CLASP
policy solutions that work for low-income people

April 15, 2013

The Honorable Congressman John Klein
U.S. House Committee on Education and the Workforce
2181 Rayburn House Office Building, Washington, D.C. 20515

The Honorable Congressman Tim Walberg
House Education & Workforce Subcommittee on Workforce Protections
U.S. House Committee on Education and the Workforce
2181 Rayburn House Office Building, Washington, D.C. 20515

Att: Celine.McNicholas@mail.house.gov; Mary.Alfred@mail.house.gov
cc : Members of the Committee

Dear Chairman Klein and Subcommittee Chair Walberg:

As the Committee on Education and the Workforce considers The Working Families Flexibility Act (H.R. 1406) sponsored by Representative Martha Roby (R-AL), CLASP urges the Committee not to move measure forward. A mission of the Committee is to protect the workforce; the bill would add a new wage rule that raises the specter of greater vulnerability for the non-exempt workforce. Since enforcement of basic wage rules is woefully under resourced, we need to fix that first.

What is needed more urgently and would clearly help the non-exempt workforce in achieving flexibility is federal policy around paid leave. Too many working families, particularly low wage working families, currently lack both paid sick days and paid family medical leave. Significantly, paid leave policies would enhance the quality of jobs and would literally protect the health and well-being of the workforce.

CLASP, the Center for Law and Social Policy, develops and advocates for policies at the federal, state and local levels that improve the lives of low-income people. Much of CLASP's efforts are aimed at improving low-income people's connections to the workforce and access to quality jobs.

The Working Families Flexibility Act has a reasonable goal – to give hourly non-exempt workers a choice between overtime pay and time off, through "comp" time that is in lieu of the overtime payments; however, there are numerous reasons to expect that instead of workers actually getting something for giving up their overtime pay, too many workers will not be given a real choice between the two and could work extra hard without receiving either wages and/or time off.

Under the proposed Act, the safeguard against overwork that was established by the Fair Labor Standards Act (FLSA) would be undone. Specifically, the FLSA requires that employers pay non-exempt workers a premium for hours worked beyond the standard 40 hour work. The extra "time and a half" payment for working hours beyond the ordinary week serves a dual purpose: it compensates workers with extra income for extra effort, and it is designed to deter employers from imposing too much work. The overtime payment is the only federal check on overwork in the U.S. Unlike many other nations, the U.S. has no statutory cap on the number of hours (including overtime) that an employer can demand of a worker. Working families need a check on overwork in order to ensure some balance between time at work and time for family.

H.R. 1406 not only leaves unfettered an employer's incentive to ask an employee to work hours beyond the standard 40 hour work week, it also leaves the timing of that request to employer discretion; federal law does not preclude an employer from asking employees to work overtime at any time – that is, with little or no notice. Some employers, particularly of low wage workers, expect their employees to work whatever hours are asked, whenever asked. Employees who refuse can face unpleasant treatment in response; their normal hours might be cut, their schedules could be changed to the worst shifts, or they could be fired.

H.R. 1406 incentivizes employers to utilize overtime. The Act presents the employer with the opportunity to avoid cash outlays for the hours an employee works beyond 40. The Act itself recognizes that some employers might try to intimidate, threaten, or coerce workers to accept comp time in lieu of payments for overtime. The Act forbids such treatment of employees. The recourse for an hourly employee who has been intimidated, threatened or coerced is to go to court. That recourse, however, is largely ephemeral since for most hourly non-exempt workers, a lawsuit is an expensive proposition not only because of the costs of legal help and but also because of the time lost in pressing the case; time that could otherwise be spent earning a living. Further, the Act establishes that the employer can deny the planned comp time because it would "unduly disrupt" operations. While employers often have some say about planned absences such as the timing of vacation (two in five low-wage working parents receive no paid – no vacation, no sick days, no personal leave - according to an Urban Institute study), the concerns around employers who might intimidate, threaten, or coerce workers apply not just to the use of comp time but also an employer's decision to deny it under the "disrupt" provisions.

As the Committee is aware, our nation's current capacity to protect the private sector workforce is already inadequate on the very basics of securing wages.

While many employers abide the law and pay workers their due, too many avoid the existing wage law and escape its consequences. One study of low wage workers in 3 cities found that more than 3 of every 4 workers who should have received overtime pay in the prior week did not get it. This is dubbed "wage theft" since the employer is keeping wages that, under the law, belong to the worker. The reason that wage theft happens so much is that employers can do so with limited impunity: scarce resources curtail government enforcement. The average employer has a .001% chance of being investigated; struggling workers are hard pressed – almost powerless - to point a finger when the employer has the wherewithal to avoid the back payment and to fire the worker.

Comp time is built upon overtime. The rampant failure to pay overtime payments within the private sector, however, makes it clear that the foundation is flawed. Before promoting comp time in the private sector, we need better practices and enforcement of overtime itself.

The subcommittee hearing included the oft-heard notion that the law allows public employees to have access to comp time, and the proposed law simply seeks to extend this to private sector employees. A major distinction between the public sector and private sector is employer practice related to overtime. While public sector employers are not immune to overtime violations, private sector employers are, as the above study and other reports indicate, in the midst of a relative epidemic.

Working families do need flexibility. Policies that would immediately help working families and not run the risks inherent in the Working Families Flexibility Act include paid sick days, paid family medical leave insurance, and improvements to the unpaid Family Medical Leave Act so that, for example, a working adult grandchild could take unpaid leave under the restrictions of the FMLA to care for an ill grandparent.

For those workers who work overtime, the first order of business for the Committee is to ensure payment. In the private sector, the epidemic of non-payment creates a financial hole for too many workers. Before laying the foundation for a new wage law, the Committee needs to see to it that there is solid ground underneath. To do less is to establish a policy that could seriously harm workers.

We urge the Committee to vote against H.R. 1406.

Jodie Levin-Epstein
Deputy Director
CLASP
Center for Law and Social Policy
Jodie@CLASP.org