Abstract. This report examines the joint manner in which Congress and the Secretary of Labor have approached the protection of young persons (16- and 17-year-olds) who drive vehicles as part of their regular work assignments. Reference is made to the Department of Labor’s development of Hazardous Occupations Order No. 2 (HO 2) which deals with such drivers and to the response from Congress–including consideration of H.R. 2327 of the 105th Congress.
Child Labor in Hazardous Occupations: “On-the-Job Driving” by Youth Workers

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ABSTRACT

This report examines the joint manner in which Congress and the Secretary of Labor have approached the protection of young persons (16 and 17 year-olds) who drive vehicles as part of their regular work assignments. Reference is made to the Department of Labor’s development of Hazardous Occupations Order No. 2 (HO 2) which deals with such drivers and to the response from Congress — including consideration of H.R. 2327 of the 105th Congress. It concludes with discussion of rulemaking versus legislation for dealing with child labor issues, and explores the safety issue with respect to teen drivers. This product may be updated if developments warrant.
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Summary

The Fair Labor Standards Act (FLSA) of 1938, as amended, is the primary federal statute dealing with the minimum wage, overtime pay, child labor and related subjects. In its initial enactment, Congress established a general framework for regulation of child labor but left to the discretion of the Secretary of Labor the determination of which types of work ought to be considered “particularly hazardous” for persons under 18 years-of-age. Where the Secretary determined that an area of work was “particularly hazardous,” he was directed by Congress to develop regulations under which young persons might be employed or to bar them totally from such employment. The result has been the development, through the years, of seventeen Hazardous Occupations Orders (HOs) for nonagricultural work.

Under HO 2, the employment of persons under 18 years-of-age is restricted in occupations that require operation of a motor vehicle. Such employment must be in conformity with stated safety standards where vehicle operation is required, must not involve driving outside of daylight hours, and what driving is permitted must be “occasional and incidental” to the young person’s employment. With only slight modification, that standard has prevailed at least since the 1960s.

Child labor standards may not always have been closely enforced, and it is possible that they have not always been clearly understood by employers and workers. During the late 1980s and early 1990s, the Department of Labor undertook a program of vigorous enforcement of child labor law. Among those found in violation were a group of automobile dealers from the State of Washington. Faced with fines, the dealers appealed to their Members of Congress to have the standard changed: permitting broader employment of young persons in work requiring operation of motor vehicles. During the 103rd Congress, legislation to modify HO 2 was introduced by Representative Mike Kreidler (D-Wash.). The legislation was not acted upon; in the 104th Congress, similar legislation was introduced by Representative Randy Tate (R-Wash.) and Senator Gorton. A hearing on the issue was held in the House Subcommittee on Workforce Protections (September 1996), but the legislation died at the close of the Congress.

Modification of HO 2 has been endorsed by automobile dealers. It has been opposed by the Department of Labor and by groups associated with children’s advocacy such as the Child Labor Coalition and the National Consumers League.

In the 105th Congress, Representative Combest introduced H.R. 2327, a bill structured differently from the Kreidler/Tate/Gorton measure but proposing to alter HO 2 to permit youth workers wider opportunity to drive in the course of their employment. The bill, with amendment, was approved by the House on September 28, 1998, and by the Senate, with further amendment, on October 12, 1998. The House concurred with the Senate version of the bill; the measure was signed on October 31, 1998 (P.L. 105-334). In its final form, the bill deals with young persons, 17 years-of-age, who drive but prohibits occupational driving by persons under 17 years-of-age.
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The Fair Labor Standards Act (FLSA) of 1938, as amended, generally, permits unrestricted employment of persons over 16 years-of-age in nonhazardous work. However, Congress specifically directed that persons between 16 and 18 years of age be excluded from employment in types of work “which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being.”1 (Emphasis added.) How “hazardous” was to be defined and what elements entered into the definition of “hazardous” were delegated to the Secretary.

Through the years, Secretaries of Labor have reviewed various types of workplace operations for their suitability for the employment of young workers. Where such operations have been found to be “particularly hazardous” for such workers, the Department (DOL) has issued Hazardous Occupations Orders (HOs) excluding from such employment persons under 18 years-of-age. Seventeen such Orders (nonagricultural) are now in place. HO 2, which deals with the operation of motor vehicles by persons 16 and 17 years-of-age, has been a subject of legislative interest through the past several Congresses. The evolution of HO 2 and its implications are discussed here as part of a broader context of child labor enforcement.

DOL and the Issue of Child Labor

Though the basic child labor provisions of the FLSA had been in place since 1938, their enforcement, it appears, may not always have had the highest priority among the assorted responsibilities of the Department.2 Within DOL, child labor regulation falls under the Wage and Hour Division which also oversees a diverse range of workplace standards statutes — among them, minimum and prevailing wages and overtime pay.

Oversight under Secretary Wirtz (1968)

In 1968, Labor Secretary Willard Wirtz instituted a review of the orders as part of “an effort to increase youth employment opportunities wherever this is possible

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1See Title 29 U.S.C. 203(l).
without endangering their health or safety.” The review process was detailed and technical. The Department solicited the views of individuals and organizations (safety engineers, officials from unions, trade association, manufacturers, etc.) with respect to specific hazardous occupations orders. The Secretary recalled: “Over 200 responses were received. These responses yielded a variety of suggestions. In some instances these suggestions were to relax certain aspects of the orders and in other cases it was proposed to extend their coverage.” After digesting the results, the Department published a notice of proposed rulemaking and invited comment. Among proposals for consideration was an amendment to HO 2 to allow persons between 16 and 18 years-of-age to operate motor vehicles, under certain limited circumstances, as part of their regular employment.4

Taking into account that, in most states, persons of 16 and 17 years-of-age are newly-licensed drivers, lacking experience on the road, the Department determined that work-related operation of motor vehicles by 16- and 17-year-olds was “particularly hazardous” and that such young persons ought not to be employed in such activity.5 However, HO 2 did provide an exemption with respect to “[i]ncidental and occasional driving” by the targeted group, stating that the ban:

...shall not apply to the operation of automobiles or trucks not exceeding 6,000 pounds gross vehicle weight if such driving is restricted to daylight hours; Provided, Such operation is only occasional and incidental to the child’s employment; that the child holds a State license valid for the type of driving involved in the job which he performs and has completed a State approved driver education course; And provided further, that the vehicle is equipped with a seat belt or similar device for the driver and for each helper, and the employer has instructed each child that such belts or other devices must be used.

Still excluded for persons under 18 years-of-age, however, was driving that involved the towing of vehicles.6 With certain refinements of language (for example, “child” would become “minor”) and definitional adjustments, the provision remains in effect.7

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5An exception (conforming to practice in some states) was allowed where 16 and 17 year-olds drove school buses: largely, it would appear, in rural areas and under close supervision.


729 CFR 570.52(b)(1). Early in the Nixon Administration, HO 2 was again considered as it applied to certain school bus drivers under the age of 18 years (a specialized segment of the order), but the basic requirement as set forth under Secretary Wirtz appears to have remained unchanged. See Federal Register, August 9, 1969. p. 12946.
Oversight under the Reagan Administration

After remaining a relatively quiet issue through much of the 1970s, federal regulation of child labor reemerged as a high-visibility issue early in the Reagan Administration. On July 16, 1982, the Department proposed major changes in its structure of child labor regulation, allowing a 4-week comment period. The proposed regulations did not focus upon HO 2, *per se*, but had a potentially serious impact for any change in existing child labor regulation. On July 28, 1982, the House Subcommittee on Labor Standards, chaired by Representative George Miller, commenced the first of two days of hearings on the issue. The wisdom and timing of the proposals was sharply questioned. Resolutions were introduced both in the House and in the Senate (H.J.Res. 551 and S.J.Res. 223) that, had they been adopted, would have prevented the Secretary of Labor from proceeding with the proposed restructuring. Then, just prior to the second day of hearings (August 3, 1982), the Department decided to extend the comment period; further consideration by the Department of Labor would follow.

By early 1983, with the comment period closed, some further action on child labor was generally expected. “Federal wage and hour regulators are sifting through a blizzard of letters from restaurant operators across the nation supporting the Reagan Administration’s plan to relax child labor restrictions on the employment of young teenagers in food-service outlets,” *Nation’s Restaurant News* reported. The trade paper also acknowledged that the DOL proposals had “generated a storm of protest from educational groups, labor unions and Congressmen who expressed outrage over what some described as a scheme to enable restauranteurs to exploit school age workers.” Senator Moynihan, the paper stated, had “called the department’s pending regulations an ‘unconscionable’ effort to ‘leave teenagers open to exploitation by a few unscrupulous employers,’” while Senator Chafee “warned the changes could ‘result in a greater risk to the safety of our working youths.’”

In April 1984, the AFL-CIO stated that “[l]aws that have protected children from exploitation by employers for nearly half a century will be gutted if the Reagan

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8The 1977 FLSA amendments (P.L. 95-151) included a provision allowing for employment of children at young at 10 years-of-age in field harvest. However, agricultural employers were required to certify that any children so employed would not be harmed by pesticides used in the fields or, conversely, that no pesticides had been used. Controversy and litigation followed. See: *Federal Register*, March 7, 1980, p. 15168-15170; *Federal Register*, March 18, 1980, p. 17160; and *Federal Register*, August 19, 1980, p. 55175-55177.

9The proposed regulatory changes were contentious, both for their content and conception and because the time allowed for comment was perceived by some to be insufficient.


Administration succeeds in its latest attempt to weaken child labor regulations."\(^{12}\)

In October 1984, in listing its semi-annual regulatory agenda, DOL included revision of child labor regulations, including possible changes in HO 2 — the prohibition against employment of minors, under certain conditions, in the operation of motor vehicles.\(^{13}\) But, nothing happened. In November 1984, the Nation’s Restaurant News headlined: “Pols May Pull Child Labor Scheme Off Back Burner.” It said that “policy makers in the Reagan Administration may soon revive a number of politically sensitive initiatives affecting the food-service industry” — among them, the effort to “modernize” child labor laws to “remove unnecessary and arbitrary restraints on the job duties of young workers.”\(^{14}\) In early January 1985, the same source reported: “The Wage and Hour division plans to ‘reform’ child labor ground rules....” Recalling the controversy that followed the earlier initiative, it suggested: “A less controversial version may emerge this year.”\(^{15}\) In mid-1986, the Reagan Administration (DOL) was still projecting child labor reform including the HO 2 revisions with respect to motor vehicle operation.\(^{16}\) But, the new child labor regulations were not forthcoming. The issue remained controversial.

### Developments Under the Bush And Clinton Administrations

Although the proposals of 1982 had been relatively “minor” in content, according to Nancy Flynn, acting deputy director of the Wage and Hour Division, they had ultimately been withdrawn because of the controversy they had provoked. Flynn suggested that it had been “somewhat naive” of the agency to propose changes without seeking outside input beforehand rather than “operating in a vacuum.”\(^{17}\)

**Secretary Brock appoints an advisory committee.** In July 1987, Labor Secretary William Brock tried a new approach, announcing creation of a Child Labor Advisory Committee “to advise the Secretary of the effective administration of the child labor provisions” of the FLSA. Secretary Brock announced:

The Committee will consist of 21 members representing child advocacy groups, employers, unions, the education community, civic organizations, State officials, child guidance professionals, and safety groups.

The Committee will function solely as an advisory body....\(^{18}\)

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\(^{18}\)Federal Register, July 21, 1987. p. 27476. Among allegations concerning the proposals of 1982 had been that they have been drawn up to meet industry needs without sufficiently taking into account the views of child advocacy and related groups. In part, the Advisory Committee was intended as a means through which to remedy this perception.
By the time the Committee met for the first time on March 9, 1988, Secretary Brock had been replaced by Ann McLaughlin. Wage and Hour Administrator Paula Smith advised the members that federal child labor regulations were “outdated, outmoded, and obsolete.” The Committee elected a chairperson, Linda Golodner of the National Consumers League, and divided itself into three subcommittees, one of which was to consider HO 2.19 When the HO 2 Subcommittee met on July 6, 1988, its agenda included “whether definitions under this Order and the exemption from the Order for incidental and occasional driving need to be refined, and whether a change should be made in the gross vehicle weight of types of vehicles permitted under the exemption for incidental and occasional driving.”20 The subcommittees continued to meet into the fall of 1988 when a final report was filed which, inter alia, urged modification (strengthening) of HO 2 including the “incidental and occasional driving” standard.21 In January 1989, Elizabeth Dole assumed her duties as Secretary of Labor in the Bush Administration.

Momentum Grows. In May 1989, the National Consumers League launched its own year-long study of child labor in the United States under Golodner’s direction. Ms. Golodner indicated that, from discussion with people in the field, she had found that “child labor is often on the low end of the priority list.” She suggested that “the picture will be even bleaker” if the Department does not get “serious about enforcing the law” and observed that “it is taking very, very long for the recommendations [of the Advisory Committee, submitted in October 1988] to get through the bureaucracy.” Responding, the Department noted that the recommendations had only reached down to Wage and Hour Administrator Paula Smith in April (six months after their submission) and that they were currently under consideration. Other, more recent suggestions, were still moving through the system.22

Through the period, numerous bills dealing with child labor were introduced in the Congress and several hearings were held. In general, witnesses pointed to abuses of child workers and the need for tougher standards, while there was some suggestion that greater vigor was needed on the part of the Department of Labor. In March 1990, Representative Donald Pease (D-Ohio) observed that “a package of

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19Federal Register, February 17, 1988. p. 4788. Part of HO 2, as noted above, dealt with the employment of 16 and 17 year-olds as school bus drivers, primarily utilized in two or three states. Although these bus drivers were the immediate concern of the Subcommittee on HO 2, its responsibilities were broader. See also Bureau of National Affairs, Daily Labor Report, March 10, 1988. p. A11-A12.


21Federal Register, November 20, 1991. p. 58627. Among other recommendations, the Committee urged “defining and delimiting the terms ‘occasional and incidental’ driving and ‘outside helper,’ specifically prohibiting the operation of trucks on private property, and specifically excluding motorcycles, mopeds, or similar vehicles from the ‘occasional and incidental’ exemption.” See Federal Register, May 13, 1994. p. 25171.

22Bureau of National Affairs, Daily Labor Report, May 18, 1989. p. A10-A11. Ultimately, the term of the Advisory Committee expired and was not extended. The initiative on the part of the National Consumers League evolved into The Child Labor Coalition, a broad umbrella group of organizations with an interest in child welfare and child labor practice, both within the United States and within a global context.
recommendations from the Child Labor Advisory Committee sits on the desk of the Secretary of Labor unanswered since 1988.” And, he suggested that the actions of the Department were “a finger in the dike.”

**Secretary Dole Develops a “Strike Force”.** Child labor has normally been an issue of some interest with the public and within the legislative community. However, during the late 1980s and early 1990s, it achieved unusually high visibility. In part, the stimulus to interest in the subject may have been inadvertent. The proposals of 1982 and creation of the Child Labor Advisory Committee, each in different ways, may have stimulated interest in child labor standards. Through the period, a steady stream of bills appeared, both in the House and Senate, with numerous hearings. The Department of Labor reacted with renewed enforcement activity. In her annual report for 1988, Secretary McLaughlin noted: the Wage and Hour Division “found 20,454 minors employed in violation of the child labor provisions of the FLSA during fiscal 1988, and it assessed $2.14 million in child labor civil penalties against 902 employers who were found to be illegally employing 13,838 minors.” With the appointment of Elizabeth Dole as Secretary of Labor, the Department took on a role of higher visibility.

In testimony before the House Subcommittee on Labor Standards in June 1990, Secretary Dole had praise for employers “who legally employ young people within the bounds of the child labor laws [and] are helping us energize and motivate our most precious resource, our human resource.” But, she continued, “...there can be no doubt that there are employers violating our child labor laws. Indeed, we’ve witnessed a disturbing 128 percent increase in violations in the past four years.” Secretary Dole reacted by increasing, substantially, the Department’s child labor enforcement efforts. She created a series of “strike forces” which moved in on targeted industries in which children were most likely to be employed. The purpose of these initiatives (collectively, “Operation Childwatch”) was to promote understanding of child labor law and to redress abuses.

Strike forces were directed, initially, toward the retail, fast-food, grocery and restaurant industries; then, toward agriculture and the garment industries, with others to follow. In her annual report for 1990, Mrs. Dole noted:

The first strike force, in March 1990, utilized more than 500 investigators for two full days. The results for Strike Force One show that 4,093 cases were initiated, disclosing 16,385 underage youth illegally employed and estimated civil money penalties of over $5.4 million.

The second strike force initiative was a one-day effort involving almost all of the Wage and Hour Division’s investigators. This strike force was conducted in June, before school was out in most areas and before the onset of summer employment. ... For Strike Force Two, results

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show that the Division initiated 2,149 investigations and found 5,877 underage youth illegally employed; estimated civil money penalties were more than $2 million.

The third strike force was held August 14 and 15 using half of the Division’s investigators nationwide. This strike force was primarily targeted on four industries: garment; construction; the amusement park and recreation industry; and agriculture (where harvest activities were in progress, and in conjunction with the Department’s on-going farm labor enforcement activities). The results for Strike Force Three show that the Division initiated 1,334 investigations ... in which 2,198 underage youth were found to be illegally employed and estimated civil money penalties were more than $580,000.

The fourth strike force was a two-pronged initiative that took place during the month of September.... The preliminary results from Strike Force Four, as of the end of FY 1990, revealed that 1,782 cases were initiated and 1,426 underage youth were found illegally employed; ...26

Secretary Dole (and, in some measure, Secretary McLaughlin) did not promulgate new regulations. Rather, they had chosen to enforce standards long in place but frequently, it appears, violated with impunity.27

Continuing Regulatory Reform. In late October 1990, the Department published a proposed rule suggesting changes in three hazardous occupations orders, one of which was HO 2; its concern with HO 2 focused upon the issue of 16 and 17 year-old school bus drivers. It moved to end that option, arguing that “16- and 17-year-old minors generally have more accidents per million miles and per driver” than those over 18-years-of-age and that “16- and 17-year-old drivers lack experience, maturity and have poorer judgment than adults.” It proposed no change in the broader exemption under “incidental and occasional.”28

The final rule was issued in November 1991 — by which time former Representative Lynn Martin had been appointed Secretary of Labor. The Department reviewed the evidence and statements submitted during the comment period. It noted that the school bus issue was now largely a dead letter; only one school district in Wyoming was then exercising the option. Of twelve comments received, only those associated with Wyoming endorsed employment of 16- and 17-year-old school bus drivers. Thus, the Department opted to allow the Washakie County, Wyoming, schools to utilize the program through the close of the 1995-1996 school year; thereafter, only drivers over 18 years-of-age might be hired. With respect to further changes in the HO 2 requirements (i.e., “incidental and

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occasional”), the Department stated that “if any such changes are appropriate, they should be made the subject of a separate rulemaking.”

In May 1994, with Robert Reich as Secretary of Labor, the Department proposed a general review of federal child labor regulation somewhat similar to that initiated under the Reagan Administration — though with a different orientation. It called for comment on any area that might be of interest including the “incidental and occasional” provisions of HO 2. While the Department issued revisions of certain regulations in April 1995, modification of HO 2 was not among them. More broadly, the review commenced by Secretary Reich is ongoing — though Secretary Reich has left office.

Recent Development of the Issue

If reformers, child advocates and some Members of Congress had applauded the more activist enforcement/compliance initiatives of Secretary Dole, the reaction from some segments of the employer community was not supportive. And, that reaction came swiftly.

The 103rd Congress

In April 1994, Representative Mike Kreidler (D-Wash.) introduced H.R. 4304, a bill to modify the hazardous occupations treatment of “minors between 16 and 18 years of age who engaged in the operation of automobiles.” Representative Kreidler protested that violation of what he termed an “outdated” child labor provision had resulted in fines of $197,000 against 59 Washington State auto dealers. After reviewing the statute and the regulations, Mr. Kreidler observed: “Typically, lot attendants are responsible for moving cars around the lot, and washing and preparing cars for customers. And on occasion,” he added, “these 17-year-old employees also fuel vehicles at nearby gas stations.” He charged that auto dealers were unable to find a definition of “incidental and occasional” and expressed amazement that the Department had, “with unexplained zeal ... pursued cases against auto dealers.” He concluded that “the word is out” that “it’s safer to fire teenager lot attendants than to risk violating a law even the Department of Labor can’t define.”

The Kreidler bill directed that the Secretary of Labor, within one year from enactment, amend the regulation governing operation of automobiles and trucks “to eliminate the requirement that such operation be only occasional and incidental to the minor’s employment and to add the requirement that such operation not be the primary duty of the minor’s employment.” As the Representative explained it, the

32 Congressional Record, April 26, 1994. E779-E780. Ultimately seven other Members from Washington delegation signed on as cosponsors of H.R. 4303 — with other Members of Congress.
bill would “allow a teenager to drive up to 50 percent of the time as long as driving was not the primary duty.” Referred to the House Committee on Education and Labor, no action was taken on the proposal.

The 104th Congress

On July 20, 1995, Representative Randy Tate (R-Wash.) reintroduced the Kreidler bill (now, H.R. 2089). Companion legislation was introduced, August 1, 1995, by Senator Gorton (S. 1099). Noting the value of work for young persons, Senator Gorton charged that the federal government “is denying young people the opportunity to work in at least one sector of our economy, car dealership.” He stated: “... what we are talking about today ... is not exploitation, but perfectly reasonable actions” — “to drive cars for short distances, say, from one lot to another across the street, or to a nearby gas station.” Senator Gorton observed:

The Department of Labor, for reasons which I cannot fathom, has imposed almost $200,000 worth of fines on dealerships throughout Washington State, even though the dealerships did not require their 16- and 17-year-old employees to drive often, or for a long time, but only in very limited circumstances.

He stated that S. 1099 “will be better for car dealerships, and better for kids who want to work.”

Hearings on the Tate bill commenced before the House Subcommittee on Workforce Protections on September 12, 1996. Following opening comments by Subcommittee Chairman Ballenger, Representative Tate appeared as the lead witness. He pointed to the “unfair” manner in which the Department of Labor had enforced the federal child labor law and which “has prevented employers from hiring hundreds of teenagers in my district.” DOL, he charged, had shifted its interpretation of the statute from “occasional and incidental” to “rare and emergency” with respect to work-related driving by 16- and 17-year-olds, an “unworkable standard” in his judgment. The Department, he suggested, should have been pursuing “other priorities” rather than “punishing businesses that provide part-time jobs and summer jobs to teenagers.”

Representative Tate was followed by Edward Fitzpatrick, an automobile dealer (two dealerships with 75 employees) from Renton, Washington, representing the Washington State Auto Dealers Association. He said that he had thought the Department of Labor would “be pleased that a private business, without government subsidy or funding, hired these teenagers;” but, instead, he “was fined $1,200 for alleged child labor violations under the Fair Labor Standards Act for allowing

\[32\text{Congressional Record, April 26, 1994. E780.}\]

\[34\text{Representative Tate had replaced Representative Kreidler as a result of the 1994 election.}\]

\[35\text{Congressional Record, August 1, 1995. p. S11107.}\]

teenagers to drive more often than in ‘rare or emergency’ situations. I was one of nearly 60 dealers in the Seattle area that was fined.” He argued that these dealers had been “unfairly fined.” The Washington State Auto Dealers Association, he concluded, “strongly supports” the clarification contained in the Tate bill.37

Linda Golodner, as President of the National Consumers League and Co-chair of the Child Labor Coalition, presented a different perspective. She stressed the safety hazard for persons, newly licensed to drive but lacking experience on the road, who drive as part of their employment responsibilities. “Teenagers are at risk every time they get behind the wheel,” she stated, citing accident statistics. The Insurance Institute for Highway Safety “reports that the risk of crash involvement per mile driven among drivers 16 to 19 years old is four times the risk among older drivers. That risk is highest at age 16 and 17.” She presented similar statistics from the National Institute for Occupational Safety and Health (NIOSH) and contended: “Teenagers are inexperienced drivers. They should not be driving on the job.” While the case of the National Automobile Dealers Association was the immediate topic, the standard (HO 2), if weakened, could have broader implications: for example, if a youth employed at a restaurant were asked to deliver a pizza to the home of a customer — a type of work in which the pressure for rapid service is intense. Ms. Golodner closed her oral testimony by urging Congress to “uphold safety standards in the face of industry demands to use cheap teenage labor.”38 The National Consumers League, she affirmed, was “strongly opposed” to the Tate bill.39

Questioning from the Subcommittee was begun by Representative Ballenger. The Washington State Auto Dealers Association had complained that enforcement of HO 2 (the restriction of job-related teen driving) had been both unexpected and retroactive. Mr. Ballenger queried: “...how retroactive was it?” Mr. Fitzpatrick deferred to the Association’s executive vice president, Janet Ramble. Ms. Ramble explained that the Department, aware that auto dealers hired large numbers of young workers and demonstrating a renewed interest in compliance with child labor law, had created “something called a strike force” and had targeted auto dealers. It wasn’t, she conceded, that penalties had been imposed retroactively but, rather, that the Department had unexpectedly increased its enforcement of a long existing standard.40 In a press statement issued the day of the hearing, the National

37Hearing, op. cit., 1996. p. 16-18. In his prepared statement, Fitzpatrick denied that there was any significant risk involved. “Before we hire anyone, including teenagers, for a position in which they will do any driving, dealers thoroughly check the applicant’s driving record. Applicants,” he continued, “with poor driving records are not hired. Lot attendants are acutely aware they are entrusted with the company’s vehicles and that their jobs are on the line if they drive carelessly. They are proud to accept the responsibility because it is a significant step in becoming an adult.” (p. 22) He summarized his experience with the Department of Labor as the kind of “overzealous enforcement that makes businesses and the public lose faith in government.” (p. 23)


40Hearing, op. cit., 1996. p. 124. In her annual report for FY1988, Labor Secretary Ann McLaughlin noted: “With an eye toward updating and improving administration of labor standards that have been on the books for a long time, a Child Labor Advisory Committee (continued...
Automobile Dealers Association and the Washington State Auto Dealers Association reiterated their strong support for the Tate/Gorton legislation.\textsuperscript{41}

Meanwhile, those supporting modification of HO 2, growing impatient about achieving direct amendment of the FLSA, sought action through an alternative route: i.e., the appropriations process. In H.R. 3755, providing appropriations for the Department of Labor, language had been added that would have prevented the Department from spending funds for “enforcement or the issuance of fines” under HO 2. Passed by the House, the language was stripped from the bill in the Senate, though the legislation ultimately died at the close of the 104\textsuperscript{th} Congress.

\section*{Action Taken by the 105\textsuperscript{th} Congress}

Auto dealers in Washington State, \textit{The New York Times} reported in the spring of 1998, “say it never occurred to them that they could be breaking the law by giving part-time jobs to 16 and 17-year-olds.” And so, \textit{The Times} added, the auto “dealers came to Congress ... for a law that would supersede the [DOL] regulation.” Darlene Adkins of the National Consumers League viewed the situation differently. “What we’re seeing is this trend of employers, industries and associations getting penalized for child labor violations ... and instead of saying we need to fix this problem and comply with the law, they’re putting pressure on legislators to change the law.”\textsuperscript{42}

\section*{Committee Consideration in the House}

On July 31, 1997, Representative Combest\textsuperscript{43} introduced H.R. 2327. The bill, titled the “Drive for Teen Employment Act,” was considered and marked-up by the Subcommittee on Workforce Protections, March 6, 1998. It was ordered reported from the full Committee on Education and the Workforce on April 1.

During full Committee mark-up, Representative Fawell (a co-sponsor of H.R. 2327) argued that the departmental requirement “significantly restricts the ability of teenagers to gain valuable experience in the workplace” and has “created confusion for many businesses.” As a result, he stated, “there have been a number of employers, primarily automobile dealerships, which have been fined thousands of

\textsuperscript{40}(...continued)

was established to review regulations on employment of minors. These regulations had remained essentially unchanged for 50 years.” (p. 11) Ms. Ramble, for the automobile dealers, argued that the Department had altered its approach to HO 2 but that it “didn’t notify anyone that they had reinterpreted incidental and occasional to mean emergency only ... the policy changed internally and they penalized people.”

\textsuperscript{41}National Automobile Dealers Association, \textit{NADA News}, September 12, 1996. 2 p.


\textsuperscript{43}Representative Tate was no longer a Member of Congress.
dollars for allowing teens to drive cars from one lot to another or to a nearby gas station for refueling.” He expressed his “strong support” for the measure.44

Conversely, the bill was opposed by DOL. Secretary Alexis Herman, in a letter of Committee Chairman Goodling, expressed concern “that the result of this legislation may be an increase in the number of automobile-related injuries and deaths caused by very young and inexperienced drivers on the job.” She noted that many young persons in the targeted age group (16 to 17 years-of-age) “will have just been licensed to drive” and, were the legislation adopted, would be spending “as much as one-fifth of their workweek behind the wheel on public roads and highways.” She stated that the option would not be limited to auto dealerships. “Sixteen and 17-year old youths could be employed to deliver pizzas or to shuttle passengers to and from hotels, for example, as long as they did not exceed the 20 percent limitation” — types of work she identified as “fast-paced” and “highly competitive.” The Secretary concluded: “We believe that responsible public policy dictates that any modifications to weaken child labor protections be carefully weighed against the potential harm to the health and safety of these young people.”45

Floor Consideration in the House

On September 28, Representative Fawell moved to suspend the rules and to bring H.R. 2327 to the floor. Through the legislative process, the earlier Kreidler and Tate/Gorton and Combest bills had been expanded to include much of the regulatory language that DOL had earlier developed (with certain other restrictive provisions). As called up for floor action, H.R. 2327 presented two general thrusts. First. It provided that, under the child labor provisions of the FLSA, “employees who are under 17 years of age may not drive automobiles or trucks on public roadways.” Thus, the discretion of the Department of Labor in establishing conditions under which 16-year-olds might drive was eliminated, a decision that strengthened the child labor protections of the Act. Second. Occupational driving by 17-year-olds was permitted only if certain conditions were met. These included:

(A) such operation is restricted to daylight hours;
(B) the employee holds a State license valid for the type of driving involved in the job performed and has no record of any moving violation at the time of hire;
(C) the employee has successfully completed a State approved driver education course;
(D) the automobile or truck is equipped with a seat belt for the driver and any passengers and the employee’s employer has instructed the

44Statement of Representative Harris Fawell at mark-up of H.R. 2327, April 1, 1998.
employee that the seat belts must be used when driving the automobile or truck;

(E) the automobile or truck does not exceed 6,000 pounds of gross vehicle weight;

(F) such driving does not involve—
   (i) the towing of vehicles;
   (ii) route deliveries or route sales;
   (iii) the transportation for hire of property, goods, or passengers;
   (iv) urgent, time-sensitive deliveries;
   (v) more than 2 trips away from the primary place of employment in any single day for the purpose of delivering goods of the employee’s employer to a customer (other than urgent, time-sensitive deliveries);
   (vi) more than 2 trips away from the primary place of employment in a single day for the purpose of transporting passengers (other than employees of the employer);
   (vii) transporting more than 3 passengers (including employees of the employer); or
   (viii) driving beyond a 30 mile radius from the employee’s place of employment; and

(G) such driving is only occasional and incidental to the employee’s employment.

For purposes of subparagraph (G), the term ‘occasional and incidental’ is no more than one-third of an employee’s worktime in any workday and no more than 20 percent of an employee’s worktime in any workweek.”

The proposed language added the provision that “the term ‘occasional and incidental’ shall apply to all pending cases, actions, or citations in which a final judgment has not been entered, except that it shall not apply to any case, action, or citation involving property damage or personal injury.” Thus, certain pending cases, flowing from prior DOL enforcement actions, would be voided.46

The legislation, Representative Fawell explained, was basically a response to what was perceived to have been inconsistent DOL policy. He recalled that the “current interpretation” of DOL regulations had resulted in “enforcement actions

46 Congressional Record, September 28, 1998. P. H9124-H9125. Various provisions had been under discussion over the years. In H.R. 1106 of the 103rd Congress, Representative Lantos, while recognizing the need for some driving by youth workers, would have set the age limit at 17 years while requiring that occupational driving “be limited to 20 percent of the minor’s work in any workday and may not exceed 5 percent of the minor’s work in any workweek.” Again, on September 12, 1996, Representative Green of Texas had written to Subcommittee Chairman Ballenger suggesting the following changes in the Tate Bill: “(1) limit to one-third, the time a minor is allowed to operate an automobile; and (2) limit to a 50 mile radius, the distance a minor is allowed to operate an automobile.”

In the Senate, the language dealing with the effective date and retroactive immunity would be subjected to technical amendment while retaining its substance. See Congressional Record, October 12, 1998. p. S12397.
against certain employers who had no advance notice” of what the Department’s policy was. He opined:

Not only is the department’s current interpretation not consistent with the regulation itself, but it has had the effect of denying important job opportunities for teenagers without any demonstrated increase in safety. As a result, innocent small business owners have been fined by the Department of Labor on the basis of an interpretation of a regulation of which they did not even have notice.

Representative Fawell reviewed the legislation that the Committee had marked-up, noting that subsequent negotiations between the sponsors of the bill and the Department had resulted in compromise language (quoted above) which was more protective of youth workers than the original proposal.47

Representative Ford termed the compromise “bipartisan” and commended the various advocates of protection for young workers for their insights and persistence which had resulted in legislation “addressing many of the legitimate concerns” that had been raised. He took note of the high accident rate associated with younger drivers, observed that while 16-year-olds would no longer be allowed to engage in occupational driving at all, the regulations governing such activity on the part of 17-year-olds had been strengthened. Mr. Ford terms the result “a sensible balance.”48

As debate continued, the focus returned to the specific case of the automobile dealers. “There are many young people, male and female, who have gotten their start working part-time at an auto dealership,” Representative Andrews observed. “Frankly, if the young person is not permitted to drive on occasion, his or her value to the auto dealer as an employer is rather diminished.” The bill, Mr. Andrews argued, “is really a youth employment bill.”49 Representative Blumenauer, taking a regional focus, pointed to the auto dealers of the Pacific Northwest, “pretty straight-ahead folks, good public citizens and easy to work with,” upon whom had been imposed “over $200,000 in fines” for violation of child labor requirements. “The process by which the new rule was adopted I think was bad; the fines were worse.” But, like Mr. Andrews, he emphasized the youth employment impact: the loss of jobs by teenagers deprived of the option of occupational driving. “These were jobs that gave young people the opportunity to earn money and gain career-building experience,” Mr. Blumenauer stated.50

Representative Green, an early sponsor of legislation to revise the requirements affecting occupational driving by teens, applauded the “clear definition” of the “limited driving” allowed by the bill and pointed to the “clear guidelines for employers” who hire such workers. His fellow Texan, Mr. Combest, affirmed a long interest “in reforming regulations that do not pass what I call ’The Stupid Test.’ I believe,” he added, “the teen driver regulation is a poster child for failing ’The

Stupid Test.” Like Representative Blumenauer, Mr. Combest pointed to what he viewed as a flawed rulemaking system at DOL.

... the Department of Labor made a major regulatory change in the working definition of what incidental and occasional meant for licensed 16 and 17 year olds driving in the workplace. ... The Department did this with no formal rule making and without informing any small businesses. Businesses first learned of the change when they received fines for non-compliance.

Representative Combest affirmed that, as sponsors of the legislation, “[w]e simply seek to bring a clearer, more reasonable standard for workers and business....”

No Members appeared in opposition to the legislation which was adopted on a voice vote.52

Senate Action and Final Passage

H.R. 2327 arrived in the Senate on October 1, 1998. On October 12, Senator Jeffords, chair of the Committee on Labor and Human Resources, sought unanimous consent to have the bill brought up for immediate consideration. He also proposed a technical amendment that altered the wording (but not the substance) of the provision dealing with the effective date and with retroactive immunity for employers against whom fines had been imposed. Without objection and without debate, the measure was approved.53

The amended bill was returned to the House on October 13.54 Later that afternoon, following a brief discussion by proponents of the measure, the Senate amendment was accepted by a voice vote; the bill was passed.55 On October 31, 1998, the legislation was signed by the President.

51 Congressional Record, September 28, 1998. p. H9127. Representative Combest noted that the legislation “has been endorsed by the National Small Business United, National Automobile Dealers Association, National Community Pharmacists Association and the National Association of Minority Automobile Dealers.”


Some General Considerations

As signed into law, H.R. 2327 (P.L. 105-334) appears to have been a product of compromise; some regarded it as “noncontroversial.”56 That it was considered, both in the House and in the Senate under unanimous consent and without a recorded vote might confirm that assessment. However, a number of questions may still arise as the statute is implemented.

Rulemaking -vs- Legislation

Development of standards under which young persons, new to the world-of-work, may be safely employed is a complicated undertaking. Initially, in 1938, Congress established a broad framework for such regulation and left its fine-tuning to the Secretary of Labor. Through the years, the Secretary has dealt with that issue through the rulemaking process: i.e., suggesting a policy, publishing a proposed regulation, inviting comment, and, after extended evaluation, publishing a final rule. Such a rule could then be further modified, if necessary, through the same process.

Even when the regular rulemaking process is followed scrupulously (which it may not have been in the case of the teen drivers), the result can be time consuming and frustrating. A general review of federal child labor regulation commenced early in the Reagan Administration and concluded without achieving its putative intent: i.e., the existing regulations were neither changed nor affirmed to be appropriate. Then, late in the Reagan Administration, the Department created a special Child Labor Advisory Committee which conferred and consulted into the Bush Administration and expired by the time the Clinton Administration came into office. In 1994, under Secretary Reich, the Department commenced another general review of the federal regulation of child labor — a process that is ongoing.

It may be that the DOL regards the existing child labor regulations that it has developed (including HO 2) as functioning well and without need of major change. But, in the enforcement of existing child labor regulations, some have argued that DOL has been neither precise, clear nor consistent — a position voiced with some vigor by the automobile dealers associations. At the same time, some proponents of the regulation believe that it is inappropriate to weaken the system of hazardous occupations orders over issues that are essentially administrative. The precise restriction of employment of youth workers within the context of a sometimes rapidly changing workplace, some might argue, may lend itself more nearly to regulation than to statute.

In the case of young persons employed by Pacific Northwest automobile dealers (who drove as a part of that employment), it would appear that the system was not entirely responsive. As the issue emerged, the Washington automobile dealers called upon the Secretary to reexamine the existing regulations. At least in part, the automobile dealers suggested that there had been a failure of communication between the Department and employers: that internal interpretive changes in policy

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had not been made known, effectively, to the auto dealerships prior to enhanced enforcement initiatives.\textsuperscript{57}

In March 1994, Senator Gorton (with nine House Members from Washington) had sought Secretary Reich’s “intervention to prevent an injustice against a large number of auto dealers in Washington state who are unintentionally at odds with an undefined Department of Labor regulation.” The letter stated that the Senator and the signatory Members had been advised by the auto dealers:

... no one from the Department of Labor has ever communicated to them an interpretation of “incidental and occasional” driving that is at odds with this [contested] practice. In fact, it was only during the current compliance audit that the dealers first learned of an internal Department of Labor interpretation meaning driving only in an emergency and/or not more than once or twice per year, an interpretation found nowhere in law or regulation.

Mr. Secretary, we believe that the vast majority of auto dealers in our state have sincerely attempted to comply with the law and regulation as they are written. They have reviewed the law and the regulation; they have consulted their national and state trade associations on compliance matters.

It affirmed: “... we share their frustration that they are being penalized for violating a phrase which the Department has been unable to define in its own regulations.”\textsuperscript{58}

In retrospect, it appears, DOL would have preferred an administrative solution in the HO 2 case. In a September 12, 1996, letter to Chairman Ballenger of the Subcommittee on Workplace Protections, Secretary Reich reviewed the Department’s opposition to the Tate bill and concluded that DOL “… believes that these issues should be dealt with through the rulemaking process.”\textsuperscript{59} In a March 31, 1998, letter to Chairman Goodling of the Committee on Education and the Workforce, Secretary Herman expressed the same view: “As a general matter, it is preferable to address such issues through notice and comment rulemaking rather than legislation.”\textsuperscript{60} But, some employers and Members of Congress may have lost confidence in the agency rulemaking option. Litigation continued with respect to past violators — perhaps not an insignificant matter. Therefore, direct legislative involvement resulted.

\textbf{The Impact For Future Rulemaking?}

During hearings on another aspect of the FLSA, the former chair of the Senate Committee on Labor and Human Resources, Senator Kassebaum (R-Kansas), opined

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\item \textsuperscript{57} Hearing, \textit{op cit.}, 1996. \textit{p. 124.}
\item \textsuperscript{58} Senator Slate Gorton, et al., to Secretary of Labor Robert B. Reich, March 9, 1994.
\item \textsuperscript{59} Secretary of Labor Robert B. Reich to Representative Cass Ballenger, September 12, 1996.
\item \textsuperscript{60} Secretary of Labor Alexis Herman to Representative William Goodling, March 31, 1998.
\end{itemize}
that “what was once a simple process has given rise to a confusing maze of rules and regulations about how the law should be applied in each workplace.”\textsuperscript{61} That “maze of rules and regulations,” however, did not develop spontaneously. Rather, they have resulted from the form and structure of the legislation DOL was asked to implement.

As development of H.R. 2327 proceeded, some questioned whether the legislation was practical: i.e., were its terms sufficiently precise. The impetus for the teen driver bill, after all, had stemmed, at least in part, from DOL’s interpretation of the language of existing regulations. But, even with explicit definitions, interpretive questions may well arise. Some may be rooted in unforeseen circumstances.

For example, if a youth were on the road at dusk (a 30 mile radius is allowed) and drove back after dark to his employer’s establishment, would that be a violation? His operation of the vehicle is permitted only during daylight hours. Further, P.L. 105-334 requires that only “one-third of an employee’s worktime in any workday” may be given over to driving: similarly, “no more than 20 percent of an employee’s worktime in any workweek.” If a youthful driver were 25 miles from her place of employment, caught in a traffic jam, and her third of a workday expired before she returned to her place of business, has a violation occurred? At a minimum, such situations seem to imply the need for very careful planning in the utilization of one’s workforce, and for equally careful record keeping and compliance inspection. Must the employer review time sheets for youth workers, assess length of likely travel time (including any mishap), and then send out only a driver with undeniably ample time to complete the trip/errand before expiration of her third of a workday — and early enough to avoid darkness, however defined?\textsuperscript{62}

Such contingencies may need to be dealt with in regulations or opinion letters developed by DOL: regulations as free as possible from ambiguity so that they are clearly and easily understood by employers, workers, and departmental compliance staff. Each nuance of policy (each regulatory provision) could provide an occasion, were enforcement strict, for sanctions. Judgment will be required both in development and implementation of the regulations for administering P.L. 105-334. On such issues, there may well be disagreement and, thus, some measure of dispute may continue even in the wake of congressional action.

The Safety Factor

Little may be expected from most 17 year-old workers in the way of prior training or skill. However, in the context of P.L. 105-334, there is one critical skill that such workers must possess: i.e., the ability to drive. The question remains as to how safely such teen workers may drive. Are young persons, for whatever reasons, more likely to experience risks in the workplace than older persons?

\textsuperscript{61}U.S. Congress. Senate. Committee on Labor and Human Resources. \textit{Oversight of the Fair Labor Standards Act}. Hearings. 104\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess., February 27, 1996. p. 1.

\textsuperscript{62}A youth worker would still be subject to workhours limitations during periods when school was in session as well as some variation depending upon whether the workday was immediately prior to a school day — factors further complicating employer calculations.
In the state of Washington, where the issue of teen drivers seems initially to have surfaced, an analysis for the period 1988-1991 found that 16 and 17 year-olds appear to have an overall work-related injury rate “more than three times greater than for adults for each hour worked.” Within the 16- to 17-year-old cohort, it was found that “the injury rate for males is almost two times greater than that for females.” The report speculated that the higher rate of injury among males might result from a propensity for males to “work in more hazardous jobs” and to “exhibit more risk-taking or reckless behavior.” Speaking generally, the report suggested that “adolescents are a high-risk group for occupational injury” and explained:

This increased risk is due to the differences between adults and adolescents in development, size, maturity, experience, and judgment. Risk-taking behavior is a typical characteristic of adolescence as they explore their capabilities but often lack perception of their limitations and vulnerability. In a workplace setting, teens may not feel capable of refusing to do a task that is inappropriate or dangerous, especially if a desire exists to be treated more like and adult than a child.

And, the report added: “They may also believe that they would not be asked to do something if it is considered dangerous.”

When, in 1990, Secretary Dole published the proposed rule dealing, inter alia, with HO 2, the Advisory Committee had “recommended that there be no exemption from the age restraints because, among other concerns, “16- and 17-year-old drivers lack experience, maturity and have poorer judgment than adults” and, further, that “[i]n comparison to adult drivers, 16- and 17-year-old minors generally have more accidents per million miles and per driver.” The Department observed, based upon data from the National Transportation Safety Board: “The accident rate per million miles for 16- and 17-year-old drivers was 12.7 for 1982-83, 14.0 for 1983-84, and 13.2 for 1984-85. The accident rate per million miles for 18-year-old and older drivers was 8.1, 10.0, and 9.2.”

More recently, the Insurance Institute for Highway Safety observed that while the “overall driver death rate [not accident rate] declined during 1975-96 from 15 to 12 per 100,000 licensed drivers,” that for 16-year-olds “was trending upward.” The Institute stated: “The rate increased among 16-year-old drivers from 19 per 100,000 in 1975 to 35 per 100,000 licensed drives in 1996, and the increase occurred among both males and females.” Conversely, the death rate among older teens has been declining slightly. “Data aren’t available to assess why the death rate for the youngest drivers is going up while rates are trending down among older drivers, even older teenagers.” Institute Vice President Allan Williams offers what he terms the

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64Ibid., p. 37.

65Ibid., p. 1.

“most plausible hypothesis ... that 16 year-olds are driving more in high-risk circumstances.” And, he adds: “Maybe 16 year-olds are getting easier access to cars than they used to....” The Institute concluded that restrictions on driving by teens ought to be increased and urged a system of graduated licensing as has been adopted in a number of jurisdictions.67

Through the years, the data may vary somewhat (as they may from one agency to another, depending upon methodology), but the general pattern appears consistent. Younger, less experienced drivers have relatively high accident rates. Where driving on public roads or in other public areas is concerned, some have argued, the bottom line “must be safety — the safety of our children and of all of us who travel on public thoroughfares.”68

The Department of Labor, responding to its mandate from the Congress, has emphasized the safety factor, requiring that where young persons are expected to drive as part of their work obligation, that requirement should not be more than “occasional and incidental,” should be strictly of a limited nature, and should not be a preferred activity.

Others, not wholly in disagreement, have suggested that the market may provide its own protection. It might be argued that employers, with expensive equipment and insurance obligations, have a vested interest in safe driving practices on the part of their staff. “There are some of my colleagues who will say that this legislation will endanger teenagers,” observed Representative Fawell, an active supporter of H.R. 2327. “But the fact of the matter is that teens do drive and they are safer when driving at work with these restrictions, than they would be outside of work.”69

67Statement released by the Virginia-based Insurance Institute for Highway Safety, April 14, 1998. The Institute pointed out that, since 1996, six states (California, Florida, Georgia, Michigan, North Carolina, and Ohio) “have adopted programs that include essential elements of graduated licensing. Such elements include six months or more in a learning phase, during which supervision is required. Then there’s another six months to a year in an intermediate licensing phase, during which unsupervised driving isn’t allowed in high-risk situations....” But, Williams concluded, “the majority of states still allow quick and easy access to licenses.”

68Hearings, op. cit., 1996. p. 29-30. A recent study, Protecting Youth at Work (Washington, National Academy Press, 1998), pages 4, 82 and 105, suggests that just over 24% of work-related deaths for 16 and 17-year-olds were associated with motor vehicles.

69Opening Statement, Representative Fawell, Committee on Education and the Workforce, April 1, 1998. Emphasis in the original.