[MS-0398.040.013.025] Given 9/26/92

VERBAL TESTIMONY RE FLSA

LEON L. WILLIAMS

Thank you for the opportunity to testify Mr. Chairman. I am Leon Williams, Supervisor in San Diego County and President Elect of the California State Association of Counties. Today, I am pleased to appear on behalf of the National Association of Counties to inform the Subcommittee of serious problems with the implementation of the Fair Labor Standards Act.

Since its enactment in 1938, the FLSA has provided important benefits to American workers. The intent of this historic legislation was to ensure fair and decent wages to the nation's rank and file workers. This continues to be the purpose of the FLSA and we do not want to see that changed.

But, I must tell you that today, because of recent court interpretations, the FLSA is no longer the protective shield for workers that Congress intended.

- Today, the FLSA protects and rewards persons who were never intended to be the beneficiaries of the Act -- I am talking about high paid professionals, administrators and executives.

- Today, court interpretations of the FLSA force public employers to divert resources to the payment of unwarranted windfalls to these unintended beneficiaries.

- Therefore, today, in my County and in local and state governments across this nation, there are fewer resources available to fairly compensate -- and indeed, to retain -- the rank and file workers who were and remain the intended beneficiaries of the Act.

- As a result, today the FLSA hurts the very persons it was intended by the Congress to protect -- this nation's rank and file workers. (And, let me say parenthetically lest the point escape attention, when workers are not fairly compensated, and when workers are laid off, the public is hurt as well.)

- Today, court interpretations of the FLSA cause public employers to violate basic, fundamental principles of public accountability -- making public employers look bad, and making the Congress look bad as well.

- And finally, today, court interpretations of the FLSA have set the stage for an eventual political backlash -- against not just the FLSA, but against Labor and against Congress -- when the fiscal ramifications of the Act become more widely known.

This crisis originated with the 1990 Federal Appeals Court ruling in the case of Abshire v. County of Kern. As a result of this and subsequent court decisions, state and local governments are facing substantial back wage liability to their higher paid professionals, administrators and executives.

The details of the Abshire case are referenced in my written testimony beginning on page 5. You and your staff are no doubt well-acquainted with the case in any event. In brief, the case had to do with the application of the FLSA exemption for professional, administrative and executive employees. The Department of Labor had established a requirement that the exemption applied only to employees who were paid on a salary basis rather than an hourly basis. Because the Kern County employees were required to account for each hour worked, the court ruled that none were exempt and that all were entitled to time-and-one-half pay for overtime.

The issue before us today is, "Who is entitled to overtime pay under the Fair Labor

Standards Act?" The question is not whether professional, administrative and executive employees should receive overtime compensation -- clearly, the nature of their responsibilities dictate that they should not. **The question is whether DOL has promulgated a regulation which denies to public employers the benefit of the exemption available to the private sector merely because the special, fiduciary obligation of public employers to their taxpaying citizens requires enhanced record-keeping.**

For the County of San Diego, as well as numerous other state and local governments nationwide, this critical situation is growing worse. Since the Abshire decision, there have been a series of court rulings with an even greater impact on state and local governments. These courts have held that the higher paid professional, administrative and executive public employees are not only covered by FLSA, but must be paid back wages in the form of time-and-a-half pay for all overtime hours worked for the past 2 to 3 years.

The basis of these court rulings is that public agency payroll systems, established pursuant to principles of public accountability, do not satisfy the court's own views of the Department of Labor "salary basis" regulations. These later cases drastically expand the detrimental impact of the Abshire ruling. Such decisions are exposing public sector entities to substantial retroactive and prospective overtime payments to higher paid professional, administrative and executive employees.

By way of example **[PLEASE REFER TO CHARTS]**:

- The County of San Diego already is engaged in 4 FLSA lawsuits involving 962 plaintiffs. The Federal District Court has ruled against the County in 2 of the lawsuits, and it is expected to rule the same way in the other 2 lawsuits. The County is facing an obligation of approximately $8-10 million in back wages from

these 4 lawsuits.

- The County continues to face more potential claims for back wages from other exempt professional, managerial, and executive employees who are not part of the current lawsuits. The County employs approximately 17,580 employees. Of these employees, 6,732, or 38.3%, are exempt and serve in "white-collar" professional, manager, and executive positions. The remaining 10,848, or 61.7%, of the employees are covered by the FLSA and serve in rank and file positions. Based on these numbers, the County faces potential back wage liability of approximately $23 million for exempt professionals, managers, and executives.

The County of San Diego, because of the nationwide recession and reductions in State and federal aid, is already facing a severe financial crisis. This FLSA liability will further cripple our ability to deliver adequate law enforcement, health and social services to County residents. Our fiscal condition also prevents us from offering any wage increases to our employees, including our rank and file employees whom the FLSA is intended to benefit. Overtime work already has been substantially curtailed, and we are trying our best to avoid massive layoffs.

It would be a travesty if FLSA-covered employees were to suffer financially because higher paid (supposedly exempt) professional, administrative and executive employees received unintended financial windfalls as a result of court interpretations of the FLSA.

Let me share with you a couple of the avenues of relief my County is pursuing in order to avoid the terrible result I have just mentioned.

- In my County, we have had to inform high paid professionals, administrators and executives that they must not record absences of less than a day in length -- in effect, we have instructed them claim compensation for <u>time not worked</u>!

- In my County, we are contemplating a modification of our practices to preclude any accounting of work time for professionals, administrators and executives so that we can protect their exempt status.

These are not acceptable solutions. Moreover, this is not the intent of the FLSA. But at this point, the County is left with little choice: either we make the changes required by the courts, or we pay time-and-a-half overtime to all our high paid professionals, managers, and executives.

It is important to note that any payroll changes made will be prospective in application, and will not resolve the tremendous retroactive liability facing counties, as well as state and local governments nationwide.

Congress should act immediately to resolve this crisis brought about by court interpretations of the FLSA. Congressional action is required because the Department of Labor is unable to provide the retroactive relief required to address this problem. Indeed, the recently promulgated DOL Final Rule revising the "salary basis" test created by the Abshire decision will not correct the problem retroactively. Moreover, it will not correct the other problems with the "salary basis" test raised by recent court rulings. That is why it is necessary for Congress to step forward now to enact clarifying legislation that will stop the misapplication of the FLSA.

We strongly urge your immediate and full support of legislation similar to H.R. 5112. Such legislation would go a long way to correct the problems I have discussed with you today. Equally important, it would represent sound public policy at a time when the public mistrusts government at all levels. It would permit state and local governments to continue with payroll systems that are established on long-standing principles of public accountability -- systems that local taxpayers understand and rely on to protect them.

Government employers cannot afford to pay employees for time not worked because of an artificial standard such as the "salary basis" test. Such a test has proven to be ineffectual, confusing and counter-productive. It must be eliminated for the public sector. We urge your swift action to enact an appropriate solution to this crisis.

Thank you for the opportunity to address your esteemed Subcommittee today.

leontalk.jrs