

**Not Enough Hours in the Day: Work Hour Insecurity
and a New Approach to Wage and Hour Regulation**

Charlotte Alexander¹ and Anna Haley-Lock²

12/10/13

DRAFT: PLEASE DO NOT CITE WITHOUT AUTHOR PERMISSION.

¹ The authors are listed alphabetically, and have made equal contributions to the manuscript. Assistant Professor of Legal Studies, Department of Risk Management and Insurance, J. Mack Robinson College of Business, Georgia State University; Georgia State University College of Law (by courtesy).

² Associate Professor, School of Social Work, University of Wisconsin – Madison. Please address correspondence to Prof. Haley-Lock at haleylock@wisc.edu, 1350 University Ave., Madison, WI 53706.

The authors wish to thank Laura Dresser, Francoise Carre, and Conrad Ciccotello for their input on an earlier version of this manuscript, and Stephanie Luce and the Retail Action Project for sharing their unique new dataset.

**Not Enough Hours in the Day: Work Hour Insecurity
and a New Approach to Wage and Hour Regulation**

Abstract

When it was passed, the 1938 Fair Labor Standards Act sought to address the “evils” of underpay and overwork by establishing a minimum wage and requiring premium overtime pay. However, today’s low-wage, hourly workers more often face underwork than overwork. In this paper, we examine the scope of the problem of work hour insecurity, particularly employers’ practice of sending workers home early from scheduled shifts. We assess tools for addressing the resulting income and scheduling instability, principally state “reporting pay” laws. We evaluate the laws’ capacity to promote work hour security, and consider paths for strengthening such protections in law.

KEYWORDS: low-wage employment, employment policy, human resource management

Not Enough Hours in the Day: Work Hour Insecurity and a New Approach to Wage and Hour Regulation

Introduction

When Congress enacted the Fair Labor Standards Act (FLSA) in 1938, its stated goal was to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers” (FLSA, 29 U. S. C. § 202). The statute took a twofold approach to achieving this goal: setting a minimum hourly wage and mandating premium overtime pay for hours worked over 40 in a workweek.¹ At the time, this approach made sense. The assumption was that work hours were plentiful, even oppressively so, but that workers’ time was undervalued. Against this backdrop of overwork and underpay, setting a minimum hourly wage rate and disincentivizing the use of exploitatively long work hours would seem to achieve the minimum standard of living at which the statute was directed. The overtime requirement placed appropriate controls on work hours; the hourly minimum wage, assuming adequate work hours, assured sufficient take-home pay.

The FLSA remains the main source of wage and hour protection for workers. Though states and localities may set higher minimum wage or overtime rates, only 18 states and the District of Columbia have done so, leaving most American workers covered by the FLSA’s wage and hour requirements (National Conference of State Legislatures, 2013). In addition, political advocacy aimed at ending working poverty has adopted the FLSA’s minimum wage-maximum hours framework. Campaigns to raise the minimum wage and enact higher “living wage” ordinances, for example, assert the importance of the hourly wage in the fight against poverty, using a formula for calculating employment income that assumes access to 40 hours of work per week (Stafford 2013; Universal Living Wage, 2013). Worker advocates also condemn the

widespread “misclassification” of workers as exempt from the FLSA’s overtime guarantee, arguing that these workers are being subject to excessive work hours without appropriate compensation (National Employment Law Project, 2009). Embedded in these efforts is the same assumption that underpins the FLSA: that ample work hours are available.

However, the reality faced by many low-wage jobholders today is no longer one of *overwork*, but rather of *underwork*. With the decline of U.S. manufacturing over the last several decades and dramatic expansion of the labor-intensive and minimally unionized service sector, employers of hourly service workers have become increasingly oriented toward reducing their human resource investments to contain business costs. Further fueled by pressures from the extended economic downturn, many firms seek to align labor costs tightly with unpredictable customer demand, achieved by utilizing their prerogative of staffing and scheduling “flexibility.” In addition to reducing numbers of permanent and full-time jobs, employers are relying on “just-in-time” scheduling to make finely tuned adjustments to employees’ hours during the week, day, and even shift. These include sending workers home before the end of a scheduled shift, calling them in unexpectedly for non-scheduled work, or posting workers’ schedules at the last minute, only to change them again in response to fluctuations in customer traffic.

For today’s low-wage, hourly workers, then, scarce, unstable, and unpredictable work hours are the new norm. This places many in a work-life bind: not complying with employers’ changing scheduling demands places workers at risk of having their hours reduced or even being terminated, but going along with the fluctuating work hours jeopardizes their dependent care arrangements and family routines; efforts to budget and save, as well as to supplement their earnings by taking second jobs; and their eligibility for public assistance programs, which require beneficiaries to work a minimum number of hours per week (Henly, Waxman, & Shaefer, 2006;

Lambert, 2008; Lambert, et al., 2012). With its underlying assumption of plentiful work hours, the FLSA contains no minimum hours mandate or any requirement that employers establish regular, predictable work schedules.

However, eight states and the District of Columbia have passed “reporting pay” laws, also known as “show up pay” laws, that attempt to remedy one aspect of work hour insecurity: employers’ practice of sending workers home early before the end of scheduled shifts in response to slow customer traffic.² These laws require employers to pay for a guaranteed number of hours, thereby imposing a financial penalty on firms using the early send-home form of just-in-time scheduling. Though the effects and efficacy of these laws for smoothing workers’ hours and income have never been studied, they may provide a model for amending the FLSA to address the realities of contemporary low-wage, hourly work.

In the current paper, we first review the historic context of the FLSA to reveal the statute’s foundational assumptions about work hour availability. Using a new dataset on New York City retail employees, we then investigate the scope of the problem of work hour insecurity, focusing particularly on the early send-home practice. We next examine several institutional responses to work hour insecurity to date, attending in particular depth to state reporting pay laws as a response to employers’ sending their workers home early. Drawing on all of these analyses, finally, we identify limitations of and prospects for the reporting pay tool as well as other strategies for remedying work hour insecurity, and thus achieving the “minimum standard of living” envisioned by the FLSA.

Historical Context of the Fair Labor Standards Act

In 1936, before he introduced the legislation that would eventually become the Fair Labor Standards Act, President Roosevelt was passed a note by a young girl while at a campaign stop in Bedford, Massachusetts. It read:

I wish you could do something to help us girls.... We have been working in a sewing factory,...and up to a few months ago we were getting our minimum pay of \$11 a week.... Today the 200 of us girls have been cut down to \$4 and \$5 and \$6 a week (Grossman, 1978).

In response to a reporter's question during that stop, President Roosevelt commented, "Something has to be done about the elimination of child labor and long hours and starvation wages" (Grossman, 1978). During the subsequent debate in Congress over the FLSA's passage, a Congressman lamented what he viewed as employers' exploitative labor practices, such as "canning factories working . . . women 10 hours a day for \$4.50 a week" (Grossman, 1978). Similarly, the Commissioner of Labor Statistics testified to a congressional committee that "during depressions, the ability to overwork employees, rather than efficiency, determined business success" (Grossman, 1978). The FLSA's central requirements of overtime pay and a minimum hourly wage responded directly to images such as these of low pay and long hours.

The FLSA's minimum wage-maximum hours approach also has its roots in earlier attempts by the states to set wage floors and hours ceilings. The first state law mandating an hourly minimum wage was passed by Massachusetts in 1913, followed quickly by additional states (Samuel, 2000). In addition, the labor movement had long attempted to set an upper bound on work hours. Maximum daily or weekly work hours requirements appeared in most union contracts in the skilled trades by as early as 1840, nearly one hundred years prior to the passage of the FLSA (Samuel, 2000). The FLSA itself was preceded by various federal attempts to set minimum wages and maximum hours, in both jobs under federal contracts (the Walsh-Healey

Public Contracts Act of 1936) and more broadly across private industry (the National Industrial Recovery Act of 1933).

The FLSA thus reflects that period's public concern with underpay in a context of routine, extreme overwork, and incorporates the wage floor and hours ceiling model used by earlier state and federal wage and hour laws. The law was not designed to respond to hours scarcity or instability; in the words of one of the earliest U.S. Supreme Court decisions to consider the statute's constitutionality, "[r]eduction of hours was a part of the plan from the beginning" (Overnight Motor Transp. Co., 1942). Yet for many workers in today's service sector, overwork have been displaced by a variety of employer strategies for limiting workers' hours that are not covered by the FLSA's approach to wage and hour regulation.

Work Hour Insecurity in Today's Low-Wage Jobs

Though strategies such as the early send-home practice predate the current economic downturn, their use appears to have accelerated as firms have sought additional ways to cut labor costs, creating a situation of inadequate, variable, and unpredictable work hours (Carre & Tilly, 2009; Lambert, et al., 2012).

Inadequate Work Hours

U.S. workers at the bottom of the labor market are increasingly scheduled for fewer hours than they wish to work. In a growing practice that has expanded involuntary underemployment among hourly workers, firms have proliferated part-time positions that provide no promise of a specific number of hours of work per week (U.S. Bureau of Labor Statistics, 2011). According to the 2008 National Study of the Changing Workplace, roughly half of low-wage, part-time hourly employees working in standard schedules, and one quarter of those with nontraditional night or evening hours, wanted more hours than they were assigned (Watson & Swanberg, 2012).

Similarly, Swanberg's CitiSales study found that 43 percent of part-time workers – and one third of full-time – wished they had more hours (Watson & Swanberg, 2012). Involuntary part-time work has also grown over the course of the economic downturn, more than doubling between 2007 and 2012 from 3.6 to 7.8 percent among women in the workforce and from 2.4 to 5.9 percent among men (Glauber, 2013). Since 2006, the retail and wholesale sector alone has cut one million full-time jobs and added 500,000 part-time jobs, and major retailers have shifted from once employing 70 to 80 percent of their workers in full-time status to categorizing at least 70 percent of jobs as part-time (Shierholz & Mishel, 2009; Greenhouse, 2012).

Even “full-time” status no longer guarantees hourly service employees that they will be scheduled as full-time (Cauthen, 2011). What was listed as a full-time job at the time of hire may turn out to be a part-time job in practice, as employers cut workers' actual hours below full-time levels. Employers have also shortened the length of work shifts, with many utilizing new computerized scheduling “optimization” to maximize their flexibility to cover 24-7 operating hours while minimizing overtime pay costs (Greenhouse, 2012; Presser, 2005). Work shifts that in the past have averaged six to eight hours have shrunk to just two or three (Greenhouse, 2012; Luce & Fujita, 2012). Employees thus face having to come in for more shifts and days in order to accumulate sufficient hours.

Variable and Unpredictable Work Hours

The above strategies generate inadequate but not necessarily variable or unpredictable work hours. Firms also change their employees' work days and shifts from one week to the next. According to Swanberg's CitiSales study, half of employees experienced consistent days of work but shift times that fluctuated within those days, while 59 percent faced weekly changes in work days, shift times, or both (Swanberg, et al., 2009). Employers magnify the disruptive effects of

work hour variation, further, by posting schedules at the last minute (for workers who do have schedules) and adjusting them after posting. As one low-income mother working as a chain restaurant server explained in a study by Haley-Lock and Posey-Maddox (under review), she typically received her work schedule on the Friday immediately before the Saturday when it became effective, “and even then, it was only a guesstimate.”

An extreme example of this practice is employers’ placing workers on “on call” status. In this case, employees are never formally scheduled, but instead required to call in or be phone-accessible to their employer during a specified period on a given day (Alexander, Haley-Lock & Ruan, under review; Freleng, 2012; Luce & Fujita, 2012). These real-time approaches to scheduling give firms maximum time flexibility for anticipating staffing needs, but come at the expense of employees who may be trying to combine second jobs, schooling, dependent care arrangements, and family and community commitments, as well as anticipate and plan around future household income (Haley-Lock & Posey-Maddox, under review; Henly, et al., 2006).

Firms also make real-time adjustments to staffing levels in response to variation in customer traffic. Aided again by computerized scheduling and sales monitoring software, an employer may send one or more workers home when customer traffic is slow, or call off their shifts altogether, to keep staffing levels tightly linked to sales by the day, shift, or shorter time increments. Haley-Lock (2011, 2012) found, for example, that operators of independently-owned and national chain restaurants in suburban Seattle and Chicago reduced staffing levels throughout the day to achieve pre-determined ratios between labor and customer sales, making adjustments as frequently as every 30 or even 15 minutes. Moreover, according to the 2008 National Study of the Changing Workforce, between 20 and 30 percent of workers experience being laid off or having hours reduced during slow periods (Watson & Swanberg, 2012).

These trends stand in notable contrast to another, well-investigated form of scheduling “flexibility”: when employers accommodate their workers’ requests for “reduced hour” schedules in order to support their work-life fit (Lambert, et al., 2012). Unlike such employee-initiated arrangements, employers’ use of part-time and contingent employment and just-in-time scheduling has emerged irrespective of workers’ preferences, creating a situation of inadequate, variable, and unpredictable work hours (Tilly, 1996; Lambert, et al., 2012; Watson & Swanberg, 2012). In the current paper, we focus on the early send-home practice to facilitate our examination of state reporting pay laws and similar union contract provisions and voluntary employer hours guarantees, but we appreciate that all of these destabilizing strategies can work in tandem to place workers’ work-life routines as well as earned income at risk.

Work Hour Insecurity among Retail Employees

To further illuminate the scope of the just-in-time scheduling problem, particularly the early send-home practice, we completed original analyses of a uniquely detailed new dataset on retail employees. In Fall 2011, staff of the Retail Action Project, in collaboration with Stephanie Luce at City University of New York, surveyed individuals who were employed in retail stores with 100 or more employees per site, including chains with a minimum of three locations in the city, across ten retail segments: furniture, home furnishings, electronics and appliances, home centers, cosmetics and beauty supply, clothing, shoes, books, office supply, stationery, and department stores. A total of 435 employees participated, representing 230 stores from across New York City’s five boroughs (Luce & Fujita, 2012 offers additional methodological information for the study).³ The project gathered extensive data on employees’ experiences with firms’ allocations of their work hours, including how often they had been sent home early from a work shift, scheduled for fewer hours than desired, scheduled on short notice, called and told to

stay home from a shift (including same-day cancellations), and required to be available to be called into work. Participants were also asked to report the minimum, maximum and average weekly hours for which they had been scheduled for work.

Our analyses of these data reveal the early send-home practice to be widespread and utilized by employers as part of a constellation of strategies for managing staffing levels “just in time.” Table 1 summarizes the extent of insecurity in retail workers’ hours and the co-occurrence of hours-destabilizing practices within this segment of the lower-wage, hourly workforce. Thirty-six percent of respondents holding non-managerial retail positions reported getting sent home early from a scheduled shift “sometimes,” “usually,” or “always” versus “rarely” or “never,” with 54 percent indicating they had been sent home early at least once.

INSERT TABLE 1 HERE

Further, the early send-home practice did not occur in isolation, but was one of a cluster of destabilizing practices experienced by survey respondents. Workers who were at least “sometimes” versus “never” or “rarely” sent home were at significantly greater risk of encountering other types of employer-driven hour insecurity. This “sent home” group was roughly twice as likely to be called and told to stay home from a scheduled shift (33 versus 16 percent) and to have a manager reduce or otherwise change their hours (60 versus 33 percent); three times as likely to have a same-day shift cancellation (28 versus 9 percent); and significantly more likely to be required to be available to be called into work at the last minute (53 versus 41 percent; Table 1). Workers in the “sent home” group also reported that they had experienced a mean of 2.34 schedule-destabilizing practices “at least sometimes,” versus a mean of only 1.53 such practices among workers “rarely” or “never” sent home.

Perhaps unsurprisingly, employees who had at least “sometimes” been sent home early also indicated being scheduled for fewer hours than they would like (69 percent, versus 40 percent of their counterparts who were “rarely” or “never” sent home early), reporting a mean of 21.9 hours per week as compared to 25.8 hours for their counterparts. Workers regularly sent home also encountered significantly greater fluctuation in their work hours from week to week, an average of 16 hours versus 12 among those never or rarely sent home. This final figure is particularly telling, as even the relatively better off group – those who were “rarely” or “never” sent home early – experienced *average* work hour fluctuations of twelve hours per week.

As with other just-in-time scheduling practices examined by the survey, early send-homes enable firms to “use hours as shock absorbers” in their attempts to minimize labor expenditures (Carre & Tilly, 2009, 11-12). Yet the FLSA, with its focus on reducing exploitatively long work hours and setting an hourly wage floor, provides no remedy for the resulting disruption in workers’ income and work hour expectations.

Institutional Responses to Work Hour Insecurity

In the absence of FLSA coverage, three other institutional responses have emerged that address work hour insecurity: union-negotiated collective bargaining agreement terms securing hour protections, private employers’ voluntary provision of guaranteed minimum hours, and state reporting pay laws.

Unions

Within certain industries and workplaces, unions have played a strong role in pressing for employers’ adoption of work hour protections through collective bargaining agreements (Alexander, et al, under review; Appelbaum and Gregory, 1990). Indeed, union-negotiated employment contracts likely represent the earliest source of protection for workers against the

income impacts of the early send-home practice. “Reporting pay” allowances were included in United Auto Workers contracts as early as 1939 (Reuther, 1964). By 1984, the Bureau of National Affairs reported that 72 percent of collective bargaining agreements contained reporting pay protections (p. 869, footnote 14, and 871, footnote 20). Under these provisions, workers who come to work when scheduled are guaranteed a minimum number of hours of pay, regardless of whether there is actually work for them to perform (Abrams & Nolan, 1984).

In the only previous scholarly work to have addressed union contracts’ guaranteed pay provisions, Abrams and Nolan describe the genesis of union contract reporting pay requirements. Historically, employers disregarded the value of employees’ non-work time, often waiting to inform workers of shift cancellations until the workers actually reported to the job site. Reporting pay requirements in union contracts were designed to respond to the “unfairness of [the resulting] uncertainty” by shifting the risk of doing business from the worker back onto management (Abrams & Nolan, 1984, 869).

While collective bargaining agreements provide some protection against the disruption caused by the early send-home practice, low levels of unionization within the service industry render them of limited relevance to today’s front-line service workers (Wial, 1993). For example, union density in the retail trade and leisure and hospitality industries stood at just 5.2 and 3.2 percent of American workers in 2012 (U.S. Bureau of Labor Statistics, 2013d). As a result, voluntary policies adopted by some private employers and state laws that apply regardless of a worker’s union status assume greater importance in addressing the problem of work hour insecurity within service sector employment.

Private Employers

Countering the trend toward just-in-time scheduling, some firms have elected to offer comparatively generous minimum work hour guarantees. These policies essentially function as voluntary adopted reporting pay requirements, with employers committing to provide work or wages (even if not worked) for all promised hours. Few data exist on the extent to which service-sector employers provide this benefit, however. Among non-managerial Retail Action Project survey respondents, 21 percent reported that they “rarely” or “never” experienced in just-in-time scheduling, but it is not known whether any of the firms represented affirmatively guaranteed a minimum number of work hours (analyses available from authors).

The big box retail chain, Costco, has voluntarily adopted a company policy guaranteeing a minimum of 24 hours per week to regular part-time employees and 38 for regular full-time employees, and sets a goal of employing roughly 50 percent of its store workforce in full-time status (Haley-Lock & Lambert, 2013). Costco also pays a higher starting wage than the industry standard and caps the number of “limited part-time,” contingent status employees per store. This combination of a relatively high hourly wage and minimum hours guarantee can be powerful for increasing take-home income and reducing levels of “working poverty” among service industry employees. It is unclear, however, whether such voluntary programs are scalable across the service sector.

State Reporting Pay Laws

Finally, a little known set of state reporting pay laws may hold promise for stabilizing work hours by targeting employers’ use of the early send-home practice. Seven states – California, Connecticut, Massachusetts, New Hampshire, New Jersey, New York and Rhode Island – and the District of Columbia have enacted reporting pay laws. (Oregon’s law applies only to minor-age employees (Or. Admin. R. 839-021-0087, 2013). As in union contracts, these

laws target schedule and income instability by requiring employers to pay for a minimum number of hours of an employee's scheduled shift, whether worked or not.

As summarized in Table 2, state reporting pay laws vary along several dimensions, including most centrally the minimum number of hours of pay an employee must receive after reporting to work (between one and four) and the required rate of reporting pay (minimum wage or an employee's regular rate, if higher). The laws also differ in exempting particular sectors or industries. In four states and the District of Columbia, for example, public and nonprofit, charitable and educational sector organizations are freed from having to provide reporting pay in any circumstance; in Connecticut, all employers not operating as beauty shops or in laundry, cleaning and dyeing, mercantile, and restaurant and hotel industries are excluded.

INSERT TABLE 2 HERE

The laws grant covered employers several additional exit options from having to provide reporting pay. When a worker is sent home early due to an "act of God" such as extreme weather that cuts power to a company facility, no reporting pay is due (Alexander, et al., under review). An additional exemption is available to employers who give advance notice of lack of work, though statutes often prescribe in great detail the length and form of such notice (Alexander, et al., under review). Employers are also permitted to ask for volunteers to go home early from a shift, with no reporting pay owed. Finally, three states – California, Massachusetts, and New York – along with the District of Columbia mandate reporting pay only for workers who are scheduled for shifts of a certain minimum length (Table 2).

Assessing the Effectiveness of Reporting Pay Laws

While not outlawing early send-homes, reporting pay laws were designed to disincentivize the practice while also helping smooth workers' schedules and income when they are sent home early. Indeed, in a state with robust reporting pay requirements, one would expect employers to retain employees during slower shifts rather than sending them home early, perhaps having them complete side work (e.g., deep cleaning, restocking, or if employees have been adequately cross-trained, providing assistance in other, busier departments of a large store). This is the response that Haley-Lock (2011) observed in chain restaurants in Vancouver, Canada, which operate under a provincial reporting pay law. Alternatively, an employer would send workers home early but pay for the legally mandated minimum number of hours, so that employees would keep more of their anticipated income from a given work shift. Whether reporting pay laws actually work as designed, however, depends on two key factors: the magnitude of the cost imposed by the reporting pay mandate and the mandate's enforceability.

Financial Impact

A threshold empirical question in assessing reporting pay laws' effectiveness is whether they impose a costly enough deterrent to dissuade employers from using the early send-home practice. The strength of the disincentive varies across reporting pay jurisdictions, a function of the number of hours of pay and hourly wage rate required, the industries covered versus exempted, and the length of a scheduled work shift necessary to trigger the reporting pay requirement (Table 2).

To help illuminate those contextual differences, Table 3 simulates the reporting pay, in two scenarios, that is due to a retail sales worker earning the median wage in the largest metropolitan area in each state with a reporting pay law. In the first case, an employee is

scheduled for a six-hour shift and sent home after working for two hours. In the second, the worker is scheduled for just three hours but also sent home after working for two. These calculations reveal notable cross-state differences in the costs that reporting pay laws impose on employers. In New Hampshire and New Jersey, no reporting pay would be due in either scenario. In California and New York, reporting pay would disappear for the shorter, three-hour shift but would be owed for the longer one. In Connecticut, workers in laundries and beauty shops could receive \$22.44 in reporting pay for the six-hour shift and \$11.22 for the three-hour shift, but those in other occupations would not qualify for any reporting pay in either scenario. In Massachusetts and Rhode Island, employees would be eligible for modest reporting pay across both shift lengths: one hour at the minimum wage and median retail wage, respectively.

INSERT TABLE 3 HERE

These simulations show that reporting pay laws may impose only a limited financial burden on employers, while creating a strong incentive for firms to keep scheduled shifts short. In five of the eight jurisdictions, no payment would be due for an early send-home after an employee has worked for two hours of a scheduled three-hour shift, while the employee would be owed reporting pay in six of the eight states after working for two hours of a six-hour shift.

Enforcement

Like any employment law, the strength of the protection offered by reporting pay laws depends on not only the costs they impose, but also the effectiveness of enforcement, which plays an important role in the likelihood of employer compliance. Though information on reporting pay violations is extremely limited, our analyses of the Retail Action Project data found that among respondents reporting that they had been sent home early at least once, less

than one third said that they “always” received reporting pay, while 35 percent “never” did (analyses available from authors; Luce & Fujita, 2012). In addition, lawsuits by workers challenging employers’ failure to provide reporting pay are rare (Alexander, et al., under review).

There are several reasons to expect both significant employer non-compliance with and under-enforcement of reporting pay mandates (Bernhardt, et al., 2009). Our simulations in Table 3 reveal the complexity of calculating reporting pay, including tracking employees’ worked and non-worked hours, which in several states are paid out at different wage rates. Well-intended firms, and particularly smaller employers without a time clock system or automated payroll processing software, may understandably err.

Financial penalties for reporting pay violations are also modest. Violating employers do not face the prospect of paying double damages for unpaid wages, as under the FLSA, or paying the plaintiffs’ attorneys’ fees, as under most federal employment statutes. Instead, violating employers must merely pay their employees the reporting pay due, perhaps with interest. As Table 3 illustrates, these figures may be small enough that compliance devolves into merely one of several considerations employers take into account in managing the costs of running a business (Bernhardt, 2012; Bernhardt, Spiller, & Polson, 2013).

Finally, the current U.S. approach to employment regulation relies heavily on workers to enforce their own rights by filing lawsuits, rather than on government inspections, investigations, and enforcement actions. Low-wage, front-line workers predictably encounter many significant barriers in trying to exercise their employment rights, including a lack of time and money, lack of legal knowledge, language barriers or lack of legal immigration status, and fear of employer retaliation (Alexander & Prasad, forthcoming; Bernhardt, 2012).

Unintended Consequences

In addition to their limited financial impact and low enforcement levels, reporting pay laws fail to guard against several employer reactions that could further jeopardize employees' work hour security. First, by allowing employers to request volunteers to leave work shifts early and then exempting those workers from the reporting pay requirement, the laws may incentivize employers to coerce workers into "volunteering." When merely getting hours "is the new bonus," employees may feel pressure to cooperate in their own reduction of hours in the near term in the hope of getting more work hours later (Luce & Fujita, 2011, 15). The "advance notice" exception, which exempts employers from reporting pay obligations if they reduce or cancel a work shift with sufficient notification to workers, is another point where the laws' protections might break down. As Abrams and Nolan (1984, 894) observed of similar provisions in union contracts, "management [may be encouraged] to 'jump the gun' and cancel work rather than incur liability under the guarantee provision."

Still more worrisome for workers' scheduling stability, employers can avoid reporting pay obligations by shortening the lengths of shifts they schedule or more dramatically by abandoning most advance scheduling in favor of requiring workers to be on call to get their hours (Alexander, et al., under review). These possibilities echo the trend among American services firms toward reduced shift lengths (Greenhouse, 2012; Table 5). Reporting pay laws may therefore produce the perverse effect of underemployment, as firms seeking to comply with the law yet maintain scheduling flexibility may schedule workers for ever shorter shifts, so long as they have the freedom to call workers in at the last minute (Alexander, et al., under review; Neumark & Wascher, 2007).

Conclusion

At 75 years, the FLSA remains a valuable source of workplace rights. However, its foundational assumption about the availability of abundant, even excessive, work hours may be

misplaced in today's world of inadequate, variable, and unpredictable schedules. To be sure, raising the minimum wage and enforcing overtime requirements are essential to the continuing project of improving the conditions of low-wage work and confronting working poverty. Yet these strategies are no longer sufficient for achieving "a minimum standard of living" for many low-wage, hourly employees (FLSA, 29 U.S.C. § 202).

The reporting pay tool, embodied in state laws and union contracts and reflected in spirit in some firms' voluntary minimum hours guarantees, represents another approach to wage and hour regulation – and a possible model for a FLSA amendment. However, existing reporting pay laws face distinct limitations in their current forms. Weaknesses in the laws' mandated reporting pay levels, enforcement mechanisms, and penalties for non-compliance render them relatively toothless and invite employer work-arounds that undermine the laws' effectiveness. While the laws represent a step in the right direction by attempting to disincentivize employers' use of early send-homes, an effective amendment to the FLSA would need to take on, in much stronger terms, the multiple facets of just-in-time scheduling and the work hour insecurity that results.

Such an amendment would not preempt the existing reporting pay protections in state law, union contracts, and private employer policies. Instead, it would create a uniform, national set of minimum requirements around scheduling and work hour security, including mandating advance work schedule assignments, minimum advance notice of those schedules, and minimum hours of pay for scheduled shifts. The FLSA's existing double damages and attorneys' fee requirements would make violations relatively costly, and the statute's retaliation protections would shield workers who enforce their rights from employer reprisals (FLSA, 29 U.S.C. § 216(b); 29 U.S.C. § 215(a)(3)). To further increase compliance, these new requirements should be accompanied by targeted enforcement by the U.S. Department of Labor in industries found to

be more statistically likely to violate (Weil, 2010). The federal government can further bolster these protections by inserting them in government contracts and grants, and by modifying the implementation of TANF's minimum work hour requirements to reflect the frequent employer-drivenness of work scheduling (Falk, 2013).

Admittedly, any proposal to expand workplace regulation at this time in American politics, general or targeted, would encounter stiff opposition by a variety of interest groups, as lawmakers are facing historically exceptional pressure to preserve employer autonomy over setting the terms of employment. Indeed, a FLSA amendment to increase work hour security would run counter to the recent wave of state legislative efforts to eliminate public sector employee unions, expand union-weakening "right to work" laws, and at the federal level, to loosen rules for employer provision of overtime pay (Meola, 2013; Lafer, 2013). Nevertheless, recent state and local campaigns around paid sick and family leave rights serve as examples of successful worker-protective legislative initiatives, and may create windows of opportunity for addressing problems of work hour insecurity through public policy. These campaigns have succeeded in shifting concerns about minimum hourly wage rates toward a broader consideration of what workers realistically need in the way of sustainable take-home pay. In addition, they have begun effectively to incorporate hours guarantees into the equation, seeking to provide paid leave time by the day or longer unit of time (National Conference of State Legislatures, 2012). A movement to amend the FLSA to achieve greater work hour security in low-wage, hourly jobs could perhaps be joined with these existing efforts, combining a focus on leave policies with one on scheduling practices, in order to come closer to achieving the FLSA's goal of "a minimum standard of living necessary for health, efficiency, and general well-being of workers."

References

- Abrams, R., & Nolan, D. 1984. "Buying Employees' Time: Guaranteed Pay Under Collective Agreements." *Syracuse Law Review* 35:867-96.
- Alexander, C., & Prasad, A. Forthcoming. "Bottom Up Workplace Law Enforcement: An Empirical Analysis." *Indiana Law Journal* 89.
- Alexander, C., Haley-Lock, A., & Ruan, N. Under review. "Stabilizing Low-Wage Work: Remedies for Unpredictable Work Hours and Income Instability."
- Appelbaum, E., & Gregory, J. 1990. "Flexible Employment: Union Perspectives." In *Bridges to Retirement: Older Workers in a Changing Labor Market*, edited by P. Doeringer, pp. 130-45. Ithaca, NY: Cornell University.
- Bernhardt, A. 2012. "The Role of Labor Market Regulation in Rebuilding Economic Opportunity in the United States." *Work and Occupations* 39(4):354-75.
- Bernhardt, A., Milkman, R., Theodore, N., Heckathorn, D., Auer, M., DeFilippis, J., González, A., Narro, V., Perelshteyn, J., Polson, D., and Spiller, M. 2009. "Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities." Report by the Center for Urban Economic Development, University of Illinois-Chicago, National Employment Law Project, and University of California-Los Angeles Institute for Research on Labor and Employment.
- Bernhardt, A., Spiller, M., & Polson, D. 2013. "All Work and No Pay: Violations of Employment and Labor Laws in Chicago, Los Angeles and New York City." *Social Forces* 91(3):725-46.

- Carre, F., & Tilly, C. 2012a. "Short Hours, Long Hours: Hour Levels and Trends in the Retail Industry in the United States, Canada, and Mexico." Upjohn Institute Working Paper No. 12-183. Kalamazoo, MI: W.E. Upjohn Institute for Employment Research.
- Carre, F., & Tilly, C. 2012b. "Work Hours in Retail: Room for Improvement." Upjohn Institute Policy Paper No. 2012-012. Kalamazoo, MI: W.E. Upjohn Institute for Employment Research.
- Cauthen, N. 2011. "Scheduling Hourly Workers: How Last Minute, "Just-in-Time" Scheduling Practices are Bad for Workers, Families and Business." Demos. Retrieved from: http://www.demos.org/sites/default/files/publications/Scheduling_Hourly_Workers_Demos.pdf.
- Fair Labor Standards Act, 29 U.S.C. §202 (1938).
- Falk, G. 2013. "The Temporary Assistance for Needy Families (TANF) Block Grant: A Primer on TANF Financing and Federal Requirements." Congressional Research Service. Retrieved from: <http://www.fas.org/sgp/crs/misc/RL32748.pdf>.
- Freleng, M. 2012. "Retail Workers Fight 'Just in Time' Scheduling." *Women's eNews*, November 12. Retrieved from: <http://womensenews.org/story/equal-payfair-wage/121109/retail-workers-fight-just-in-time-scheduling#.Ud9Lm20yhvI>.
- Glauber, R. 2013. "Wanting More but Working Less: Involuntary Part-Time Employment and Economic Vulnerability." Issue Brief No. 64, Carsey Institute, Summer..
- Greenhouse, S. 2012. "A Part-Time Life, As Hours Shrink and Shift." *The New York Times*, October 27.
- Grossman, J. 1978. "Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage." Retrieved from: <http://www.dol.gov/dol/aboutdol/history/flsa1938.htm>.

- Haley-Lock, A. 2011. "Place-Bound Jobs at the Intersection of Policy and Management: Comparing Employer Practices in U.S. and Canadian Chain Restaurants." *American Behavioral Scientist* 55(7):823-42.
- Haley-Lock, A. 2012. "The Structural Contexts of Low-Wage Work: Restaurant Employment Practices Across Firm Geography, Size and Ownership Status." *Journal of Poverty* 16:447-68.
- Haley-Lock, A., & Posey-Maddox, L. Under review. "Fitting It All In: The Interplay of Parental Employment and School Engagement."
- Lafer, G. 2013. "The Legislative Attack on American Wages and Labor Standards, 2011-12." Briefing Paper #364, Economic Policy Institute, October.
- Lambert, S. 2008. "Passing the Buck: Labor Flexibility Practices that Transfer Risk onto Hourly Workers." *Human Relations* 61:1203-27.
- Lambert, S., & Haley-Lock, A. 2004. "The Organizational Stratification of Opportunities for Work-Life Balance." *Community, Work and Family* 7(2):179-95.
- Lambert, S., Haley-Lock, A., & Henly, J. 2012. "Schedule Flexibility in Hourly Jobs: Unanticipated Consequences and Promising Directions." *Community, Work & Family* 15(3):293-31.
- Luce, S., & Fujita, N. 2012. "Discounted Jobs: How Retailers Sell Workers Short." Joint report of the Murphy Institute at City University of New York and the Retail Action Project. Retrieved from: http://retailactionproject.org/wp-content/uploads/2012/01/FINAL_RAP.pdf.

Meola, O. 2013. "House Passes Cantor-Backed Measure on Comp Time." *Richmond Times-Dispatch*, May 11. Retrieved from: http://www.timesdispatch.com/news/state-regional/government-politics/article_6e5a11a4-2bc6-5ed1-89cf-6196b7bc7e62.html.

Mishel, L., Schmitt, J., & Shierholz, H. 2013. "Assessing the Job Polarization Explanation of Growing Wage Inequality." Working paper of the Economic Policy Institute, January 11. Retrieved from: <http://www.epi.org/publication/wp295-assessing-job-polarization-explanation-wage-inequality/>.

National Conference of State Legislatures. 2013. "State Minimum Wages." Retrieved from: <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx>

National Conference of State Legislatures 2012. "State Family Medical Leave and Parental Leave Laws." December. Retrieved from: <http://www.ncsl.org/issues-research/labor/state-family-and-medical-leave-laws.aspx>.

National Employment Law Project. 2009. "Backgrounder: Worker Misclassification Cheats Everyone." Paper presented at the NELP 2009 Unemployment Insurance Reform Conference. Retrieved from: <http://www.nelp.org/page/-/UI/UI%20Conference/Chalife.Misclassification%20Backgrounder%20.pdf>.

Neumark, D., & Wascher, W. 2007. "Minimum Wages and Employment." IZA Discussion Paper No. 2570, January.

Oregon Administrative Regulation 839-021-0087 (2013).

Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 577-78, 62 S. Ct. 1216, 1220, 86 L. Ed. 1682 (1942).

Presser, H. 2005. *Working in a 24/7 Economy*. New York: Russell Sage.

- Reuther, W. 1964. "The United Automobile Workers: Past, Present, and Future." *Virginia Law Review* 50(73):58-103.
- Samuel, H. 2000. "Troubled Passage: The Labor Movement and the Fair Labor Standards Act." *Monthly Labor Review* December: 32-37.
- Schmitt, J. 2009. "Unions and Upward Mobility for Service Sector Workers." Center for Economic and Policy Research, April.
- Shierholz, H., & Mishel, L. 2009. "Highest Unemployment Rate Since 1983." Economic Policy Institute, June 16.
- Stafford, D. 2013. "Minimum Wage Bill Being Introduced." *Kansas City Star*, March 4.
Retrieved from: <http://www.kansascity.com/2013/03/04/4099513/minimum-wage-bill-being-introduced.html>.
- Stone, B. 2013. "Costco CEO Craig Jelinek Leads the Cheapest, Happiest Company in the World." *BusinessWeek*, 5. Retrieved from: <http://www.businessweek.com/articles/2013-06-06/costco-ceo-craig-jelinek-leads-the-cheapest-happiest-company-in-the-world#p5>.
- Swanberg, J., James, J., Ojha, M., Werner, M., & McKechnie, S. 2009. "Introduction to the CitiSales Study." Issue Brief No. 1, CitySales Study. Retrieved from: http://www.uky.edu/Centers/iwin/citisaless/_pdfs/IB1-HourlyWorkers.pdf.
- Tilly, C. 1996. *Half a Job*. Philadelphia: Temple University Press.
- Tilly, C. 2007. "Wal-Mart and Its Workers: Not the Same All Over the World." *Connecticut Law Review* 39(4):1805-23.
- Universal Living Wage (2013). Organizational website. Retrieved from: <http://www.universallivingwage.org/>.

U.S. Bureau of Labor Statistics 2008. "Involuntary Part-Time Work on the Rise." Issues in Labor Statistics, Summary 08-08, December. Retrieved from:

<http://www.bls.gov/opub/ils/pdf/opbils71.pdf>.

U.S. Bureau of Labor Statistics 2013a. "Characteristics of Minimum Wage Workers: 2012."

Retrieved from: <http://www.bls.gov/cps/minwage2012.htm>.

U.S. Bureau of Labor Statistics 2013b. "Occupational Employment Statistics Data, May 2012: Metropolitan and Nonmetropolitan area." Retrieved from:

<http://www.bls.gov/oes/tables.htm>.

U.S. Bureau of Labor Statistics 2013c. "Occupational Employment Statistics Data, May 2012: May 2012 State Occupational Employment and Wage Estimates, District of Columbia."

Retrieved from: http://www.bls.gov/oes/current/oes_dc.htm.

U.S. Bureau of Labor Statistics 2013d. "Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry." January. Retrieved from:

<http://www.bls.gov/news.release/union2.t03.htm>.

U.S. Bureau of Labor Statistics 2011. "Employment Situation Summary." February 4. Retrieved from: <http://www.bls.gov/news.release/empsit.nr0.htm>.

U.S. Department of Labor 2012. "Minimum Wage Laws in the States - January 1, 2013." Wage and Hour Division, December. Retrieved from:

<http://www.dol.gov/whd/minwage/america.htm>.

Watson, L., & Swanberg, J. (2011). "Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation." Workplace Flexibility 2010.

Weil, D. 2010. "Improving Workplace Conditions Through Strategic Enforcement." Wage and Hour Division, U.S. Department of Labor, May. Retrieved from:

<http://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

Wheary, J. 2012. "The Cure for Low-Wage Jobs." Yahoo! Finance. December 12. Retrieved

from: <http://finance.yahoo.com/blogs/the-exchange/cure-low-wage-jobs-024517988.html>.

Wial, H. 1993. "Emerging Organizational Structure of Unionism in Low-Wage Services."

Rutgers Law Review 45(Summer):671-738.

Table 1. *Employees' experiences with types of scheduling instability, by frequency of being sent home early from work shifts (N=364).*

	Employee sent home early sometimes, usually, or always (N=147)	Employee sent home early rarely or never (N=217)
Job began in part-time status	57.8*	47.9
Scheduled for fewer hours than preferred	68.7***	39.7
Fewest hours scheduled per week	21.9*** (10.3)	25.8 (11.9)
Fluctuation in weekly hours (in hours)	15.6*** (9.7)	12.0 (10.8)
a) Scheduled with less than a week's notice	54.5	54.9
b) Called and told to stay home from scheduled shift	32.6***	15.7
c) Work shift is cancelled the day of	28.0***	8.5
d) Must be available to be called in to work	53.3**	40.9
e) Manager reduces or changes hours without employee's consent	60.3***	32.6
Average number of practices a) through e) that employees encounter at least "sometimes"	2.34*** (1.4)	1.53 (1.1)

Source: Retail Action Project "Retail Survey Project" data, non-managerial employees only.

Note: * $\leq .10$; ** $\leq .05$; *** $\leq .01$. Numbers are percentages unless otherwise noted; standard deviations are in parentheses next to means where applicable. Of the 391 cases, 36 were missing job titles to indicate managerial status and omitted from these analyses. For the variable indicating frequency of being sent home early, there were 27 missing cases, leaving a final sample size of 364.

Table 2. *Summary of state reporting pay law characteristics.*

State	Minimum hours paid	Hourly pay rate	Excluded industries or organizations	Other limits
California	Half of scheduled shift (minimum 2 hours, maximum 4)	Regular rate	Counties, quasi-municipal corporations, school districts, nonprofit educational institutions	
Connecticut	4	Regular rate except in restaurants and hotels (minimum wage then)	Employers not operating in beauty shops, laundry, cleaning & dyeing, mercantile, and restaurant and hotel industries	<ul style="list-style-type: none"> • Employer exempted if notice given day before • Restaurants/hotels: 2 hours' pay • Mercantile: 2 hours' pay if shifts usually less than 4 hours (as agreed by employer and employee) • Laundry: 2 hours' pay on Saturdays if shifts usually less than 4 hours
D.C.	4 (or scheduled hours, if fewer)	Minimum wage	U.S. and D.C. governments and employers subject to Railway Labor Act	Paid only for hours worked if shifts are usually less than 4 hours
Massachusetts	3 (assuming at least 3 scheduled hours)	Minimum wage	Charitable agencies; hospitals, nursing homes, et al.; schools, universities, and colleges; summer camps	Only applies to shifts scheduled for 3+ hours
New Hampshire	2	Regular rate		
New Jersey	1	Regular rate		Employer exempted when minimum number of hours agreed on by employer and employee have been provided before start of work on day involved
New York	4 (or scheduled hours, if fewer)	Minimum wage		<ul style="list-style-type: none"> • If less than 4 hours scheduled, pay is due only for hours worked • Restaurants: 3 hours • Across 2 shifts, at least 6 hours to be paid; 3 work shifts, at least 8 hours (unless shifts are usually scheduled for fewer hours)
Rhode Island	3	Regular rate	State and local governments and religious, literary, and charitable corporations	

Ellen Neely, Women Employed; state labor department sites (and minimum wage/hours law sites within those); and legal research conducted under the oversight of the first author.

Table 3. *Simulated reporting pay wages by statute-adopting state.*

State	Minimum hourly wage	Median hourly wage	Amount of reporting pay for employee sent home after working 2 hours	
			<i>6-hour scheduled shift</i>	<i>3-hour scheduled shift</i>
California – Los Angeles	\$8.00	\$10.14	\$10.14 (1 hour)	No reporting pay
Connecticut – Bridgeport	\$8.25	\$11.22	\$22.44 (2 hours) for laundry employees Sundays through Fridays, and beauty shop employees (no reporting pay for all others)	\$11.22 (1 hour) for laundry employees Sundays through Fridays, and beauty shop employees (no reporting pay for all others)
District of Columbia	\$8.25	\$11.21	\$16.50 (2 hours)	No reporting pay
Massachusetts - Boston	\$8.00	\$10.63	\$8.00 (1 hour)	\$8.00 (1 hour)
New Hampshire – Manchester	\$7.25	\$10.69	No reporting pay	No reporting pay
New Jersey – Newark	\$7.25	\$11.39	No reporting pay	No reporting pay
New York – New York City	\$7.25	\$11.02	\$14.50 (2 hours)	No reporting pay
Rhode Island – Providence	\$7.75	\$10.46	\$10.46 (1 hour)	\$10.46 (1 hour)

Source: U.S. Bureau of Labor Statistics (2013b & c).

Notes: “Regular” pay rates used for these calculations, as specified by laws (Table 1), are defined using the median hourly wages for “retail salespersons” in each state’s largest metropolitan area for May 2012.

Notes

¹ The FLSA also abolishes child labor in most circumstances.

² Other destabilizing practices are also the subject of protections available in state laws and union contracts. For example, some states have enacted “call in pay” laws, which compensate workers who are required to come to work during non-scheduled times, and union contracts contain similar provisions. See Alexander, et al. (under review), a companion piece to this paper that provides detailed legal analyses of such laws.

³ The RAP data have several limitations to generalizability. They come from workers employed not only in a large and highly diverse U.S. metropolitan area, but also in relatively large firms. Our analyses may thus be constrained in illuminating the realities of retail job instabilities in smaller geographic and business settings. However, because these data are drawn from a state that has adopted a reporting pay law, the “just-in-time” scheduling practices analyzed here may reflect a relatively “best” case scenario for work hour insecurity faced by retail employees. Workers in states without reporting pay protections may face increased scheduling and work hour instability.