



## Workplace Flexibility May 2009 Public Policy Issue Statement

### **Background**

The principle federal laws that govern workplace flexibility are the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA).

The FLSA, which was enacted in 1938, establishes standards for minimum wage, overtime pay, and child labor. Under current law, non-exempt employees must be paid overtime for working more than 40 hours per week. Public-sector employers, however, may offer employees a choice of compensatory time or pay when the employee works over 40 hours in a week.

Enacted in 1993, the FMLA, enacted in 1993, provides unpaid leave for the birth, adoption or foster care placement of an employee's child, as well as for the "serious health condition" of a spouse, son, daughter, or parent, or for the employee's own medical condition. In 2008, the Act was amended to provide up to 26 weeks of unpaid leave to an employee to care for a family member who is injured while serving on active military duty and up to 12 weeks of leave for urgent needs related to a family member's current active military service.

In 2005, California became the first state to provide up to six weeks or partial paid leave to employees for family and medical leave issues. Recently, the states of Washington and New Jersey as well as the cities of San Francisco, CA, Washington, D.C. and Milwaukee, WI have enacted laws to provide paid leave to employees for similar situations. During the 2008 state legislative session, 14 states considered enacting paid leave laws similar to those in California, Washington, and New Jersey.

### **Issue**

The FLSA and the FMLA represent a somewhat outdated and rigid approach to mandated employee benefits. Many employers and associations believe these laws and their concomitant regulations are not responsive to the evolving needs and lifestyles of today's workforce.

Many employers continue to encounter challenges in implementing existing leave requirements that do not reflect the changing nature of the 21<sup>st</sup> Century workforce. As a result, the focus is on documentation of incremental leave and the reasons for the leave rather than on seeking innovative ways to help employees to balance the demands of both work and family life.

At the same time, there is a growing movement advocating new government legislation that would create new mandates for employers. These groups have focused their efforts on initiatives to require employers to provide paid sick leave as well as to expand the current FMLA to include paid leave.

Some key Members of Congress have expressed strong support of these proposals, and many observers believe such legislation could be debated within the next year or two.

To help balance work, family and personal needs, many employers are already voluntarily providing paid sick, personal, vacation and maternity leave for employees. According to the *SHRM 2008 Employee Benefits Survey*, 74 percent of employers offer paid sick leave, 82 percent of employers offer paid vacation leave, and 15 percent offer paid maternity leave outside of what is covered by a short-term disability benefit.

Recently, more employers have offered Paid Time Off (PTO) plans in lieu of other employer-sponsored paid leave programs. These plans typically combine all common leave benefits (vacation, sick leave, holidays and personal days) into one leave program that can be used in any circumstance by the employee. According to the *SHRM 2008 Employee Benefits Survey*, 60 percent of employers offer PTO plans to their employees.

### **SHRM Proposed Policy Statement**

SHRM believes that the United States must have a 21<sup>st</sup> Century workplace flexibility policy that meets the needs of both employers and employees. Rather than a one-size fits all government mandate, the policy should be a new approach that reflects different work environments, representation, industries and organizational size.

The policy should support employees in balancing their work and family obligations; provide paid leave to the employee; and at the same time provide certainty, predictability and stability to employers. Under this new approach, employers that meet a safe harbor leave standard would not be subject to federal, state and local leave requirements. Alternatively, employers that chose not to offer this leave standard would be subject to existing federal leave requirements.

At the same time, SHRM believes current government leave laws need to be improved and streamlined. The FMLA needs to be strengthened to prevent misuse and abuse of the leave, which currently threatens the integrity of the Act. Additionally, statutes such as the FLSA need to be reviewed and updated to reflect the needs and protections of a 21<sup>st</sup> Century workforce. This includes allowing employers to provide flexible work options, such as offering employees a choice of compensatory time or overtime pay.

SHRM generally opposes any form of government mandate on employee benefits or leave requirements. SHRM believes employers, not the government, are best situated to know the benefit preferences of their employees. Any government initiative that removes or restricts an employer's flexibility in shaping such leave policies often creates undue hardships for employees and employers.

SHRM's proposed public policy position supports the following key workplace flexibility principles:

**Flexible Paid Leave** - SHRM supports a new approach to providing employees with paid leave that reflects different work environments, industries and organizational size. This paid leave approach should support employees in balancing their work and family obligations and at the same time, provide certainty, predictability and stability to employers in sponsoring the program. This program would operate much like a PTO plan, with an employer providing a guaranteed standard block of flexible paid leave to the employee that can be used for any leave purpose. Under this proposal, leave would be subject to the notice requirements and parameters of the employer's policy including requirements for the employee to use their annual leave. Alternatively an employer may permit an employee to rollover a capped portion of the unused accrued leave benefits from one year to the next or receive the benefits in the form of a contribution to a retirement or flexible spending account. An employer that met the requirements of this program would be exempt from mandated federal, state and local leave requirements.

**Flexible Work Arrangements** – Flexible Work Arrangements (FWAs) allow an employee to alter the time and/or place when/where work is conducted on a regular basis, consistent and predictable with the employer's operations. SHRM believes public policy should encourage and support employer efforts to create and implement FWAs.

**Telecommuting** – Allowing employees to telecommute can be beneficial for both employers and employees. SHRM recognizes that while telecommuting will not be practical for all employees or all employment situations, SHRM believes that public policy should support and encourage telecommuting. However, employers should have the right to determine which employees or employment situations make telecommuting practical.

**Paid Leave Mandates** – SHRM generally opposes any form of government mandate for paid leave benefits including benefits funded through state insurance funds, as the Society believes that employers, not the government, know the benefit preferences of their employees. HR professionals traditionally work to tailor leave programs that meet the needs of their employees and employers. SHRM has concerns with proposals that implement a “one-size-fits-all” paid-leave mandate.

**Family and Medical Leave Act** - SHRM believes that improvements to the Act's definitions and notice requirements would reduce administrative and compliance problems for employers and HR professionals who are complying with FMLA requirements. Although supportive of the goals of the FMLA, the Society opposes expansion of the Act at this time.

**Compensatory Time** – The Fair Labor Standards Act limits employee flexibility because it prohibits private sector employers from offering paid time off as compensation for working overtime hours. SHRM believes that private sector employees should be afforded the same flexibility that public sector employees have in having a choice of compensatory time or overtime pay.