STATEMENT OF NOBUMICHI HARA

SENIOR VICE PRESIDENT, HUMAN CAPITAL

GOODWILL INDUSTRIES OF CENTRAL ARIZONA

ON BEHALF OF THE

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

SUBMITTED TO

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HEARING ON

"THE FAIR LABOR STANDARDS ACT: IS IT MEETING THE NEEDS OF THE TWENTY-FIRST CENTURY WORKPLACE?"

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Introduction

Chairman Walberg, Ranking Member Woolsey, and distinguished members of the Subcommittee, my name is Nobumichi Hara, Senior Vice President of Human Capital for Goodwill Industries of Central Arizona. I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I am a member. On behalf of our approximately 260,000 members in over 140 countries, I thank you for this opportunity to appear before the Committee to discuss the relevance of the Fair Labor Standards Act (FLSA) to the 21st century workplace.

SHRM is the world's largest association devoted to human resource management. The Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

Goodwill Industries of Central Arizona is one of 163 autonomous Goodwills served by a member services organization, Goodwill Industries International. In 2010, Goodwill of Central Arizona provided career services to over 30,000 individuals by assisting job seekers through career centers, job fairs, and by providing job skills training, work experience, and case managed programs in vocational rehabilitation. Those programs were administered under the Work Incentives Improvement Act, Senior Community Service Employment Program, Summer Youth Work Experience Program, and other government grants and contracts.

In essence, our mission is about workforce development. Last year, we placed 9,200 people in jobs in the greater Phoenix, Yuma and Prescott communities. In carrying out our mission we employ nearly 2,000 employees; the majority of whom are people with barriers to employment. We offer a competitive pay and compensation package to our employees and offer flexible work options, including flexible scheduling, telecommuting, and compressed work programs. Our employees work very hard with one goal in mind: putting people to work.

In my testimony, I will explain the key issues posed by the FLSA to our nation's employers and employees; demonstrate how the FLSA prohibits employers from providing workplace flexibility that today's employees want; and share SHRM's efforts to promote these benefits to employees.

The Fair Labor Standards Act

The Fair Labor Standards Act of 1938 (FLSA) has been a cornerstone of employment and labor law since 1938. The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments. The FLSA was enacted to ensure an adequate standard of living for all Americans by guaranteeing the payment of a minimum wage and overtime for hours worked in excess of 40 in a workweek.

The U.S. Department of Labor's Wage and Hour Division (WHD) administers and enforces the FLSA with respect to private employers and state and local government employers. Special rules apply to state and local government employment involving fire protection and law

enforcement activities, volunteer services, and compensatory time off instead of pay in overtime situations.

Virtually all organizations are subject to the FLSA. A covered enterprise under the FLSA is any organization that "has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and has $500,000 in annual gross volume of sales; or engaged in the operation of a hospital, a preschool, an elementary or secondary school, or an institution of higher education."[1]

Employees of firms that are not covered enterprises under the FLSA still may be subject to its minimum wage, overtime pay, recordkeeping, or child labor provisions if they are individually engaged in interstate commerce or in the production of goods for interstate commerce.

Employee Classification Determinations under the FLSA

The FLSA provides exemptions from both the overtime pay and minimum wage provisions of the Act. Employers and HR professionals use discretion and independent judgment to determine whether employees should be classified as exempt or non-exempt and, thus, whether they qualify for the overtime pay provisions or the minimum wage provisions of the FLSA. Generally speaking, classification of employees as either exempt or non-exempt is made on whether the employee is paid on a salary basis with a fixed rate of pay, and their duties and responsibilities.

The FLSA provides exemptions from both the overtime pay and minimum wage provisions for:

1. Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and employees in certain computer-related occupations (as defined in Department of Labor regulations) known as the "White Collar" provisions.
2. Employees of certain seasonal amusement or recreational establishments, employees of certain small newspapers, seamen employed on foreign vessels, employees engaged in fishing operations, and employees engaged in newspaper delivery.
3. Farm workers employed by anyone who used no more than 500 "man-days" of farm labor in any calendar quarter of the preceding calendar year.
4. Casual babysitters and persons employed as companions to the elderly or infirm.

In addition, the FLSA provides additional exemptions from only its overtime pay provisions for the following positions:

1. Certain commissioned employees of retail or service establishments; auto, truck, trailer, farm implement, boat, or aircraft sales-workers, or parts-clerks and mechanics servicing autos, trucks, or farm implements, who are employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers.

[1] 29 U.S.C. 203(s)(1)(A)

2. Employees of railroads and air carriers, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans.
3. Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations.
4. Domestic service workers living in the employer's residence.
5. Employees of motion picture theaters.
6. Farm workers.

The FLSA also provides partial exemptions from only overtime pay in the following instances:

1. For employees engaged in certain operations involving agricultural commodities and to employees of certain bulk petroleum distributors.
2. Hospitals and residential care establishments may adopt, by agreement with their employees, a 14-day work period instead of the usual seven-day workweek, if the employees are paid at least time-and -one-half their regular rates for hours worked over eight in a day or 80 in a 14-day work period, whichever is the greater number of overtime hours.
3. For employees who lack a high school diploma, or who have not attained the educational level of the 8th grade, who can be required to spend up to 10 hours in a workweek engaged in remedial reading or training in other basic skills without receiving time-and-one-half overtime pay for these hours. However, the employees must receive their normal wages for hours spent in such training and the training must not be job-specific.
4. Public fire departments and police departments may establish a work period ranging from seven to 28 days in which overtime need only be paid after a specified number of hours in each work period.[2]

As shown by the above descriptions of the various types of FLSA exemptions, classification decisions for many positions are not black-and-white. It can be easy for an employer to mistakenly misclassify employees as exempt who, in reality, should be non-exempt, or vice-versa.

Despite the ambiguity of many employment situations, the stakes in "improperly" classifying employees are high. The U.S. Department of Labor (DOL) frequently audits employers and penalizes those that misclassify employees, awarding up to three years of back pay for overtime for those employees, plus attorneys' fees, if applicable. Predictably, audit judgments can be subjective, since two reasonable people can disagree on a position's proper classification. Employers also face the threat of class-action lawsuits challenging their classification decisions.

FLSA – a 20th Century Statute

The FLSA was enacted toward the end of the Great Depression and reflects the realities of the industrial workplace of the 1930s, not the workplace of the 21st century. The Act itself and its implementing regulations have remained relatively unchanged in the more than 70 years

[2] Society for Human Resource Management (2008). Fair Labor Standards Act (FLSA) of 1938.

since its enactment, despite the dramatic changes that have occurred in where, when and how work is done. Information technology and advances in communication have clearly transformed how businesses operate, communicate and make decisions. Cell phones, tablets, BlackBerries, and other technology allow many employees to perform job duties when and where they choose.

As a result, minimum wage policies and overtime exemption requirements which may have been appropriate in the 1930s are out of step with current knowledge and a technology-based economy, creating unnecessary regulatory burdens for employers and restricting employers' ability to be flexible and address contemporary employee needs.

We believe the FLSA makes it difficult if not impossible in many instances for employers to provide workplace flexibility to millions of non-exempt employees. While non-exempt employees can receive time-and-a-half pay, they cannot be afforded the same workplace flexibility benefits as exempt employees.

Workplace Flexibility and the Fair Labor Standards Act

The increased diversity and complexity within the American workforce – combined with global competition in a 24/7 economy – suggests the need for more "workplace flexibility." C-suite executives, for example, say the biggest threat to their organizations' success is attracting and retaining top talent.[3] Human resource professionals believe the best way to attract and retain the best people is to provide workplace flexibility.[4] Moreover, a large majority of employees – 87 percent – report that flexibility in their jobs would be "extremely" or "very" important in deciding whether to take a new job.[5]

To be clear, workplace flexibility is defined as giving employees some level of control over how, when and where work gets done. Altering how, when and where work gets done in today's modern workplace, however, also raises compliance concerns with the FLSA.

Although both employers and employees identify the need for greater flexibility, the outdated FLSA presents challenges for organizations wanting to implement flexible work arrangements (FWAs). Flexible work arrangements alter the time and/or place that work is conducted on a regular basis; must work for both the employer and employee; and must be voluntary for employees. Employers, however, encounter challenges under the FLSA in offering some FWAs.

For example, I was recently approached by a group of Goodwill employees in Central Arizona who wanted to work a bi-weekly compressed workweek. Under the FLSA, employers are permitted to allow a non-exempt employee to work four, 10-hour days Monday through Thursday for a total of 40 hours in a week, and take every Friday off without the employer incurring any overtime obligations. However, our employees proposed working a nine-hour day Monday through Friday of the first week for a total of 45 hours, and work three, nine-hour days and one eight- hour

[3] Company of the Future Survey (2010). Society for Human Resource Management and the Economist Intelligence Unit.
[4] Challenges Facing Organizations and HR in the Next 10 Years (2010). Society for Human Resource Management.
[5] National Study of the Changing Workforce (2008). Families and Work Institute.

in the second week and take Friday off, because working 10 hours was physically too difficult for them and did not comport to their work-family obligations. This schedule, however, would require the employer to pay overtime for the additional hours over 40 hours in the first week. In addition, several states have daily overtime requirements for more than an eight-hour day, further complicating employer efforts to provide this type of flexible work arrangement.

Another example of a FWA that raises compliance concerns under the FLSA is a Results-Oriented Work Environment or (ROWE). Very simply a ROWE allows employees to set their own schedules to produce required results. Providing this type of flexible option to non-exempt employees may put the employer at risk of overtime obligations under the FLSA and also raises unfair labor practice concerns under the National Labor Relations Act.

The statute also prohibits private sector employers from offering non-exempt employees time off in lieu of compensation, even though all public sector employees are offered this type of flexibility. We have non-exempt employees who request make-up time when they miss work to deal with illness, family matters, or personal matters. Newer employees and employees who have used up their sick and/or vacation benefits cannot receive pay for missed time. However, if they cannot make-up their missed time reasonably within the same work week, we are unable to meet their requested need. If we allow employees to make-up their time into their following week, we will incur overtime pay as the time they work in that second week would be in addition to their normal 40-hour work. As a non-profit organization, we have to control our expenses in order to maximize value derived from donated goods to pay for programs and growth.

I have also faced a challenge under the FLSA with individuals classified as non-exempt inside sales employees in our call center. Formerly, these employees were classified as outside sales employees who were exempt from the FLSA's overtime requirements and frequently were on the road making sales calls to customers. Because of the advances in technology, these employees are hardly ever required to visit a customer in person and do most of their sales work through e-mail, web-based demonstrations, the phone and other electronic mediums.

At INVESTools Inc., an investor education products and services company, these employees' compensation is based on an hourly rate of pay and a commission that is designed to give them an incentive for closing sales of sophisticated products and services ranging from $5,000 to $30,000 in price. These employees often want to work long hours to earn these commissions, some bringing home over $100,000 per year. However, we were required to pay overtime based on the weighted average of their hourly pay and commissions, which would significantly increase their hourly rate, making their overtime pay fiscally unaffordable to my organization. As a result, we have had to limit their working time or pay overtime. That curtailed their motivation, increased expenses and decreased profitability, and limited our ability to remain successful.

These are a few examples of how the Fair Labor Standards Act fails to recognize the changing characteristics of the workforce.

A 21st Century Workplace Flexibility Policy

As noted above, a growing number of employers recognize the benefits of workplace flexibility and are implementing effective and flexible workplace practices as a key business strategy. At the same time, complex, and sometimes overlapping federal, state and local laws do little to support employer creativity and innovation in responding to the flexibility needs of the 21st century workforce. That is why SHRM has advocated a comprehensive workplace flexibility policy that, for the first time, responds to the diverse needs of employees and employers and reflects different work environments, union representation, industries and organizational size.

SHRM released a set of "Principles for a 21st Century Workplace Flexibility Policy" in 2009 to help guide policymakers in the development of public policy that meets the needs of *both* employees and employers. I have included a copy of these principles at the end of my written statement (Appendix A).

Workplace Flexibility Educational Efforts

In addition to advocating for a new approach to workplace flexibility public policy, SHRM has also engaged in a significant effort to educate HR professionals and their organizations about the importance of effective and flexible workplaces. On February 1, 2011, SHRM formed a multi-year partnership with the Families and Work Institute (FWI), the preeminent work-family think-tank known for rigorous research on workplace flexibility issues.

The primary goal of this partnership is to transform the way employers view and adopt workplace flexibility by combining the research and expertise of a widely respected organization specializing in workplace effectiveness with the influence and reach of the world's largest association devoted to human resource management. By highlighting strategies that enable people to do their best work, the partnership promotes practical, research-based knowledge that helps employers create effective and flexible workplaces that fit the 21st century workforce and ensures a new competitive advantage for organizations.

Although FWI is an independent non-advocacy organization that does not take positions on these matters, and the position of SHRM should not be considered reflective of any position or opinion of FWI, I'd like to briefly mention one of the key elements of the SHRM/FWI partnership, the *When Work Works* program, because it seeks to educate and showcase employers who are meeting the needs of our 21st century workforce. *When Work Works* is a nationwide initiative to bring research on workplace effectiveness and flexibility into community and business practice. Since its inception in 2005, *When Work Works* has partnered with an ever-expanding cohort of communities from around the country to:

1. Share rigorous research and employer best practices on workplace effectiveness and flexibility.
2. Recognize exemplary employers through the Alfred P. Sloan Awards for Business Excellence in Workplace Flexibility,

3. Inspire positive change so that increasing numbers of employers understand how flexibility can benefit both business and employees, and use it as a tool to create more effective workplaces.

As a proud resident of Arizona, I am particularly pleased that *When Work Works* is a statewide initiative in my state under the direction of the Chandler Chamber of Commerce. In fact, 40 Arizona employers are highlighted in the SHRM/FWI publication, "2011 Guide to Bold New Ideas." as recipients of the coveted Sloan Award.

Mr. Chairman, I would also note that *When Work Works* is a statewide initiative in Michigan, where the Michigan Council of the Society for Human Resource Management and the Detroit Regional Chamber serve as our community partners. In fact, Sloan Award winner Motawi Tileworks, Inc. (www.motawi.com) is located in Michigan's 7th Congressional District. The 22 employees that are hand-crafting tiles from this Ann Arbor shop have great freedom in determining their schedules. No one cares when they start, stop or schedule their breaks, and overtime is forbidden. This is just one example of innovative workplace strategies we are uncovering through the *When Work Works* initiative.

Conclusion

The Fair Labor Standards Act is a cornerstone among America's workplace statutes. SHRM educates its membership and their organizations about all wage and hour issues under the FLSA. But the FLSA was crafted in a bygone era, and it should be re-evaluated to ensure it still encourages employers to hire, grow, and better meet the needs of their employees.

We believe the FLSA hinders employer's ability to provide the flexibility that millions of non-exempt employees want. SHRM and its members, who are located in every congressional district in the nation, are committed to working with this subcommittee and other members of Congress to modernize the outmoded FLSA in a manner that balances the needs of both employees and employers and does not produce unnecessary and counterproductive requirements.

Now more than ever, there is a compelling need for workplace flexibility that benefits both employers and employees. Going forward, SHRM will continue to highlight workplace flexibility as a key business imperative, conduct and share research with HR professionals on how effective and flexible workplaces can benefit the bottom-line, and provide information and resources that will help employers successfully implement workplace strategies that enable employees to manage their work-life fit.

Thank you. I welcome your questions.

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Appendix A.

Principles for a 21st Century Workplace Flexibility Policy

The Society for Human Resource Management (SHRM) believes the United States must have a 21st century workplace flexibility policy that meets the needs of *both* employees and employers. It should enable employees to balance their work and personal needs while providing predictability and stability to employers. Most importantly, any policy must encourage – not discourage – the creation of quality new jobs.

Rather than a one-size-fits-all government approach, where federal and state laws often conflict and compliance is determined under regulatory silos, SHRM advocates a comprehensive workplace flexibility policy that, for the first time, responds to the diverse needs of employees and employers and reflects different work environments, union representation, industries and organizational size.

For a 21st century workplace flexibility policy to be effective, SHRM believes that all employers should be encouraged to provide paid leave for illness, vacation, and personal days to accommodate the needs of employees and their family members. In return, employers who choose to provide paid leave would be considered to have satisfied federal, state and local leave requirements. In addition, the policy must meet the following principles:

Shared Needs – Workplace flexibility policies must meet the needs of both employees and employers. Rather than an inflexible government-imposed mandate, policies governing employee leave should be designed to encourage employers to offer a paid leave program (i.e., illness, vacation, personal days or a "paid time off" bank) that meets baseline standards to qualify for a statutorily defined "safe harbor." For example, SHRM envisions a "safe harbor" standard where employers voluntarily provide a specified number of paid leave days for employees to use for any purpose, consistent with the employer's policies or collective bargaining agreements. In exchange for providing paid leave, employers would satisfy current and future federal, state and local leave requirements. A federal policy should:

- Provide certainty, predictability and accountability for employees and employers.
- Encourage employers to offer paid leave under a uniform and coordinated set of rules that would replace and simplify the confusing – and often conflicting – existing patchwork of regulations.
- Create administrative and compliance incentives for employers who offer paid leave by offering them a safe harbor standard that would facilitate compliance and save on administrative costs.

- Allow for different work environments, union representation, industries and organizational size.
- Permit employers that voluntarily meet safe harbor leave standards to satisfy federal, state and local leave requirements.

Employee Leave – Employers should be encouraged to voluntarily provide paid leave to help employees meet work and personal life obligations through the safe harbor leave standard. A federal policy should:

- Encourage employers to offer employees with some level of paid leave that meets minimum eligibility requirements as allowed under the employer's safe harbor plan.
- Allow the employee to use the leave for illness, vacation, personal and family needs.
- Require employers to create a plan document, made available to all eligible employees, that fulfills the requirements of the safe harbor.
- Require the employer to attest to the U.S. Department of Labor that the plan meets the safe harbor requirements.

Flexibility – A federal workplace leave policy should encourage maximum flexibility for both employees and employers. A federal policy should:

- Permit the leave requirement to be satisfied by following the policies and parameters of an employer plan or collective bargaining agreement, where applicable, consistent with the safe harbor provisions.
- Provide employers with predictability and stability in workforce operations.
- Provide employees with the predictability and stability necessary to meet personal needs.

Scalability – A federal workplace leave policy must avoid a mandated one-size-fits-all approach and instead recognize that paid leave offerings should accommodate the increasing diversity in workforce needs and environments. A federal policy should:

- Allow leave benefits to be scaled to the number of employees at an organization; the organization's type of operations; talent and staffing availability; market and competitive forces; and collective bargaining arrangements.
- Provide pro-rated leave benefits to full- and part-time employees as applicable under the employer plan, which is tailored to the specific workforce needs and consistent with the safe harbor.

Flexible Work Options – Employees and employers can benefit from a public policy that meets the diverse needs of the workplace in supporting and encouraging flexible work options such as telecommuting, flexible work arrangements, job sharing, and compressed or reduced schedules. Federal statutes that impede these offerings should be updated to provide employers and employees with maximum flexibility to balance work and personal needs. A federal policy should:

- Amend federal law to allow employees to balance work and family needs through flexible work options such as telecommuting, flextime, part-time, job sharing and compressed or reduced schedules.

- Permit employees to choose either earning compensatory time off for work hours beyond the established workweek, or overtime wages.
- Clarify federal law to strengthen existing leave statutes to ensure they work for both employees and employers.