Chapter 6

Legal and Regulatory Issues

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Chapter 6
Legal and Regulatory Issues

This chapter addresses legal and regulatory issues related to work schedules and hours of work, referred to generally as work schedules. In particular, it discusses Federal and State regulation, including statutes and regulations currently in place and potential areas of regulation under existing authority. The discussion will consider several categories of statutes:

- statutes relating directly to work schedules and hours of employment;
- safety and health regulatory statutes not dealing directly with work schedules (to the extent that work schedules are shown to affect the safety and health of employees and the public, these statutes could be an important source of legal authority to regulate schedules); and
- statutes that protect the collective rights of employees (work schedules are included in collective bargaining agreements).

The chapter also addresses a number of legal issues related to work schedules, among them:

- the relationship between Federal and State regulation;
- various types of mechanisms to enforce the legal requirements, as well as their advantages and disadvantages; and
- the regulation of public employees.

CURRENT AREAS OF REGULATORY ACTION

A distinction in Federal regulatory structure should be emphasized at the outset. In some cases, such as the Hours of Service Act in the railroad industry, requirements regarding work schedules are included in the statute itself and therefore could be modified only by legislative action. In other instances, the statutes give an administrative agency quasi-legislative authority, and the requirements are promulgated in rules issued by the agency, for example, the regulation of hours of work of air personnel by the Federal Aviation Administration (FAA), in the Department of Transportation (DOT). Changes in these requirements could therefore be made by the agency through amendments to the rules.

Hours of Service Act

It is not surprising that the earliest Federal regulation of work schedules took place in industries where public safety is an important factor. Early Federal regulation of railroads was concerned with the integrity of the physical equipment and imposed requirements for safety equipment on railroad engines and cars (see Safety Appliance Act, 45 U.S.C. 1 ***et seq.).*** However, it was clear that significant hazards to employees and travelers existed because of the failure of some employees responsible for operations to discharge their responsibilities in a safe manner. This led to enactment of the Hours of Service Act (HSA) in 1907 (45 U.S.C. 61 ***et seq.). The*** Supreme Court has recognized that the purpose of this statute was to avoid dangers to employees and to the public when employees do hazardous work for such long periods hat-they are unfit and their judgment is compromised (3). Responsibility for enforcement of this statute originally rested with the Interstate Commerce Commission. When DOT was created in 1966, this responsibility was transferred to the Secretary of Transportation and the Federal Railroad Administration (FRA) [Public Law 89-670 (1966); 49 U.S.C. 1655(e)(2); 49 U.S.C. 102 (DOT); 49 **U.S.C. 103 (m)].**

Although the HSA has been amended several times since 1907, its basic requirements have remained the same. In addition to the work schedule requirements in the law itself, FRA has issued rules under the act that impose requirements for recordkeeping and reporting and govern construction of employee sleeping quarters (49 CFR 228).

The HSA applies to any common carrier engaged in interstate or foreign commerce by railroad [45 U.S.C. 61(a)]. Employees commonly covered include locomotive engineers, firefighters, conductors, train operators, and switch operators (49 CFR 228, app. A). The act makes it unlawful for a common carrier to require or permit an employee who has been continuously on duty for 12 hours to continue on duty or go on duty until he or she has had at least 10 consecutive hours off duty [45 U.S.C. 2(a)(l)]. The act also makes it unlawful to permit or require an employee to continue or go on duty when he or she has not had at least 8 consecutive hours off

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duty during the preceding 24 hours [45 U.S.C. 62(a)(2)]. The act includes **as** on-duty time all time that the employee spends in connection with train movement, as well as all time in the service of the common carrier [45 U. S. C. 62(b) (1990 pocket part)]. Time on duty begins when an employee reports for duty and ends when he or she is released from duty. It includes periods for rest at other than designated terminals [45 U.S.C. 61(b)(3)]. An exception to these limitations is provided for crews of a wreck or relief train when the crew's work is related to an emergency, in which case employees may remain on duty for 4 additional hours in any period of 24 consecutive hours [45 U.S.C. 62(c)].

The HSA specifies that the common carrier must also provide sleeping quarters for employees which afford an opportunity for rest free from interruption caused by noise under the control of the railroads [45 U.S.C. 62(a)(3)]. Similarly, sleeping quarters may not be constructed in or near areas where railroad switching and humping operations are performed [45 U.S.C. 62(a)(4)]. These requirements have been interpreted in FRA rules, which, among other things, define the distance requirements for sleeping quarters and specify procedures for approval by FRA of construction plans for sleeping quarters (49 CFR 228, subpart C).

The HSA also limits hours for other categories of employees, that is, those not actually engaged in or connected with train movements. It is unlawful for any employee who uses electrical or mechanical devices to dispatch, transmit, or receive orders affecting train movements to remain on duty for more than 9 hours in a 24-hour period in a place where two or more shifts are employed [45 U.S.C. 63(a) and 1990 pocket part]. The same is true for 12 hours in a 24-hour period where one shift is employed [45 U.S.C. 63(a)(2)]. Special authorization is given for 4 hours of additional service in a 24-hour period in case of emergency, but not exceeding 3 days in 7 consecutive days [45 U.S.C. 63(c)]. Other work schedule requirements are imposed for individuals engaged in installing, repairing, or maintaining signal systems. An individual who has been on duty continuously for 12 hours may not continue on duty without at least 8 consecutive hours off duty during the preceding 24 hours [45 U.S.C. 63a (a)].

These provisions are the maximum permissible hours of service consistent with safety (45 U.S.C. 64 and 1990 pocket part). However, the HSA also provides that they are proper subjects for collective bargaining under the National Labor Relations Act and the Railway Labor Act (discussed later). That is, a carrier and employee representative may agree to further limit employee work schedules (45 U.S.C. 64 and 1990 pocket part).

A related statute, but one designed for an entirely different purpose, is the Adamson Act, enacted in 1916 and codified together with the HSA (45 U.S.C. 65). The Adamson Act establishes a day's work to be 8 hours, for the purpose of compensation for services (45 U.S.C. 65). Thus, the act does not bar workdays of more than 8 hours, it simply provides that 8 hours is the basis for calculating overtime under the Fair Labor Standards Act and under collective bargaining agreements. The Adamson Act may provide economic incentives for limiting work schedules, but it does not regulate them directly.

Enforcement of the HSA, as noted, is assigned to the Secretary of Transportation (49 CFR 209.1). The Administrator of the FRA is appointed by the President with the advice and consent of the Senate and reports directly to the Secretary of Transportation. The provisions of the HSA relating to manner of enforcement were amended significantly by the Rail Safety Improvement Act of 1988 (45 U.S.C. 64A). The enforcement scheme of the FRA under the HSA and related safety statutes will be discussed in more detail below.

Persons violating requirements of the HSA are liable for civil penalties. The penalties for willful violations may be as high as $1,000 per violation [45 U.S.C. 64a(a)(l)]. The FRA decides whether a penalty is to be assessed. Where no compromise is reached with the offending party, it is the duty of the U.S. Attorney to sue to collect the penalty in a Federal court under the Federal Claims Collection Act [45 U.S.C. 64a(a)(l)].

The FRA's most sweeping enforcement tool, although one that it has used only rarely, is its authority to issue emergency safety orders halting conditions or practices that create a hazard of death or injury to persons [45 U.S.C. 432(a)]. After issuance of the order, it must be reviewed in a trial-like hearing (49 CFR 211.47, 216.21-27). This emergency authority is unique in that it can be used to address unsafe practices and conditions whether or not they contravene an existing regulatory or statutory requirement (49 CFR 209, app. A). The

provision has been held by a U.S. court of appeals to apply to conditions or practices that are hazardous under the HSA respecting sleeping accommodations, even though HSA requirements are enforced in court by the U.S. Attorney and not the FRA (21).

The Railroad Safety Act, which became law in 1970 (45 U.S.C. 421 *et seq.),* authorizes the Secretary of Transportation, through FRA, to issue rules for all areas of railroad safety to supplement laws and rules already in effect, including those under the Hours of Service Act. To date, the FRA has not issued any. The FRA's potential to regulate work schedules will be discussed below.

Motor Carrier Safety Act of 1984

The Motor Carrier Safety Act of 1984 (MCSA) is an example of a statute that gives an administrative agency quasi-legislative authority to regulate safety. Congress stated in the preamble to the MCSA that the purpose of the law was to:

- promote the safe operation of commercial motor vehicles;
- minimize dangers to the health of the operators of those vehicles and of other employees whose employment directly affects motor carrier safety; and
- assure increased compliance with traffic laws and with various regulations issued under the act (49 U.S.C. App. 2501).

The MCSA covers commercial motor vehicles defined as:

- vehicles with gross weight exceeding 10,001 pounds;
- vehicles designed to transport more than 15 persons (including the driver); and
- vehicles used to transport certain hazardous materials [49 U.S.C. App. 2503(1)].

Federal, State, and local government employers are not covered by the act.

The Secretary of Transportation is required to issue regulations that, at a minimum, ensure that the physical condition of operators of commercial motor vehicles is adequate to safe operation and that the operation of the vehicles does not have deleterious effects on the physical condition of the operators [49 U.S.C. App. 2505(a)(3),(4)]. Regulations regarding motor carrier safety are exercised by the Federal Highway Administration (FHWA) through the Office of Motor Carriers.

The Secretary of Transportation's responsibility **to** issue regulations under MCSA has been implemented in part by FHWA regulations entitled Hours of Service of Drivers (49 CFR 395). These regulations relate to maximurn on-duty and driving time, drivers' records of on-duty status, and provisions for special circumstances. The regulations also contain provisions for the use of automatic on-board recording devices (49 CFR 395.15) and provide that these devices not be used to harass operators (the latter provision stemming from concern that the devices might be used to spy on drivers). The on-board devices record such things as engine revolutions per minute, vehicle speed, oil temperature and pressure, distance traveled, driving time, breaks, daily rest periods, and compliance with speed limits.

Hours of Service Regulations for Drivers

The basic work schedule limitation in FHWA regulations is that no driver may be required or permitted to drive:

- more than 10 hours following 8 consecutive hours *off* duty;
- for any period after having been on duty 15 hours following 8 consecutive hours off duty;
- for any period after having been on duty 60 hours in any 7 consecutive days if the motor carrier does not operate every day of the week;
- for any period after having been on duty 70 hours in any period of 8 consecutive days if the motor carrier operates every day of the week (49 CFR 395.3).

The regulations define on-duty time to include waiting-time; inspection time; time spent loading, unloading, or repairing equipment; and time in any motor vehicle, even if not driving. It does not include time spent resting in a sleeper berth meeting FHWA requirements.

In an emergency, a driver may complete a run without violating the regulations if the run can reasonably be completed without such a violation. In the event of adverse driving conditions, such as snow, sleet, or fog, a driver may drive for 2 additional hours to complete a run or reach a safe place; however, a driver may never drive for more than 12 hours following 8 consecutive hours off duty or after being on duty 15 hours following 8

consecutive hours off duty (49 CFR 395.10). These regulations do not apply to carriers transporting passengers or property in order to provide relief in the event of a natural disaster (49 CFR 395.12).

The regulations contain two methods for determining a driver's hours of service. Under the first, the carrier requires the driver to record his or her duty status for each 24-hour period on a specified grid or on a previously approved daily log, in combination with any company forms. Under the other, the carrier requires drivers to use an automatic on-board recording device in lieu of manual recording. The recording device produces on demand an electronic display or printout of the driver's hours of service, including the sequence of duty status changes and each day's starting time (49 U.S.C. 395.15).

Enforcement

Regulations issued under the Motor Carrier Safety Act are enforced by FHWA through periodic random inspections and inspections conducted in response to complaints (49 U.S.C. App. 2509-2511). The FHWA is authorized to impose civil penalties for violations of MCSA in amounts specified in DOT's authorization statutes (49 U.S.C. 521). A penalty of up to $500 may be imposed for violations of recordkeeping requirements. Where there has been a serious pattern of safety violations other than recordkeeping, a civil penalty of up to $1,000 for each offense may be assessed; however, total penalties may not exceed $10,000. If FHWA determines that a health or safety violation resulted or reasonably could have resulted in serious physical injury or death, a civil penalty of up to $10,000 may be imposed for each offense. No penalty may be imposed on an employee except for gross negligence or reckless disregard of safety, in which case the penalty may not exceed $1,000 [49 U.S.C. 521(b)(l)(B)]. A person is entitled to be given notice when charged and to be given an opportunity for a hearing before the penalty becomes final.

The FHWA can order a vehicle out of service or order an employer to cease all or part of its commercial motor vehicle operations if it finds that a violation or combination of violations poses an imminent hazard to safety [49 U.S.C. 521(b)(5)]. Criminal penalties may be imposed on anyone who knowingly or willfully violates the statute or regulations; if the violator is an employee, the penalty is limited and may be applied only if the unlawful activity could have led to death or serious injury. Special agents of FHWA can also declare **a driver out** of service and therefore ineligible to drive if they determine that the driver has been on duty longer than the maximurn period permitted in the regulations (49 CFR 395.13).

Civil Air Safety

The Secretary of Transportation has the statutory duty to promote the safety of commercial airlines by prescribing and revising reasonable rules and regulations governing maximum' hours or periods of service of airmen and other employees of air carriers [49 U.S.C. App. 1421(a)(5)]. The FAA has issued numerous safety regulations under its statutory authority, including limitations on duty and flight time and rest requirements for various categories of covered employees [14 CFR 121(P-S)]. Enforcement of FAA safety rules is governed by provisions of the Federal Aviation Act (49 U.S.C. App. 1471 *et seq.)* and the implementing regulations (14 CFR 13.15,13.16) and includes agency authority to impose civil penalties, orders of compliance, criminal penalties, punitive damages, and injunctions (49 U.S.C. App. 1471,1472,1523).

Work Schedule Limitations

FAA has issued rules prescribing duty and flight limitations for pilots, air traffic controllers, engineers, and crew members of various kinds of air carriers [14 CFR 121(P-S)]. Because the rules are detailed and complex, only the flight time limitations and rest requirements for crew members of domestic air carriers will be summarized here.

Under the rules, a domestic air carrier is not permitted to issue, and a flight crew member may not accept, an assignment for flight if the crew member's total flight time will exceed:

. 100 hours in a calendar month;
. 30 hours in 7 consecutive days; or
. 8 hours between required rest periods.

In addition, a flight crew member may not be assigned flight time during the 24 consecutive hours preceding the scheduled completion of any flight segment unless he or she has a scheduled rest period of at least:

. 9 consecutive hours for less than 8 hours of scheduled flight time;

. 10 consecutive hours for 8 to 9 hours of scheduled flight time; or
. 11 consecutive hours for 9 or more flight hours.

These rest requirements may be reduced if a rest period of a specified length is scheduled to begin no more than 24 hours after the reduced rest period.

The rules further require that the crew member be relieved of all duty for at least 24 hours during any 7 consecutive days and prohibits the assignment or acceptance of any duty during any scheduled rest period. The rules also provide that flight time does not include:

- time spent in transportation provided to the crew member by the carrier to and from the airport; and
- time when the airplane does not reach its destination within the scheduled time because of circumstances beyond the control of the carrier [14 CFR 121(Q)].

Separate FAA rules prescribe flight time limitations for pilots and other crew members of flag air carriers [14 CFR 14 (R)] and of supplemental air carriers and commercial operators [14 CFR 121 (5)].

Limitations on duty time for air traffic controllers are also important to safety. Except in emergency situations, a certified air traffic tower operator may not be required to work in excess of:

. 10 consecutive hours or
. 10 hours during a 24-hour period unless he or she has been allowed a rest period of at least 8 hours before or at the end of the first 10 hours of duty.

In addition, an air traffic controller must be allowed at least 1 day off during each consecutive 7-day period (14 CFR 65.47).

Enforcement

The FAA is authorized to enforce the safety requirements of the Federal Aviation Act by means of civil and criminal penalties. Where the FAA believes that an emergency exists, it is authorized, either on its own initiative or on a complaint, to issue an order promptly [49 U.S.C. App. 1485(a)].

Maritime Safety

The U.S. Coast Guard has been part of DOT since 1966, when the Department was created (49 U.S.C. 108). The shipping statute related to work schedules contains specific requirements on the manning of vessels (46 U.S.C. 8101-8105). In particular, the provisions on watches limit hours of service. An officer may take charge of a deck watch on a vessel only if that officer has been off duty for at least 6 of the 12 hours immediately before departure [46 U.S.C. 8 104(a)]. On certain oceangoing or coastwise vessels (vessels that only go along the coast), a seaman cannot be required to work more than ***9*** of 24 hours when in port or more than 12 of 24 hours at sea, except when life or property is endangered [46 U.S.C. 8104(b)]. Similarly, a seaman in a deck or engine department cannot work more than 8 hours in 1 day on a towing vessel, except in an emergency or on certain merchant vessels [46 U.S.C. 8104(c),(d)]. On certain towing vessels, an individual cannot work for more than 12 hours in a consecutive 24-hour period except in an emergency [46 U.S.C. 8104(h)]. Additional statutory requirements related to watches may affect hours of service indirectly, such as provisions concerning the number of watches into which personnel must be divided [46 U.S.C. 8104(1)]. The statute also prescribes certain rest periods and prohibits unnecessary work on Sundays and certain holidays [46 U.S.C. 8104(e)(2)]. In some circumstances, however, such as when work is necessary for the safety of the vessel or saving a life on board another vessel, these restrictions are not applicable [46 U.S.C. 8104(f)].

National Transportation Safety Board

The National Transportation Safety Board (NTSB) is a separate and independent agency made up of five members appointed by the President with the advice and consent of the Senate. The NTSB's primary responsibility is to investigate railway, aircraft, highway, marine, pipeline, and hazardous material accidents in order to determine the probable cause of an accident and to make recommendations concerning safety (49 U.S.C. App. 1903, 1906). Although NTSB has no direct regulatory authority and cannot require compliance, its recommendations are publicized and may be influential in a number of arenas. Indeed, the law requires the Secretary of Transportation to respond to NTSB safety recommendations, including giving a statement of intent to address the recommendations, together with a proposed procedure and a timetable for adopting them. The Secretary must give a detailed explanation for his or her refusal to adopt NTSB recommendations. NTSB accident reports

and other reports have addressed issues related to hours of service in all modes of transportation.

Nuclear Powerplant Regulation

The Nuclear Regulatory Commission (NRC) was created in 1974 under the Energy Reorganization and Development Act (42 U.S.C. 5841 *et seq.).* It has the authority to regulate the possession and use of nuclear materials, nuclear power reactors and facilities, and persons who use nuclear materials [42 **U.s.c.** 2201(b); 10 **CFR** 55].

The NRC has issued **a** policy statement regarding working hours for nuclear powerplant staff [47 FR 23,836 (1982)]. NRC policy statements are enforceable only if a plant voluntarily incorporates them into its technical specifications as part of the NRC licensing procedure. The policy statement addresses the need to establish controls to prevent situations in which fatigue could reduce the ability of personnel to operate a reactor safely. The controls, which focus on shift staffing and the use of overtime, apply to staff who perform safety-related functions and ensure that such staff are not assigned to shift duties while in a fatigued condition, which might reduce their mental alertness or their decisionmaking ability. The objective is for plants to employ enough personnel so that operating staff work a normal 8-hour day, 40-hour week. However, where unforeseen problems or special circumstances arise necessitating major overtime, the policy offers certain guidelines to be followed. According to the policy statement, an individual, even in emergency situations, should not be permitted to work:

. more than 16 consecutive hours;
- more than 16 hours in a 24-hour period;
- more than 24 hours in a 48-hour period; or
- more than 72 hours in any 7-day period.

In addition, a break of at least 8 hours should be allowed between work periods, and licensed operators at controls should be relieved periodically and given noncontrol responsibilities during their tour of duty [47 FR 23,836 (1982)]. Nuclear powerplant control room operators are discussed in greater detail in chapter 7.

Fair Labor Standards Act

The Fair Labor Standards Act (FLSA), a centerpiece of New Deal employment legislation enacted in 1938, originally:

. mandated a minimum wage rate for covered employees (29 U.S.C. 206);
. required employers to pay an overtime premium for each hour worked in excess of 40 hours in a single week (29 U.S.C. 207); and
- imposed penalties on employers for oppressive child labor (29 U.S.C. 212).

In 1963, the FLSA was amended to provide for equal pay for equal work regardless of sex [29 U.S.C. 206(d)]. The act has also been amended to expand its coverage. It originally imposed statutory requirements only on employers engaged in commerce or in the production of goods for commerce [29 U.S.C. 206(a); 29 U.S.C. 207(a)(l)], but it now includes certain agricultural employees and State and local government employees.

The statutory and regulatory provisions of FLSA relating to who is covered are detailed and complex. Thus, for example, employees in a bona fide executive, administrative, or professional capacity are exempt from FLSA's requirements [29 U.S.C. 213(a)(l)]. Other employees may be exempt from the maximum hour requirements alone [29 U.S.C. 213(b)] and still others from the child labor requirements [29 U.S.C. 213(c)]. The Department of Labor has issued regulations and statements of general policy relating to the coverage of FLSA. Of particular relevance is the extent to which FLSA overtime provisions apply to employees of railroads, motor carriers, airlines, and maritime transportation.

The FLSA is implemented by the Wage and Hour Division of the Department of Labor. The act is enforced primarily through suits brought by the U.S. Government and by private individuals. Criminal penalties, enforced by the Department of Justice, are authorized in some cases [29 U.S.C. 216(a)], and violations of the child labor requirements are enforced by a system of administratively determined civil penalties [29 U.S.C. 216(e)].

Child Labor Provisions

Child labor laws protect children from mistreatment in employment settings and ensure that employment will not interfere with their schooling. Children between 14 and 16 may not work in certain occupations, such as those connected with transportation, under any circumstances [29 CFR 570.33(f)(l)]. In other occupations, employment of 14- to 16-year-olds is permitted if confined to the following times:

Box 6-A—Evolution of the 8-Hour Workday

The 8-hour workday began as a key demand of the labor movement in the United States during the last quarter of the 19th century. The shortened day was advocated as a means of increasing leisure time for workers and as a way to offset the unemployment of workers whose jobs were being taken over by machines. Labor leaders, such as Samuel Gompers, believed that shortening the workday to 8 hours would provide more jobs for those whose tasks were threatened by automation. This did not prove to be true, however, since increased automation led to heightened production, even with fewer workers.

Despite this, the movement for an 8-hour workday continued. In 1938, the concept was codified in the Fair Labor Standards Act under the section regulating maximum hours for workers (29 U.S.C. 207). This section limited the standard workweek to 40 hours, indirectly creating the 8-hour workday. Any work beyond the initial 40 hours required compensation at one and one-half times the employee's regular rate (29 U.S.C. 207).

Reasons for this limitation of hours included the desire for more leisure time and improved morale within the working population, the health benefits of shorter hours, and increased general well-being. Economic factors also enhanced the acceptability of the 8-hour day to the employer. It was thought that shorter hours would ultimately lead to increased health and a reduction of social ills, which would bolster productivity and increase profits.

Furthermore, philosophical and societal goals entered into the reasoning behind the legislation. President Franklin D. Roosevelt stated in a message to Congress on May 24,1937, "[a] self-supporting and self-respecting democracy can plead no economic reason for chiseling workers' wages or stretching workers' hours. , . . [e]nlightened business is learning that competition ought not to cause bad social consequences which inevitably react upon the profits of business itself. . . . Government must have some control over maximum hours. . . to protect the fundamental interests of free labor and a free people,'

SOURCES: Office of Technology Assessment, 1991; *United States Code Congressional & Administrative News*, 89th Congress, vol. 2 (St. Paul, MN: West Publishing, 1%7), pp. 3002-3003; *United States Code Congressional & Administrative news, 93rd* Congress, vol. 2 (St. Paul, MN: West Publishing, 1975), pp. 2814-2819; *United States Code Congressional & Administrative News*, 101st Congress, vol. 2 (St. Paul, MN: West Publishing, 1990), pp. 696-697.

- outside school hours;
- not more than 40 hours per week when school is not in session;
- not more than 18 hours per week when school is in session;
- not more than 8 hours per day when school is not in session;
- not more than 3 hours per day when school is in session; and
- between 7 a.m. and 7 p.m. in any 1 day, except during the summer, when the evening hour will be 9 p.m. [29 CFR 570.35(a)].

The regulations also provide for employment of children between 14 and 16 in school-related work and career exploration programs meeting certain requirements. Among those requirements is that the employment shall not exceed 23 hours in 1 week or 3 hours in 1 day when school is in session [29 CFR 570.35A(d)].

Overtime Provisions

Unlike the child labor provisions of FLSA, which directly limit the work schedules of minors, the minimum wage and overtime provisions have only an indirect impact on regulation. The FLSA requires an employer to pay each employee meeting certain requirements a minimum wage (29 U.S.C. 206). Under the overtime provisions, an employer may not employ a worker for more than 40 hours per week unless the worker is paid at one and one-half times his or her regular rate (29 U.S.C. 207). Thus this statute does not prohibit employers from requiring or permitting employees to work more than 40 hours a week, but it does regulate the basic hourly rate and the resulting regular rate on which overtime is based. Box 6-A explains the origin of the 8-hour workday.

Central to both minimum wage and overtime provisions is the determination of hours worked. This can become complicated when it involves issues such as waiting time, rest and meal periods, preparatory and concluding activities, lectures, meetings, training programs, and travel time (29 CFR 785, subpart C). Of particular relevance is its application to sleeping time. An employee who is required to be on duty for less than 24 hours is working even though he or she is permitted to sleep or engage in personal activity when not busy (29 CFR 785.20, 785.21). However, for employees required to be on duty for 24 hours or more, the employer and employee may agree to exclude from

hours worked a regularly scheduled sleeping period of not more than 8 hours, as long as adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted sleep [29 CFR 785.22(a)]. No more than 8 hours sleep time can be excluded, however [29 CFR 785.22(a)]. If the sleep period is interrupted to such an extent that the employee cannot get a reasonable amount of sleep, the entire period must be counted as hours worked. According to Wage and Hour Division guidelines, if 5 hours of sleep are not provided, the entire time is work time [29 CFR 785.22(b)]. In a recent case involving overnight relief workers at residential facilities for the mentally retarded, the court held that the employees, though on duty for more than 24 hours, were entitled to compensation for sleep time because of the nature of their accommodations and the frequent need to attend to clients at the facilities (8).

State Regulation

There is a substantial body of State regulation in the area of employee hours and conditions of work, some of which relates directly or indirectly to work scheduling. Because of the extensive nature of the material, only a few examples will be discussed. In considering State legislation, one should bear in mind the possible preemptive effect of Federal regulation of the same subject matter.

A number of States have legislation paralleling the FLSA. An example is Michigan's minimum wage law, enacted in 1964 (11) and last amended in 1980. This law establishes a minimum wage and overtime pay and provides for exemptions for certain categories of employees. Michigan also has in effect a work scheduling law for motor truck and tractor operators (sec. 480.12, 480.13 of Compiled Laws of 1970). Under the law, a person may not drive a motor truck or tractor more than 10 hours in 15 hours, and then only following 8 hours off duty. The law defines duty time as beginning with the person's reporting for duty and ending with the person's release. It further provides that off-duty time may be accumulated in a sleeping berth in two periods of at least 2 hours each (1 1).

Michigan has also enacted a child labor statute, which imposes work schedule limitations on certain minors. The law does not apply to:

. children over age 15 who have graduated from high school;
- children over 16 who have passed a certain development test; and
. emancipated minors.

In addition to prohibiting certain work entirely, the law makes it unlawful for a person under 18 to be employed in a covered occupation for:

. more than 6 days in 1 wink;
- more than a weekly average of 8 hours per day; and
- more than 48 hours in 1 week or more than 10 hours in 1 day.

In addition, the minor may not be employed between 10:30 p.m. and 6 a.m. when school is in session, or between 11:30 p.m. and 6 a.m. when school is not in session. A minor in school may not be employed a combined school and workweek of 48 hours when school is in session. Children under 16 have the same restrictions, except they may not be employed between 9 p.m. and 7 a.m. (11).

Other State legislation focuses generally on work schedule limitations for specific categories of employees, such as minors, and requirements for premium pay for overtime. A notable exception that has attracted wide attention is the recently enacted New York State statute regulating the work schedules of attending physicians and certain postgraduate trainees in hospitals [N.Y. State Code, Title 10, sec. 405.4(a)(6)]. This matter is discussed in more detail in chapter 8. Box 6-B discusses employer liability for accidents caused by a sleep deprived employee in a recent Oregon case.

AREAS OF POTENTIAL REGULATORY ACTION

Regulatory action can arise from the enactment of new (or amended) legislation covering work schedules or from the promulgation of new regulations under existing statutory authority. With respect to the enactment of new Federal legislation, there is no serious question regarding the power and authority of the Congress to take legislative action to regulate work schedules. Along line of Supreme Court cases has established the plenary power of Congress to regulate economic matters, including labor regulation, under the commerce clause of the U.S. Constitution. While Federal legislation could apply work schedule requirements selectively, that is, to some categories of employees but not to others, there would have to be a satisfactory explanation for its

Box 6-B—Employer Liability

"Employment," according to ***Black's Law Dictionary,*** includes the actual act of working and may include a reasonable amount of space and time necessary to travel to and from the work site. An employer who allows an employee to work too many hours without rest may be found negligent in cases where this employee causes an accident, even after leaving the job site.

Faverty v. McDonald's Restaurants of Oregon, Inc.: The jury found McDonald's liable for allowing its employee to drive home after working an all-night shift and awarded Frederic M. Faverty $170,000 for medical expenses and lost wages and $230,000 in general damages. The employee, Matthew A. Theurer, an 18-year-old high school senior, left McDonald's at the end of a 12-hour split shift after asking the manager to schedule another worker for his next shift because he was tired. Theurer began the 19-mile drive to his home but fell asleep behind the wheel and struck Faverty's car head on. Faverty suffered serious injuries. Theurer was killed. Theurer had worked a 51/z-hour shift on Sunday night from 6 p.m. to 11:30 p.m. and had attended a full day of school on Monday. On Monday afternoon he began a 12-hour split shift that ran from 3:30 p.m. to 7:30 p.m., resumed at midnight, and lasted until 8:20 a.m. Tuesday. According to testimony, Theurer had complained at school and work that he was tired. He had had less than 7 hours of sleep in the 48 hours before the accident and had not slept at all in the 24 hours preceding the crash.

Faverty sued McDonald's for his injuries stemming from the automobile accident. The jury found that McDonald's knew, or should have known, of Theurer's exhaustion and that he planned to drive home by himself. According to this decision, it should have been foreseeable to McDonald's that Theurer would be operating a motor vehicle and would be a danger to himself and others since he had been awake more than 24 hours. McDonald's is appealing this decision.

SOURCES: Office of Technology Assessment, 1991; based on Associated Press, "McDonald's Loses Worker's Collision Case," New *York Times,* Apr. 1, 1991, p. A12; Case No. 90-0100394, Circuit Court of the State of Oregon for the County of Multnomah; *Black's Law Dictionary,* 5*th* ed. (St. Paul, MN: West Publishing Co., 1979); M. Lowery, attorney, legal department, McDonald's Corp., Oakbrook, IL, personal communication, June 18, 1991.

doing so. This explanation could consist of data showing particular danger from fatigue in specific industries. Such an explanation would probably be upheld, particularly sine legislation singling out certain industrial groups for regulatory purposes has substantial precedent.

At the same time. it should be emphasized that some distinctions in regulatory coverage may be problematic under the equal protection clause of the U.S. Constitution and State constitutions and under civil rights statutes. Distintions based on gender and race would be subject to particular scrutiny. Thus, for example. a statute that limited night work for women but not men would be scrutinized very carefully by the court. The argument that women are in need of special protection is no longer acceptable and probably would not stand up in court (17). Where Federal statutes already include specific work schedule requirements, as for example railroad employees, modification of these requirements may be necessary.

With regard to State legislation, the issue is somewhat more complex. While State legislatures generally have authority to regulate economic matters, they are subject to both Federal constitutional limitations (e.g., due process and equal protection) and State constitutional limitations. In addition, any State regulatory action, whether in the form of a statute, regulation, order, or decision, may be preempted by Federal regulatory action in the same area, The issue of Federal preemption is a complex area of law involving constitutional principles, Federal statutory language and intent, and a substantial body of precedent. Any potential State legislative action or other regulatory action would have to take into account this body of law.

occupational Safety and Health Laws

The most likely source of authority in regulating work schedules would be safety and health statutes. Some of these deal specifically with occupational safety and health, notably the Federal Occupational Safety and Health Act (OSH Act) (29 U. S.C. 651).

The Occupational Safety and Health Administration (OSHA) was created to implement the provisions of the OSH Act, which covers all private employees [29 U.S.C. 652(5)]. Although Federal and some State and local employees are not covered

by the basic OSHA program, they are covered by separate provisions [29 U.S.C. 652(5), 668]. Covered employers have two basic obligations:

. to comply with occupational safety and health standards issued by OSHA; and
. to comply with the general duty clause (see later discussion) (29 U.S.C. 654).

OSHA enforces those obligations through a system of workplace inspections, the issuance of civil penalties of up to $70,000, and citations with abatement requirements [29 U.S.C. 666(a)-(d)]. The OSH Act also includes authority for limited criminal penalties [29 U.S.C. 666(e)].

OSHA Standards

OSHA has issued a large body of standards, generally separated into safety standards and health standards (29 CFR 1900 et seq.), but none deals with work scheduling. If, however, OSHA determined that hours of work pose a safety or health hazard to employees, it could regulate work schedules by issuing a standard. In considering whether OSHA should take regulatory action on work schedules through the promulgation of standards, a number of factors must be kept in mind:

- The standard's purpose must be to protect employee safety and health; OSHA has no authority to issue standards directed solely toward public safety (2).
- OSHA's jurisdiction is broad, and many serious hazards are competing for its regulatory attention. OSHA would have to determine that regulation of work schedules was particularly important before it would take action. With such subjects as AIDS, ergonomic hazards, the hazards of blood-borne diseases to health care workers, and various carcinogens on its agenda, there is serious question whether OSHA is likely to tackle the work schedule issue in the near future. Interested parties may petition OSHA to begin rulemaking on an issue, may make use of political or other means to persuade the agency to act, and may sue in court to force OSHA to act. In some cases, courts have ordered OSHA to undertake rulemaking, but this has been in the context of carcinogens or other special circumstances (15).
- OSHA rulemaking is typically slow, with years elapsing before a final standard is issued and upheld in court. While priority items are often speeded up, such special treatment would not necessarily be accorded to work schedule regulation. On occasion, courts have forced OSHA to complete rulemaking, but this is unusual and takes place only in special situations (16).

General Duty Clause

The general duty clause of the OSH Act [sec. 5 (a)(l)] requires that an employer provide employees with a workplace free from recognized hazards likely to cause death or serious physical harm [29 U.S.C. 654(a)(l)]. Like standards, the general duty clause is enforced through workplace inspections, citations, and penalties. However, enforcement differs in several important respects. When OSHA enforces a standard, the employer's obligations are defined by the standard, which has already entailed a public participation phase and has usually been upheld by a court. Thus, in the enforcement proceeding OSHA need only establish the facts and show that the standard was violated in order to uphold the citation and penalty.

In general duty proceedings, however, the burden on OSHA is greater. There is no specific obligation to be enforced; there are only the more generalized requirements of section 5 (a)(l). To establish a general duty violation, OSHA must show the following:

- There is a recognized hazard. On this, there is considerable case law, and while OSHA generally need not prove that the employer recognized the hazard, it is still necessary to show that the hazard has been recognized by industry or safety experts (14).
- The hazard is likely to cause death or serious physical harm.
- Feasible methods of abatement of the hazard exist.

The general duty clause is usually not applicable where a standard covering the hazard involved already exists, even when it can be shown that the existing standard is generally recognized as inadequate.

Employer obligations under the general duty clause are established on a case-by-case basis. This means that employers would have to sift through OSHA announcements and Occupational Safety and Health Review Commission and court decisions to determine what work schedule requirements are

considered by OSHA to be recognized as a possible hazard. OSHA would have to establish, and reestablish, the recognition of these hazards in each individual case to be enforced. Thus, use of the general duty clause to regulate work schedule hazards would probably lead to less effective compliance and would be more burdensome for the agency. In short, if OSHA decides to regulate employee work schedules; the requirements should be defined by a standard issued after rulemaking. Despite the possible length of the standards proceedings, standards afford the only reliable basis for regulation. Until a standard is issued, the general duty clause would be available to deal with particularly egregious hazards (12).

State Plans

The OSH Act contains specific provisions dealing with State plans (29 U.S.C. 667). State occupational safety and health enforcement is expressly preempted by OSHA standards on the same issue, unless a State plan is in effect. States may submit their own programs for State occupational safety and health enforcement and, if found at least as effective as Federal standards, the State program will be approved. On approval, the State is entitled to escape preemption and to enforce its own program with 50 percent financial assistance from OSHA. Ultimately, a State may be granted final approval, at which time Federal enforcement legally ends and the State alone enforces safety and health obligations; however, the State must maintain its program at a level at least as effective as OHSA's. It also would be required to issue at least as effective a standard if OSHA were to promulgate a new standard for work schedules. OSHA continues to monitor the effectiveness of State programs, even after final approval, and may withdraw approval of a State plan [29 U.S.C. 667(f)].

There are at present 26 approved plans submitted by States and other jurisdictions, and 14 of these have been granted final approval. In these, there is no Federal enforcement, with States having jurisdiction over most occupational safety and health enforcement under their plans.

In sum, if OSHA undertook regulation of work schedules, the Federal standard and enforcement would cover fewer than half the States; the remainder would be covered by State standards and enforcement. This State activity must be at least as effective as OSHA's and, with limited exceptions, may be more effective [29 U.S.C. 667(c)(2)].

Mine Occupational Safety and Health

In 1977, Congress enacted the Federal Mine Safety and Health Act (30 U.S.C. 801 *et seq.). This* statute assigned enforcement of its standards to the Mine Safety and Health Administration (MSHA) in the Department of Labor. The act covers all coal and other mines and authorizes the issuance of mine safety and health standards (30 U.S.C. 803). The procedures for issuance of standards are similar to the OSHA procedure, including authority to issue emergency temporary standards (30 U.S.C. 811). MSHA is required to enforce these standards, but in a number of respects its enforcement provisions are more stringent than those in the OSH Act. Thus, for example, MSHA in some circumstances has administrative close-down authority (30 U.S.C. 817), and the mine safety statute provides for a mandatory minimum number of inspections per year for various kinds of mines (30 U.S.C. 813). The Supreme Court has held that, unlike OSHA, MSHA is not obligated to obtain a search warrant before conducting amine inspection (6). The greater stringency of MSHA statutory procedures is due largely to congressional recognition of the seriousness and immediacy of hazards at mines.

The act does not provide for State plans, but State standards that provide for more stringent protection than Federal standards or provide protection where no applicable Federal standard exists may be enforced (30 U.S.C. 955). Provisions are also made for Federal grants to States for the purpose of developing and enforcing effective mine safety and health standards (30 U.S.C. 953).

MSHA is given explicit authority to issue mandatory health and safety standards for the protection of life and the prevention of injury in coal and other mines [30 U.S.C. 81 l(a)]. This authority parallels OSHA's authority, and on a satisfactory showing that work schedules create safety and health hazards for employees, MSHA would have authority to issue mandatory standards protecting employees from work schedule hazards (12).

OSHA is preempted by the OSH Act from applying to any working condition covered by another statutory program [29 U.S.C. 653(b)(l)]. Since mine employees are covered comprehensively

by MSHA standards and enforcement, OSHA does not apply to them or to mine working conditions.

Other Safety and Health Statutes

In addition to statutes dealing with protection of employees, there are mixed-purpose statutes designed to protect both public and employee safety. An example is the Federal Railroad Safety Act of 1970 (45 U.S.C. 421 ***et seq.),*** designed to protect both railroad employees and passengers and members of the public who may be affected by railroad operations.

Federal Railroad Safety Act

The Federal Railroad Safety Act is designed to:

- promote safety in all areas of railroad operations;
- reduce railroad-related accidents; and
- reduce deaths and injuries to persons caused by accidents involving any carrier of hazardous materials (45 U.S.C. 421).

Under the law, the Secretary of Transportation, acting through the Federal Railroad Administration, is required to prescribe rules, regulations, orders, and standards for all areas of railroad safety, supplementing those laws and regulations already in effect (45 U.S.C. 431). The statute expressly provides that FRA is not authorized to issue rules related to qualifications of employees except when qualifications are specifically related to safety [45 U.S.C. 431(a)]. The act further authorizes carriers and unions to enter into bargaining agreements related to qualifications of employees, consistent with FRA rules issued under the statute. The statute contains a timetable for FRA issuance of safety rules and provides for court review of the rules.

The act authorizes railroad safety rules to supplement those contained in earlier statutes and in previously issued administrative rules. Thus, while the Hours of Service Act (45 U.S.C. 61 ***et seq.)*** prescribes specific limitations on the hours of service of specific categories of railroad employees, the Railroad Safety Act would authorize FRA to issue safety rules for additional categories of railroad employees or prescribe additional requirements. These new rules could impose limitations on employee work schedules as long as the rules were specifically related to safety.

FRA has promulgated regulations on the control of alcohol and drug use by railroad employees to prevent accidents and casualties resulting from impairment of employees (49 CFR 219). Accordingly, it could be argued that FRA would have authority to regulate work schedules if it could be proved that regulation would prevent railroad accidents resulting from such conditions as fatigue and inattention.

Motor Carrier Safety Act

Under the MCSA, the Secretary of Transportation is authorized to issue regulations establishing minimum Federal safety standards for commercial motor vehicles. At a minimum, these standards must ensure that:

- . the responsibilities imposed on operators of vehicles do not impair their ability to operate the vehicles safely;
- the physical condition of operators is adequate to enable them to operate vehicles safely; and
- . the operation of vehicles does not have deleterious effects on the physical condition of operators (49 U.S. App. 2505).

This authority is broad enough to include work schedule regulation. Indeed, FHWA has already issued hours of service regulations and regulations on alcohol and drug use of operators, which have been upheld (22). Accordingly, FHWA could amend existing hours of service regulations or issue additional regulations on work scheduling.

Federal Aviation Act

Under this statute, the FAA has specific authority, in the interests of safety, to issue reasonable rules and regulations governing the maximum hours or periods of service of airmen and other employees of air carriers. The FAA is also authorized to issue reasonable rules and regulations or minimum standards governing other practices, methods, and procedures it finds necessary to provide adequately for safety in air commerce [49 U.S.C. App. 1421(a)(5),(6)]. As already discussed, FAA has issued hours of service regulations for various categories of employees in air commerce, and it would have the authority to modify or add to these regulations, subject to court review.

U.S. Coast Guard

The Coast Guard supervises the merchant marine of the United States and merchant marine personnel. It has specific statutory authority to take action governing vessels and shipping in the interests of marine safety and seamen's welfare (46 U.S.C. 2103). The statute also contains specific requirements for the reaming of vessels, including limitations on hours of service for certain types of employees, particularly in relation to watches on ships. The Coast Guard has general authority to issue interpretations of the manning requirements (46 CFR 15) and hours limitations and to issue regulations limiting hours beyond those stipulated by the statute, based on its authority to regulate marine safety and seamen's welfare.

Energy Reorganization and Development Act

The NRC has authority to issue regulations governing nuclear materials in order to protect health or to minimize danger to life or property [42 U.S.C. 2201(b)]. This could provide sufficient authority for the agency to regulate work schedules of covered employees. NRC has already issued regulations related to fitness for duty of employees of licensees, prescribing a program of drug and alcohol testing (10 CFR 26). Work schedule regulations could be analogous, as they, too, impose requirements for fitness for duty. The relevance of schedule restrictions to fitness has been recognized explicitly by NRC in a policy statement.

Relationship of OSHA to Other Laws

Broadly speaking, where an agency has general statutory authority to regulate employee safety or health, or both, this authority ordinarily includes regulation of work schedules if the connection between safety and health and the regulatory requirements can be shown. There may be more limited authority over work schedules under specific statutes, and conclusions on the extent of that authority can be drawn from the statutory language, its legislative history, and relevant decisions. The OSH Act covers occupational safety and health in all private industries. In addition, there are other statutes which provide regulatory authority over both public and occupational safety and health; these include several statutes administered by the Secretary of Transportation (45 U.S.C. 2121; 49 U.S.C. App. 1421). These statutes may also provide agency authority over work schedules of employees.

There remains the issue of the jurisdictional overlap between OSHA's broad employee safety and health coverage and the coverage of industry-specific statutes relating to employee safety and health. Thus, for example, employees of private railroads are covered by OSHA under the Railroad Safety Act and the Hours of Service Act. The OSH Act [29 U.S.C. 653(b)(l)] deals with this issue and provides that the act does not apply to working conditions when other Federal agencies exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health. While the language of this section is not entirely clear, its purpose is to prevent redundant regulation of occupational safety and health, while avoiding any gaps in employee protection. OSHA has issued an interpretative regulation of this provision (29 CFR 1955), which contains the following general principles:

- The act applies only when *specific working conditions are* regulated by another Federal agency. OSHA would not be preempted in an entire industry merely because some working conditions in that industry were regulated by another Federal agency (20). The only industry-wide preemption that has taken place is in mining, which is regulated comprehensively under the Mine Safety and Health Act.
- The regulation of working conditions by another Federal agency would be preemptive, even where the relevant statute is not directed exclusively to employee safety and health (for example the Railroad Safety Act, which also deals with public safety). However, the statute must intend to include employees in the class of persons to be protected under it (7).
- In order to preempt OSHA, another Federal agency must have exercised its statutory authority to protect employees (19).

It is apparent, therefore, that it would be necessary to study the statutes and regulations of both OSHA and other Federal agencies to determine, in the event of overlapping jurisdiction, which regulations would apply. Even after study, the answer may not be apparent, and court decisions sometimes add to the confusion. In order to clarify jurisdictional issues for the public and the agencies themselves, OSHA has entered into a series of agreements with other

Federal agencies to define more accurately their respective jurisdictions.

Fair Labor Standards Act

As discussed, the child labor provisions of FLSA authorize the Department of Labor's Wage and Hour Division to issue regulations respecting the employment of children 14 to 16 years old to ensure that their employment in permissible occupations will not interfere with their schooling or their health and well-being [29 U.S.C. 203(1)(2)]. The Wage and Hour Division has issued such regulations (29 CFR 570.35) and has authority to amend or replace them, but it does not appear to have authority to regulate the *hours of employment* of other minors. Thus, FLSA prohibits the employment of children 16 to 18 years old in an occupation which the Division determines is particularly hazardous and detrimental to their health and well-being [29 CFR 570(E)]. The Division's discretion, therefore, relates to defining the particularly hazardous *occupations* and not to determining permitted hours of employment [29 CFR 570(E)]. For children under 14, the statute bars any employment [29 U.S.C. 203(1)] except under specific circumstances in agriculture and the entertainment industry [29 U.S.C. 213(c)].

The overtime provisions of FLSA would not provide authority for direct regulation of shift schedules. Under the act, an employer is prohibited from employing workers for more than 40 hours a week unless a premium wage is paid. It follows that if the appropriate time-and-a-half wage rates are paid, there would be no barrier to employment under FLSA for hours beyond the 40-hour week in any arrangement that is otherwise in accordance with law. This conclusion is underscored by a consideration of the main purpose of the overtime provisions of FLSA, which was to spread the work among more workers. While the law had an additional purpose, namely, to promote health among workers by limiting excessive work hours and thus providing for more rest and leisure, this further goal was achieved by providing a financial penalty for employers who imposed lengthy hours on the existing work force. Any argument that FLSA authority extends to direct shift regulation could persuasively be answered by citing the OSH Act, passed 22 years after FLSA, which was designed expressly to protect employee health and which provides clear authority for direct shift regulation. On the other hand, the Wage and Hour Division would have authority to modify its interpretations of hours worked and thus indirectly affect work schedules.

Labor Relations Statutes

So far, this chapter has considered shift regulation under command and control type regulatory statutes, which impose direct and enforceable obligations on employers. The Labor-Management Relations Act (LMRA), originally enacted as the National Labor Relations Act in 1935, amended and renamed in 1947, and amended twice since then, provides a regulatory framework for employee exercise of collective rights, including the right to bargain collectively and to enter into collective bargaining agreements (29 U.S.C. 141 *et seq.). These* bargaining agreements may, and often do, contain provisions on limitations of hours and shift restrictions, which are enforceable as a matter of contract law through private remedies.

Labor-Management Relations Act

The LMRA is administered by a five-member National Labor Relations Board (29 U.S.C. 153). The coverage of the act is broad, applying to virtually all private employers (29 U.S.C. 152).

Under the act, the employer and the union are obligated to bargain collectively with each other, and a refusal to bargain in good faith is an unfair labor practice [29 U.S.C. 158(a)(5),(b)(3),(d)]. The obligation to bargain in good faith relates only to mandatory subjects of bargaining, that is, wages, hours, and other terms and conditions of employment (13). There is a considerable body of case law on the issue of what subjects are mandatory, but there is little doubt that hours of employment, including work schedules, are among them.

The LMRA does not regulate shift schedule limitations directly. However, at least partly because of the legal requirements imposed by the act, parties regularly enter into collective bargaining agreements that include hours and shifts. Bargaining agreements with such clauses may be reached voluntarily by parties not covered by LMRA.

While LMRA covers the bulk of private employees, several other labor-management statutes should be mentioned. The Railway Labor Act (45 U.S.C. 151 ***et seq.)*** governs the labor relations of railroads and their employees. Like LMRA, the Railway Labor Act requires carriers and employees to exert every reasonable effort to make and maintain

agreements (45 U.S.C. 152). This obligation covers rates of pay, rules, and working conditions. While hours are not expressly mentioned, the obligation to bargain over them could be encompassed by working conditions.

There is a wide range of clauses in collective bargaining agreements relating to hours of work. These have been collected in the Bureau of National Affairs' *Collective Bargaining, Negotiation and Contracts (5).* According to this survey, virtually all contracts contain hours and overtime provisions; typical provisions include:

- daily and weekly work schedules;
- overtime premium pay;
- distribution of overtime work; and
- length of lunch and rest periods (5).

Many contracts state the length of the workday and workweek, and some specify the days of the week on which work may be performed. Management, however, may retain scheduling rights, frequently with a requirement for advance consultation with the union (5).

Some contracts provide specific restrictions on scheduling, such as no split shifts (5) and limits on switching employees from one shift to another (5). The bargaining agreement between a steel company and a chemical workers' union (5) provides that employees are not permitted to work more than 16 hours within any 24-hour period unless an employee is awaiting replacement and is willing to stay or needs 2 additional hours to finish a job.

Various contract clauses deal with overtime, covering both scheduling and premium compensation. One contract for aluminum and steel workers (5) limits the amount of employee overtime. Except in cases of emergency, no employee may be permitted or required to work:

- more than 16 consecutive hours in a workday;
- 16 overtime hours in a workweek;
- more than two consecutive 16-hour work periods; or
- more than 16 hours in any 24-hour period.

In another contract for industrial workers, no employee may be required to work more than 12 continuous hours and may not be penalized for leaving after that time (5). Other provisions relate to rest periods with pay during regular shifts (5).

In sum, there are many clauses concerning shift scheduling that may appropriately be part of the mandatory collective bargaining process.

State Labor Relations Legislation

A number of States have labor relations statutes addressing mandatory bargaining issues. For example, the Connecticut Labor Relations Act (Corm. Gen. Stat., 1958 rev. sec. 31-101-111, CCH *Rep.*, 47,000) contains:

- provisions defining the rights of employees (sec. 31-104);
- provisions prohibiting unfair labor practices by employers (sec. 31-105);
- procedures for employee election of representatives (sec. 31-106); and
- procedures for the handling of unfair labor "practices cases (sec. 31-107).

In some cases, State labor relations statutes are applicable only to a specific industry, for example, the California Agricultural Labor Relations Act (Third Extraordinary Sess., L. 1975, amended, ch. 1292, L. 1980; *CCH Rep.,47,400). In* any event, the scope of these labor relations laws depends both on their language and interpretation and, significantly, on the extent to which they" are preempted by the Federal LMRA.

Federal preemption in the field of labor relations has been much litigated and has been the subject of numerous Supreme Court decisions. The purpose of Federal preemption is to avoid duplicative or inconsistent State regulation of conduct regulated by the Federal Government under the U.S. Constitution's supremacy clause. Preemption depends in the first instance on the intent of Congress as expressed in the Federal statute. In the case of LMRA, Congress expressly provides that the States are free to regulate with respect to employers over whom the National Labor Relations Board lacks legal jurisdiction or declines to exercise its jurisdiction [29 U.S.C. 164(c)]. Otherwise, since Congress has not indicated its intention to preempt State regulation completely, the courts must decide the extent of the preemption.

The Supreme Court has developed three tests for deciding whether State regulation is preempted in the field of labor relations (1, 10, 18). Early in the history of the LMRA, the Supreme Court applied the tests quite strictly, often finding State regulations preempted (18). More recently, the Court has found preemption inapplicable, for a variety of reasons (4).

The important point here is that State regulation of labor relations cannot be considered separately from the Federal requirements and the preemptive effect of the Federal regulatory structure (9).

GOVERNMENT EMPLOYEES

The government as employer determines the working conditions of its employees. Its authority may be limited by certain authorizing statutes or by other regulatory statutes insofar as they apply to government employees, for example, FLSA. In addition, both the Federal and many State governments may have bargaining obligations under labor relations statutes specifically applicable to government employees.

Federal Employees

Under Federal law, each executive agency is required to establish a basic administrative workweek of 40 hours for full-time employees and to require that work be performed within a period of not more than 6 of any 7 consecutive days [5 U.S.C. 6101(a)(2)]. The law further imposes certain limitations on work scheduling, except in cases where the agency head determines that agency operations would be seriously handicapped or costs would be substantially increased by them. These limitations are:

- assignments to tours of duty are scheduled in advance, over periods of not less than 1 week;
- the basic workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;
- the working hours in each day in the basic workweek are the same;
- the basic nonovertime workday does not exceed 8 hours;
- the occurrence of workdays does not affect the basic workweek; and
- breaks of more than 1 hour may not be scheduled in a basic workday [5 U.S.C. 6101 (a)(3)].

An important innovation in Federal employee work scheduling took place with enactment of legislation providing for flexible and compressed work schedules for Federal employees. This law was originally passed in 1978 [Public Law 95-390 (1978)] and amended several times, most recently in 1982 [Public Law 97-221 (1982); 5 U.S.C. 6121 *et* seq.]. Under the statute presently in effect, an agency is authorized to establish programs of flexible schedules, which include:

. designated hours during which an employee must be present for work; and

. designated hours which an employee may elect as the time for his or her arrival or departure, solely . . . for the purpose of accumulating credit hours to reduce the length of the workweek or another workday [5 U.S.C. 6122(a)].

The head of an agency may cancel all or part of a flexible scheduling program if he or she determines that the program is substantially disrupting agency operations or is incurring additional costs [5 U.S.C. 6122(b), 6131].

The statute also authorizes an agency to establish programs which use a 4-day workweek or other compressed schedules (5 U.S.C. 6127). It provides for excepting an employee from a compressed schedule program or transferring the employee if the program imposes personal hardship. In addition, the head of an agency may decide not to establish or to discontinue a flexible or compressed schedule if it would have an adverse impact on the agency, as defined in the statute [5 U.S.C. 6131(a)].

The OSH Act does not apply directly to Federal and State employees [29 U.S.C. 652(5)]; therefore, OSHA standards and the statute's enforcement provisions are not used by the Department of Labor to enforce safety and health requirements in the Federal workplace. However, the OSH Act contains a separate provision, section 19 (29 U.S.C. 668), covering safety and health programs for Federal agencies. The section assigns to the head of each Federal agency the responsibility for establishing and maintaining an effective and comprehensive safety and health program that is consistent with the standards promulgated by OSHA covering private employees [29 U.S.C. 668(a)]. If OSHA issues requirements for private employers concerning safety and health (as, for example, limitations on hours of work), the heads of the Federal agencies would be required to impose similar limitations, except to the extent that circumstances differ, as determined by **OSHA.**

The FLSA applies to most Federal Government employees, including civilians in the military and employees of the executive, judicial, and legislative branches of the Federal Government [29 U.S.C.

203(e)]. Thus, the wages, hours, and working conditions set by the Federal Government for Federal employees must meet the minimum wage, overtime, and child labor requirements of the FLSA.

In 1966, Congress passed the Federal Labor-Management Relations Act (5 U.S.C. 7101 ***et seq.),*** establishing a program of labor relations for Federal employees. The program is administered by the Federal Labor Relations Authority (5 U.S.C. 7104). The basic rights of employees include the right to join or assist a union, or to refrain from such activity, and through their own representatives to engage in collective bargaining with respect to conditions of employment (5 U.S.C. 7102). However, because the Federal Government is the employer, and because Federal employees may not strike to enforce their demands (5 U.S.C. 1819), the obligation of the Federal agency to bargain with Federal employee unions is defined in a more limited manner than the bargaining obligation of private employers (5 U.S.C. 7106, 7117). For example, with certain exceptions, the agency's obligation to bargain collectively must be consistent with any Federal law or any Government rule or regulation [5U.S.C.7117(a)(l), (2)]. A Federal agency's authority to fix hours of work for its employees may be affected by its statutory bargaining obligation. Many bargaining agreements between Federal agencies and Federal employee unions are in effect, and some contain provisions on hours of work of Federal employees.

State Employees

State governments and their agencies are authorized to set the hours and working conditions of State employees in accordance with the provisions of State law. State law is applicable to the extent that it is not preempted by Federal law and does not contravene any specific constitutional prohibition or statutory prohibitions in Federal or State law.

The OSH Act does not cover State employees [29 U.S.C. 652(5)]. However, in order for a State to qualify for Federal approval or financial assistance, its employees must be covered by an occupational safety and health plan that is as effective as the plan covering private employees [29 U.S.C. 667(c)]. In addition, OSHA regulations allow States to develop and obtain approval for plans covering State employees alone. Under these laws and regulations, if the OSH Act were to limit the hours and shifts of employees, States with approved plans would be required to do likewise for both private and State employees.

The FLSA currently applies, with some exceptions, to State and local employees [29 U.S.C. 203(e)(2)(C)]. While the child labor provisions apply without change to State employees, FLSA now allows States to grant compensatory time instead of overtime pay under some circumstances for State employees [29 U.S.C. 207(0)]. In addition, FLSA contains provisions directed specifically toward employees engaged in fire protection and law enforcement activities for State public agencies [29 U.S.C. 207(K)].

The LMRA does not apply to State employees [29 U.S.C. 152(2)]. However, a number of States have their own labor relations statutes governing State and local employees, and these statutes impose collective bargaining obligations on the parties. An example is the Massachusetts State labor relations act, which includes a requirement that the State bargain with employee representatives (CCH *Labor Law Rep.,* Massachusetts 47,000). However, because the State is the employer, the bargaining obligation is defined more narrowly than under the LMRA, which is applicable to private employees *(CCH Rep.,* **47,019, 47,025).**

SUMMARY AND CONCLUSIONS

The protection of the safety and health of American working men and women is the central goal of a variety of Federal and State regulatory statutes. The best known of these is the Federal Occupational Safety and Health Act.

Since early in 20th century, the protection of employees and the public from the hazards resulting from certain work scheduling practices in the transportation industry has been the subject of specific regulatory action. At present, enforceable statutes or regulations are applicable to various groups of railroad, motor carrier, air carrier, and maritime employees. In addition, the Federal minimum wage law limits the working hours of certain minors.

Under the Federal Labor-Management Relations Act, employees are guaranteed the right to organize and to bargain collectively. Additional protection against the hazards to employees of work scheduling is also afforded under a number of voluntarily negotiated collective bargaining agreements.

States provide parallel protection to employees against work scheduling risks under statutes and regulations, subject, however, to the limitations imposed by the doctrine of Federal preemption.

In general, currently effective Federal and State statutes provide a broad base of authority for the issuance and implementation of regulations to strengthen the protection of employees in this area. Particularly noteworthy in this regard is the OSH Act, with its pervasive coverage of all private employers. Acting under this statute, the Department of Labor has authority, on a showing of significant risk to employees, to issue and enforce regulations relating to work scheduling. States with approved occupational safety and health plans would be required to provide protection that is at least as effective as that under the OSH Act.

While no additional statutory authority is necessary to enhance employee protection, it should be recognized that the enactment of an industrywide statute dealing expressly with the regulation of work scheduling would constitute a strong declaration of governmental policy and would provide a considerable impetus to protective progress in this area.

CHAPTER 6 REFERENCES

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