THE SALES INCENTIVE 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

HEARING HELD IN WASHINGTON, DC, JUNE 7, 2001

Serial No. 107-17

Printed for the use of the Committee on Education and the Workforce

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 2002

77-672 pdf

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: (202) 512-1800 FAX: (202) 512-2250
Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON EDUCATION AND THE WORKFORCE

JOHN A. BOEHNER, Ohio, *Chairman*

THOMAS E. PETRI, Wisconsin
MARGE ROUKEMA, New Jersey
CASS BALLENGER, North Carolina
PETER HOEKSTRA, Michigan
HOWARD P. "BUCK" McKEON, California
MICHAEL N. CASTLE, Delaware
SAM JOHNSON, Texas
JAMES C. GREENWOOD, Pennsylvania
LINDSEY O. GRAHAM, South Carolina
MARK E. SOUDER, Indiana
CHARLIE W. NORWOOD, JR., Georgia
BOB SCHAFFER, Colorado
FRED UPTON, Michigan
VAN HILLEARY, Tennessee
VERNON J. EHLERS, Michigan
THOMAS G. TANCREDO, Colorado
ERNIE FLETCHER, Kentucky
JIM DeMINT, South Carolina
JOHNNY ISAKSON, Georgia
BOB GOODLATTE, Virginia
JUDY BIGGERT, Illinois
TODD RUSSELL PLATTS, Pennsylvania
PATRICK J. TIBERI, Ohio
RIC KELLER, Florida
TOM OSBORNE, Nebraska
JOHN ABNEY CULBERSON, Texas

GEORGE MILLER, California
DALE E. KILDEE, Michigan
MAJOR R. OWENS, New York
DONALD M. PAYNE, New Jersey
PATSY MINK, Hawaii
ROBERT E. ANDREWS, New Jersey
TIM ROEMER, Indiana
ROBERT C. "BOBBY" SCOTT, Virginia
LYNN C. WOOLSEY, California
LYNN N. RIVERS, Michigan
RUBEN HINOJOSA, Texas
CAROLYN McCARTHY, New York
JOHN F. TIERNEY, Massachusetts
RON KIND, Wisconsin
LORETTA SANCHEZ, California
HAROLD E. FORD, JR., Tennessee
DENNIS KUCINICH, Ohio
DAVID WU, Oregon
RUSH D. HOLT, New Jersey
HILDA L. SOLIS, California
SUSAN DAVIS, California
BETTY McCOLLUM, Minnesota

Paula Nowakowski, Chief of Staff
John Lawrence, Minority Staff Director

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

CHARLIE NORWOOD, Georgia, *Chairman*

JUDY BIGGERT, Illinois, *Vice Chairman*
CASS BALLENGER, North Carolina
LINDSEY O. GRAHAM, South Carolina
JOHNNY ISAKSON, Georgia
BOB GOODLATTE, Virginia
RIC KELLER, Florida
JOHN ABNEY CULBERSON, Texas

MAJOR R. OWENS, New York
DENNIS KUCINICH, Ohio
PATSY T. MINK, Hawaii
LYNN C. WOOLSEY, California
LORETTA SANCHEZ, California
HILDA L. SOLIS, California

Table of Contents

OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE 2

STATEMENT OF RANKING MEMBER MAJOR R. OWENS, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE 3

STATEMENT OF J. RANDALL MacDONALD, SENIOR VICE PRESIDENT, HUMAN RESOURCES, IBM CORPORATION, ARMONK, New York 6

STATEMENT OF MARY ENENMOH, TERRITORY RELATIONSHIPS REPRESENTATIVE, IBM.com, COPPELL, TX 8

STATEMENT OF RANDY SCHENAUER, PRESIDENT, DELAWARE VALLEY WHOLESALE FLORIST, INC., SEWELL, NJ 9

STATEMENT OF CHRISTINE OWENS, DEPUTY DIRECTOR OF PUBLIC POLICY, AFL-CIO, WASHINGTON, D.C. 11

APPENDIX A - WRITTEN OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE, U.S. HOUSE OF REPRESENTATIVES 33

APPENDIX B - WRITTEN STATEMENT OF J. RANDALL MACDONALD, SENIOR VICE PRESIDENT, HUMAN RESOURCES, IBM CORPORATION, ARMONK, NEW YORK 37

APPENDIX C - WRITTEN STATEMENT OF MARY ENENMOH, TERRITORY RELATIONSHIP REPRESENTATIVE, IBM.COM, COPPELL, TEXAS 49

APPENDIX D - WRITTEN STATEMENT OF RANDY SCHENAUER, PRESIDENT, DELAWARE VALLEY WHOLESALE FLORIST, INC., SEWELL, NEW JERSEY .. 53

APPENDIX E - WRITTEN STATEMENT OF CHRISTINE OWENS, DEPUTY DIRECTOR OF PUBLIC POLICY, AFL-CIO, WASHINGTON, D.C. 59

Table of Indexes 66

HEARING ON

THE SALES INCENTIVE COMPENSATION ACT

Thursday, June 7, 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 1:00 p.m., in Room 2175, Rayburn House Office Building, Honorable Charlie Norwood, Chairman of the Subcommittee, presiding.

Present: Representatives Norwood, Biggert, Ballenger, Isakson, Keller, Owens, Kucinich, Mink, Woolsey, and Sanchez

Also present: Representatives Tiberi and Frost

Staff Present: Molly McLaughlin Salmi, Professional Staff Member; Victoria Lipnic, Professional Staff Member; Kent Talbert, Professional Staff Member; Dave Thomas, Legislative Assistant; Peter Gunas, Director of Workforce Policy; Jo-Marie St. Martin, General Counsel; Ron Reese, External Affairs Director; Scott Galupo, Communications Specialist; Heather Valentine, Press Secretary; Michael Reynard, Deputy Press Secretary, Patrick Lyden, Professional Staff Member; Deborah Samantar, Committee Clerk/Intern Coordinator; Peter Rutledge, Senior Legislative Associate, Labor; Maria Cuprill, Legislative Associate, Labor; and Brian Compagnone, Staff Assistant, Labor.

Chairman Norwood. A quorum being present, the Subcommittee on Workforce Protections will come to order.

The Subcommittee is meeting today to hear testimony on H.R. 2070, the Sales Incentive Compensation Act. According to Rule 12B of the Committee rules, any oral statements will be limited to the Chairman and the Ranking Minority Member. This will allow us to hear from our witnesses sooner and help Members keep to their schedules; therefore, if other Members have statements, they may be included in the hearing record. Without objection, all Members' statements and witnesses' written testimony will be included in the hearing record.

OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

This is our first hearing this Congress on an issue related to the Fair Labor Standards Act of 1938. I fully expect that the Subcommittee will look at a number of other issues under the Act during this session of Congress. This will continue previous efforts by the Subcommittee to review a broad range of wage- and hour-related issues, and to identify areas that should be updated to reflect changes that have occurred in the workplace.

I would like to extend a warm welcome to our witnesses. Nearly all of you have traveled some distance in order to share your expertise and knowledge with us. We very much appreciate your willingness to be part of the legislative process.

Today's hearing will focus on H.R. 2070, the Sales Incentive Compensation Act. This bipartisan bill was introduced yesterday by two of our colleagues on the Full Committee, Representatives Tiberi and Andrews.

No doubt, many of my colleagues are familiar with the history of this legislation. Last Congress, the House considered and passed the bill as part of a package to increase the minimum wage and provide tax relief for small businesses.

The House also passed similar legislation during the 105th Congress. Both times, however, the Senate failed to act on the legislation. I would also note that we have new Members on our Subcommittee on both sides of the aisle, and so for many of our Members, this hearing will be both informative and educational.

The Sales Incentive Compensation Act addresses the problem of fitting 21st century salespeople into a law crafted for a 1938 workforce. Current law addresses the situation of salespeople who travel from customer to customer, referred to as an outside salesperson. The law also addresses the situation of salespeople who work in retail stores. But the law fails to address the situation of a modern inside sales force that often sells very sophisticated and complex products and services. They do so by using the tools of modern commerce, telephone, faxes, computers and the Internet.

This is a narrow bill that would amend the Fair Labor Standards Act to provide a new exemption for minimum wage and overtime for certain types of salespeople. It does not exempt all salespeople from the Fair Labor Standards Act. It speaks only to those who have, by reason of their specialized and technical knowledge of their products or services and their relationship with customers, meet the conditions laid out in this bill.

This is not the first time that the Subcommittee has heard from employees testifying in favor of changing the law as it relates to inside salespeople. We will hear today about how a law that was intended to protect workers now has the effect of denying them the opportunity to maximize their sales and income.

I want to emphasize that we are hurting salespeople if we do not change this law. Mr. Tiberi's bill would help salespeople to perform their jobs more effectively by allowing them to schedule their work hours in such a way as to maximize sales, and thereby increase their own earnings. Surely, increasing flexibility for workers or allowing them to maximize their earnings while retaining important protections for them ought to be things that we can agree upon for today's workforce.

I look forward to hearing the testimony and I appreciate the witnesses taking the time to participate in this hearing. I will now yield to the distinguished Ranking Member, Mr. Owens, for his opening statement.

WRITTEN OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE – SEE APPENDIX A

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

Thank you, Chairman Norwood. I want to thank all of today's witnesses for taking the time to share their views with us. However, this legislation has been considered, as you heard before, in previous Congresses, and many of us already are quite familiar with it.

I strongly opposed this legislation in the 105th and the 106th Congresses. It, therefore, should be no surprise that I am still strongly opposed to the legislation. Today, as in the past, some will contend that this legislation somehow helps workers. In my view, nothing could be further from the truth.

The sole effect of this bill is to require workers to work longer hours for less money. In fact, the bill can result in workers being required to work overtime for no pay at all. Assuming an employee earns a base salary of 1.5 times the minimum wage, which is $16,068 a year and earns commissions or bonuses at a rate equal to 40 percent of their base salary, then an employer's only obligation to pay an employee for hours worked in

excess of 40 hours per week is to pay an employee such commissions as the employee may have earned during that period. If the employee has no commissions, the employer is not required to pay the employee anything, not even a base wage for the overtime hours the employee worked.

The bill is not limited to workers who are wealthy or even earn middle class incomes. This bill exempts low-wage workers from overtime. In 1990, when the Congress established a wage floor for those in the computer industry to be exempted from overtime, and I was the cosponsor of that legislation, we established that floor at 6.5 times the minimum wage; an annual salary at that time was $57,420.

This bill exempts workers making as little as $22,495 a year for overtime compensation. A minimum wage worker who is required to work 60 hours a week and who also earns $6,427 a year in commissions is not entitled to any overtime pay under this legislation. By exempting workers making as little as $22,500, many workers will have to work more than 40 hours a week simply to make enough money to support their family without public assistance. Frankly, it is outrageous that we would consider taking away overtime protection from workers who may be eligible for food stamps. But that is what this bill does.

Employers have been paying overtime pay to inside sales workers for almost 65 years. In light of that fact, it can hardly be contended that employers cannot afford to pay overtime. On the other hand, a worker who barely earns 2 times the minimum wage often depends on overtime in order to make ends meet. Take away overtime from that worker, and they may still be able to work enough extra hours to support their family, but they will have no time to spend raising their family, I assure you.

One hundred years ago, workers typically had to work 10 hours a day, 6 days a week, in order to earn enough to house, clothe and feed their families. No one I know contends that returning to those days would represent progress. But that is exactly the direction that this legislation takes us in.

There are many problems with this legislation, but the most serious is that it denies overtime protection to workers who are barely earning a living wage. Far from enhancing the earning opportunities of workers, the fact of this legislation is to increase the income of employers at the expense of workers.

This bill robs the poor to pay the rich. Mr. Chairman, I don't think the rich need this kind of help. I certainly don't think the poor should be required to provide this kind of help.

Chairman Norwood. Thank you, Mr. Owens, for your opening statement.

I would now like to introduce our panel of witnesses. But before I do that, I would like to welcome one of our colleagues from Texas, Mr. Frost, to the Subcommittee today. Mr. Frost has a constituent who is on our witness panel, and I would like to extend the courtesy of allowing him to introduce that witness to us.

The gentleman from Texas is recognized for the purpose of introducing his constituent.

Mr. Frost. Thank you, Mr. Chairman.

I appreciate the courtesy of being able to present Mary Enenmoh to the Committee. Mary is from the Dallas area, and works with IBM in Dallas. I have had the chance to visit her and her work site. She has some unique factors involving her particular employment that she would like to call the Committee's attention to and how the current law affects her.

I understand Major Owens' deep concerns about this legislation. I would only ask that Ms. Enenmoh have the opportunity to present her story and talk about how current law affects her and how she would like to see the Committee consider changes in current law so that she would be better able to perform her particular job.

I understand that this is a contested piece of legislation. The Committee obviously will do what it feels is best, but I did want to have the opportunity to appear with her today so that she could tell her story to this Committee. I thank you very much.

Chairman Norwood. Thank you, Mr. Frost. Mr. MacDonald, if you will take your seat at the table.

I would like to introduce J. Randall MacDonald, Senior Vice President of Human Resources for IBM Corporation. Next is Ms. Mary Enenmoh, who is a Territory Relationships Representative for IBM, followed by Mr. Randy Schenauer, President of Delaware Valley Wholesale Florist, Inc. We welcome you, sir. Our final witness is Ms. Christine Owens the Deputy Director of Public Policy for AFL-CIO.

We would like to thank all of you and welcome you. Before you begin your testimony, I want to remind all of our Members that they will be allowed to ask questions after all witnesses have completed their testimony. In addition, Committee Rule 12b imposes a 5-minute limit on all questions.

I also want to remind the panelists that we have you scheduled for 5 minutes each. I won't be real firm on that, but try to summarize your testimony. Of course, your full statement will be put in the record, but try to keep it in the 5-minute time frame the best you can. I see that all the microphones are too far out, so if you want us to hear you, pull those microphones to you.

Let us start with you, Mr. MacDonald and you may begin your testimony.

STATEMENT OF J. RANDALL MacDONALD, SENIOR VICE PRESIDENT, HUMAN RESOURCES, IBM CORPORATION, ARMONK, New York

Thank you, Chairman Norwood, Mr. Owens and Members of the Subcommittee. I am Randy MacDonald, Senior Vice President of Human Resources for the IBM Corporation.

Thank you for inviting me here to talk today about IBM's concerns with how inside sales employees are classified. We applaud Mr. Tiberi and Mr. Andrews for their leadership in introducing the Sales Incentive Compensation Act, which would amend FLSA and extend the sales exemption to cover both inside and outside sales reps.

IBM supports this important legislation. We would like to submit that the world has changed dramatically in the last 60 years. And we believe that the Fair Labor Standards Act needs to be appropriately modernized in certain areas to reflect the world we live in.

When the Fair Labor Standards Act was passed in 1938, technology-driven sales centers with inside sales reps just didn't exist. At IBM, all sales calls were made face to face. By the way, in that same year, the big technological innovation was a ballpoint pen and nylon. Similarly, when the Wage and Hour Regulations were written in 1954, the minimum wage was $.75 cents. Yet, the first silicon transistor was just introduced, and many of today's leading companies were not even around. But things indeed have changed.

Just when we think we have reached the last frontier, yet another appears. We are in the midst of a technological transformation that is reshaping the world of work. It is evident that the Internet fuels the network world. We already see the visible signs of the change and the possibilities are still being explored.

Distance doesn't matter so much anymore. The world has gotten smaller. New market possibilities continue to emerge in brands in many, many different ways. Going to work doesn't have to mean going to bricks and mortar. Work at home can indeed be an option as has been proven many times already. Shopping on-line means speed and flexibility. Face-to-face contact is no longer the imperative. Virtual companies with employees scattered worldwide don't have to be science fiction any longer.

So while the world of work has changed, the laws that govern how we have worked haven't modernized at the same speed. The FLSA needs to be updated to reflect the changes that have taken place since it was enacted in 1938. IBM is committed to addressing the emerging needs of our employees, particularly the need for work-life balance and the need for controlling one's opportunity and career and pay.

It is in IBM's best interest to provide adaptive work environments to employees to balance the pressures of work and the demands of their home lives. It can have a profound effect on competitiveness and productivity. Inside sales reps don't have the same opportunity as employees who are exempt under the law.

It is interesting to note that the FLSA authors in 1938 recognized the difficulty in tracking overtime for outside sales reps and made them exempt and not subject to overtime requirements. But they didn't envision our network world, our Internet-based business operations or the need for inside sales reps. In effect, the law today creates an unnecessary and problematic disparity between our inside and our outside sales force.

In order to comply with the laws, our inside sales reps are required to work in more structured office environments with a defined shift of hours than their outside counterparts. They are tied to the rigid concept of time and place. Our inside sales employees are true professionals, like our outside sales force. They sell the entire IBM product line directly to our customers and want the same opportunity for wealth creation. They are expected to exercise discretion and are responsible for customer sales and satisfaction. They just happen to use the Internet, the telephone and fax to do it.

We believe they should have the same opportunity for work-life balance as their outside counterparts. For example, we have inside sales employees who would like to be able to work from home when they need to, would like to have the afternoon off to see their child's ball game and pick up work where they left off in the evening and would like to be treated as the conscientious professionals they are. They want it, and IBM would like to give it to them, but our hands are tied unless the law is modernized. Just as employees' expectations for workplace responsiveness have emerged, so have the expectations of our customers.

Customers have seen the power of E-business. The accessibility and broad reach of the Internet have forever changed their expectations for support and response. Accurate, round-the-clock service is now the price of entry for sustainable success in our business. IBM.com was created to be a responsive organization that would quickly organize to meet increased customer demands. The IBM.com sales center is a cutting edge, high performance telephone and Internet based sales organization. At the core of our IBM.com operation are our inside sales reps. They have the primary responsibility for handling IBM's small- and medium-sized business customers. Those are the very same small- and medium-sized businesses that are constituents in your districts. Our ability to shift simple transactions to the Web and to continue to modernize our processes increases the efficiency and productivity of our sales force.

Benefiting from our customers in IBM, the employee benefits I have described earlier are hard to argue with, but the business rationale is compelling. The change in the Act will increase employee satisfaction, motivation and productivity. It will support the needs of our business and be able to respond to customers in this rapidly changing environment. We support the legislative effort to modernize the Act and create appropriate parity for our IBM sales employees.

Mr. Chairman, thank you for allowing me to testify today.

WRITTEN STATEMENT OF J. RANDALL MACDONALD, SENIOR VICE PRESIDENT, HUMAN RESOURCES, IBM CORPORATION, ARMONK, NEW YORK - SEE APPENDIX B

Chairman Norwood. Thank you very much, Mr. MacDonald.

Ms. Enenmoh, you may begin your testimony, please.

STATEMENT OF MARY ENENMOH, TERRITORY RELATIONSHIPS REPRESENTATIVE, IBM.com, COPPELL, TX

Mr. Chairman, Mr. Owens and Members of the Subcommittee, thank you for allowing me to testify here today. My name is Mary Enenmoh, and I am currently employed by the IBM Corporation as an inside sales representative in Coppell, Texas.

I was raised in Cincinnati, Ohio, where I attended the University of Cincinnati earning a bachelor's degree in marketing in 1981. I currently live in Plano, Texas, which is a suburb of Dallas.

I have lived in Texas for 20 years and in Plano for 9 years. As an inside sales rep, my job is to engage and manage resources to develop and close sales. The entire process is done with the use of a telephone, the Internet, FAX machines, mailings, IBM personnel on the outside and business partners. The sale can be closed without my ever having a face-to-face meeting with my customers.

I have specific responsibility for accounts in the media industry, printing, publishing and advertising. My territory consists of six companies, The West Group, the Tribune Company, Experian, A.C. Nielsen, P. R. Donnelly and Leo Burnett. I work with executives, such as chief technology officers, chief information officers, chief marketing officers, et cetera, to understand the issues important to them. I view these issues as opportunities, and I proceed to coordinate the teams, consisting of various specialists and sometimes business partners to help me present the appropriate IBM product and/or service. In addition, I may call on any employee in these organizations to continue to develop and ultimately close the sale.

For this year, my territory quota is $6 million. On IBM large accounts, in addition to an inside sales rep, a local outside sales representative is also assigned. The responsibilities and job description of the outside sales representative mirrors mine. For example, we both have a quota to meet in order to make commissions. We are both responsible for calling on customers to sell IBM products. We are both responsible for customer satisfaction and so on. The only difference between the two of us is that my contact with the customer is not face-to-face. I use modern technology.

As an inside sales rep, I am an hourly employee. My teammate, however, is salaried. While my teammate and I are both managed by the results we generate as sales professionals, as a nonexempt employee, I also have my time managed. The E-business tools we work with give my teammate the option to work from home when she needs to rearrange her work schedule to accommodate her family life and her travel. In addition, my teammate is given a laptop to maximize her efficiency wherever she goes. As a nonexempt professional, I do not have that option. While my colleague can use these

tools to catch up on making investments in her own development and success during off-hours away from work, I cannot.

I believe that the current law views the inside sales job differently from the way I actually do my job. The law assumes that I need to be protected and frankly, this is neither accurate nor fair.

I am a sales professional and focused much more on the goals of my job and career than in the hours worked in a week. I care much more about the money that I can make by working hard and exceeding my quota than I do about working more hours and making time and a half. After all, to me, sales is about managing my territory, not about managing my overtime. Thank you.

Chairman Norwood. That was a very thoughtful statement, thank you very much.

WRITTEN STATEMENT OF MARY ENENMOH, TERRITORY RELATIONSHIPS REPRESENTATIVE, IBM.com, COPPELL, TX – SEE APPENDIX C

STATEMENT OF RANDY SCHENAUER, PRESIDENT, DELAWARE VALLEY WHOLESALE FLORIST, INC., SEWELL, NJ

Thank you. Good afternoon, Chairman Norwood, Vice Chairman Biggert, Representative Owens and Members of the Committee. My name is Randy Schenauer, I am the President of Delaware Valley Wholesale Florists. We are a floral wholesale and supplier, and one of the largest in the United States with 480 employees. In addition to our corporate facility in Sewell, New Jersey, which is our main operating facility, we have distribution centers in Linthicum, Maryland, Edison, New Jersey and Plainview, New York.

I am both pleased and honored to appear before this esteemed group to discuss the treatment of inside sales professionals and the Fair Labor Standards Act. Before I get into the details, I would first like to thank Representative Tiberi and Representative Andrews for introducing legislation that would overcome a major impediment to our Company's growth and compensation to our sales associates.

My goal this afternoon is to highlight three problems with the antiquated FLSA as it relates to inside sales professionals:

First, in its current form, the FLSA denies inside sales people the opportunity to reach their full income potential, which Mary has very eloquently explained.

Second, this Act, which was written over 63 years ago, has not been updated to reflect the modern workplace and advances in technology, which have changed the way salespeople, do their jobs today.

Finally, it is incredulous that the FSLA does not recognize that these employees are highly skilled and professional.

Before I get into the FSLA caps on employees' earnings, I think it is very important to share some background information and paint a picture for you on how the wholesale distribution in flowers and floral supplies work. Unfortunately, unlike many other countries where floral buying is a way of life, the flower industry in the United States relies very heavily on what we term "floral holidays." The obvious ones are Valentine's Day and Mother's Day. Thanksgiving, Christmas and Easter play a minor role. However, the key point here is that our industry is subject to higher peaks and lower valleys than many other industries due to the cyclical nature of our market.

The window of opportunity for our sales professionals and our company is very limited. Retail florists' demands have increased substantially because of the hours of operations. Stores that were open at 10:00 a.m. are now open at 7:00 a.m. and remain open until 10:00 p.m. Stores that were once open on the weekend only on Saturdays are now open on Sundays because retail florists feel the need to compete with mass markets. This is not a request or a requirement to have our sales people work longer hours, but to have our salespeople be more flexible.

Our industry, the floral industry, is highly competitive with both wholesalers operating at 1.5 percent to 2-1/2 percent as the bottom line. We compete with over 100 wholesalers in our market area from Long Island, New York to Washington, D.C. The inside sales associate or sales professional and the customer relationship is key because of flexibility in developing a relationship.

In 1938, it was probably impossible to compete without traveling to meet customers face to face. In the floral industry, it was probably easier back then, because you might have had only 50 varieties of flowers. Today, Delaware Valley sells over 1,000 different varieties of flowers, 500 different indoors green plants, 6,000 different supplies or hard goods, which are vases and other floral supplies. How did we take that type of inventory on the road? If you think that you have congestion here in Washington, D.C. today, I would like you to picture Delaware Valley having 10 to 15 53-foot refrigerated tractor-trailers rolling down K Street going from store to store. Not a pretty picture.

One of the key reasons inside sales professionals can do the same jobs as outside salespeople can be attributed to the advances in technology. As I mentioned earlier, traveling to call on the customers may have been the norm in 1938, but today our inside sales professionals are armed with many technological tools that allow them to do everything and maybe more than their outside counterparts.

In Delaware Valley the sales rep can effectively sell 30 to 40 accounts per day via phone, computer or fax, while outside sales professionals see maybe five to six customers. Technology has definitely allowed us to move more sales professionals from the outside to the inside. I would think that the Committee would view this as a very positive move. Why? It takes cars and trucks off the road, reduces congestion, reduces pollution and conserves energy. Last, but certainly not least, it is impossible for me to

understand how our sales associates are not considered highly skilled and professional.

We sell four different product lines, as I said, fresh flowers, green plants, supplies, and we actually sell fruit. Receiving training on cross-selling and sales training from our full-time sales professional trainer is just one of the things that we keep our salespeople professional.

In closing, I would just like the Committee to recognize the level of responsibility, knowledge, expertise and dedication of these sales professionals. They should not be treated differently than their coworkers who are employing the same techniques but do their work on the outside.

On behalf of Delaware Valley and SAF, I would like to thank Chairman Norwood for holding this hearing. This is very important legislation that is critical to our continued success and future growth. I fully understand the spirit of the law and what the writers of FLSA were looking to accomplish and whom they were looking to protect. However, we are neither a company, nor an industry looking to mistreat our inside sales professionals or work them to death. Enacting this legislation will allow our inside sales professionals to take full advantage of today's technology and cyclical nature of our industry to maximize their earnings. There is no doubt that both our highly trained sales professionals and our company will benefit from this legislation.

Thank you very much for your time.

WRITTEN STATEMENT OF RANDY SCHENAUER, PRESIDENT, DELAWARE VALLEY WHOLESALE FLORIST, INC., SEWELL, NJ - SEE APPENDIX D

Chairman Norwood. Thank you, Mr. Schenauer. Ms. Owens, you may begin.

STATEMENT OF CHRISTINE OWENS, DEPUTY DIRECTOR OF PUBLIC POLICY, AFL-CIO, WASHINGTON, D.C.

Thank you very much, Chairman Norwood, Representative Owens and Members of the Subcommittee. On behalf of the 13 million working women and men of the AFL-CIO, I appreciate the opportunity to appear here today to address our concerns about the proposed Sales Incentive Compensation Act, as we have described more fully in the written statement we have submitted for the record.

The AFL-CIO opposes this change to the Fair Labor Standards Act, which would completely eliminate minimum wage and overtime protections for certain workers who have always been covered by the Act. It would take away these protections without any new safeguards or guarantees.

The affected workers would have no guarantee of added pay, regardless of how many overtime hours they worked, and employers would be free to require as much

overtime as they wanted without incurring any mandatory overtime payments. Indeed, once freed of minimum wage and overtime requirements, and I think this point is critical; employers could extend even the normal workweek beyond 40 hours without raising pay above the threshold set in the bill.

In short, we think this is a one-sided deal. Without giving up anything, employers get the absolute right to lengthen worker's hours, in some cases effectively cut workers pay and to avoid any risk associated with sales.

For workers, there are no guarantees. Any benefits that some might arguably receive are speculative, and we think they are more than outweighed by the risk, the loss of protections and the potential loss of earnings for many other affected workers.

I would like to focus on two points that we think are central to the discussion:

First, many supporters of this legislation justify the notion that inside sales workers should lose their minimum wage and overtime rights, because outside sales employees don't have them, but this argument completely ignores the reason that outside sales workers have always been exempt. The exemption for outside sales workers was an accommodation for employers. Congress recognized that it was unfair to impose on employers a requirement to pay minimum wage and overtime to workers who were away from the work site for more than 80 percent of their work hours and, therefore, employers could not monitor when those workers were there, how much they were working, when they stopped, when they started. The exemption was not for workers it was for employers.

Second, and obviously this rationale does not apply to workers who work on the inside.

The consequences of this legislation are profound. As Major Owens said, the workers who would lose their minimum wage and overtime rights are not simply the better-paid workers who are represented here today. Instead, they are largely average workers who need and depend on minimum wage and overtime protections to support themselves and their families.

This proposal reaches workers earning as little as $22,500 a year. That is not a high wage. It is less than the eligibility threshold for food stamps. It translates into hourly wages that are lower than average hourly wages in 1999. And it is even $1,000 less than the average annual wages in 1998.

In all likelihood, many of the workers who would be affected by this legislation depend far more on their guaranteed overtime pay to support their families than they do on any commissions they may or may not earn if this legislation were to pass. Additionally, this legislation eliminates any break on employers' imposition of mandatory overtime or excessive work hours, and it does not guarantee any added earnings for longer hours. Indeed, many workers would actually end up working longer for less.

As I have noted, employers would be free to impose as many overtime hours as they wanted, and because they were no longer subject to the time-and-a-half overtime pay requirement, they would not have any incentive not to do so. Although employees would earn commissions for overtime hours, they would earn nothing if they made no sales, and they would hence be working for free. Moreover, because employers could unilaterally extend the normal workweek beyond 40 hours without increasing pay, an affected employee could actually experience a pay cut.

These are extraordinarily perverse anomalous results completely contrary to the purposes of the FSLA. Finally, we believe that the legislation, despite the test it sets out, invites manipulation of workers' duties and pay in order to expand its reach. This type of jerry-rigging of job descriptions already occurs under other FSLA exemptions, and there is no reason to think it would not happen here, especially among the ranks of lower-paid sales workers whose employers could reap huge savings if they were no longer required to satisfy minimum wage and overtime requirements.

The members of the AFL-CIO certainly believe that workers have problems under the existing law. But the problem is not that they have the fundamental right to earn the minimum wage and overtime pay. It is instead that although the Fair Labor Standards Act is more than 60 years old and conferred bedrock protections, violations persist. In 1999, alone, the Labor Department collected more than $100 million for more than 220,000 employees who were found to have suffered minimum wage and overtime violations.

We believe that before Congress takes away minimum wage and overtime protections from even more workers, we need to do a much better job of ensuring that existing rights are fully respected and fully protected.

Thank you very much.

WRITTEN STATEMENT OF CHRISTINE OWENS, DEPUTY DIRECTOR OF PUBLIC POLICY, AFL-CIO, WASHINGTON, D.C. – SEE APPENDIX E

Chairman Norwood. Thank you very much, Mrs. Owens, for your comments. There is a lot of suggestion that inside professionals don't make a living wage, et cetera, and that this would lead to worsening that.

I would like to ask you, Mr. Schenauer, what does your average inside sales representative make on an annual basis in total compensation? What is the percentage of total compensation that comes in commissions and in incentives for your inside sales representatives?

Mr. Schenauer. We have 64 inside sales representatives, and four outside sales representative. Our inside sales representatives are paid a salary plus commission. And right now of the 64 inside salespeople, the average income is $52,500.

The percentage of commission versus salary is 70 percent salary and 30 percent of their total compensation is made up of commissions.

Chairman Norwood. Seventy percent is commission?

Mr. Schenauer. Seventy percent is salary, 30 percent is commission.

Chairman Norwood. Thirty percent is commission.

Mr. Schenauer. Thirty percent, yes, sir.

Chairman Norwood. Mr. Tiberi, we are delighted that you have joined us and appreciate you and Mr. Andrews dropping this bill. As you know, you will be able to question the witnesses, however, only after the Subcommittee has questioned them.

But I would like to ask you a question, if I may, about this bill. Is there anything in this bill that simply requires employees to work pass 40 hours? The implication is that if we pass this bill, then everybody is going to have to work for 60 hours.

Mr. Tiberi. Thank you, Mr. Chairman. Thank you for giving us an opportunity to have a hearing today and I also want to thank Mr. Andrews as well.

No is the short answer to your question. There is absolutely nothing in this bill that would require an employee to work over 40 hours per week. And again, the purpose of this bill is to give the flexibility to the highly trained professional, inside salesperson. And I am just going to refer back to the comments of the witness who was born in the great Buckeye State, in Cincinnati. Her comments, I think go to the heart of the issue. This is really an issue that gives the employee more flexibility.

Chairman Norwood. So this bill allows the employee to work longer than that if they'd like.

Mr. Tiberi. Correct.

Chairman Norwood. In order to make more money; is what it boils down to?

Mr. Tiberi. Right. Yes, sir.

Chairman Norwood. Mrs. Enenmoh, do you consider yourself a working American?

Ms. Enenmoh. Yes, I do.

Chairman Norwood. I do, too. I sort of suspected that you did. If we were to pass this bill, would this help you as a working American? Would you increase your income?

Ms. Enenmoh. Absolutely. I have been a sales professional for over 12 years, and I thrive on commissions. I thrive on being rewarded for my hard work and my performance. That would definitely help me.

Chairman Norwood. Do you work longer than 40 hours now?

Ms. Enenmoh. No, I do not.

Chairman Norwood. And is that because the time-and-a-half factor comes in and your hours are controlled?

Ms. Enenmoh. Well, partly. And also because as a professional, it really is disturbing to me to have to constantly keep track of hours and time and 20 minutes here and 30 minutes there or wherever. It disturbs me that I can't think of the big picture and be available to my customers when they need me to be, and thereby increasing revenue and my income.

Chairman Norwood. Are you confident that when you tell me this, that you are speaking for yourself and your colleagues who are in similar situations? If we would just pass this bill, would it help all working Americans to do better?

Ms. Enenmoh. Absolutely. My colleagues are so excited that I am here because we are professionals. We went to college. We want to be in this profession because we enjoy having that "income tax return" feeling every month or every quarter.

Chairman Norwood. You get that?

Ms. Enenmoh. You get that extra check and you wonder what to do with it. Having overtime dollars is not something that excites me. It excites me to get a big bonus check.

Chairman Norwood. Right; to make those sales.

Ms. Enenmoh. My colleagues feel the same.

Chairman Norwood. Mr. Schenauer, you want to comment?

Mr. Schenauer. I'd like to comment on Mary's point. This also offers family members and particularly, female inside sales representatives, job flexibility. I know at Valentine's Day or Mother's Day, that is our window of opportunity to make a killing on the commission check. But in the middle of July, when they can complete their sales within a 30-hour workweek, the flexibility just isn't there for them.

Chairman Norwood. Thank you, sir. I see my time is up.

Mr. Owens, you are now recognized for 5 minutes.

Mr. Owens. Mrs. Owens, as a general matter, considering the costs of training, taxes and benefits and assuming no overtime protection, would it be cheaper for an employer to require a single worker to work 60 hours or would it be cheaper to hire two workers to work 30 hours?

Ms. Owens. As a general matter, it is cheaper to require a single worker to work 60 hours. And I think your question goes to one of the original purposes of the overtime requirement that there were several. One purpose was because workers in this country, I

mean, if we want to talk about flexibility, the maximum flexibility would be to say I am not going to work overtime, but unless one is represented by a union, no worker in this country has the right to refuse to work overtime, no worker has a protected right to refuse to work overtime. The time-and-a-half pay requirement provides the only tool that workers have to discourage the imposition of maximum mandatory overtime.

And to your question, Mr. Owens, one of the purposes of the overtime requirement also is to create additional jobs, rather than overloading the existing numbers of workers with more work hours.

Mr. Owens. Mrs. Enenmoh, you say you support this bill because it would enable you to earn more money by working longer hours?

Ms. Enenmoh. Yes, sir.

Mr. Owens. Would you support the bill if it required to you work longer hours just to make the same amount of money that you already make? Would you support the bill if that had the effect on other workers; that is, it required them to work longer hours but they got no increase in income?

Ms. Enenmoh. Well, I am concerned about any employee that would have to work for no compensation. So I can't speak to all of the employees in different professions. All I can do is speak to sales professionals.

There is not a sales professional that I know of, and I belong to different organizations, who worries about overtime and working 60 hours a week or more than 40 hours a week. We know that there is flexibility on the days you don't work 8 hours because on some days you work more than that.

I have been in the field before as a sales professional. It has never been abused. I have never had to work 60-hour weeks on a constant basis. If I were working on a big deal, it was up to me and I was rewarded for it because I got the money in the end.

Mr. Owens. You can't foresee a situation where a worker would be working longer hours and some of those hours would be for no pay under the commission system?

Ms. Enenmoh. No, I really can't see that. I have been on both sides. I have been what is called a “sales associate.” I was in a retail organization, people walked up to me, they asked for product, and I sold it to them. I didn't consider myself a sales professional.

In my current job, I do research on my customers. I spend a lot of time helping them and thinking about how I can help them solve their issues, meet their business needs, and in turn how I can make money for myself.

That is why I call myself a sales professional versus something like a sales associate. And in the case of the sales associate, I have never seen that kind of thing abused, and I really wouldn't expect that to be abused.

Mr. Owens. So are you saying you always earn a commission?

Ms. Enenmoh. Have I always earned commission?

Mr. Owens. You always earned commission when you were working extra hours, is that what you are implying? If you are good at your work, you will always earn a commission so there will never be a situation where you are working extra hours and didn't earn anything?

Ms. Enenmoh. Well, when I was a sales associate, of course, I would get compensated for overtime if I worked overtime.

Mr. Owens. Now you also would under present law?

Ms. Enenmoh. Yes, under the present law. However, I can't see that a company currently would have an hourly employee and work them without overtime. And in my case, since I thrive on commissions, I prefer the commissions and the bonuses, versus the few extra dollars of overtime pay.

But I honestly cannot see that being a problem with someone who is an hourly sales employee.

Mr. Owens. Mr. MacDonald, you said it is too difficult for IBM to track the hours worked by inside salespeople if they are allowed to work at home. All IBM has to do is to require employees to self-report how many hours they work. IBM can tell employees don't work overtime and report every hour you work whether or not it is overtime.

Is that very hard? Is the problem that you don't trust your workers to make honest reports?

Mr. MacDonald. No. It is quite to the contrary. I think that is what the revision in this act is really saying. We want to trust our employees, but the burden of proof right now lies with the employer.

So if Mary were to go home at night and work without us knowing it we would be in violation of the Act. Therefore, the burden of proof is on us, and the way we can assure that we meet the letter of the law is by saying you can't do that at home. I would suggest that this really takes the monitoring out of the workplace and, empowers a sense of trust in the employee, because they can do what they want to do when they want to do it.

This is a networked and global economy. Consequently, we have to think about the fact that this is a sales job not a production-type job. It is different. They don't work hour to hour. It is built on relationships, and that is what Mr. Tiberi's exemption is about.

Mr. Owens . Do you favor a bill that increases minimum wage? If this were part of the package, would you support that legislation?

Mr. MacDonald. Well, I will say it this way in the spirit of candor; I am very fortunate to work for a corporation that doesn't have an issue about minimum wage, because we pay very competitive wages. That seems to me a decision that has to be reached in the halls of Congress about what is right for the country.

Mr. Owens. Thank you.

Chairman Norwood. Thank you, Mr. MacDonald.

I hope we are all very clear about this bill. This bill is calling for an exemption for inside sales reps. It is not calling for an exemption of overtime pay across the board. This is only about inside sales professionals.

Mr. Keller, you are now recognized for 5 minutes.

Mr. Keller. Thank you, Mr. Chairman. My first question is to Ms. Enenmoh.

I heard in your comments earlier you were excited about receiving your commission check in the mail, and I just wanted to tell you something else to be excited about. About 3 hours ago President Bush signed the tax law and as a result as a single mom, you are going to be getting another check for $500 in a few months.

If this law is changed, won't you miss getting overtime?

Ms. Enenmoh. No, because the overtime is just such a small part of the picture as a sales professional. What I really like is making more than those incremental dollars that overtime after taxes can bring. Getting a large check, because I have worked hard and I have earned it and I put effort into it, far outweighs those few dollars for overtime. I wouldn't miss that, no.

Mr. Keller. All right. How do you respond to those folks that say in your case if you work an extra 10 or 15 hours, you are going to make a little more money because you are a star professional? What about those folks who aren't as successful? Don't you have some concerns that maybe they are not going to get those commission checks?

Ms. Enenmoh. Well, a part of this is not just working more hours to get my commissions. A lot of it is flexibility, such as leaving at 3:00 because not much was happening in the office, my kid had a game. I went to the game.

But I know that in the evening, there is going to be a conference call with the West Coast with my customer, and I am going to miss that opportunity, because I can't call him from home. If I can't call him when he wants me to call him, then guess what, by the next day, he already has another taker.

Mr. Keller. The flexibility is a big part.

Ms. Enenmoh. Exactly. It is not that I worked more than 8 hours that day; I may have only worked 8 hours that day. But I found an opportunity that absolutely made money

for me.

Mr. Keller. Mr. Schenauer, you heard her articulate testimony. How do your employees feel about being exempt from overtime?

Mr. Schenauer. This addresses your last question and Representative Owens' question about working more hours and not making a commission. We are talking about professional salespeople. I was a sales rep and I will admit to you that I am a different breed of person.

I was working hours for the sake of working hours. I was there to make a sale, and there is nothing like doing the deal at the end. As you just said, 3 hours ago the tax bill was signed, and there was a lot of happy people. Why? Because the deal was done.

It is the same thing with the sales professional. I am certainly not saying to you that with every hour worked the commission meter is going ding, ding, ding, ding. Salespeople are a different breed. They are not going to work 50, 60, 65 hours, if they are not making the sales.

Mr. Keller. Thank you.

Mr. MacDonald, you are an executive here at IBM. You have listened to Ms. Enenmoh testify. As someone who is a leader in an organization, are her views on this issue relatively reflective of views held by those in your organization that share the same position as sales professional?

Mr. MacDonald. Her colleagues would be very proud of her, because I think she is clearly representing them. You know this isn't just our company sitting in a room deciding that this is a problem. We as a company have found out about this by conducting morale surveys at our employee focus groups. For us, 1400 people in this particular case were telling us that they didn't feel like sales professionals. They don't feel like they work in an environment that is conducive to them.

I will tell you some rather proprietary numbers. Our turnover is higher by a factor of three for inside sales than outside sales, yet both are still doing the same exact jobs, selling the exact same products and services. One of the things that we have been told as they leave is that they don't like to be classified in this manner.

Mr. Keller. Is that part of the reason you testified earlier? The law, as it stands now, impacts your ability to attract and retain top talent?

Mr. MacDonald. I have gotten to know Mary, and she talked about her college degree and what her vision is for her children. I think that what we are trying to do is to place people in these key jobs and make them feel motivated in the profession, and they are telling us that they don't feel that way.

Mr. Keller. Thanks, Mr. Chairman, I yield back.

Chairman Norwood. Thank you. Now I would like to yield 5 minutes to the gentlewoman from Hawaii who grows the best pineapples on the planet, Ms. Mink.

Mrs. Mink. Thank you, Mr. Chairman.

I subscribe to the position that is so well articulated by our Ranking Member, Congressman Owens. This matter has come before this Committee previously, and we have voted on it on the floor as well. And I don't understand. We have inside salespeople and outside salespeople. With the changing scene of business technology and commerce a good deal of the work can be done outside, in a home, or in an environment as has been described.

If such a worker undertook, Mr. MacDonald, to become a sales professional for your company and chose to work at home making these sales and earning the commissions that would come with those sales, would not that individual be considered an outside salesperson?

Mr. MacDonald. Not with the way we set it up.

Mrs. Mink. How did you set it up, and why wouldn't that person qualify as an outside salesperson? What in the law says that an outside salesperson has to drive a truck?

Mr. MacDonald. Well, I am not familiar with how it would relate to a truck driver. I am familiar with how it would relate internally. When we do our inside sales teams, part of what Mary would tell you is the collaboration that goes on, the ability to get technical help.

You have to realize that the customer that she is selling to is a small- and medium-sized customer. When we sell to a large customer, we have teams that are relatively available all the time directly at that customer site, where Mary has to go out and seek out help. So that is the reason that we consolidate our teams in an inside-sales approach; the technical expertise and the ability to team on the core are available.

Mrs. Mink. So the distinction as you just described it is as a matter of supervision. The inside salesperson still requires supervision, because they are put together in the team and they are directed by a supervisor on how to do their job. You cannot do that if a person is truly professional and is allowed to do whatever they can do to earn a commission, but they stay at home and pursue this sales activity?

Mr. MacDonald. I don't recall using supervision.

Mrs. Mink. That is the way I interpreted your answer.

Mr. MacDonald. That is fair. I would say to you that the way the work environment is today, it is done with a series of technical and sales teams.

I would argue that the supervisor seldom is involved in the customer interface and/or sale. Mary has a discretionary opportunity. She makes decisions on her own, and I think that is the important thing here. When we look at this exemption, this is allowing

people to have to discretion.

Mrs. Mink. So why can't your company allow discretion for these individuals who are dissatisfied with having to punch a clock and work 40 hours, to work from their homes and to have this individualized, personalized relationship with these small and large businesses and be motivated primarily from the point of view of earning commissions, because that is what this is all about, earning more money?

And I don't see the difficulty of your company being able to set aside these individuals that you think are capable, becoming outside salespersons so that we don't need to pass legislation like this which carves out a category of workers and takes them outside of the minimum wage and the overtime. I just don't see it.

Mr. MacDonald. I will yield to my colleague, because she is anxious to answer your question.

Mrs. Mink. Absolutely.

Ms. Enenmoh. Thank you. That is a very good question. I am so glad I will get a chance to explain the difference.

Yes, inside can go outside. I mentioned West Coast before. My territory is Chicago. However, I have a Chicago company, the Chicago Tribune or the Tribune Company. They own the Chicago Tribune Newspaper. They also own the LA Times on the West Coast. They own the Orlando Sentinel in Florida. I can't be in all three of these time zones at one point.

Regarding your question on inside versus outside, the inside sales position was developed initially to address customers who were smaller. So that makes me someone who calls outside of the Dallas, Texas area. I was glad the inside sales positions were developed, because it took me off of the street, where I did not want to be.

I wanted to eliminate that windshield time. I now have two small kids. They need me home at a certain hour. I don't want to be looking across the desk at a customer at 5:30 or 6:00 in the evening when I know I need to be home helping my kid with his homework.

So I chose to leave the outside and go inside, and the inside sales position allowed me to continue my profession as a sales professional. So all I want is to continue working as a sales professional, but have the flexibility to sometimes make a call when I am at home, which now is considered overtime.

Mrs. Mink. Thank you, Madam Chairman.

Mrs. Biggert. (Presiding). Thank you. It appears that it is now my time to ask some questions. So I yield myself 5 minutes.

Mr. MacDonald, are you asking or would you like this exemption, for all of your hourly employees? What is the distinction here between other hourly employees and

those that you are requesting this for?

Mr. MacDonald. No. The exemption that we are seeking is for a very limited group of people called inside sales. We have 320,000 people worldwide, with 150,000 here in the States. Many of those people will continue as nonexempt. This is specifically for this group, and basically this Act provides us with a criterion of four or five steps that we have to go through.

There are still people in inside sales that will not be exempted from this, and we will continue to keep them as nonexempt. So this is a very small population that we are trying to keep working here.

Mrs. Biggert. Can you give an example of somebody that might be in inside sales that would not be included in this group?

Mr. MacDonald. The Act, as I understand it, or the amendment would be very specific that a relationship does not already exist with the customer. Somebody that was making a cold call would not be exempt from this Act and, therefore, would have to have a nonexempt status.

Mrs. Biggert. Would this be somebody like a telemarketer?

Mr. MacDonald. That would be a good example.

Mrs. Biggert. Ms. Enenmoh, there seems to be some talk about coercing you to work more hours or take this rather than an hourly overtime. Have you heard of anybody who has ever said, oh, I would have to work more hours, or I am coerced to do this?

Ms. Enenmoh. No, and I really can't see that being a concern for any of my colleagues. As professionals we know that there is always the potential.

Mrs. Biggert. Okay.

Ms. Owens, have you heard from any of your members who don't want to have something like this that they would be able to do under this definition of inside sales?

Ms. Owens. Our affiliates have, Congresswoman, and the Communications Workers, for example, represent about 50,000 members who they think would be affected by this provision. UNIT, which is the Needle Trade Union, represents about 5,000 workers, the Newspaper Guild represents about 10,000 workers, and the Teamsters estimate that they represent as many as 90,000 workers who could be unfavorably affected by this provision.

So we have quite a few members who feel like it is not in their interests. And I might add that a number of our members who would be affected are not fortunate enough to make $50,000. They would be more towards the low end of the threshold that this legislation sets.

Mrs. Biggert. Would there be any possibility that working this way they might be able to make more money, or do they feel that they are slotted into that amount?

Ms. Owens. I think that they feel it is a big gamble. I think also that while it is true that this legislation does not require anyone to work overtime, the experiences of many of our members in the Communications Workers Union especially, has been that in the last several years they have had to work many, many hours of involuntary overtime.

That has been a significant factor in many of the strikes and other labor actions over the last several years. Even with the protections of collective bargaining agreements, which impose some limitations, these workers still feel they have to work too many hours and the trade-off is just too great.

Mrs. Biggert. Are these all workers that have had the technical knowledge that is required for this bill?

Ms. Owens. Many of them are.

Mrs. Biggert. Are these that have had previous sales?

Ms. Owens. Many of them are, yes, certainly.

Mrs. Biggert. How about the detailed understanding of the needs?

Ms. Owens. Many of these are very highly skilled, highly trained sales workers.

Mrs. Biggert. Thank you.

Mr. Schenauer, if the FLSA requirements are such a big problem, why don't you use the outside salespeople? Is it for the same reason Ms. Enenmoh gave regarding traveling?

Mr. Schenauer. Absolutely. We have 3,000 customers, and as I mentioned, we have 64 inside sales reps, and we talk to our customers every day. For us to do that, I couldn't even venture a guess as to how many people we would have to put on the road, which was my point in the testimony with putting more cars on the road. So for us it would be impossible.

Mrs. Biggert. Thank you, and my time has expired.

Mr. Kucinich is recognized for 5 minutes.

Mr. Kucinich. Thank you very much, Madam Chair. It is always interesting to do the math on these things.

First of all, to Ms. Enenmoh and to the rest of the witnesses, welcome, we certainly have a high degree of respect for people who go into sales. It is a very competitive business. There is high pressure. You produce or you are out. I mean the

gentleman stated the fact that turnover is three times, isn't that what you said?

Mr. MacDonald. Yes. I said voluntary turnover.

Mr. Kucinich. Involuntary?

Mr. MacDonald. I said voluntary, you are implying that it is involuntary.

Mr. Kucinich. You are saying it is voluntary. Okay. It is a high-pressure business, wouldn't you agree?

Mr. MacDonald. Unequivocally.

Mr. Kucinich. Okay. So sometimes people can't just take it, they have to leave?

Mr. MacDonald. We agree on that, too.

Mr. Kucinich. Is there a point at which people don't produce? If they don't sell, are they out?

Mr. MacDonald. Yes.

Mr. Kucinich. Okay. I understand the logic, which causes IBM to come here and seek this change in the law. You must understand the concerns that we have about a condition where people would be in a situation where they could be working overtime because they want to; let us say, if they don't sell anything, they don't get anything.

I mean you must understand that we are concerned about people who could find themselves in a condition where they would work overtime and not get compensated for it because they don't sell.

Mr. MacDonald. I do understand the point. I think that Randy said it quite appropriately, that a salesperson is a different breed and they are betting on the upside. I mean that is what this is all about.

Mr. Kucinich. If I may, in this case, sir, the employee takes the risk, not the employer.

Mr. MacDonald. In any sales environment, typically, some compensation is at risk.

Mr. Kucinich. But in the case of what you are asking for here, the employee takes the risk. I did some math here just using the $52,500 you gave as a kind of an example.

Mr. Schenauer. That was my example.

Mr. Kucinich. Were you the one that gave the figure $52,500 for sales? I broke it down. If that person said that the commission rate was 30 percent is that right?

Mr. Schenauer. Yes, sir.

Mr. Kucinich. Okay. I broke that down. If the math is right, about $36,550 of that would be salary and the rest would be commission.

Mr. Schenauer. It sounds about right.

Mr. Kucinich. I took that and I broke it down hourly. I took the salary part and I separated it out from the commission, and what I came up with was this. I looked at 40 hours a week for 52 weeks and it works out to $18 an hour or $720 a week at 40 hours. If that person is put into an overtime situation, because sales is high pressure to produce-produce, maybe they want to.

Let us get away from coercion for a second. If they were working as some people do when they are in sales, they love to work. I love to work, I probably work 60 to 80 hours a week easy, easy. I don't know what we make an hour.

Chairman Norwood. You are not making minimum wage then?

Mr. Kucinich. But because I love to work, I understand what you are saying. You love to do it, just go for it. But let us say somebody is working an average of 20 hours a week overtime, because it does happen. Under the current law, they would be entitled to time and a half, which would be $27 an hour and just doing the math here that equals a week with overtime. People would go from $720 a week to $1260 a week with the overtime.

Now if you extrapolated that over a year, just talking about salary or salary with overtime would equal $64,630 a year with an average of 20 hours a week overtime. Salary with commission is 52,500. That is assuming a 30 percent commission.

You know, you can cut this anyway you want. I am saying that my concern is that under the formula you are offering, assuming 30 percent, which sounds, by the way, a pretty generous commission, frankly, and assuming that everyone is selling at that rate, the legislation, of course, covers people at $22,500 with minimum wage and a 40 percent, $6,000.

So I just wanted to point that out to you, Mr. Chairman, and Members of the Committee, because it does matter whether people get overtime or not, because that means they get rewarded for the time they put in whether they sell or not.

Chairman Norwood. I thank the gentleman for his questions.

It is a pleasure to recognize my good friend. Would you like to respond to that?

Ms. Enenmoh. Yes.

Chairman Norwood. Please do.

Ms. Enenmoh. Well, I wanted to talk about the $22,000 and this kind of thing. The lawyers might disagree, I don't know, but to my mind that person who is probably making $22,000 a year is not doing what I am doing.

I know some people who work in telecommunications, and they are in sales. They make cold calls and they do have technical knowledge. They know their product. But before they make their call into a household, for example, they don't know anything about me. That is a telemarketing move.

When I do research, I actually do this with the intent of calling this customer and building a business case. So I am just saying that I think that there is a difference in the different levels of sales and sales professionals.

Mr. MacDonald. If you are going to make that apples to apples comparison, you have to use the 20 hours. Then I have to ask the question if in 20 hours did she take her quota from 650,000; for argument's sake, what would be the leverage on that? And so you can make an argument for 540 for overtime, but I may make an argument that that is a substantial wealth creation that she can create by taking her quota up beyond that. It gives her the opportunity to leverage her own hours of work as she sees fit. I think that is the apples to apples comparison we have to use.

Chairman Norwood. It is a pleasure now to recognize my friend and colleague from Georgia, Mr. Isakson.

Mr. Isakson. Thank you, Mr. Chairman. If I can, I would like to take the liberty of answering Mrs. Mink's question, which is the $64,000 question.

It is the Internal Revenue Service that would prohibit IBM from allowing that inside salesperson to do outside activity. Everybody needs to listen real close because we did this in Congress. You can respond in a minute.

There is a specific code section for independent contractors, which prohibits benefits being paid to the employee, prohibits structured control of the employee, there is a 10-point IRS test. So the Fair Labor Standards Act has its impositions, which don't allow it. Second, the Internal Revenue Service Code, which allows it, but under very narrow parameters, is not good for the worker in terms of this type of situation. Now, I would like to ask Mr. MacDonald a question.

Mr. MacDonald, do you know of any circumstance where a sales organization ever increased its profits by lowering what it paid its salespeople?

Mr. MacDonald. I have been in the business 32 years, and I have never heard of one.

Mr. Isakson. I was in sales for 10 years and was President of a company for 22 years, and I will submit to you no organization, no component of an organization whose job description is sales can increase their profits by reducing what they pay their employees. It does not work.

And when you read the definitions in here, this specifically precludes any manufacturing, and any direct service, other than the service of sales, and particularly is defined by a very narrow scope of individual.

I really did want to make those two cases, because I know the IRS test very well from past experience. I also know from running a company that went through some very difficult times, you are often tempted to tell your salespeople I have got good news, we are going to pay you less so we can make more. And it doesn't work because they go to the next person.

I will in my remaining time admit I may appear to have a prejudice, having been in a sales organization myself and been the President of one. Further, I represent IBM's other sales center like the one that Mary works in, which is located in Highland Office Park in Smyrna, and I think I represent the largest retail florist in the United States, or one of them, in terms of Carithers Florist as well.

I would point out what the gentleman said are the limitations with regard to Valentine's Day and Mother's Day and Christmas. The unintended consequence of the Fair Labor Standards Act on a person working in the industry that has peak and narrow windows of sales opportunity actually restricts the ability for that individual to make the most money they can.

That in fact is the truth of the matter in retail, is it not Randy? That in retail sales you generally have about 30 percent of the year where you make about 90 percent of your money and 70 percent of the year where you make the remaining 10 percent, is that not correct?

Mr. Schenauer. You hit the nail on the head.

Mr. Isakson. It is also true in many types of retail sales. The inflexibility of the Fair Labor Standards Act really prohibits an individual like Mary, if she were in inside sales, to maximize her earnings potential, particularly if you accept what Mr. MacDonald has said.

Mr. MacDonald. By the way you can call me Randy, too.

Mr. Isakson. The last point I would simply suggest to all of us when we consider this, because I have great respect for the workers Ms. Owens is representing. None of us are in favor of any semblance of a scenario that would allow employees to be taken advantage of.

I would imagine some of the people that she mentioned with the print industry are probably the retail, inside salespeople, that sell classified advertising. I used to buy a lot of advertising from them and I would guess they would be the first ones that would be happy to have this opportunity to make a lot more money. We really should look at this because I think it is a win-win situation from everything I can see.

The last thing I would observe is that when the Fair Labor Standards Act passed in 1938, the Congress of the United States voted by the Clerk calling the roll and each of us having to answer individually. Had we not embraced technology and used our "ATM" cards to vote instantaneously and publicly for the whole world to see, we would move even slower than we do now, Mr. Chairman. So I think part of this is to be able to take

advantage of what technology has done to allow inside sales to be even more productive, first for the salesman and second for the company.

I yield back the balance of my time.

Mr. Owens. Would the gentleman allow Ms. Owens to respond?

Mr. Isakson. Mr. Owens, I would be delighted to.

Chairman Norwood. You need to ask the Chair, since his time is up.

Mr. Owens. I thought he was yielding back his time. Will the Chairman please allow her to respond?

Chairman Norwood. Of course, she can. Ms. Owens, do you have a response?

Ms. Owens. I am not exactly sure what I am responding to.

I would like to respond to something else that was said in terms of some of the workers who would be covered in response to a question from Congresswoman Biggert. Some of the Yellow Page salespeople that the Communications Workers represent, in fact, have to do substantial research, have to know a great deal about their customers, have to have a lot of technical expertise, and they are very concerned about the impact that this legislation would have on them.

Chairman Norwood. Thank you very much.

Ms. Woolsey, you are now recognized for questions for 5 minutes.

Ms. Woolsey. Thank you, Mr. Chairman.

I would like to respond to Mr. Isakson's comment about independent contractors, and be very clear that an independent contractor is not an employee. An independent contractor actually has to be available to work for more than one employer. The situation is entirely different from inside and outside sales. It isn't even close. I was a human resources professional for 20 years. I have been here 10 years now, but things don't change that much.

One of the questions I have, I think Mr. MacDonald would be the best to answer it. With this gray area, it is clear who is an outside salesperson; the “professional salesperson?” Why can't there be a situation where you pay overtime and commissions and it can be based on how much the person produces as a commission? Why does one have to be exclusive of the other?

Mr. MacDonald. Well, I can answer that question, because we do pay overtime and we do pay commissions. We pay a base, what is called variable pay, which is an IBM wide incentive system, and Mary has a commission system. What we are saying is that the burden on us is that she can't work flexible hours; she can't go beyond the norm. The

norm being the example that she used about being on a West Coast conference call.

This exemption gives her the opportunity to earn more because she is not structured and she is not disciplined. So we already do what you suggest. What we are really giving is an opportunity for her to have more wealth creation.

Ms. Woolsey. Well, then that leads me to the issue of allows versus forced, because I think that is the problem. When is a person allowed to take care of himself or herself and when are they forced to do something by the employer? It brings me to looking at the Fair Labor Standards Act for nonexempt employees who do get paid overtime, and the issue of meal breaks and rest breaks. A nonexempt employee and the employer are mandated to provide those breaks for those employees.

If the employer sets up a situation where employees waive those breaks because they voluntarily think that they are a better employee to the employer that is not their right. They can't voluntarily give up their break, and it sets a precedent that looks like the employer expects every single employee to give up their breaks.

I am afraid that is what you are aiming at here. I mean I know you don't mean to, and IBM would never treat their employees unfairly, but there is the idea that they are mandated by the employer to do something that they wouldn't want to do themselves. Now, Mary, you want to do this, but there are a lot of people who can't afford to do it and aren't earning enough to do to it.

Ms. Owens, I would like you to respond to this point, and then the other witnesses.

Ms. Owens. Congresswoman, thank you. I guess I would like to respond to this larger point about flexibility that has been raised and to say that, quite honestly, I understand the argument that has to do with working more than 40 hours a week better than I do the concerns about flexibility.

There is nothing under the Fair Labor Standards Act that prevents an employer from saying to an employee go ahead and take 3 hours off this afternoon to go watch your child's piano recital or elsewhere, and then put in 3 hours tonight. That is perfectly legal. Nothing prohibits that. Nothing prohibits an employer from saying if you are going to be on this conference call to California tonight, why don't you come in 2 hours late this morning. That is perfectly legal.

Similarly, there is nothing about the Fair Labor Standards Act that prohibits or restricts any employer from allowing employees to work at home. And, in fact, many employers do it. In fact, when I ran a business and employed folks I let them do it, and we were considerably lower tech than IBM.

So there is a lot within the Fair Labor Standards Act already that permits and allows flexibility on the part of employers and employees without running afoul of the overtime and minimum wage requirements.

Chairman Norwood. I want to thank all of you for your very thoughtful and interesting testimony. I thank the Members for being here. I think this has been a good hearing.

I will close the hearing with one question. Mr. MacDonald, if we pass this bill, will you and your company pay more to your employees or less?

Mr. MacDonald. There is no doubt in my mind two things will happen. One is we will pay more. We will pay more and we will adjust because the nature of the work will be more comparable to outside salespeople.

Two, there is no doubt in my mind based on talking to our employees that they will have the ability to make customer contacts as they see fit when it is best for the customer and for themselves. There is no doubt in my mind this will be more money for everybody.

Chairman Norwood. Mary, if we pass this law, will you make more money or less?

Ms. Enenmoh. I will make more money.

Chairman Norwood. Randy, if we pass this law, will your company, your industry pay more to employees or less?

Mr. Schenauer. Chairman, our people work 40 hours a week and there hasn't been a year where a sales rep has made less money than the previous year. So based on history, yes, certainly our salespeople will make more money.

Chairman Norwood. Ms. Owens, thank you for your testimony. I won't ask you that same question, but I will thank you for your observations about flex time, and when we get ready to pass that legislation, I want you to come back and testify for us.

Mr. Kucinich. Would the chairman yield?

Chairman Norwood. Yes, sir.

Mr. Kucinich. I think the question that you asked each of the panelists is a great question and if the Chair in his wisdom could extend the courtesy of that question to the last witness, I would feel that this was a complete hearing.

Chairman Norwood. The best I can tell, Ms. Owens is not an inside sales rep or representing a company that is. That is why I didn't ask her.

Mr. Kucinich. With all due respect, Mr. Chairman, and, you know, I have great respect for you, I am just wondering.

Chairman Norwood. I would feel better if you asked it. Go ahead, Dennis.

Mr. Kucinich. I appreciate the Chair's indulgence. To the witness representing the AFL-CIO, if this legislation is passed, will the tens of thousands of workers you represent

in your presence at this table be making more money or less?

Ms. Owens. Well, I think they fear that they could well make less and work longer for it. I would also like to say that as concerned as the AFL-CIO is about the tens of thousands of workers we represent who are affected, we are perhaps even more concerned about the hundreds of thousands more who make $22-$23,000 and could really be hurt.

Mr. Kucinich. I thank the witness. I want to thank the Chair for his kindness. Thank you so much.

Chairman Norwood. You are welcome. You are a good friend, thank you. Let us conclude by making a couple of observations.

One, this Act has always done this. It is high time Members on both sides of the aisle throw that out. We are in the 21st century. The Fair Labor Standards Act was passed in 1934 and we cannot think that way any longer. Just because it worked well 50 years ago doesn't necessarily mean it works well today.

I am going to conclude now if I may.

Mr. Owens?

Mr. Owens. May I comment?

Chairman Norwood. Yes, Mr. Owens.

Mr. Owens . If the same attitude you are applying here to the Fair Labor Standards Act could be applied also to the minimum wage, we could work together on this and really come up with some productive legislation.

Chairman Norwood. Well, you will be happy to know that I voted for the minimum wage increase that had the tax cuts in it for small businesses and, in fact, gave the inside salespeople the opportunity to use their own skills and head in terms of how much they work. So there is your answer.

Mr. Owens. I look forward to working with you.

Chairman Norwood. I wanted to point out that just because the Act has been this way for 50 years, we cannot just continue as if it is the right thing to do today. My major problem, frankly, with the Fair Labor Standards Act is that it is simply not flexible. It is a situation where one size fits all, and where parts of things in that Act might work very well for some groups and work very well for the AFL-CIO and what they are interested in. But after all, most of America is not in the AFL-CIO. There are people out there, hard-working Americans, trying to make a living. Now I tend to trust them.

Mary, I believe you are the only one here that is a professional inside sales rep. And I honestly believe that I could trust you to make a decision about how to best maximize your income. This is what this is all about. If she wants to go, Mary ought to have the opportunity to go to that ballgame without talking to anybody or make that

conference call at 10 o'clock at night if she wishes. And the reason is because it gives her an opportunity to maximize her income.

I also want to point out that there is a difference for professional people. Now, you have to consider that. They are paid according to their production; sometimes they work real hard and don't get paid. But these are Americans, working Americans, who chose that kind of life, because they know in the end they have a greater opportunity to maximize their income. That is why they chose that. Closing the deal is part of it. I sure do understand that, Randy. But the other part is they know they give themselves the opportunity to hit the homerun.

If that life as a professional person doesn't suit them, not to worry, they will find something else to do. If you can't make those sales, for whatever reason, you are going to quit doing that, because you are not maximizing the income that you would like to receive. Give these folks an opportunity to live their lives. They are not asking us to pass this bill because it will hurt them, I guarantee you.

Look, I have got some great communication workers in my district, and I am pretty close to them and I understand that. They are not exactly as hardheaded about this, at least mine aren't, as you imply. I think, yeah, maybe they are more nervous perhaps than the employees at IBM. That may be true, too, but these people are professionals.

If they can make those sales, they need to be turned loose to make them whenever they want to. If you don't pass this, this is not going to increase anybody's income, because a company can't pay time and a half. They work at not doing that for obvious reasons. Randy, I bet you do pay time and a half sometime, but I bet you don't a lot of times. Not passing this bill doesn't increase anybody's income.

So I encourage the House of Representatives and, in particular, this Committee to consider this bill strongly, as we have done the last two Congresses. Pass the bill and give working professionals like Mary a chance to run her whole career the way she sees fit, and I bet she will do just great.

Thank you all for being here. It has been a pleasure. The meeting is adjourned.

Whereupon, at 2:40 p.m., the Subcommittee was adjourned.

APPENDIX A - WRITTEN OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE, U.S. HOUSE OF REPRESENTATIVES

The Honorable Charlie Norwood
Chairman
Subcommittee on Workforce Protections
Hearing On H.R. 2070
"The Sales Incentive Compensation Act"

June 7, 2001

This is the Subcommittee's first hearing this Congress on an issue related to the Fair Labor Standards Act of 1938. I fully expect that the Subcommittee will look at a number of other issues under the Act during this session of Congress. This will continue previous efforts by the Subcommittee to review a broad range of wage and hour related issues and to identify areas that should be updated to reflect changes that have occurred in the workplace.

I would like to extend a warm welcome to our witnesses. Nearly all of you have traveled some distance in order to share your expertise and knowledge with us. We very much appreciate your willingness to be a part of the legislative process.

Today's hearing will focus on H.R. 2070, "The Sales Incentive Compensation Act." This bipartisan bill was introduced yesterday by two of our colleagues on the Full Committee, Representatives Tiberi and Andrews. No doubt many of you are familiar with the history of this legislation. Last Congress, the House considered and passed the bill as part of a package to increase the minimum wage and provide tax relief for small businesses. The House also passed similar legislation during the 105th Congress. Both times, however, the Senate failed to act on the legislation. I would also note that we have new Members of the Subcommittee on both sides of the aisle and so for many of the Members, this hearing will be both informative and educational.

The Sales Incentive Compensation Act addresses the problem of fitting 21st century salespeople into a law crafted for a 1938 workforce. Current law addresses the situation of salespeople who travel from customer to customer, referred to as an "outside salesperson." The law also addresses the situation of salespeople who work in retail stores. But, the law fails to address the situation of a modern inside sales force that often sells very sophisticated and complex products and services. They do so by using the tools of modern commerce – telephones, faxes, computers and the Internet.

This is a narrow bill that would amend the Fair Labor Standards Act to provide a new exemption from minimum wage and overtime for certain types of salespeople. It does not exempt all salespeople from the Fair Labor Standards Act. It speaks only to those who by reason of their specialized and technical knowledge of their products or services and their relationship with their customers, meet the conditions laid out in the bill.

This is not the first time that the Subcommittee has heard from employees testifying in favor of changing the law as it relates to inside salespeople. We will hear today about how a law that was intended to protect workers now has the effect of denying them the opportunity to maximize their sales and income. I want to emphasize this – we are hurting salespeople if we do not change the law. Mr. Tiberi's bill would help salespeople to perform their jobs more effectively by allowing them to schedule their work hours in such a way as to maximize sales and increase their own earnings. Surely increasing flexibility for workers, allowing them to maximize their earnings, and retaining important protections for them ought to be things that we can agree upon for today's workforce.

I look forward to hearing the testimony and I appreciate the witnesses taking the time to participate in this hearing.

APPENDIX B - WRITTEN STATEMENT OF J. RANDALL MACDONALD, SENIOR VICE PRESIDENT, HUMAN RESOURCES, IBM CORPORATION, ARMONK, NEW YORK

TESTIMONY
OF
J. RANDALL MACDONALD
SENIOR VICE PRESIDENT - HUMAN RESOURCES
IBM CORPORATION
BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
ON
THE SALES INCENTIVE COMPENSATION ACT

JUNE 7, 2001

Good morning, Chairman Norwood, Mr. Owens and members of the Subcommittee. My name is Randy MacDonald and I am Senior Vice President - Human Resources for the IBM Corporation. Thank you for inviting me here today to talk with you about IBM's concerns with how "inside sales" employees are classified under the Fair Labor Standards Act (FLSA) and the recently introduced *Sales Incentive Compensation Act*, which would amend the FLSA and extend the sales exemption to cover both "inside" and "outside" sales reps.

I would also like to introduce Mary Enenmoh, who will be talking with you about her own experience as an IBM "inside sales" employee. Before that, however, I would like to describe some of the dramatic changes that have taken place in the workplace over the last 60+ years since the enactment of the Fair Labor Standards Act, and focus on how the FLSA law impacts both IBM's ***.com*** business and our "inside sales" employees.

IBM is the world's largest information technology company with 80+ years of leadership in helping businesses innovate. Our business ranges from fundamental research to semiconductors and other technologies which comprise information technology products to the highest end of supercomputing. IBM software offers the widest range of applications, middleware and operating systems for all types of computing platforms, and our services enable customers to take full advantage of the new era of e-business. Today, we have operations in more than 160 countries and have over 320,000 employees. The history of IBM has been one of constant marketplace and technological change, enormous pride, and a strong brand image. Today's competitive pressures offer increased challenges to every information technology company around the world, including IBM.

Our ability to lead in innovation has two foundations – our technology and our people. A top priority at IBM is to attract, motivate, and retain the best talent in our industry to support our customers and our business. To achieve this priority, we need to focus our efforts in several areas: talent, leadership, climate, and performance. We believe that

the FLSA has a direct impact on IBM's ability to meet this objective and to grow our *ibm*.com business.

Mr. Chairman, let me be clear that IBM recognizes the value and sanctity of the Fair Labor Standards Act. We understand that when the Act was created in 1938, the work place was vastly different than it is today. Many employees not only experienced substandard working conditions but also were forced to work long hours and did not receive adequate wages for the hours they worked – let alone overtime.

We also appreciate that the Fair Labor Standards Act established some boundaries to protect workers from unscrupulous employers. We agree with the original intent of the FLSA and we respect the important role its enactment has played in our nation's history. We also believe, however, that certain provisions of the FLSA need to be modernized to accommodate the workplace changes that have occurred over the last six decades since its enactment. Many of these changes are truly positive developments for workers and employers alike.

Currently under the wage and hour law, IBM's "inside sales" force, which uses the Internet and the telephone to sell products to our customers, is treated differently from our traditional outside sales force. As a result of this disparity, it is hard for us to attract and retain the best talent for this critical element of how we approach the marketplace.

The New Networked Economy and Workplace Changes

In today's networked economy, the way in which we do business has dramatically changed and, as a result, so has our workplace. Several years ago, IBM coined the term "e-business" to describe all the ways people derive value from this networked world, and to define a strategic direction in the emerging networked economy.

In fact, the Internet has emerged as a powerful means for conducting transactions of every type:

> Transactions among employees within a business -- to improve how products are developed, how ideas are shared, how teams are formed, how work gets done;
>
> Transactions between a business and its suppliers, distributors and retailers, to reduce cycle time, increase speed and efficiency;
>
> Transactions between a business and its customers; and
>
> Transactions and interactions between governments and citizens, students and educators, health care providers and their patients.

The way we buy and sell, distribute things, work, teach and interact with each other has changed as well. Using my own company as an example, this past year, IBM did $23 B in business over the Web. That is up from $3 B two years ago. Last year, we handled 99 million self-service customer inquiries and transactions over the Web. And

we did 96% of our invoicing in a paperless manner. The most successful companies in the future will be those that learn how to use knowledge about customer behavior, markets, economies, technology, and do it faster and more efficiently than their competitors. Most companies have begun to use the Web to strengthen their customer service operations; streamline supply chains and reach existing and new customers.

The accessibility and broad reach of the Internet have forever changed customers' expectations regarding support and response. As a result, our customers expect our products and services to be delivered more quickly than ever before. They expect accurate, round-the-clock service. The only way we can successfully perform in this environment is to have more flexible organizations that are able to respond and organize quickly to meet these increased customer demands.

Profile of Ibm.com

That is why we developed the ***ibm.com*** business – which is an e-business operation focused on using Internet technologies. As part of this process, we developed a customer sales and support model that depends upon using "inside sales" reps, as opposed to our traditional outside sales force. These "inside sales" reps cover 95% of all of IBM's customer accounts. Let me put it another way. What these "inside sales" reps do is core to our ***ibm.com*** business operations since they have primary responsibility for handling our company's support of small and medium-sized business customers.

ibm.com is a "cutting edge, high performance" telephone and Internet-based sales organization representing virtually all IBM products and services to customers across the United States and Canada. ***ibm.com*** employs product and services sales specialists in the U.S. and Canada. In fact, you should know that our "inside" and outside sales employees in Canada don't have the problem that we are discussing today because they are all exempt. They are treated identically under the law, whereas, their counterparts in the U.S. are not.

Our 1400 U.S. "inside sales" employees in the U.S., located in Atlanta and Dallas, sell the entire IBM product line directly to our customers using the telephone, fax and the Internet. When the sales centers first opened in 1996, they employed almost 450 employees. Today, that number has almost tripled.

Profile of "Inside Sales" Force & Complex Solution-Based Transactions

Much like their traditional "outside sales" counterparts, these "inside sales" employees have overall responsibility for customer sales and satisfaction within a particular industry set. These "inside sales" employees are generating several billion dollars in annual revenue for the company, thus, making IBM one of the largest direct marketing operations in the world. Last year, ***ibm.com's*** product specialists handled over 7.7 M calls and each specialist produced approximately $5.3 M in revenue for the company.

One misconception I would like to correct is that these "inside sales" employees are order takers. To the contrary, these employees are responsible for designing and

handling complex high-tech, solution-based transactions for our customers. These employees are professionals and some of them have advanced degrees:

65% of IBM's "inside sales" reps have college degrees

7 % have MBAs and

1% have Ph.D.s

What's the Problem?

The 21st century brings with it a rapidly evolving workforce with associated lifestyle and business climate needs that demands flexibility. A key workforce strategy at IBM is to create and support a climate that is flexible enough for employees to have balance in their lives and encourage them to take responsibility for their career direction. Let me repeat that. **A key workforce strategy at IBM is to create and support a climate that is flexible enough for employees to have balance in their lives and encourage them to take responsibility for their career direction.**

We believe that the Fair Labor Standards Act, which is the primary federal statute regulating wages and hours of work, hampers this process by creating disparity between "inside" and "outside" sales employees. Specifically, sales employees who travel out of the office to a customer's place of business are exempt from coverage by the Fair Labor Standards Act. Thus, they are treated as professional salaried employees. However, employees who conduct sales from "inside" the company are covered by the FLSA and must be paid on an hourly basis and be subject to overtime requirements and rigid time schedules.

Let me restate this: the only reason these two sales forces are treated differently under the current law is because one performs his/her responsibility face-to-face and the other using modern technology. We believe this anomaly should be corrected.

The Fair Labor Standards Act (FLSA)

Generally speaking, the Fair Labor Standards Act covers employers engaged in interstate commerce that meet certain annual dollar volumes of business. The FLSA definition of interstate commerce is very broad, and the dollar value of business ($500,000 per year) is low enough so that there is no question that a company like IBM is covered.

As a general rule, the FLSA requires that hours of work in excess of 40 hours, in a seven-day period, be compensated at a rate of one-and-one-half times the employee's regular rate of pay. The FLSA also requires employers to maintain records, which reflect the employees' hours of work and wages received.

There are limited exceptions to the FLSA minimum wage, overtime and record

keeping obligations for certain types of employees. The most common exemptions are for executive, administrative and professional employees. At the outset, it is important to recognize that these exemptions are narrowly construed and the burden of proving that an employee is exempt lies with the employer.

In order to qualify for one of these exemptions, an employee must be paid at least a certain minimum salary, which is paid irrespective of the number of hours an employee works, and the primary duties they perform must also be of an "exempt" nature.

The minimum salary requirements are so low so that they are not even an issue for IBM's inside sales employees. To meet this requirement under the FLSA, an employee has to be paid only $250 per week. Our "inside sales" employees earn well above anything the FLSA would require, even as it is currently written.

This issue is further complicated by the way the FLSA defines what an employee's primary duties have to be in order to be considered exempt. For example, the exemption that is the closest match for our "inside sales" employees is the "administrative" exemption. To qualify for that exemption, an employee's primary duties must consist of office or non-manual work that is directly related to the management policies or general business operations of an employer and requires the exercise of independent judgment and discretion.

The Department of Labor and the courts interpreting this exemption have found "inside sales" employees to be the equivalent of production employees because their job is to "produce" sales for their employer. Under these interpretations, "inside sales" employees also don't perform work of substantial importance to the management or operation of the business of a company despite that the revenue they generate has a significant impact on IBM overall.

These decisions are dictated by the way the FLSA exemptions are written. However, the exemptions were written many years ago, without today's professional salesperson in mind, or the benefits and flexibility of the Internet and modern information technology. This leads to a blind interpretation of the realities of the modern "inside sales" employee.

In addition, the FLSA has from its inception included an exemption for outside salespersons who sell at locations away from the employer's place of business. There is no minimum salary required for this exemption. For close to half a century the DOL has consistently taken the position that "inside sales" employees cannot qualify under the outside sales exemption. We believe that there is no meaningful difference between the type of work that our "inside" and our outside sales employees perform.

As you might imagine, these restrictions are out of sync with today's customer service needs as well our sales employees' pursuit of greater flexibility to balance both their work/family needs and their ability to increase their earnings. These restrictions create an artificial distinction between "inside" and outside sales reps, although both call on the same territories, have the same accounts, have very substantial quotas, work in partnerships on teams together and are paid off the same sales results. This disparity

makes it difficult to attract, hire and retain the best salespeople for ***ibm.com*** and other Internet-based sales organizations.

It is logical to ask why IBM does not simply accept the increased cost of overtime payments and enable the employees to work longer hours to drive higher performance. We would, in fact, be willing to increase compensation if the payments were linked to increased sales performance. However, under FLSA, these increased costs would result from overtime hours worked and not sales performance. The fundamental business model of ***ibm.com*** does not support increased costs that are derived simply from more hours worked rather than increased sales.

Fiercely Competitive e-Business Workforce Needs Unmet

In 1938, the authors of the FLSA recognized the difficulty in tracking overtime for outside sales reps and classified them as "exempt" and, therefore, not subject to the law's overtime requirements. Unfortunately, the authors never envisioned the networked world Internet-based business operations or the need for "inside sales" reps.

In today's business environment, the concept of the centralized office is becoming less and less typical as workers demand more and more flexibility and control over their destiny. In fact, on any given day, 50 percent of IBM's workforce works remotely. Knowledge has gained strategic importance in value creation for companies like IBM and a knowledge-based workforce has emerged. This is a workforce based on talent, leadership and performance. A key element of attracting and retaining top talent is to provide the climate and tools that allow these employees to have self-directed career progression. Today's knowledge workers demand an environment that has fewer conventional constraints and more autonomy for decision making. It embraces opportunities created by risk-taking and builds tolerance for failure.

At IBM, we have worked hard in our sales call centers to build a climate that supports creativity and risk-taking while providing a sense of challenge and an opportunity for growth. The constraints of the FLSA are counterproductive to the requirements of knowledge workers in the new economy. This talented IBM workforce cannot thrive and may not survive under the old economy model of rigid supervisory structures, inflexible concepts of time and place, and a lack of challenging career opportunities.

Work/Life Balance and Flexibility

IBM is sensitive to the needs of all employees and to the communities in which we operate. We believe it is in IBM's best interest to provide all of our employees the flexibility to balance the pressures of work with the demands of their home life. We also recognize that the ability to balance work and personal lives can have profound effects on competitiveness and productivity.

In a 1996 IBM work/life survey, 86% of the respondents reported that the ability to balance their work and personal lives was of considerable importance in their decision to continue working for IBM. This increased from 77% in 1991. Also, in 1996, work/life balance joined compensation and benefits as the number one reason they

would leave IBM prior to retirement. This is particularly true for our top performers and women.

Attracting and retaining top talent at IBM is key to our continuing to be a world-class organization, trusted employer and industry leader. IBM has used the data gathered from its work/life surveys to improve existing programs and to add programs to address new issues. Our flexibility options have seen a steady progression of enhancements – such as telecommuting – to meet employee needs. However, telecommuting is not an option for our "inside sales" employees since it is difficult to accurately track time away from the office in order to comply with the FLSA overtime requirements – a problem which the authors recognized when they drafted the law in 1938.

Once again, the FLSA impedes our ability to let our inside sales reps participate in the kind of work/life balance programs that their counterparts elsewhere in IBM utilize to balance their work and personal lives.

Willing to Pay More

While the employee benefits are hard to argue with, the business rationale is also compelling.

Greater flexibility will increase employee satisfaction, motivation, and productivity. It will also support our fundamental business model, which is grounded in customer response in a rapidly changing environment. We need flexibility to provide flexibility. It is the road to greater revenue and profitability. So, the heart of this issue is a win for employees and a win for the company.

Our analysis predicts that changing from overtime pay to incentive pay will cost IBM more money. We accept this and we have already factored this into our business plan. However, we would prefer to pay for performance and results rather than merely paying for hours worked, as required under the FLSA.

Retention Issue

Another reason we want to address this issue is that we have a retention problem with our "inside sales" rep jobs (15% attrition for "inside sales" reps vs. 5% attrition for outside sales reps). When we do the exit interviews, employees tell us that they're leaving because they want more flexibility in their work/family life and they want to earn more money. They have stated that they would prefer to have less of their salary guaranteed, as required by the FLSA, in exchange for greater opportunities to earn commissions, as do outside sales reps.

They have told us that the structure and management systems in place to "supervise" the inside sales function are not conducive to their self-image and responsibilities as professionals. For morale reasons alone, they have chosen to pursue outside sales positions where they do not have the same restrictions. A number of employees who left IBM stated specifically that the inability to work from home one or two days a

week and escape the horrific traffic congestion encountered during their commutes was a cause for their departure. They can get more of their needs met by going down the street to one of our competitors or a business partner – where the job is very similar to what they do now but it is not subject to the FLSA requirements.

Can't Win in Courts

Before coming here today and asking for your help in changing the law, we carefully looked at the current FLSA and the applicable DOL regulations. We know how they have been interpreted by the courts. We know how they have been interpreted by the DOL in its regulations. And, we know how they have been applied in practice by the DOL during audits.

It should be no surprise to anyone familiar with wage and hour requirements that exemptions from overtime in the law, as currently written, have been narrowly construed and construed in a way which places the burden of demonstrating that an exemption exists on the party asserting the exemption – here, employers like IBM. We have fully analyzed the job description and job requirements for our "inside sales" positions and time and again found that despite that "inside sales" employees are doing the same type of work as our outside sales employees. We believe the language of the FLSA, as currently written and interpreted by the courts and government agencies, prevents us from legitimately classifying these jobs as exempt.

This is like fitting a square peg in a round hole and even if we put all of our legal resources behind a legal challenge, we do not think we could successfully challenge the "inside sales" classification in court. Simply stated, the courts are bound to interpret the FLSA as it is written and would be going beyond their authority to interpret the Act's provisions in a way which would bring IBM's "inside sales" employees the kind of change we are asking for today. The courts would basically have to rewrite the statute to reach this result. That, obviously, is a job for you, our elected officials, and is why we are here today requesting this change in the law.

Legislative Solution

Consequently, we think that the only way we can solve our problem is to change the law through legislation. Recently, Rep. Tiberi and Rep. Andrews introduced the *Sales Incentive Compensation Act*, which would amend the FLSA and extend the sales exemption to cover both "inside" and "outside" sales reps. We believe the legislation not only fits IBM's facts and circumstances but that of today's modern, increasingly Internet-based workforce.

Conclusion

For these reasons, we support the Tiberi/Andrews legislation to modernize the FLSA to create parity for all of our sales employees within IBM and bring it in line with today's 21st century workplace and e-business needs.

Mr. Chairman, thank you for your consideration. I ask that my entire written statement

be entered into the record.

Thank you.

APPENDIX C - WRITTEN STATEMENT OF MARY ENENMOH, TERRITORY RELATIONSHIP REPRESENTATIVE, IBM.COM, COPPELL, TEXAS

TESTIMONY
OF
MARY ENENMOH
INSIDE SALES REPRESENTATIVE
IBM CORPORATION
BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
ON
THE SALES INCENTIVE COMPENSATION ACT

JUNE 7, 2001

Mr. Chairman, Mr. Owens, and Members of the Subcommittee, thank you for allowing me to testify here today. My name is Mary Enenmoh and I'm currently employed by the IBM Corporation as an Inside Sales Representative in Coppell, Texas.

I've worked for IBM for 2 years, both years as an "inside sales" representative. I have been a sales professional for over 12 years in the industries of printing, telecommunications and retail. I was raised in Cincinnati, Ohio, where I attended the University of Cincinnati, earning a Bachelor's Degree in Marketing in 1981. I currently live in Plano, Texas, which is a suburb of Dallas. I've lived in Texas for 20 years and in Plano for 9 years.

As an "inside sales" rep, my job is to engage and manage resources to develop and close sales. The entire process is done with the use of the telephone, Internet, fax machine, mailings and outside IBM personnel or business partners. The sale can be closed without my ever having a face-to-face meeting with the customer.

I have specific responsibility for accounts in the media industry – printing, publishing and advertising. My territory consists of six companies: The West Group, The Tribune Company, Experian, AC Nielsen, RR Donelly and Leo Burnett. I work with executives, such as Chief Technology Officers, Chief Information Officers, Chief Marketing Officers, etc. to understand the issues important to them. I view these issues as opportunities and proceed to coordinate the teams, consisting of various specialists and sometimes business partners, to help me present the appropriate IBM product and/or service. In addition, I may call on any employee in these organizations to continue to develop and ultimately close the sale. For this year, my territory quota is $6,000,000.

On IBM's large accounts, in addition to an "inside sales" rep., a local outside sales representative is also assigned. The responsibilities and job description of the outside

sales representative mirrors mine. For example, we both have a quota to meet in order to make commissions. We are both responsible for calling on the customer to sell IBM products. We are both responsible for customer satisfaction and so on. The only difference between the two of us is that my contact with the customer is not face-to-face; I use modern technology.

As an "inside sales" rep, I'm an hourly employee. My teammate, however, is salaried. While my teammate and I are both managed by the results we generate as sales professionals, as a nonexempt employee, I also have my time managed. The e-business tools we work with give my teammate the option to work from home when she needs to rearrange her work schedule to accommodate her family life and/or travel. In addition, my teammate is given a laptop to maximize her efficiency wherever she goes. As a nonexempt professional, I do not have that option. While my colleague can use these tools to catch up or make investments in her own development and success during off-hours away from work, I cannot.

I believe that the current law views the "inside sales" job differently from the way I actually do my job. The law assumes that I need to be protected and, frankly, this is neither accurate nor fair.

I am a sales professional and focus much more on the goals for my job and career than in the hours worked in a week. I care much more about the money that I can make by working hard and exceeding my quota than I do about working more hours and making time and a half. After all, sales is about managing my territory, not about managing my overtime.

Again, I thank you for the opportunity to address this committee and ask that my statement be entered into the record.

APPENDIX D - WRITTEN STATEMENT OF RANDY SCHENAUER, PRESIDENT, DELAWARE VALLEY WHOLESALE FLORIST, INC., SEWELL, NEW JERSEY

STATEMENT OF
RANDY SCHENAUER
DELAWARE VALLEY WHOLESALE FLORIST, INC.
ON BEHALF OF
THE SOCIETY OF AMERICAN FLORISTS

COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
ON
THE TREATMENT OF INSIDE SALES PEOPLE
UNDER THE FAIR LABOR STANDARDS ACT

June 7, 2001

Good morning Chairman Norwood and members of the Committee. My name is Randy Schenauer and I am President of Delaware Valley Wholesale Florist, Inc. Delaware Valley Wholesale Florist is one of the largest wholesale floral supply companies in the United States with over 480 employees. Delaware Valley is headquartered in Sewell, New Jersey. We also have three branch operations, located in Plainview, New York; Edison, New Jersey; and Linthicum, Maryland. We are members of the Society of American Florists (SAF), representing the entire floral industry in the United States. We are also members of the Wholesale Florists and Florist Suppliers of America (WFSA), who represent more than 1,500 wholesale floral operations in the United States.

I am pleased to have the opportunity to appear before you today to discuss the treatment of inside sales personnel under the Fair Labor Standards Act (FLSA).

First, I would like to thank Representatives Pat Tiberi and Rob Andrews for introducing this legislation that would overcome a major impediment to our company's growth, and to the fair compensation of our sales representatives. The Tiberi-Andrews bill, called the "Sales Incentive Compensation Act" would update and modernize a narrow section of the Fair Labor Standards Act (FLSA) to level the playing field between inside and "outside" sales representatives.

I would like to highlight several problems with the antiquated Fair Labor Standards Act regarding compensation of inside sales employees. First, as it currently stands, the FLSA denies inside salespeople the opportunity to reach their full income potential. Second, the FLSA has not been updated to reflect the modern workplace and advances in technology, which have changed the way commissioned sales representatives, perform their jobs. Last, the FLSA does not recognize that these employees are highly skilled professionals.

THE PROBLEM: The FLSA Caps Employee's Earnings

Wholesale distributors of flowers and florist supplies routinely employ both outside and inside salespeople all of whom generally are paid on a salary-plus- commission basis. However, under current law, a sales employee based inside a wholesale operation must be paid time-and-one-half for hours worked in excess of 40 in any given work week. The time-and-a-half is computed based on their salary plus commission, so paying them overtime can be very complex. Therefore, this FLSA requirement forces many employers to cap the number of hours their employees work in one week at 40 hours. This requirement effectively prevents salespeople from selling more flowers and hard goods, and denies them the ability to make more money. Employees would much prefer to be allowed to work flexible hours under their customary salary-plus commission basis.

Basically, the FLSA's overtime protections are not necessary for a typical sales representative in the wholesale floral industry. These employees' skills and contributions to the business are invaluable and reflected in their compensation. The average salary with commission for a sales representative at Delaware Valley is $52,500. Some make more than that amount, but if our sales representatives were not hindered by the restrictive rules of the FLSA, the average salary would greatly increase.

Due to the restrictions of the FLSA, employees' earning power is greatly impaired because they are limited to 40 hours of work per week during their busiest and most profitable seasons. Inside salespeople could take home a much bigger paycheck and increase sales for the company if they could work more than 40 hours in these peak weeks. The wholesale floral industry is subject to higher peaks and lower valleys than other industries due to the cyclical nature of sales in the floral industry. The sales volume increases dramatically during special holidays such as Valentine's Day, Mother's Day and Christmas. Other peak sales times, where the ability to work overtime would be helpful, include weddings, parties, and special events. Sales made during these hectic times are time-consuming, require great attention to detail and take an enormous amount of hard work and perseverance.

Inside salespeople in the wholesale floral industry are highly motivated. Many of the sales associates say they want to spend more time calling on prospective customers, thereby increasing their potential for earnings -- but they can't, due to the antiquated FLSA. Good service is the key to a sales representative's success and good service means having the freedom to adjust their hours to more closely reflect a typical retailer's hours. Frequent and last minute deliveries are two of the most valuable services a wholesaler can offer their customer. But, the law prevents sales representatives from excelling in service.

SAF asked several key wholesaler members to survey their sales representatives regarding the impact of limiting them to a 40-hour workweek. Unanimously, all employees responded that they could not achieve the goals they set for themselves unless they are free to work a longer day. The hourly restriction deeply affects their earning ability. Flexibility is the key to their success. During the course of a regular week, customer needs, inventory, and special projects all require extra time. The bottom line is that the sales representative has to be there when the customer needs him

or her.

The wholesale floral industry is highly competitive. Price, product and timely delivery are all factors affecting the relationship between inside sales professionals and their customers – retail florists. Retail florists have varying hours of operation. Some open at 8:00 a.m. and close at 5:00 p.m., while others are open from 10:00 a.m. to 9:00 p.m. Most are open on Saturday, all day, and many are open on Sunday. The inside sales employee's success depends on satisfied customers. In order to properly service their customers, our sales representatives must have the flexibility to quickly respond to requests, solve problems and provide the special attention that only a professional salesperson can give.

MODERN TECHNOLOGY ALLOWS SALESPEOPLE TO COME "INSIDE"

Under current law, salespeople who work away from their employer's premises can qualify for an exemption from overtime requirements as "outside" sales employees. Inside sales employees however, performing the same job within the employer's office, must still be paid overtime for all the hours worked over 40. This does not seem to be equitable.

The wholesale floral industry has undergone dramatic changes over the last 60 years. We routinely conduct our business by phone, fax, computer and e-mail. Our sales representatives work on the premises and use technology to reach their clients on a daily basis. At Delaware Valley, we are in the process of implementing a new computer system with the most sophisticated technology to enable us to provide e-commerce solutions to meet the needs of our customers.

The reality is, with new technology, salespeople can sell more efficiently and be more responsive to their customers on-site today than they could as "outside" sales employees in the past.

In 1938, it was impossible to compete without traveling to meet customers face-to-face on a daily basis. Today, the wholesale industry's sales employees have little need to travel because technology allows them to do nearly everything from their desk. Current law says because a salesperson works in the wholesale industry, works on commission, and happens to be located on the premises of the employer; he or she is subject to overtime provisions of the FLSA. These rules are now an impediment to the success of the modern employee and need to be updated.

INSIDE SALES PEOPLE ARE HIGHLY SKILLED

Our sales representatives are highly skilled professionals with an in-depth knowledge of our different product lines. For example, at Delaware Valley we sell three product lines: fresh flowers, floral supplies and botanicals. Each sales representative must understand each line. They are trained to cross-sell. In addition our sales representatives perform another important function - communicating key market information to their team and buyers. Salespeople are expected to maintain a current awareness of new product, new uses for old products and new trends in the industry.

They solve problems, and in sum take an active role in customer service.

More specifically, our sales representatives need to know how to care for the product and, if necessary, how it is grown. They need to know the pricing structure and, if the product is imported, where it was grown and some of the unique growing characteristics of the region in which it was grown. In addition, inside salespeople devote countless hours to discussing the wishes of their customers to better understand what they want and need. These are the same activities performed by "outside" salespeople in the past.

The FLSA should be amended to recognize the responsibility, knowledge, expertise and dedication of these professionals. They should not be treated differently than coworkers who are employing the same techniques but doing their work outside the employer's office. Both employees are performing the same function -- but they are not treated equally under the FLSA. This situation is unfair, ambiguous and confusing.

Exempting inside salespeople from the overtime requirement under FLSA would give employees the flexibility they need to develop and sustain customer relationships. The FLSA currently does not offer this option and is ultimately an impediment to the economic success of sales representatives and their company.

The Society of American Florists thanks Chairman Norwood for holding this hearing and Representatives Tiberi and Andrews for introducing this important legislation.

This very important legislation is critical to our continued success and future growth. Our industry has changed drastically over the past several years, and our competition is no longer a local issue but more of a global concern. Enacting this legislation will allow our inside sales representatives to take full advantage of today's technology and the cyclical nature of our industry to maximize their earnings. There is no doubt that both our highly trained sales professionals and our company will benefit from this legislation.

APPENDIX E - WRITTEN STATEMENT OF CHRISTINE OWENS, DEPUTY DIRECTOR OF PUBLIC POLICY, AFL-CIO, WASHINGTON, D.C.

Testimony of Christine L. Owens, Deputy Director
AFL-CIO Public Policy Department
Before the Subcommittee on Workforce Protections of the
House Committee on Education and the Workforce

June 7, 2001

Chairman Norwood, Representative Owens, and members of the subcommittee: On behalf of the 13 million members of the AFL-CIO, I appreciate the opportunity to appear before you today to address our concerns about the proposed Sales Incentive Compensation Act, which would completely end the minimum wage and overtime rights of certain sales workers. As I describe more fully below, the AFL-CIO opposes this proposed amendment to the Fair Labor Standards Act (FLSA), and any other measure that would strip away such fundamental and longstanding worker rights and protections.

The proposed amendment to the FLSA would end the guaranteed rights that certain sales workers have always had to earn at least the federal minimum wage and to receive time-and-a-half pay for overtime hours they work. And it would take away these rights without providing any new protections or safeguards for the affected workers. Under the regime proposed by this bill, workers would have **no** guarantee of added pay, regardless of the number of overtime hours they work; and employers would be free to require as much overtime as they desire, without incurring any additional mandatory wage payment obligations. Indeed, once freed of the obligation to meet minimum wage and overtime requirements, employers would be entitled to extend even the normal work week, without raising workers' pay above the threshold in the bill.

In short, the proposed amendment is a one-sided deal that represents a complete win for employers, while conferring no new rights on employees: Without giving up anything, employers get the absolute right to lengthen workers' hours, cut workers' pay, and avoid any risks associated with sales. For workers, on the other hand, there are no guarantees at all: any benefits that some might arguably receive are speculative at best and more than outweighed by the risks, loss of protections, and potential loss of earnings for most affected workers.

Background

Section 13(a) of the FLSA, 29 U.S.C. 213(a), exempts certain categories of workers from the law's minimum wage and overtime requirements. Included among these are "outside sales" employees, who spend more than 80 percent of their work hours away from their employer's place of business. The proposed legislation the Subcommittee is considering would add a new provision to section 13(a) that would exempt all sales workers who meet certain requirements, including an annual earnings threshold and certain knowledge and duties criteria. Under this proposal, workers with annual

earnings as low as $22,500 who meet the additional skills and duties test would lose their minimum wage and overtime rights and protections. In effect, the proposed amendment would extend an exemption that has always excluded one category of workers – outside sales employees – from the FLSA minimum wage and overtime protections to another group of workers – insides sales employees – who have always enjoyed those protections. Far from advancing the rights or promoting these interests of these newly exempted workers, the proposed legislation would be a step backwards for most.

There is no basis for extending the exemption of "outside sales" employees to other sales workers covered by the FLSA. "Outside sales" employees are exempt from the FLSA minimum wage and overtime requirements for a very practical reason: because these employees do not work on-site, their employers have no effective way to monitor their actual work hours. Congress believed it was both unreasonable and unfair to expect employers to satisfy minimum wage and overtime requirements for employees, when employers had no practical way to know how many hours these employees worked, and no real power to control their hours. Exempting "outside sales" workers from minimum wage and overtime requirements was thus a fair and reasonable accommodation to a practical reality created by the nature of the job.

The rationale for exempting outside sales employees does not extend to the workers who would lose their existing minimum wage and overtime guarantees under this proposed legislation. Those workers are "inside sales" employees, whose hours can be readily and easily monitored. Far from enhancing the flexibility and earnings potential for these workers, as proponents of the legislation argue, exempting them from the FLSA takes away minimum wage and overtime rights they have always enjoyed, creating a real possibility that many would end up working longer for less. Simply put, this proposal is a bad deal for workers and their families.

Consequences of proposed exemption

Expanding the existing section 13(a) exemption to end the minimum wage and overtime rights for sales workers would have profound consequences for the affected workers and for their employers. But the trade is far from even. In exchange for losing their guaranteed minimum wage and overtime protections, employees would get no guarantees at all. Employers, on the other hand, would lose nothing: As long as their sales employees fell within the test spelled out in the proposed exemption, employers could impose as many work hours as they wanted, without incurring any additional mandatory wage payment obligations.

Thus, for example, as a result of the expanded exemption, employers could require their newly exempt sales employees to put in as many overtime hours as they wanted. While employees would earn commission for sales during those overtime hours, they would earn nothing if they made no sales. In short, they would be working for free. Employees would incur all the costs – longer hours for their employers, with less pay from them – while the employers would get all the benefits – longer hours from their employees, with no added pay obligations to them.

Indeed, once minimum wage and overtime protections were stripped away from sales employees, their employers could unilaterally impose regular work weeks that routinely exceeded 40 hours. As long as sales employees met the earnings, skills and duties threshold outlined in the proposed legislation, their regular work weeks could be just as short, or just as long as their employers wanted. Under this proposal, an employee who normally works 40 hours each week for $22,500 a year could henceforth be required to work 45 hours each week, for the same $22,500 a year. As a result of losing minimum wage and overtime protections, the employee's hourly pay rate would drop by more than $1.00, from $10.81 to $9.61. This would be a perverse and anomalous result, completely contrary to the purposes of the Fair Labor Standards Act.

Eliminating employers' obligation to provide overtime pay for sales workers also robs these workers of the only tool they have, outside of collective bargaining, to discourage their employers from imposing excessive work hours. Unless they are represented by unions, workers have no protected right to refuse to work whenever their employers want them to, or for any number of hours their employers require. One purpose of the FLSA's time-and-a-half overtime pay requirement is to act as a check on employers' imposition of excessive work hours. Removing the minimum wage and overtime protections sales workers currently enjoy eliminates this check altogether.

The proposed amendment to the FLSA would also encourage employers to manipulate sales workers' job duties and/or pay levels in order to take advantage of the new exemption. Employers would have a powerful incentive to boost the pay of sales employees slightly or to modify their duties somewhat, in order to bring these workers within the new exemption and end their minimum wage and overtime rights. Thus, the new exemption would not only immediately affect workers who already meet the requirements spelled out in the bill; it would eventually affect countless additional sales workers, who without any significant change in duties or pay, would suddenly find that they had become exempt employees.

Affected Workers

Estimates of the numbers of workers immediately affected by the proposed legislation vary. According to an earlier Department of Labor analysis, as many as 1.5 million sales workers would lose their minimum wage and overtime protections if this legislation were passed. Our own analysis of 1998 Bureau of Labor Statistics data indicates that the number could be even greater, as many as 2.5 million workers. And as we noted above, many workers not immediately covered by the legislation would, with little change in their actual work or wages, nevertheless eventually become subject to the exemption.

While it is unlikely that routine telemarketers would be covered by the proposed exemption, numerous other sales workers in relatively low paid, low skilled positions would be. These include individuals who sell mortgage banking or other financial services, Yellow Pages advertising, medical or scientific equipment and medications, and workers engaged in wholesale distribution and sales. Among AFL-CIO affiliates, the Communications Workers Union (CWA) estimates that as many as 50,000 of its

members selling yellow page ads and telecommunications products and services could lose their minimum wage and overtime protections; UNITE estimates that as many as 5,000 sales workers it represents could be covered by the proposal; the International Brotherhoods of Teamsters estimates that potentially, as many as 90,000 of its members could be affected; and the Newspaper Guild (now a part of CWA) believes that 10,000 of its members (and as many as 100,000 workers in the newspaper industry overall) could lose out, if this proposal passed. These figures are the tip of the iceberg, since in every instance, there are many more unrepresented workers in similar positions who would be affected by the proposed amendment. Of course, those workers who are represented by unions would at least have the safeguard of collective bargaining to help them retain rights they might otherwise lose were this proposal enacted. Most workers, however, would have no such protection.

Among the workers who would lose their minimum wage and overtime rights, many have relatively low earnings, and many are women. Contrary to the notion that the proposed exemption largely affects high wage earners, the proposal would strip away bedrock wage and hour guarantees from employees who depend upon these protections to support themselves and their families. Employees earning as little as $22,500 would be subject to the expanded exemption for sales workers. That annual earnings figure is less than the 2001 food stamps eligibility threshold of $22,945. It is also well below the $32,185 livable wage (1997 dollars) that the National Priorities Project has calculated a family of four needs each year to meet its basic needs. The hourly wage resulting from the proposed earnings threshold, $10.81, is more than $2.00 less than average hourly earnings in 1999; and it is also less than average hourly wages for sales workers that year. Indeed, at the current minimum wage, the earnings threshold prescribed by the legislation falls almost $1,000 below average annual wages for 1998.

Thus, the workers who would lose their minimum wage and overtime rights as a result of this legislation are not simply better paid workers whose jobs may have changed as a result of technological advances. They are, instead, primarily average workers who need and depend on the minimum wage and overtime protections they have to support themselves and their families; who need to retain these rights and protections as an ironclad assurance that they are entitled to be paid for the hours they work; and who need the protection the overtime pay requirement provides to act as a brake on excessive work hours, which they are otherwise powerless to refuse.

Conclusion: For the reasons set out above, the AFL-CIO opposes the proposed Sales Incentive Compensation Act, which would end minimum wage and overtime protections for millions of sales employees.

Workers certainly have minimum wage and overtime problems, but the problem is not with their fundamental right to earn the minimum wage and overtime pay. The problem is that, even though the FLSA has been around for more than 60 years and even though it confers bedrock rights and protections that are the very cornerstone of the nation's worker protection safety net, FLSA violations persist. In 1999 alone, the latest year for which data is available, the Department of Labor collected more than $100 million dollars in back wages for more than 220,000 employees who experienced minimum wage and overtime pay violations.

Before we take away minimum wage and overtime protections from even more workers, we need to do a much better job of making sure that the rights workers now have are respected and fully protected. The AFL-CIO believes that protecting workers' existing rights, not ending them, is a top national priority. And we believe that should be a first order of business for this Subcommittee.

Sources

Modifying Minimum Wage and Overtime Pay Coverage for Certain Sales Employees Under the Fair Labor Standards Act, Congressional Research Service, December 9, 1999.

State of Working America, 2001-01, Economic Policy Institute (September 2001).

U.S. Department of Labor, Bureau of Labor Statistics, *National Compensation Survey: Occupational Wages in the United States, 1998,* December 1999.

U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Employment Statistics 1998*, AFL-CIO analysis (2000).

Workers Say 'No Deal' to a Raw Deal: A Minimum Wage Hike for Millions Should Not Be Tied to Lower Pay and Longer Hours for Millions More, AFL-CIO, September 2000.

Working Hard, Earning Less: The Story of Job Growth in America, National Priorities Project and Jobs with Justice, December 1998.

Table of Indexes

Chairman Norwood, 2, 4, 5, 8, 9, 11, 13, 14, 15, 18, 20, 25, 26, 28, 30, 31
Mr. Frost, 4, 5
Mr. Isakson, 26, 27, 28
Mr. Keller, 18, 19
Mr. Kucinich, 23, 24, 25, 30, 31
Mr. Macdonald, 17, 18, 19, 20, 21, 22, 24, 26, 27, 28, 30
Mr. Owens of New York, 16, 17, 18, 28, 31
Mr. Schenauer, 13, 14, 15, 19, 23, 24, 25, 27, 30
Mr. Tiberi, 14
Mrs. Biggert, 21, 22, 23
Mrs. Mink, 20, 21
Ms. Enenmoh, 14, 15, 16, 17, 18, 21, 22, 25, 30
Ms. Owens, 15, 22, 23, 28, 29, 31
Ms. Woolsey, 28, 29