

A 'Modest' Proposal: The 32-Hour Workweek

By **Daniela Porat**

Law360 (August 10, 2021, 6:50 PM EDT) -- The pandemic has upended ideas about where and how work can be done, and a new Democrat-led bill to cut the workweek to 32 hours has set off debate on whether the fundamental principle underpinning wage and hour law can be recast.



Rep. Mark Takano, D-Calif., doesn't expect his 32-hour workweek proposal to pass right away, but is optimistic it won't take years. (iStock)

Rep. Mark Takano, D-Calif., recently introduced H.R. 4728 to reduce the workweek to 32 hours from 40, the standard since the early days of the Fair Labor Standards Act.

Takano said his proposal — which would amend the FLSA and entitle nonexempt employees to overtime pay after 32 hours — is both "bold and modest," because it's a small piece of what will be a larger effort to realize a shorter workweek, but it also catalyzes a public discussion.

The idea to implement a shorter workweek predated the pandemic, Takano said in an interview with Law360.

But for him, the several months "of working differently, of living differently, has precipitated among many, many Americans, both employees and employers alike, questions about whether we return to 'normal' or we start looking at a new normal," he said.

Here, Law360 explores the implications of reimagining work hours.

'A New Line in the Sand'

Economic upheavals such as the Great Depression prompt societies to rethink how things are done, and the COVID-19 pandemic offered an opportunity to inject the idea of a shorter workweek into broader discussions about changing workplace norms, Takano said.

But, the lawmaker added, the discussions about a shorter workweek have been more robust in industries or companies made up of overtime-exempt professionals, and this bill is an attempt to "not leave wage earners out of this conversation" and "draw a new line in the sand" at 32 hours.

"Nothing in my legislation prevents people from working more hours, but it does set a new expectation," he said.

Though Takano said he doesn't expect the bill to pass right away, he also doesn't think it will languish for years, and the immediate impact wouldn't necessarily be a shorter workweek but rather higher pay on the fifth day of work.

Changing the hourly overtime threshold could be an effective way to force companies to think more deeply about whether certain extra work is necessary, said Sally Abrahamson, a partner at worker-side firm Werman Salas PC.

Abrahamson said she has seen this happen with misclassification cases she has litigated in which an employer must change an employee's status and make them overtime eligible.

"Once they make a decision that that needs to change and that they are eligible, the work structure changes, and so companies become a lot more cognizant of the amount of time that people are working because it's hitting their bottom line," she said.

One provision that could significantly affect employers is the bill's adoption of a California-style daily overtime pay, said Tao Leung, a partner at management-side firm Hogan Lovells.

Those stipulations would require employers to pay time-and-a-half after eight hours on a given workday and double-time above 12 hours.

"It's not just changing the FLSA to a 32-hour week, that's already a huge jump," Leung said. "But just proposing daily overtime and daily double time would be a big jump for many employers."

A 32-hour workweek would have cascading effects on many areas of wage and hour law, especially since many benefits are tied to hours, such as paid time off, said Erin Torcello, a member at management-side firm Bond Schoeneck & King PLLC.

"It's not so easy to just say, 'OK, we're moving from 40 hours to 32 hours.' That is one domino," Torcello said. "If you knock that domino, how many other dominoes have to fall along with it?"

"Employers' policies interact with one another," she said.

What About Exempt Employees?

By design, Takano's bill would apply only to nonexempt workers.

By adding nonexempt workers to the debate surrounding shorter workweeks, Takano said the bill "adds weight, and legitimacy to the conversations that are happening for the exempt employees."

"We can't underestimate how much legitimacy the law confers on a concept and an idea," he said. "I think those who are exempt employees, it's in their interest to legitimize what they aspire to, by saying that 'Hey, yes, we as a country ought to commit to this basic working condition.'"

It also makes sense on a practical level, because exempt positions' pay isn't tied to hours worked, Abrahamson said.

But Torcello said she wondered whether the exclusion of exempt employees would potentially harm upward mobility, especially for women.

She said that though a 32-hour workweek might help relieve the financial or time-management pressures involved with child care, for example, what happens when a nonexempt employee is promoted but no longer has the protections afforded by the bill?

"Are you creating another feeling or barrier for women in the workplace that have those obligations if they are opting for a flexible 32-hour work week, and that is not available for nonexempt employees, supervisors, managers, executives?" she said. "Is that creating another barrier for women in the workplace?"

Workplace Flexibility Debate

The bill is coming **at a moment** when the idea of "respecting people's time as a value" is gaining traction and more fair workweek laws are being passed, Abrahamson said.

"I think the timing is really good because we're kind of in this innovative time where people might be a little bit more open to thinking about different ways that work can get done," she said.

But for Leung, the bill misses the mark when it comes to flexibility.

Instead of locking workers and companies into four eight-hour days, a better proposal would be to allow employees to work four 10-hour days, Leung said.

"I think that would probably accomplish the same result in terms of giving employees flexibility, but by mandating a 32-hour workweek what you would likely see is, at least for a lot of companies, is that they would just staff the employee for 32 hours," he said. "So not only are they not getting more overtime, they're actually getting less straight time as well."

One of several precursors to the 40-hour standard was the Ford Motor Co. instituting a 40-hour workweek in 1926 in its car manufacturing facilities, a precedent Torcello referred to when discussing the viability of changing norms through legislation.

The shift to a shorter workweek will happen because businesses will discover that it is more profitable or better for recruitment and productivity to have such a structure in place, she said.

"It's really difficult to legislate cultural change," Torcello said.

Nevertheless, the bill is succeeding in one of Takano's main goals: sparking debate.

"It took decades for the 40-hour workweek and a two-day weekend to be cemented in American life, and legislation was sort of the culmination of cataclysmic events like the Depression," he said. "As we're trying to lift ourselves out of the pandemic ... one of the cultural consequences has been this interest in how long our workweek should be in the 21st century."

--Editing by Haylee Pearl and Roy LeBlanc.