

## The Federal Employees Flexible and Compressed Work Schedules Act (FEFCWA) Spring 2006

Federal law establishes scheduling requirements for government employees, generally requiring federal agencies to set regular work hours over a traditional Monday through Friday workweek. These requirements, along with provisions of the Fair Labor Standards Act (FLSA), impede flexible work arrangements (FWAs) for federal employees.<sup>1</sup> The Federal Employees Flexible and Compressed Work Schedules Act ("FEFCWA") removes these legal barriers for two specific types of alternative work schedules (AWS): flexible work schedules (FWS) and compressed work schedules (CWS). Under an FWS, an agency establishes core hours when all employees must be at work and allows employees to choose arrival and departure times around those core hours. Under a CWS, an employee's bi-weekly, 80-hour work requirement is scheduled by the agency for less than 10 days (e.g., eight 10-hour workdays rather than ten 8-hour workdays).

The FEFCWA authorizes—but does not require—these AWS programs. Permanently authorized in 1985, the FEFCWA grants agencies broad discretion to establish AWS programs, but limits this discretion in union settings by requiring agencies to negotiate AWS programs with the employees' exclusive representative. Once a program is established, an employee must meet program eligibility criteria and receive supervisory approval for participation in an AWS, all of which may be subject to the terms of an applicable collective bargaining agreement.

Because the law does not mandate AWS programs or guarantee employee participation in established programs, implementation and usage of AWS programs depends upon management support and leadership. President Clinton's requirement that agencies establish programs to encourage flexible work arrangements increased agency implementation of AWS programs, but employee usage of AWS programs remains inconsistent across and within the federal agencies. Despite this, federal employers and employees consistently judge AWS programs a success, reporting improved employee morale and agency efficiency and supporting the continuation and expansion of AWS programs.

Section I of this memo reviews enactment of the FEFCWA over an eleven-year period that included two three-year experimental phases. Section II sets out the legal requirements of the law, and Section III reviews available information regarding agency implementation and employee usage of AWS since permanent authorization of the law in 1985.

### I. Enactment of the FEFCWA

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The push for AWS for federal employees was spurred by private sector success stories showing that flexible work practices increase employee productivity and morale, and reduce commuting costs.<sup>2</sup> After studying scheduling practices of private sector and federal employers, the General Accounting Office (GAO) concluded that, while alternate work schedules might benefit the government and its employees, existing law prevented federal

agencies from establishing AWS.<sup>3</sup> Specifically, chapter 61 of title 5 (and, to a lesser extent, the FLSA), prevented the following types of AWS:

- 4/40 schedules because employees may not work over 8 hours in any 1 day without receiving overtime pay,
- flexitime schedules which allow employees to work varying times and/or numbers of hours each day, and
- 4/40 schedules which use compensatory time for overtime worked on a recurring and regular basis<sup>4</sup>

The GAO recommended legislation to amend existing law and, after reviewing the GAO report, the Civil Service Commission agreed to "seek the necessary legislation to amend certain provisions of title 5 of the U.S. Code and the Fair Labor Standards Act to permit controlled experimentation with both compressed and flexible work schedules."<sup>5</sup>

### A. Congress Enacts the FEFCWA of 1978 to Evaluate AWS

Four years later, and following several hearings and a variety of legislative proposals, Congress passed the Federal Employees Flexible and Compressed Work Schedules Act of 1978.<sup>6</sup> The FEFCWA of 1978 allowed federal agencies to implement AWS "experiments" for three years,<sup>7</sup> and required the Civil Service Commission to report back to Congress and make legislative and administrative recommendations before the act expired in 1982.<sup>8</sup> The law did not require agencies to conduct experimental programs or prescribe the form that any such experiments would take.<sup>9</sup>

Midway through the experimental period, the GAO submitted a report to Congress warning that the lack of uniformity in AWS programs, lack of meaningful agency self-evaluation, and insufficient monitoring by the Office of Personnel Management (OPM; successor of the Civil Service Commission) would make assessment impossible.<sup>10</sup> The OPM disagreed, insisting that the experiment would "provide meaningful decision-making information."<sup>11</sup> In its subsequent report, OPM judged the experiment a success, concluding "that all of the alternative work schedule types used in the experiment were successful in most situations from the perspective of both the experimenting organizations and individuals."<sup>12</sup> With specific regard to employee and employer satisfaction, OPM reported:<sup>13</sup>

- On the employee survey more than 90 percent of employees and more than 85 percent of supervisors were satisfied with and wish to retain their AWS schedule.
- When asked to rate the success of experiment and future AWS plans, more than 79 percent of experimenting organizations judged it a success and 83 percent plan to continue until the expiration of authority.

After also concluding that "careful and complete management assessment is required prior to implementing an AWS program and periodically during its operation," OPM recommended that Congress enact permanent legislation that would include "appropriate control and oversight."<sup>14</sup>

### B. Congress Enacts the FEFCWA of 1982 to Continue AWS Evaluation

Disagreement regarding the extent of agency control and oversight of AWS programs prevented permanent authorization of the FEFCWA of 1978 at the end of its initial 3-year experimental phase, and Congress agreed to a 4-month extension of the law<sup>15</sup> while it further debated the future of the law.

In that debate, OPM Director Donald Devine, who had been recently appointed by newly-elected President Ronald Reagan, sought "broad authority to regulate and oversee the use of [AWS]" and recommended OPM pre-approval of all compressed work schedules.<sup>16</sup> The Reagan administration also argued for unilateral agency authority to establish or terminate AWS programs. Democrats, with strong support from the unions, maintained the need for agencies to negotiate with employee representatives in establishing or terminating AWS programs.<sup>17</sup>

While these disputes and a desire for further evaluation of AWS programs prevented permanent authorization of the 1978 law, Congress agreed to amend the law and allow another three-year experiment.<sup>18</sup> The Federal Employees Flexible and Compressed Work Schedules Act of 1982 allowed agencies to review and terminate existing experimental AWS programs.<sup>19</sup> A decision to terminate an existing program was not negotiable or reviewable but, where existing programs were terminated, an agency or union could bargain over establishment of a new AWS program. For continued or newly established AWS programs, the FEFCWA of 1982 provided agencies with greater authority to terminate AWS programs that had an "adverse agency impact" while still requiring negotiation with employee representatives.<sup>20</sup> Any impasse between agencies and unions regarding establishment or termination of an AWS program based on "adverse agency impact" would be referred to the Federal Service Impasses Panel for resolution.

### C. Congress Permanently Authorizes AWS in 1985

When the law came up for consideration again at the end of its second 3-year experimental phase, the GAO reported widespread support for AWS programs. With regard to surveyed employees, the GAO presented the following major findings:<sup>21</sup>

- 74 percent of the employees indicated that they support the continuation of the program
- 72 percent of the employees using alternative work schedules felt that the schedules gave them greater flexibility to meet family obligations (doctor's appointments, meetings, etc.)
- 74 percent of the employees on an alternative work schedule believe the program has had a favorable or very favorable effect on their morale
- 89 percent of the employees on an alternative work schedule who have a need for dependent care were satisfied or very satisfied with their work schedules, while 62 percent of the employees on a fixed schedule were satisfied or very satisfied.

From agency interviews, the GAO reported:<sup>22</sup>

Personnel and labor relations official at the 11 agencies we visited said that generally they have had positive experiences with alternative work schedules. They said that, overall, there have been

improvements in service to the public, employee morale, efficiency of agency operations, and employment opportunities. Most agency officials said that alternative work schedules had no effect on mass transit facilities, traffic congestion, or energy consumption. All agency officials said employees were able to devote more time to their families and personal interests as a result of alternative work schedules.

Although temporarily extended while permanent authorization was delayed by peripheral controversies,<sup>23</sup> FEFCWA was permanently authorized in December 1985 without any substantive changes to the provisions enacted in 1982.<sup>24</sup>

## **II. Legal Requirements of the FEFCWA of 1985**

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The FEFCWA creates an exception to title 5 and the FLSA for flexible and compressed work schedules, which are the only types of alternative work schedules authorized by the law. While granting discretion to agencies to establish these AWS programs, this discretion is subject to a duty to bargain where employees are represented by a union<sup>25</sup> and agencies also must follow the requirements for FWS and CWS set forth in the law. These requirements, as described below, limit the types of schedules that agencies and their employees may create.

### **A. Flexible Work Schedules**

The FWS provisions of FEFCWA allow agencies to provide employees with certain types of flexibility in scheduling work hours. An agency may, for example, allow employees to vary starting/quitting times each day but still require each employee to work 8 hours each day. An agency also may allow employees to vary the number of hours worked each day. While the FEFCWA allows this sort of variance within FWS programs, the law establishes the parameters within which the agencies and their employees may operate, as described below.

#### **1. THE FEFCWA MODELS FOR FLEXIBLE WORK SCHEDULES**

The FEFCWA provides the following exception to Title 5 for flexible work schedules, which it defines to include designated core and flexible hours:

[5 U.S.C. § 6122. Flexible schedules; agencies authorized to use]

- (a) Notwithstanding section 6101 of this title, each agency may establish, in accordance with this subchapter, programs which allow the use of flexible schedules which include –
  - (1) designated hours and days during which an employee on such a schedule must be present for work; and
  - (2) designated hours during which an employee on such a schedule may elect the time of such employee's arrival at and departure from work, solely for such purpose or, if and to the extent permitted, for the purpose of accumulating credit hours to reduce the length of the workweek or another workday.

An election by an employee referred to in paragraph (2) shall be subject to limitations generally prescribed to ensure that the duties and requirements of the employee's position are fulfilled.

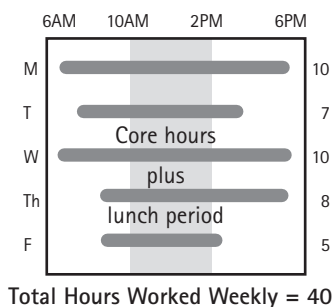
Within an FWS, an agency sets the hours that an employee must be at work (core hours) and also sets those hours during which employees can elect arrival and departure times (flexible hours).<sup>26</sup> Employee election of arrival and departure times during flexible hours "shall be subject to limitations generally prescribed to ensure that the duties and requirements of the employee's position are fulfilled."<sup>27</sup> These prescribed limitations may include supervisory pre-approval of an employee's AWS, including chosen start/end times.<sup>28</sup> Following these basic rules, an agency could create an FWS program that allows employees to elect different starting/quitting times each day but requires employees to work 8 hours each day.

Under the FEFCWA agencies also may allow employees to vary the length of any given workday by approving employee use of "credit hours."<sup>29</sup> Employees are compensated for credit hours at their regular, non-overtime rate of pay.<sup>30</sup> Where an agency approves the use of credit hours, employees may work more than 8 hours on one day in order to accumulate extra ("credit") hours and reduce the number of hours worked on another day during that same week.<sup>31</sup>

The employee also may carry accumulated credit hours over into the next pay period in order to vary the length of the workweek, within limits prescribed by the act or by the agency.<sup>32</sup> The FEFCWA limits full-time employees to accumulating no more than 24 credit hours and restricts part-time employees to no more than one-fourth of their basic work requirement.<sup>33</sup> Like the election of daily start/end times, an employee's election of credit hours may be subject to supervisory approval.<sup>34</sup>

As the agency charged with responsibility for prescribing regulatory and other guidance to agencies regarding AWS,<sup>35</sup> OPM has identified five kinds of permissible FWS under the FEFCWA: flexitour, gliding, maxiflex, variable day, and variable week schedules.<sup>36</sup> Within each of these FWS models, employees and supervisors set the individual's schedule. For example, under a variable day schedule, the agency sets core hours during which all employees must be present.<sup>37</sup> Employees and supervisors can otherwise agree to vary starting/quitting times or the number of hours worked on any given workday. In the model below, for example, the employee starts/ends work at different times each day, working more than 8 hours on Mondays and Wednesdays in order to earn credit hours and shorten the workday on Tuesdays and Fridays. Another employee might work a different schedule under the exact same FWS program, choosing instead to work longer hours Monday and Tuesday, working even fewer hours on Friday, and selecting different starting/quitting times.

### VARIABLE DAY SCHEDULE<sup>38</sup>



Because employee election of flexible hours and credit hours remains subject to any "limitation generally prescribed to ensure that the duties and requirements of the employee's position are fulfilled,"<sup>39</sup> employee participation in any available FWS program and his/her flexibility under that program ultimately is determined by the particular agency's policy. Agency policy may, for example, limit program eligibility (e.g., restricting FWS program eligibility to certain classes of employees and/or only to high-performing employees), and otherwise set conditions for ongoing participation in or possible termination of an FWS. As described below, the FEFCWA also provides certain specific requirements for establishing, altering, or terminating FWS programs.

## 2. REQUIREMENTS FOR ESTABLISHING, ALTERING, OR TERMINATING FLEXIBLE WORK SCHEDULES.

Although the FEFCWA generally grants agencies broad discretion to establish AWS programs, the law prevents agencies from establishing AWS programs that have an "adverse agency impact."<sup>40</sup> For non-unionized employees, an agency head's decision that a flexible work schedule will have an adverse impact is not reviewable. In the union setting, however, the union can challenge the agency's determination, with any impasse over this decision going to the Federal Service Impasses Panel ("Panel").<sup>41</sup> This provision, combined with other provisions making union employees' participation in any AWS program contingent on the terms of a collective bargaining agreement,<sup>42</sup> requires agencies to negotiate with the exclusive representative of unionized employees regarding the establishment and details of any AWS program.<sup>43</sup> OPM guidance suggests that negotiated agreements cover particular problem areas, including the need for supervisory approval or advance notice of starting/ending times within a flexible work schedule, lunch times, and required compensatory time off for certain employees.<sup>44</sup>

Where employees are not represented, an agency is free to establish an FWS program and require employee participation in that program. However, because an employee in an FWS program may select arrival and departure times that mirror a traditional work schedule (e.g., choosing to start work at 9:00 a.m. and end at 5:00 p.m.), mandatory participation in an FWS is unlikely to create scheduling problems for employees.

With regard to alteration of an existing AWS, an agency may adjust employees' schedules (e.g., changing starting/quitting times or removing them from an existing schedule) only as provided in a governing collective bargaining agreement or otherwise permitted by the FEFCWA.<sup>45</sup> For employees on FWS (union and non-union), the law ensures agency's the right to make certain adjustments under the following conditions:

[5 U.S.C. § 6122. Flexible schedules; agencies authorized to use]

- (b) Notwithstanding any other provision of this subchapter, but subject to the terms of any [collective bargaining agreement], if the head of an agency determines that any organization within the agency which is participating in a program under subsection (a) is being substantially disrupted in carrying out its functions or is incurring additional costs because of such participation, such agency head may—
  - (1) restrict the employees' choice of arrival and departure time,
  - (2) restrict the use of credit hours, or
  - (3) exclude from such program any employee or group of employees.

The terms "substantially disrupts" and "additional costs" are not defined, and the FEFCWA provides no right for review of an agency head's decision to alter or terminate an FWS under § 6122(b). Because this decision is subject to the terms of any governing collective bargaining agreement, however, the right to alter an existing FWS may be limited in the union setting.<sup>46</sup> Recognizing the potential for disagreement in that setting (and the corresponding right of employees to grieve agency decisions), OPM suggests that agencies and unions set criteria for determining substantial disruption or cost but has otherwise provided no guidance on the meaning of these terms.<sup>47</sup>

In addition to this provision ensuring that agency's retain the right to alter existing FWS that cause substantial disruption or additional cost, the FEFCWA allows agency heads authority to terminate any FWS that has an "adverse agency impact." An "adverse agency impact" is defined as:

- (1) a reduction of the productivity of the agency;
- (2) a diminished level of services furnished to the public by the agency; or (3) an increase in the cost of agency operations (other than a reasonable administrative cost relating to the process of establishing a flexible or compressed schedule).<sup>48</sup>

Like the decision not to establish an FWS program, the decision to terminate an FWS based on adverse agency impact must be negotiated with the representative of unionized employees.<sup>49</sup> If the parties reach impasse over termination of an existing AWS, the dispute is presented to the Federal Impasses Panel. The AWS cannot be terminated while the dispute is pending and the Panel "shall promptly consider any case ... and shall rule on such impasse not later than 60 days after the date the Panel is presented the impasse."<sup>50</sup> The Panel must rule in favor of the agency if the decision to terminate an AWS "is supported by evidence that the schedule has created an adverse agency impact."<sup>51</sup> The agency bears the burden of proof, and unsubstantiated assertions of adverse impact are insufficient.<sup>52</sup> The Panel has rejected agency determinations of adverse impact where the agency has successfully implemented a similar AWS, or where the work schedule is similar to one used successfully in a similar agency.<sup>53</sup>

## **B. Compressed Work Schedules**

The CWS provisions of FEFCWA allow agencies to compress a regularly scheduled 80-hour biweekly work requirement into fewer than 10 workdays. While some variety in the types of compressed schedules is possible (e.g., 4-day workweek or 3-day workweek), these schedules are fixed by the agency, providing little additional flexibility for employees. And, while the FEFCWA provisions requiring agencies to negotiate with the exclusive representative of unionized employees apply to FWS and CWS, other requirements regarding administration of AWS programs differ.

### 1. THE FEFCWA MODELS FOR COMPRESSED WORK SCHEDULES

The FEFCWA provides the following exception to the scheduling requirements contained in Title 5 for compressed work schedules, which it defines to include 4-day and similar shortened workweeks:

[5 U.S.C. § 6127. Compressed schedules; agencies authorized to use]

- (a) Notwithstanding section 6101 of this title, each agency may establish programs which use a 4-day workweek or other compressed schedule.

The law defines a "compressed work schedule" as:

[5 U.S.C. § 6121. Definitions]

(5) "compressed schedule" means --

- (A) in the case of a full-time employee, an 80-hour biweekly basic work requirement which is scheduled for less than 10 workdays, and
- (B) in the case of a part-time employee, a biweekly basic work requirement of less than 80 hours which is scheduled for less than 10 workdays."

Unlike an FWS, under which employees may vary total work hours or starting/ending times in a workday or workweek, CWS generally consist of regularly scheduled workdays of greater than 8 hours. By scheduling employees for more than 8 hours each day, agencies allow employees to complete their basic 80-hour biweekly work requirement in less than 10 workdays. While nothing in the FEFCWA itself seems to preclude additional employee flexibility within established CWS, OPM has taken the position that "although agencies may change or stagger the arrival and departure times of employees, there are no provisions for employee flexibility in reporting or quitting times under a CWS program."<sup>54</sup> OPM has made it similarly clear that employees on CWS cannot accumulate credit hours in order to vary the length of workdays in their CWS. "There is no legal authority for credit hours under a CWS program. The law provides for credit hours only for flexible work schedules."<sup>55</sup> While these interpretations are currently contained in OPM's informal guidance,<sup>56</sup> OPM has proposed regulations that contain these same limitations on flexibility with regard to starting/ending times and hybrid schedules.<sup>57</sup>

As it does for FWS, the FEFCWA sets out the requirements for overtime work (hours worked in excess of the established CWS) and holiday pay.<sup>58</sup> While employees on FWS receive compensation or credit for 8 hours on a holiday, employees on CWS are compensated or credited for the number of hours that the employee regularly works on that day.<sup>59</sup>

OPM has identified three types of compressed work schedules: four-day workweeks (four 10-hour days each week), three-day workweeks (three 13-hour and twenty minute days each week), or 5/4-9 compressed plans (eight 9-hour and one 8-hour day in a biweekly pay period).<sup>60</sup>



## 2. REQUIREMENTS FOR ESTABLISHING, ALTERING, OR TERMINATING COMPRESSED WORK SCHEDULES.

The FEFCWA provisions requiring agencies to negotiate with the exclusive representative of unionized employees regarding the establishment, termination, and terms of any AWS program apply with equal force to CWS.<sup>61</sup> Thus, as with FWS, agencies have the right not to establish or to terminate a CWS that has an "adverse agency impact, but unions still may challenge an agency's decision not to establish or to terminate a CWS on that ground."<sup>62</sup> Employees in a union cannot be included in a CWS except as provided for in the governing collective bargaining agreement, and any agency seeking to establish a CWS in a unionized setting must negotiate with the employees' exclusive representative in order to do so.<sup>63</sup>

As with negotiated agreements for FWS programs, a collectively bargained agreement between an agency and union establishing a CWS may include substantive and procedural requirements for the CWS program (including, e.g., criteria for employee participation and grounds for agency alteration of the program). In the CWS context, however, agencies have an additional burden to bargain for the right to alter existing CWS schedules because § 6122(b) of the FEFCWA, which ensures an agency's right to alter an existing FWS based on substantial disruption or additional cost,<sup>64</sup> does not apply to CWS. Therefore, to the extent an agency wants the right to alter existing CWS based disruption or cost, it must bargain for this right along with any additional grounds that might warrant changes to existing CWS.

In the non-union setting, agencies are free to establish (or refuse to establish) a CWS program without negotiation, as is the case with FWS programs. However, non-unionized employees have an additional safeguard in the CWS context that they do not have for FWS programs, where an agency may require non-unionized employees to participate in established FWS. In the CWS context, agencies cannot require non-unionized employees to participate in an established CWS unless a majority of the employees in the relevant work unit have voted to be included in the CWS.<sup>65</sup> And even where the majority vote for the CWS, an individual employee still may be excused from participation in the CWS or reassigned to a different position if the agency determines that mandatory participation in the CWS would cause personal hardship for the employee.<sup>66</sup>

### III. Agency Implementation and Employee Usage of AWS

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Because AWS programs are not mandated by law, implementation and employee usage depends on management support and leadership. Increased attention during President Clinton's administration to the need for greater flexibility in federal work schedules led to greater agency implementation of AWS but actual employee usage of AWS remains difficult to assess.

#### A. Government Norm-Setting Mandates and Increased Agency Implementation of AWS Programs.

Shortly before the beginning of the Clinton administration, a 1992 GAO survey of federal employees' attitudes towards their workplace found employees' desire for increased workplace flexibility to be "especially noteworthy,"<sup>67</sup> observing that approximately 57% of federal employees were not participating in AWS, and that of those, over three-quarters were not allowed by their agencies to participate, either because the agency did not

offer AWS at all, or did not offer AWS to them.<sup>68</sup> The report recommended that "greater attention to helping employees balance their work and family responsibilities can make the government a much more attractive employer."<sup>69</sup>

During the first hundred days of his presidency, Bill Clinton established the National Performance Review (NPR), an initiative chaired by Vice President Al Gore with the goal of "mak[ing] the entire Federal Government both less expensive and more efficient, and [changing] the culture of our national bureaucracy away from complacency and entitlement toward initiative and empowerment."<sup>70</sup> The NPR delivered its first report to the President in September 1993, relating various success stories and best practices from both the public and private sectors, and identifying concrete recommendations to "make government work better and cost less."<sup>71</sup> One of those recommendations was increased usage of AWS. Finding that "our ability to recruit and retain the best employees—and motivate them to be productive—depends on our ability to create a satisfying work environment," the report found that "[m]any agencies do not fully advocate or implement flexible workplace policies," and recommended that President Clinton "issue a directive requiring that all agencies adopt [AWS]...."<sup>72</sup>

A second GAO report in 1994 joined the NPR's recommendation,<sup>73</sup> finding that although 57 of 59 organizations surveyed had AWS programs of some sort, those programs tended to be limited in availability and actual flexibility.<sup>74</sup> Many offered only minimal deviation from traditional work schedules, and the AWS programs that were offered were not offered to all employees organization-wide.<sup>75</sup> The GAO report attributed the discrepancy to differential treatment of unionized and non-unionized workers,<sup>76</sup> differences in management styles of supervisors and leaders, and varying levels of organization commitment to the AWS program.<sup>77</sup> The report predicted that "[i]f an executive order causes agencies to liberalize their AWS programs, employee use of AWS should increase."<sup>78</sup>

President Clinton followed the recommendation of the NPR and GAO, and issued two presidential memoranda, on July 11, 1994, and June 21, 1996, directing executive agencies to pursue "family-friendly work arrangements," including AWS.<sup>79</sup> The 1996 memo mandated that agencies report their progress in implementing AWS and NPR's status report to the President the following year indicated that majorities of employees at the Departments of Defense, Energy, and Labor, and at the Environmental Protection Agency were participating in AWS.<sup>80</sup> A later review by the OPM in 2000 indicated that by the end of the Clinton administration, over 94% of agency locations were offering some form of AWS,<sup>81</sup> and AWS were available to approximately two-thirds of employees.<sup>82</sup>

## B. Employee Usage of AWS

While GAO and OPM reports indicate growth in the implementation of AWS across the executive branch, actual employee usage remains difficult to assess and these reports have consistently identified ongoing barriers to effective implementation and utilization of AWS programs. The primary barriers include: lack of support from management, from top leadership to individual supervisors;<sup>83</sup> inconsistent implementation that varies from department to department (or from individual supervisor to supervisor);<sup>84</sup> restricted availability to certain classes of employees;<sup>85</sup> and lack of effective communication between supervisors and employees about availability of AWS and/or scheduling of flexible hours.<sup>86</sup> As a result, and because the law does not require estab-

ishment of AWS programs or guarantee employees access to established programs, availability and utilization of AWS programs remains inconsistent across and within the federal agencies.

Despite difficulties with implementation and utilization, agencies and employees both view AWS programs as an extremely effective form of workplace flexibility and agree that the benefits of these programs—including increased employee morale and productivity—greatly outweigh the challenges.<sup>87</sup> Those benefits, often cited by both employers and employees, include:

- Increased agency competitiveness in recruitment and retention of quality employees;<sup>88</sup>
- Improved employee morale;<sup>89</sup>
- Greater ability for employees to balance work and personal/family needs;<sup>90</sup> and
- Reduced unscheduled absences.<sup>91</sup>

Reports also indicate that AWS programs have become one of the most effective ways for agencies to recruit, motivate, and retain staff,<sup>92</sup> and although universal availability remains elusive, AWS are the most frequently implemented workplace flexibility programs in the federal government among those not mandated by law.<sup>93</sup> Because of these benefits, and in an ongoing effort to change current workplace scheduling norms, the GAO and OPM continue to strongly encourage agency use of AWS. For example, in a 2001 report analyzing detrimentally high staff turnover rates at the Securities and Exchange Commission, the GAO identified the agency's recalcitrance in implementing AWS as a factor in staff dissatisfaction.<sup>94</sup> OPM has recently announced a new government-wide initiative to promote AWS and other workplace flexibility practices to recruit and retain talent.<sup>95</sup> As with previous norm-setting initiatives, these efforts target management leadership and support for AWS, with the hope that employee usage of AWS will increase across and within federal agencies.

### ENDNOTES

<sup>1</sup> See 5 U.S.C. § 6101 (Title 5, hours of work); 29 U.S.C. § 207 (FLSA, maximum hours).

<sup>2</sup> See General Accounting Office, Legal Limitations on Flexible and Compressed Work Schedules for Federal Employees, at 8-9 (1974) [hereinafter "Legal Limitations"], *reprinted in Examination of Alternative Working Hours and Arrangements: Hearing Before the Subcomm. on Employment, Poverty, and Migratory Labor of the S. Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 60 (1976).

<sup>3</sup> GAO, Legal Limitations, *supra* note 2, at 1, 8-11, 12.

<sup>4</sup> GAO, Legal Limitations, *supra* note 2, at 13. Obstacles to certain flexible schedules created by the FLSA impede private employers as well as federal agencies.

<sup>5</sup> GAO, Legal Limitations, *supra* note 2, at Appendix I.

<sup>6</sup> Pub. L. 95-390, 92 Stat. 755 (1978).

<sup>7</sup> *Id.* § 2 (authorizing "carefully designed, controlled, and evaluated experimentation by Federal agencies"). See also §§ 102(c), 202(d) (three-year sunset provision).

<sup>8</sup> *Id.* § 304.

<sup>9</sup> See, e.g., *id.* § 202(a). Earlier proposals required agencies to conduct experimental AWS programs. Mandatory agency participation proved too controversial and an amendment negotiated by Representative Edward Derwinski (R-IL) and Representative Stephen Solarz (D-NY) made agency participation voluntary. Compare H.R. Rep. No. 95-912 (1978) (section 4 of the bill as reported out of committee) with 124 Cong. Rec. 15434 (1978) (amendment offered by Rep. Solarz and passed by floor vote).

<sup>10</sup> General Accounting Office, The Alternative Work Schedules Experiment: Congressional Oversight Needed to Avoid Likely Failure, at 18-19 (FPCD-81-2, 1980) [hereinafter "Congressional Oversight Needed"].

<sup>11</sup> Letter of Gary R. Nelson, Assoc. Dir. for Compensation, Office of Personnel Management, Commenting on GAO Report (Aug. 25, 1980), in GAO, Congressional Oversight Needed, *supra* note 10, at 62.

<sup>12</sup> Office of Personnel Management, Alternative Work Schedules Experimental Program: Interim Report to the President and the Congress, at 2 (PP 60-19, 1981).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Pub. L. 97-160, 96 Stat. 21 (1982).

<sup>16</sup> Letter of Donald J. Devine, Director, Office of Personnel Management, Accompanying Legislative Recommendations (Feb. 9, 1982), in *Hearing on H.R. 5366 to Amend Title 5, United States Code, to Provide Permanent Authorization for Federal Agencies to Use Flexible and Compressed Employee Work Schedules, Before the Subcomm. on Civil Serv., Post Office, and Gen. Servs. of the S. Comm. on Governmental Affairs*, 97th Cong. 75 (1982). OPM also recommended more specific limitations on usage of AWS, greater management control over the decision to implement or terminate AWS (especially in the context of collective bargaining agreements), and a requirement that AWS be used "only when they would improve productivity or provide greater service to the public and would not add to the cost of agency operations." *Id.* See also *id.* at 84 (section analysis of OPM's proposed legislation, amending organized labor negotiation provisions to grant greater autonomy to management).

<sup>17</sup> 128 Cong. Rec. 5034 (1982).

<sup>18</sup> Pub. L. 97-221, 96 Stat. 227 (1982).

<sup>19</sup> *Id.* § 4(b)(1).

<sup>20</sup> *Id.* § 2, amending 5 U.S.C. § 6131 (a) and (c). The FEFCWA of 1978 had allowed agency termination of AWS programs "but subject to the terms of any [collective bargaining agreement]." The FEFCWA of 1982 allowed an agency to refuse to establish or terminate an AWS "notwithstanding any collective bargaining agreement" but still required negotiation with unions regarding the establishment or termination of an AWS program.

<sup>21</sup> GAO, Alternative Work Schedules for Federal Employees, at 3 (July 19, 1985), in *Federal Employees Flexible and Compressed Work Schedules Act: Hearings on H.R. 1534 Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service*, 99th Cong. (1985).

<sup>22</sup> *Id.*

<sup>23</sup> Pub. L. 99-69, 99 Stat. 167 (1985); Pub. L. 99-109, 99 Stat. 482 (1985); Pub. L. 99-140, 99 Stat. 563 (1985).

<sup>24</sup> Pub. L. 99-196, 99 Stat. 1350 (1985) (striking § 5 of the 1982 act, which contained its sunset provision).

<sup>25</sup> 5 U.S.C. §§ 6130, 6131. Agencies also may not establish an AWS program that would have an adverse agency impact.

<sup>26</sup> 5 U.S.C. § 6122(a).

<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., National Federation of Federal Employees, Local 642 and Bureau of Land Management, Lakeview District Office, Lakeview, Oregon, 27 F.L.R.A. 862 (1987) (rejecting agency contention that union AWS proposal violated an agency's right to set limits on employee schedules to ensure that the employee's job duties were fulfilled where all of the AWS were subject to management approval).

<sup>29</sup> The FEFCWA defines "credit hours" as: "any hours, within a flexible schedule established under section 6122 of this title, which are in excess of an employee's basic work requirement and which the employee elects to work so as to vary the length of a workweek or a workday." 5 U.S.C. § 6121(4). "'Basic work requirement' means the number of hours, excluding overtime hours, which an employee is required to work or is required to account for by leave or otherwise." § 6121(3).

<sup>30</sup> 5 U.S.C. § 6123(b). For example, where an employee elects to work 10 hours on one day in order to shorten another workday, that employee is compensated at his/her regular rate of pay for all 10 hours worked (8 regularly scheduled hours and 2 credit hours). FEFCWA also defines and prescribes premium pay for overtime work (hours ordered in advance and in excess of 8 hours a day or 40 hours a week), holidays, and other situations (e.g., nightwork). See 5 U.S.C. §§ 6123, 6124 (computation of premium pay; computation of holiday pay). Employees on FWS receive 8 hours pay for holidays.

<sup>31</sup> 5 U.S.C. § 6122(a)(2).

<sup>32</sup> 5 U.S.C. § 6126(a).

<sup>33</sup> *Id.* An employee's "basic work requirement" is "the number of hours, excluding overtime hours, which an employee is required to work or is required to account for by leave or otherwise." 5 U.S.C. § 6121(3).

<sup>34</sup> 5 U.S.C. § 6122(a)(2).

<sup>35</sup> 5 U.S.C. § 6133 (charging OPM with responsibility for promulgating regulations, providing technical assistance, and reviewing AWS programs).

<sup>36</sup> See Appendix B, *infra*, for definitions and models of these FWS programs. See also OPM, Handbook on Alternative Work Schedules, Appendix B: Models of Flexible Work Schedules, at <http://www.opm.gov/oca/aws/html/appendb.asp> (last visited June 10, 2006).

<sup>37</sup> OPM, Handbook on Alternative Work Schedules, Alternative Work Schedule Definitions, at <http://www.opm.gov/oca/aws/html/define.asp> (last visited June 10, 2006).

<sup>38</sup> See Appendix B, *infra*.

<sup>39</sup> 5 U.S.C. § 6122(a)(2).

<sup>40</sup> 5 U.S.C. § 6131(a). "Adverse agency impact" with regard to agency termination of existing AWS programs is discussed in greater detail below.

<sup>41</sup> 5 U.S.C. § 6131(c)(2).

<sup>42</sup> 5 U.S.C. § 6130(a)(2) (employees represented by a union "shall not be included [in any AWS] except to the extent expressly provided under a collective bargaining agreement between the agency and the exclusive representative"), and § 6130(a)(1) (making any AWS subject to the terms of a governing collective bargaining agreement).

<sup>43</sup> See *Bureau of Land Management v. Federal Labor Relations Authority*, 864 F.2d 89 (9th Cir. 1988) (holding that all aspects of an AWS are negotiable in collective bargaining).

<sup>44</sup> Office of Personnel Management, Guidance Bulletin, Negotiating Flexible and Compressed Work Schedules (OLRWP-12, December 1996), available at <http://www.opm.gov/lmr/html/flexible.asp>.

<sup>45</sup> OPM, Negotiating Flexible and Compressed Work Schedules, *supra* note 44, at <http://www.opm.gov/lmr/html/flexible.asp#Exclusions>.

<sup>46</sup> Because the FEFCWA grants agencies the right to alter existing schedules based on substantial disruption or additional costs, agencies do not need to bargain for the substantive right to alter existing FWS on these grounds. See, e.g., *Air Force Accounting and Finance Center, Denver Colorado and American Federation of Government Employees, Local 2040, AFL-CIO*, 42 FLRA 1196, 1205 (1991). However, agencies still must bargain regarding procedural safeguards for such decisions, their impact, and any similar issues related to alteration of employees' schedules. *Id.*; see also, OPM, Negotiating Flexible and Compressed Work Schedules, available at <http://www.opm.gov/lmr/html/flexible.asp>.

<sup>47</sup> *Id.*

<sup>48</sup> 5 U.S.C. § 6131(b).

<sup>49</sup> 5 U.S.C. § 6131(3)(A).

<sup>50</sup> 5 U.S.C. § 6131(3)(C).

<sup>51</sup> 5 U.S.C. § 6131(3)(C).

- <sup>52</sup> See, e.g., Department of the Army, U.S. Army Ordnance Missile and Munitions Center and School, Redstone Arsenal, Alabama and Local 1858, American Federation of Government Employees, AFL-CIO, 90 FSIP 21 (1990). Uncontroverted affidavits asserting specific adverse impacts are sufficient. See, e.g., Department of the Air Force, Langley Air Force Base, Langley Air Force Base, Virginia and Local R4-106, National Association of Government Employees, SEIU, AFL-CIO, 91 FSIP 29 (1991).
- <sup>53</sup> See, e.g., Dept. of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Lompoc, California and Local 3048, American Federation of Federal Employees, AFL-CIO, 00 FSIP 129 (2000); FDIC, Boston, Massachusetts and Local 2823, American Federation of Government Employees, 83 FSIP 37 (1984).
- <sup>54</sup> OPM, Handbook on Alternative Work Schedules, Compressed Work Schedules, at <http://www.opm.gov/oca/aws/html/comp.asp> (last visited June 10, 2006).
- <sup>55</sup> *Id.*
- <sup>56</sup> See also OPM, Handbook on Alternative Work Schedules, at <http://www.opm.gov/oca/aws/index.asp> (last visited June 10, 2006). ("There is no authority to establish hybrid work schedules that borrow selectively from the authority for flexible work schedules and the authority for compressed schedules in an effort to create a hybrid work schedule program providing unauthorized benefits for employees or agencies. [Citation omitted.] However, it should be noted that some forms of flexible work schedules (e.g., maxiflex) allow work to be compressed in fewer than 10 workdays in a biweekly pay period.")
- <sup>57</sup> 70 Fed. Reg. 1083-84 (Jan 5, 2005) (proposed 5 CFR § 610.402, "definitions," and proposed 5 CFR § 610.403, "covered work schedules").
- <sup>58</sup> The law also covers other situations involving premium pay for hours worked. See 5 U.S.C. § 6128 (computation of premium pay for overtime, Sundays, and holidays). See also OPM, Alternative Work Schedules (AWS), Compressed Work Schedules (CWS), at <http://www.opm.gov/oca/worksch/HTML/AWSaws.asp>; Appendix A *infra*.
- <sup>59</sup> 5 U.S.C. § 6128 (d). See also Appendix A *infra*.
- <sup>60</sup> OPM, Handbook on Alternative Work Schedules, Appendix C, Models of Compressed Work Schedules, at <http://www.opm.gov/oca/aws/html/appendc.asp>. See also Appendix C *infra*.
- <sup>61</sup> 5 U.S.C. §§ 6130, 6131.
- <sup>62</sup> Where an agency and union disagree over the agency's decision not to establish or to terminate a CWS based on "adverse agency impact," that impasse is presented to the Federal Service Impasses Panel. See Section II, A.2, above.
- <sup>63</sup> 5 U.S.C. § 6130(2).
- <sup>64</sup> See Section II.A.2, *supra*.
- <sup>65</sup> 5 U.S.C. § 6127(b)(1).
- <sup>66</sup> See 5 U.S.C. § 6127(b)(2).
- <sup>67</sup> General Accounting Office, Federal Employment: How Federal Employees View the Government as a Place to Work, at 12 (GAO/GGD-92-91, June 18, 1992) [hereinafter "Federal Employees' Views"].
- <sup>68</sup> *Id.* at 25. The study found that 56.9% of employees did not use AWS; and that of those, 19.1% said their agencies had AWS programs but did not allow them to participate, and 57.6% said their agencies had no AWS program. 12.5% indicated they chose not to participate in AWS although it was available to them, and the remaining 12.9% either gave an unclassified response or did not respond. The same review found 41.2% of employees were participating in AWS in some form.
- <sup>69</sup> *Id.* at 12.
- <sup>70</sup> Remarks Announcing the Initiative to Streamline Government, 29 WEEKLY COMP. PRES. DOC. 350 (Mar. 3, 2003).
- <sup>71</sup> National Performance Review, From Red Tape to Results: Creating a Government that Works Better and Costs Less (Sept. 7, 1993), available at <http://govinfo.library.unt.edu/npr/library/nprprt/annrpt/redtpe93/> (quoted material taken from subsection at <http://govinfo.library.unt.edu/npr/library/nprprt/annrpt/redtpe93/23ba.html>) (last visited May 29, 2006).
- <sup>72</sup> *Id.* (quoted material taken from subsection at <http://govinfo.library.unt.edu/npr/library/nprprt/annrpt/redtpe93/216e.html>). See also NPR Recommendation HRM07: Enhance Programs to Provide Family Friendly Services, available at <http://govinfo.library.unt.edu/npr/library/reports/hrm07.html> (last visited June 6, 2006).
- <sup>73</sup> General Accounting Office, Alternative Work Schedules: Many Agencies Do Not Allow Employees the Full Flexibility Permitted by Law, at 12 (GAO/GGD-94-55, March 29, 1994) [hereinafter "Many Agencies Do Not Allow Full Flexibility"].
- <sup>74</sup> *Id.* at 6-9.

<sup>75</sup> *Id.*

<sup>76</sup> Whether the burden of this differential fell on union or non-union employees was not consistent. Rather, the union/non-union dividing line was one of various arbitrary divisions along which effects of AWS's discretionary nature could be seen. In some workplaces, unionized workers could participate in AWS while non-unionized workers could not; in other workplaces, the reverse was true. *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 12.

<sup>79</sup> See Memorandum of President William J. Clinton, Implementing Federal Family Friendly Work Arrangements, 32 WEEKLY COMP. PRES. DOC. 1119 (June 21, 1996); Memorandum of President William J. Clinton, Expanding Family-Friendly Work Arrangements in the Executive Branch, 30 WEEKLY COMP. PRES. DOC. 1468 (July 11, 1994). See also OPM, Negotiating Flexible and Compressed Work Schedules, *supra* note 44, at <http://www.opm.gov/lmr/html/flexible.asp#Introduction> (clarifying explicitly that Clinton's memoranda were in response to the NPR and GAO recommendations).

<sup>80</sup> AL GORE, TURNING THE KEY: UNLOCKING HUMAN POTENTIAL IN THE FAMILY-FRIENDLY FEDERAL WORKPLACE: A STATUS REPORT ON FEDERAL WORKPLACE FAMILY-FRIENDLY INITIATIVES TO PRESIDENT BILL CLINTON, at 10 (National Performance Review, 1997), available at <http://govinfo.library.unt.edu/npr/library/papers/bkgrd/turnkey.pdf> (last visited May 30, 2006). The report indicated that 50% of Defense, 70% of EPA, 75% of Energy, and 85% of Labor employees participated in AWS. These were success stories, and are almost certainly exceptional. For instance, the NPR report also indicated that only 22% of CIA employees were utilizing AWS. Though a significant increase from 8% in 1990, that is nowhere near the utilization at the highlighted agencies. *Id.*

<sup>81</sup> Office of Personnel Management, Achieving a Balance: Meeting Work and Family Obligations, at 5 tbl.1 (July 2000).

<sup>82</sup> *Id.* at 7 tbl.2. But see Office of Personnel Management, A Review of Federal Family-Friendly Workplace Arrangements, at 1, 10 fig. 1 (July 1998), available at <http://permanent.access.gpo.gov/lps918/www.opm.gov/wrkfam/report.pdf> (last visited May 29, 2006) [hereinafter "Review of Workplace Arrangements"] (figure graphic available at <http://www.opm.gov/wrkfam/html/famfig1r.gif> (last visited May 30, 2006)) (indicating that only about a third of federal employees actually participated in AWS as of 1998, an apparent decrease from the 41% reported in 1992 in GAO, Federal Employees' Views, *supra* note 67, at 7). The apparent decline in employee uptake goes unremarked in the OPM report, which surveyed personnel offices whereas the 1992 report surveyed employees. Additionally, U.S. Department of Labor statistics on use of flexible work schedules (not including compressed work schedules) by federal employees show usage at just over a third of employees in 1997 (the first year surveyed) and 2001, but falling to 28.8% in the most recent survey in 2004. See Bureau of Labor Statistics, Press Releases, Workers on Flexible and Shift Schedules (1997, 2001, and 2004), available at [http://www.bls.gov/schedule/archives/all\\_nr.htm#FLEX](http://www.bls.gov/schedule/archives/all_nr.htm#FLEX). These datasets and the apparent discrepancies between them are not addressed in GAO or OPM literature.

<sup>83</sup> See OPM, Achieving a Balance, *supra* note 81, at 8; OPM, Review of Workplace Arrangements, *supra* note 82, at 12-14; GAO, Many Agencies Do Not Allow Full Flexibility, *supra* note 73, at 7-9.

<sup>84</sup> See, e.g., OPM, Achieving a Balance, *supra* note 81, at 6 (noting that many organizations leave implementation to the discretion of individual supervisors).

<sup>85</sup> See OPM, Achieving a Balance, *supra* note 81, at 8, 10; OPM, Review of Workplace Arrangements, *supra* note 82, 11, 13; GAO, Many Agencies Do Not Allow Full Flexibility, *supra* note 73, at 7-9. Sometimes unionized employees may use AWS while non-unionized employees may not, and sometimes vice versa. GAO, Many Agencies Do Not Allow Full Flexibility, *supra* note 73, at 7. AWS have also not tended to be available to supervisory and senior-level staff. OPM, Achieving a Balance *supra* note 81, at 6; GORE, TURNING THE KEY, *supra* note 80, at 12.

<sup>86</sup> See OPM, Review of Workplace Arrangements, *supra* note 82, at 12; GORE, TURNING THE KEY, *supra* note 80, at 12; GAO, Many Agencies Do Not Allow Full Flexibility, *supra* note 73, at 10-11.

<sup>87</sup> See, e.g., General Accounting Office, Human Capital: Effective Use of Flexibilities Can Assist Agencies in Managing Their Workforces, at 15 (GAO-03-2, Dec. 6, 2002) [hereinafter "Effective Use of Flexibilities"]. Identified challenges included increased difficulty in scheduling meetings and ensuring office coverage. See OPM, Achieving a Balance, *supra* note 81, at 7; OPM, Review of Workplace Arrangements, *supra* note 82, at 15 tbl.1, 19 tbl.2; GAO, Many Agencies Do Not Allow Full Flexibility, *supra* note 73, at 9-11.

<sup>88</sup> See GAO, Effective Use of Flexibilities, *supra* note 87, at 15; OPM, Achieving a Balance, *supra* note 81, at 6; OPM, Review of Workplace Arrangements, *supra* note 82, at 18.

<sup>89</sup> See GAO, Effective Use of Flexibilities, *supra* note 87, at 15; OPM, Achieving a Balance, *supra* note 81, at 6; OPM, Review of Workplace Arrangements, *supra* note 82, at 19 tbl.2; GAO, Many Agencies Do Not Allow Full Flexibility, *supra* note 73, at 4.

<sup>90</sup> See GAO, Effective Use of Flexibilities, *supra* note 87, at 15; OPM, Review of Workplace Arrangements, *supra* note 82, at 19 tbl.2; GAO, Many Agencies Do Not Allow Full Flexibility, *supra* note 73, at 4.

<sup>91</sup> See GAO, Effective Use of Flexibilities, *supra* note 87, at 15; OPM, Achieving a Balance, *supra* note 81, at 6; OPM, Review of Workplace Arrangements, *supra* note 82, at 19 tbl.2.

<sup>92</sup> See, e.g., GAO, Effective Use of Flexibilities, *supra* note 87, at 15 (noting that AWS programs are "among the effective flexibilities most cited by agency management and supervisors, human resources officials, and union representatives.")

<sup>93</sup> OPM, Review of Workplace Arrangements, *supra* note 82, at 1.

<sup>94</sup> See, e.g., General Accounting Office, Securities and Exchange Commission: Human Capital Challenges Require Management Attention, at 19 (GAO-01-947, Sept. 17, 2001).

<sup>95</sup> See Stephen Barr, *Government Opens Drive to Offer New Hires Flexibility in Work Locations and Schedules*, WASH. POST, June 7, 2006, at D4.