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H.R. 1180, WORKING FAMILIES FLEXIBILITY ACT OF 2017

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

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H.R. 1180, WORKING FAMILIES FLEXIBILITY ACT OF 2017

Wednesday, April 5, 2017
U.S. House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections
Washington, D.C.

The subcommittee met, pursuant to call, at 10:00 a.m., in Room 2175, Rayburn House Office Building, Hon. Bradley Byrne [chairman of the subcommittee] presiding.

Present: Representatives Byrne, Grothman, Stefanik, Ferguson, Takano, DeSaulnier, Norcross, and Shea-Porter.

Also Present: Representatives Foxx, Scott, and Bonamici.

Staff Present: Bethany Aronhalt, Press Secretary; Andrew Banducci, Workforce Policy Counsel; Ed Gilroy, Director of Workforce Policy; Jessica Goodman, Legislative Assistant; Callie Harman, Legislative Assistant; Nancy Locke, Chief Clerk; John Martin, Professional Staff Member; Dominique McKay, Deputy Press Secretary; James Mullen, Director of Information Technology; Krisann Pearce, General Counsel; Lauren Reddington, Deputy Press Secretary; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Olivia Voslow, Staff Assistant; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Denise Forte, Minority Staff Director; Christine Godinez, Minority Staff Assistant; Eunice Ikene, Minority Labor Policy Advisor; Stephanie Lalle, Minority Press Assistant; Kevin McDermott, Minority Senior Labor Policy Advisor; Richard Miller, Minority Labor Policy Advisor; Veronique Pluviose, Minority General Counsel; and Elizabeth Watson, Minority Director of Labor Policy.

Chairman BYRNE. Good morning, everyone. A quorum being present, the subcommittee will come to order.

I would like to begin by welcoming our witnesses. Some of you have traveled from across the country, including one from my home State of Alabama, to be here today. Welcome, and thank you for joining us.

As I said at our first subcommittee hearing of the 115th Congress, the rules and regulations surrounding the *Fair Labor Standards Act* are simply outdated. We live in the twenty-first century, yet many of the rules governing America's workplaces were designed by those who lived during the Great Depression.

It goes without saying that a lot has changed since then. Millennials now represent the majority of the workforce. Hard for me to believe, but that is true. In nearly half of two-parent households, both mom and dad work full time. That is up from roughly 30 percent in 1970. Meanwhile, technological advances continue to rapidly change the very nature of how we work and stay connected to work.

As a result, men and women today face a different set of challenges when it comes to balancing demands of their professional lives and their personal lives. There simply are not enough hours in the day. I hear that a lot from people. It is something I hear so often as I talk to neighbors and families in my district.

As our colleague, Representative Martha Roby, once put it, "We cannot legislate another hour in the day." That is true, but we can do our part to ensure the Federal Government is not making life more difficult for workers and their families.

That is why Representative Roby introduced the *Working Families Flexibility Act*, this commonsense proposal, would improve the quality of life of many hardworking men and women by removing outdated Federal restrictions imposed solely on the private sector.

You see, for decades, public sector employers have been able to offer workers the choice between paid time off and cash wages for working overtime. That is because in 1985, Congress amended the *Fair Labor Standards Act* to give public sector employees greater flexibility.

In fact, in a report filed by this very committee more than 30 years ago, our Democrat colleagues wrote that this change in law recognized the "mutual benefits" of comp time for State and local governments and their employees. The Democrat Committee report even refers to the "freedom and flexibility" comp time would offer public sector workers.

But under Federal law, it is still illegal to extend the same benefits to private sector employees who are eligible for overtime pay. This is not right and it is not fair. Private sector workers should be afforded the same freedom to do what is best for themselves and their families.

For many Americans working paycheck to paycheck, earning some additional income is the choice that is best for them, but the Federal Government should not assume that is the best choice for everyone.

Many individuals would welcome the opportunity to put in a few extra hours if it meant having more paid time off to catch a child's baseball game or dance recital. Others are in desperate need of greater flexibility to care for an aging relative, juggle work and parenting while a spouse is deployed overseas, or complete another semester of college while working full-time, something Mr. Takano and I have talked a lot about, helping people that are trying to go back to school.

Every worker has a different story, but they all deserve the choice between more time and more money in the bank. They all deserve to choose the best option that meets their personal needs.

Unfortunately, union leaders and special interest groups have tried desperately over the years to deny workers the freedom to make their choice. They have used no shortage of false and mis-

leading rhetoric in the process, so allow me to briefly explain what this bill actually does.

This bill preserves the 40-hour work week and existing overtime protections. I will say it again. This bill preserves the 40-hour work week and existing overtime protections. For workers who elect to receive paid time off, for workers who elect to receive paid time off, their leave would accrue at the same rate, time-and-a-half, as wages.

The bill includes strong protections to ensure the use of comp time is completely voluntary. Workers can switch back to receiving cash wages whenever they choose, and they are allowed to cash out their comp time for any reason at any time.

Additionally, it is up to the employee to decide when to use his or her time off, so long as reasonable notice is provided and the request is not overly disruptive. This is the same commonsense standard that exists in the public sector, and I suspect it is the same standard that is applied in most of our congressional offices.

This bill also includes important protections to prevent employers from intimidating or coercing employees into receiving paid leave in lieu of cash wages, and the Department of Labor would have full authority to enforce those protections.

This legislation is ultimately about freedom, choice, and fairness. An antiquated Federal law should not limit the ability of private sector employees to better balance work and family.

Democrats and Republicans came together more than 30 years ago to amend the law to provide more choices for public sector workers, and it is time we did the same thing for workers in the private sector.

This is not a new or radical idea either. In fact, President Bill Clinton had his own comp time proposal during his presidency.

I want to thank Representative Roby for leading this effort. Improving workplace flexibility is one step we can take to make a positive difference in the lives of American families, and it does not require another government program, another Federal mandate, or onerous regulations that burden small businesses. That is why I support the *Working Families Flexibility Act*, and I urge all of my colleagues to do the same.

I look forward to our discussion today, and I will now yield to the ranking member, Mr. Takano, for his opening remarks.

[The statement of Chairman Byrne follows:]

Prepared Statement of Hon. Bradley Byrne, Chairman, Subcommittee on Workforce Protections

Good morning everyone. I'd like to begin by welcoming our witnesses. Some of you have traveled across the country—including from my home state of Alabama—to be here today. Welcome, and thank you for joining us.

As I said at our first subcommittee hearing of the 115th Congress, "the rules and regulations surrounding the *Fair Labor Standards Act* are simply outdated." We live in the 21st century, yet many of the rules governing America's workplaces were designed by those who lived during the Great Depression.

It goes without saying that a lot has changed since then. Millennials now represent the majority of the workforce. In nearly half of two-parent households, both mom and dad work full time. That's up from roughly 30 percent in 1970. Meanwhile, technological advances continue to rapidly change the very nature of how we work and stay connected to work.

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For decades, public-sector employers have been able to offer workers the choice between paid time off and cash wages for working overtime. That's because in 1985, Congress amended the *Fair Labor Standards Act* to give public-sector employees greater flexibility. In fact, in a report filed by this very committee more than 30 years ago, our Democrat colleagues wrote that this change in the law recognized the "mutual benefits" of comp time for state and local governments and their employees. The Democrat committee report even refers to the "freedom and flexibility" comp time would offer public-sector workers.

But under federal law, it is still illegal to extend the same benefits to private-sector employees who are eligible for overtime pay. This isn't right, and it isn't fair. Private-sector workers should be afforded the same freedom to do what's best for themselves and their families. For many Americans working paycheck to paycheck, earning some additional income is the choice that's best for them. But the federal government shouldn't assume that's the best choice for everyone.

Many individuals would welcome the opportunity to put in a few extra hours, if it meant having more paid time off to catch a child's baseball game or dance recital. Others are in desperate need of greater flexibility to care for an aging relative, juggle work and parenting while a spouse is deployed overseas, or complete another semester of college while working full-time.

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This legislation is ultimately about freedom, choice, and fairness. An antiquated federal law shouldn't limit the ability of private-sector employees to better balance work and family. Democrats and Republicans came together more than 30 years ago to amend the law to provide more choices for public-sector workers, and it's time we did the same for workers in the private sector. This isn't a new or radical idea either. In fact, President Bill Clinton had his own comp time proposal during his presidency.

I want to thank Representative Roby for leading this effort. Improving workplace flexibility is one step we can take to make a positive difference in the lives of American families—and it doesn't require another government program, a federal mandate, or onerous regulations that burden small businesses. That is why I support the *Working Families Flexibility Act*, and I urge all of my colleagues to do the same.

I look forward to our discussion today, and I will now yield to Ranking Member Takano for his opening remarks.

Mr. TAKANO. Well, thank you, Chairman Byrne. With all due respect, H.R. 1180 needs to be renamed "The Betrayal of Working Families Act." It creates new rights for employers to withhold

workers' hard-earned overtime pay, but really no new rights for employees.

Right now, an employee who takes time off from work can use her overtime pay to cover her expenses while she is out. She can put her overtime pay in the bank where it will earn interest, and take time off from work later, using that paycheck plus the interest to cover her expenses. It is that simple. Nothing is as fungible or as convenient as cash.

The Betrayal of Working Families Act makes things much more complicated. If instead of getting overtime pay, she accepts her employer's offer of comp time, she will not get a paycheck for her overtime. She will get an IOU. Many workers will feel compelled to accept comp time given the power differential between nonunion employees and their employers.

By accepting comp time, she would forfeit her overtime pay and the interest she would have earned if she put that paycheck in the bank. Instead of paying her for the overtime when she earned it, at some point in the future, which could be more than a year later, her employer may let her take comp time, returning her withheld wages, minus any interest the employer earned while holding on to her paycheck.

She has essentially given her employer an interest-free loan repayable only when the employer decides it is convenient, not when she needs the money or the time off from work.

I have a slide here that shows how this could play out across a company. Now ACME Inc., a hypothetical company, could get 160 free comp time hours from each of its 200,000 FLSA-covered employees at $7.25 an hour from each employee. That is $232 million ACME Inc. would not have to pay to its workers for about a year after they earned it. To get an equivalent loan from a bank, ACME Inc. would have to pay roughly 6 percent interest. ACME Inc. saves $14 million by relying on comp time to take out an interest-free loan from its employees instead.

As this example illustrates, the *Betrayal of Working Families Act* is simply another attempt by congressional Republicans to give every advantage to corporations and special interests, and take, take, take from families who have the least to spare.

Since January, President Trump and congressional Republicans have broken promise after promise to working people. President Trump said in his inaugural address, "To all Americans, in every city near and far, small and large, from mountain to mountain and from ocean to ocean, hear these words: you will never be ignored again. Your voice, your hopes, and your dreams will define our American destiny."

This could not be further from the truth. The majority's plan to repeal the ACA has threatened 24 million Americans' access to healthcare. Their attack on rules to protect retirement security has undercut millions of Americans' ability to save for old age, and they fought the overtime rule which would give millions of hardworking Americans a raise. Up next, President Trump wants tax breaks for the wealthy and to gut programs like workforce training that would help people get good-paying jobs.

Instead of rigging the economy in favor of the rich and powerful, it is time to rewrite the rules to make the economy work for everyday Americans.

Hardworking Americans made our Nation's productivity rise by more than 70 percent over the past four decades. Yet, it is CEOs' pay that has risen by nearly 1,000 percent during that same period while workers' wages barely grow. Special interests do not need more leverage and power. It is hardworking Americans' turn to finally get a break.

Instead of bringing up legislation that diminishes people's ability to provide for and to care for their families, this Committee should bring up legislation that strengthens the *Fair Labor Standards Act* by raising the minimum wage, restoring the overtime salary threshold, ensuring equal pay, providing truly flexible and predictable schedules and paid leave, as well as strengthening workers' ability to bargain for a better life. These solutions are clear and, unfortunately, H.R. 1180 is not among them.

Thank you. I yield back, Mr. Chairman.

[The statement of Mr. Takano follows:]

Prepared Statement of Hon. Mark Takano, Ranking Member, Subcommittee on Workforce Protections

Thank you, Chairman Byrne. H.R. 1180 should be renamed the *Betrayal of Working Families Act*. It creates new rights for employers to withhold workers' hard-earned overtime pay, but no new rights for employees.

Right now, an employee who takes time off from work can use her overtime pay to cover her expenses while she's out. She can put her overtime pay in the bank where it will earn interest, and take time off from work later—using that paycheck, plus the interest to cover her expenses.

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By accepting comp time, she would forfeit her overtime pay and the interest she would have earned if she put that paycheck in the bank. Instead of paying her for the overtime when she earned it, at some point in the future—which could be more than a year later, her employer may let her take comp time, returning her withheld wages—minus any interest the employer earned while holding onto her paycheck.

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Instead of rigging the economy in favor of the rich and powerful, it's time to rewrite the rules to make the economy work for everyday Americans.

Hardworking Americans made our nation's productivity rise by more than 70 percent over the past four decades. And yet it is CEOs' pay that has risen by nearly 1000 percent during that same period, while workers' wages barely grow.

Special interests don't need more leverage and power—it's hardworking Americans' turn to finally get a break.

Instead of bringing up legislation that diminishes people's ability to provide for and care for their families, this committee should bring up legislation that strengthens the Fair Labor Standards Act by raising the minimum wage, restoring the overtime salary threshold, ensuring equal pay, providing truly flexible and predictable schedules and paid leave, as well as strengthening workers' ability to bargain for a better life. The solutions are very clear—and H.R. 1180 is not among them.

Chairman BYRNE. Thank you, Mr. Takano. Pursuant to Committee Rule 7(c), all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record, and without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure to introduce today's witnesses. Ms. Leslie-Jo Boyd Christ serves as chief resource officer at WellStone Behavioral Health in Huntsville, Alabama.

Ms. Crystal Frey is vice president of human resources at Continental Realty Corporation, Baltimore, Maryland, and is testifying on behalf of the Society for Human Resource Management, or SHRM.

Ms. Vicki Shabo is vice president at the National Partnership for Women & Families here in Washington, D.C.

Mr. Leonard Court is a director at Crowe & Dunlevy in Oklahoma City, Oklahoma, and is testifying on behalf of the U.S. Chamber of Commerce.

I will now ask our witnesses to raise your right hand.

[Witnesses sworn.]

Chairman BYRNE. Let the record reflect the witnesses answered in the affirmative. Before I recognize you to provide your testimony, let me explain our lighting system.

You each will have five minutes to present your testimony. When you begin, the light in front of you will turn green. When one minute is left, the light will turn yellow. When your time has expired, the light will turn red. At that point, I will ask you to wrap up your remarks as best as you are able. After you have testified, members will each have five minutes to ask questions.

I am not real heavy with the gavel, so I am not going to right at five minutes just whack you right down. That is the time to really kind of wrap it up. If you would, please, try to keep as close to that as you can. Are we clear on that? Okay.

Let's start with our first witness. That will be you, Ms. Christ.

TESTIMONY OF LESLIE–JO BOYD CHRIST, CHIEF RESOURCE OFFICER, WELLSTONE BEHAVIORAL HEALTH, HUNTSVILLE, ALABAMA

Ms. CHRIST. Chairman Byrne, Ranking Member Takano, and members of the Committee, it's an honor to be here with you today to discuss comp time.

I serve as the chief resource officer at WellStone Behavioral Health, a public nonprofit community mental health center in Huntsville, Alabama, where I have worked for the past 18 years. Prior to my H.R. career, I proudly served our country for 24 years, including service in Operation Iraqi Freedom.

At WellStone, we strive to restore hope and healthy living to our clients. To fulfill this mission, our 300 employees provide services to patients with serious emotional disturbances and mental illnesses. In 2016, our dedicated employees served 9,000 clients, logging nearly 200,000 service hours.

As a healthcare facility, we're not only dedicated to patient care, but we're also committed to the wellbeing of our employees. We offer many programs and benefits, including generous paid leave and flexible work options, to support our employees' diverse work/life needs.

Our benefits, which are outlined in greater detail in my written statement, have helped us achieve several awards and are critical to our employee and family friendly culture.

Mr. Chairman, because our employees provide critical mental health services to members of the community during times of crisis, I personally work with many employees to address their own specific work/life needs, which is why I'm here today.

I believe many of my employees would benefit from having the choice of comp time, especially since 63 percent of our workforce are nonexempt, and women account for 72 percent of our total workforce.

Allow me to give you three recent examples of where I believe comp time would have been helpful to WellStone employees.

Just after starting at WellStone, one of our clerical staff members learned she was pregnant, but not yet eligible for paid leave under our short-term disability plan. While working on a major project, she incurred significant overtime, and asked if we could just waive the overtime and credit her that time, so she could take off and receive pay during her maternity leave. It was difficult telling this single mom-to-be that this arrangement was not an option under the current law.

My son, he's an on-call WellStone employee in our acute care setting, and he often earns overtime pay. Like any other 18-year-old living at home, he tends to spend his overtime pay when he earns it, but if he were allowed to choose comp time, he's told me he would rather take the comp time to have a leave savings plan, where he could build a bank of leave, and if he needed to use the leave, he could use it or he could get a lump sum pay out at the end of the year.

Many employees work side by side with the Huntsville Police Department at my organization, who you know benefit from receiving overtime pay or comp time. It is not uncommon for the officers to discuss their comp time arrangements with my employees, who

then come to me on a regular basis asking why we don't offer comp time as an option for staff members.

These employees believe it's WellStone denying them of this option, until I explain it's the Federal law, the *Fair Labor Standards Act*, to be exact, that prohibits comp time for the private sector, yet allows it for the public sector.

Mr. Chairman, these are just a few examples that demonstrate WellStone's interest in comp time. There have been many others, and I expect there will be more in the future, as our employees seek choices in navigating their work/life obligations.

That's why I strongly support H.R. 1180, the *Working Families Flexibility Act*, introduced by my home State Representative, Martha Roby. This bill would give both employers and employees choices.

Under the legislation, employers decide whether they even offer the comp time arrangement, and if an employer does offer it, each employee can decide whether to participate in the comp time program, and we know comp time works. After all, it's been a success in the public sector for decades.

Updating FLSA to give all employers and employees this option, to me, frankly, is a no-brainer. After all, Mr. Chairman, employers like WellStone are always looking for ways to assist employees in their work/life needs, to drive recruitment, retention, and engagement.

Since no two workplaces are the same, it is important for employers to have many opportunities and options as possible to support the needs unique to their workforce and their employees.

Therefore, I hope Congress will advance this reasonable legislation, and I thank you for this opportunity, and I'm happy to answer any questions you might have.

[The statement of Ms. Christ follows:]

Statement of
Leslie Christ, RBA, SHRM-CP, PHR
Chief Resource Officer
WellStone Behavioral Health
Huntsville, AL

Submitted to the
U.S. House Education and the Workforce Committee
Subcommittee on Workforce Protections

Hearing on
"H.R. 1180, Working Families Flexibility Act"
April 5, 2017

Introduction

Good morning Chairman Byrne, Ranking Member Takano and distinguished members of the Committee. My name is Leslie Christ, and I serve as the Chief Resource Officer at WellStone Behavioral Health, where I have worked for the last 18 years. I am honored to be here today to share my thoughts on H.R. 1180, the Working Families Flexibility Act, including how it would benefit my employees at WellStone.

By way of introduction, I have over 25 years of experience in human resources (HR) and have been a member of the Society for Human Resource Management (SHRM) for 12 years. I have earned the SHRM Certified Professional certification along with numerous other industry certifications.

Prior to my career in HR, I served our country as a logistics officer in the United States Army Reserves and the Alabama National Guard. During my 24 years of military service, I was additionally trained in mortuary affairs, achieving the rank of major and serving in Operation Iraqi Freedom in Kuwait as the Theater Mortuary Affairs Officer, for which I was awarded the Bronze Star Medal and the Global War on Terrorism Service Medal.

In my testimony, I will share details about WellStone Behavioral Health's services, mission and benefits. I will also discuss our committed workforce and how I believe my organization and our employees would benefit from compensatory, or "comp," time as outlined in the Working Families Flexibility Act.

About WellStone Behavioral Health

WellStone Behavioral Health is the doing business name of the Huntsville Madison County Mental Health Board located in Huntsville, Alabama, which held its first meeting in April of 1969. The organization's creation was a direct result of the

Alabama Legislature passing Act 310, which authorized the formation of regional mental health boards across the state.

WellStone is a public non-profit community mental health center with 300 employees. In 2016, we served over 9,000 clients with over 197,000 service hours from our employees. In terms of our workforce, roughly 63 percent of our staff are non-exempt, hourly employees; women make up the majority of our workforce, accounting for 72 percent of our total employee population; and 37 percent of our staff are under the age of 37.

Our organization treats clients with serious emotional disturbances, mental illnesses and/or substance use issues. Our mission is to restore hope and healthy living by providing comprehensive behavioral health services in the community. To achieve our mission, we provide a pre-school day treatment program, school-based services, outreach services, outpatient clinical and medical care for both children and adults, as well as Adult Residential and Acute Care programs.

Group Homes for Adults are also available, and living arrangements are staffed by WellStone's clinical support personnel 24 hours a day, 7 days a week, 365 days a year to assist with issues related to the residents' behavioral health conditions. These dedicated professionals assist our clients with basic living skills needed to move to more independent living situations. Our Acute Care facilities, which also operate every hour of every day, assist with stabilization of behavioral health crisis conditions that require inpatient treatment.

WellStone Benefits and Work-Life Programs

As you can see, our dedicated employees provide critical mental health services to members of our community during times of crisis. Because we are a health care facility, we are particularly cognizant of our employees' health and well-being and firmly believe it is essential to take care of oneself in order to take care of others. As such, WellStone offers many benefits, including paid leave and flexibility offerings, to support our employees and their diverse work-life needs. Below, I have outlined a few of the benefits and programs that have resulted in WellStone receiving the "Family Friendly Business Award" from the National Children's Advocacy Center and being nominated several times as a "Best Place to Work."

Flexible Work Arrangements – One way we assist our employees in navigating their work and family needs is by offering flexible work arrangements, including compressed work weeks, alternative or flexible work hours, and a time-off plan. Under this program, an employee who needs time off but doesn't have enough leave to cover the absence may work more hours on other days within the pay week to cover the absence. For example, an employee who normally works 8:00 a.m. to 5:00 p.m. Monday through Friday but needs to take Friday off could shorten his or her lunch breaks or come in early or stay later Monday through Thursday to cover the time off on Friday. In addition, some of our Group Home staff members who may desire time off but do not have enough leave to

cover the absences may swap shifts with other employees. WellStone works with each employee by being creative in ensuring employees may take time off from work to care for their families and themselves while being paid.

Paid-Time-Off (PTO) Program – In 2015, we moved away from offering traditional paid sick leave and paid annual leave to offer a PTO program to provide our employees with a more flexible approach to time off rather than restricting the use of paid leave to specific categories. Employees who work 30 hours or more each week earn PTO at a rate determined by both the number of hours worked and length of service. For example, an employee working 40 hours per week for the first 5 years earns 3 weeks of paid leave; 4 weeks is provided for employees working 40 hours per week who have been employed between 6 and 10 years; and employees working 40 hours per week with more than 10 years of service receive 5 weeks of paid leave. WellStone also has no cap on PTO balances, so an employee is permitted to continue to accrue leave instead of having to "use it or lose it." This is valuable to many of our employees who have families abroad and use the accrued leave to take a month or two off to travel.

Other Paid Leave Options – WellStone also provides both short- and long-term-disability plans; up to 3 days of paid bereavement leave; the difference between military employees' military pay and civilian pay for a period of 21 days; and 9 paid holidays.

Health Care and Other Benefits – WellStone pays 90 percent of the premium cost of health insurance for our employees. We also provide employees supplemental accident, cancer and critical illness plans with built-in wellness benefits, plus cafeteria/flexible benefit plans for dependent care, medical reimbursement and outside supplemental plans for premium reimbursements, as well as clinical/medical licensure reimbursement, clinical supervision for licensure and professional development opportunities.

Retirement Benefits – We provide a defined benefit pension plan for employees in which employees are vested after 10 years. We also provide a 457(b) / 401(a) retirement plan in which our organization matches a portion of each employee's retirement contributions and the employee is completely vested after 5 years of employment.

In addition to the programs outlined above, WellStone has an annual event to recognize employee tenure and longevity with the organization, providing both monetary bonus awards and gifts to employees reaching milestones of continuous employment. Staff retreats, luncheons and family activities throughout the year help us promote teamwork, collaboration and "fun" time.

WellStone's Workforce

After working at WellStone for over 18 years, I can tell you that our employees are not at WellStone for the pay; rather, they are there because they have a passion for their work and our overall mission. In fact, the average salary of our workforce is between $30,000 and $32,000 per year. Our top-notch benefits and employee/family-friendly culture are vital to recruiting and retaining quality team members. In fact, we

have a high percentage of employees who left the organization over the years to pursue higher compensation but returned because of WellStone's commitment to its workforce, both in terms of the benefits offered and our willingness to work with every employee to support their specific work-life needs.

Earlier in my statement, I quoted WellStone's mission statement to "restore hope and healthy living" to our clients, and, Mr. Chairman, this philosophy extends to our staff as well. Our core values shape how we behave and are known as the "3 Cs": We are **CARING** and compassionate toward those impacted by behavioral health disorders. We are **COMMITTED** and dedicated to one another through collaboration and teamwork. Lastly, we exhibit a **CAN-DO** attitude as optimistic problem-solvers who do what it takes to get the job done.

For example, it is not unusual for some of our employees to work on weekends, going to clients' homes to ensure that they take their medications or responding to calls from local law enforcement to assess a community member who may need mental health assistance. Our employees routinely fill in for shifts when needed in the Group Homes, which often means addressing a crisis that extends their workday. I am proud to say that WellStone employees go above and beyond in fulfilling client and community needs, oftentimes putting client needs before their own.

Compensable ("Comp") Time and H.R. 1180

In the early 1990s, I worked for the Alabama Department of Industrial Relations, where I first encountered state employees who could use compensable, or "comp," time. This option, which has been available to federal, state and local government employees for almost 40 years, allows employees the choice to receive overtime pay for more than 40 hours worked in a week or to "bank" paid leave and use it at a later date. Just as each hour of work over 40 hours is paid at a rate of one and a half times the employee's regular rate of pay, paid time off accrues at a rate of one and a half hours for each hour of overtime worked. While I was a temporary employee at the time and did not earn leave, I witnessed the added flexibility comp time afforded these state employees who could decide for themselves whether to bank paid leave to fit their work-life needs or to receive the overtime pay.

Since coming to WellStone many years ago, I have often reflected on the above experience with comp time and contemplated how beneficial this option would be for many WellStone employees, especially since overtime is a regular occurrence in our Group Homes and Acute Care settings, given that they must be staffed every hour of every day. Overtime is also prevalent in other departments, whether in janitorial services, clerical or technology, where we have staff shortages or "planned overtime" when we need to finish a major computer project. Below, I provide three examples of recent situations where I am confident WellStone employees would have benefited from the voluntary **option** of having access to comp time.

1.) **Clerical Staff** – Recently, we had a major computer endeavor where we needed to reconfigure payor sources in our electronic medical records to maximize insurance payments. One of our dedicated clerical staff, who was relatively new to the organization at the time and learned she was pregnant shortly after starting at WellStone, volunteered to work on this project. It was clear that given her recent hire date and the date of the child's anticipated birth, she would not have enough leave accrued to cover her 6-week absence from work, as our short-term disability for new mothers requires at least 6 months' tenure to be eligible. While working on this project, she incurred significant overtime and asked me if she could "waive" the overtime to "credit" her that time so she could receive pay during her maternity leave. I had to explain to her that we were unable to do so because it was against the law. It was difficult conveying this message to this single-mom-to-be, who felt she should be allowed the option to choose for herself whether to take the overtime pay or paid leave when her child was born.

2.) **Acute Care Employee** – My son, who works as an on-call employee at our Acute Care facility and therefore is not eligible for WellStone's PTO program, attends a local college and is studying to become a nurse. During school breaks, he sometimes works for multiple staff and therefore earns overtime pay. When he earns overtime pay, like any 18-year-old living at home, he spends it. If he were provided the option to choose comp time, my son has told me he would take it to have a leave "savings plan," where he could accumulate this time and a half and receive a lump sum at the end of year if he did not need the paid time off. Knowing that he could choose to no longer participate in the comp time plan, as outlined in H.R. 1180, should he need the overtime pay at some point is another reason this comp time option is attractive to my son.

3.) **WellStone Staff Who Interact with State Employees** – Many WellStone employees work side by side with Huntsville Police Department officers, who do benefit from the option of receiving overtime pay or comp time. In fact, we have Huntsville police officers that work part time at our facility, so it is not uncommon for the officers to discuss this comp time arrangement with our staff. Therefore, WellStone employees come to me on a regular basis asking why we do not offer comp time as an option for staff members. These employees believe it is an organizational decision not to offer this flexibility, until I explain to them that the Fair Labor Standards Act prohibits this option for private-sector employers and employees, yet it is available for employees of federal, state and local governments. It is difficult for employees to understand why the rules are different for public or governmental agencies when they work so hard for our community.

Mr. Chairman, these are just a few recent examples that demonstrate WellStone employee interest in comp time, but there have been others and I expect there to be more inquiries going forward—and I suspect we are not alone. Every workplace is unique and

every workforce is diverse, and WellStone is no exception. Therefore, it is important that we have the ability to offer the same workplace flexibility options at my non-profit organization that are afforded to government employers.

I appreciate that Representative Martha Roby, from my home state of Alabama, has introduced H.R. 1180, the Working Families Flexibility Act, to allow all employers, including WellStone, the option of offering comp time to non-exempt employees. This reasonable legislation is voluntary for both employers and employees. While WellStone would certainly be interested in offering comp time if this bill were enacted, other organizations may not. Moreover, while I believe many of WellStone's hourly workers would choose to participate in a comp time program, it is important that this bill provides employees the ***choice*** of whether to take paid leave or cash wages for overtime hours worked. If an employee opted to participate in a comp time arrangement but later realized that overtime pay was a greater need, the employee would have the right to discontinue participation in the comp time program after giving written notice. This bill includes other important employee protections, including a requirement that an employer cash out any unused comp time at year's end at the higher of either the regular time-and-a-half rate at which time was earned or the final regular rate.

Conclusion

Mr. Chairman, as I noted above, WellStone employees are committed to the mission of improving the health and well-being of our clients. Our employees are not driven by high salaries, but their time is very valuable to them. In fact, many of our employees live paycheck to paycheck. Employees are not guaranteed overtime weekly; therefore, our employees are not dependent on overtime as regular income. Currently in our Group Homes when there are shifts open, employees volunteer to work additional shifts, with some earning overtime and some receiving regular pay depending on the number of hours they worked that pay week. As previously stated, our culture of Caring, Commitment and Can-Do is important to us.

Imagine in January, an employee earns 30 hours of overtime and is paid the time and a half. Since the employee's budget is based on her regular pay, she has some "extra" money and spends it. In March, the same employee gets ill and ends up in the hospital for over three weeks. Because this was unexpected and she doesn't have enough leave, the employee goes without a full paycheck—or without a paycheck at all. How will she pay the rent, the hospital co-pay or her prescription drug expenses? This scenario could be avoided if the employee had the option of banking paid time off that could be used for emergencies like this or for any other reason. Similar scenarios have happened at WellStone.

My Chairman, employers like WellStone are always looking for ways to assist employees with their work-life fit and to drive recruitment, retention, engagement and productivity. Since no two workplaces are the same, it is important that employers have as many options as possible to support their unique workforces.

It would be helpful if our laws did not restrict our ability to offer flexible work options, including comp time, especially since it is an option that has worked well in the public sector for so many years. Congress has an opportunity to level the playing field for all employers and employees by advancing H.R. 1180 to give all a choice to offer and receive comp time.

Again, thank you for the opportunity to participate in today's hearing. I am happy to answer any questions you may have.

Chairman BYRNE. Thank you, Ms. Christ. Ms. Frey?

TESTIMONY OF CRYSTAL FREY, VICE PRESIDENT OF HUMAN RESOURCES, CONTINENTAL REALTY CORPORATION, BALTIMORE, MARYLAND, ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Ms. FREY. Good morning, Chairman Byrne, Ranking Member Takano, and members of the Committee. I am Crystal Frey, the vice president of human resources at Continental Realty Corporation, or CRC, located in Baltimore, Maryland.

I appear before you today on behalf of the Society for Human Resource Management, or SHRM, of which I've been a member for 21 years.

I appreciate the opportunity to provide input into H.R. 1180, the *Working Families Flexibility Act*, a bill to allow private sector employers the opportunity to provide paid leave for overtime hours worked.

Mr. Chairman, as you know, comp time has been an option for nonexempt employees in the public sector for more than three decades, so the concept of giving employees the choice to select paid time off for overtime hours worked is nothing new.

The FLSA was enacted in the 1930s, and it reflects the realities of the industrial workplace, not the workplace of the twenty-first century. It's time to amend this outdated statute to extend the benefit to the private sector.

The increased diversity and complexity of the twenty-first century is driving the need for more workplace flexibility, including paid leave and flexible work options.

Fifty-six percent of parents struggle to balance work and family responsibilities, 50 percent of fathers say they spend too little time with their children, and 40 percent of mothers say they always feel rushed. Because employees are juggling more responsibilities between work and home, public policy should encourage or allow employers to offer voluntary workplace flexibility options that would help employees meet their work/life obligations.

That's why I'm pleased to join SHRM in supporting H.R. 1180. This bill would amend the FLSA to permit the private sector to offer employees the voluntary choice of taking overtime and cash payments, as they do today, or in the form of paid time off from work. Paid time off would accrue at a rate of 1.5 hours for each hour of overtime worked, allowing employees to accrue up to 160 hours of comp time per year.

An employer, however, could choose to cash out the comp time after 80 hours after providing the employee with 30 days' written notice, and all comp time would have to cash out at year end.

The bill also includes several important employee protections. In the ever-changing real estate industry, offering workplace flexibility is key to recruiting and retaining top talent. This is especially true in my company, which competes for talent in the Washington, D.C., metro area, where many Federal workers can use comp time.

CRC is committed to the success of our employees at work and at home, which is why we have a retention rate of over 80 percent and our average tenure is seven years' employment. CRC has re-

ceived numerous awards, which speaks to our culture, but, more importantly, they demonstrate our commitment to our employees.

CRC is invested in its workforce and is always looking for additional opportunities to provide employees with flexibility. Many CRC employees have inquired about comp time, and I can tell you it's incredibly difficult to explain to employees why they can't choose for themselves whether to take overtime pay or paid time off for hours worked over 40 in a week.

Many CRC employees would benefit from having the option of comp time, particularly those who work at our commercial properties. Often these employees work overtime to respond to situations created by inclement weather or maintenance related issues. The ability to bank paid time off would give these employees a sense of reassurance knowing they could take time off when they need it most and receive pay.

Mr. Chairman, all the workplace flexibility practices outlined in my written statement are voluntary. We don't have to offer these benefits, but we do, because they work well for our employees, and help us attract and retain the best people.

The choice of offering comp time arrangements to employees would provide us with another workplace flexibility tool to support our employees and their diverse needs.

That's why H.R. 1180's voluntary approach to comp time for employers and employees is so important. If enacted, this bill would give employers the option of offering a comp time program and employees the choice of whether to participate in a comp time arrangement.

SHRM strongly supports comp time as outlined in H.R. 1180 because it meets our core workplace flexibility principles, for flexibility to be effective, it must work for the employers and the employees. While advancing this bill is a step in the right direction, SHRM also welcomes a broader conversation on additional ways that public policy can facilitate greater voluntary adoption of workplace flexibility programs.

Thank you so much for your time, and I look forward to your questions.

[The statement of Ms. Frey follows:]

Statement of Crystal Frey, SHRM-SCP, CCP, SPHR
Vice President, Human Resources
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On Behalf of The
Society for Human Resource Management

Submitted to The
U.S. House Education and Workforce Committee
Subcommittee on Workforce Protections

Hearing On
"H.R. 1180, The Working Families Flexibility Act"

April 5, 2017

Introduction

Good morning Chairman Byrne, Ranking Member Takano and distinguished members of the Committee. My name is Crystal Frey, and I am Vice President of Human Resources at Continental Realty Corporation located in Baltimore, Maryland. I have over 20 years' experience in HR, having worked for a federal government contractor, a real estate company and a special events planning company and in both union and non-union environments. Thank you for this opportunity to testify before the Subcommittee on H.R. 1180, the Working Families Flexibility Act of 2017.

I am pleased to appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I have been a member for 21 years. I am also a member of my local SHRM chapter, the Chesapeake Human Resources Association.

SHRM is the world's largest human resource (HR) professional society, representing 285,000 members in more than 165 countries. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

Continental Realty Corporation (CRC), founded in 1960, is a three-generation, family-owned company. CRC has earned a reputation for excellence and has grown into one of the most respected real estate investors and operators in the Mid-Atlantic and Southeast. Our diverse real estate portfolio comprises shopping centers, apartment communities, flex space, office parks, restaurants, undeveloped land and warehouse buildings. We have diverse in-house resources specializing in acquisitions, financing, asset management, property management, leasing, construction, information technology, marketing and legal.

In my testimony, I will share more about my business; outline my strong support for H.R. 1180, the Working Families Flexibility Act of 2017; share with you some workplace flexibility practices at my company; and offer SHRM's workplace flexibility policy recommendations for Congress.

About CRC

Many of CRC's 300 employees celebrate milestones of 10, 15, 20 and 25 years with the company each year. Approximately 200 members of our workforce are non-exempt employees who work at our various properties overseeing operations daily. Another 80 employees serve in our corporate office in Baltimore working in asset management, acquisitions, legal, IT, marketing, human resources, accounting, construction and financing.

I am proud to say that CRC takes its commitment to be a good corporate citizen seriously, providing many opportunities in the neighborhoods where we operate. We focus on hiring individuals from the local market and have developed a corporate university to provide training to employees so that they can develop skills for their current positions as well as develop themselves for future career growth. Our diverse workforce reflects the makeup of the communities around us and includes non-traditional students, single parents, grandparents who are caregivers and Millennials starting their careers. This means our employees also have diverse needs, many of which do not always fit neatly into our standard policies, procedures, or a one-size-fits-all government mandate.

CRC's unparalleled dedication to being the best in the business is evidenced by the awards we continue to receive. We have been recognized for our continuing education efforts, customer satisfaction, community service and commitment to personal health. CRC was honored as one of the "Top Workplaces in Baltimore" for several years; received the WorldatWork Seal of Distinction in 2017, as well as *SmartCEO* magazine's Healthiest Company Award in 2015; and was named a Healthiest Employer in the *Washington Business Journal* for three straight years. These accolades and recognition certainly strengthen our recruitment and retention efforts, but, more importantly, they demonstrate our commitment to and investment in our employees.

Because the real estate environment is ever-changing, our company and team members are flexible and adaptable. At CRC, we implement strategies to support employees' work-life needs, help improve engagement and morale, increase productivity, retain top performers, and, ultimately, improve our business performance. It is also worth noting that CRC competes for talent in the Washington, D.C., metro area, which has a significant federal employee presence. Federal employees have access to the type of flexibility we are discussing today: compensatory, or "comp," time. As a private employer, CRC is unable to offer this option to our workforce.

I believe a key to recruiting and retaining top talent is the ability to have a flexible workplace policy that meets the needs of our employees and the business imperatives of CRC. We are invested in our workforce, and at CRC we are always looking for additional opportunities to provide employees with flexibility. The bill we are here to discuss today would do just that.

Background on Compensatory Time

In 1938, Congress passed the Fair Labor Standards Act (FLSA). Among the act's provisions was the requirement that hours of work by non-exempt employees beyond 40 hours in a seven-day period must be compensated at a rate of one and a half times the employee's regular rate of pay. In 1978, Congress passed a temporary bill, the Federal Employees Flexible and

Compressed Work Schedules Act, which changed the FLSA, authorizing comp time for federal employees. In 1985, the Federal Employees Flexible and Compressed Work Schedules Act was reauthorized and made permanent. At the same time, Congress amended the FLSA to expand overtime coverage requirements and protections to state and local agencies and their employees. During that same year, the choice to select paid leave or overtime compensation was expanded to state and local agencies and their employees.

As you can see, the concept of giving employees the choice to select paid time off for overtime hours worked is nothing new—it has been an option widely available to federal and public-sector employees for nearly 40 years, and, by all accounts, it has worked well. While the U.S. House of Representatives has considered legislation to allow for comp time in the private sector several times, dating back to the 106th Congress, it is troubling that Congress has not yet extended this same benefit to hardworking private-sector employees. In the 21st century workplace, it's time to give private-sector non-exempt employees the opportunity to choose for themselves whether to receive cash wages or paid time off for working overtime.

Need for Compensatory Time

The FLSA was enacted toward the end of the Great Depression and reflects the realities of the industrial workplace of the 1930s, not the workplace of the 21st century. The act itself has remained relatively unchanged in the nearly 80 years since its enactment, despite the dramatic changes that have occurred in where, when and how work is done.

The increased diversity and complexity within the American workforce—combined with global competition in a 24/7 economy—is driving the need for more workplace flexibility, to include both paid leave and flexible work options. According to national data, 99 percent of employers with 50 or more employees have some form of time off with pay for their full-time employees[1]. Research further demonstrates that employees value workplace flexibility. Employees rate workplace flexibility among the top three benefits offered by an employer that are very important to their job satisfaction.[2]

Yet work-family conflict continues to be an issue for most working Americans, among both male and female employees. Working parents (56 percent) say that it is difficult for them to balance work and family responsibilities. In addition, 50 percent of fathers say they spend too little time with their children and 40 percent of mothers say they always feel rushed.

Given these statistics, there is no doubt that employees today are juggling ever more responsibilities between work and home, which is why many

[1] Paid Time Off, Vacations, Sick Days and Short-term Caregiving in the United States (2015).
[2] Employee Benefits research report (2016). Society for Human Resource Management.

employees are requesting more flexibility at work. In fact, a recent study found that adults who are employed or looking for work value flexibility as much as they value having paid family or medical leave[3]. Therefore, public policy proposals that encourage or allow employers to offer more voluntary flexible work options are welcomed.

H.R. 1180, the Working Families Flexibility Act of 2017

SHRM commends Representative Martha Roby (R-AL) for introducing H.R. 1180, the Working Families Flexibility Act of 2017, which would modernize the application of the FLSA to the private sector by permitting employers to offer their employees the *voluntary* choice of taking overtime in cash payments, as they do today, or in the form of paid time off from work.

Just as with overtime payments, paid time off would accrue at a rate of one and a half hours for each hour of overtime worked. Employees would be able to accrue up to 160 hours of comp time per year, although an employer could choose to "cash out" the comp time after 80 hours after providing the employee with 30 days of notice. An employer would also be required to cash out any unused comp time at year's end at the higher of either the regular time-and-a-half rate at which time was earned or the final regular rate.

The Working Families Flexibility Act also includes important employee protections. For example, employees can *choose* whether to participate in a comp time arrangement, giving employees choice and control. Under the bill, an employee must **voluntarily** enter into a written comp time arrangement with the employer. Any employer coercion is prohibited, as is conditioning employment based on participation in a comp time program. These rights may be enforced in the same way as other rights and protections of the FLSA. It is also important to note that this legislation does not affect the 40-hour workweek or change the way overtime is calculated.

Providing this comp time option would allow employees the opportunity to build a bank of time that they can use to take paid time off when they need it, provided the time off does not unduly disrupt the business operations of the employer. Importantly, this is the same standard for using comp time that is already included in federal statute that allows public-sector employees to access comp time. Also, if the employee chooses a comp time arrangement but later prefers to receive cash wages for overtime hours worked, the employee can discontinue the comp time program by giving the employer written notice. Comp time off as a workplace option gives non-exempt employees more control over their time and can improve employee morale and job satisfaction and increase productivity by giving employees the option of increased flexibility.

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[3] Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies (2017). Pew Research Center.

On a personal note, I can tell you that many of CRC's employees have inquired about the possibility of using comp time to pursue personal goals. As an employer that is invested in our workforce, it is incredibly difficult to explain to employees why they cannot choose for themselves whether to take overtime pay or paid time off for any hours worked over 40 in a week. Therefore, I am pleased to join SHRM and its 285,000 members in strong support of H.R. 1180 to make this choice available to private-sector employers and employees.

CRC Invests in Employees and Workplace Flexibility

As I mentioned above, CRC is committed to the success of our employees at work and at home, which has helped us achieve a retention rate of over 80 percent—considerably higher than the industry standard of 70 percent or less. Our average tenure is 7 years of employment. We were proud to be named to *The Baltimore Sun*'s "Top Workplaces" list for the past three years, particularly as this is determined solely on the basis of employee survey responses.

A core value at CRC is to build the best team, and we recognize that healthy and fit employees who have an optimal work-life fit are mentally and physically prepared to perform at high levels each and every day. This is one reason we maintain our award-winning wellness program. Key elements of the program include flexible scheduling, adjusted summer hours and discounted gym memberships, as well elder care and child care referrals through our employee assistance program. In addition, voluntary quarterly wellness initiatives focus on health education, healthy eating, exercise, financial wellness and emotional wellness. We also support our employees in their career growth through tuition reimbursement programs and by offering best-in-class, industry-specific training programs.

In addition to the above-mentioned wellness initiatives, CRC provides a full range of health and paid-leave benefits to attract and retain the best talent, including 3 to 4 weeks of vacation based on tenure, 3 personal days and 6 paid sick days annually, paid bereavement and jury leave, and 9 paid holidays. Short- and long-term-disability insurance is fully paid by the company to provide some income replacement when an employee experiences a non-work-related injury or illness. Additionally, CRC maintains an unpaid leave of absence policy for employees who experience an emergency that does not qualify for leave under the Family and Medical Leave Act (FMLA). While employees may use their current paid leave in conjunction with this policy, the availability of comp time would further complement this policy.

CRC continually strives to ensure that our employees' work-life needs are met by implementing innovative solutions. As mentioned above, CRC maintains flexible work schedules, a very popular option for the Washington, D.C., area to recruit and attract employees. Employees may establish a schedule beginning at 7:30 a.m., 8:00 a.m., 8:30 a.m. or 9:00 a.m. provided that business unit goals are

being met. This option is an arrangement that allows employees to make choices about when and how long work is performed. Additionally, our summer work schedule includes closing the office at 4:30 p.m. every Friday between Memorial Day and Labor Day. CRC continues to pay the rate for a full eight-hour day on Fridays during this time. We also close our offices early the day prior to any company holiday (usually by 1:00 p.m.) and pay all employees (exempt and non-exempt) through the end of the day to provide them with an opportunity to get an early start with their families on the holidays.

In addition to these voluntary practices, we make other accommodations to meet employee needs. For example, I was recently approached by a non-exempt leasing consultant who was facing numerous life-changing events at one time, including the birth of her child, her upcoming marriage and the completion of her college degree. She requested an alternative schedule to accelerate the pace of her education to graduate prior to her due date. While the employee normally worked Monday through Friday from 9:30 a.m. until 6:00 p.m., we supported her request for schedule flexibility, allowing her to work 35 hours in order to leave early on certain days to attend class.

I am pleased to report that the employee finished the degree program in December and returned from FMLA leave just two weeks ago after having the opportunity to spend time with her newborn child. CRC was happy to support our employee's goal of finishing her degree prior to the birth of her child, and if comp time had been an option available to her, I believe it would have given her even more access to paid leave.

Many of our employees would benefit from having the option of comp time, particularly those who work at our commercial properties. Often, these employees work overtime to respond to emergency situations created by inclement weather or maintenance-related issues. The ability to bank paid time off would give these hardworking employees a tremendous sense of reassurance, knowing they could take time off when they need it most and receive pay.

Consider the case of one of our groundskeepers who is originally from Vietnam. He needed to take a leave of absence of about a month to attend extensive marital rites focused on the temple and area near his birthplace. Similarly, one of our maintenance technicians required a leave of absence to attend extensive funeral rites for his father in his village located in an African nation. Many of these life events and associated customs do not fall precisely within the leave procedures established by most private sector employers in the United States.

Both of the employees mentioned above could use CRC's unpaid leave of absence policy that I mentioned earlier. Under this policy, an employee who does not otherwise qualify for leave under the FMLA may request an unpaid leave of

absence for other serious or urgent reasons. We developed this policy because of the diversity of urgent situations that may arise for good employees who need time off. Again, if comp time were an option, a portion of or all of these unpaid leaves could have been paid as employees could use the comp time banked in conjunction with these leaves.

Having the ability to design our workplace practices in ways that support our mission and values, and that develop and fulfill our employees, is critical to us. CRC and employers like us want to be able to continue to manage our workplaces in ways that work for us and that provide us these mutually beneficial outcomes. In the examples mentioned above and countless others, we were happy to accommodate these requests for valued employees who needed flexibility to meet all their obligations and achieve their goals. The choice of offering comp time arrangements to our employees would provide us with yet another workplace flexibility tool to support our employees and their diverse needs.

Mr. Chairman, these workplace flexibility practices that CRC has implemented are voluntary. We don't have to offer these benefits, but we do because they work well for our employees and help us attract and retain the best people. However, if forced onto another employer in Baltimore, or across the state or the country, these benefits might not work as well for them given that every workforce is unique.

That's why this bill's (H.R. 1180) voluntary approach to compensatory time for employers and employees is so important. If enacted, this bill would give employers the ***option*** of offering a comp time program and employees the ***choice*** of whether to participate in the comp time arrangement. Under current law, private-sector employers and employees are without this option and this choice—an option and choice that their government counterparts have enjoyed for nearly 40 years. SHRM strongly supports comp time as outlined in H.R. 1180 because it meets our core workplace flexibility principle—that for flexibility to be effective, it must work for both employers and employees.

SHRM's Recommendations for a Workplace Flexibility Policy

HR professionals like me are on the front lines of devising workplace strategies to create effective and flexible organizations. As such, SHRM and its members have given careful consideration to the role public policy can play in advancing the adoption of workplace flexibility.

It is our strong belief that public policy must meet the needs of employees and employers alike. Rather than government mandates prescribing a specific solution, policy proposals should accommodate varying work environments, employee needs, industries and organizational sizes, while fostering innovation and a competitive economy.

A 21st century policy should incentivize employers to voluntarily offer a minimum threshold of paid leave and flexible work options to all employees. In exchange, employers would receive predictability and certainty in offering a uniform workplace flexibility program, rather than the current patchwork of state and local requirements employers currently encounter. While SHRM is pleased to support H.R. 1180 because it is a voluntary, workable policy for both employers and employees, a more comprehensive solution that encompasses the above elements is warranted. SHRM looks forward to continuing to work with members of the House and this Committee on this proposal.

Conclusion

In a 21st century workplace, flexibility policies help both multinational corporations and small businesses meet the needs of their employees. At its core, workplace flexibility is about improving business results by providing employees with more *control* over how, when and where work gets done. H.R. 1180 would give private-sector non-exempt employees more *control* by giving them the option of paid time off for overtime hours worked.

As I outlined in this testimony, my company and employers across the country would appreciate the option of allowing for comp time as a way to help employees better meet their work-life needs. Comp time has been a success for federal and public-sector employees for nearly 40 years. It's now time to extend this benefit choice to employees in the private sector.

Thank you. I am happy to answer any questions you may have.

Chairman BYRNE. Thank you, Ms. Frey. Ms. Shabo?

TESTIMONY OF VICTORIA S. SHABO, VICE PRESIDENT, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, WASHINGTON, DC

Ms. SHABO. Good morning, Mr. Chairman and Ranking Member. I'm Vicki Shabo, vice president at the National Partnership for Women & Families, which is a nonprofit, nonpartisan advocacy organization here in Washington, D.C.

For more than 45 years, we have fought for every major Federal policy advance that has helped women and families. It's been said here many times, most of us hold jobs, both women and men, in order to support ourselves and our families.

Most of us also provide care to loved ones. Seventy percent of children live in households where all parents work. Tens of millions of people provide unpaid care to older adults in their families each year and hold paying jobs at the same time.

In short, work/family challenges connect us all, but workplace policies too often fall short by failing to provide fair wages, predictable schedules, and paid time to recover from illness and care for our loved ones.

The employees at Ms. Christ's company and Ms. Frey's are quite lucky compared to millions of workers across the country who don't have even these benefits that you all provide, and I'm so grateful that you do.

Even SHRM's own research released earlier last month shows that practices are not getting better for most workers in this country. America's working people haven't reaped the benefits of a growing economy. Over the past four decades, workforce productivity has increased by more than 70 percent, while hourly compensation has increased by just about 11 percent.

This has meant more stress and less opportunity for workers across the country, in rural areas and small towns and in big cities alike, and it's meant less predictability, less security, and less independence for those families now and in the future.

This isn't the America that your constituents or any of us deserve. There's no question that lawmakers must update our workplace policies to meet the needs of 21st century families, but H.R. 1180 would be a giant step in the wrong direction. Instead of investing in and empowering people with higher wages, this so-called "flexibility bill" offers forced choices and false promises. Instead of building on the success of State and local policies and leading private sector practices, it gives workers a pay cut without the guarantee of time off when they need it most.

It sets up a false dichotomy between time and money, when people urgently need both. The FLSA allows both, and research shows that employers benefit from both.

Let me briefly outline five key problems. First, 1180 purports to require an agreement by an employee to accept comp time, but the employees I reference in my opening statement—Suzanna, who is a clerical worker with three children and an elderly mother and an unpredictable schedule; Janice, a nurse, who has seen the value of her wages decline dramatically; and Allyson, who says that overtime pay means the difference between meatloaf for supper instead

of rice and beans—these women could easily feel obligated to agree to comp time, even though money would be more valuable, because for them, they would fear that refusing comp time, even if it's supposed to be voluntary, could mean fewer hours, subpar shifts, and the loss of being offered overtime opportunities in the future. It would also mean for them greater scheduling instability, higher child care expenses, and lower wages in the short term.

Second, this bill should be called the "Employer Flexibility Act," because it makes it cheaper, again, in the short term, for employers to provide comp time than to pay overtime wages. They'll have every reason to hire fewer people, relying on them to work more hours, which means more time away from their families, with the promise of future comp time. And as you well know, you can't pay the rent or buy groceries with comp time.

Third, it would provide an interest-free loan to employers by permitting them to defer payment for as long as 13 months.

Fourth, it would give employers, not employees, the flexibility to decide when and even if comp time can be used or offered, and then to decide whether to cash it out, tossing employees well-constructed plans to use their accrued comp time.

Finally and fifth, it offers no remedy to workers when employers deny a request to use comp time, except to ask that the time be cashed out. And even then, the employer need not provide those valuable wages for another 30 days.

Experiences with comp time in the public sector illustrate these challenges all too clearly. There is a lot of case law on this. And let's not pretend that benevolence motivated that public sector use of comp time. It was a cost savings measure.

We urge you to reject 1180. At a time when the Nation urgently needs workplaces that are more fair and family friendly, this bill is an empty promise, a cruel hoax, that would take the country in the wrong direction. Instead, working families need a suite of policies, and let me tell you about a few.

First, the *Healthy Families Act*, which makes paid sick days available to millions of workers and builds on laws in 7 States and 32 localities. The *FAMILY Act*, which would create a national paid family and medical leave fund modeled on successful, responsible, and self-sustaining programs in California, Rhode Island, New Jersey, and soon New York and D.C.

Expanded access to the FMLA, a gradual increase in the minimum wage to $15, and the elimination of the tipped minimum wage, the *Paycheck Fairness Act* to help close the gender-based wage gap, which by the way, in one year could pay for an entire course of community college for a woman or her child. The *Schedules That Work Act*, to encourage fairer and more predictable schedules.

The Nation needs these advances. America's people across regional and political views support these advances, and businesses do, too, even smaller businesses. There's data on this.

So, thank you for the opportunity to testify here today. I apologize for going over my time, but look forward to answering your questions.

[The statement of Ms. Shabo follows:]

Written Statement of Victoria S. Shabo
National Partnership for Women & Families

Submitted to the U.S. House Committee on Education and the Workforce
Subcommittee on Workforce Protections
Hearing on H.R. 1180, the Working Families Flexibility Act

April 5, 2017

Good morning, Chairman Byrne, Ranking Member Takano, members of the Committee and my fellow panelists. I appreciate the opportunity to testify before you today on H.R. 1180.

I am Vicki Shabo, Vice President at the National Partnership for Women & Families, a nonprofit, nonpartisan advocacy organization. For more than 45 years, we have fought for every major federal policy advance that has helped women and families. We promote fairness in the workplace, access to quality, affordable health care, reproductive health and rights, and policies that help women and men meet the dual demands of work and family. Our goal is to create a society that is free, fair and just, where nobody has to experience discrimination, all workplaces are family friendly, and every person has access to quality, affordable health care and real economic security.

The National Partnership is proud to have drafted the Family and Medical Leave Act (FMLA) and led the coalition that fought to make it law. Since the FMLA's adoption in 1993, women and men have used the law more than 200 million times to care for themselves or their loved ones. More recently, to build on the FMLA and expand economic opportunities for America's families more broadly, the National Partnership has helped win dozens of new federal, state and local workplace policies and private sector innovations to increase workers' access to paid sick days, paid family and medical leave and fair schedules, raise wages and advance fair pay. Experience shows that when working people can both care and provide for themselves and their families, everyone benefits.

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H.R. 1180 Offers a False Choice between Time and Pay – Eroding Bedrock Protections at a Time When Congress Should Focus on Improving Them

I am here today to speak in opposition to H.R. 1180, the so-called Working Families Flexibility Act, which will harm rather than help America's working families. People today are struggling to meet their job and family obligations, to make ends meet and to save for the future. For most people, there is no "either-or choice" to be made between time and money. Both are absolutely critical to survival, security and the pursuit of better opportunities.

Most of us – women and men – hold jobs in order to make a living and support ourselves and our families, and many also provide needed care to loved ones. Nearly seventy percent of children live in households where all parents work.[1] Women make up nearly half of the U.S. workforce, and mothers are key breadwinners in nearly two-thirds of families.[2] Mothers of color play an especially critical role as breadwinners for their families.[3] At the same time, women remain primary caregivers in most families, even as men – and especially younger men – want to and are taking on more caregiving responsibilities.

Work-family care obligations are not limited to parents of minor children. Between 2014 and 2015, an estimated 34.2 million adults provided informal care to adults age 50 and older, most commonly to relatives; most of these family caregivers held paying jobs, and more than half of those working family caregivers worked full time.[4] Demographic trends show that care obligations will only increase in the years ahead.

Higher wages are also essential to families' economic security. Yet despite a slow, but steady increase in employment since the depths of the recession and a recent slight increase in average wages,[5] too many of America's workers and families are struggling. Over the past four decades, workforce productivity has increased by 73.4 percent, but hourly compensation has increased by only 11.1 percent.[6] Nearly half of

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[1] U.S. Census Bureau. (2016). *American Community Survey 1-Year Estimates 2015, Table DP03: Selected Economic Characteristics.* Retrieved 31 March 2017, from https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_DP03&prodType=table

[2] Glynn, S.J. (2014, June). *Breadwinning Mothers, Then and Now.* Center for American Progress Publication. Retrieved 31 March 2017, from http://cdn.americanprogress.org/wp-content/uploads/2014/06/Glynn-Breadwinners-report-FINAL.pdf

[3] Anderson, J. (2016, September). *Breadwinner Mothers by Race/Ethnicity and State.* Institute for Women's Policy Research Publication. Retrieved 31 March 2017, from https://iwpr.org/publications/breadwinner-mothers-by-raceethnicity-and-state/

[4] AARP Public Policy Institute and National Alliance for Caregiving. (2015, June). *Caregivers of Older Adults: A Focused Look at Those Caring for Someone 50+.* Retrieved 1 April 2017, from http://www.aarp.org/content/dam/aarp/ppi/2015/caregivers-of-older-adults-focused-look.pdf

[5] Center on Budget and Policy Priorities. (2017, March). *Chart Book: The Legacy of the Great Recession.* Retrieved 31 March 2017, from http://www.cbpp.org/research/economy/chart-book-the-legacy-of-the-great-recession

[6] Economic Policy Institute. (2016, August). *The Pay-Productivity Gap.* Retrieved 1 April 2017, from http://www.epi.org/productivity-pay-gap/

adults in 2015 said they would not be able to afford a $400 emergency expense, according to the Federal Reserve.[7]

This means too many people are worried about their finances and have reason to fear that, when family challenges arise, they will be unable to hold on to their jobs, meet their financial obligations and maintain their economic independence. Many people also contend with work schedules that are unpredictable, inflexible and unstable – diminishing or eliminating their ability to find stable child care, further their education, or hold multiple jobs, and creating substantial uncertainty about their take-home pay on a week-to-week or month-to-month basis. While a growing share of workers can only find part-time work, others are forced into mandatory overtime.[8] People who face mandatory overtime demands tend to have less flexibility to take time off during the work day or change their starting and ending times,[9] which can make it difficult or impossible to meet personal or family obligations.

There is no question that America's working people and families need updated workplace policies and higher wages. And, in some cities and states, successful policies are in place to offer just that. Unfortunately, H.R. 1180 would do the opposite. This legislation is based on smoke and mirrors. It pretends to offer the time off people need when they need it but, in fact, it offers a pay cut for workers without any attendant guarantee of time. It also sets up a dangerous, false dichotomy between time and money when, in fact, working families need both.

Quite simply, H.R. 1180 would be a step in the wrong direction for approximately 59 million hourly, full-time workers as well as for salaried, non-exempt workers who are eligible for overtime pay.[10] Instead of providing working people and their families with the time off and the financial stability they need to care for themselves and their loved ones, this "flexibility" bill offers forced choices and false promises.

H.R. 1180 has been introduced multiple times, in virtually identical form, since the late 1990s. Fortunately for the nation's workers, it has not become law. That is good news because this bill would undermine the very purposes of the Fair Labor Standards Act (FLSA), which for nearly 80 years has helped protect the working hours and paychecks of covered employees. The FLSA's requirement that non-

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[7] Board of Governors of the Federal Reserve System. (2016, May). *Report on the Economic Well-Being of U.S. Households in 2015.* Retrieved 31 March 2017, from https://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf

[8] Golden, L. (2015, April). *Irregular Work Schedules and Its Consequences.* Economic Policy Institute Publication. Retrieved 1 April 2017, from http://www.epi.org/publication/irregular-work-scheduling-and-its-consequences/

[9] Ibid.

[10] Shierholz, H. (2017, April. Personal communication. Senior Economist and Director of Policy, Economic Policy Institute)

exempt employees be paid time-and-a-half for every hour of work in excess of 40 hours per week was intended to spread job opportunities to more workers and create disincentives for overwork, giving working women and men the ability to spend time with their loved ones. For public sector workers – whose guaranteed right to overtime pay was eliminated in the 1980s as a way to conserve state and local revenues – comp time has been used as an excuse for underpayments and wage theft. We must not create those same challenges for private sector workers.

H.R. 1180 would provide workers with neither the pay nor the time they need to make their lives work. Let me tell you about a woman the National Partnership and our colleague organization, Family Values @ Work, met a few years ago.

Susannah, a clerical aide in Los Angeles, had a 20-year-old son, a 19-year-old daughter, a 5-year-old daughter and a 73-year-old mother with health problems.[11] She said her hours had been cut from 40 per week to 30, but her workload had not decreased. "We put in a lot of 'voluntary' time," she explained. "We get told things like, 'If you can't handle it or it's too much work for you, maybe we can find someone else.'" Despite family obligations that required her to be home in the evenings, Susannah felt constant pressure from her supervisor to work extra hours on short notice. "If I need to work overtime, I do it to keep my job," she explained, even though those extra hours often created child- or elder-care problems and extra expenses. At the same time, Susannah said her employer treated her with suspicion when she needed to take a day off to care for her sick child. She said she sometimes went to work sick for fear that taking a day off would mean losing her job.

Susannah is just one of the many workers whose experiences put a face on data from the U.S. Bureau of Labor Statistics and major national surveys that show the tremendous control that employers exert over employees' lives, including whether they are permitted to take time off for family and medical needs, whether and when workers must report to – or be available for – work, and fears of termination that prevent people from asserting their rights. It also illustrates the family demands that workers face, and how hard it can be to care for children and parents at the same time, especially without paid time off and enough income to cover unexpected expenses.

Susannah's situation may be better now than when we met her because of new paid sick days laws and a higher minimum wage where she lives. But there are people with similar stories all over the country. Their experiences shine a bright light on why H.R. 1180 is so deeply flawed. It would give workers less control over both their

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11 National Partnership for Women & Families and Family Values @ Work. (2011, February). *Los Angeles Workers Speak: The Employee Case for Flexibility in Hourly, Lower-Wage Jobs.* Retrieved 31 March 2017, from http://www.nationalpartnership.org/site/DocServer/W_F_Workflex_LA_Workers_Voice.pdf?docID=8241

time and their paychecks. It fails to guarantee the time off that workers need, regardless of their opportunity or ability to work overtime hours. And for the growing segment of workers whose challenges stem from the opposite problem – working fewer hours than they would like with unpredictable schedules and little notice or control – this proposal would do absolutely nothing to assure access to the pay, stability or the paid time off they need to meet their family responsibilities or deal with medical needs.[12]

Comp time, accepted freely and fairly and available on demand for non-vulnerable workers, may have a place in a suite of policy solutions to help workers and families. But H.R. 1180's brand of comp time is designed to benefit employers who want to take a low road by providing them the option of interest-free loans at their employees' expense. It does not offer any greater flexibility to employers who genuinely want their employees to have time off. It does not offer any of the protections workers need. It is utterly tone-deaf to what people experience at their jobs.

The following are our specific concerns about H.R. 1180:

H.R. 1180 Magnifies the Power Imbalance between Employees and Employers

H.R. 1180 would place significant power in the hands of employers, while limiting the ability of employees to earn the wages they need to support their families. It would permit employers to offer comp time in lieu of overtime to one, some or all eligible workers. And although it requires an "agreement" between employers and employees, it does not give an employee wishing to remain in her or his employer's good graces any true "choice," especially in fast-growing industries like food service and retail, where multiple workers may have the same job responsibilities and may be perceived by employers as interchangeable. As a Florida worker explained in a focus group commissioned by the National Council of La Raza, "[T]he employer can abuse you, can use you because you're scared to lose your job. You lose your job, they fire you, they'll get somebody else or two other people."[13]

Their precarious position may force workers into accepting comp time instead of pay for fear of losing their livelihoods, even when overtime pay may mean the difference between "having rice and beans for dinner or having meatloaf," as Allyson, a

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[12] Golden, L. (2016, December). *Still falling short on hours and pay: Part-time work becoming new normal.* Economic Policy Institute Publication. Retrieved 31 March 2017, from http://www.epi.org/files/pdf/114028.pdf; Lambert, S. J., Fugiel, P. J., & Henly, J. R. (2014, August). *Precarious Work Schedules among Early-Career Employees in the US: A National Snapshot.* University of Chicago Employment Instability, Family Well-Being, and Social Policy Network Publication. Retrieved 31 March 2017, from https://ssascholars.uchicago.edu/sites/default/files/work-scheduling-study/files/lambert.fugiel.henly_.precarious_work_schedules.august2014_0.pdf

[13] Lake Research Partners. (21 September, 2012). *Focus Groups among Lower-Income Latinos in Florida.*

MomsRising member and mom from New Mexico, said recently.[14] And, as I'll discuss in a moment, the comp time offered here may not even be available when workers need it, rendering this proposal a true wolf in sheep's clothing.

H.R. 1180 would put workers at very real risk. An employee who does not accept comp time could find herself penalized with fewer hours, non-preferred shifts and loss of overtime work. The employee's "choice," then, would be to accept comp time instead of needed pay or, if she reasonably asks for pay for overtime work and faces retaliation, to try to fight it in court. That is an unrealistic expectation for workers who fear losing their jobs and have no resources with which to litigate.

H.R. 1180 Would Mean Less Work for Some and More Work – and Extra Expenses – for Others

H.R. 1180 undermines the central tenets of Section 7 of the FLSA: creating reasonable work hours for all, and work and job opportunities for many. Because it is cheaper for employers to provide comp time than to pay overtime wages, there is a significant incentive for employers to hire fewer people and rely on overtime hours – paid for in future comp time – to get work done. H.R. 1180 could translate into fewer jobs at a time when millions of people are looking for work. And it would mean greater scheduling instability, uncertainty and unpredictability for workers who are asked to work overtime hours; potentially greater child care and transportation expenses; and, at the same time, fewer dollars in workers' pockets to meet the additional costs and inconveniences that more overtime work would bring.

H.R. 1180 Means Less Paycheck Security for Employees and an Interest-Free Loan for Employers

H.R. 1180 would permit employers to defer compensation – in money or time – to employees for as long as 13 months. In essence, comp time creates an interest-free loan for employers because employees who work overtime today may not see the value of that overtime for more than a year.

The legislation would allow employers to retain and earn interest on the wages they would otherwise have been obligated to pay. Although it is true that an employee can trade banked comp time for overtime pay, employers have 30 days to grant the request. That means that an employee who needs the overtime pay for an emergency expense may have to wait a full month for it.

[14] Martin, R. (2017, March 31. Personal communication. National Director: Workplace Justice Campaigns, MomsRising.org)

H.R. 1180 Fails to Provide the Time that Working People Need

The worker flexibility offered by H.R. 1180 is nothing more than a mirage. That's because this proposal would give the employer, not the employee, the "flexibility" to decide when and even if comp time can be used. The plain language of the bill requires an employee to make a request in advance to use the comp time he or she has earned, gives the employer a "reasonable period" after the request is made to say yes or no, and permits the employer to deny the request entirely if the employee's use of comp time would "unduly disrupt" operations.

This means that a mother who asks to take comp time to stay home with her toddler because her child care provider is sick would have no guarantee that she'll be able to use the time she's earned and banked. And there is no guarantee that a son's request to use a week of comp time to help his aging parent relocate to a nursing home would be granted.

If an employee's request is arbitrarily or unfairly delayed or denied, H.R. 1180 provides no recourse. There is no remedy under this proposal for an employee who is unable to use accrued comp time, except to ask that the time be cashed out. This is far from the kind of family friendly policies workers need.

H.R. 1180 Jeopardizes Employees' Wages When Firms Die or Go Bankrupt

All of this assumes the employer remains in business and employees can eventually use the time they've banked, or receive the cash equivalent when banked time is paid out. But H.R. 1180 would provide no protections to employees when firms collapse or go bankrupt. Between January 2013 and January 2016, 2.3 million workers lost their jobs when their employer closed or moved.[15] In the third quarter of 2015 alone, 704,000 jobs were lost at 207,000 establishments that experienced firm deaths.[16]

Firm death or bankruptcy means workers could lose the value of unused comp time – up to 160 hours per employee, or nearly $2,400 for a typical hourly worker.[17] Imagine that sum aggregated across an entire workforce or a community where a large employer goes bankrupt or a factory closes. Workers deprived of unpaid wages they have earned would have less to spend and some would be forced to rely more

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[15] U.S. Bureau of Labor Statistics. (2016, August). *Worker Displacement, 2013-2015* (Table 8). Retrieved 1 April 2017, from https://www.bls.gov/news.release/pdf/disp.pdf

[16] U.S. Bureau of Labor Statistics. (2017, January). *Business Employment Dynamics—Second Quarter 2016, Revised* (Table 8). Retrieved 1 April 2017, from https://www.bls.gov/news.release/pdf/cewbd.pdf

[17] Based on the median hourly wage of $14.91 for an hourly worker aged 25+ in 2015, as reported in U.S. Bureau of Labor Statistics. (2016, November). *Highlights of Women's Earnings in 2015.* Retrieved 31 March 2017, from https://www.bls.gov/opub/reports/womens-earnings/2015/pdf/home.pdf

on public services and supports to get by. Unpaid comp time could also impair workers' eligibility for unemployment compensation.

H.R. 1180 Fails to Provide Affordable Remedies to Workers or Resources to the U.S. Department of Labor (DOL)

Even under current wage and overtime law, unscrupulous employers regularly violate employees' rights to earn overtime payments because the benefits of non-compliance outweigh the financial liabilities. H.R. 1180 would increase employers' incentives to ignore the FLSA's wage and overtime provisions. It does not provide administrative remedies for employees who have been coerced into accepting comp time or whose rights to freely choose comp time versus overtime payments have been violated. Instead, employees' only recourse would be through the courts. But few low-wage workers have the resources to sue. And, as noted above, employees would have no right at all to use accrued comp time when they need it.

In addition, H.R. 1180 would add significant new provisions to the FLSA and create a new imperative for employee and employer outreach while providing no additional funds for the education and enforcement efforts its new provisions require. The U.S. Department of Labor's Wage and Hour Division already struggles to enforce the FLSA with too few investigators and too small a budget. If the president's proposed budget is enacted, DOL's resources will be even more substantially diminished.

For each of these reasons – and because employees simply should not have to put in extra time beyond a 40-hour week *and* forgo pay in order to scrape together self-funded paid sick days, paid family and medical leave or other personal time off – we ask you to reject H.R. 1180. It is a deeply flawed proposal that would cause massive harm to workers. It offers a false, flawed choice that would make times even tougher for working people and their families. It would be a giant step in the wrong direction for the country. We can – we must – do better.

Toward a More Family Friendly and Prosperous Nation: Public Policy Solutions that Workers and Families Need

What the United States needs is a suite of policies that will raise wages, promote fair pay, improve access to paid time to care for loved ones and ensure more predictable work schedules. Our progress and prosperity are stymied by the status quo and changes are long overdue.

Widely Discredited Myths Impede Our Progress

For too long, a number of widely discredited myths have stood in the way of progress. The organized business lobby and other opponents have perpetuated the unsupportable falsehoods that fair wage laws and family friendly policies are zero-sum, expensive and marginal to working families' economic stability and well-being. A growing body of evidence demonstrates that the opposite is true. Employees, families, businesses, taxpayers and governments all have a stake in creating more family friendly workplaces and increasing the economic security of working families.

The most egregious myth is that fair pay and expanded work-family policies harm employers. In reality, these policies benefit business through improved retention, reduced turnover costs and a consumer base with more income to spend.[18] In fact, studies show that businesses support these policies. Even the Council of State Chambers, a national association of state chambers of commerce CEOs and executive leaders, has found that members and prospective members of state chambers are overwhelmingly supportive of a suite of policies, including a higher minimum wage (80 percent), increased maternity leave and mandated or increased paternity leave (72 and 82 percent, respectively), fair work schedules (78 percent) and paid sick time (73 percent).[19]

A second, related myth is that fair pay and expanded work-family policies are too costly for taxpayers. In reality, these policies provide cost-savings to governments – and, without question, the status quo carries terrible costs – to workers, families, the public health, businesses, our economy and our country. In fact, workers' lack of access to paid family and medical leave deprives America's families of nearly $21 billion each year.[20] A study released by Pew Research Center last month found that, among workers who received no pay or insufficient pay during a recent family or medical leave, 17 percent used public assistance programs and one-third or more took on debt (37 percent) or put off paying their bills (33 percent); among low-wage workers who took an unpaid or insufficiently paid parental leave, a whopping 48 percent turned to public assistance.[21] The status quo not only robs people of their

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[18] National Partnership for Women & Families. (2015, March). *Paid Family and Medical Leave: Good for Business.* Retrieved 31 March 2017, from http://www.nationalpartnership.org/research-library/work-family/paid-leave/paid-leave-good-for-business.pdf

[19] Luntz Global. (2016, January). Survey of 1,000 business executives commissioned by the Council of State Chambers, December 29, 2015. Retrieved 31 March 2017, from https://www.scribd.com/doc/306913089/Council-of-State-Chambers-Topline

[20] Glynn, S. J., & Corley, D. (2016, September). *The Cost of Work-Family Policy Inaction.* Center for American Progress Publication. Retrieved 31 March 2017, from https://www.americanprogress.org/issues/women/reports/2016/09/22/143877/the-cost-of-inaction/

[21] Horowitz, J., Parker, K., Graf, N., & Livingston, G. (2017, March). *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies.* Pew Research Center Publication. Retrieved 31 March 2017, from http://assets.pewresearch.org/wp-content/uploads/sites/3/2017/03/22152556/Paid-Leave-Report-3-17-17-FINAL.pdf

financial security and economic autonomy, but shifts costs to others, including to government and taxpayers.

In contrast, common-sense leave policies will benefit us all. If all workers had paid sick days, 1.3 million emergency room visits could be prevented each year in the United States, saving $1.1 billion annually. More than half of these savings – $517 million – would accrue to taxpayer-funded health insurance programs such as Medicare and the State Children's Health Insurance Program.[22] In addition, both women and men who take paid leave after a child's birth are significantly less likely to use public assistance or Supplemental Nutrition Assistance Program (SNAP) benefits in the following year.[23] And women who take paid leave are more likely to be working nine to 12 months after a child's birth and to have higher earnings than women without leave.[24] Like other policies that promote higher wages and economic opportunity, paid leave helps grow the economy and the tax base while reducing reliance on public services.

It is time to reject these absurd myths, which have been disproven time and again, and instead work together to adopt innovations that are long overdue. We do not need to require workers to forgo wages to subsidize their own time off, as H.R.1180 proposes. Instead, we need to adopt national policy solutions patterned on those working well in states and cities across the country that guarantee fairer wages and adequate time to care for serious personal and family needs.

The policies I'll discuss have strong popular support across the political spectrum. In a poll commissioned by the National Partnership last November, 82 percent of voters said it is important for Congress and the president to consider new laws to help keep working families economically secure, including ensuring workers the right to earn paid sick days and creating a system of paid family and medical leave insurance.[25] Policies that would provide wage protections in the form of a higher minimum wage and fair pay for women have similarly strong support.

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[22] Miller, K., Williams, C., & Yi, Y. (2011, October 31). *Paid Sick Days and Health: Cost Savings from Reduced Emergency Department Visits.* Institute for Women's Policy Research Publication. Retrieved 31 March 2017, from http://www.iwpr.org/publications/pubs/paid-sick-days-and-health-cost-savings-from-reduced-emergency-department-visits

[23] Houser, L., & Varatanian, T. (2012, January). *Pay Matters: The Positive Economic Impacts of Paid Family Leave for Families, Businesses and the Public.* Rutgers Center for Women and Work Publication. Retrieved 31 March 2017, from http://www.nationalpartnership.org/research-library/work-family/other/pay-matters.pdf

[24] Ibid.

[25] National survey of 1,200 voters conducted November 6-8, 2016 by Lake Research Partners and The Tarrance Group on behalf of the National Partnership for Women & Families. Retrieved 1 April 2017, from http://www.nationalpartnership.org/research-library/work-family/lake-research-partners-election-eve-night-omnibus-survey-results-on-issues-of-importance-to-working-families.pdf

Families, Businesses and the Economy Will Benefit When Workers Are Paid Fair Wages

It is a huge problem for our country that the value of workers' wages has not kept pace with the cost of living. That makes overtime pay even more important for workers who are able to work overtime. As Janice Stanton, a MomsRising member from Oregon with more than 25 years of experience as a registered nurse, put it recently, "My income and benefits have progressively declined.... As a single adult who lives alone, it is often a challenge to meet my increasing expenses. Anything extra has to be paid for mostly via overtime labor. Allowing [employers] to short-change their underpaid employees further, by denying them overtime pay simply makes a vastly unjust system even more so. If an employee is choosing to work overtime, s/he wants that extra money."[26]

H.R. 1180 would literally take money out of workers' paychecks at a time when Janice and millions of working women and men like her need common-sense policies to improve their financial security through higher, fairer wages.

First, the recent **modernization of the overtime eligibility threshold** for non-exempt salaried workers must be sustained. The updated rule – raising the salary threshold from $455 to $913 per week (in 2015 dollars) – would improve economic security and/or restore reasonable work hours to an estimated 12.5 million workers, more than half of whom are women and one-third of whom are parents of minor children.[27]

In addition, gradually **raising the minimum wage to $15.00** and eliminating the tipped minimum wage would mean increased wages for tens of millions of workers, nearly 55 percent of whom are women and more than one-third of whom are Black or Latino.[28] A rise in the minimum wage to $15.00 would provide food security for an estimated 1.2 million people, increase consumer spending and stimulate the economy.[29]

It is also imperative that we ensure **fair pay for women.** Yesterday was Equal Pay Day, a symbolic day that marks how far into the year women who hold full-time, year-round jobs must work to catch up to what men were paid in the prior year. The

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[26] Martin, R. (2017, March. Personal communication. National Director: Workplace Justice Campaigns, MomsRising.org).

[27] Eisenbrey, R. & Kimball, W. (2016, May 17). *The new overtime rule will directly benefit 12.5 million working people.* Economic Policy Institute Publication. Retrieved 1 April 2017, from http://www.epi.org/publication/who-benefits-from-new-overtime-threshold/

[28] Huizar, L. & Gebreselassie, T. (2016, December). *What a $15 Minimum Wage Means for Women and Workers of Color.* National Employment Law Project Publication. Retrieved 1 April 2017, from http://www.nelp.org/content/uploads/Policy-Brief-15-Minimum-Wage-Women-Workers-of-Color.pdf

[29] Ibid; Rodgers III, W. (2016). *The Impact of a $15 Minimum Wage on Hunger in America.* The Century Foundation Publication. Retrieved 1 April 2017, from https://tcf.org/content/report/the-impact-of-a-15-minimum-wage-on-hunger-in-america/

gender-based wage gap is pervasive and unrelenting. Over the course of a year, women who work full time, year-round are paid just 80 cents for every dollar paid to men, amounting to a typical annual gap of $10,470. That money could buy 78 weeks of food or cover nearly a year of rent.[30] There is an even larger disparity in the wages paid to Black women, Latinas, white women and some ethnic subgroups of Asian women when compared not to men overall, but to white, non-Hispanic men.

For many women who experience gender discrimination in wages, overtime pay can help bolster financial stability, but H.R. 1180 would threaten their ability to receive pay for the overtime work they do. In contrast, the **Paycheck Fairness Act** would increase women's financial stability by promoting fair pay practices. It would help women challenge and eliminate discriminatory pay practices, limit employers' use of prior salary history in hiring and compensation decisions, help train women and girls in salary negotiation, support government collection of critical wage data and reward employers that have good pay practices.

Employees Must be Able to Earn Paid Sick Days to Protect Their Health and Economic Security

Everyone gets sick and needs medical care for themselves or their families at some point. While H.R. 1180 would do nothing to assure that workers have the paid sick days they need, the **Healthy Families Act (H.R. 1516/S. 636)** would ensure that most of the 41 million workers who do not have any paid sick time could start to earn it.[31] The Healthy Families Act would allow workers to earn up to seven paid sick days annually to use to recover from short-term illness, care for a sick family member, seek routine medical care or obtain assistance related to domestic violence, sexual assault or stalking. Employers that already provide this type of leave would not have to provide additional paid sick time.

The Healthy Families Act is a much more effective solution than H.R. 1180 in providing workers with the time they need to care for their loved ones and themselves. It guarantees employees the ability to use the sick time they have earned and builds on best practices from laws that are now or will soon be in place in seven U.S. states and 32 localities.[32] At a time when more than half of parents do not have even a few paid sick days they can use to care for an ill child[33] and tens of

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[30] National Partnership for Women & Families. (2017, April). *America's Women and the Wage Gap.* Retrieved 31 March 2017, from http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf

[31] U.S. Bureau of Labor Statistics. (2016, March). *Leave benefits: Access, private industry workers, National Compensation Survey* (Table 32). Retrieved 31 March 2017, from https://www.bls.gov/ncs/ebs/benefits/2016/ebbl0059.pdf

[32] National Partnership for Women & Families. (2016, November). *Current Paid Sick Days Laws.* Retrieved 1 April 2017, from www.nationalpartnership.org/psdlaws

[33] Smith, K., & Schaefer, A. (2012, June). *Who Cares for the Sick Kids? Parents' Access to Paid Time to Care for a Sick Child.* Carsey Institute at the University of New Hampshire publication. Retrieved 31 March 2017, from http://scholars.unh.edu/cgi/viewcontent.cgi?article=1170&context=carsey

millions of workers have elder care responsibilities,[34] working families need the paid sick time the Healthy Families Act would provide and not the false, elusive promise of comp time offered by the Working Families Flexibility Act.

Workers Need Paid Family and Medical Leave and Expanded FMLA Protections during the Best and Worst of Times

In addition to paid sick days to cover short-term needs, nearly all working men and women will need time away from their jobs at some point to care for a new child, a seriously ill loved one or to address their own serious health condition. Despite this universal need, only 14 percent of U.S. workers have designated paid family leave through their employers and less than 40 percent have personal short-term disability insurance through an employer-sponsored plan.[35] For lower-wage workers, access to paid family and medical leave is even more rare.

Tens of millions of workers cannot afford to take the time they need without some wage replacement,[36] and H.R. 1180 would do nothing to address this pervasive problem. It does not offer a guarantee that an expecting parent who planned carefully for time away from work to welcome a new child to the family – or a sister who wants to help a sibling through cancer treatment – would be able to take banked comp time to meet those needs. Despite rhetoric to the contrary, H.R. 1180 would not even guarantee that a parent who wanted to use banked comp time to attend a parent-teacher conference would have that leave request granted.

It is time for the United States to adopt a national system of paid family and medical leave insurance and to expand unpaid, job-protected FMLA leave to cover more workers who need leave for more reasons.

The **Family And Medical Insurance Leave (FAMILY) Act (H.R. 947/S. 337)** would create a national paid family and medical leave insurance program, modeled on successful programs in California, New Jersey, Rhode Island and, soon, New York and the District of Columbia. The FAMILY Act would create a self-sustaining program that would provide up to 12 weeks of paid leave to workers welcoming a new child, caring for a seriously ill or injured close relative, addressing their own serious

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[34] MetLife Mature Market Institute. (2011, June). *MetLife Study of Caregiving Costs to Working Caregivers: Double Jeopardy for Baby Boomers Caring for Their Parents.* Retrieved 31 March 2017, from https://www.metlife.com/assets/cao/mmi/publications/studies/2011/Caregiving-Costs-to-Working-Caregivers.pdf

[35] U.S. Bureau of Labor Statistics. (2016, March). *Leave benefits: Access, private industry workers, National Compensation Survey* (Tables 16 & 32). Retrieved 31 March 2017, from https://www.bls.gov/ncs/ebs/benefits/2016/ebbl0059.pdf

[36] Horowitz, J., Parker, K., Graf, N., & Livingston, G. (2017, March). *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies.* Pew Research Center Publication. Retrieved 31 March 2017, from http://assets.pewresearch.org/wp-content/uploads/sites/3/2017/03/22152556/Paid-Leave-Report-3-17-17-FINAL.pdf; Abt Associates Inc. (2012, September 6). *Family and Medical Leave in 2012: Technical Report.* Retrieved 31 March 2017, from https://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf

health condition or dealing with certain circumstances of a military service member's deployment. The FAMILY Act has the support of 78 percent of voters, including 66 percent of Republicans and 77 percent of independents.[37] It also has the support of 70 percent of small businesses surveyed nationwide,[38] and it is the recommended approach of a working group of small business owners convened last year.[39]

Paid leave has been shown to increase families' financial stability; promote better health outcomes for children, older adults and caregivers; generate new tax revenues; and reduce burdens on the social safety net. In the year following a birth, new mothers who take paid leave are 54 percent more likely to report wage increases and 39 percent less likely to need public assistance than mothers who do not. Fathers who take paid leave are also less likely to need public assistance.[40] Paid leave safeguards the income and retirement security of workers with elder care responsibilities who might otherwise have to drop out of the workforce. On average, a worker who is 50 years of age or older who leaves the workforce to take care of a parent will lose more than $300,000 in wages and retirement income.[41]

In addition to paid leave, the **FMLA should be updated**. America's workers need better access to job-protected leave in a broader range of circumstances. According to the most recent Department of Labor data, slightly less than 60 percent of the workforce is eligible for FMLA leave, leaving tens of millions of workers vulnerable to job loss when family or personal needs arise.[42] The comp time offered by H.R. 1180 would not fill this gap.

Complaints that most small businesses cannot handle job-protected leave are baseless. It's past time we extend FMLA protections to employees in smaller businesses. Indeed, new Small Business Majority data shows that 71 percent of

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[37] National survey of 1,200 voters conducted November 6-8, 2016 by Lake Research Partners and The Tarrance Group on behalf of the National Partnership for Women & Families. Retrieved 1 April 2017, from http://www.nationalpartnership.org/research-library/work-family/lake-research-partners-election-eve-night-omnibus-survey-results-on-issues-of-importance-to-working-families.pdf

[38] Small Business Majority and Center for American Progress. (2017, March). *Opinion Poll: Small Businesses Support Paid Leave Programs.* Retrieved 31 March 2017, from http://www.smallbusinessmajority.org/sites/default/files/research-reports/033017-paid-leave-poll.pdf

[39] Main Street Alliance. (2017). *Paid Family and Medical Leave: A Proposal for Small Business Success.* Retrieved 31 March 2017, from http://www.mainstreetalliance.org/small_business_owners_support_family_act

[40] Houser, L., & Varatanian, T. (2012, January). *Pay Matters: The Positive Economic Impacts of Paid Family Leave for Families, Businesses and the Public.* Rutgers Center for Women and Work Publication. Retrieved 31 March 2017, from http://www.nationalpartnership.org/research-library/work-family/other/pay-matters.pdf

[41] MetLife Mature Market Institute. (2011, June). *The MetLife Study of Caregiving Costs to Working Caregivers: Double Jeopardy for Baby Boomers Caring for Their Parents.* Retrieved 31 March 2017, from https://www.metlife.com/assets/cao/mmi/publications/studies/2011/Caregiving-Costs-to-Working-Caregivers.pdf

[42] Abt Associates Inc. (2012, September 6). *Family and Medical Leave in 2012: Technical Report.* Retrieved 31 March 2017, from https://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf

small business owners surveyed nationwide would support dropping the FMLA business size threshold to 20 employees from its current level of 50.[43]

The definition of "family member" should be updated beyond parents, spouses and minor children to allow workers to take FMLA leave to care for a domestic partner, parent-in-law, adult child, sibling, grandchild or grandparent.

The FMLA's promise of job protection should also be extended to include part-time workers and to address more circumstances. We commend members of the House in both parties for supporting an FMLA expansion for certain bereavement leaves (H.R. 1560/S. 528), but believe that proposal should also extend to grieving spouses as well as adult children grieving the death of a parent. The death of a close relative often comes with substantial legal and practical challenges as well as emotional strain, and too often people are forced to return to their jobs in the midst of the turmoil created by a loved one's death.

In addition, H.R. 1180's lead sponsor and others have talked about comp time as the solution to a parent's need to attend a parent-teacher conference. A much more useful policy solution, and one that would help many more parents and children, is a "small necessities" expansion of the FMLA, which would allow workers to take up to 24 hours per year to attend school meetings, parent-teacher conferences and other essential educational activities. Finally, survivors of domestic violence and sexual assault should be able to use FMLA leave to seek legal, medical and relocation services.

True Flexibility Would Reflect Employees' Needs for Predictability, Notice and Fluidity in Scheduling

H.R. 1180 has the word "flexibility" in its title, but the flexibility it offers workers is an empty promise. A growing body of research shows that true flexibility and predictability – the ability to vary work schedules and to have advance notice of scheduling, for example – provide benefits for workers and cost-savings for employers. Nothing in the FLSA prohibits these best practices.

The **Schedules That Work Act** would create a right for workers to request schedule adjustments and incentives for employers to implement fair scheduling practices. This would limit the use of "just in time" scheduling and call-in shifts, which hold workers back, impede their productivity on the job, interfere with their caregiving

[43] Small Business Majority and Center for American Progress. (2017, March). *Opinion Poll: Small Businesses Support Paid Leave Programs.* Retrieved 31 March 2017, from http://www.smallbusinessmajority.org/sites/default/files/research-reports/033017-paid-leave-poll.pdf

responsibilities at home and create extra child care and transportation expenses. In addition, DOL should be funded adequately to allow it to educate employers about the flexibility available under the FLSA and the benefits that flexibility provides.

Conclusion

At a time when our nation's working families urgently need public policies that make our workplaces more fair and family friendly, H.R. 1180 is an empty promise – a cruel hoax that would take the country in the wrong direction. It would make life appreciably harder for families that are already struggling. No amount of misleading or deceptive rhetoric can soften the blow. For many workers, H.R. 1180 would bring less pay, less flexibility and workplaces that are even less family friendly.

Instead of wasting time on smoke and mirrors to try to hide the real impact of this bill – which will cause grievous injury to the millions of people across the country who are looking for hope and opportunity, economic security and higher wages – I urge you instead to support updates to the minimum wage and overtime protections for eligible workers, promote fair pay through the Paycheck Fairness Act, extend access to time to care through the Healthy Families Act, the FAMILY Act and FMLA expansions, and promote scheduling predictability through the Schedules That Work Act. These are the advances the nation needs and the public wants. These are the initiatives that would help our nation's workers and their families, employers, communities and our economy.

Chairman Byrne, Ranking Member Takano and members of the Committee, thank you for the opportunity to testify here today. With our many allies, and on behalf of America's workers, the National Partnership for Women & Families hopes to work with you to advance policies that are truly fair and family friendly.

Chairman BYRNE. Thank you, Ms. Shabo. Mr. Court?

TESTIMONY OF LEONARD COURT, DIRECTOR, CROWE & DUNLEVY, OKLAHOMA CITY, OKLAHOMA, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. COURT. Thank you, Mr. Chairman. I'm honored to appear before the Committee on behalf of the U.S. Chamber of Commerce to discuss H.R. 1180, the *Working Families Flexibility Act of 2017*.

As you know, the U.S. Chamber is the world's largest business federation. My firm, Crowe & Dunlevy, in Oklahoma City, is a long-time member of the Chamber, and I chair the Chamber's Wage, Hour, and Leave Subcommittee.

I want to talk to you today about the act because it presents options for the employees. The bill would harmonize for private sector employees the same benefits that have been available for public sector employees, including some of your own staffs, since 1985.

The bill has been carefully drafted to ensure that employees are given the choice of whether to participate in the program, how long they want to participate in the program, when they seek the option to cash out in the program, and to give them protections against the kind of hypothetical force or coercion that has been discussed earlier today.

Prior witnesses from SHRM have talked to you about the benefits of the Act, and of course, this is not the first time this Act has been discussed before the Committee or this concept, so I want to talk to you about some of the arguments that are being advanced against the act.

My paper has a more extensive discussion of these, so I want to limit my remarks to three or four specific points.

First, opponents of the bill try to claim that it will undermine the protection for low-wage workers because employers will coerce employees into taking comp time, and we've already heard comments to that effect this morning.

Let's be clear, the decision to participate in the program and the decision of whether or not to take this comp time is a voluntary decision based upon the employee's choice.

In Section (e)(4) of the bill, there is protection that prohibits an employer from intimidating, threatening, or coercing an employee in terms of whether they participate in this program, and when they decide to voluntarily take its benefits.

Second, a variation of that is that the bill will weaken protections for Americans by reducing the cost of overtime. Now, this argument in many respects assumes that this is not paid leave. In fact, not only will you have to pay as an employer the same costs that you would if you had paid the overtime during the pay period, which you could very well be paying more because the Act requires that when the overtime is cashed in, it is cashed in at the higher hourly rate.

So, taking the hypothetical that was given earlier, if I get comp time in January at $7.25, but I get a pay raise in July to $9, my comp time, if I cash it out after that point in time or at the end of the year is going to be paid at the $9 rate, not the $7.25. So, in fact, it could cost employers more, not less, under this program.

Third, upon its claim that too much control is given to the employer in this regard, I think that ignores the clear wording of the bill.

The use of comp time, the ability to cash it in, is dependent upon only two things. One, that the employee give reasonable notice to the employer, and two, that comp time that's going to be taken will not unduly disrupt the business operation.

Now, this is not a hypothetical standard. We have this standard already for public employees. We have 20 years of case law showing that this standard is a difficult standard for the employer to prove in court and to beat.

Fourth, there's the unfounded argument that the employer could refuse to hire individuals if they will not agree to comp time. The provisions of the bill simply do not allow that. They have the same protection as covers Federal employees in the use of flex time, and, in fact, to even be eligible, you must have worked 1,000 hours for that employer within the previous 12 months.

Last and certainly not least, opponents of the bill say that employers may force employees to cash out comp time against their will. The protections of the bill clearly do not allow that. The employer can require an individual to cash out only comp time over 80 hours, which is a better protection than is given to those in the public sector, and the employee, on the other hand, can request to cash out comp time only within a 30-day notice.

So, let me, if I quickly can, apply these rules to the hypothetical that's been given. A company has 200,000 covered employees who are opting into the program. That would seem to indicate they want to be in that program because it is their choice, not the employer's.

Over the course of the year, not one of them chooses to take the cash instead of the comp time. Again, that would seem to indicate that they want the benefit that has been given. Last and certainly not least, it can, as I indicated to you, increase the cost to the employer because several of those 200,000 employees would probably have been given pay raises during the course of that year.

It is time to bring the private sector on a footing that is equal to the public sector, to harmonize the benefits. Therefore, on behalf of the U.S. Chamber and employers everywhere, we urge you to pass this bill. Thank you.

[The statement of Mr. Court follows:]

Statement of the U.S. Chamber of Commerce

ON: **Reviewing H.R. 1180, the Working Families Flexibility Act of 2017**

TO: **U.S. House of Representatives Committee Subcommittee on Workforce Protections of the Committee on Education and the Workforce**

DATE: **April 5, 2017**

BY: **Leonard Court, Senior Partner, Crowe & Dunlevy**

1615 H Street NW | Washington, DC | 20062

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

STATEMENT OF LEONARD COURT
SENIOR PARTNER, CROWE & DUNLEVY, A PROFESSIONAL CORPORATION
BEFORE THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS
HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE

Reviewing the Working Families Flexibility Act of 2017

April 5, 2017

Mr. Chairman and Members of the Subcommittee:

I am honored to appear today on behalf of the U.S. Chamber of Commerce to express our support for H.R. 1180, the Working Families Flexibility Act of 2017. My law firm, Crowe & Dunlevy is one of the two largest firms in Oklahoma, and, is a member of the Chamber's Labor Relations Committee where I serve as the Chairman of the Subcommittee on Wage, Hour and Leave issues.

The Working Families Flexibility Act of 2017, like its predecessors, would allow employers to offer employees the option to choose to take their overtime compensation as paid time off instead of just direct compensation. Employees who chose this would thus be getting the same amount of extra income by getting paid time off at the rate of 1.5 hours for each hour of overtime worked. The bill would harmonize the private sector with the public sector where this option is already available and has been used without problems.

The bill is carefully drafted to ensure that employees retain maximum flexibility in being able to choose whether to take the comp time option, whether to continue exercising it, when they may seek a cash out of their banked time, and to protect them from any coercion or undue influence from the employer as to whether they exercise the comp time option.

Because this bill has been introduced and considered by this committee several times before, there is little new that can be said about it. Other witnesses this morning have discussed their views on the merits of the legislation and I would like to use my remarks to refute various arguments we know opponents of this bill will raise. Many of these are based on a misreading of the bill, and others are based on a view that employers simply do not treat their employees properly.

Among the attacks opponents like to raise is that by promoting this bill, Republicans are undermining the 40-hour workweek and jeopardizing overtime pay. The Fair Labor Standards Act's (FLSA) 40-hour workweek as the threshold for earning overtime compensation remains totally untouched. Ironically, Obamacare's definition of a full time employee being 30 hours a week averaged over the course of a month represents a direct challenge to the 40-hour workweek and may make it harder for some employees to earn overtime. The FLSA 40-hour workweek remains the threshold necessary to earn overtime, and thus compensatory time under this bill.

Opponents argue that the bill will undermine protections for low wage workers because employers will coerce employees into taking comp time instead of traditional overtime

compensation. The decision to opt for comp time always rests with the employee, not the employer. The bill explicitly prohibits employers from trying to "intimidate, threaten, or coerce" any employee regarding their rights to choose or not to choose to take the comp time option, or their right to use banked comp time. The bill provides that employers who violate these protections are subject to specific penalties. Finally, this argument seems based on the misreading of the bill that comp time is unpaid, as opposed to the fact that it is paid time off. The only incentive an employer would have to coerce an employee into taking comp time would be if the leave was unpaid.

A variation on that assertion is that the bill will weaken overtime protections for working Americans by significantly reducing the cost of overtime to employers. This argument only works if the bill converted overtime compensation into unpaid leave. But under the bill, comp time is paid time off and will accrue at the rate of one-and-one-half paid hours for each hour of overtime worked. The cost to employers is the same. In addition, the employer must pay the employee for accrued, unused comp time at the highest rate received by the employee during the time in which the comp time was accrued.

We have also heard opponents claim that employers are only interested in offering comp time because it will mean they can hold onto the employee's earnings and use those funds for their own purposes. In fact, employers must carry the liability for the employee's earnings thereby tying up those funds. Further, given that an employee can request a pay out of their accrued earnings at any time and the employer must comply within 30 days, employers will need to ensure that sufficient funds are obligated to cover these amounts. Employers who would choose to offer the comp time option would do so because their employees are interested in having the choice.

Similarly, some opponents have suggested that private sector employers cannot be trusted like public sector employers because they are in business to make a profit. Private sector employers must abide by the various laws that protect employees' interests, including all the other provisions of the FLSA. To suggest they cannot be trusted to responsibly implement this provision is to suggest that they cannot be trusted with any new law. Furthermore, that same profit motive means private sector employers must respond to market forces and be vigilant that they remain a desirable employer. Offering comp time would be one way a private sector employer could distinguish itself from its competitors.

Opponents also fear that the employer maintains too much control over when the employee may use the comp time. Under the bill, the timing and use of comp time is up to the employee – subject only to the employee giving reasonable notice to the employer of the intent to use comp time, and the employer's limited right to limit the employee's use based on whether the employee's absence would unduly disrupt the business operations. These conditions are identical to those that apply to the use of comp time in the public sector and similar to the limits on use of leave under the Family and Medical Leave Act (FMLA). They are also similar to basic leave request procedures used by employers outside the context of these laws.

Another unfounded argument raised against the bill is that an employer could refuse to hire an employee or give overtime based upon whether the worker will take comp time. This is

rebutted by specific language in the bill prohibiting an employer from coercing or attempting to coerce an employee into taking comp time in lieu of cash overtime. The language of the bill prohibiting coercion is the same language that covers federal employees in the use of flex time (5 USC 6132). Furthermore, under the bill, willingness or unwillingness to take comp time cannot be a condition of employment. The bill allows workers the option of comp time, while protecting those workers who do not want comp time but prefer traditional cash overtime wages.

Consistent with their view that employers will find ways to coerce their employees, notwithstanding the prohibitions such actions, opponents argue that the penalties for coercion in the bill are too weak. In fact, the penalties in the bill for coercion are the same as those for unpaid overtime under the FLSA, and comparable to those in other labor laws such as the FMLA. The employee receives the amount of pay owed plus an equal amount in liquidated damages (plus attorney's fees and costs). If the employee has already used and been paid for the comp time, then that amount is deducted from the award (since they have already received the overtime pay), but he or she may still receive the liquidated damages. In addition, the other remedies, including civil and criminal penalties and injunctive relief, under the FLSA apply. The employee can seek redress through a private right of action, or the Department of Labor may sue on behalf of the employee.

Opponents also believe an employer may force an employee to cash out comp time against his or her will. The bill allows the employer to cash out accrued comp time after giving 30 days' notice to the employee and restricts this option to accrued hours over 80, unless the employee requests the cash out. The employee can request a cash out at any time, and the employer must comply in 30 days. These provisions are in recognition that either party may, for a variety of reasons, change their mind and prefer to cash out the comp time and pay the accrued overtime wages.

Another fallacious argument is that employees who earn comp time should receive credit for those hours for purposes of health and pension benefits. Comp time is given for overtime hours, which are hours for which the employee has worked and is "entitled to pay" and are therefore considered "hours of service" under ERISA (29 C.F.R. Sec. 2530.200b-2). There would be no change in the hours of service with which an employee would be credited for purposes of accrual, participation, and vesting under ERISA.

Likewise, opponents seem to think that when an employee takes comp time, that time should be considered hours worked for purposes of additional overtime pay. The standard for calculating "hours worked" has been in place under the FLSA since the 1930's. The only hours which may be counted in the calculation of overtime pay are hours which the employee has actually worked. Comp time would be treated the same as vacation leave, sick leave, and leave under the FMLA, none of which are considered "hours worked" under the FLSA. Similarly, comp time in the public sector has not been considered "hours worked."

Some on the other side worry that an employee who is terminated with comp time eligibility may suffer a loss of unemployment compensation because of the comp time entitlement. The bill requires the employer to cash out all accrued comp time upon termination of employment, whether voluntary or involuntary. Depending upon state laws, such payments

might be netted out against the initial week or weeks' unemployment benefits, in the same way as severance pay is when that is provided. The employee's unemployment benefits are thus deferred not lost for the employee. In other words, the employee would be eligible for the same amount of unemployment benefits whether or not he or she receives cashed out comp time, but if the comp time is cashed out, the unemployment benefits will last longer.

One of the most creative opposition arguments is that allowing comp time banks of up to 160 hours 'may encourage' employers to go out of business to escape liability. The 160 hours is a maximum. The employer or the employee may insist on a lower limit, and an employee may choose not to take comp time at all. The bill also requires an annual cash out of accrued comp time, and allows the employee to request a cash out of his or her accrued comp time at any time. Finally, the notion that an employer would voluntarily go out of business to avoid paying out accrued comp time is absurd.

Opponents also worry that the bill has no protections for employees if an employer goes bankrupt. But, the bill explicitly says that accrued comp time is given the same status as unpaid wages, and thus given the same priority as any other wages owed to workers in the event of bankruptcy.

Ironically, those opposed to the bill believe that a union could bow to pressure from the management, to specify that accrued comp time must be used by employees during a period of slow work, such as during a model change-over in an automobile plant. However, a collective bargaining agreement cannot preempt the parameters on comp time that are spelled out in the bill. Thus, an employee may use comp time whenever he or she wishes, subject to the requirements for reasonable notice the employee's absence not being "unduly disrupt[ive]" to the operations of the employer. This applies even if the agreement to accept comp time is negotiated by the union; the union may not waive this right of the employee who owns the comp time. The employee is also protected by the prohibitions against employer coercion.

Finally, the other side worries that the bill fails to require an employer to notify employees of their rights under the Act. Section 4 of the bill explicitly provides for notification to employees through the FLSA poster that employers must display in the workplace.

This bill has been introduced and debated many times. All of the arguments opposing it have been answered and rebutted. It is now time to enact the Working Families Flexibility Act of 2017.

Chairman BYRNE. Thank you, Mr. Court. Now, we get to the part of the hearing where we get to ask questions. I will call on myself for the first questions.

Ms. Christ, you mentioned your experience working for the State of Alabama, where a comp time policy was in place. You also know that many of your employees work closely with police officers who are able to choose comp time instead of overtime pay.

As an HR professional with a nonprofit community mental health center, do you believe your employees would benefit from the option of choosing comp time in the same way State and local government employees have benefited from the comp time option?

Ms. CHRIST. Mr. Chairman, 100 percent, yes. I did work at the Department of Industrial Relations and, also, we do work closely with the Huntsville Police Department.

The way we operate, 24 hours a day, 365 days a year, we do have opportunities or situations where crises occur, and our employees are there to do the job to help our community, so thereby, being able to choose an option to take time off later, if they happened to have had overtime that week, would benefit them, but they would have that choice.

I believe that's why I'm a proponent, because I know our employees would like that choice.

Chairman BYRNE. Thank you. Mr. Court, under the bill, an employer would only be permitted to deny an employee's request to use accrued comp time if it would "unduly disrupt" the business operations. There are some who have suggested this would allow employers total control over scheduling when comp time can be taken. Could you elaborate on whether or not that is an accurate characterization of the bill's language?

Mr. COURT. Mr. Chairman, I believe that would be a very inaccurate characterization. We have over 20 years of legal precedent under cases in the public sector which use exactly that same standard. The burden of proof is on the employer. The courts have consistently held that financial cost alone is not enough to beat that standard.

For instance, if I want to refuse your ability to take comp time because it's going to cost me more to bring in another person and pay them overtime, the courts have consistently held that does not meet the standard.

So, there is a clear protection there for employees. It's a standard that's used and has been used for 20 years in the public sector. I have every reason to believe it can work in the private sector also.

Chairman BYRNE. Thank you. Ms. Frey, your written testimony discusses the role public policy can play in advancing the adoption of workplace flexibility. The bill we are discussing today is certainly one of those options, and I thank you for conveying SHRM's strong support for H.R. 1180.

What other policies could, as you note in your written testimony, accommodate the increased diversity and complexity within the American workforce?

Ms. FREY. Thank you, Chairman. Certainly, comp time would be a step in the right direction, but we believe that policies that would broaden the capability of employers to expand and encourage them to expand paid leave options, as well as workplace flexibility, would

be something that we would want to dialogue on, and certainly something we would want to work with this subcommittee on. Thank you.

Chairman BYRNE. Ms. Shabo, I was listening to your testimony, and you alluded to the fact that the sort of benefits that are provided by Ms. Christ's company and Ms. Frey's company are not necessarily available to everybody, so you may have employees in different situations.

Does this bill not provide the sort of flexibility that would allow them to do what they want to do, at the same time, not coercing others to do it if they do not want to do it?

Ms. SHABO. Well, I think the FLSA currently provides this flexibility, if you want to call it that, which is that they are currently obligated to provide their employees with overtime pay for overtime hours worked. Those employees can save that money. They can invest it on their own. They can earn interest. Ms. Christ's son can put that money in the bank and start to watch returns on his money as well.

Chairman BYRNE. But they cannot get comp time.

Ms. SHABO. There is nothing preventing these employers from saying you worked 20 extra hours last week, why don't you take 20 hours this week or take 10 hours? Take the time you need this week to deal with your family situation, we're not going to penalize you for not showing up for work tomorrow. There's nothing that prevents that.

Chairman BYRNE. Let me ask Mr. Court to respond to that.

Mr. COURT. I think the example that's being used is one that is allowed only in the same pay period, so if I work the extra 20 hours a week in the first week of April, and my granddaughter, who happens to be a pretty good tennis player, has a tournament at the end of April, I'm not going to get that 20 hours a week off at the end of April.

So, the flexibility that's talked about under the current FLSA is very limited to two week periods of time. The flexibility under this bill is much different and much more beneficial.

Chairman BYRNE. Thank you. Mr. Takano?

Mr. TAKANO. Thank you, Mr. Chairman. Ms. Shabo, do you care to respond to that, what he just said?

Ms. SHABO. Yeah, I mean, there is nothing that would prevent the employee from going to their employer in that situation and saying, hey, my daughter has a tennis tournament at the end of April, you know, thank you for offering me this time off next week, but actually, would you mind if I just waited until the end of the month and took the time then? An employer that wants to make their employees happy, wants to make sure their employees' morale is good, will say yes.

Mr. TAKANO. Thank you. Because of the overtime salary threshold where workers are automatically eligible for overtime pay has not been updated in a very, very long time, today, it is possible for employers to demand very long hours for many of their employees, without paying them a cent for hours worked beyond 40 hours a week.

H.R. 1180 gives employers yet another tool to deny workers overtime pay, at the very moment their overtime rights ought to be strengthened.

Ms. Shabo, would you tell this Committee about the extent to which the number of employees covered by overtime rules has fallen since the 1970s as a result of the failure to update the threshold?

Ms. SHABO. Yes, absolutely. I think you're talking about the salary rule for overtime.

Mr. TAKANO. Yes.

Ms. SHABO. So, back in the 1970s, 1975, about 60 percent of the workforce that were covered under the salary threshold for being able to earn overtime pay. We're down to 8 percent. Unfortunately, the rule that would have increased the salary threshold to $47,000 is held up in court, but that is something that we very much want to see increased.

It would cover the new rule, if the Obama administration rule were put into effect, it would cover around 12.5 million more workers, more of half of whom are women, many of whom are parents.

Mr. TAKANO. In 1979, nearly 12 million salaried workers had overtime protections, but today, with a 50 percent larger workforce, only 3.5 million salaried workers are automatically protected. That is a real decline. That is just stunning to learn that.

I have a report here from the Economic Policy Institute that highlights the false choice between flexibility and overtime. I ask unanimous consent to enter it into the record.

Chairman BYRNE. Without objection.

Mr. TAKANO. Ms. Shabo, by making overtime cheaper, wouldn't H.R. 1180 incentivize employers to assign mandatory overtime rather than letting employees go home to their families?

Ms. SHABO. I'm afraid that it would. I mean, say you have six employees that are all cashiers, some of them choose to accept comp time, some of them want their overtime pay because they need to pay bills.

The implicit incentive for that employer is to award the overtime hours to the workers that are planning to use comp time, which means they're getting more labor from those folks. It also means less hours for those other workers who very much are relying on their overtime pay to make ends meet.

Mr. TAKANO. For people with family commitments, being forced to stay late at work can mean children do not get picked up from a child care center or met at the bus stop. Would you tell us about the extent to which workers are already being forced to work mandatory overtime and its impact on their lives?

Ms. SHABO. Yes. So, there's some really great research based on national survey data that anybody can get access to, that asks about required overtime. More than a quarter of workers that are forced to work overtime now or asked to work overtime are being forced to work overtime by their employers.

That's a lot of people who don't have any say over their schedules, who aren't able to meet those obligations, and in an economy that is still needing to produce more jobs and better quality jobs, the incentive to offer overtime and to take overtime is pretty great for folks.

The other thing, just to link to your prior question, there's also research showing that folks that are just above that $23,000 salary threshold are more likely to be asked to work overtime. They are also less likely to have control over starting and working hours or other sort of pieces of flexibility that allows them to make their lives work and to have control.

Mr. TAKANO. So, is this legislation likely to make this problem worse?

Ms. SHABO. Yes, I absolutely believe that for many, many, many workers, the *Working Families Flexibility Act* would make lives worse. It would give them less control, less wages, and a lot more uncertainty.

Mr. TAKANO. So, really, what we are talking about here is less choices for workers and more leverage for the employers, more convenience for the employers. As I said in my opening statement, I do not believe there is anything that is convenient or as fungible as cash. We are taking that fungibility, that convenience, away from employees.

So, thank you for your testimony. I appreciate it. I yield back.

Chairman BYRNE. The chair now calls on the distinguished Ranking Member of the Committee, the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Chairman, this bill really purports to provide flexibility for workers, but in reality, the only real flexibility is for employers. It provides employers with flexibility to avoid paying time-and-a-half overtime that the *Fair Labor Standards Act* requires. By making overtime hours cheaper, H.R. 1180 would create a perverse incentive for employers to encourage their employees to work excessive hours.

Let me ask Ms. Shabo a couple of questions. Is there any prohibition against an employer choosing employees for overtime that would accept comp time rather than overtime?

Ms. SHABO. No, sir.

Mr. SCOTT. You had talked about kind of the real choice, and if you do not change the law, there is nothing in present law to prevent someone from working overtime, getting paid time-and-a-half, and then subsequently just taking those hours off with an agreement with the employer.

How would that work, and is that different from present law?

Ms. SHABO. Well, under current law, an employee could work overtime, say there is a factory that needs to meet a demand, they're a subcontractor, and they need to meet a demand. I know in Alabama, there are a lot of car manufacturers that have car suppliers, and they have their employees working 12-hour shifts for seven days to meet demand.

Those employees would be paid for their time, and if the employer wants to make sure their employees are having the time they need with their families, there's nothing preventing them in current law from giving those employees time off, whether that's paid or unpaid time off. There's nothing that prevents them under current law from allowing their employees to shift their start or end times or to work a split shift, or to work four 10-hour days instead of eight 5-hour days. Nothing at all. The current law already provides that flexibility.

Mr. SCOTT. If they took time off, say they worked four hours, got time-and-a-half, got six hours, then a few weeks later, took six hours off, they would lose pay for those six hours, and essentially, they would be right back where the bill would put you.

Ms. SHABO. Right.

Mr. SCOTT. That would be really a choice of the employee, not of the employer. Is that right?

Ms. SHABO. Yes.

Mr. SCOTT. A suggestion was made that when the employee selects the time for the comp time, and it is unreasonably delayed, that all they have to do is file a lawsuit. Can you say a word about how practical that is as a remedy?

Ms. SHABO. Sure. We already know a couple of things. One, filing litigation is a pretty onerous task, particularly for a worker who doesn't have a lot of leverage in their workplace, who doesn't have any protections against being fired other than antiretaliation language that exists in current law. Pursuing a lawsuit for something like this is very difficult.

We already know there are vast Wage and Hour Division violations, wage and hour law violations. DOL is pursuing those. I'm very worried that under the President's budget, DOL is seeing a 21 percent decrease in their budget if the President's budget is approved. There are no administrative remedies in this bill.

There are very few worker protections, and I worry in that situation that you've just described that workers will really be left on their own without much power and without the ability to recover the wages that they are owed.

Mr. SCOTT. After an employer says no, the attorney fees for the lawsuit would probably exceed whatever you would get. Is that right?

Ms. SHABO. Yes, I would imagine so. A good illustration of this is say that a woman works several extra hours, earns overtime pay, and she has banked it as comp time under this proposal. Her mother then needs surgery, and she asks her employer to use her banked comp time so that she can be there with her mother at surgery.

Now, the case law from the public sector would say in some cases you don't actually get to take your time on the day you want it if it will disrupt the employer's operations. The employer just needs to give you that time within a reasonable period.

So, say you want your day on Tuesday, so you can be with your mother, but your employer says Tuesday is really not a good day, we have a big demand, and I'm not going to be able to fill that. Why don't you take Thursday instead? That leaves the person both with the inability to be there with her mother, but also without the ability to get those wages to pay a caregiver to be there with her mother at that time.

In that case, she has really nothing of value at the moment that she needs it, whereas, something like the *Healthy Families Act* would provide an earned paid sick day at that same time.

Mr. SCOTT. Thank you. Mr. Chairman, I ask unanimous consent that a letter from AFSCME be entered into the record in opposition to the bill.

Chairman BYRNE. Without objection, so ordered.

The chair now recognizes the distinguished Chairwoman of the full Committee, the gentlewoman from North Carolina, Dr. Foxx.

Mrs. FOXX. Thank you very much, Mr. Chairman. Ms. Frey, Continental Realty Corporation seems to be doing all the right things when it comes to implementing workplace flexibility practices, contrary to what some of my Democrat colleagues claim by and large. I think most employers do the right thing by employees.

You were pretty clear about the need for policies to encourage or allow employers to offer voluntary options, and that includes having a voluntary approach to comp time. Can you elaborate on why it is so important for policymakers to avoid crafting one-size-fits-all requirements for employers with respect to flexible work options?

Ms. FREY. Thank you. Yes, ma'am. So, with the one-size-fits-all mandate, unfortunately, all employers and all workplaces are not the same. I can draw from my own experience as to competition for top talent, especially here in the metro D.C. area, and really having the flexibility to be able to maintain, retain, and keep our top talent is extremely important to us.

It's far less disruptive to provide something like that rather than to lose some of the people that we consider high performers, that we need to keep and retain and develop. Thank you.

Mrs. FOXX. Thank you. Ms. Christ, you described several flexible arrangements for workers at WellStone. How would offering the comp time option enhance your ability to provide employees the personalized work options many of them are seeking, and would comp time fit well with the other flexible work arrangements you offer?

Ms. CHRIST. Thank you very much. Yes, having comp time would actually be another asset for our employees. We do compressed work weeks. We have flexible schedules, but also in our group homes, our employees can work with other employees to swap shifts.

That still doesn't take into effect if they want leave three months from now to take a family vacation, although we do provide generous leave policies, if they don't have enough leave to cover it, they're going to be on leave without pay. We're going to allow them to be off, but if they chose to save their comp time or their overtime and just convert it to comp time, that would be their choice.

So, I think that's why I advocate for our employees because although we do offer generous leave and flexible schedules, this is just another addendum or another option for them.

Mrs. FOXX. By the way, I want to thank all of you for being here today. Mr. Court, I think the arguments you have made for this legislation are excellent. Do you know any reason why private sector workers should not have the same opportunities and choices in workplaces afforded to public sector workers?

Mr. COURT. I do not.

Mrs. FOXX. Thank you. Mr. Chairman, I would just make one quick comment. I do not understand why it is better for people who work in the public sector to have this option and other people not to have it. We often get accused of the laws not applying to us that apply to everybody else.

I think it is time that we outlined the benefits that public service employees get that the private sector is not allowed to have. I just do not think most of the public understands this, as Ms. Christ outlined in her comments. She has to explain to the employees there that public sector people can get this, but private sector people cannot because of Federal legislation.

It just does not make any sense. Thank you, Mr. Chairman. I yield back.

Chairman BYRNE. Thank you, Dr. Foxx. The chair now recognizes the gentleman from New Jersey, Mr. Norcross.

Mr. NORCROSS. Thank you, Chairman, appreciate it. To our distinguished Chairwoman, I believe most employers try to do what is right. I do not think there is any real distinction on that, but obviously, there are employers that do not.

What we are trying to look at here is a win for both employers and employees. A happy employee makes for a better workplace, generally more profitable and more productive.

So, following that, when I first started my career, I was a single dad. In this case of comp time, if I worked the first eight to 10 weeks in the year an extra five or 10 hours a day, that is great, I would build up this comp time if I wanted that. The difference is if I wanted it in my paycheck, I would not have any choice in that under this bill that we are looking at today.

Correct, Ms. Christ? You would not have the choice whether you want comp time or overtime, correct? The employee.

Ms. CHRIST. With H.R. 1180, if you went into a written agreement with your employer saying I would prefer the comp time instead of overtime, you would have that choice.

Mr. NORCROSS. No, let me be very specific here. The employee does not have that choice unless they sign off on it. You, as the employer, could make that employee take comp time versus overtime, correct?

Ms. CHRIST. We would make them take the overtime? If that employee did not choose comp time, if we offered it—

Mr. NORCROSS. That is what you do. Under the law, if this bill were to pass, you would have the ability to impose comp time, correct?

Ms. CHRIST. No.

Mr. NORCROSS. That is not correct?

Ms. CHRIST. That is not correct, sir.

Mr. NORCROSS. Okay, then maybe I got some different information.

Ms. SHABO. I am happy to jump in. The plain language of the statute, of the bill, says there has to be a written agreement between an employer and an employee for the employee to accept and for the employer to provide comp time in lieu of overtime pay.

I don't know what job you had at the time, perhaps you had leverage, perhaps you were a unique employee and your employer wanted to make you happy, and they would give you whichever of those two you wanted.

I think the concern is that where there are hourly workers, where there are workers who are really for all purposes interchangeable in terms of their ability to do the job, the preference that an employer would have, whether knowingly or implicitly,

would be to give the employees who would bank comp time the overtime hours rather than giving the overtime pay in the current period to the employees that wanted the overtime pay.

Mr. NORCROSS. So, compare what we are talking about today to the existing law for public employees, and give me some of the differences.

Ms. SHABO. The public employees—in 1985, the Supreme Court ruled in the *Garcia* case that the *Fair Labor Standards Act* applied to public employees, and States and localities were employers for the purposes of the *Fair Labor Standards Act*. That was counter to a lot of the ways that public employers had been operating, and they had been providing comp time already.

They were very, very worried. The National Association of Counties and the League of Cities were really worried that this was going to create very tight budgets, especially as their emergency workers were working overtime hours.

So, Congress and President Reagan crafted an exception for public employees, so they would be able to receive comp time in lieu of overtime pay, which had been the practice up to that point.

But there are very real differences between public employers and private employers. There's a profit motive in the private sector that doesn't exist in the public sector. There are often due process protections for public sector employees, whether outright or through collective bargaining agreements. There is less likelihood, not so much anymore, but less likelihood that employers will go bankrupt or go out of business leaving their employees holding the bag for unpaid comp time, which can influence their ability to receive unemployment insurance.

There are a lot of differences that make these two situations quite in opposite to each other.

Mr. NORCROSS. Under this provision, you would not have to pay, if they chose to not take the comp time but take the overtime, you would not have to pay that until the following year, is that correct? By the end of January the following year?

Ms. SHABO. It would depend on if the employee wanted to use their comp time and the employer agreed they could use their comp time, they would receive the comp time and it would be paid when they used the comp time.

For employees that has banked their comp time, the bill would allow the employer to hold on to the value of that banked comp time until January 31 of the next year.

Mr. NORCROSS. So, that income would be deferred to the next year, is that correct?

Ms. SHABO. It would be an interest-free loan to employers until the next year.

Mr. NORCROSS. It would be on next year's income, not on the year they earned it?

Ms. SHABO. Correct.

Mr. NORCROSS. So, they get to defer that. Thank you. I yield back my time.

Chairman BYRNE. Thank you. The chair now recognizes the distinguished Mr. Ferguson from Georgia. Mr. Ferguson is one of our new members. We welcome you and recognize you for questions.

Mr. FERGUSON. Thank you, Mr. Byrne, and thanks to each of you for taking time to be here. It is interesting to listen to the banter back and forth. There seems to be many times an assumption that employers are the bad guys and they are going to purposely try to box their employees out or do harm to their employees.

One of the things I would like, Ms. Christ and Ms. Frey, if you would speak to, as a small business owner myself, I tried to provide as many flexible options as I could to my employees. It is something that they wanted.

We are entering a period of economic growth right now. We are going to have a real challenge with skilled employees and recruiting those skilled employees. Tell us how this would help you in recruitment of employees in the 21st century economy, and how your employees would want this as an option.

Ms. CHRIST. We have workers that deal with mental illness, of course, 24/7, strong behaviors, and they're highly trained. We train them, but we want to keep them. So, in order to keep them, to reduce turnover, we have to be flexible and offer creative solutions to them in order to help that work/life balance.

So, being a nonprofit, our pay scales aren't high, but our benefits and flexibility to promote our workforce culture of caring is foremost, so this bill would definitely help in our cause for recruitment and retention.

Ms. FREY. Thank you for asking that question. I think it's an excellent question. My organization's interest in something like this would be to provide flexibility. We're already providing a number of paid leave benefits, but the truth of the matter is that employees ask for this flexibility.

I can share any number of stories about employees who come to us either wanting a transitional schedule after returning from maternity leave or wanting a compressed schedule, or wanting an adjusted schedule so they can return to school. We really try to balance the employer's needs and the employee needs, and work on effective solutions together. I find that when we come together and provide those creative solutions together, we have a very committed workforce, we have great morale, and these individuals turn out being very high performers.

So, I can give you any number of instances where we've made accommodations like that, and that person has turned around, and in my opinion, really awarded us tenfold by just being such a great employee and a motivated employee.

Mr. FERGUSON. I agree with both of you that if you can create flexibility in the workplace and give your employees options, they are going to be much more productive, much more loyal.

One of the things I took great pride in as an employer was having the environment where the average tenure of an employee with me was well over 10 years. That is something that is important, and over and over again, what we found is many times employees wanted time away from the office to take care of their personal needs, their family, whatever it may have been, and we found that we were more productive because employees knew they had the flexibility to take the time when they needed it.

So, I think most really good businesses really kind of view employees as their greatest asset, and we have to be innovative in this Nation, in this 21st century economy.

I think we have to stay away from the view that business is there to punish or to hurt employees. We want our employees happy. We want them productive. It is one of the greatest things we can do as employers is to make sure that we have a healthy, happy, functioning workforce that operates at a high level.

So, Mr. Chairman, I yield back. Thank you.

Chairman BYRNE. Thank you, Mr. Ferguson. The chair now recognizes the gentlewoman from New Hampshire, Ms. Shea-Porter.

Ms. SHEA–PORTER. Thank you, and thank you all for being here. It is a very interesting discussion for me because I was raised by parents who each had small businesses. I was an essential part of their labor force, and protected, as the family. We grew things together. So, I do understand what it is like when somebody does not show up, the stresses and strains on small businesses.

However, I also worked in a number of jobs that were not glamorous when I was going through school, including factories and restaurants, and as a chambermaid. And yeah I was exploited there. I had some great employers and I had some that were just awful and I felt like there were no protections.

I think what we are talking about is a country that has mixed businesses and attitudes towards the employer and attitudes toward the employees. I believe our goal here is to try to protect everybody here.

I just have a couple of yes or no questions that I would like answered by each one of you, please, and just yes or no. Employees cannot count on using time when they actually need it, so employees cannot necessarily save up for, say, a birth or a surgery. Yes?

Ms. CHRIST. No, ma'am.

Ms. SHEA–PORTER. You believe under this bill they can count on using that time, guaranteed the time they need, the date they need?

Ms. CHRIST. Yes, ma'am. For my organization—

Ms. SHEA–PORTER. No, I am talking about under this bill.

Ms. CHRIST. In this bill, yes, ma'am, unless it unduly disrupts business operations.

Ms. SHEA–PORTER. See, that is an important part, because babies always disrupt. They arrive at a certain time. So, I just wanted to get that from you, each one of you, please.

Ms. FREY. I would agree, I believe employees can use the time when they need it.

Ms. SHEA–PORTER. Okay. That is not how the bill is written.

Ms. SHABO. No, they can't use the time when they need it as an absolute guarantee under this bill.

Ms. SHEA–PORTER. Right. Mr. Court?

Mr. COURT. Yes, they can, subject to the unduly restrictive test.

Ms. SHEA–PORTER. It is that "subject" part that is really always difficult, is it not? What happens is, I know from the small businesses, there is never a good time for anybody not to show up. I get that. The reality is they cannot be certain they are going to get it.

Second question. An employer can cash out. So, if the employee was saving it for a birth or a vacation or school break or whatever, they could lose it, right? Because the employer can decide after 80 hours to say, I am not going to do the comp time.

Ms. CHRIST. Yes, with notice to the employee.

Ms. SHEA–PORTER. The point is if I am saving for say a birth, then the notice is not going to change my circumstances. Yes? No?

Ms. FREY. Yes, with notice, we would receive the compensation at time-and-a-half.

Ms. SHEA–PORTER. Okay. Again, I am saving for the birth of a baby, and the employer can come to me and say, sorry, you are not going to get paid because it is not good for the business at this time. It may be legitimate in terms of the business schedule, but I am just talking about there are no ironclad guarantees. Ms. Shabo?

Ms. SHABO. There are no guarantees.

Ms. SHEA–PORTER. Mr. Court?

Mr. COURT. The employer can cash out in excess of 80 hours, you would still have the 80 hours' comp time pay.

Ms. SHEA–PORTER. My understanding is they can cash out, an employer can then say, I have decided not to do the comp time. I have checked this, but Ms. Shabo, is that your understanding as well?

Ms. SHABO. That's my understanding.

Ms. SHEA–PORTER. That is mine. I have checked it. So, how about a compromise? If they held the money, if the company held the money for 80 hours, say, and then decided to cash out, right, for the employee, because that could extend over many months, then would anybody be willing to pay interest on the money they held that belonged to the employee, if the employer was the one who changed the deal?

If the employer says after 80 hours, I am not going to give you comp time, I have decided I would rather cash out, do you think it would be fair to pay the employee interest for the money that they held during that time? It is holding hours.

Ms. FREY. I think that is something that I would need to study in more detail.

Ms. SHEA–PORTER. We want to be fair here. The other

part is could we say to a company that you have to guarantee at least 75 percent of the request you honor in terms of the scheduling. In other words, they cannot have a 100 percent record of saying, no, that is inconvenient, and we could just maybe set a time that the company has to honor 75 percent of the request, understanding that 25 percent, you have to be flexible for a business, just so we know they are adhering to the spirit of the rule, as well as the actual rule.

Would that go well with everybody here?

Chairman BYRNE. Mr. Court, do you have an answer? If you could give it very quickly because we are getting out of time here.

Mr. COURT. I'm not in favor of a hard percentage limit. I think the unduly burdensome test and the 20 years of history that we have in the public sector says that works well enough right now.

Ms. SHEA–PORTER. You would be okay if they did set a test to make sure that companies were adhering most of the time to the requests for comp time?

Chairman BYRNE. The gentlewoman's time has expired. I am going to allow the witness to answer very quickly.

Ms. SHEA–PORTER. Thank you.

Mr. COURT. No, that's not what I meant to imply. I think the current test in the bill is good enough.

Ms. SHEA–PORTER. All right. Thank you. I yield back.

Chairman BYRNE. The gentlewoman's time has expired. The gentlewoman from New York, Ms. Stefanik, is recognized.

Ms. STEFANIK. Thank you, Mr. Chairman. Ms. Christ, I noticed in your testimony that a majority of WellStone's employees are women and many are younger workers. Based on your experience with that workforce, how important are flexible work arrangements to employees, and do younger workers have different priorities than older workers?

Ms. CHRIST. Thank you for your question. Our workforce with women as the majority, it's very essential that they have time off, especially because many of our employees are single parents. So, they take care of not only maybe their own children, but also their other family members, maybe parents, elderly parents, or extended family. So, it would be important.

Our younger workers, they have many times different needs, but one of the things I've noticed with our workers, they like the flexibility. They want it in their hands. They don't want to be in a box and contained to an 8:00 to 5:00. So, it's nice to be flexible and give them the choice.

Ms. STEFANIK. Thank you. I think it is important to note that with technology and iPhones, we are in a 21st century workforce. You talked about the demographics at WellStone. I think that is representative of much of the change in demographics, there are 14 million single parents in the workplace, and 85 percent of workers value workplace flexibility when considering a new job.

This is a good thing, providing more balance and flexibility, so thank you for your answers, and I would like to yield the balance of my time to the chairman.

Chairman BYRNE. Thank you, Ms. Stefanik. Mr. Court, let me ask you a follow-up question. What is the remedy that an employee has against an employer if he or she is not compensated for accrued comp time, and is that different from the remedy which he or she would have when an employee has a claim for unpaid wages?

Mr. COURT. Mr. Chairman, it is the same remedy under the *Fair Labor Standards Act*. You not only get the value of what you have lost, but twice that much, liquidated damages, if it is considered to be willful.

To address Representative Scott's concern concerning attorney fees eating up that award, if the company loses, they pay the attorney fees for the employee under the *Fair Labor Standards Act*. In addition, since this is a bill that falls under the jurisdiction of the Department of Labor, you may not have to bring a lawsuit. You may be able to file a charge with the Department of Labor, who

can investigate as they do other wage and hour claims, and that doesn't cost you a dime.

Chairman BYRNE. Back to you, Mr. Court. The opponents of this bill suggested, in previous debates at least, that the bill would encourage employers to demand excessive hours by making overtime less expensive, thus undermining the 40-hour work week protections against excessive hours.

Will this bill reduce overtime costs for employers? In other words, does comp time allow an employer to avoid paying overtime premiums?

Mr. COURT. The comp time certainly does not allow the employer to avoid paying the overtime premiums, as I said in response to an earlier question. It, in fact, could increase the cost if the individual receives a pay raise over the course of the year after they have already banked the comp time.

Chairman BYRNE. One of the things that I am hearing is there is some incentive in this bill for employers to essentially game the system and take advantage of employees, to rob them of either their pay or their accrued comp time.

Is that possible under the bill, that an employer could do that, and would there not be some remedy by the employee against that?

Mr. COURT. No, Mr. Chairman, it is not. The bill very specifically has remedies, has prohibitions against coercion, threatening employees, so the employee is going to get the benefit of the paycheck if they want it because they're not forced to enter the program, or if they want to bank the comp time, then they have the guarantee of the ability to use it, unlike the example that Ms. Shabo was giving, where you are depending upon the employer to agree to let you have time off. This is a right you would have under the statute.

Chairman BYRNE. As one lawyer to another, I have not had to defend these before, but if you get one of these things either from an employee or Department of Labor, it is no fun. There is every incentive in the world to avoid having anything close to this. Would you agree with that?

Mr. COURT. Absolutely.

Chairman BYRNE. Thank you. The chair now recognizes the gentleman from California, Mr. DeSaulnier.

Mr. DESAULNIER. Thank you, Mr. Chairman. I do want to follow up with a couple of comments. Having spent 35 years as an owner and manager of restaurants, that most employers want to do the right thing, but the framework for doing the right thing is part of what we are talking about here.

It sounds as if from all of the employer representative witnesses that this is a zero-sum game from your viewpoint for the employees. Is that the way you look at it? If they take the comp time, it is a zero-sum game for them?

Ms. CHRIST. If they choose the comp time, they're still going to get that time-and-a-half, which is really paid leave or paid time off, the same as if they chose to get the overtime, sir.

Mr. DESAULNIER. Okay. Is that the way you view it, Ms. Frey?

Ms. FREY. I would agree with Ms. Christ. I think it's a choice on the part of the employee, and it's a choice they can make and they can elect by agreement, and they can also opt out of the agreement at any time.

Mr. DESAULNIER. Mr. Court?

Mr. COURT. Yes, I would agree with the two previous witnesses' answers, plus I think our experience in the public sector where we have had this for a long time would tend to indicate that.

Mr. DESAULNIER. Ms. Shabo, I want to go to you, because some of the confusion that I am still trying to figure out with your response and Ms. Christ's response is that they take the comp time, but they do not get paid for some indeterminate period of time.

In California, you are required or it used to be, you had five working days to pay your employees, including their time-and-a-half. So, if my employees decided to do comp time, when do they get compensated for that time-and-a-half? Is it five days after the work period, in their paycheck, or is it a year from then?

Ms. SHABO. So, they would take the comp time when their employer allows them, when they request it and their employer allows them to take it. If they want to cash out for the value of their comp time, it would be within 30 days of their request, or if they don't make a request, and it is still on the employer's books, the 31st of January of the next year.

Mr. DESAULNIER. So, it is not a zero-sum game to the employee?

Ms. SHABO. No, the value of the employee's wages is sitting with the employer for some period of time until they take the time. I think the other thing that's missing in this conversation, if I could just interject, is we're talking about a very small segment of the workforce that is actually working more than 40 hours a week to be able to even get the value of this time.

Often, we are looking at people who have too few hours, and also don't have any paid leave, so I don't think it's reasonable to think about these two proposals, the *Working Families Flexibility Act* or something like the *Healthy Families Act*, which provides paid sick days, which you have in California and in Oregon, or paid family leave, which you have in California and in several other States.

Those are things that are guaranteed for people who need the time no matter how many hours they're working or who they are working for. Whereas, this bill really only applies to a narrow slice of folks, and only to those employees lucky enough to work for fair employers, like it sounds like you all are, who will administer this new comp time benefit fairly.

Mr. DESAULNIER. So, in California, we have those benefits, as you say, provided by law, but we also protect the eight hour workday in addition to the 40-hour work week. We had many hearings when I was in the legislature about changing the flexible work permits.

Employers can easily do that by a majority vote of their employees. I think the threshold is like five employees, so it captures most of the workforce. We want that in California because of the social model, the pressures on families, long commutes, but we want to make sure the base level is paid, and it is a zero-sum game.

So, I think when we talk about innovation, we have to sort of look at it both ways. I always struggle with this, and the Chairman has heard me before, coming from a high cost of doing business area, as a business person, you want to lift all boats.

So, while I agree we should have flexibility, it sometimes drove me crazy as a restaurant owner in California that I had to pay

time-and-a-half for split shifts, which required my employees sometimes to drive a long time back and forth, but it was fine with me as long as all my competitors had to do the same thing.

So, I struggle with the hollowing out of the American middle class, not to blame this law for that, but as a potential contributor to that, that if it is going to be innovative, and it is zero-sum. It really is zero-sum.

The last point, the enforcement mechanism. I am one who believes that a private right of action is not the most effective. As the Chairman said, nobody likes a visit from regulators. However, it can be much more efficient.

Ms. Shabo, can you talk about that a little bit, both from the employer and employee standpoint, about the mechanism to enforce this small percentage of people who actually would choose this?

Ms. SHABO. Sure. I mean, the law provides private right of action, as you said. I don't read it as providing a particularly good administrative remedy for folks here, if any administrative remedy at all.

You know, I think it's important to look at wage-and-hour violations, which have increased to the tune of millions of dollars, including in the districts of folks who are sitting here today.

I don't think we want to increase litigation here, but what we are potentially setting up through this so-called "Working Families Flexibility Act" is actually increasing uncertainty about what employees must have, what employers must do, and the real potential for a lot more disputes about what money is owed to whom and when.

Mr. DESAULNIER. Thank you. Thank you, Mr. Chairman.

Chairman BYRNE. Thank you. The chair now recognizes the gentlewoman from Oregon, Ms. Bonamici.

Ms. BONAMICI. Thank you very much, Mr. Chairman. I thank you for allowing me to join your subcommittee. I really appreciate the conversation.

Ms. Shabo, there has been a suggestion that this bill, H.R. 1180, is needed so employers can provide flexibility, but is there anything in the *Fair Labor Standards Act* right now that prevents employers from providing flexibility now to, for example, paid or unpaid leave, or flexible predicable schedules, without giving up their right to overtime pay?

Ms. SHABO. No, there's not.

Ms. BONAMICI. Thank you. I agree with my colleague from California, there are a lot of people now who are facing a great deal of economic insecurity and anxiety. There are people who are worried about whether they can pay their rent or find housing, healthcare costs, balancing family responsibilities, saving for retirement, saving for kids to go to college, the whole long list.

People are concerned that maybe their kids will not have the opportunities they had, and we are seeing that across the country, people working longer hours, sometimes more than one job. Our workforce also looks drastically different than it did, say, 50 years ago.

The Democrats have put forth a working families agenda: several pieces of legislation that would keep workers in the workforce, provide scheduling flexibility, which there is a lot of technology that

helps with that, as we know, to allow workers to care for themselves and their families, and raise stagnant wages.

As you mentioned, the Oregon legislature recently not only passed paid sick day policy, but also increased the minimum wage. We have a tiered system, it depends on urban areas, rural areas. They are currently also debating legislation to create paid family leave, like the rest of the world provides.

Can you talk about how these types of workplace policies affect workforce participation and our country's economic prosperity, and how would this bill, H.R. 1180, affect our sort of larger goal of preparing the workforce to meet the 21st century economy?

I do want to mention, because Ms. Shea-Porter mentioned and others have mentioned, small businesses. I met with many small businesses in Oregon who are providing these policies, and they are finding that not only do they have a happier, healthier workforce, they also have less challenge with recruitment and great retention, because they found that if they provide these policies to their workforce, they stay, they are happier, and these are small businesses. People are concerned that this does not work with small businesses, but we have many examples to show that it does.

Ms. SHABO. That's right, and thank you for your question. Actually, one of the arguments that's often used is some of what's come up here, which is that it should be up to employers to decide what they want to do because it makes for better recruitment and retention, and it gives them a leg up.

What we actually find when we look at the data is small businesses—a study commissioned by Small Business Majority that was released just last week shows that 70 percent of businesses nationwide, which is based on a scientific sample of small businesses, support the Family Act, which would create a national paid family and medical leave standard.

Seventy percent, and most of that sample was not Democrats, it was Republicans and Independents. Across the board with the public, close to 80 percent of people support a national paid family and medical leave insurance program similar to what exists in California, New Jersey, Rhode Island, maybe soon in Oregon, certainly soon in New York, and here in D.C.

Ms. BONAMICI. Basically any industrialized country.

Ms. SHABO. Yes. We have an opportunity here in the U.S. to leapfrog in some way some of those other countries by creating a leave that is of reasonable length, that has adequate wage replacement, that applies equally to women and men, and for all purposes, not just parental leave, but also to address the explosion in aging of the population and elder care.

We know when workers have paid family leave, women in particular, they are more likely to return to work within a year of giving birth. They are likely to earn higher wages. They are less likely to rely on programs like public assistance and food stamps; same with new dads. Women and men are both more likely to have hundreds of thousands of dollars of additional income and retirement savings when they are—

Ms. BONAMICI. I do not mean to interrupt, but I also want to ask, yesterday was Equal Pay Day. I want to ask about that, too. A day when women's wages finally catch up with what men made last

year. The *Paycheck Fairness Act* would put some teeth into that and strengthen that. What would this bill, H.R. 1180, do for women and equal pay?

Ms. SHABO. At best, nothing. At worse, it would create a pay cut, and we know that two-thirds of minimum wage workers are women, the vast majority of tipped workers are women, and this does nothing to raise wages for folks. In fact, it takes money out of workers' pockets at the time when they need it most.

Ms. BONAMICI. When we look at the challenges facing workers right now, this is the wrong direction. I just wanted to also mention when we were talking about family leave, about 25 percent of women go back to work within two weeks of having a child in this country. For those of us who have had children, we know how challenging that must be.

Thank you. I yield back the balance of my time.

Chairman BYRNE. Thank you, Ms. Bonamici. The chair now recognizes the gentleman from Wisconsin, Mr. Grothman.

Mr. GROTHMAN. A couple of questions here. I will start out with Ms. Frey. There is an article in the National Review, and I do not know if it has been referred to yet, kind of talking about the difference of who is on the side of the worker, who is not here.

The National Review's assessment is the Republicans are in favor of giving workers an option of doing whatever they want with their overtime pay, and the Democrats oppose it. Do you agree with that assessment, that the Republicans are kind of more in favor of freedom and allowing people to do what they want as opposed to the Democrats are saying you have to use your overtime this way?

Ms. FREY. Honestly, sir, I couldn't answer that. I could only answer what our organization would be in favor of, which would be certainly giving employees the option to make those choices, whether to receive that compensation as overtime pay at the time or to use comp time.

Mr. GROTHMAN. Okay. I will ask Ms. Shabo a question, kind of along the same lines. I recently ran into an employer who at his surprise—he was a minimum wage employer, but he was trying to find a way to incentivize his employees to be more productive in a factory.

To his surprise, his employees preferred getting another 3 or 4 hours off rather than a cash bonus. This is something that was a surprise to him because he felt clearly he would have taken the cash if he was in their position.

It does show particularly that many young people today would rather have Friday off or Friday afternoon off or something like that.

Now, in the mix, we put a situation where some women do not consider money as important, and would rather have the time off to spend with their children or family.

Do you not feel it is a little bit philosophically wrong, following up on your last answer here, to tell that woman or man that you do not have a choice in the matter? If you accumulate overtime, you have to use it, you have to take the money, the money should be the most important thing for you. And if you would rather have another, whatever, 120 hours a week or 120 hours a year, whatever, off to spend with your children, that is against the law.

Do you not feel it is wrong for you to put yourself in the position of the employee and tell them they have to value money more?

Ms. SHABO. But in your hypothetical, there's nothing that is stopping that worker from going to her employer and saying, I'd really like to take a month off, and, you know, I've earned the overtime pay, I'm putting it in the bank, I have money saved up to go take my vacation. May I please have some extra time off? If that employer values the employee and wants the employee to be happy, they will say yes. If they want to, they will say yes. An employee can use their bargaining power if they have it to be able to ask for that time off.

You know, I don't think all employers are bad at all. I just moderated a really excellent roundtable of employers last week out in California, who all had different practices and all had similar philosophies about doing the right thing for their employees.

But what we're talking about here is putting employees in a situation where maybe they don't have the ability to leverage that time off later, they need the value of their wages, and what we're doing here is providing an out for employers who don't want to take the high road to pay their employees the money that they are owed at the time they are owed it.

Mr. GROTHMAN. Well, what we are doing here is creating flexibility. I think the whole purpose of the *Fair Labor Standards Act*—it was put together by people who do not necessarily trust employers to do the best thing for their employees. Otherwise, we would not have the law in the first place.

I think what it does is it forces employers to give employees an option. And I think a lot of employees, if my experience in talking to employers is any indication, value that time off. They value that family time.

You are creating a situation here in which, in some cases, the employees who bank that money are forbidden from using that time with their family and have to take the cash, which you kind of implied in your response with the congresswoman before. And there are some women who are going to say, I do not mind if I do not make any money, I would rather take the time off.

Now, at the end of the year when the professors do the study and they show women are not making as much money at that company because they have opted to take time off, but is it up to us to weigh in and say, you cannot value your family more than additional cash?

Ms. SHABO. But in that case, that woman would already have worked extra hours away from her family to be able to even have the option of having comp time or overtime. So, I guess I'm not sure I'm following the hypothetical.

Mr. GROTHMAN. There may be times where you want more family time than other times. Maybe that person—could be a man, too—depending on when his spouse works, he would rather or she would rather spend time with their children than have an outside caregiver, that sort of thing.

Ms. SHABO. Sure.

Mr. GROTHMAN. Maybe they have another child, a younger child, and they want to spend time with the younger child. It seems to me that rather than having us people in Washington tell them

what is best for them, would it not be better to allow the employee to determine what is in their best interest and best interest of their family?

It is true that some people, if they do not have this option, are just going to keep working and earn more money. For people who think the be all and end all in life is how much money you make, and we have to worship those statistics saying you have a more satisfactory life when you are making more money, I can see why to oppose this bill.

For those of us who do not think the most important thing in life is how much money you are making, why do you not allow them that option if the employer will not?

Chairman BYRNE. Ms. Shabo, his time has expired, but let me give you a chance to very quickly respond to that.

Ms. SHABO. Sure. I think my basic answer is if an employee is in a position where they want that time, there's nothing that is preventing them from asking their employer to give them that time now.

In terms of people building up as much money, I think about the 30 million women who are heads of household and live in poverty right now who need those wages.

Chairman BYRNE. Thank you. The gentleman's time has expired. I would like to thank our witnesses for taking the time to testify before the subcommittee today. I am going to turn now to Mr. Takano and ask if he has any closing remarks.

Mr. TAKANO. Thank you, Mr. Chairman. Let me just say in response, I still say there is nothing as convenient or as fungible as cash. That leverage really should be left to the employee, as far as cash or time.

I want to thank all of our witnesses for their testimony today. It is clear from this hearing that what I would like to call the "Betrayal of Working Families Act," provides employers with flexibility to deny workers their overtime pay, while giving employees nothing in return really.

We heard that employers can unilaterally decide that they do not want to allow employees to take comp time they have earned and cash them out instead, cancelling the doctor's appointment, recovering from surgery, or elder care that the employee might have planned.

We heard that the Betrayal of Working Families Act would make it more likely that employers would force employees to work longer hours and deprive them of time-and-a-half pay for doing so. Workers desperately need more time with their families and more money.

Today, most low-wage workers do not have access to a single paid sick day, and far too many workers earn poverty level wages since Congress has not raised the minimum wage in nearly a decade.

This legislation plays a cruel trick on cash-strapped and time-strapped workers by forcing them to give up time with their families and pay in exchange for the hope that they might eventually be able to take a day off, if it is convenient to their employer. This is really about more leverage for the employer, not convenience for the employee.

H.R. 1180 is entirely consistent with congressional Republicans' agenda to rig the rules of our economy in favor of special interests and against everyday Americans.

In the first two months of the 115th Congress, House Republicans filed 40 *Congressional Review Act* Joint Resolutions to roll back rules designed to make Americans safe on the job, prevent discrimination, ensure educational equity, and clean air and clean water. The President has already signed many of these into law.

This betrayal of working families has got to stop. Congressional Republicans should not be trying to hoodwink working families into handing over their overtime pay. The American people deserve real solutions they can count on. They need paid sick days and family leave, and strengthened rights to overtime pay.

The pretty packaging of this legislation as so-called "flexibility" for working families should fool no one. This is just another attempt to take money out of workers' paychecks. We should reject this once and for all.

I yield back, Mr. Chairman.

Chairman BYRNE. Thank you, Mr. Takano. This law, the *Fair Labor Standards Act*, was passed in the 1930s. Let us remember what the workplace of the 1930s looked like. First of all, the vast majority of mothers with children under 18 were not in the workplace. Today, it is almost 71 percent.

One of those women in the workplace in the 1930s was my grandmother, because my grandfather had been killed and she had to work. She had the typical job at the time, an 8:00 to 5:00 job, so she was not there in the afternoons when my mother or my uncles had things at school. My Uncle Bill had a severe disease that affected his legs, eventually crippled him. There were times where she would have to take off work. It was tough on her to be able to be there for his treatments.

Now, we have nearly three-quarters of our mothers in the workplace, and for them, money is not a good substitute for being there with the kids, rather it is a school play, an athletic event, a school trip, or whether they have somebody sick or who has a serious injury or illness, like my Uncle Bill.

So, the whole idea is we are going to try to get Federal law in sync with what is really happening in the real lives of American workers. Ms. Christ and Ms. Frey told us what the real lives of American workers are like. A lot of them want that freedom to be able to trade out and get that comp time, so they can go on that field trip 2 months down the road, or they know they have a cancer treatment with an elderly parent that is coming up and they need to be able to bank that time to be with them, or do a myriad of other things that are impinging upon their lives.

So, all this is trying to do is give them that flexibility, give them that option, which is just in keeping with what the new workplace looks like.

I was sitting here watching Ms. Stefanik. She pulled out her cell phone. There is more computing power in that cell phone than there was in this whole building worth of computers when I was coming through college 40 years ago.

We can do so much more from our homes and other places and be able to make work. Now, I know there are some concerns that

there are some bad actors out there in the private sector that are going to take this law and do bad things to people.

Well, first of all, I think that is an absolutely inaccurate presumption. Most employers are just exactly like Ms. Christ and Ms. Frey here, they are looking for ways to give their employees a better workplace.

If there are bad actors out here, here is what the bill says under remedies. It says, "An employer that violates Section 7(a)(4) shall be liable to the employee, affecting the amount of the rate of compensation for each hour of compensatory time accrued by the employee and any additional equal amount as liquidated damages," so it is twice, and attorney fees.

Now, if you are an employer and you have any sense about you, that is not a very good economic decision, and you cannot just sit there, they are not going to want to bring this action. I think anybody with any common sense in business is going to presume that is going to happen, and they are not going to make that economic decision.

That is why it is put in here it is twice the amount of pay plus attorney fees. By the way, and I do not mean this in any way derogatory to you, Mr. Court, or to me when I was a labor attorney, those attorney fees can be substantial. They are almost as big a reason not to do it as anything else here.

So, the remedies provided in here are pretty good, they are pretty effective in telling an employer do not violate the protections in this law to keep employees from being taken advantage of here.

So, I really appreciate the testimony we have had today. It has flushed a lot of good issues. There was good back and forth. I think we know what some points and counterpoints are that will inform other members of this committee when this bill comes up for markup in the full committee, and inform the entire House when it comes before the House.

I do think there is one thing we can all agree upon. We should be doing everything we can to help those working mothers, those working dads, and other people, to have the sort of flexibility that we can provide them in the workplace of the 21st century. Maybe it is time to get away from a 1930s law to do that.

[Additional submissions by Mr. Byrne follow:]

College and University Professional Association for Human Resources

April 5, 2017

Chairman Bradley Byrne
Education and Workforce Subcommittee on
Workforce Protections
Washington, DC 20515

Ranking Member Mark Takano
Education and Workforce Subcommittee on
Workforce Protections
Washington, DC 20515

Dear Chairman Byrne and Ranking Member Takano:

On behalf of the College and University Professional Association for Human Resources (CUPA-HR), I write in strong support of H.R. 1180, the *Working Families Flexibility Act of 2017,* and to thank the subcommittee for holding this important hearing. CUPA-HR serves as the voice of human resources in higher education, representing more than 23,000 human resources professionals and other campus leaders at almost 2,000 colleges and universities across the country. Higher education employs over 3.9 million workers nationwide, with colleges and universities in all 50 states.

H.R. 1180 would amend the Fair Labor Standards Act to allow private employers, including private colleges and universities, the opportunity to offer non-exempt employees who have worked overtime hours the choice between paid time off (known as compensatory time or comp time) or overtime pay. Under current federal law, public-sector employers, including public-sector colleges and universities, may offer this benefit, but private-sector employers may not.

On April 11, 2013, CUPA-HR President and CEO Andy Brantley appeared before this subcommittee to testify on the benefits of compensatory time. Drawing on his experience as associate vice president for human resources at a large public university, Mr. Brantley provided several examples of instances where employees benefitted from compensatory time even though the university provided a wide range of generous paid leave policies to all employees. Mr. Brantley lamented that compensatory time was not an available benefit when he served in a prior position as director of human resources at a private institution.

Representing both public and private colleges and universities, CUPA-HR believes employers at private universities should be afforded the opportunity to provide the same flexibility to employees as public universities. We applaud the Chairman and the Subcommittee for holding this hearing and the leadership of Rep. Martha Roby of Alabama for introducing the *Working Families Flexibility Act of 2017.*

Thank you for convening today's hearing and for the opportunity to submit this letter for the record.

Respectfully Submitted,

Joshua A. Ulman
Chief Government Relations Officer
College and University Professional Association for Human Resources

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RILA
RETAIL INDUSTRY LEADERS ASSOCIATION
Educate. Collaborate. Advocate.

1700 North Moore Street, Suite 2250, Arlington, VA 22209

April 5, 2017

The Honorable Bradley Byrne
Chairman
Subcommittee on Workforce Protections
119 Cannon House Office Building
Washington, D.C. 20515

The Honorable Mark Takano
Ranking Member
Subcommittee on Workforce Protections
1507 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Byrne and Ranking Member Takano:

On behalf of the Retail Industry Leaders Association (RILA), I write in support of H.R. 1180, the Working Families Flexibility Act of 2017. RILA commends the Committee on Education and the Workforce Subcommittee on Workforce Protections for holding a hearing on this legislation, and urges all Committee members to support it.

By way of background, RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturer facilities and distribution centers domestically and abroad.

As the employers of millions of Americans, our members fully support flexible workplace policies as our employees are constantly faced with the significant challenge of balancing the demands of work, family, and personal responsibilities. For this reason, RILA members are increasingly interested in policies that will provide more options for employees to better manage their work-life balance.

Specifically, H.R. 1180 would allow employers to offer employees the choice of overtime compensation in the form of monetary payment or in the form of compensatory time off, or "comp time." Employees would then have the chance to accrue additional time off for up to 160 hours per year. It is important to note that the bill also includes several provisions offering employee protections for workers who choose to take advantage of the comp time option, such as an automatic payout to the employee for time not used. Because this option is voluntary, it allows the employees to decide which form of compensation best suit their personal needs.

Employees and employers alike have made it very clear that they prefer innovative workforce policies -- including the use of a flexible comp time option. As the voice of the world's largest and most innovative retailers, RILA appreciates the Committee's leadership in advancing a comprehensive agenda that enhances rather than inhibits flexibility in the workplace. For this reason, RILA strongly urges the Subcommittee to review and advance the Working Families Flexibility Act of 2017 to the full Committee to ensure that employees and employers can meet the needs of working families.

Sincerely,

/s/
Evan Armstrong
Vice President, Government Affairs

[Additional submissions by Mr. Scott follow:]

April 4, 2017

Lee Saunders
President
Elissa McBride
Secretary-Treasurer
Vice Presidents
Se'Adorea K. Brown
Miami Springs, FL
Richard L. Capone
Pittsburgh, PA
Stacy Chamberlain
Portland, OR
Connie Derr
Albuquerque, NM
Greg Devereux
Olympia, WA
Danny Donohue
Albany, NY
Denise Duncan
San Dimas, CA
David R. Fillman
Harrisburg, PA
Henry A. Garrido
New York, NY
Mattie Harrell
Franklinville, NJ
Johanna Puno Hester
San Diego, CA
Danny J. Homan
Des Moines, IA
Nicholas J. LaMorte
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New Britain, CT
John A. Lyall
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Kathryn Lybarger
Oakland, CA
Roberta Lynch
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Christopher Mabe
Westerville, OH
Gerard S. Middleton Sr.
Baltimore, MD
Victoria E. Mitchell
New York, NY
Douglas Moore Jr.
San Diego, CA
Frank Moroney
Boston, MA
Michael Newman
Chicago, IL
Henry Nicholas
Philadelphia, PA
Randy Parreira
Honolulu, HI
Steven Quick Sr.
Indianapolis, IN
Lawrence A. Roehrig
Lansing, MI
Joseph P. Rugola
Columbus, OH
Eliot Seide
South St. Paul, MN
Alan F. Shanahan
Los Angeles, CA
Paul Spink
Milwaukee, WI
Mary E. Sullivan
Albany, NY
Braulio Torres
San Juan, PR
Anthony Wells
New York, NY
123-17a
03/17

Subcommittee on Workforce Protections of the
Committee on Education and the Workforce
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative:

On behalf of the 1.6 million members of the American Federation of State, County and Municipal Employees (AFSCME), I urge you to oppose H.R. 1180, the Working Families Flexibility Act of 2017. H.R. 1180 claims to help American workers better balance the needs of family and the workplace by allowing employers to offer private-sector employees the choice of paid time off in lieu of cash wages for overtime hours worked. But contrary to its stated purposes, the proposed law will result in more overtime hours for employees for less money and without any guarantee of compensatory time when needed.

For over 80 years and counting, the Federal Labor Standards Act (FLSA) establishes the basic requirements for wage and hour protections including overtime compensation. Under FLSA, overtime compensation must be provided for covered employees working more than the maximum period of 40 hours per week. However, H.R. 1180 provides no guaranteed right for an employee to use banked compensatory time when needed, even in the case of a personal or family emergency. Instead, this legislation gives discretion to the employer to permit use of compensatory time only "within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the employer."

This legislation calls for an irresponsible change to the FLSA that will negatively impact worker's actual take home pay, and the valued time spent with their family when both are needed for workers' financial stability and to address family obligations. Also, if an employee's request to use comp time is denied because the employer unilaterally decides it is "unduly disruptive", the law provides no recourse. And then, even when provided the compensatory time, the use of that time is controlled solely by the employer. In short, employees can be denied overtime pay, and effectively be prevented from meeting their family needs.

Our experience in the public sector has revealed that employers' control over the use of compensatory time inflicts very real hardships on the public employees entitled to compensatory time for their overtime work. Employees request specific dates for valid reasons. Employees need the earned time off for milestones such as children's birthdays, family and friends' weddings, funerals, scheduled vacations and other date-specific activities.

American Federation of State, County and Municipal Employees, AFL-CIO
TEL (202) 429-1000 FAX (202) 429-1293 TDD (202) 659-0446 WEB afscme.org 1625 L Street, NW, Washington, DC 20036-5687

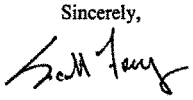
Giving the employer veto power has been burdensome and abused by employers in the public sector and it has been cause for litigation. In theory, employees may take compensatory time within a reasonable period after making the request. In practice, it creates problems for employees denied the time when they need it and the language of the law becomes a false promise.

Balancing the demands of family and the workplace are already a challenge for far too many workers. At a time in our country when our priority should be investing in stable jobs with good wages and benefits, our attention should not be on legislation that would further hurt workers who are already subjected to very little formality with respect to an agreement to take compensatory time off in lieu of overtime pay.

Nothing in the current compensatory time-off application of the FLSA prevents employers from giving leave to employees who work long hours. Neither does the new proposal offer the critical protections workers need in the 21st century. Workers need solutions that actually help them manage work and family responsibilities; not a law that will provide less flexibility to a workforce under the guise of providing more.

H.R. 1180 attacks workers' paychecks, time off and flexibility; and AFSCME strongly opposes this bill.

Sincerely,



Scott Frey
Director of Federal Government Affairs

SF:KLS:mc

May 6, 2013

Dear Member of Congress:

We, the undersigned organizations, urge you to oppose the so-called Working Families Flexibility Act of 2013 (H.R. 1406), a smoke-and-mirrors bill that offers a pay cut for workers without any guaranteed flexibility or time off to care for their families or themselves. As members of Congress on both sides of the aisle have acknowledged, people today are struggling to meet the demands of job and family, as well as to make ends meet. Americans urgently need lawmakers to take the next step on the road to a family friendly nation. But H.R. 1406 is not what the nation needs. It is, at best, an empty promise and it would cause considerably more harm than good.

The Working Families Flexibility Act offers a false choice between time and pay. The bill's supporters claim H.R. 1406 would give hourly workers more flexibility and time with their loved ones by allowing them to choose paid time off, rather than time-and-a-half wages, as compensation for working more than 40 hours in one week ("comp time"). But the irony is that workers will only get more time with their families after they've spent long hours away at work. And there is nothing in H.R. 1406 that guarantees that workers will be able to use the comp time they have earned when they need it.

The worker flexibility offered by H.R. 1406 is nothing more than a mirage. That's because this proposal gives the employer, not the employee, the "flexibility" to decide when and even if comp time can be used. The bill permits the employer to deny the request entirely if the employee's use of comp time would "unduly disrupt" operations or to grant leave on a day other than the day requested by the employee. This means that H.R. 1406 provides no guarantee that workers can use their earned time when a child falls ill, to attend a parent-teacher conference, or to help an aging parent settle in to a nursing home. Employers can veto an employee's request to use comp time even in cases of urgent need.

H.R. 1406 would put workers at very real risk and provides an interest-free loan to employers. An employee who does not accept comp time could be penalized with fewer hours, bad shifts and loss of overtime hours. And because it is cheaper to provide comp time than to pay overtime wages, there is a significant incentive for employers to hire fewer people and rely on overtime hours – paid for in future comp time – to get work done. It would permit employers to defer compensation for unused comp time for as long as 13 months, creating an interest-free loan for employers and hardships for workers.

H.R. 1406 provides few protections for workers and no additional resources to the U.S. Department of Labor for education, investigations and enforcement. While this bill adds significant new provisions to the Fair Labor Standards Act (FLSA), it provides no additional funds for the education and enforcement efforts the new provisions will require. Workers would have few remedies in cases of employer misconduct or bankruptcy. The problem of wage theft (the non-payment or underpayment of wages for hours worked) would be exacerbated by making it easier for employers to avoid overtime compensation obligations.

The Fair Labor Standards Act (FLSA) currently allows employers to provide workers with flexibility and time off without compromising their right to be paid fairly for the hours they work. The types of flexibility allowable under the FLSA include alternative start and end times, compressed or variable work hours within a week, split shifts, work at multiple locations and paid or unpaid time off. The proponents of H.R. 1406 set up a false dichotomy that would force workers to choose between flexibility and overtime pay when, in reality, the FLSA does nothing to prevent employers from offering both.

Instead of wasting time on smoke and mirrors, Congress should focus on policy solutions that have been proven to work. We urge Congress to adopt policies that will provide families with the economic security and the time that they need:

- The Healthy Families Act (H.R. 1286/S. 631), which makes earned paid sick days available to millions of workers;
- Paid family and medical leave insurance modeled on successful state programs in California and New Jersey;
- Expanded access to the FMLA for more workers for more reasons, and so parents could, in fact, have the time they need to attend parent-teacher conferences without risking their jobs;
- The Fair Minimum Wage Act (H.R. 1010/S. 460) which brings the minimum wage back to a reasonable level and, in so doing, provides businesses with customers, improves our economy, and help locals communities thrive;
- The Paycheck Fairness Act (H.R. 377/S. 84), which helps close the gender-based wage gap; and
- Measures to encourage fairer and more predictable work hours and prohibit mandatory overtime.

Workers simply should not have to put in extra time beyond a 40-hour week *and* forgo pay to earn time to care for themselves or their loved ones. We urge Congress to reject H.R. 1406 and instead adopt family friendly policies that provide true flexibility for working families, not an empty promise that would make life appreciably harder for families that are already struggling.

Sincerely,

National Organizations

National Partnership for Women & Families
9to5
A Better Balance: The Work and Family Legal Center
African American Ministers In Action (AAMIA)
African American Ministers Leadership Council (AAMLC)
American Association of University Women (AAUW)
American Federation of Government Employees (AFGE)
AFL-CIO
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers, AFL-CIO

The Arc
Business and Professional Women's Foundation
Campaign for Community Change
Center for Law and Social Policy (CLASP)
Coalition of Labor Union Women
Coalition on Human Needs
Demos
Direct Care Alliance
Equal Rights Advocates
The Every Child Matters Education Fund
Family Equality Council
Family Values @ Work Consortium
Feminist Majority
Food Chain Workers Alliance
Friends Committee on National Legislation
Half in Ten
HIV Prevention Justice Alliance
Human Rights Campaign
Interfaith Worker Justice
Jewish Women International
Jobs with Justice/American Rights at Work
Labor Council for Latin American Advancement
Labor Project for Working Families
Leadership Center for the Common Good
The Leadership Conference on Civil and Human Rights
Legal Momentum
LULAC
Main Street Alliance
Maternity Care Coalition
MomsRising
NAACP
National Action Network
National Association of Social Workers
National Consumers League
National Council of Jewish Women
National Council of La Raza (NCLR)
National Council of Women's Organizations
National Domestic Workers Alliance
National Employment Law Project
National Employment Lawyers Association (NELA)
National Hispanic Council on Aging
National Latina Institute for Reproductive Health (NLIRH)
National Organization for Women (NOW)
National Primitive Baptist Convention, USA, Inc.
National Research Center for Women & Families
National Women's Law Center
NETWORK, A National Catholic Social Justice Lobby
Partnership for Working Families

People For the American Way
PICO National Network
Progressive National Baptist Convention, Inc. (PNBC)
Progressive States Network
Restaurant Opportunities Centers United
RESULTS
Service Employees International Union (SEIU)
United Steelworkers (USW)
USAction
VESSELS
Wider Opportunities for Women
Women Employed
Working America

State and Local Organizations

Arkansas
Little Rock National Organization for Women
Northwest Arkansas Workers' Justice Center

Arizona
Sun City/West Valley National Organization for Women

California
9to5 California
Center on Policy Initiatives
Legal Aid Society-Employment Law Center

Colorado
9to5 Colorado
Colorado Fiscal Institute
Colorado Organization for Latina Opportunity and Reproductive Rights (COLOR)
Colorado Progressive Coalition
FRESC: Good Jobs, Strong Communities
Interfaith Worker Justice Committee of Colorado
NAACP Colorado/Montana/Wyoming State Conference

Connecticut
Connecticut Working Families Party

District of Columbia
D.C. Employment Justice Center

Florida
Broward County Chapter of the National Organization for Women
Farmworker Association of Florida

Florida National Organization for Women
Organize Now
Palm Beach County National Organization for Women
Pasco National Organization for Women
Tampa Chapter of the National Organization for Women

Georgia
9to5 Atlanta
Victory for the World Church

Illinois
AIDS Foundation of Chicago
Chicago Chapter Coalition of Labor Union Women
Human Action Community Organization (HACO)
Illinois State CLUW
SEIU HealthCare Illinois & Indiana

Indiana
Central Indiana CLUW Chapter
Central Indiana Labor Council
Community, Faith & Labor Coalition

Maine
Maine Women's Lobby

Maryland
Baltimore National Organization for Women
Job Opportunities Task Force
Public Justice Center

Massachusetts
Jewish Alliance for Law & Social Action
Massachusetts Paid Leave Coalition
St. Paul A.M.E. Church

Michigan
Wayne County Chapter of National Organization for Women

Minnesota
Uptown National Organization for Women

Mississippi
The Mississippi Workers' Center for Human Rights

New Hampshire
NH Sisters of Solidarity
NH National Alliance for Direct Support Professionals

New Jersey
Grace Cathedral Family Worship Center, Inc.
Greater New Jersey CLUW Chapter
Hope House Family Life Ministry
New Jersey Citizen Action
New Jersey Tenants Organization
Northern NJ Chapter of National Organization for Women

New York
Catalyst
Gay Men's Health Crisis (GMHC)
New York Paid Leave Coalition
New York State Nurses Association
Progressive States Network
Rockland County Chapter of National Organization for Women

North Carolina
Fayetteville National Organization for Women
North Carolina Justice Center

Ohio
Akron Area National Organization for Women
National Organization for Women, Greater Cleveland Chapter
Ohio National Organization for Women
Southeast Seventh-day Adventist Church
Toledo Chapter, National Organization for Women
Woodland Christian Church (Disciples of Christ)
Zion Hill Missionary Baptist Church

Oregon
Central Oregon Coast National Organization for Women
Family Forward Oregon

Pennsylvania
Micah Leadership Council
New Hope Baptist Church
Ni-ta-nee National Organization for Women
Northeast Williamsport National Organization for Women
PathWays PA
Pennsylvania Association of Staff Nurses & Allied Professionals (PASNAP)
Pennsylvania Council of Churches
Philadelphia Coalition of Labor Union Women
Pittsburgh UNITED
Women's Law Project

Texas

Equal Justice Center
North Dallas National Organization for Women
Workers Defense Project

Vermont
Voices for Vermont's Children

Virginia
Charlottesville Chapter of the National Organization for Women (CNOW)
NoVA National Organization for Women
Vienna Area National Organization for Women
Virginia National Organization for Women

Washington
Puget Sound Advocates for Retirement Action
Thurston County Chapter, National Organization for Women
WA State National Organization for Women

Wisconsin
9to5 Milwaukee
SEIU HealthCare Wisconsin
Wisconsin National Organization for Women
Workers' Rights Center

[Additional submission by Mr. Takano follows:]

Economic
Policy
Institute

False choice for workers—Flexibility or overtime pay

Policy Memo • By Ross Eisenbrey and Celine McNicholas • April 3, 2017

The Working Families Flexibility Act (H.R. 1180), introduced February 16, 2017, by Rep. Martha Roby (R-Ala.), would further erode overtime protections for American workers. Millions of workers are working overtime but are not getting paid for it.[1] This is, in part, the result of outdated overtime rules governing workers' eligibility for overtime pay. The erosion of overtime protections has led to workers earning less money while working longer hours, and has created a generally overworked middle class. The way to address this issue is to strengthen overtime protections—not, as H.R. 1180 does, create a new *employer* right to avoid paying workers overtime.

Background

The Fair Labor Standards Act (FLSA) requires employers to pay certain employees time-and-a-half (or 1.5 times) their regular pay rate for each hour of work per week beyond 40 hours. For nearly 80 years, this system has struck a successful balance by giving employers a way to get work done at a fair price while protecting employees' time with their families. Most hourly workers are guaranteed the right to overtime pay, while salaried workers' eligibility is based on their pay and the nature of their duties. Most salaried workers who earn less than $455 per week ($23,660 annually) are automatically eligible for overtime pay, regardless of their job duties. Salaried workers who earn $455 per week or more may be exempt from guaranteed overtime if their job duties fall into one of three categories: professional, administrative, or executive. The duties associated with these categories involve supervisory responsibilities or a high degree of control over their time and tasks because these exemptions from guaranteed overtime were intended to apply to only a small segment of workers who perform relatively high-level work with a salary that reflects this.

However, the salary threshold has been updated only once since the 1970s—in 2004, when it was set too low. As a result, the share of the salaried workforce that earns less than the threshold has shrunk significantly. Consider that in 1979 nearly 12 million salaried workers had overtime protections. But today,

with a 50 percent larger workforce, only 3.5 million salaried workers are automatically protected.[2] Workers who have lost overtime protection based on an outdated salary threshold have lost not only the right to be paid time-and-a-half for their overtime—they have lost the right to be paid for it at all. And now that overtime hours do not cost employers extra money, they are more likely to require workers to work longer hours. No wonder so many workers feel that they need "flexibility" to balance family responsibilities. Employers have no incentive not to require those workers to work extra hours.

Obama-era rule

The deterioration of overtime protections led to the promulgation of a Department of Labor rule to restore the salary threshold to a meaningful level. The rule—scheduled to take effect on December 1, 2016, but blocked by an injunction that is on appeal in the U.S. Court of Appeals for the Fifth Circuit—raised the threshold from $455 to $913 per week (or from $23,660 to $47,476 for a year-round worker). The rule would directly benefit a wide range of workers including 6.4 million women and 4.2 million parents.[3]

Working Families Flexibility Act

The Working Families Flexibility Act would amend the FLSA to allow private-sector employers to "compensate" hourly workers with compensatory time off in lieu of overtime pay. Contrary to proponents' claims, the bill does not create employee rights, it takes them away. It does create a new *employer* right—the right to delay paying any wages for overtime work for as long as 13 months. The legislation forces workers to compromise their paychecks for the possibility—but not the guarantee—that they will get time off from work when they need it.

Congressional Republicans have introduced versions of this legislation for the past 20 years:

- *H.R. 1*, the Working Families Flexibility Act of 1997, which sought to amend the FLSA to extend comp time to the private sector.
- *H.R. 1119*, the Family Time Flexibility Act, which proposed extending comp time to the private sector in 2003.
- *H.R. 6025*, the Family Friendly Workplace Act, a nearly identical comp-time bill introduced in 2008.
- *H.R. 933*, a reintroduction of the Family Friendly Workplace Act in 2009.

Despite the marketing, none of these bills would have resulted in greater flexibility for workers. Instead, they would have simply allowed employers to avoid paying overtime. Workers depend on the wage and overtime protections in the FLSA. They should not have to sacrifice earned wages to have flexibility.

FLSA already provides flexibility

The FLSA is the original family-friendly law. It permits a wide range of flexible work schedules. For example, under current law, public and private employers may choose to allow their workers to vary the start or end of their workday, including on an ad-hoc basis. Employers may also choose to permit employees to schedule four 10-hour days with one workday off, or arrange nine-hour workdays with a day off every other week. All of these arrangements are permissible under the FLSA. Employers can and should take advantage of the flexibility the current law already provides.

Perhaps most revealing, under the FLSA, an employer may pay an employee for overtime worked in a given week and then, to reward the employee for putting in extra time, may schedule future unpaid time off. The result would be that the total annual hours worked and income received would be the same as under Rep. Roby's comp time in lieu of overtime proposal, but workers would not have to wait for up to 13 months to be paid for the overtime hours. In other words, *everything the comp time bill purports to provide for workers is actually available under the FLSA.*

The bill will reduce worker income

The Working Families Flexibility Act would result in less money in employees' paychecks, even when they do work overtime. Many employees rely on overtime pay to earn enough money to make ends meet every month—but this bill would allow employers to avoid paying overtime premiums when employees work extra hours, by giving them "comp time" to bank for future use instead. This means employees will still be working longer hours, but they will be receiving less in their paychecks at the time they work the longer hours. They will essentially be loaning their employer their overtime pay (at no interest) for as long as 13 months.

The "flexible" arrangements of the comp time bill could be offered today, with no new employer rights, duties, paperwork, recordkeeping, causes of action, or oversight.

Under the legislation, an employee may decline to accept comp time in lieu of overtime. It follows that employers will assign overtime preferentially to those who accept comp time, thereby depriving the workers who need the extra cash of opportunities for overtime work. So, not only will the employees who receive comp time instead of overtime pay earn less, so will the employees who refuse comp time and insist on being paid overtime pay.

The bill would give employers—not employees—the right to control comp time

Nothing in the bill guarantees a worker that she will be able to use accrued comp time hours when she needs to access them. Under the legislation, an employer may deny a worker's request for comp time if it "unduly disrupts the operations of the employer." This broad standard for denying overtime provides employers with enormous control over employees' access to comp time.

Furthermore, because the bill provides inadequate penalties, there is little incentive for unscrupulous employers to provide meaningful access to comp time. (An employer is liable for only the wages owed as well as liquidated damages reduced by each hour of comp time used by the employee.) Instead of providing meaningful access to comp time, employers could simply assert undue disruption to their operations in response to a request for a comp time hour and deny a worker the requested time off and continue to avoid paying overtime wages. The bill does not require employers to pay employees interest on their comp time pay, which employees would receive if they put their overtime pay in the bank, so the employer gets to keep any interest earned on the wages held as well.

The bill would lead to unpredictable schedules for workers

- The comp time bill undermines the fundamental goal of the FLSA's overtime rules: to discourage employers from overworking employees by making it more expensive for them to do so.
- Allowing employers to give "comp time" cheapens the use of overtime since employers don't have to pay out overtime premiums when the work is actually done.
- The employer, not the employee, has the final say over when comp time can be used. Employers can deny an employee's request to use comp time hours if they feel it would "unduly disrupt" the employer's business. And employees are required to make a request in advance without any leeway in emergency situations. Accordingly, many employees will work a lot of overtime and find their leave banks full at the end of the year. If workers don't manage to use at least two-thirds of their banked comp time, they will actually have worked more hours during the year, not less.

Because this bill makes overtime work cheaper for the employer, employers will be more likely to schedule mandatory overtime more often.

Why comp time won't work in the private sector

Proponents of comp time in lieu of overtime pay argue that public-sector employees receive this benefit and it should be extended to private-sector workers. However, there is little information available on the use of and experience with comp time in state and local governments, making it impossible to determine whether workers are able to meaningfully access comp time under the system. Furthermore, there are important differences between the public-sector workforce and the private-sector workforce that make comp time riskier for private-sector workers. Public-sector workers can't be fired except for good cause, they have administrative appeal rights, and they have significantly higher rates of union representation. These considerations make them more likely to challenge an employer's decision denying them the use of comp time and less likely to be coerced into agreeing to comp time in lieu of overtime pay. And, while nothing in this legislation provides any guarantee that a worker will ever be able to take the comp time that she accrues when she needs it, private-sector workers also face a real danger of losing comp time accrued in the event of a business failure. According to the Small Business Administration, in 2013, over 400,000 small businesses closed.[4] Nothing in the legislation provides workers whose employer goes out of business with a guarantee to receive payment for accrued comp time. The employer is not required to put sufficient money in escrow or to buy a bond to guarantee payment in case of closure or bankruptcy.

Conclusion

At no risk to the employee, the FLSA already allows an employer to grant time off to employees who work overtime. H.R. 1180 adds nothing but delay and risk to the employees' right to receive extra compensation when they work more than 40 hours in a week.

Endnotes

1. Ross Eisenbrey and Lawrence Mishel, *The New Overtime Salary Threshold Would Directly Benefit 13.5 Million Workers*, Economic Policy Institute report, August 2015.

2. Ross Eisenbrey. Testimony before the United States Senate Committee on Small Business and Entrepreneurship, May 11, 2016. Current statistics referred to are as of 2014.

3. Ross Eisenbrey and Will Kimball, *The New Overtime Rule Will Directly Benefit 12.5 Million Working People*, Economic Policy Institute report, May 2016.

4. U.S. Small Business Administration Office of Advocacy, "Frequently Asked Questions," June 2016.

[Questions submitted for the record and their responses follow:]

MAJORITY MEMBERS:

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WASHINGTON, DC 20515-6100

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ADRIANO ESPAILLAT, NEW YORK

May 19, 2017

Ms. Vicki Shabo
Vice President
National Partnership for Women & Families
1875 Connecticut Avenue NW
Suite 650
Washington, DC 20009

Dear Ms. Shabo:

Thank you, again, for testifying before the Subcommittee on Workforce Protections at a legislative hearing on H.R. 1180, *Working Families Flexibility Act of 2017*. I appreciate your participation.

Please find enclosed additional questions submitted by a Committee member following the hearing. Please provide written responses no later than June 2, 2017, for inclusion in the official hearing record. Responses should be sent to Jessica Goodman of the Committee staff, who can be contacted at (202) 225-7101.

We appreciate your continued contribution to the work of the Committee.

Sincerely,

Bradley Byrne
Chairman
Subcommittee on Workforce Protections

Enclosure

CC: The Honorable Mark Takano, Ranking Member, Subcommittee on Workforce Protections

Rep. Foxx (NC)

1. Ms. Shabo, many workers employed by federal, state, and local governments are able to have additional flexibility in the workplace by utilizing compensatory time arrangements similar to that provided for private-sector workers under H.R. 1180. Given your arguments against this bill, do you favor repealing laws providing this flexibility to government workers? And, if not, please explain to the Committee why you believe private-sector workers should be treated differently than public-sector workers.

[Ms. Shabo's response to question submitted for the record follows:]

June 2, 2017

Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515-6100

Dear Chairman Byrne and Ranking Member Takano:

This letter is in response to a question for the record submitted by Chairwoman Foxx following the subcommittee's April legislative hearing on H.R. 1180, *Working Families Flexibility Act of 2017*. Ms. Foxx asked my opinion on the use of compensatory time arrangements for public sector workers. A review of literature and court decisions show that public sector workers face challenges, and that these challenges would be even more acute for private sector workers.

For nearly 80 years, the Fair Labor Standards Act (FLSA) has protected the working hours and paychecks of covered employees. There is no reason to erode core FLSA protections for private sector workers with elusive promises of "flexibility" for employees because H.R. 1180 provides nothing beyond what employers are able to provide now. The difference is simply whether employees are paid for the overtime hours they work or whether employers and employees "bank" the value of that time for the employee's possible later use.

Proponents of the Working Families Flexibility Act claim that public sector workers gained access to compensatory time in the 1980s as a means of providing "flexibility," but legislative history shows otherwise. Congress eliminated public sector workers' guaranteed right to overtime pay in 1985, not as a means of providing "flexibility" to employees, but as a cost-saving measure. Congress amended the FLSA in response to the U.S. Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit Authority* and at the behest of state and local governments to avoid the cost of overtime payments[1,2]

In the decades since Congress amended the FLSA for public employees, public sector workers have faced well-documented challenges accessing the compensatory time they have accrued. Employers' control over public sector employees' use of comp time has burdened workers and triggered litigation. For reference, the FLSA states that public sector employees may take leave using accrued compensatory time within a "reasonable period after making the request if the use of the compensatory time does not unduly disrupt" their employer.[3] In practice, this means employers interfere with employees' use of the time they have earned in the following ways:

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[1] *Garcia v. San Antonio Metro. Transit Auth.*, 469 US 528 (1985).
[2] See U.S. Congress, Senate Committee on Labor and Human Resources, Subcommittee on Labor, Fair Labor Standards Amendments of 1985, hearing on S. 1570, 99th Cong., 1st Sess., Jul. 25, Sept. 10, and Aug. 28, 1985 (Washington: GPO, 1986).
[3] 29 U.S.C. § 207(o)(5)(B).

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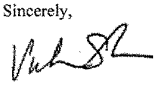
- The "reasonable period" for notice requirement has been interpreted by some courts to mean that an employee must provide as much as a year's notice to their employer before taking leave.[4]
- The "reasonable period" requirement within which compensatory time requests must be granted has been interpreted to allow an employer to instruct an employee to take comp time on a day other than the day the employee requested, so long as it is within a "reasonable period" of the day requested by the employee.[5]
- Although "unduly disrupt" in the regulations means more than "mere inconvenience," employers have significant discretion to determine whether an employees' absence would "impose an unreasonable burden on the [employer's] ability to provide services of an acceptable quality and quantity for the public."[6]
- The FLSA's public sector provisions allow public employers to compel employees' use of banked comp time when the employee has accrued too much time, negating an employees' interest in saving banked time.[7]

Differences between public and private sector employment heighten the risks for private sector workers, making compensatory time an even less desirable proposition:

- Private sector workers lack civil service protections that public sector workers have.
- A far smaller share of the private sector workforce is unionized, which further reduces protections available and limits workers' ability to negotiate different protective requirements.
- Wage and hour violations related to overtime are far more common in the private sector, which means that enforcement resources are already stretched and the risk that current violators will also shirk new wage and hour requirements is greater.
- Private sector employers have a profit motive to limit payroll costs and forgo payments for overtime, instead preferring to take an employee's labor as a "loan" to be paid later in comp time.
- Private sector employers are more likely to go bankrupt, leaving employees more vulnerable to losing the value of their banked labor.

Working people – whether in the public sector or the private sector – need fair wages and the guarantee of paid time to deal with personal and family issues. Comp time guarantees neither. At a time when our nation's working families urgently need public policies that make our workplaces more fair and family friendly, H.R. 1180 is an empty promise. Our nation's workers need stronger workplace protections and new policies that reflect their needs. H.R. 1180 is a step in the wrong direction.

Sincerely,



Vicki Shabo
Vice President

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[4] *Mortensen v. County of Sacramento*, 368 F.3d 1082 (9th Cir. 2004).
[5] *Houston Police Officers Union v. City of Houston*, 330 F.3d 298 (5th Cir. 2003) and *Mortensen v. County of Sacramento*, 368 F.3d 1082 (9th Cir. 2004).
[6] *Saunders v. City of New York and the Department of Education of the City of New York*, 594 F.Supp 2d 346 (S.D.N.Y. 2008).
[7] *Christensen v. Harris County*, 529 US 576 (2000).

Thank you very much. This hearing is adjourned.
[Whereupon, at 11:43 a.m., the subcommittee was adjourned.]