

An hourglass-shaped graphic with a globe inside. The top bulb is dark grey, and the bottom bulb is light blue. The globe is light blue with dark blue outlines of continents. The hourglass is centered on the page.

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The Fair Labor Standards Act: Minimum Wage in the 109th Congress

William G. Whittaker, Domestic Social Policy Division

October 30, 2006

Abstract. The Fair Labor Standards Act (FLSA) is the primary federal statute in the fields of minimum wage, overtime pay, child labor, and related subjects. In the 109th Congress, legislation in a variety of forms has been introduced that would modify the act in each of these areas, and that would extend the act's minimum wage protections to workers in the Commonwealth of the Northern Mariana Islands (CNMI).

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Updated October 30, 2006

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The Fair Labor Standards Act: Minimum Wage in the 109th Congress

Summary

The Fair Labor Standards Act (FLSA) is the primary federal statute in the fields of minimum wage, overtime pay, child labor, and related subjects. In the 109th Congress, legislation in a variety of forms has been introduced that would modify the act in each of these areas, and that would extend the act's minimum wage protections to workers in the Commonwealth of the Northern Mariana Islands (CNMI).

This report deals only with the minimum wage aspects of the act. Other components of the FLSA are considered in separate CRS products.

In 1938, following several decades of discussion and research in academic and policy circles, Congress adopted the FLSA. The act is a living statute that Congress has variously modified through the years in response to altered public policy and workplace realities. It has undergone major amendment on eight separate occasions, in addition to periodic less extensive adjustments.

Currently, the general minimum wage is \$5.15 an hour, the last adjustment having taken place in September 1997. There are, however, a number of specialized minima: for example, a sub-minimum wage for youth, special calculation of the rate as it affects *tipped* employees, and a reduced wage structure for persons with disabilities. Through the past several Congresses, bills have been introduced that would alter the minimum wage or change aspects of it. For example, in the 109th Congress, see H.R. 1091, H.R. 2429, H.R. 2748, H.R. 3413, H.R. 3732, H.R. 4505, H.R. 5368, H.R. 5550, H.R. 5970, S. 14, S. 846, S. 1062, and S. 2725, plus several floor amendments that would similarly affect the minimum wage.

Through the years (from the initial enactment of the FLSA in 1938 up to 1996), minimum wage legislation had been introduced and referred to the committees of jurisdiction for analysis and, ultimately, for a possible report. It was regarded as a singular piece of legislation. In 1996, the measure emerged as a rider to a more general economic measure. Thus, some have asserted, it has now become *traditional* (based upon the 1996 enactment) that an increase in the federal minimum wage should be accompanied by general tax breaks and other similar considerations for industry.

There are no time constraints (no expiration dates) built into the FLSA. Congress is not required to take up wage/hour legislation at all — though social and economic pressure (and other policy concerns) may render such action appropriate.

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The Fair Labor Standards Act: Minimum Wage in the 109th Congress

The Fair Labor Standards Act (FLSA) of 1938, as amended, is the primary federal statute in the area of minimum wages and certain related labor standards issues: e.g., overtime pay and child labor.¹ Various bills related to the FLSA have been introduced in the 109th Congress. Thus far, none of these measures has been enacted.

There are no expiration dates embedded within the FLSA, and thus, Congress is under no obligation to act on amendments to the statute — though the declining value of the minimum wage could provide an impetus for action. Were Congress to take up minimum wage legislation, it could focus narrowly upon an increase in the base rate: raising the floor above the current \$5.15 per hour level. But, it could act more expansively, dealing with a variety of minimum wage-related issues and, perhaps, revising certain other aspects of the act such as its overtime pay or child labor provisions.

Some, during recent years, have urged that changes in wage/hour standards should be coupled with tax and other benefits for business. While such linkage seems to have become a popular issue for discussion, there is no structural reason to proceed in that manner. Broadening the scope of the FLSA legislation (including overtime pay, child labor, and assorted other economic issues within a single comprehensive bill) *could* reduce the likelihood that any measure in this area would ultimately be adopted; but conversely, depending upon the overall content of such a package, it *could* expand the measure's appeal.²

Introduction

The FLSA is an umbrella statute that deals with a series of labor standards issues. These fall, roughly, into three categories: *first*, minimum wage (Section 6 of the act); *second*, overtime pay (Section 7); and, *third*, child labor (Section 12). Section 3 of the act defines the concepts used throughout the statute and, thereby,

¹ For a quick summary of current proposals relating to the FLSA, see CRS Report RL32901, *Minimum Wage, Overtime Pay, and Child Labor: Inventory of Proposals in the 109th Congress to Amend the Fair Labor Standards Act*, by William G. Whittaker.

² Proponents and opponents of an increase in the minimum wage have, variously, discussed the potential impact of such an approach — pro and con. Some view additional provisions (for example, “comp time” or an expanded “small business exemption”) as an appropriate strategy. Others regard such collateral measures as a *poison pill* intended to scuttle minimum wage revisions.

limits or qualifies its wage/hour and child labor provisions. Traditionally, Congress has mandated broad general coverage and, then, has specified select groups or categories of workers who are not to be covered by the act. Section 13 provides a body of exemptions (or special treatment) for segments of industry and/or groups of workers. In the latter areas, the Secretary of Labor has been granted wide interpretive powers — though these have not been without limit.

While the act is often treated as an integrated unit, it can also be approached in terms of its three general component parts — and of individual sub-units of each. This report focuses narrowly upon the federal minimum wage. Other related issues (e.g., child labor and overtime pay) are considered separately in other CRS products.³

Under the FLSA, Congress has established a basic minimum wage (since 1997, \$5.15 per hour) that must be paid to most covered workers. However, the level of the wage floor may vary from one group of workers to another with various exceptions and sub-minima built into the statute. Thus, the issue may be *which* minimum wage rate is applicable and *to which* workers it should be applied.⁴

Through the past century, the minimum wage (alone or with other wage/hour issues) has sparked partisan comment and assertion. The issue has not been solely whether there is an appropriate federal role in wage/hour regulation (that continues to be debated), but what that role ought to be. At what level should the minimum wage be set? Should it be indexed? How broad should minimum wage coverage be? And if there are exemptions (which there are), upon what foundation should they rest? For example, should small firms be able to pay their workers at a lower rate than large firms? Should wage rates be productivity-based or respond to the needs and personal lifestyles of the workers involved? Might the wage floor depend upon an employee's nonwork status: e.g., whether the worker is the sole earner in a family, a secondary earner, or a student? As under current law, should the rate vary with the age of the worker — even where the work performed and productivity level among workers may be comparable?⁵

³ See, for example, CRS Report RL31501, *Child Labor in America: History, Policy and Legislative Issues*; and CRS Report RL31875, *Compensatory Time vs. Cash Wages: Amending the Fair Labor Standards Act?* (the comp time issue has not reemerged as free standing legislation in the 109th Congress), both by William G. Whittaker. See, also, CRS Report RL30927, *The Federal Minimum Wage: The Question of Indexation*, by Gerald Mayer, and CRS Report 98-278, *The Gender Wage Gap and Pay Equity: Is Comparable Worth the Next Step?*, by Linda Levine.

⁴ Several aspects of minimum wage coverage may need to be taken into account. *First*: Many states have state-mandated minimum wage standards. These may be roughly parallel to the federal minimum wage: They need not be — and often are not. *Second*: Not all workers are covered under the FLSA — nor under state wage/hour standards. These coverage patterns (including patterns of exemption) need to be taken into account when considering the potential impact of changes in federal wage/hour law. *Third*: Because of variations in coverage (with extensive administrative rules governing implementation and enforcement of wage/hour law), it may be perilous to suggest who is (or is not) covered by the requirements of statute. Too many variables affect coverage to allow easy assessment.

⁵ Under current law, there are special rates for youth workers, for full-time students who
(continued...)

Minimum Wage: Background and Comment

When the FLSA was enacted in 1938, its coverage was largely limited to industrial workers engaged in interstate commerce. Retail, service, and agricultural workers, generally, were not protected — nor were persons employed by state and local governments. On eight separate occasions through the years (see **Table 1**), the act has undergone general amendment, which has normally included language dealing with overtime pay and/or child labor, as well as with modification of the wage floor. On numerous occasions, the FLSA has been subject to more narrowly focused single purpose amendment.

Table 1. Federal Minimum Wage Rates, 1938-2006

Public law	Effective date	Rate
P.L. 75-718 (Enacted June 25, 1938)	October 1938	\$0.25
	October 1939	0.30
	October 1945	0.40
P.L. 81-393 (Enacted October 26, 1949)	January 1950	0.75
P.L. 84-381 (Enacted August 12, 1955)	March 1956	1.00
P.L. 87-30 (Enacted May 5, 1961)	September 1961	1.15
	September 1963	1.25
P.L. 89-601 (Enacted September 23, 1966)	February 1967	1.40
	February 1968	1.60
P.L. 93-259 (Enacted April 8, 1974)	May 1974	2.00
	January 1975	2.10
	January 1976	2.30
P.L. 95-151 (Enacted November 1, 1977)	January 1978	2.65
	January 1979	2.90
	January 1980	3.10
	January 1981	3.35
P.L. 101-157 (Enacted November 17, 1989)	April 1990	3.80
	April 1991	4.25
P.L. 104-188 (Enacted August 20, 1996)	October 1996	4.75
	September 1997	5.15

With the original enactment, Congress was feeling its way: i.e., learning how to deal with constitutional impediments to federal involvement in private sector labor standards regulation. Coverage patterns during the 1940s and 1950s remained relatively flat, with only minor adjustment. Then, in the 1960s and 1970s, there was

⁵ (...continued)

work no more than part-time, for disabled persons, and for others. That these rates (except nominally for the disabled) are related to productivity may not be entirely clear.

substantial expansion of coverage with intermittent increases in the level of the minimum wage. Since 1977, change has been restricted *largely* to increases in the basic wage rate and modification of existing FLSA provisions. Amendment has often been contentious, conditioned by economic considerations and political compromise.⁶ Generally, expansion of coverage has been opposed by employers and supported by workers — reflecting, in the short term, who benefits from an increase in the minimum wage and upon whom the costs fall.

The basic federal minimum wage rate is statutory and will remain at its current level until Congress takes specific action to alter it. Again, Congress has no specific obligation to revisit the minimum wage and thus *may* not do so. However, over the long term, congressional inaction could have the effect of *repeal through attrition*. Fewer and fewer workers would likely earn the minimum wage (its value having been reduced through inflation), and the requirement, eventually, could become relatively meaningless. Conversely, Congress could index the minimum rate, assuring a constant real value without further congressional intervention.

Some states have a minimum wage requirement that is higher than the FLSA requirement. Where that is the case, *the higher standard normally prevails*. (See **Table 2**.) In addition, the minimum wage for American Samoa is set through a commission appointed by the U.S. Secretary of Labor, and has been, generally, lower than the otherwise applicable federal rate under the FLSA. In the Commonwealth of the Northern Mariana Islands (CNMI), the insular government currently exercises authority with respect to wage standards — an issue of ongoing contention.

General Policy Concerning the Minimum Wage

For the past century, the minimum wage has been a focus of public policy discussion. Advocates for each side in the debate — academicians (notably, economists), policy analysts, and persons from the media — have argued with great vigor. Although the literature is extensive, the result is by no means definitive. FLSA historian Willis J. Nordlund, writing in the late 1990s, observes that

... one would presume that enough was known about the program to formulate a defensible strategy depicting effects of program change. This is not the case. There is no more agreement about these effects today than there was at the program's inception [with passage of the FLSA] fifty years ago.⁷

⁶ See *Congressional Record* 30, 1937, p. 7876. More generally, see CRS Report 89-568, *The Fair Labor Standards Act: Analysis of Economic Issues in the Debates of 1937-1938*, by William G. Whittaker (out of print but available from the author).

⁷ Willis J. Nordlund, *The Quest for a Living Wage: The History of the Federal Minimum Wage Program* (Westport, Conn.: Greenwood Press, 1997), p. xvii.

**Table 2. Status of State Minimum Wage Rate
(as of spring 2006)**

Jurisdictions with minimum wage rates <i>higher than</i> the federal FLSA		
Alaska (\$7.15)	Illinois (\$6.50)	Oregon (\$7.50)
California (\$6.75)	Maine (\$6.50)	Rhode Island (\$7.10)
Connecticut (\$7.40)	Maryland (\$6.15)	Vermont (\$7.25)
Delaware (\$6.15)	Massachusetts (\$6.75)	Washington (\$7.63)
District of Columbia (\$7.00)	Minnesota (\$6.15)	Wisconsin (\$5.70)
Florida (\$6.40)	New Jersey (\$6.15)	
Hawaii (\$6.75)	New York (\$6.75)	
Jurisdictions with minimum wage rates <i>at the same level</i> as the federal FLSA (\$5.15)		
Arkansas	Missouri	Oklahoma
Colorado	Montana	Pennsylvania
Georgia	Nebraska	Puerto Rico
Guam	Nevada	South Dakota
Idaho	New Hampshire	Texas
Indiana	New Mexico	Utah
Iowa	North Carolina	Virginia
Kentucky	North Dakota	West Virginia
Michigan	Ohio	Wyoming
Jurisdictions with minimum wage rates <i>less than</i> the federal FLSA		
American Samoa ^b (administered)	Kansas (\$2.65)	Virgin Islands (\$4.65)
Jurisdictions with <i>no</i> state minimum wage requirement		
Alabama	Louisiana	South Carolina
Arizona	Mississippi	Tennessee

Source: U.S. Department of Labor, Wage and Hour Division, Employment Standards Administration, [http://www.dol.gov/esa/minwage/america.htm], Apr. 3, 2006.

- a. Coverage patterns vary from one jurisdiction to another. Some jurisdictions have a structured minimum wage system (i.e., different rates for various industries, sizes of firms, etc.). The table refers to *the highest standard applicable* under the law of the jurisdiction. In some jurisdictions, the rate (but not necessarily the pattern of coverage) is linked to the federal FLSA.
- b. For American Samoa, the minimum wage rate is set administratively, and varies from one industry to another at rates lower than the federal minimum wage.

The available data and analysis, it would seem, are fragile and often contradictory. Still, critics and proponents of a minimum wage floor continue to praise and to critique the concept in unusually strong and, often, unqualified terms.

Few questions in the continuing debate are new. They are raised with little agreement concerning basic concepts. Many of the assumptions are implicit: not fully enunciated and, perhaps, not even recognized. Minimum wage debate, perhaps more than other economic issues, may have a psychological component, reflecting community values and fears. There continues to be an outpouring of minimum wage literature — some of it analytical but much of it political advocacy.

The Socio-Economic Context of Minimum Wage. The minimum wage is often presented as a mechanism through which to assist the *working poor*: usually a non-union worker with few skills and little bargaining power.⁸ Some advocates of a minimum wage view it not only as socially useful but, also, as economically useful: promoting socio-economic equity; providing a floor under wages; stimulating demand for goods and services; expanding employment; and, with other measures, bolstering the general economy.

Some critics of the minimum wage, conversely, have viewed it as an inefficient approach to income redistribution — and an unjustified intrusion into the operation of *the free market*. They contend that minimum wage increases have an inflationary impact, restructure employment patterns, may reduce aggregate employment, and impose an unnecessary burden upon employers and consumers. Such critics often view the wage floor as economically harmful, especially for the unskilled and new workforce entrants who, critics say, may be priced out of the job market.

Economists and policy analysts continue to disagree about the impact of changes in the minimum wage and about what the effects of the minimum wage have been. The issues are both socio-economic and ideological, and have changed little since the debates of 1937-1938.⁹

⁸ Concerning early interest in the minimum wage, see Lawrence B. Glickman, *A Living Wage: American Workers and the Making of Consumer Society* (Ithaca, Cornell University Press, 1997); George E. Paulsen, *A Living Wage for the Forgotten Man: The Quest for Fair Labor Standards, 1933-1941* (Selinsgrove, PA, Susquehanna University Press, 1996); David A. Moss, *Socializing Security: Progressive-Era Economists and the Origins of American Social Policy* (Cambridge, Harvard University Press, 1996); and Jerold L. Waltman, *The Politics of the Minimum Wage* (Urbana, University of Illinois Press, 2000). In her study, *Civilizing Capitalism: The National Consumers' League, Women's Activism, and Labor Standards in the New Deal Era* (Chapel Hill: The University of North Carolina Press, 2000), Landon R. Y. Storrs discusses both the origins of minimum wage legislation and the socio-economic/reform context from which the federal legislation emerged.

⁹ See, for example “New Minimum Wage Research: A Symposium,” *Industrial and Labor Relations Review*, Oct. 1992, pp. 3-99; “The Minimum Wage: Some New Evidence” (a symposium) *Journal of Labor Research*, winter 2002, pp. 1-67; David Card and Alan B. Krueger, *Myth and Measurement: The New Economics of the Minimum Wage* (Princeton: Princeton University Press, 1995); and Oren M. Levin-Waldman, *The Case of the Minimum Wage: Competing Policy Models* (Albany: State University of New York Press, 2001).

What Do We Mean by *Minimum Wage*? When people speak of a minimum wage, they often speak in terms of “a livable wage” or “a decent wage” or “a fair wage,” or suggest that the working poor ought to be able to live “in reasonable comfort” and enjoy economic “dignity.” Early in the century, it was common to speak of a “living, family, saving wage.” But when individuals use such terms, is there any reasonable assurance of a consistent meaning?

In statute, the minimum wage is clearly defined: \$5.15 per hour for most (but not all) covered workers. The FLSA does not translate that dollar amount into social or human terms. Is \$5.15 an hour actually a “livable wage” — and livable by whose standard? Does “reasonable comfort,” for example, mean safe and adequate shelter with modest amenities? How are “safe” and “adequate” and “modest” defined?

If one thinks in terms of a “family” wage, how should the family be structured? Should both spouses engage in paid work? Should one spouse reside at home: his or her companion earning the livelihood for the *family*? Might there be children in the household? If so, how many: two or four or six? See, for example, the calculations in **Table 3**.

Some may view “minimum” as the lowest wage an individual will accept (a “reservation wage”) or the highest amount an employer is willing to pay. Some urge repeal of a legislated wage floor altogether — and define the “minimum” as whatever rates are set by supply and demand in a *free market* economy: i.e., a “market wage.”

How *Minimal* Is Minimum? Minimum wage debates contain frequent references to the “poverty level” for a family of two or three or more. If Congress intends the minimum wage to be set at a level high enough to move a family out of poverty (as some suggest), then some measurement of family size and of total household income is necessary in assessing the adequacy of the FLSA minima. If, instead, the minimum wage is productivity-based (i.e., resting upon the contribution of the worker), then family size and non-wage income (support, for example, from other household members or through sources of income not related to the individual’s employment) would seem irrelevant.¹⁰

Under current law, a minimum wage worker employed full-time and full-year (40 hours per week for 52 weeks at \$5.15) would earn \$10,712. A full-time worker, under age 20 and paid at the statutorily permissible sub-minimum rate (\$4.25 per hour), could earn \$8,840 — for the same hours of work and for performing the same duties. After 90 consecutive days *with an individual employer*, however, his or her sub-minimum rate would ordinarily increase to \$5.15 an hour.¹¹ These amounts are

¹⁰ Some may argue that basing a wage rate on the *productivity* of the worker may be, itself, misleading since in large measure, worker productivity is based upon the skills of management and upon management-controlled elements such as work organization, availability of appropriate equipment, morale, ambience, and other similar factors.

¹¹ This suggests some of the problems in calculating minimum wage earnings. While a worker under age 20 can be paid \$4.25 per hour through the first 90 consecutive days with any employer, his wage after 90 days would have to be increased to the full \$5.15 per hour (continued...)

prior to any deductions and exclusive of any fringe benefits. **Table 3** sets forth the level of income regarded as a poverty threshold, at various family sizes, for eligibility for certain federal assistance programs. The extent to which the poverty guidelines are realistic can be, and has been, debated. The guidelines have no *direct* connection with the federal minimum wage, but they are frequently cited in discussions of the minimum wage and are used by some analysts as a measure of the adequacy of the wage floor.

**Table 3. Poverty Guidelines,
All States and the District of Columbia (2006)**

Size of family unit	Poverty guideline		
	<i>States and District of Columbia</i>	<i>Alaska</i>	<i>Hawaii</i>
1	\$9,800	\$12,250	\$11,270
2	13,200	16,500	15,180
3	16,600	20,750	19,090
4	20,000	25,000	23,000
5	23,400	29,250	26,910
6	26,800	33,500	30,820
7	30,200	37,750	34,730
8	33,600	42,000	38,640

Source: U.S. Department of Health and Human Services, “Annual Update of the HHS Poverty Guidelines,” 71 *Federal Register* 3848-3849, Jan. 24, 2006.

Note: For family units with more than eight members, add \$3,400 for each additional member. For Alaska, add \$4,250, and for Hawaii, add \$3,910. Poverty guidelines are not defined for Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, or other U.S.-related insular jurisdictions.

Since much minimum wage work is also part-time and/or part-year, estimating actual annual income for minimum wage workers may be problematic. Some workers, normally earning the minimum wage, find, either through their own designs (school and sports, for example) or through the absence of minimum wage-type work, that their year-long income may fall substantially below an annualized figure. Similarly, choosing a wage rate that will comport with the work patterns of minimum wage earners and still provide “a living wage” may prove daunting. Further, while

¹¹ (...continued)

— unless he moved on to a second, third, or fourth employer, or dropped out of work for a period of time and broke the “consecutive” days pattern. Were he a full-time student working no more than part-time, he could be subject to a different sub-minimum wage option. Were he partially disabled and employed under Department of Labor (DOL) certification, he could be paid at any rate found to be commensurate with his productivity — however low that might be.

some minimum wage work may provide a fringe benefit component, such fringes are often not available until a worker has been engaged for a minimal period of time (a period that a minimum wage worker quite possibly cannot reach). Minimum wage work often provides only cash income and little more. Under present law, the concept of a minimum wage is limited to a cash wage.

To Whom Should *Not Less Than the Minimum Wage Be Paid?*

FLSA minimum wage requirements have always been subject to exceptions, sometimes excluding from coverage those likely to be the most poorly paid workers. Upon what basis has Congress included — or excluded — workers from minimum wage protection under the FLSA?¹²

When a Member of Congress (or that body collectively through legislation) speaks of the “minimum wage worker,” to whom is reference made? Is the minimum wage worker viewed as a single individual? A parent? A *single* parent? The sole economic support for a family? A teenager? Is the FLSA minimum intended to be a wage floor for all workers, urban and rural — for employees only of large firms, or for those employed by small businesses as well? *Should any non-work or non-productivity factors be taken into account when setting the wage floor* — for example, age (a youth or senior citizen), student status, or family size? Whom does a legislator have in mind when setting the federal minimum wage at, for example, \$5.15 per hour? Is that mental image consistent with the demographic reality of the minimum wage workforce?

Various social and demographic distinctions have been cited to justify minimum wage rate differentials. For example, the FLSA, under certain conditions, allows a full-time student “employed in a retail or service establishment, agriculture, or the institution of higher education that such student attends” to be paid a lower minimum wage than that required for a non-student (even for equal work) — so long as the student works only “part-time” (defined by the statute). The wage level, here, may be conditioned less upon productivity than upon how the worker spends his off-duty hours: i.e., that he is a student and is enrolled in academic course work. If he drops out of school but keeps his job, the law requires that his hourly rate of pay be raised to at least the full *applicable* minimum. Similarly, even while remaining an employed full-time student, if his hours of work increase to more than part-time, he must be paid at the full applicable minimum rate. Applicability of the student sub-minimum rate (Section 14(b)) is dependent upon maintenance of full-time student status and not more than part-time employment. What is the rationale for paying a part-time worker less, on a per-hour basis (here, a sub-minimum rate), than a full-time worker — even for the same work performed under the same conditions and equally well? What assumptions about “need” and “productivity” are implicitly built into the student sub-minimum wage option — and are these assumptions valid?

Some may argue that this wage structure creates an incentive for young persons to leave school or to shift their primary focus from study to work. The rationale for sub-minimum wage treatment, however, is that it may offset the problems young

¹² See, for example, discussion during the 1938 debate on the original FLSA. *Congressional Record*, June 14, 1938, p. 9257.

persons have in finding work that will match their academic schedules: i.e., making them cheaper and, thus, more attractive to employ.

It can be argued that younger persons, by definition, are less experienced and, therefore, less productive than “prime age” adults. This conclusion, however, *may not be valid* for *minimum wage-type work* and, indeed, an argument can be made that for low-skilled entry-level positions, young persons may be more productive: i.e., more vigorous, more nearly satisfied with such routine activity. What criteria should be taken into account with respect to the elderly (who *may* be less — or more — productive in minimum wage-type work) or the disabled?

Should minimum wages be needs-based or productivity-based? If a worker has an affluent spouse (or parents), should he (or she) be payable at a *sub-minimum* rate because his (or her) combined *family income* is relatively high? Should one who spends his wages on luxury items (designer clothes, CDs, beer and pizza) be paid at a lower rate than one who spends his earnings on tuition, baby formula — or for food, rent, or transportation? If needs-based, then should the minimum wage be pegged to family size: the more children, the higher the minimum wage rate? Are such distinctions useful or workable and do they lend themselves to public policy formulations?

Who Should Pay the Minimum Wage? How the minimum wage worker is defined and the intent of Congress in establishing/maintaining a federal minimum wage are critical to consideration of *by whom* the minimum wage ought to be paid.

Speaking Generally. Is the minimum wage intended to be sufficient *to sustain a worker* (however defined by Congress): i.e., a single person without dependents or a sole breadwinner for a family? If so, should *an employer* be obligated to pay a wage of at least the amount needed to sustain the worker (and, where applicable, his or her dependents) — an amount that could, presumably, be affected by the assumptions built into the definition of *a minimum wage worker*?¹³

If a productivity-based minimum wage is not sufficient to sustain a worker (and his or her dependents, if any), then by whom (if anyone) should the deficiency be made up? Should it be paid by the employer who directly benefits by paying low wages (through utilizing the services of a low-wage workforce) — and, indirectly, by the consumer of the goods and services such low-wage workers provide — through an increase in the minimum wage rate? Or should the difference between one’s wage and one’s need *be subsidized* by the taxpayer?

The Minimum Wage -v.- the EITC. In 1975, Congress established the Earned Income Tax Credit (EITC), which, as amended, provides a tax credit to certain low-wage workers. Beginning as a relatively small program (about 6.2

¹³ Since workers compete with each other in the labor market, paying a needs-based rate could encourage an employer to hire single persons without dependents and, thus, to keep labor costs (wages) low: to avoid hiring persons who are married with children. Similarly, youth workers, paid at a sub-minimum rate, are often thought to be, potentially, economic substitutes for older workers who must be paid a full minimum scale.

million recipients), it has since expanded, with various additions, to about 22.1 million tax filers (2003). To qualify, a family must reside in the United States (unless absent for military duty). While oriented toward persons with children, some childless adults may also qualify. But the program can also be complex and has been, historically, subject to significant over-claims (or, on some occasions, perhaps, under-claims) of benefits.¹⁴

Some laud the EITC for helping “to lift ... working families above the poverty threshold and to provide a greater work incentive to low-income workers.”¹⁵ But the EITC can also be viewed as a wage supplement, not only for workers but also for low-wage employers who may continue to pay low wages to their workers and profit from utilization of such low-wage employees while tax revenues (through the credit mechanism or through other public subsidies) assist their workers in meeting basic living costs. Thus, arguably, the routine cost of doing business is shifted from the individual employer to the general taxpayer. Similarly, the EITC can be viewed as a subsidy to the consumers of the goods and services produced by low-wage workers.

Conversely, some argue, the EITC affords firms that operate on a slim margin an opportunity to remain in business and to provide employment, even if at low wages. However, the EITC is conditional upon the low earnings of the worker, not the marginal profitability of the employer. It makes no distinction between businesses (employers) that are struggling economically and those that are doing well. Speaking generally, some view the EITC *as a supplement to* the minimum wage, predicated upon the needs of a worker rather than upon his productivity; others, *as a substitute for* future minimum wage increases. Employer/business acceptance of the EITC and hostility toward the minimum wage *may* reflect an economic reality: with the EITC, the taxpayer subsidizes the employer’s wage costs; with the minimum wage, those costs fall directly upon the employer or businessperson and indirectly upon the consumer.

Small Businesses. The FLSA’s small business exemption allows certain qualifying employers to be exempt from the FLSA minimum wage requirements. In general (though the exemption is complex), this could include firms “whose annual gross volume of business done” is less than \$500,000, though individual employees of such firms, engaged in interstate commerce, may be covered individually. In addition, the act contains numerous more narrowly focused exemptions.

Over time, there has been pressure from the small business community to expand its exemption. Proponents have argued that small firms may be adversely affected — or even driven out of business — by having to pay their workers the minimum wage. However, some may argue that no test of profitability has been proposed with respect to firms benefitting from the small business exemption: It is

¹⁴ “A childless adult must be at least 25 years of age, but not more than 64 years of age to be eligible for the EITC, and cannot be claimed as a dependent on another person’s tax return.” See CRS Report RL31768, *The Earned Income Tax Credit (EITC): An Overview*, and CRS Report RS21477, *The Earned Income Tax Credit (EITC): Policy and Legislative Issues*, both by Christine Scott.

¹⁵ Bureau of National Affairs, *Daily Labor Report*, Aug. 23, 1993, p. A10.

enjoyed by prosperous and struggling businesses alike. But, where small businesses are free from a minimum wage obligation, the question remains: How will workers employed by small businesses sustain themselves and, where applicable, their families? Further, what are the implications of a “small business exemption” with respect to competition between small firms and mid-sized or larger firms?

Needs of the Minimum Wage Worker. Much of the debate over increasing the minimum wage has focused upon the low-wage worker. Does he (or she) *really need* the increased income? Is he productive enough to justify (to earn) a higher minimum wage? Does he have other sources of income: for example, a working spouse or an employed parent? How will the worker spend his earnings: for essentials or for luxuries? In short, is he (or she) merely working for *pin money*?¹⁶

Comparable issues have not been raised about business. Does the small businessperson *really need* the increased profits from employing low-wage (sub-minimum wage) workers? Could he (or she) reasonably pay a higher wage? When assertions are made with respect to the limited resources of an enterprise, should a *means test* be prescribed for such employers?

General Demographics of the Minimum Wage Workforce

Data concerning the minimum wage workforce are difficult to develop with precision. Not everyone is covered by the minimum wage. Some low-wage workers may be paid at or below the federal minimum wage; but because of exemptions built into the statute, they may not be affected by the changes that Congress may make. In such cases, their pay may continue (at whatever levels) without being influenced by Congressional action. Conversely, some employers may choose to pay the statutory minimum because it is a convenient and generally recognized basic rate for low-wage employment — even where their workers may not be subject to the act’s minimum wage provisions.

In addition, persons employed at or below the federal minimum wage may change jobs (and economic status) with some frequency, moving into and out of work in response to non-work-related factors: school, pregnancy or, perhaps, a change in marital status. Some workers may be multiple jobholders.¹⁷

Not all workers *covered* under the FLSA are covered in precisely the same way. Thus, statistical data in this area may be somewhat imprecise and we may, often, be speaking of *the low-wage worker* rather than *the minimum wage worker* covered under the FLSA.

¹⁶ The term, *pin money*, historically, was frequently used with respect to women’s wages: i.e., to provide *a little something extra* but not for the *essentials* of a household. Increasingly, the term is now used, mostly disparagingly, with respect to youth workers who have various alternative sources of income and do not really *need* to be employed — or who are doing so as a lark.

¹⁷ Surveys of income *may* collect information only with respect to a worker’s main job.

Who Are the Minimum Wage Workers? In 2005, about 1.882 million workers, paid at hourly rates, earned at or below the federal minimum wage of \$5.15 per hour: About 479,000 were paid *at* the minimum rate and about 1.403 million were paid *below* the minimum.¹⁸ These are workers who are 16 years of age or older.

In absolute numbers, according to data provided by the Bureau of Labor Statistics (BLS), persons working at or below the minimum are about as likely to be adults as youth (see the discussion below), more likely to be female than male, and more likely to be white than of another race. Further, persons working at or below the minimum wage are more likely to be working part-time than full-time.

Critics of the minimum wage often point to a minimum wage worker who is a young person, working for “pin money” and being supported by a suburban middle-class family. Conversely, proponents of a higher minimum often view the low-wage workforce as largely adult and, thus, suggestive of more serious needs.

Statistics can be used to support either interpretation. If, for example, using 2005 data, one defines a youth as someone between 16 and 19 years of age, then about 26.1% of workers, paid hourly at or below the minimum wage, are youths and about 73.9% are adults. If one’s definition is more expansive, defining youth as between 16 and 24 years of age, then about 53.3% of persons earning at or below the minimum wage are youths and only 46.7% are adults. Thus, even with an expansive definition of youth (16 to 24 years of age), close to half of the minimum wage/sub-minimum wage workforce is 25 years of age or over.¹⁹

For minimum wage type work, the two demographic groups may well be in competition, with youth workers readily substitutable for older workers and with younger workers having an employment advantage. Even where covered by minimum wage requirements, youth workers may often, legally, be hired at a sub-minimum wage — and, often, at hours of work (fragmented part-time employment) that could not sustain a family or even a single adult.²⁰

¹⁸ About 75.6 million workers, out of a civilian noninstitutional workforce of around 150 million, were paid hourly rates in 2005. In transmitting numbers of minimum wage workers, the Bureau of Labor Statistics states, “It should be noted that it is *not possible to determine* whether workers surveyed in the CPS [Current Population Survey, upon which BLS relies] are actually covered by the Fair Labor Standards Act or by individual State minimum wage laws. Thus, some workers being reported as earning an hourly wage of \$5.15 may not, in fact, be covered by Federal or State minimum wage laws; at the same time, the presence of a sizable number of workers with wages below the prevailing Federal minimum wage does not necessarily indicate violations of the Fair Labor Standards Act or applicable State laws, because of the numerous exemptions to these wage statutes.” (Emphasis added.)

¹⁹ It is difficult to assess needs, in the context of minimum wage work; but one might speculate that persons who continue to be employed in very low-paying jobs, over time, may have a pressing need for the income earned.

²⁰ In addition to their legally allowable lower wage rate, other arguments can be made for the competitive advantages of youth workers. They may have more energy than older workers and may be more flexible. They are normally short-term employees who do not join unions, do not vest in pension programs, do not earn vacation benefits, and are less
(continued...)

Among hourly workers, paid at or below the general minimum rate, about 65.6% were women and about 34.4% men. Although the data are imprecise because of definitional questions with respect to race and ethnicity, it is clear that the majority of workers earning at or below the federal minimum wage are white.²¹

In 2005, about 59.8% of workers at and below the minimum wage were employed on a part-time basis; about 39.9% were full-time. Some 71.1% of part-time workers were female. (Some statistical variation may result from a small number of multiple jobholders.) Low-wage employment may tend to be less stable than more highly compensated employment, with workers suffering involuntary joblessness or moving in and out of the labor force because of discouragement, quitting to seek better wages and working conditions, or for other personal reasons.

Full-time employment is not synonymous with full-year employment. Estimating the annual income of minimum wage workers may be problematic since many full-time minimum wage workers may not be employed on a full-year basis. There may be periods when they are not working (or not working at the minimum wage).

Beyond uncertainties about combinations of part-time or full-time, part-year or full-year employment, one must recall that the minimum wage is a cash wage. Fringe benefits earned by a minimum wage worker are likely to be less than those of more highly paid persons, widening the gap between the economic well-being of the minimum wage worker and others. On the other hand, minimum wage workers may have other sources of income.²²

The Size of the Minimum Wage Workforce. In 2005, as noted above, there were roughly 1.882 million workers, paid at hourly rates, who earned at or below the federal minimum wage of \$5.15 per hour. They constituted only about 2.5% of hourly paid workers from an aggregate of about 75.6 million hourly paid workers. This figure constitutes the smallest percentage of persons earning at or below the minimum wage in the United States in recent times.²³ (See **Table 4**.) An important question is: Why?

²⁰ (...continued)

likely to be ill or suffer job-related strains that one might associate with long-term employment or age. Conversely, the argument can be made that they are less disciplined, have fewer skills (though few skills are required for minimum wage-type work), are less dependable, and may be less acclimated to the culture of the world of work.

²¹ BLS divides the low-wage workforce into “white,” “black,” and “Asian” within the context of race and provides a separate classification of “Hispanic or Latino.” The various shadings of color are becoming increasingly difficult to categorize. Concerning this classification, see Mary Bowler, et al., “Revisions to the Current Population Survey Effective January 2003,” *Employment and Earnings*, Feb. 2003, pp. 4-7, and 14.

²² Data, here, have been drawn from unpublished sources provided by the U.S. Bureau of Labor Statistics. The bureau has used information drawn from the Current Population Survey (CPS), provided by the U.S. Census Bureau.

²³ The early history of the FLSA was marked by a relatively sparse coverage which, through the 1960s and 1970s, was generally broadened giving the act, roughly, its present form.

Table 4. Number and Percent of Workers Paid Hourly at the Minimum Wage or Less

Workers paid hourly rates		
Year	Total paid the minimum wage or less	
	Number in thousands	As a percentage of hourly paid workers
1979*	6,913	13.4
1980*	7,773	15.1
1981*	7,824	15.1
1982	6,496	12.8
1983	6,338	12.2
1984	5,963	11.0
1985	5,538	9.9
1986	5,060	8.8
1987	4,697	7.9
1988	3,927	6.5
1989	3,162	5.1
1990*	3,228	5.1
1991*	5,283	8.4
1992	4,921	7.7
1993	4,332	6.7
1994	4,127	6.2
1995	3,655	5.3
1996*	3,724	5.4
1997*	4,754	6.7
1998	4,427	6.2
1999	3,340	4.6
2000	2,710	3.7
2001	2,238	3.1
2002	2,168	3.0
2003	2,100	2.9
2004	2,003	2.7
2005	1,882	2.5

Source: United States Bureau of Labor Statistics.

* Years in which a legislated change in the federal minimum wage took effect.

This numerical decline is not necessarily indicative of improved economic status for the low-wage worker. Rather, it may be that, as the value of the statutory minimum shrinks in terms of constant dollars, fewer workers are employed at or below the rate reflected in the reduced value of the statutory minimum. Nor does this imply that the economic status of those who have moved to a rate a little in excess of the statutory minimum has improved: i.e., those who are above the statutory minimum but who are still low-wage workers. Rather, their wage may have kept pace with inflationary pressures while the statutory minimum did not — suggesting little or no actual change of economic status.

In policy terms, this would appear to have several implications. If the statutory minimum wage remains at its current level while the general wage level rises because of inflation and/or productivity improvements, the number of minimum wage workers could reasonably be expected to experience a further decline. Fewer and fewer people could be expected to be employed at the low wage level — even though their economic condition may not have improved. Thus, were Congress to take no action with respect to the minimum wage, allowing its value to continue to decline, the size of *the minimum wage workforce* could reasonably be expected to decline until it virtually disappears. This *would not mean* that the low-wage workforce had shrunk, but merely that an increasingly large number of such persons would be employed *at wages above the declining real value of the statutorily defined minimum*.

Under this scenario (which is generally consistent with the trajectory of legislated increases in the statutory minimum wage since its peak year, 1968), the minimum wage would have been effectively *repealed by attrition*.²⁴ In that context, an argument might be made that since so few would actually be employed at rates at or below the statutory minimum (its relative value notwithstanding), the problem of the working poor could be handled through other more narrowly targeted means — possibly through transfers of income rather than through strictly work-related earnings. This, however, may run counter to public policy that income from work is generally preferable to transfers or entitlements that must be financed through taxation.

Finally, as noted on **Table 2**, state minimum wage rates have, in some respects, moved in to fill the gap of a declining federal minimum wage. *However*, such considerations have been uneven. Eighteen states and the District of Columbia have rates higher than the federal standard, but most of these are on the West Coast and in New England. Illinois, Delaware, Maryland, the District of Columbia, and Florida provide exceptions — and, even here, Florida might not be classified as a traditional Southern state. Speaking generally, the Midwest and the Old South have either gone along with the federal rate (they would have had little choice since the federal rate, if the standard is higher, takes precedent over a state rate), or they have simply stood apart. To the extent that there is a disparity in earnings, this might be viewed by some as contributing to a certain fracturing of the national economy with relative levels of wealth and of poverty among America's workers.

²⁴ See CRS Report RS20040, *Inflation and the Real Minimum Wage: Fact Sheet*, by Brian W. Cashell.

Commonwealth of the Northern Mariana Islands (CNMI)

In the mid-1970s, the CNMI entered into a quasi-autonomous relationship with the United States. By the Commonwealth agreement, regulation of overtime pay, under the FLSA, is enforced by DOL — but the minimum wage is governed by CNMI law. The CNMI also controls its own immigration policy. Finally, the CNMI is regarded as within the U.S. customs area. The result has been the development of industries based upon low wages and alien contract labor, the product of which carries a “Made in America” label and competes with other American-made goods.²⁵

Through the past decade, human rights and labor standards in the CNMI have been the subject of DOL investigations, congressional hearings, and proposed legislation. In the 105th Congress, the Committee on Energy and Natural Resources voted to report legislation co-sponsored by Senators Daniel Akaka (D-Hawaii) and Frank Murkowski (R-Alaska) that would, *inter alia*, have created a U.S.-controlled insular minimum wage structure.²⁶ The legislation died at the close of the 105th Congress, but the CNMI issue was the subject of further hearings by the Committee during the 106th Congress. Several general minimum wage proposals of the 106th Congress included language that would have brought the CNMI wage floor into conformity with that of the states, had they been adopted.

In the 107th and 108th Congresses, there was continuing interest in the CNMI, with a number of bills introduced that would have extended FLSA minimum wage protection for workers employed in the insular jurisdiction. Normally, these proposals would have phased in the full national rate through a series of incremental steps. In related action, on June 5, 2001, the Senate Committee on Energy and Natural Resources reported legislation to amend immigration law as it applies to the CNMI under the Covenant of Association between the Islands and the United States. (See S.Rept. 107-28.) The bill died at the close of the 107th Congress.

The issue of minimum wage protection for workers in the CNMI, in part because of the alleged concentration of *sweatshop* industry in the islands, remains on the wage/hour agenda of the 109th Congress. (See the legislative section of this report.)

²⁵ See CRS Report RL30235, *Minimum Wage in the Territories and Possessions of the United States: Application of the Fair Labor Standards Act*, by William G. Whittaker.

²⁶ U.S. Congress, Senate Committee on Energy and Natural Resources, *Northern Mariana Islands Covenant Implementation Act*, report to accompany S. 1275, 105th Cong., 2nd sess., S.Rept. 105-201.

Minimum Wage Legislation in the 109th Congress

Early in the 109th Congress, various proposals were introduced that would have raised the federal minimum wage and/or made other changes in the FLSA. Some were single-issue proposals; others were part of broader legislative packages.

Establishing a Tradition?

The original FLSA proposals of 1937-1938 were in the form of freestanding legislation: focusing narrowly upon labor standards but covering the entire field of wage/hour and child labor protections. As a procedural matter, the next seven rounds of minimum wage increases (1949, 1955, 1961, 1966, 1974, 1977, and 1989), though each provided for other changes in the FLSA itself, took the form of freestanding legislation. Non-FLSA or non-wage/hour issues were not addressed as part of a package with minimum wage and related concerns. Any “trade-off” to assist employers in dealing with the impact of wage/hour enactments (for example, the “tip credit” or youth/student sub-minimum wage provisions) were considered within the context of wage/hour legislation *per se*.

In 1996, minimum wage and related FLSA amendments were brought to the floor in the House as an amendment to a broad package of non-wage/hour proposals mostly associated with tax matters of interest to industry. Indeed, the FLSA was a relatively small part of the overall package. While some components of the wage/hour portion of the bill had been the subject of hearings during the 104th Congress, others had not been — nor had the body of FLSA-related provisions been considered by committee as a unit. During the spring and summer of 1996, the joint minimum wage/tax revision measure moved through Congress, and was signed by President Clinton on August 20, 1996 (P.L. 104-188).²⁷

When minimum wage legislation came to the floor during the 106th Congress, it largely followed the 1996 pattern. It combined tax revisions in behalf of the business community with changes in the FLSA — including an increase in the minimum wage.²⁸ By this point, the two issues — a minimum wage increase for low-paid workers and tax breaks for employers (whether or not they employed workers paid at the minimum wage) — had become linked in policy terms: i.e., that the former could not go forward, it seemed, without the latter.

²⁷ See CRS Issue Brief IB95091, *The Minimum Wage: An Overview of Issues Before the 104th Congress*, by William G. Whittaker (archived, but available from the author). See also Alissa J. Rubin, “Congress Clears Wage Increase with Tax Breaks for Business,” *Congressional Quarterly*, Aug. 3, 1996, pp. 2175-2177; and Julie Kosterlitz, “A Bounty For Business,” *National Journal*, Oct. 26, 1996, pp. 2289-2292.

²⁸ In the Senate, minimum wage increases had been included in H.R. 833, as amended, the Bankruptcy Reform Act of 1999; in the House, it was part of H.R. 3081, the “Small Business Tax Fairness Act of 2000.” Though each chamber passed a version of the minimum wage legislation, the proposals died at the close of the 106th Congress. See CRS Report RL30690, *Minimum Wage and Related Issues Before the 106th Congress: A Status Report*, by William G. Whittaker (archived, but available from the author).

Linkage, although a *tradition* only since the 104th Congress (1996) and used only during that one occasion, has appeared to become a frequently accepted focus of the minimum wage debate during succeeding Congresses. “We came to the table,” observed Representative Rick Lazio (R-NY), “with the realization that a wage increase was fair but we also came to the table with a desire to protect the small business people who will end up bearing the direct burden of any wage increase that we pass here today.”²⁹ Senator Don Nickles (R-OK) concluded, looking ahead to the 107th Congress: “It kind of fits, frankly, to do it as a part of the tax package next year.”³⁰ Some may argue that, in practice, linkage is a matter of fairness and equity with respect to those who are called upon to fund an increased minimum wage.

Not all observers concurred. Amy Borrus, writing in *Business Week*, termed the tax/minimum wage bill “a monument to legislative logrolling,” stating that “its veneer of virtue made it the perfect vehicle for a tax-break extravaganza.”³¹ Representative Charles Rangel (D-NY) seemed to sum up the views of critics of linkage: “We should not be forced to bribe the wealthy in our society in order to secure a simple dollar more per hour for the poorest working American families.”³² Thus, some may argue, that proposals to raise the minimum wage have become, in practice, a vehicle for legislating economic benefits for employers and others in higher income brackets.³³ The notion continues into the 109th Congress.

Minimum Wage: The Issue of Indexing

Varying through the years, the minimum wage reached its peak in 1968 in real (inflation-adjusted) terms and has, since then, declined in constant value. “In January 2006,” states CRS analyst Brian W. Cashell, “it would need to have been increased to \$9.05 to equal the purchasing power of the statutory minimum wage in February 1968.”³⁴

²⁹ *Congressional Record*, Mar. 9, 2000, p. H860.

³⁰ Bureau of National Affairs, *Daily Labor Report*, Dec. 6, 2000, p. A12.

³¹ Amy Borrus, “Why Business Isn’t Bucking This Minimum-Wage Hike,” *Business Week*, Nov. 1, 1999, p. 55. Borrus added, “And that’s how lobbyists managed to squeeze maximum benefits for their clients out of the minimum-wage measure.”

³² Bureau of National Affairs, *Daily Labor Report*, Mar. 9, 2000, p. A8.

³³ In general, see Bureau of National Affairs, *Daily Labor Report*, Apr. 25, 2001, pp. A6-A7; and Juliet Eilperin, “Business Seeks Tax Breaks in Wage Bill: Pay Raise is Viewed as Best Chance at Cuts,” *The Washington Post*, May 14, 2001, pp. A1 and A12. In an article, “Business Coalition Holds Firm for Bush Tax Cut Package,” *Congress Daily*, Apr. 19, 2001, reporters Stephen Norton and Charlie Mitchell state that trade association and business supporters of the Bush Administration’s tax package have shown “remarkable discipline in resisting the urge to press for inclusion of their own pet items” in the tax package, “mindful of assurances from GOP leaders that there will be a ‘second bite at the apple’ for business-specific provisions next year or even later this year — possibly paired with a bill to raise the minimum wage.”

³⁴ CRS Report RS20040, *Inflation and the Real Minimum Wage: Fact Sheet*, by Brian W. Cashell. As noted here, the current minimum wage level (\$5.15 per hour) can be reduced, (continued...)

During the initial debates on wage/hour legislation in 1937-1938, it was suggested that a reasonable rate (for that period) would have been 40 cents an hour and a 40-hour work week. Under prolonged objections from southern industrialists, the operative figures were dropped to 25 cents per hour and to a 44-hour work week — in each instance to be raised or lowered according to statute. Thus, Congress avoided dealing with a regional option and southern industrialists also avoided stricter standards.

Because the minimum wage under the FLSA is set in statute, it remains at a fixed level, without regard for changes in the general economy, until Congress alters it through legislation. Failure of the minimum wage to maintain parity with the cost of living has been a continuing concern. Some have questioned whether the minimum wage floor should remain at a fixed point, subject to action by Congress. They suggest it might usefully be *indexed* to reflect changes in the cost of living (or shifts in other economic variables), thus providing a more regular pattern of increase. On the other side, some contend that there really isn't a need for a federal minimum wage at all.

Indexation was discussed during the last century as an approach to wage stability — but was rejected. It was last a subject of extensive congressional debate during consideration of the 1977 FLSA amendments — but was, once again, rejected, the Congress seemingly preferring the current method of direct legislative action.³⁵ Several states — notably, Oregon, Washington, and Vermont — have experimented with minimum wage indexation in recent years.³⁶

To reach the 1968 level (in current dollars), as suggested above, the federal minimum wage would need to be approximately \$9.05. The most expansive proposal, now before the Congress, would set the minimum wage at \$7.50 per hour — to go into effect October 1, 2009.

³⁴ (...continued)

under various segments of the law, to lower rates — including a special reduced wage for *disabled* workers predicated upon their individual capabilities but with no fixed standard.

³⁵ See H.R. 2812 (107th Congress), introduced by Representative Bernard Sanders (I-VT), which discusses indexation.

³⁶ See CRS Report RL30927, *The Federal Minimum Wage: The Issue of Indexation*, by Gerald Mayer.

Senate Proposals To Raise the Federal Minimum Wage

The general federal minimum wage is set in statute at \$5.15 per hour: a cash wage that does not take into account fringe benefits — though various provisions of law permit payment at a lower rate.³⁷ Thus, when the minimum wage has been considered, there are often other — collateral — issues involved as well.

The Kennedy-Santorum Debate

During debate on the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005” (S. 256), minimum wage emerged twice.

First, on March 3, 2005, Senator Edward Kennedy proposed an amendment (S.Amdt. 44) that would have raised the minimum wage, in steps, to \$7.25 an hour beginning 24 months (and 60 days) after enactment of the legislation. In addition, the Kennedy proposal would have applied the federal minimum wage, in steps, to the Commonwealth of the Northern Mariana Islands.³⁸ The proposal by Senator Kennedy was defeated by a vote of 46 ayes to 49 nays on March 7, 2005.³⁹ He indicated that the debate would continue as other bills moved forward.

Second, on March 7, 2005, in connection with the amendments by Senator Kennedy, Senator Rick Santorum introduced a more far-reaching proposal (S.Amdt. 128). It would have: (a) raised the minimum wage to \$6.25 an hour, in steps, to have full effect 18 months after enactment; (b) created a program of *compensatory time* as an alternative to ordinary overtime pay; (c) created an enhanced *small business exemption*; (d) altered the *tip credit* under the FLSA; and (e) provided a range of unrelated tax and other incentives for business. The Santorum proposal was defeated (38 yeas to 61 nays) on March 7, 2005.⁴⁰

The Kennedy-Enzi Debate

October 17, 2005, during consideration of the Departments of Transportation and the Treasury (H.R. 3058), Senator Kennedy reintroduced legislation (S.Amdt. 2063) that would have raised the minimum wage to \$7.25, in steps, beginning 24 months and 60 days after enactment. On this occasion, however, the Senator’s proposal was subsequently modified to provide an increase in the minimum wage, in steps, to \$6.25 per hour — as had been proposed by Senator Santorum during the earlier debate. Senator Michael Enzi entered a separate proposal (S.Amdt. 2115) that

³⁷ For a quick summary of minimum wage legislation (and that affecting overtime pay and child labor), see CRS Report RL32901, *Minimum Wage, Overtime Pay, and Child Labor: Inventory of Proposals in the 109th Congress to Amend the Fair Labor Standards Act*, by William G. Whittaker.

³⁸ *Congressional Record*, Mar. 3, 2005, pp. S1979-S1980.

³⁹ *Congressional Record*, Mar. 7, 2005, p. S2132.

⁴⁰ *Ibid.*, pp. S2132-S2133.

would have provided for a number of changes: flexible schedules, an alteration of the *tip credit*, and revision of various accounting provisions — among other items. There was significant debate on each side of the issue. As the matter came to a vote, Senator Christopher Bond raised a point of order that an increase in the minimum wage that Senator Kennedy was advancing would be in violation of the Congressional Budget Act of 1974 as an “unfunded mandate.” In turn, Senator Kennedy raised a similar point of order on the Enzi amendment. As a result, each proposal was defeated — not on its substance but, rather, on a point of order.⁴¹

The National Defense Authorization Act for 2007

On June 19, 2006, during consideration of the “National Defense Authorization Act for Fiscal Year 2007,” an amendment by Senator Kennedy (S.Amdt. 4322) dealing with the minimum wage was called up. The Kennedy amendment proposed the following: (a) an increase in the federal minimum wage, in steps, to \$7.25, and (b) applicability of the federal minimum wage, in steps, to the Commonwealth of the Northern Mariana Islands. Immediately, Senator Frist proposed a second-degree amendment to the Kennedy amendment (S.Amdt. 4323) entitled “transportation of minors in circumvention of certain laws relating to abortion.” The Frist proposal called for fine and imprisonment (“not more than one year, or both”) for persons who become involved in certain interstate abortion activity.⁴²

“Personally,” said Senator Frist, “... I don’t believe this is the appropriate bill on which to be addressing the minimum wage,” and so “... I second-degred that amendment with a child custody protection amendment.” There had been “some discussion” about a cloture motion on either minimum wage or on child custody, but “after further discussion,” they agreed to work out “the most appropriate manner to bring to the floor and address these issues over the next — I am not sure how long it will take, but figure out exactly how long that is.” Frist stated: “... I believe that a minimum wage amendment should not be debated on this particular bill, but it looks like it will be debated....” Finally, he suggested, “We need to look, at some point, at the issues surrounding our overall economy ... and look at the issues surrounding the minimum wage, but to do it in isolation on a totally unrelated bill I don’t think is the way to go.”⁴³

As the leaders proceeded to discuss procedure for moving forward with the minimum wage amendment, Senator Enzi announced that he would be offering his own amendment. “Of course,” he stated, “I am going to ask that he [Kennedy] withdraw that amendment and I do not propose my amendment because they don’t have to do with the Department of Defense authorization.” To those watching the

⁴¹ See *Congressional Record*, Oct. 18, 2005, pp. S11469-S11470, and Oct. 19, 2005, pp. S11547-S11548. See also *Daily Labor Report*, Oct. 19, 2005, p. A10 and Oct. 20, 2005, p. A15. One industry spokesperson opined: “... if an increase [in the minimum wage] appeared inevitable, one way of softening the impact would be to include some pro-business measures in the bill — like a corresponding increase in the deductibility of business meals.” See *Nation’s Restaurant News*, Sept. 26, 2005, p. 77.

⁴² *Congressional Record*, June 19, 2006, p. S6051.

⁴³ *Congressional Record*, June 19, 2006, p. S6052.

debate, Enzi stated, some may wonder how the minimum wage relates to the current legislation. “The answer is: It doesn’t.”⁴⁴

Senator Enzi Reenters the Debate. Senator Enzi, in a preliminary statement, observed that on four occasions during the current Congress, the Senate had taken up the minimum wage issue — and each time rejected it. (See the Santorum and Enzi discussions, above.) Senator Enzi asserted that he would be “... plenty willing to have the debate again.” The Senator affirmed: “We want to have the American public making as much money as possible.” The new Enzi proposal would provide for an increase to \$6.25 in steps “over 18 months. But, more important than the numbers, only my amendment,” he stated, “recognizes the enormous burdens a mandate such as this would place on the backs of America’s small businesses.”⁴⁵

Senator Enzi then proceeded to explain why an increase in the federal minimum wage was not a good idea — presumably not even the rate of increase that he was proposing. He extolled the small businessperson who trains individuals “with no skills.” Such recruits, he suggested, work only for a short period (perhaps “the first month”) at the minimum rate before moving on “to other levels.” They “get paid more money or they go elsewhere....” Confronted with a minimum wage increase, some employers “increase prices” (“... which they usually can’t do or face a potential loss of customers”), reduce spending on health coverage or other benefits, or terminate employment.⁴⁶

There is a “spiral effect” to an increase in the minimum wage. And a minimum wage may not be justified in productivity terms. “Earned wage growth cannot be legislated. We do a disservice to all concerned, most especially the chronic low-wage worker, to suggest that a Federal wage mandate is the answer.” Turning to high school students (a relative subgroup of minimum wage workers), Senator Enzi suggested: “These noncompletion and dropout rates and poor earning capacity that comes with them cannot be fixed by a Federal minimum wage policy.” And then there are those who are just incompetent.

“Have you ever had a bill for \$10.81 and you gave the clerk \$11 and then you gave them a penny? That is no skills, if they can’t figure out they owe you the 20 cents. No skills.”

The minimum wage “does absolutely nothing to enhance job skills for low-wage workers,” he stated. “In fact, to the extent it makes entry into the workforce more difficult, and increases low-skilled unemployment, as a minimum wage hike without

⁴⁴ *Congressional Record*, June 20, 2006, p. S6123. Neither the Kennedy amendment nor the cited Enzi amendment had been the subject of hearings by the Senate Committee on Health, Education, Labor, and Pensions (HELP): No hearings have been scheduled. Senator Enzi chairs the HELP Committee.

⁴⁵ *Congressional Record*, June 20, 2006, p. S6123.

⁴⁶ *Congressional Record*, June 20, 2006, p. S6124.

economic relief for small business will unquestionably do, it will have precisely the opposite effect.”⁴⁷

Though opposed to an increase in the minimum wage, Senator Enzi threatened to propose such an increase as a counterpoise — were Senator Kennedy to continue with his proposal. In addition to an actual rate increase (over time, to \$6.25 per hour), the Enzi bill would provide an updating of the small business exemption under the FLSA to \$1 million (it is currently \$500,000), a system of flexible scheduling, restructuring of the *tip credit*, and a series of non-wage benefits sought by small businesses.⁴⁸

Senator Kennedy, Senator Warner, and Compromise. Senator Kennedy rose to respond. As to why a minimum wage amendment was being debated as part of the National Defense Authorization, the Senator stated that our troops “are fighting for American values, American principles. Part of American values and principles is economic fairness, not the exploitation of poor workers in the United States of America. That is why it is relevant.” As a more practical matter, the Senator stated: “... we would not have another opportunity to do it on any other bill until the recessing of the Senate.”⁴⁹

The Senator from Massachusetts saw minimum wage quite differently from the Senator from Wyoming: “Study after study finds raising the minimum wage does not cause job loss.” Inflation, he stated, was yet “another canard” that was pointed to by minimum wage critics; but with the small amount of the minimum wage increase (“less than one-fifth of 1 percent of the national payroll”), any inflation would be offset by other factors. One could expect increased morale and greater productivity as people take “greater pride in their work,” he argued. Absenteeism would be reduced because people “were treated with greater respect.” Minimum wage is “a fairness issue.” It is also “a women’s issue” and “a family value issue” and “a civil rights issue because so many of the workers are men and women of color.”⁵⁰

At that juncture, the Frist amendment remained to be dealt with — i.e., interstate transportation for purposes of abortion. At last, Senator John Warner addressed his colleagues. He asked (a) that the Frist second-degree amendment be withdrawn, (b) that Senator Enzi be recognized in order to offer a first-degree amendment relating to the minimum wage, (c) that the Senate resume debate at 9:30 a.m. the following morning with time equally divided between the chairman and ranking member of the HELP Committee (respectively, Senators Enzi and Kennedy), (d) that no amendments be permitted to either proposal, and (e) that “if either amendment does not get 60 votes in the affirmative, then that amendment would be automatically withdrawn.” After some discussion, Senator Warner’s motion was agreed to.⁵¹

⁴⁷ *Congressional Record*, June 20, 2006, p. S6124.

⁴⁸ *Congressional Record*, June 20, 2006, pp. S6126-S6128.

⁴⁹ *Congressional Record*, June 20, 2006, p. S6128.

⁵⁰ *Congressional Record*, June 20, 2006, pp. S6129-S6130.

⁵¹ *Congressional Record*, June 20, 2006, pp. S6137 and S6139. Senator Enzi’s amendment (continued...)

Debate, a ‘Qualified’ Victory, and Procedural Withdrawal. Debate opened on June 21, 2006, with a generalized introduction by Senator Kennedy. Discussion followed.

Senator Jeff Sessions pointed to certain of the broader implications of the minimum wage: that is, to suggest the impact of excessive and illegal immigration upon the incomes of American workers. “We are being told by the business community that there is this incredible shortage out there — they can’t find workers so they have to have foreign workers....” Senator Sessions then observed: “If a business wants to find more workers, they will usually increase wages, not decrease them.” Again, Senator Sessions stated: “I would say that the current rate of immigration, legal and illegal ... has depressed the wages of low-skilled American workers.” Senator Kennedy disagreed with these observations. We are talking about jobs “an American does not take” and “that an American worker has not been interested in and refused to accept,” Senator Kennedy said.⁵²

Senator Judd Gregg stressed that the Enzi proposal was a “thoughtful and effective” way to meet the needs of working people — “especially single women in the workplace, especially single moms....” Senator Gregg suggested that the Kennedy proposal would “raise the minimum wage too quickly” and to a level that “small employers can’t afford.” But the thrust of the Senator’s comments focused upon “family time.” Though impassioned about the wage rate, proponents of an increase in the minimum wage “... stiff-arm the working mother in this country,” the Senator said. Senator Gregg then proceeded to a discussion of *compensatory time* (comp time) as a replacement for overtime rates — an Enzi proposal. “Sure, the minimum wage is important. But there are a lot more people who are going to be affected by the family time language in this bill....” Then Senator Gregg suggested: “Why don’t we include this [comp time] on the other side? We know why they don’t: Because labor unions are against it.” And he added: “It is a knee-jerk reaction on the part of organized big labor to this language.”⁵³

Senator Kennedy responded that the comp time proposal, suggested by Senator Enzi (and endorsed by Senator Gregg) would provide flexible scheduling for the employer — but not for the worker. The employer, he stated, “makes the sole judgment and decision.”⁵⁴

Other arguments, pro and con, were quickly rebutted.⁵⁵ Economic studies have found that “increases such as the proposed minimum wage hike would not reduce employment,” Senator Paul Sarbanes affirmed, and would have certain other advantages: notably, a reduced turnover rate. “You get a more experienced and

⁵¹ (...continued)

was S.Amdt. 4376. See Congressional Record, June 20, 2006, pp. S6178-S6185.

⁵² *Congressional Record*, June 21, 2006, pp. S6194-S6195.

⁵³ *Congressional Record*, June 21, 2006, pp. S6195-S6196.

⁵⁴ *Congressional Record*, June 21, 2006, p. S6196.

⁵⁵ See CRS Report RL31875, *Compensatory Time vs. Cash Wages: Amending the Fair Labor Standards Act?* by William G. Whittaker.

productive workforce, lower costs for recruiting new workers, and lower costs for training new workers.”⁵⁶ Senator Johnny Isakson argued for “the marketplace” — as would Senator Enzi.⁵⁷ Senators Patty Murray and Russell Feingold argued that the minimum wage was simply not enough to permit a family to live decently.⁵⁸ Finally, Senators Kennedy and Enzi closed out the debate. There had been effectively no discussion of the actual non-wage substance of the Enzi amendment. And only at the last minute was a very general letter concerning conditions in the CNMI inserted into the record.

With all time having expired, the voting began. On the Kennedy amendment, the vote was 52 yeas to 46 nays — sufficient under normal circumstances to have passed the amendment. But since an agreement had been worked out with the Republican leadership that a 60-vote margin would be needed, the vote was insufficient. The amendment was “automatically withdrawn.” On the Enzi amendment, the vote was 45 yeas to 53 nays; but since a 60-vote margin was also needed in this case, the amendment was “automatically withdrawn.”⁵⁹

House Proposals to Raise the Federal Minimum Wage

In the House of Representatives, action on the minimum wage (and on related matters) was often the concern of committees, being debated extensively prior to being brought to the floor — if that course were chosen.

The Labor, Health and Human Services, and Education Appropriations Bill (for 2007)

During consideration of the Departments of Labor, Health and Human Services, and Education (for 2007), on June 13, 2006, by the House Appropriations Committee, an amendment was offered by Representative Steny Hoyer that would increase the federal minimum wage to “not less than \$5.85 an hour beginning on January 1, 2007, not less than \$6.55 an hour beginning on January 1, 2008, and not less than \$7.25 an hour beginning on January 1, 2009.” The Hoyer amendment was approved in committee by a vote of 32 yeas to 27 nays, with seven Republicans having joined with Democrats in support of the proposal. Thereafter, the measure was approved by a voice vote.⁶⁰

Hoyer announced that he was “very pleased” that his amendment had been adopted by the House Appropriations Committee. “Republicans talk about creating

⁵⁶ *Congressional Record*, June 21, 2006, p. S6197.

⁵⁷ *Congressional Record*, June 21, 2006, p. S6197-S6198.

⁵⁸ *Congressional Record*, June 21, 2006, pp. S6199-S6201.

⁵⁹ *Congressional Record*, June 21, 2006, pp. S6203-S6204. See also Bureau of National Affairs, *Daily Labor Report*, June 22, 2006, p. AA1.

⁶⁰ Bureau of National Affairs, *Daily Labor Report*, June 14, 2006, p. AA1.

an ‘ownership society,’ yet the fact,” he stated, “remains that their policies have left millions of families earning the minimum wage struggling to afford the basic necessities.” He further stated that unless the leadership interferes, “the amendment’s passage means the House will vote on the minimum wage for the first time in a decade.”⁶¹

The measure (with the Hoyer amendment) will still require floor consideration. Representative Howard P. “Buck” McKeon, Chairman of the House Education and Labor Committee, was quoted as suggesting that he would like to see a point of order raised against the amendment if it comes to the floor.⁶² The minimum wage amendment, the Bureau of National Affairs’ *Daily Labor Report* notes, “is outside the jurisdiction of the Appropriations Committee,” which could make it “subject to a point of order under House rules.”⁶³

Appropriations for the Departments of Commerce, Justice, and State

On June 20, 2006, during consideration of the appropriations for the Departments of Commerce, Justice, and State, Representative David Obey introduced an amendment to raise the minimum wage, in steps, to \$7.25 per hour by January 2009.

The Republicans, with a majority on the committee, either were not present or declined to vote with the Democrats in support of a minimum wage increase. Thus, the Obey amendment failed (28 yeas to 34 nays) — in part because the recent/pending amendment to the Labor, Health and Human Services, and Education bill was viewed as having dealt with the issue.⁶⁴

When on June 28, 2006, while the House had under consideration H.R. 5672 (the Commerce, Justice, and State appropriations bill), Representative Obey once more offered an amendment: to raise the federal minimum wage to \$7.25, in steps, by January 1, 2009, and to extend the minimum wage to the Commonwealth of the Northern Mariana Islands, in steps, until it reaches the otherwise applicable federal minimum wage. Representative Frank Wolf (R-VA) reserved a point of order and discussion followed.

Representative Obey recalled the prior experience with the Departments of Labor, Health and Human Services, and Education. “Every Democrat voted for that amendment, and so did seven Republicans. But,” he continued, “after that happened and the amendment had passed ... the bill was blocked from consideration by the leadership of this House and by the Rules Committee.” Mr. Obey then explained the

⁶¹ Comments by Steny Hoyer, dated June 13, 2006, appeared on his website. See [http://hoyer.house.gov/Newsroom/index.asp?ID=720].

⁶² Bureau of National Affairs, *Daily Labor Report*, June 14, 2006, p. AA1.

⁶³ Bureau of National Affairs, *Daily Labor Report*, June 16, 2006, p. A11.

⁶⁴ Bureau of National Affairs, *Daily Labor Report*, June 21, 2006, p. A9; and *CG Today, Midday Update*, June 20, 2006.

attempt to amend the Departments of Commerce, Justice, and State appropriations in committee (noted above) and how that effort has failed. “We, therefore, asked the Rules Committee to make in order an amendment on this bill which would adjust that minimum wage, and that is what I am trying to do today.” Mr. Obey observed that “... if the point of order is lodged against this amendment, that we will once again be blocked from our effort to provide an increase in the minimum wage....” He further stated:

“... I just want to say to those who say this is not the proper vehicle and we should try to do it on some other bill, that for 9 years we have been waiting for the majority party to find the right vehicle to accomplish this. And for 9 years, nothing has happened.”

Representative Obey explained, from his own experience, some of the complications of having to deal with a very low minimum wage. He suggested that he was not interested in the “niceties about which committee is supposed to handle this bill. This bill,” he stated, “ought to be out on the floor. This amendment ought to pass.”⁶⁵

The rules of the House, however, took precedence. “I believe it is an appropriate issue to debate,” Representative Wolf replied, “but the appropriate forum for debate is with the authorizing committees and with an opportunity for both sides on the issue to present their cases.” Traditionally (except with the 1996 amendments), minimum wage had come to the floor as a freestanding bill, reported from the committee of jurisdiction. “Today’s pending legislation,” Mr. Wolf stated, “is not a place for the debate, and I would hope that the authorizing committee would schedule hearings and bring forward a bill and let the House work its will.” The point of order was “conceded and sustained.” The Obey amendment was, thus, withdrawn.⁶⁶

The Permanent Estate Tax Relief Act of 2006

On June 22, 2006, during floor consideration of the *Permanent Estate Tax Relief Act of 2006* (H.R. 5638), proponents of an increase in the federal minimum wage again took to the floor.

During debate on Resolution 885, Representative James McGovern argued that although the Majority regards tax relief “for the wealthiest people in the United States” to be an “emergency,” it has declined to consider an increase in the minimum wage. McGovern recalled that the Appropriations Committee, a week earlier, had approved an increase in the minimum wage and had included it within the Labor-HHS-Education appropriations bill. But he also stated that the Majority Leader will not allow the House to “consider that provision.” McGovern continued:

“We should be debating today an increase in the minimum wage for workers in this country. We should be doing something that will make a difference in the lives of people who are struggling.... And, instead, here we go

⁶⁵ *Congressional Record*, June 28, 2006, pp. H4712-H4713.

⁶⁶ *Congressional Record*, June 28, 2006, p. H4713.

again bringing the estate tax bill up ..., a bill that benefits mostly people who are very well off.”⁶⁷

Sharpening the contrast, Representative Louise Slaughter pointed out that the current value of the minimum wage “... is at its lowest level since 1955.”⁶⁸ The Congress has “time to deal with estate taxes that will benefit basically people who have wealth in excess of millions of dollars,” stated Representative Benjamin Cardin, but it does not have “enough time to deal with increasing the minimum wage that has been stagnant now for the last 10 years, people making \$5.15 an hour.” And he asked: “Where is the priority of this Congress?”⁶⁹ This is “the ultimate values debate,” added Representative Nancy Pelosi.⁷⁰ Representative Jim McDermott termed the entire debate “the theater of the absurd.”⁷¹

As the vote neared, Representative Charles Rangel moved to recommit the bill with a series of instructions that closed with the admonition: “... based on the above the Committee shall report the same back to the House only after the House has acted on an increase in the minimum wage.”⁷² The motion to recommit failed.⁷³ The estate tax package was adopted (269 yeas to 156 nays).⁷⁴

Internet Gambling Prohibition

On July 11, 2006, the House called up House Resolution 907, providing for the consideration of the *Unlawful Internet Gambling Prohibition and Enforcement Act of 2006* (H.R. 4411). The question arose: Should Members vote *no* on the resolution so that a minimum wage amendment could be added?

The resolution was introduced by Representative Phil Gingrey (R-GA), who directed his remarks to the gaming aspects of the measure. When James McGovern (D-MA) spoke, he, too, endorsed the rule — but then went on to discuss the minimum wage. “The minimum wage is not keeping pace with the cost of living in America today,” he argued. “Poverty is getting worse in our country today.... And it is frustrating that the leadership on the other side of the aisle seems indifferent to that sad reality.”⁷⁵ “What we are asking for is the opportunity to be able to debate the

⁶⁷ *Congressional Record*, June 22, 2006, p. H4429.

⁶⁸ *Congressional Record*, June 22, 2006, p. H4432. Ms. Slaughter proposed a rejection of the resolution, allowing her to bring H.R. 2429 (the Miller minimum wage bill) to the floor for an up-or-down vote

⁶⁹ *Congressional Record*, June 22, 2006, p. H4450.

⁷⁰ *Congressional Record*, June 22, 2006, p. H4456.

⁷¹ *Congressional Record*, June 22, 2006, p. H4451.

⁷² *Congressional Record*, June 22, 2006, p. H4461.

⁷³ *Congressional Record*, June 22, 2006, pp. H4462-H4463.

⁷⁴ *Congressional Record*, June 22, 2006, pp. H4466-H4467.

⁷⁵ *Congressional Record*, July 11, 2006, p. H4970.

issue of increasing the Federal minimum wage and letting people in this Chamber, both Republicans and Democrats, have an opportunity to vote up or down.”⁷⁶

While Republicans remained silent on the minimum wage issue, Representative George Miller stated that a rule on gaming practices was “the only place where we can protest the priorities of this Congress.” Miller, Ranking Minority Member of the Committee on Education and the Workforce, added that there are “... huge gaps of time where it would be available to debate the minimum wage, hold hearings on the minimum wage, and report out a bill for consideration by the Members of Congress. And yet,” he said, “that is not being done.”⁷⁷ McGovern seemed to agree. “... those of us on this side believe that increasing the minimum wage for working families in this country needs to be a priority, and we would prefer to have this discussion during a debate on the minimum wage. Unfortunately,” McGovern stated, “the leadership on the other side continues to deny us that opportunity.”⁷⁸

As debate drew to an end, Representative McGovern urged “... all Members of this House to vote ‘no’ on the previous question so that I can amend the rule and allow the House to vote on H.R. 2429, the Miller-Owens bill to increase the Federal minimum wage....”⁷⁹ However, Members voted to approve the rule: 214 yeas to 189 nays.

Credit Agency Duopoly Relief Act

On July 12, 2006, the House called up the *Credit Agency Duopoly Relief Act of 2006* (H.R. 2990). Representative Shelley Moore Capito (R-WV) introduced H.Res. 906, setting forth the terms under which the bill would be debated. In responding for the Democrats, Representative Doris O. Matsui explained the likely amendments and stated that Members “... will have an opportunity to support today ... an increase in the minimum wage. Just as the credit rating bill seeks to safeguard average Americans in the long term, so should Congress protect their immediate financial needs by increasing the minimum wage.”⁸⁰

Representative James McGovern was one of the early speakers on the proposal. He stated that he had “no problem with the rule before us,” but then added: “... I rise because I do have a serious problem with the way this House is being run.” McGovern continued:

“There is something very, very wrong with this Congress when the Republican leadership refuses to recognize and appreciate the important

⁷⁶ Congressional Record, July 11, 2006, p. H4971-H4972.

⁷⁷ Congressional Record, July 11, 2006, p. H4972. Representative James Leach (R-IA), did state: “I would comment to begin with on Mr. McGovern’s point. I think he has a really quite excellent one on the minimum wage.” He then moved on to discuss the gambling implications of H.R. 4411. *Congressional Record*, July 11, 2006, pp. H4974-H4975.

⁷⁸ *Congressional Record*, July 11, 2006, p. H4973.

⁷⁹ *Congressional Record*, July 11, 2006, p. H4976.

⁸⁰ *Congressional Record*, July 12, 2006, p. H5058.

contributions of workers in this country, and consistently, and I would add callously, refuses to raise the Federal minimum wage.”

McGovern suggested that, in his opinion, Republican priorities “are messed up.” He added: “Is corporate greed part of your Family Values Agenda?” Then he explained his purpose. “You [Members of Congress] will have an opportunity today to make a difference by voting against the previous question so that we can bring an increase in the minimum wage up for a vote.”⁸¹

Representative Barney Frank (D-MA) reiterated the same thought. “We are not trying to displace the underlying bill [H.R. 2990]. We are seeking to defeat the previous question so we can also have a vote on the minimum wage.” Mr. Frank stated:

“We have this extraordinary disparity in this country between hardworking jobs, 40 hours a week, for a pittance, \$5.15 an hour, too little to support their families; and then we have CEOs getting tens and hundreds of millions of dollars when there is no connection between their work and the success of their companies that anybody has been able to measure.”

He continued at some length to discuss the rationale for not bringing up the minimum wage for a vote, concluding, “We are really here talking about not just economic fairness, but democracy.”⁸² Representative Rush Holt (D-NJ) then added to the debate. “We will have a recorded vote in a few minutes on the previous question. This is not an arcane parliamentary procedure. Every editorial board, every citizen group, every voter,” he suggested, “ought to understand what this vote means. It means, will we have a vote on the floor about raising the minimum wage to something that is tolerably humane?”⁸³ With McGovern, Representative Hoyer called on the Members to “defeat the previous question” so that a minimum wage proposal can be brought to the floor.⁸⁴

Representative Matsui, closing the debate on the rule, affirmed that she would “be asking Members to vote ‘no’ on the previous question so I can amend the rule and provide this House with an opportunity to vote on legislation to increase the Federal minimum wage....”⁸⁵

⁸¹ *Congressional Record*, July 12, 2006, p. H5058.

⁸² *Congressional Record*, July 12, 2006, p. H5059.

⁸³ *Congressional Record*, July 12, 2006, p. H5060. Representative Obey explained, from his perspective, the rationale for bringing up the minimum wage on a credit industry bill. “The way this House works, absolutely nothing can be brought to the floor for a House vote unless we have the permission of the majority party leadership to do so. And the fact is that for the last month they have been absolutely stonewalling every single effort to bring an increase in the minimum wage to this floor.” Mr. Obey concluded: “That is not right, it is not fair, and it is not moral.” See *ibid.*, pp. H5060-H5061.

⁸⁴ *Congressional Record*, July 12, 2006, p. H5061.

⁸⁵ *Congressional Record*, July 12, 2006, p. H5061.

For her part, Representative Capito suggested that the vote on the previous question was “procedural” and is “without substance.”⁸⁶ No other comments from the Majority had been made on the minimum wage implications of the bill. On the previous question, the vote was 308 yeas to 113 nays.⁸⁷

Vocational and Technical Education Act: Miller Motion to Instruct

On July 12, 2006, the House called up the Senate-passed bill, S. 250 (the *Vocational and Technical Education for the Future Act*), and without objection it was determined that conferees be appointed. At that point, Representative George Miller proposed a motion to instruct the conferees to include within the conference substitute the following language: “In section 3(2) of the bill, after the phrase ‘high wage’ insert ‘(in no case less than \$7.25 an hour).’”⁸⁸

Miller reminded the House that the federal minimum wage “is just \$5.15 an hour,” stating that such a figure “is a shame, it is an insult, and it is a moral outrage.” He reviewed the purposes of the original enactment and walked his colleagues through the realities of the current consumer market. “... [T]he fact of the matter is that these people who have made a conscious decision to go to work every day are so badly disadvantaged that they cannot raise themselves above the poverty line.” Mr. Miller continued: “... you cannot build a strong and rich country on the backs of poor people. It simply will not work.”⁸⁹

Representative Howard P. “Buck” McKeon (R-CA) then rose to explain what the bill in question would do. “Nothing in the Vocational Education bill before us has anything to do with the minimum wage,” he stated, “nor had there been any discussion of the minimum wage among the conferees, because this is neither the time nor the place to consider an increase.” Mr. McKeon further stated that the proposal is for a reauthorization of the vocational education bill. “We have been meeting with the Senate for almost a year trying to work out, resolve the differences between the bills so we can get a bill finally passed and to the President’s desk.”⁹⁰

About 15 minutes ago, McKeon stated, “... the Democrats gave us this motion to instruct conferees that says: ‘In section 3(2) of the bill, after the phrase ‘high wage’ insert ‘(in no case less than \$7.25 an hour).’” Now, McKeon suggested, “... it sounds like they are talking about minimum wage, but what they are doing is defining a high wage as \$7.25 an hour.” As Representative McKeon explained, the proposal would not amend the FLSA to create a new minimum wage level, but rather would apply only to those students engaged in “academic and technical and equip them with the knowledge to proceed with postsecondary education.” In the process,

⁸⁶ *Congressional Record*, July 12, 2006, p. H5061.

⁸⁷ *Congressional Record*, July 12, 2006, pp. H5079-H5080.

⁸⁸ *Congressional Record*, July 12, 2006, p. H5073.

⁸⁹ *Congressional Record*, July 12, 2006, pp. H5073-H5074.

⁹⁰ *Congressional Record*, July 12, 2006, p. H5074.

he suggested, the proposal would “give us something that changes the definition of high wage to \$7.25 an hour and ends up tainting good work with bad politics.”⁹¹

Without rebutting McKeon’s contention, Miller objected: “Our committee [Education and the Workforce] has had no hearings and they are not reporting the bill. Where is the time and where is the place?” Referring to those who work at or below the minimum wage, Miller stated: “... where do they go to make their case to this Republican Congress? Where is that time and where is that place?”⁹²

On the Miller motion to instruct the conferees on S. 250, the vote was 260 yeas to 159 nays. The motion was agreed to.⁹³

Pledge [of Allegiance] Protection Act of 2005

On July 19, 2006, the House called up for debate the *Pledge Protection Act of 2005* (H.R. 2389). As the debate on the rule (H.Res. 920) commenced, Representative Obey was recognized. He observed that “for 9 years there has been no increase in the minimum wage.” Obey reviewed the recent congressional record on minimum wage votes and pointed to an article from *Congressional Quarterly* (CQ). “It is unlikely that GOP leaders would allow an up-or-down vote on a wage increase. Rather,” Obey stated, still quoting the CQ article, “... aides say that if they craft a bill, it would likely include so-called sweeteners.” Obey continued:

“... I am proud of the fact that on this side of the aisle, our Members do not have to be maneuvered and cajoled and enticed into voting for a minimum wage increase. I am pleased by the fact that on this side of the aisle, Members do not need sweeteners in order to do what is right on this issue.”⁹⁴

W. Todd Akin (R-MO), sponsor of the Pledge Protection Act, stated that he had come “to discuss” the rule; but, “... most of the discussion that seems to come from the other side is complaining about priorities.” Representative Akin went on to discuss the philosophy behind the Pledge Protection Act and affirmed that the “bill is important and not irrelevant or trivial.”⁹⁵

As debate on the rule (H.Res. 920) drew to a close, Representative Alcee L. Hastings (D-FL), speaking for the Democratic minority on the rule, interjected: “I urge all Members to vote ‘no’ on the previous question so I can amend the rule and

⁹¹ *Congressional Record*, July 12, 2006, p. H5074. Later, p. H5075, Mr. McKeon reiterated: “As I said earlier, what it does is change high-skill, high-wage to \$7.25 an hour. That is what I read from their motion to instruct.” Again, McKeon noted: “... aside from all of the rhetoric about the minimum wage, this is not a vote on the minimum wage bill, it is a vote on reauthorizing the Vocational Education Act.”

⁹² *Congressional Record*, July, 12, 2006, p. H5075.

⁹³ *Congressional Record*, July 12, 2006, p. H5080.

⁹⁴ *Congressional Record*, July 19, 2006, p. H5390.

⁹⁵ *Congressional Record*, July 19, 2006, pp. H5390-H5391.

provide this House with yet another chance to vote on legislation to increase the Federal minimum wage.” He continued:

“My amendment provides that immediately after the House adopts this rule it will bring H.R. 2429, the Miller-Owens minimum wage bill, to the House floor for an up-or-down vote. This bill will gradually increase the minimum wage from the current level of \$5.15 an hour to \$7.25 an hour after about 2 years.”

Representative Hastings noted that “... [it] is identical to language that was included in the Labor-HHS appropriations bill that was blocked by the majority leadership last month.” Further, he stated: “It is also identical to the language that we on the Democratic side have tried to bring to this floor in recent weeks.” He added: “... every day that we fail to bring legislation to the floor to increase the minimum wage is another day we turn our backs on America’s low-income and middle-class families who desperately need our help.”⁹⁶

There was no substantive rebuttal to the Hastings proposal. When the rule was called up, the vote was 257 yeas to 168 nays. The Hastings proposal fell.⁹⁷

Action Urged by 28 Republican House Members

On July 12, 2006, 28 Republican Members of the House joined together to urge that action be taken on minimum wage legislation prior to the August recess.

Spearheaded by Representatives Frank LoBiondo (R-NY) and Steven LaTourette (R-OH), co-chairs of the House Republican Working Group on Labor, the 28 House Republicans signed an appeal to Majority Leader Boehner requesting that minimum wage legislation be brought up for a vote. The signers suggested that “it has been nearly ten years since the last increase in the minimum wage” was signed into law. They stated that a person who regularly works a 40-hour workweek “earns \$10,700 per year. Nobody working full time,” the Members observed, “should have to live in poverty. We believe it is time for Congress to take responsible action to raise the minimum wage and ensure our hard working constituents can provide for their families.”⁹⁸

Several of the signatories stated that their respective states had raised state minimum wage laws, thereby creating an economic imbalance. “We must level the playing field,” stated Representative Phil English (R-PA), “and provide a fair wage for all American workers while ensuring that local businesses are not encouraged to move to a neighboring state with a lower minimum wage.”⁹⁹ Similarly,

⁹⁶ *Congressional Record*, July 19, 2006, p. H5395.

⁹⁷ *Congressional Record*, July 19, 2006, p. H5397.

⁹⁸ The letter, addressed to Representative John Boehner, Majority Leader, appears on the website of Representative LoBiondo, visited on July 20, 2006: www.house.gov/apps/list/press/nj02_lobiondo/071306.html.

⁹⁹ See press release, website of Representative English, visited July 20, 2006,

(continued...)

Representative John Sweeney (R-NY) remarked that “New York State has already seen fit to provide a better living wage for employees,” and expressed concern that “businesses in New York do not leave to go to states with a lower minimum wage, taking needed jobs with them.”¹⁰⁰

Proponents of a minimum wage increase had pressed for an up-or-down vote — presumably only dealing with the minimum wage *per se* — or with very closely related issues. Representative LoBiondo, in a followup press release, stated that he had met with Majority Leader Boehner “on developing a comprehensive legislative package that could also provide benefits to the small business community.”¹⁰¹ However, a more comprehensive package (with *sweeteners*) may pose new problems. On July 18, 2006, Representative George Miller wrote to Boehner, stating that “... a legitimate vote on the minimum wage must not be saddled with poison pills, such as labor law rollbacks.”¹⁰² Representative Obey took basically the same approach, noting “Republican leaders must not attempt to defeat this proposal by attaching ‘poison pill’ provisions.”¹⁰³

House Acts on Estate Tax, Incentives for Business, and the Minimum Wage

During the early evening of July 28, 2006, following a day during which the House was in recess (subject to the call of the Chair), that body was called to order. Representative Doc Hastings (R-WA), speaking for the Committee on Rules, presented H.Res. 958, a “same day rule.”

Debating the Preliminaries

As structured, there would be a series of sequential debates. First, the House would be asked to approve a *martial law rule* (H.Res. 958): a term sometimes applied to consideration of certain bills that, in its absence, would require a *lay-over provision*, or certain similar requirements. Second, the House would debate the rule

⁹⁹ (...continued)

[http://www.house.gov/apps/list/press/pa03_english/MW0706.html].

¹⁰⁰ See press release, website of Representative Sweeney, visited on July 20, 2006, [http://www.house.gov/list/press/ny20_sweeney/PR071206MINWAGE.html].

¹⁰¹ See press release, website of Representative LoBiondo, visited on July 20, 2006: www.house.gov/apps/list/press/nj02_lobiondo/071306.html.

¹⁰² See Representative George Miller to Majority Leader Boehner, July 18, 2006, Miller website, [http://www.house.gov/apps/list/press/ed31_democrats/re171806c.html], visited July 20, 2006.

¹⁰³ See press release, website of Representative Dave Obey, July 18, 2006, [<http://obey.house.gov/HoR/WI07/Newsroom/Press+Releases/Obey+Continues+Fight+For+A+Fair+Minimum+Wage.htm>], visited on July 20, 2006. See, also, Ben Pershing and Erin P. Billings, “*Wage Hike Vote Likely in House*,” Roll Call, pp. 1 and 24.

on the particular bill (H.Res. 966). Third, there would be a debate on the bill itself: in this case, H.R. 5970.

Debate on the *Martial Law Rule*: H.Res. 958. Under H.Res. 958, a variety of issues (several bills) were to be in contention, one of which dealt with “economic security for all Americans.” Representative Hastings assured the membership that the bills were of “vital importance to the American people.”¹⁰⁴

James McGovern, speaking for the minority of the House Rules Committee, rose “in strong opposition to this martial law rule.” Representative McGovern stated:

“Apparently, the Republican leadership will be presenting a minimum wage bill that will be loaded down with sweetheart tax deals for the wealthy and the corporate special interests, the same special interests that call the shots in the Republican House.”

McGovern objected to the timing of the bill (that the bills “appeared literally just an hour ago which no one has read...”).¹⁰⁵ Others continued in largely the same manner. Representative Gene Green (D-TX) affirmed: “We should have an up-and-down vote on a minimum wage increase, not a vote on [a] minimum wage increase and the estate tax at the same time or pension reform or whatever else the leadership feels convenient to add to this bill.”¹⁰⁶

Hastings responded that “... we have the minimum wage in the same bill as the sales tax [deduction],” and added: “it seems to me to be a pretty attractive package.”¹⁰⁷ Hastings stated that he was “not in favor of raising the minimum wage” and that he had “never voted for that.” He would vote for this bill, he stated, “...not because I embrace the minimum wage” but “...because it has the sales tax deduction for Washington State and other States that don’t have sales tax deductibility.” Hastings concluded: “It seems to me it is the best of all worlds in the give and take of the legislative process....”¹⁰⁸

On H.Res. 958, the vote was 217 yeas to 192 nays. The resolution was adopted and the martial law rule was passed.¹⁰⁹

Debate on the Rule for Floor Consideration: H.Res. 966. As reported from the Committee on Rules, H.R. 5970 came to 183 pages. Mr. Hastings recited its contents: some elements of pension legislation, state and local sales tax

¹⁰⁴ *Congressional Record*, July 28, 2006, pp. H6023-H6024. The bill on the minimum wage was part of a composite bill that deals with the estate tax, with other provisions. Of 183 pages, the minimum wage and related issues occupy three pages.

¹⁰⁵ *Congressional Record*, July 28, 2006, p. H6024.

¹⁰⁶ *Congressional Record*, July 28, 2008, p. H6025.

¹⁰⁷ *Congressional Record*, July 28, 2006, p. H6025.

¹⁰⁸ *Congressional Record*, July 28, 2006, p. H6026.

¹⁰⁹ *Congressional Record*, July 28, 2006, pp. H6028-H6029.

deductions, special tax treatment of privately owned forest lands, extension of a research and experimentation tax credit, proposals dealing with education — and, finally, issues related to the minimum wage.

The structure of the bill raised questions with minimum wage advocates. The American people, Mr. McGovern began, “want and deserve a clean up-or-down vote on raising the minimum wage, and this rule does not provide for such a vote.” He characterized the bill as cluttering “up the minimum-wage vote with ... tax cuts for the wealthy.”¹¹⁰ Representative Charles Rangel (D-NY) stated that the primary focus of the bill was “the estate tax” with the minimum wage added.¹¹¹ “It links action to help struggling families, working families,” stated Representative Sander Levin (D-MI), “with tax breaks for the very wealthy. And why the linkage? It is clear. Because the estate tax provisions can’t pass on their own.”¹¹²

Conversely, Representative Deborah Pryce (R-OH) affirmed: “Our friends on the other side of the aisle are already calling this political, but they are wrong. It is,” she said, “another example of House Republicans getting things done for the American people.”¹¹³

On H.Res. 966, there was a recorded vote with 217 yeas and 194 nays. The House then proceeded, following a break for other business, to take up H.R. 5970.¹¹⁴

The Bill (H.R. 5970) as Reported

As presented (and as approved by the House), the minimum wage portion of the bill was divided into four parts.

First: The minimum wage would be increased by the following amounts: \$5.85 per hour, beginning on January 1, 2007; \$6.55 an hour, beginning June 1, 2008; and \$7.25 an hour, beginning June 1, 2009.

Second: Tips “shall not be included as part of the wage paid to an employee to the extent that they are excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee....”

Parts one and two *may not* have been especially controversial. However, the remainder of the bill’s minimum wage provisions — dealing with the *tip credit* — it seems could be contentious. There follows:

Third: “Notwithstanding any other provision of this Act, any State or political subdivision of a State which on or after the date of enactment of the Estate Tax and Extension of Tax Relief Act of 2006 excludes all of a tipped employee’s tips

¹¹⁰ *Congressional Record*, July 28, 2006, p. H6032.

¹¹¹ *Congressional Record*, July 28, 2006, p. H6034.

¹¹² *Congressional Record*, July 28, 2006, p. H6035.

¹¹³ *Congressional Record*, July 28, 2006, p. H6032.

¹¹⁴ *Congressional Record*, July 29, 2006, pp. H6038-H6039.

from being considered as wages in determining if such tipped employee has been paid the applicable minimum wage rate, may not establish or enforce the minimum wage rate provisions of such law, ordinance, regulation, or order in such State or political subdivision thereof with respect to tipped employees unless such law, ordinance, regulation, or order is revised or amended to permit such employee to be paid a wage by the employee's employer in an amount not less than....”

Fourth: (continuing) “... an amount equal to —

“(A) the cash wage paid such employee which is required under such law, ordinance, regulation, or order on the date of enactment of the Estate Tax and Extension of Tax Relief Act of 2006; and

“(B) an additional amount on account of tips received by such employee which amount is equal to the difference between the cash wage described in subparagraph (A) and the minimum wage rate in effect under such law, ordinance, regulation, or order, or the minimum wage rate in effect under section 6(a), whichever is higher.”

Unlike changes in the minimum wage prior to the 1996 round, there have been no hearings on the specific proposals of H.R. 5970 — and, thus, there is no testimony to serve as a guide to its interpretation.

The House Considers the Bill: H.R. 5970

Debate on H.R. 5970 was divided between Representatives William Thomas (R-CA) and Rangel of New York. Much of the testimony was generic — perhaps because the bill had just been introduced prior to actual debate.¹¹⁵

Debate on the minimum wage aspects of the bill tended to emphasize what opponents considered to be the short-comings of the legislation. Representative Robert Andrews (D-NJ) stated: “No bill more clearly captures the distorted values of the majority of the House than the bill before us right now.” Of the estate tax provisions of the bill, Andrews affirmed, “This shows us who comes first.” Again, speaking generally, “This is a shameful distortion of the country's values.”¹¹⁶

Others, however, were positive. Representative Frank LoBiondo (R-NJ) rose “in support of this minimum-wage package which I think is long overdue.” He thanked “the 48 or 50 other Republicans that stood along together with me in presenting our case....” He continued:

“Some Republicans are not happy about this. If I had my choice, this package would have looked a lot different. But we don't live in the world of the perfect, and we should not sacrifice the good for the perfect.”

¹¹⁵ See *Congressional Record*, July 28, 2006, p. H6028.

¹¹⁶ *Congressional Record*, July 28, 2006, p. H6190.

He suggested that the “reality is that probably a straight minimum-wage vote, that I would have preferred,” probably couldn’t have been passed.¹¹⁷

A somewhat different perspective arose from the Far West. “The only people in the State of Washington whose wages will be affected by this bill, should it pass,” stated Jay Inslee (D-WA), “will have their minimum wage decreased.” Inslee pointed to the impact of the tip credit.

“Seven states are in the same position: Alaska, California, Minnesota, Montana, Nevada, Oregon and Washington. In seven States in this country, the only people who will be affected by this bill are those who will get their minimum wage slashed.... That is what you have written into this bill. ...I want to make sure people understand in the States of Washington, Montana, Nevada, California, those States, that if it [H.R. 5970] did pass, they would be cutting restaurant workers.”¹¹⁸

Representative Miller concurred in the Inslee comments. “They would lose their wages under this bill,” Miller said.¹¹⁹

Representative J. D. Hayworth (R-AZ) pointed to a “level of Orwellian ‘newspeak’ emanating from our friends on the left. We are now told that a reasonable, rational compromise that includes many commonsense ideas is somehow legislative extortion.” He continued: “Isn’t it interesting the lexicon offered by the left? If it is a compromise forged by conservatives that somehow actually, ironically delivers on an issue for which my friends on the left believe they have ownership, why, that is a poison pill.”¹²⁰

Representative David Scott (D-GA), recalling a line from *Julius Caesar*, remarked on “the meanest cut of all in this bill.” The bill “excludes all of the tipped employees’ tips from being considered as wages in determining if such tipped employees have been paid the applicable minimum wage rate.”¹²¹ Representative Jim McCrery (R-LA) joined the dialogue.

“Mr. McCRERY. ... I just want to say to the point that some are making about States that have no tip credit law and have a higher minimum wage..., all they have to do in response to passage of this bill is to pass any kind of tip credit. It can be a minimal tip credit, and then they can fully restore the minimum wage

¹¹⁷ *Congressional Record*, July 28, 2006, p. H6192.

¹¹⁸ *Congressional Record*, July 28, 2006, p. H6192.

¹¹⁹ *Congressional Record*, July 28, 2006, p. H6193. In the several states, minimum wage rates are higher than the wages under the FLSA or there is a provision of state law that precludes tips from being included in calculating the overall minimum wage. Thus, were the proposed legislation to be enacted and unless a state amends its law, the state law governing the minimum wage for the tipped worker in those states would be overturned by the language of H.R. 5970.

¹²⁰ *Congressional Record*, July 28, 2006, p. H6194-H6195.

¹²¹ *Congressional Record*, July 28, 2006, p. H6195.

that that State wishes its employees to have. So it is not that complicated. It is not that difficult as some Members have suggested.

“Mr. INSLEE. ... what we want to point out and we want to make sure, because I think I have confirmed this ... the way this works, if this bill passes, in the State of Washington the minimum wage goes down the next day \$1.78 an hour.

“The gentleman is correct. If the State legislature got together and essentially overrode the Republicans in Congress, they might be able to get it back up where it was. But you know what? ... it is not going to happen. That is why we object to cutting the minimum wage in any State by any Congress of any party.”

Representative McCrery suggested that “it is a legitimate issue the gentleman brought up” but it could “easily be taken care of, the same way his State originally enhanced the minimum wage in Washington.”¹²²

Inslee was not alone in his protest. “After months of stalling, the Republican leadership was finally forced to allow a vote. Unfortunately it was not a simple vote on minimum wage...,” stated Earl Blumenauer (D-OR). “In Oregon restaurant workers are paid \$7.50 per hour and yet this legislation would reduce their wage to only \$5.15 per hour.” Representative Blumenauer commented that the bill was “poorly drafted” and argued: “The minimum wage needs to be increased by crafting a simple and clear solution that protects states with existing legislation. Under no circumstance,” he stated, “should the Federal government undercut what Oregon voters have already established.”¹²³

George Miller proposed to recommit the bill with instructions; the motion was defeated: 190 ayes to 220 nays.¹²⁴ On a final vote, the bill was adopted with 230 ayes to 180 nays.¹²⁵

¹²² *Congressional Record*, July 28, 2006, p. H6195. Traditionally, the federal government has established a general standard of wages and hours and has allowed the states to build upon that standard. H.R. 5970's impact on that policy may raise questions relating to federal and state relations.

¹²³ *Congressional Record*, July 28, 2006, p. H6199.

¹²⁴ *Congressional Record*, July 28, 2006, pp. H6219-H6220.

¹²⁵ *Congressional Record*, July 28, 2006, pp. H6220-H6221.

The Senate Takes Up the House-Passed Bill

On August 3, 2006, the Senate took up the so-called “trifecta” legislation.¹²⁶ As considered by the Senate, the bill (H.R. 5970) was composed of three units. *Part one* dealt with tax measures: i.e., the estate tax or “death tax.” *Part two* concerned the extenders: tax law that deals with the treatment of state sales tax for internal revenue purposes, a research and development tax oriented toward industry, etc. *Part three* provided for an increase in the federal minimum wage. The three components were taken up more-or-less sequentially — through, here, emphasis will be placed on the minimum wage provisions of the act.¹²⁷

Initial Concern: The “Tip Credit”

Debate on the issue was interspersed throughout the day of August 3, 2006. Senator Norm Coleman (R-MN), early in the day, suggested that he found it “regrettable that some of my Democratic colleagues are now arguing that the tip credit provision would actually lead to a reduction in the minimum wage for those workers in non-tip credit states.” Further: “The charge that the tip credit provision would result in the minimum wage for tipped workers going down is absolutely false.” Senator Coleman sought permission to have printed into the *Record* a statement by Victoria A. Lipnic, Assistant Secretary of Labor for Employment Standards (August 2, 2006), addressed to Senator Frist. The letter reads, in pertinent part:

“If Section 402 of the Act (“Tipped Wage Fairness”) were passed into law, WHD [the Wage and Hour Division] would read Section 402 *as protecting the current minimum wages* of the tipped employees in the seven states that now exclude a tipped employee’s tips from being considered as wages because to do otherwise *would be inconsistent with what we understand to be the intent of Congress and the Fair Labor Standards Act*, which WHD enforces.

“Nevertheless, we are aware that some have argued that Section 402 is ambiguous.” (Emphasis added.)

Senator Coleman said that Lipnic letter “... says that absolutely the Fair Labor Standards Act prohibits employers from paying less than the current minimum wage.” He emphasized that “The letter from the Department of Labor is very clear.”¹²⁸

For others, however, the clarity of the proposed amendment was more problematic. They questioned how *protecting the current minimum wages* for a tipped employee who (a), under state law *may not* have his/her wages reduced by tips received but who (b), under the proposed amendment, would have that restraint removed. The issue was how the *intent of Congress*, which had traditionally allowed

¹²⁶ In the Senate, the bill was termed by Senator Frist as the “Family Prosperity Act” and, informally, as the “trifecta.”

¹²⁷ *Congressional Record*, Aug. 3, 2006, pp. S8725-S8726. On Aug. 2, 2006, *Congressional Record*, p. S8668, Senator Frist filed a cloture motion on H.R. 5970.

¹²⁸ *Congressional Record*, Aug. 3, 2006, pp. S8677-S8678.

for elimination of the tip credit under state law, would be interpreted given the proposed legislation.¹²⁹ “The waiters and waitresses who depend on tips in seven States” affirmed Senator Durbin, “will get a pay cut with this so-called minimum wage increase.”¹³⁰ The *tip credit* “should be called a tip penalty,” suggested Senator Carl Levin (D-MI), since it allows employers of tipped employees to pay as their share of the minimum wage “as little as \$2.13” per hour — assuming that the remainder of the minimum wage is made up through tips. According to Senator Levin:

“Although this tip penalty has been Federal law for years, States have been free to guarantee higher wages to workers in these industries. This bill would supersede those state laws to permit the lower wages. This will decrease wages in at least seven States, and it will set a dangerous precedent by allowing the Federal Government to interfere with the States to cut the wages of the lowest-paid workers.”¹³¹

Senator Patty Murray (D-WN) placed in the *Record* a letter from Gary K. Weeks, director, Washington State Department of Labor and Industries, which seemed to support the comments of critics. “Under our preliminary analysis,” Weeks’s letter stated,

“this proposal, in effect, appears to nullify an employer’s obligation to pay the minimum wage rate ... with regard to tipped employees. This means that Washington workers who receive tips — typically service industry workers — would see a decrease in income.”

He further said that the proposal would allow the several states to revisit the issue and, if they chose to do so, “... to amend their laws to specifically reinstate their current minimum wage rate laws.” But, until such action were to occur, the House-passed bill (then before the Senate) “would diminish workers’ rights in Washington State.”¹³²

General Issues in the Debate

With Senators Frist and Reid in charge, debate on the general issue of H.R. 5970 commenced when the Senate convened on August 3, 2006. Senator Grassley looked to the non-wage aspects of the bill, noting that he would continue to support

¹²⁹ See discussion of the tip credit provisions in this report, above, pages 37-40.

¹³⁰ *Congressional Record*, Aug. 3, 2006, p. S8729. The seven states are Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington — along with Guam.

¹³¹ *Congressional Record*, Aug. 3, 2006, p. S8741.

¹³² *Congressional Record*, Aug. 3, 2006, p. S8731. The letter from Weeks, dated Aug. 3, 2006, was addressed, jointly, to Senators Murray and Maria Cantwell (D-WA). See also memorandum by Jon O. Shimabukuro, Legislative Attorney, Congressional Research Service, to Honorable Barbara Boxer, Aug. 2, 2006, *Congressional Record*, pp. S8732-S8733.

minimum wage increases “as long as the increase doesn’t raise teen unemployment and doesn’t hurt small business.”¹³³

Rising in Opposition. Critics of H.R. 5970 seem to have been grouped together — speaking first. Senator Kennedy stated: “The Republican bill would boost the bottom line for America’s restaurants, while taking money away from hardworking Americans who depend on tips to support themselves and their families.” Kennedy discussed the problem of tipped employees in a range of crafts, referring to the seven states that currently do not allow a tip credit to employers. “In fact, the Fair Labor Standards Act encourages States to enact laws that are more protective for workers than the Federal law.” Then, he moved on to an analysis of the current proposal.

“... the Republican bill would take power away from the States by nullifying these state laws providing stronger wage protections for tipped employees than [would] the Federal standard....

“Under this bill, tipped workers would see drastic reductions in their take-home pay. A waitress at a family restaurant in Washington State, for example, will see her hourly wages drop by \$5.50 an hour. That’s almost \$11,500 per year. A hotel maid in Oregon will see her hourly wages drop by \$5.37 an hour. That’s almost \$11,200 a year.”¹³⁴

Senator Frank Lautenberg (D-NJ) termed the bill “a cynical ruse.” The measure, he said, “marries the minimum wage increase with this huge cut in the inheritance tax.” He continued “... the Republican position is: we will only help everyday working people in America if you give multi-millionaires and billionaires a bribe.”¹³⁵ Senator Jack Reed (D-RI) focused upon procedural matters. “The economic disparities between minimum wage workers and wealthy people whose large estates are subject to the estate tax are so vast that pairing these two measures together defies logic. I am hard pressed,” Reed stated, “to find a link between either of these issues and the extension of several expiring tax provisions that have been tacked on as well.”¹³⁶ Senator Daniel Akaka (D-HI) was “disheartened that the majority in Congress uses the plight of our low-income and disadvantaged to better the cause for the wealthiest among us,” and suggested that it was “truly an outrage that the majority has stooped so low to do this....”¹³⁷

Senators Tim Johnson (D-SD) and Christopher Dodd (D-CT) generally concurred, while Senator John Kerry (D-MA) suggested of the tax-minimum wage linkage: “This is nothing more than political blackmail.”¹³⁸ Meanwhile, Senator Barack Obama (D-IL) observed: “This is simply an attempt to dare members of my party to vote against an increase in the minimum wage which has been one of our

¹³³ *Congressional Record*, Aug. 3, 2006, p. S8726.

¹³⁴ *Congressional Record*, Aug. 3, 2006, p. S8732.

¹³⁵ *Congressional Record*, Aug. 3, 2006, pp. S8734-S8735.

¹³⁶ *Congressional Record*, Aug. 3, 2006, p. S8735.

¹³⁷ *Congressional Record*, Aug. 3, 2006, pp. S8736-S8737.

¹³⁸ *Congressional Record*, Aug. 3, 2006, pp. S8737-S8739.

long-time priorities.” Again, Senator Obama stated: “They have decided to hold an increase in the minimum wage hostage to a fiscally destructive cut in the estate tax.”¹³⁹

Rising in Support. As the period for debate drew to a close, several Republicans rose to challenge the Democratic position, but, although some were as vigorous in style as were the critics, they tended to focus on non-minimum wage issues, for the most part.

Senator Santorum stated: “We have voted on minimum wage more in this Chamber than probably any other issue.” Then, the Senator moved on to other matters. “This is a compromise. This is giving things that I can tell you many on this side of the aisle don’t want to give....”¹⁴⁰ Senator Kay Bailey Hutchison (R-TX) had “heard the Democratic leader call this a ‘do-nothing Congress.’ He said that several times. I have heard it before. Yet here we have a bill that will go directly to the President.” She explained that the bill “gives a minimum wage increase of over \$2 that we have been trying to do, along with tax cuts for small businesses so that it is a balance for years in this Congress. We have,” Mrs. Hutchison affirmed, “been trying to permanently ease the burden of the death tax ever since I got to this Senate.” She indicated that the tax negatively affects “the small businesses” and “the farmer who is going to have to sell his farm when he dies.... It is the small business that has been built by a family.” She stated: “This is a bill that would take away the ability to call this a ‘do-nothing Congress.’” Mrs. Hutchison concluded that following the Democratic line would be “... turning our back on the middle class and the poor people of this country who depend on the minimum wage and death tax relief.”¹⁴¹ And Senator Jon Kyl (R-AZ) affirmed: “The bottom line of this legislation ... is it will increase the standards of living and decrease the cost of dying.”¹⁴²

Senator Pete Domenici (R-NM) rose “in support of the Estate Tax and Extension of Tax Relief Act of 2006 ... more commonly known as the Family Prosperity Act.” He would support the legislation “because it represents a fair and reasonable compromise on all three of these important issues.” Later, Senator Domenici explained: “I have said many times before that I would support an increase in the minimum wage if it was crafted properly. I believe that this bill is crafted properly because it raises the minimum wage while extending some personal and business tax cuts and reduces the overreaching death tax.”¹⁴³

Senator Enzi, chair of the Committee on Health, Education, Labor, and Pensions, similarly rose “in strong support of ... the Estate Tax and Extension of Tax Relief Act.” But, here, his focus was upon the Abandoned Mine Land Trust Fund (AML) and related issues. Though he mentioned that the legislation would provide “a minimum wage increase,” he did not discuss that issue here. “I also take this

¹³⁹ *Congressional Record*, Aug. 3, 2006, p. S8739.

¹⁴⁰ *Congressional Record*, Aug. 3, 2006, p. S8742.

¹⁴¹ *Congressional Record*, Aug. 3, 2006, pp. S8742-S8743.

¹⁴² *Congressional Record*, Aug. 3, 2006, p. S8743.

¹⁴³ *Congressional Record*, Aug. 3, 2006, p. S8743.

opportunity to voice my support for the estate tax relief contained in this legislation” — a tax which he regarded as “burdensome and unfair.” In closing, Senator Enzi noted his intention “to vote in favor of the overall package.” He explained: “I strongly support the inclusion of the AML legislation. I am also strongly supportive of the tax extenders and the death tax relief. I hope that my colleagues will see the importance of this legislation and will join me in supporting its passage.”¹⁴⁴

The Issue Brought to a Vote

In the Senate, the issue was a cloture motion. On that motion, the vote was 56 yeas to 42 nays. “Three-fifths of the Senators duly chosen and sworn not having noted in the affirmative,” the *Record* read, “the motion is rejected.” The qualifying vote would have been 60 votes.

Anticipating that the vote would go against the position taken by the majority, Senator Frist changed his vote from yea to nay in order “to preserve all of my procedural options.” The Senator explained: “I initially voted ‘yes’ on cloture, but by switching to a ‘no’ vote, I preserve my right, as leader, to revisit this issue in the future as a package.” He went on to discuss the concept of a “do nothing” Congress and, in closing, stated:

“... as I have said before, these issues must be addressed as a package: permanent death tax relief, tax policy extensions, and a 40-percent increase in the minimum wage.

“All three together. All or nothing.

“Not bringing this package — the Family Prosperity Act — to the floor is tantamount to saying, “‘We don’t care about America’s economic security.’”¹⁴⁵

Other Minimum Wage Proposals of the 109th Congress

Additional minimum wage legislation in the 109th Congress has emerged in a variety of forms: sometimes, as an independent free-standing bill; on other occasions, as part of more general legislation.

The Stabenow Proposal

Senator Debbie Stabenow, on January 24, 2005, introduced S. 14, a composite infrastructure and jobs bill, part of which would increase the minimum wage to \$7.25. The minimum wage component would begin to take effect 60 days after

¹⁴⁴ *Congressional Record*, Aug. 3, 2006, pp. S8744-S8745. Speaking generally, some Democratic Members — perhaps most who spoke — focused upon the minimum wage and spoke at length about it. Similarly, some Republican Members seemed to emphasize tax questions and, for the most part, did not focus on the minimum wage.

¹⁴⁵ *Congressional Record*, Aug. 3, 2006, p. S8746-S8747.

enactment and be phased in over two years. The bill would also reverse actions taken (2003-2004) on overtime payment for certain workers categorized as *executive*, *administrative*, or *professional*.¹⁴⁶ The bill was referred to the Committee on Finance.

The English Proposal

Representative Phil English, on March 3, 2005, introduced H.R. 1091, a bill (a) to increase the minimum wage, in steps, to \$6.50 beginning October 1, 2008, and to expand the pattern of exemption to eliminate employers with nine or fewer employees; (b) to allow for an altered *small business exemption* under the act; and (c) to provide assorted incentives intended to stimulate the growth of business. The bill was referred to the Committee on Ways and Means and to the Committee on Education and the Workforce.

See, also, H.R. 5368, a composite bill that provides for small business tax incentives and would raise the federal minimum wage, in steps, to not less than \$7.50 an hour beginning October 1, 2009. At the same time, H.R. 5368 would increase the small business exemption from \$500,000 (its current rate) to \$1 million by September 30, 2008. The bill would also exempt employers with fewer than 10 employees from minimum wage protection. The bill was introduced by Representative English (with Representatives Simmons and Weldon of Pennsylvania), and was referred to the Committees on Ways and Means and Education and the Workforce.¹⁴⁷

The Durbin Proposal

Under the date of April 19, 2005, Senator Durbin introduced S. 846, a bill to increase the federal minimum wage, in steps, to \$7.25 per hour beginning 24 months and 60 days after enactment. The bill also deals with overtime pay under Section 13(a)(1) of the act, and expresses the *sense of the Senate*, among other things, for “strong support for multiemployer defined benefit pension plans.” The bill was placed on the Senate Legislative Calendar under General Orders (Calendar No. 80).

The Kennedy/Miller Proposals

On May 18, 2005, Senator Kennedy and Representative George Miller introduced bills that would raise the federal minimum wage to \$7.25 per hour (over a period of years) and would amend treatment of the minimum wage in the Commonwealth of the Northern Mariana Islands (S. 1062 and H.R. 2429, respectively). The Miller bill was referred to the House committee on Education and the Workforce and, on June 22, 2005, was referred to the Subcommittee on

¹⁴⁶ See CRS Report RL32088, *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, by William G. Whittaker.

¹⁴⁷ H.R. 5368 was introduced on May 11, 2006. The summary, above, is drawn from a “pre-publication” edition of the bill, on line as of May 15, 2006.

Workforce Protections. The Kennedy proposal was placed on the Senate Legislative Calendar under General Orders (Calendar No. 109).

The Andrews Proposal

Representative Robert Andrews, on June 7, 2005, proposed the “Camp Safety Act of 2005.” The bill (H.R. 2748) would “condition the minimum-wage-exempt status of organized camps under the Fair Labor Standards Act of 1938 on compliance with certain safety standards....” The bill was referred to the House Committee on Education and the Workforce and, on June 11, to the Subcommittee on Workforce Protections.

The Boehlert Proposal

Representative Sherwood Boehlert, on July 25, 2005, introduced the “Minimum Wage Competitiveness Act of 2005.” The Boehlert bill (H.R. 3413) would increase the federal minimum wage, in steps, to \$7.15 an hour beginning on January 1, 2007. The bill also includes a provision raising the minimum wage of the CNMI in steps until it reaches the federal minimum wage. Referred to the House Committee on Education and the Workforce, the bill was referred to the Subcommittee on Workforce Protections.

The Clinton Proposal

On May 4, 2006, Senator Clinton introduced S. 2725, titled the “Standing with Minimum Wage Earners Act of 2006.” The bill would increase the federal minimum wage to \$7.25 per hour, in steps, beginning 24 months and 60 days after enactment. In addition, the bill provides that subsequent changes in the minimum wage “shall be automatically increased for the year involved by a percentage equal to the percentage by which the annual rate of pay for Members of Congress” is increased under “the Legislative Reorganization Act of 1946 (2 U.S.C. 31).” The bill was referred to the Committee on Health, Education, Labor, and Pensions.

The Miller CNMI Proposals

On June 7, 2006, Representative George Miller, with others, introduced a new proposal, the “United States-Commonwealth of the Northern Marianas Human Dignity Act” (H.R. 5550).

When, during the mid-1970s, the CNMI entered into a quasi-autonomous relationship with the United States, the islanders retained certain rights or responsibilities. For example, goods produced in the islands were allowed to be shipped under the designation of “Made in America.” Since the islanders also controlled immigration policy and the minimum wage (overtime was the responsibility of the DOL in Washington), their industries enjoyed a major advantage of foreign labor employed at low costs.

It has been suggested, by some, that the islands have gradually become *sweatshops*, making use of labor from China and the south Pacific states but with little concern for labor standards or labor laws. Others have viewed the islands as an indicator of how a free enterprise system could and should work — being free from artificial constraints. Through a number of years, insular affairs have been the subject of hearings before committees of the Congress — with an ample record established, though with some disagreement as to its implications.

With H.R. 5550, there would be a restructuring of the U.S.-insular relationship. At the end of the Covenant between the Marianas and the United States, certain additional items would be added. *Inter alia*:

(a) The bill would restrict the use of the term, “Made in America,” unless certain conditions had been met. Each individual “providing direct labor in production of such product,” must have been paid a wage “equal to or greater than” the minimum wage under the FLSA. The product was “produced or manufactured in compliance with all Federal laws relating to labor rights and working conditions...” None of the workers would be employed “under conditions of indentured servitude.”¹⁴⁸

(b) The minimum wage provisions of the FLSA shall apply to the Commonwealth. However, there would be a series of step increases to bring the insular minimum up to the otherwise applicable federal rate — which rate shall be reached about the end of the first decade of the twenty-first century. Thereafter, the insular rate shall be equal to the federal rate.

(c) Duty-free and quota-free status will not apply unless (1) federal labor standards are met, (2) indentured workers are not employed in the manufacture of the product, and (3) the Commissioner of Customs has certified that the islands are not being used as an illegal trans-shipment point.

(d) The Immigration and Nationality Act shall apply to the Northern Mariana Islands as though it were a state of the union. The Secretary of Homeland Security shall, under specified constraints, be permitted to adjust the immigration status of certain insular workers.

(e) Special protections are afforded to persons engaged in contracts for the construction of “public buildings and public works” — setting wage and related standards.

(f) A program of technical assistance would be included.

(g) Various reports are mandated.

The Miller bill (H.R. 5550) was referred to the Committee on Resources and, in addition, to the Committee on Ways and Means.

¹⁴⁸ Indentured servitude is defined as including “all labor for which an alien worker is in the Commonwealth ... solely by virtue of an employment contract with a specific and sole employer or ‘master’ who is in control of the duration of the stay of the indentured alien worker in the Commonwealth.... If the worker displeases the employer/master, the contract is terminated and the employee must leave the Commonwealth....”

Some Collateral Issues

Although not always thought of as part of the minimum wage debate, there are other issues that do play an intricate role in consideration of minimum wage-related issues. Certain of these are discussed below.

The Youth Sub-Minimum Wage

During the 1960s and 1970s (as retail and service industries — major employers of youth workers — were brought under the FLSA), the issue of a *youth sub-minimum* wage became extremely active. Proponents of the concept (most notably from the hotel and restaurant industries — but from other segments of the economy as well) urged that youth workers be paid at a rate lower than the standard minimum wage, regardless of experience or the quality of work they performed. In each case and after heated debate (this came up through several years), the issue was defeated.

Through a number of years after adoption of the 1977 FLSA amendments, no further adjustments were made in the federal minimum wage. When George H. W. Bush became President in 1989, he agreed to sign a new minimum wage increase if, among other things, it included a general sub-minimum wage for workers beginning new employment. However, in the form adopted by the Congress, the President vetoed the measure. Following an extended period of reconsideration, Congress presented the President with a new bill, which he did sign — and which contained a sub-minimum wage for youth.¹⁴⁹

The new program, as it related to youth employment, was divided into two parts, and focused upon youth not having “attained the age of 20 years.” The first part covered a 90-day period at the sub-minimum wage with no conditions beyond those imposed by the employer and the willingness of the worker to accept the work. The second part was more complex. It involved an additional 90-day period, but included a training wage component. At the close of the 180-day period, a regular minimum wage or more would be required for the employee. The program was *experimental*, to begin on April 1, 1990, and to end on April 1, 1993. At the end of the trial period, the Secretary of Labor was to provide Congress with an assessment. As it turned out, almost no one used the program and it was not extended.¹⁵⁰

Three years passed. In 1996, minimum wage legislation came up as a floor amendment to an industry-oriented bill — with a sub-minimum wage for youth as one of its provisions. Following floor debate and approval in the House, the measure was forwarded to the Senate. Negotiations continued in the Senate and, ultimately,

¹⁴⁹ See “Minimum-Wage Impasse Finally Ended,” *Congressional Quarterly: Almanac*, 101st Congress, 1st Session, 1989. Congressional Quarterly Inc., 1990, pp. 333-340.

¹⁵⁰ P.L. 101-157, Section 6: training wage. See U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, *Report to the Congress on the Training Wage Provisions of the Fair Labor Standard Act Amendments of 1989 from the Secretary of Labor*, Robert B. Reich, Apr. 21, 1993, 24 pp.; and Kevin G. Salwen, “Subminimum Wage of \$3.62 an Hour Is on Deathbed but Draws Few Mourners,” *The Wall Street Journal*, Mar. 12, 1993, p. A4.

the measure was passed with the sub-minimum wage in place — the bill subsequently being signed into law by President William Clinton (P.L. 104-188).¹⁵¹ As enacted, the bill would allow an employer to pay a youth (under 20 years of age) a sub-minimum wage of \$4.25 per hour through the first 90 consecutive days of employment with an employer.

Having set forth a youth sub-minimum rate, Congress then raised the general minimum rate to \$5.15 an hour — but without linking the youth worker option to the new standard. Unless Congress takes specific action to increase the youth rate, it will remain at \$4.25 per hour even if the general minimum wage is raised. Legislatively, the youth rate is a separate issue from the general wage floor.¹⁵²

The ‘Tip Credit’ Provision

During the 1960s and 1970s, the FLSA was progressively expanded to provide protection for retail and service employees. Some of these workers were “tipped employees” and their employers argued, successfully, that since they were given tips by the public, they (the employers) ought not to be responsible for paying such tipped employees a full minimum wage. Through the years, the level of the so-called *tip credit* (the value of tip income received by tipped employees that an employer could count toward his or her minimum wage obligation) has varied.

Under the 1996 FLSA amendments, Congress provided a *tip credit* at 50% of the regular minimum wage (i.e., \$2.13 an hour) — based upon the \$4.25 per hour general minimum wage as it was then in effect. So long as an employee received tip income on a regular basis sufficient to reach the statutory minimum wage, when combined with an employer contribution of \$2.13 per hour, the employer had no further minimum wage obligation. (The credit deals only with the amount to be paid by the employer of a tipped employee.) Thereafter, the tipped employee would receive — either in a combination of tips and cash wages or cash wages alone where there were insufficient tips — an amount sufficient to reach the full minimum wage. Then, Congress increased the federal minimum wage, in steps, to \$5.15 per hour.¹⁵³

In the 1996 FLSA amendments, Congress was working from a minimum wage floor of \$4.25 per hour. Thus, \$2.13 per hour (one half of the minimum wage) was

¹⁵¹ When signing the new minimum wage bill, President Clinton observed, “I should note that I disagree with certain provisions added to the minimum wage title of the Act, such as the provision creating a new sub-minimum wage for young people and the one denying increased cash wages to most employees who rely on tips for part of their income. Still, those defects do not obscure the central accomplishment of this Act — securing the first minimum wage increase since 1991.” See *Public Papers of the Presidents of the United States: William J. Clinton*, Book II, 1996. Washington: United States Government Printing Office, 1998, p. 1317.

¹⁵² See “Congress Clears Wage Increase With Tax Break for Business,” *Congressional Quarterly: Almanac, 104th Congress, 2nd Session, 1996*. Congressional Quarterly Inc., 1997, pp. 7-3 to 7-9.

¹⁵³ For a discussion of the tip credit, see CRS Report RL33348, *The Tip Credit Provisions of the Fair Labor Standards Act*, by William G. Whittaker.

set as the new base rate for employers. When Congress increased the federal minimum, in steps, to \$5.15 per hour, the threshold income for tipped employees remained at \$2.13 per hour. The minimum cash wage (\$5.15 per hour) and the *tip credit* provision (\$2.13 per hour) are not linked. They do not increase in tandem.¹⁵⁴

The Computer Services Professional Rate

Beginning in the 1960s, pressure increased to have certain computer services workers defined administratively by the Department of Labor as “professional” and, therefore, exempt under Section 13(a)(1) of the FLSA from the standard minimum wage and overtime pay protection. When the Department seemed to demur, Congress (in 1990) enacted legislation directing the Secretary to develop regulations that would permit such an exemption if, among other criteria, “such employees are paid on an hourly basis” at a rate that is “at least 6½ times greater than the applicable minimum wage” (P.L. 101-583). The Department proceeded as directed, developing a regulation under Section 13(a)(1) and justifying the exemption on the *professional* character of the targeted personnel.

Under the 1996 FLSA amendments, Congress *directly* amended the act with Section 13(a)(17) to exempt the targeted computer services workers where, among other qualifying criteria, they are paid “on an hourly basis ... at a rate of not less than \$27.63 an hour” (P.L. 104-188). While \$27.63 was 6½ times the then applicable minimum wage of \$4.25 per hour prior to the 1996 FLSA amendments, the wage requirement for exemption was set at a specific dollar amount. Then, Congress raised the minimum wage. The computer services threshold wage and the general minimum wage were no longer linked. Specific action by Congress is required to alter the threshold.¹⁵⁵

The ‘Small Business’ Exemption

Since enactment of the FLSA in 1938, Congress has attempted, variously, to exempt certain *small businesses* from coverage under the act. Ultimately, Congress instituted a dollar volume test for exemption, though the level of that test has been changed through the years.

In 1989, the threshold for the small business exemption was \$362,500 in terms of annual sales. Congress, as part of the 1989 FLSA amendments (P.L. 101-157), increased the threshold to \$500,000 — and made certain other adjustments in the

¹⁵⁴ See also H.R. 3732, introduced on Sept. 13, 2005, and referred to the Committee on Education and the Workforce, Subcommittee on Workforce Protections: the “Minimum Wage Fairness Act of 2005.” The bill calls for a restructuring of the current tip credit system.

¹⁵⁵ See CRS Report RL30537, *Computer Services Personnel: Overtime Pay under the Fair Labor Standards Act*, by William G. Whittaker. Regulatory changes, proposed (and now implemented) by the Department of Labor with respect to Section 13(a)(1) could affect workers in the computer services industry. See CRS Report RL32088, *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, by William G. Whittaker.

statute. With enactment, the amendments were turned over to the Department of Labor for implementation. At that juncture, the Department ruled that there were, in effect, two standards. On the one hand, a person — employed by a firm with proceeds of less than \$500,000 — could be exempt *unless* he were personally engaged in interstate commerce. If he were involved in interstate commerce, then he would be covered by minimum wages and overtime pay *as an individual* under the FLSA. Some argued that the department's ruling did not adhere to the intent of Congress. Others held that the ruling was, indeed, the correct interpretation of congressional intent. In any case, an employer, henceforth, would need to be absolutely certain that the work engaged in by his or her employee *could not be classified* as interstate commerce — thus, rendering the worker FLSA-covered.

The small business threshold, however interpreted, is set at a specific dollar amount, requiring direct action by Congress to alter it. The provision is not directly affected by any change in the general minimum wage.¹⁵⁶

The Case of American Samoa

American Samoa was acquired by the United States as a result of the Spanish-American War (1898), supplemented by a series of treaties.

When enacted in 1938, the FLSA applied (or seemed to apply) to Samoa as it did to the states of the Union. However, the wage/hour statute does not appear to have been immediately enforced. During the early 1950s, the tuna canning industry became Samoa's major private sector employer. When it appeared that the industry would be required to pay its workers the national minimum wage (though its economy was somewhat different from that of the mainland), the industry appealed to Congress to write an exception into the act. Following hearings, the FLSA was amended. An industry committee structure was created under which an appropriate minimum wage for the island group would be developed administratively.¹⁵⁷

The industry committee structure was intended, it appears, to have been an interim measure while the insular economy progressed toward mainland standards. Half a century later, the system remains in place. The minimum wage for American Samoa continues to be set administratively. It is independent from any change in the general minimum wage rate under the FLSA.¹⁵⁸

¹⁵⁶ See CRS Issue Brief IB90082, *The Federal Minimum Wage: Changes Made by the 101st Congress and Their Implications*, by William G. Whittaker (archived, but available from the author.)

¹⁵⁷ P.L. 84-1023. See also U.S. Congress, Senate Committee on Labor and Public Welfare, *Amending the Fair Labor Standards Act of 1938*, hearings, 84th Cong., 2nd sess., May 8, 1956 (Washington: GPO, 1956).

¹⁵⁸ See CRS Report RL30235, *Minimum Wages in the Territories and Possessions of the United States: Application of the Fair Labor Standards Act*, by William G. Whittaker. The Samoan minimum wage is calculated on an industry-by-industry basis, but is generally lower than that which applies on Guam or in the States.

Health Care Concerns and the Issa Bill

On December 13, 2005, Representative Issa proposed linking the minimum wage, both federal and state, with certain aspects of health care legislation. The bill, H.R. 4505 (the “Health Care Incentive Act”), was referred to the Committee on Education and the Workforce, and to the Subcommittee on Workforce Protections.

Under the Issa bill, the Secretary of Labor would be directed to promulgate a rule “requiring” that any employer engaged in interstate commerce where “Federal or State law” establishes a minimum wage “at a rate that is higher than the minimum wage required by section 6(a) of the Fair Labor Standards Act of 1938 ... as in effect on September 1, 1997” (i.e., \$5.15 per hour) would “... be permitted, in accordance with regulations promulgated by the Secretary, to count the value of creditable health care benefits provided by such employer to an employee in determining the wage such employer is required to pay an employee.” The Secretary “shall include a contribution to a health saving account or similar account” in determining *creditable benefits*, and shall determine a formula for “a minimum value of such benefits.” Finally, the bill provides the following: “In no case shall the credit permitted by the rule promulgated under this section exceed the difference between the minimum wage under section 6(a) [in effect on September 1, 1997] ... and the wage rate otherwise applicable.”

Under the Issa proposal, the wage floor would be \$5.15 per hour (the rate payable under section 6(a) of the FLSA on September 1, 1997). Any amount above that level, whether under state or federal law, could be payable in the form of *creditable benefits* — to be defined by the Secretary of Labor but to include “a contribution to a health savings account or similar account.” The credit for health care benefits could be substituted for any future increase in the cash minimum wage. Thus, in effect, the minimum wage could be capped at \$5.15 per hour — depending upon how the benefit package is assessed by the Secretary, the value that is assigned to it, and whether it is fully utilized.