizations, subsidiaries, or partnerships to the entities you disclosed in response to question number 4 that you will not be representing? If so, please list:	Yes	No X

Signature: _____ Date: 7/26/01

Please attach this sheet to your written testimony.

PERSONAL INFORMATION: Please provide the committee with a copy of your resume (or a curriculum vitae). If none is available, please answer the following questions:

a. Please list any employment, occupation, or work related experiences, and education or training which relate to your qualifications to testify on or knowledge of the subject matter of the hearing:

See attached to testimony

b. Please provide any other information you wish to convey to the Committee which might aid the members of the Committee to understand better the context of your testimony:

Please attach to your written testimony.

APPENDIX E – WRITTEN STATEMENT OF LEONARD COURT, SENIOR PARTNER AND CHAIRMAN OF THE LABOR AND EMPLOYMENT LAW SECTION, CROWE AND DUNLEVY, OKLAHOMA CITY, OK, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE, WASHINGTON, D.C.

Statement of the U.S. Chamber of Commerce

ON: PERFORMANCE-BASED PAY AND THE FAIR LABOR STANDARDS ACT: TESTIMONY IN SUPPORT OF H.R. 1602, THE "REWARDING PERFORMANCE IN COMPENSATION ACT"

TO: SUBCOMMITTEE ON WORKFORCE PROTECTIONS OF THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE

BY: LEONARD COURT

DATE: JULY 31, 2001

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

STATEMENT OF LEONARD COURT
TO THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

Thank you, Mr. Chairman, and Members of the Committee.

By way of introduction, I am a member of the Labor Relations Committee of the U.S. Chamber of Commerce and the Chair of its Fair Labor Standards Act Subcommittee. I am testifying today on behalf of the U.S. Chamber of Commerce. I am a senior partner and the Chairman of the Labor and Employment Law Section of Crowe & Dunlevy, Oklahoma's largest law firm. In addition, I am an adjunct professor of law at Oklahoma City University Law School and the University of Oklahoma School of Law teaching labor and employment law.

Our firm represents employers of all sizes in Oklahoma from large corporations like Goodyear, Avis and others to small, privately owned companies with less than twenty-five employees. This broad spectrum of clients allows me to see the reactions of many different companies in a variety of industries to the issues of performance-based pay before this Committee today.

My observations are based on three assumptions. First, in the current atmosphere of global competition, rewarding employees for improvements is desirable whether these be in areas of productivity, efficiency or incentive. While we would like to believe that all employees give maximum effort, we know that financial incentives motivate workers to better performance. Second, predictability of compensation is important to most of us. Employees want to know what their earning potential is. Third, bonuses are an effective and desirable method of compensation. The Fair Labor Standards Act (FLSA) itself

recognizes this principle by allowing employers to give discretionary bonuses without penalizing the employer by requiring that the bonus be included in the regular rate of pay. Unfortunately, FLSA, which was enacted over sixty years ago, impedes these principles with its treatment of non-discretionary bonuses and their required inclusion in the regular rate of pay.

Unquestionably, the nature of competition and the responses to these competitive pressures have changed since the FLSA was originally enacted. Today, even small Oklahoma companies must compete across international borders. To do so effectively, these companies must improve productivity and efficiency. Also, they must attract and retain the highest quality workforce possible. This means that employers must look to new, more innovative compensation methods to motivate and keep the best employees. Many employers believe that performance-based incentives are the most productive way to motivate and reward at both the individual and group levels. The Committee has already received testimony in previous years that illustrates this point.

Performance-based bonuses are widely used to motivate and reward exempt employees. Unfortunately, the outdated provisions of the FLSA discourage employers from rewarding employees in the non-exempt workforce in the areas where such incentives would be most useful. Employers tend to reject these performance-based plans because the costs associated with required recalculation of each employee's regular and overtime rates are a substantial disincentive to such payments. While the advent of computerized payroll programs has lessened this burden somewhat, they certainly have not eliminated the need for developing the individualized programs and checking the

recalculations. This represents time and money which could be better spent providing employees with additional bonus compensation.

Recent client discussions illustrate the problem. In preparing for the hearing, I discussed this legislation with a variety of clients. Irrespective of client size, the response was similar. The administrative costs and hassles currently associated with non-discretionary bonus and gainsharing programs cause employers to decide not to offer such programs to non-exempt workers. This Committee has already received significant amounts of testimony concerning these problems with the current law, and I do not intend to duplicate that information.

I acknowledge that quantifying the number of companies who would adopt gainsharing or bonus programs if H.R. 1602 became law is virtually impossible to determine. However, my personal experience tells me that the percentage is significant. I would note that within the last month, at least one smaller client, who was unaware of the current FLSA requirements concerning non-discretionary bonuses, rejected consideration of a bonus-type payment plan after learning of the current FLSA demands.

Furthermore, in my role as Chairman of the U.S. Chamber's FLSA Subcommittee, I have repeatedly heard other employment attorneys and business representatives share these same experiences. Our subcommittee has identified passage of this type of legislation as one of the most important modifications that can be made for benefit of both management and their employees.

The net result under current FLSA law is that non-exempt and exempt employees become even more separate. The exempt workers receive gainsharing and bonus programs that will not be offered to non-exempt workers. Being a member of a

successful operation is important to employee morale. All members of that team want to share in the rewards given for their success. The current approach under the FLSA gives employers only two options in this regard. The company can either try to fulfill the cumbersome and outdated recalculation requirements or it can give performance-based bonuses only to its exempt employees. Thus, at a competitive time when cooperation is needed within the entire workforce, the FLSA creates a further divide between exempt and non-exempt workers.

Additionally, the academic side of me believes that the outdated FLSA treatment of bonuses is directly contrary to the need for predictability. By excluding discretionary bonuses from the required recalculation of overtime and including non-discretionary bonuses in that recalculation, the FLSA specifically encourages the employer to adopt discretionary rather than non-discretionary bonus programs. Efforts at non-discretionary rewards, whether they be gainsharing or bonuses, set specific goals or standards for the employee or employee-team to achieve and outline what the financial reward is for accomplishing those goals. In this way, the plan tells the employees what they have to do and what they get. Current FLSA treatment discourages adoption of these programs. On the other hand, the discretionary bonus encouraged by the FLSA does just the opposite. The employee has no guarantee of reward and no specific roadmap of what the company wants. Instead, it leaves the employee totally at the mercy of the employer's good will both as to amount, if any, and timing.

Opponents of this legislation urge its defeat because a few unscrupulous employers may attempt to manipulate the system. To deprive the employees at the vast majority of companies that want to give non-exempt employees legitimate incentives

from reaping the additional financial benefits of such programs, in order to guard against the few who may be inclined to abuse the system, is simply wrong. It is like saying that we should deprive all unions of the right to strike because a minority of picketers engages in strike line violence.

H.R. 1602 helps solve these problems while at the same time retaining the basic protections provided by the FLSA The language of Section 2 (2) of the bill requires a written, published plan based upon a pre-established formula that is formulated to provide "additional remuneration over and above the wages and salaries that are not dependent upon the existence of such plan...". H.R. 1602 also provides that the plan must be established and maintained in good faith. These provisions provide more than adequate protection against the unscrupulous employer.

H.R. 1602 simply allows companies to offer incentive programs to make themselves more competitive. Such programs give non-exempt employees predictable rewards for achieving specified goals just as they are currently offered to exempt employees.

The bonus provisions of the FLSA were passed in a different era to fulfill different needs. Over time, Congress has amended this statute to exclude certain non-discretionary additional incentives from the regular rate calculation such as profit sharing and stock option plans in recognition of the need to update this statute. It is now time to take the next step in that journey by enacting H.R. 1602.

Mr. Chairman, I appreciate the opportunity to share these views with the Committee.

Committee on Education and the Workforce

Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)

Your Name: Leonard Court		
1. Will you be representing a federal, State, or local government entity? (If the answer is yes please contact the Committee).	Yes	No X
2. Please list any federal grants or contracts (including subgrants or subcontracts) which you have received since October 1, 1998: None		
3. Will you be representing an entity other than a government entity?	Yes X	No
4. Other than yourself, please list what entity or entities you will be representing: Crowe & Dunlevy United States Chamber of Commerce		
5. Please list any offices or elected positions held and/or briefly describe your representational capacity with each of the entities you listed in response to question 4: Crowe & Dunlevy - Chairman, Labor and Employment Law Section U.S. Chamber - Chairman, FLSA Subcommittee		
6. Please list any federal grants or contracts (including subgrants or subcontracts) received by the entities you listed in response to question 4 since October 1, 1998, including the source and amount of each grant or contract: None		
7. Are there parent organizations, subsidiaries, or partnerships to the entities you disclosed in response to question number 4 that you will not be representing? If so, please list:	Yes	No X

Signature: Leonard Court Date: July 28, 2001

Please attach this sheet to your written testimony.

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